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DETERMINATION OF THE APPROPRIATE BARGAINING UNIT BY THE NLRB: A LACK OF OBJECTIVITY PERCEIVED

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I. INTRODUCTION: THE PROBLEM

One of the principal objectives of the National Labor Relations Act is the protection of the employee's free choice of a collective bargaining representative.¹ A majority vote of the employees within a certified bargaining unit establishes the union's representation status, and the National Labor Relations Board possesses the supervisory and regulatory powers necessary to insure a properly conducted election.²

Perhaps the most important step in the election procedure is the Board's certification of an employee unit suitable for efficient collective bargaining. The question of union representation may well be resolved when the Board determines the confines of the appropriate unit, since the preference of the employee members of the unit probably will have been ascertained prior to the union's petition. It is the contention of this article that, in making this important determination, the Board has frequently allowed one factor to become controlling: that factor is the extent to which the members of the unit requested, and other potential units, have been organized. This contravenes the express mandate of section 9(c)(5) of the act.³ In addition, this em-

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¹ 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

² 61 Stat. 143 (1947), as amended, 29 U.S.C. §§ 159(a)-(e) (1964).

³ 61 Stat. 143 (1947), 29 U.S.C. § 159(c)(5) (1964) states that "in determining whether a unit is appropriate for the purpose specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

phasis on the employee's right to organize indicates that the Board has neglected the corollary to this right, *i.e.*, the right to *reject* collective bargaining.⁴

In recent years, there has been substantial controversy over the weight that should be given to the extent of the union's organizational success as a factor in the Board's determination of the scope of the bargaining unit.⁵ The Board's increasing reliance on this factor manifests a policy that whatever is good for the growth of organized labor is good for the country. This attitude is inconsistent with an impartial, flexible application of the act. When such a premise is given precedence over recognized objectives of the act with which it may conflict, it signifies a dangerous course of administrative procedure. It is submitted that this apparent determination of policy may lead to a justifiable loss of confidence in the objectivity and neutrality of the Board's quasi-judicial processes. This danger is augmented by the rationale expressed within the Board's published case decisions, which is so weak and vague⁶ as to demonstrate an *a priori* approach to the issues in dispute. An examination of the cases that have dealt with contested bargaining unit questions supports the conclusion that the Board has a pronounced tendency to establish as appropriate whatever unit most reflects the extent of the union's organizational success, regardless of other considerations.

The Board's determination of the election unit is a matter of primary concern to the union, since an unsatisfactory choice may result in an election which rejects any union representation. Due to the importance of this issue, the so-called "fact-finding, non-adversary" representation proceedings commonly generate more acrimony and heated argument than do unfair labor practice controversies. The Board's apparent lack of both objectivity and consistency naturally does not alleviate this situation. It would benefit all practitioners in the field, and eliminate wasted time, effort, and expense, if the Board would openly declare the criteria which will determine the appropriate unit. Such a stand would terminate the Board's current piecemeal ap-

⁴ 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964) specifies that an employee "shall also have the right to refrain from any or all of such activities"

⁵ See generally Daykin, *Determination of the Appropriate Bargaining Unit by the NLRB: Principles, Rules, and Policies*, 27 Fordham L. Rev. 218 (1958); Grooms, *The NLRB and Determination of the Appropriate Unit: Need for a Workable Standard*, 6 William & Mary L. Rev. 13 (1965); Note, *The Board and Section 9(c)(5): Multilocation and Single-Location Bargaining Units in the Insurance and Retail Industries*, 79 HARV. L. Rev. 811 (1966).

That the statute itself is ambiguous on the subject of organizational success, see *Texas Pipe Line Co. v. NLRB*, 296 F.2d 208, 213-14 (5th Cir. 1961).

⁶ Just recently, the Supreme Court remanded one Board decision which could not be properly reviewed "due to the Board's lack of articulated reasons." *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-43 (1965).

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proach and allow representation hearings to be conducted with far more efficiency and speed.

It is the purpose of this article to support the contention that the criteria alluded to in Board decisions are superfluous and inconclusive factors, to be rationalized away in arriving at final unit determinations; that analysis of Board case law reveals a distinct preference for bargaining units that coincide with the extent of the union's organizational success.

II. AN APPROPRIATE VS. THE APPROPRIATE

For many years, the NLRB has adhered to the doctrine that *some* organization among employees in a plant unit is preferable to none at all. This preference stems from the belief that the objectives of the NLRA will best be achieved by encouraging, not impeding, collective bargaining. It is because of this policy that the Board has chosen to construe the act to permit the approval of *any* appropriate unit, rather than to limit certification to the *most* appropriate unit. As the Board said in *Black & Decker Mfg. Co.*:⁷

[I]t has been our declared policy to consider only whether the requested unit is an appropriate one even though it may not be the optimum or most appropriate unit for collective bargaining. We are convinced that such a policy is compatible with the objectives of the Act which seeks to encourage rather than impede the collective-bargaining process.⁸

To implement this policy, the Board has rationalized a correlation between the "appropriate" unit and the one which has been most effectively organized. Perhaps as a result of constant repetition by the Board, this fundamentally unsound approach to the act is rarely, if ever, questioned today, despite the fact that the text of the act⁹ does not suggest, nor (in this writer's opinion) even permit such a construction.

The Board's interpretation of the act made one of its earliest appearances in *Garden State Hosiery Co.*,¹⁰ which was decided prior

⁷ 147 N.L.R.B. 825 (1964).

⁸ *Id.* at 828. See *P. Ballantine & Sons*, 141 N.L.R.B. 1103, 1106 (1963), where the Board stated that it "must be wary lest its unit determinations unnecessarily impede the exercise by employees of these rights [to self-organization and collective bargaining]."

⁹ 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1964) provides:

The Board shall decide in each case whether, in order to assure 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, plant unit, or subdivision thereof

¹⁰ 74 N.L.R.B. 318 (1947). The groundwork for this interpretation, however, was laid as early as 1937. In *Gulf Oil Corp.*, 4 N.L.R.B. 133, 137 (1937), the Board approved a unit which did "not constitute the most effective bargaining unit," because otherwise, "there will be no collective bargaining agent whatsoever for these workers"

to the adoption of section 9(c)(5).¹¹ Actually, the three-member Board disagreed as to the proper weight that should be accorded the extent of union organization. The majority insisted that the objectives of the act required the Board to give this factor substantial consideration.¹² The dissent, on the other hand, contended that such an attitude would "sacrifice . . . the principle of majority rule" and impair "industrial stability."¹³

The majority's argument was strained, but, because of its use as authority in many subsequent Board decisions, it deserves close attention. The principle issue in the case was

whether the Board should deny the knitting department employees the benefits of the Act until the other employees also become interested in collective bargaining, or whether it should make collective bargaining an immediate possibility for those who may presently desire it.¹⁴

The issue was framed in terms compatible with the NLRA as it read before the Taft-Hartley amendments of 1947. The whole tenor of the act at that time was weighted in favor of encouraging the associational activities of employees.¹⁵ The Board, in designating bargaining units, was to "insure to employees the full benefit of their right to self-organization and to collective bargaining" ¹⁶ Therefore, the issue in *Garden State Hosiery* was correctly stated in terms of the knitters' right to collective representation, a right which was to be actively promoted by the Board. Although it was argued that the remaining employees—a majority in the plant—could be adversely affected by the bargaining tactics of the minority,¹⁷ the Board answered that the organizational rights of the few must be advanced and should not be retarded by the reluctance of the many.¹⁸ Thus, any appropriate unit must be certified.

This argument, even if legally sound before 1947, became quite obsolete after that year. The Taft-Hartley amendments de-emphasized unionization and statutorily recognized the rights of those em-

¹¹ The case was decided June 20, 1947, and the act did not go into effect until sixty days after its enactment on June 23, 1947.

¹² 74 N.L.R.B. at 320-21.

¹³ Id. at 327.

¹⁴ Id. at 320.

¹⁵ Section 7 of the act, 49 Stat. 452 (1935), originally read:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

¹⁶ NLRA § 9(b), 49 Stat. 453 (1935).

¹⁷ 74 N.L.R.B. at 326-28 (Member Reynolds, dissenting). See pp. 188-89 *infra*.

¹⁸ Id. at 324.

ployees who wished to remain unrepresented. The Board was charged with the duty of assuring to *all* employees "the fullest freedom in exercising the rights guaranteed by this subchapter"¹⁹ And these rights had been amended to include "the right to refrain from any or all of such activities"²⁰ As the House Conference Committee had stated, the Board was to accord "a substantially larger measure of protection of those rights when bargaining units are being established"²¹ It does not seem that carving out *an* appropriate bargaining unit from the optimum larger unit would be compatible with this mandate, since those employees who were in the optimum unit but had rejected organization might find their relationship with the employer affected by the actions of a minority.²²

Attempting to rationalize its selection of a bargaining unit which was not optimum, the Board in *Garden State Hosiery* resorted to semantic dependence on Webster's International Dictionary. This authority was employed to demonstrate that the word "appropriate" carried with it no connotations of the superlative.²³ This may be true, but the act specifies designation of *the* appropriate unit.²⁴ This *does* suggest the superlative. The Board, however, transformed the words "the appropriate" to "an appropriate," and this modification was unexplained and undiscussed. This reasoning, or lack thereof, became authority for many post-Taft-Hartley decisions to the same effect.²⁵

One of the cases cited by the Board in *Garden State Hosiery* was *Pittsburgh Plate Glass Co. v. NLRB*.²⁶ But this case is hardly support for the Board's argument. Throughout its opinion, the Supreme Court spoke of "the appropriate unit" and "the most suitable unit." For example, the Court states:

The Labor Act places upon the Board the responsibility of determining *the* appropriate group of employees for the bargaining unit. In accordance with this delegation of authority, the Board may decide that all employees of a single employer form *the most suitable unit* for the selection of collective bargaining representatives, *or* the Board may

¹⁹ 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1964).

²⁰ 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

²¹ H.R. Rep. No. 510, 80th Cong., 1st Sess. (1947), in U.S. Code Cong. Serv. 1135, 1153 (1947).

²² For example, a strike by an organized minority could easily bring the work of an entire plant to a halt. In addition, wage increases and changes in terms of employment secured by the minority will likely have ramifications felt by the majority. See pp. 188-89 *infra*.

²³ 74 N.L.R.B. at 324 n.15.

²⁴ 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1964).

²⁵ E.g., *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418 & n.13 (1950), enforced in part, 190 F.2d 576 (7th Cir. 1951).

²⁶ 313 U.S. 146 (1941).

decide that the workers in any craft or plant or subdivision thereof are *more* appropriate.²⁷ (Emphasis added.)

The relevant proceedings in *Pittsburgh* may be stated simply. The Board approved the union's petition for a unit composed of the production and maintenance employees in a multi-plant division of the employer's business. After an election won by the union, the employer refused to bargain, claiming that the union was not the proper bargaining agent because only a single-plant unit was appropriate. The Court discussed the employer's contentions, but nevertheless sustained the Board's ruling:

[A]n independent unit at Crystal City, the Board was justified in finding, would frustrate division-wide effort at labor adjustments. It would enable the employer to use the plant there for continuous operation in case of stoppage of labor at the other plants. We are of the view that there was adequate evidence to support the conclusion that the bargaining unit *should* be division-wide.²⁸ (Emphasis added.)

The Court's position is clearly revealed. There is "the appropriate unit" in each case, and the Board's decision is sustained only because there is substantial evidence supporting its finding that the unit "*should*"—not "*could*"—be division-wide.

Today the Board, faced with a bargaining unit controversy, might concede that the unit requested by the employer is appropriate.²⁹ It will even concede, on occasion, that it may be the *most* appropriate.³⁰ It will conclude, however, that since the unit requested by the petitioning union is *also* appropriate, the petition may be granted.³¹ Inevitably, it will cite as precedent decisions leading back to the *Garden State Hosiery* case.

Perhaps the most obvious incongruities caused by this interpretation of "appropriateness" have occurred in the Board's "residual unit" determinations. Typically in these situations, a group of employees will have been excluded from other units previously deemed appropriate by the Board. A union then petitions the Board to certify a separate unit consisting of these "fringe" employees, and, even though the group may be heterogeneous and does not share a community of interest, the Board will approve the petition. The reason given is that otherwise these employees will be unable to bargain collectively.³²

²⁷ Id. at 152.

²⁸ Id. at 164-65.

²⁹ See, e.g., *Sears, Roebuck & Co.*, 152 N.L.R.B. 45, 47 (1965).

³⁰ See, e.g., *Dixie Belle Mills, Inc.*, 139 N.L.R.B. 629, 631 (1962).

³¹ E.g., *Sears, Roebuck & Co.*, supra note 29; *Dixie Belle Mills, Inc.*, supra note 30.

³² E.g., *Kraft Foods Co.*, 116 N.L.R.B. 582, 585 (1956); *Kroger Co.*, 93 N.L.R.B. 274, 275 (1951).

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This doctrine is acceptable where the initial units were *the* appropriate ones, for there is no viable alternative. The Board, however, does not stop there. Because of its "an appropriate" policy, it will grant the original petitions even though the requested units are not optimum and even though the employer objects strenuously.³³ Then, despite the fact that the remaining employees do not constitute an appropriate unit under the normal criteria, the Board will nevertheless apply its residual unit doctrine to approve the subsequent petition.

*Hot Shoppes, Inc.*³⁴ presents just such a case. The employer's relevant operations involved the preparation of food at two Chicago commissaries, the transportation of food to the airport, the loading of food on planes, and the return of soiled equipment to the commissaries. The Regional Director, pursuant to a union petition, found appropriate, but not optimum, a unit comprising

all flight equipment handlers and their helpers, setup men, and all regularly employed part-time employees in these categories engaged in the transportation of food from company premises to airplanes, installing and removing food from such airplanes, and transporting food from the airplanes to the company premises . . . but excluding field supervisors . . . and all other employees.³⁵

The employer had objected to this unit, claiming that the only appropriate unit consisted of *all* the employees engaged in food, beverage, and equipment preparation and transportation.³⁶

Local 593, AFL-CIO, then petitioned for an election among all employees other than those previously included in the earlier unit. The Board approved the petition, finding that "the unit sought herein is appropriate as a residual unit *apart from whether it might be appropriate on other grounds.*"³⁷ (Emphasis added.) Surely this opinion illustrates the foolishness and artificiality of the Board's position. It reaffirms a unit determination which at best is only appropriate—and certainly not optimum—only to recognize a residual second unit which is not even appropriate. There can be no justification for such an absurd result.

III. THE SINGLE-PLANT UNIT

The Board frequently invokes a presumption in favor of the appropriateness of a unit composed of a class of employees in a single

³³ E.g., *Dixie Belle Mills, Inc.*, supra note 30.

³⁴ 143 N.L.R.B. 578 (1963).

³⁵ Id. at 582.

³⁶ Id. at 582-83.

³⁷ Id. at 583.

plant within a multi-plant operation.³⁸ The validity of this presumption is said to be drawn from the statute itself:

A plant unit, being one of the unit types listed in the statute as appropriate for bargaining purposes, is presumptively appropriate, and should, other things being equal, prevail over other unit types not designated in the statute.³⁹

The flaw in this interpretation of the statute is that it has not been applied to other types of units also specifically mentioned in the same provision.⁴⁰ There is nothing in the act to suggest a congressional intent to favor single-plant units over these other types. Moreover, according to the Board's own reasoning as quoted above, the plant unit should not necessarily "prevail over other unit types . . . designated in the statute." Yet the presumption has been applied in favor of the plant unit even where arguments have been made for an employer-wide unit—the first unit type listed in section 9(b) of the act.⁴¹ Because of the questionable validity of the Board's interpretation, it is important to analyze the effect of this presumption and to see whether a pattern of selective application has been emerging.

In 1944, the Board had declared a policy of rejecting units of debit insurance agents which were less than state-wide or company-wide in scope. The reasons for this policy were stated by the Board in the *Metropolitan Life Ins. Co.* decision:⁴²

[T]he rapid growth of union organization among insurance agents makes it clearly appear that provisional units less than State-wide in scope are, under ordinary circumstances, unnecessary to make collective bargaining reasonably possible for them if they desire it In the instant case, since the Federation, the Independent, and the C.I.O. are all actively engaged in a broad organizational program in Ohio, and since it may reasonably be anticipated that one of these organizations may in the near future extend its membership to State-wide proportions, we are of the opinion that it will

³⁸ E.g., *Black & Decker Mfg. Co.*, supra note 7, at 828; *Welsh Co.*, 146 N.L.R.B. 713, 715 (1964); *Dixie Belle Mills, Inc.*, supra note 30, at 631.

³⁹ *Beaumont Forging Co.*, 110 N.L.R.B. 2200, 2201-02 (1954).

⁴⁰ Those other types are the employer unit, craft unit, or subdivision of any of the designated units. 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1964).

⁴¹ See e.g., *Black & Decker Mfg. Co.*, supra note 7; *Welsh Co.*, supra note 38; *Gordon Mills, Inc.*, 145 N.L.R.B. 771 (1963); *P. Ballantine & Sons*, supra note 8. Compare *Frisch's Big Boy Ill-Mar, Inc.*, 147 N.L.R.B. 551 (1964) (representation), 151 N.L.R.B. 454 (1965) (unfair labor practice), enforcement denied, 356 F.2d 895 (7th Cir. 1966).

⁴² 56 N.L.R.B. 1635 (1944).

not effectuate the policies of the Act to set up city-wide units for employees of the Company in Ohio at this time.⁴³

Although the express reasons for this policy are in contravention of section 9(c)(5), the policy was not abandoned, or even modified, after passage of the Taft-Hartley Act in 1947.

In 1961, the Board finally reversed itself, declaring in *Quaker City Life Ins. Co.* that henceforth it would apply "normal unit principles to the cases as they arise."⁴⁴ Consequently, the district-office unit desired by the petitioning union was deemed appropriate. The reasons given for rejecting the seventeen-year-old doctrine are revealing. After quoting the above language from its 1944 decision, the Board stated:

As a practical matter, however, such statewide or company-wide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance agents to an extent certainly never contemplated by the Act, or for that matter, by the Board that decided the *Metropolitan Life* case.⁴⁵

The *Quaker City* case did not condemn past Board policy as a violation of section 9(c)(5), although the Board recognized that the 1944 decision was based on organizational factors.⁴⁶ As a matter of fact, the *Quaker City* decision seemed to result from consideration of those same factors, the only difference being that the organizational efforts of the union had proven unsuccessful.⁴⁷ No other changes from the conditions which existed in 1944 were mentioned. In addition, if the Board was indeed attempting to overrule an impermissible criterion and declare the appropriateness of the single-office unit, how can it so casually disregard seventeen years of precedent?⁴⁸

That the insurance agents problem is not unique for the Board is revealed by examination of analogous developments in the area of retail grocery chains. In its *Safeway Stores, Inc.* decision⁴⁹ of 1951, the Board had declared that an appropriate bargaining unit in the

⁴³ Id. at 1640.

⁴⁴ 134 N.L.R.B. 960, 962 (1961) (representation), 138 N.L.R.B. 61 (1962) (unfair labor practice), enforced in part, 319 F.2d 690 (4th Cir. 1963).

⁴⁵ Ibid.

⁴⁶ Discussing the opinion in the *Metropolitan Life* case, the Board declared that the language "clearly . . . indicates that the rule was adopted solely in anticipation of broader organization on a companywide or statewide basis, which at that time appeared imminent." Ibid.

⁴⁷ Compare the two *P. Ballantine & Sons* cases, 120 N.L.R.B. 86 (1958) and 141 N.L.R.B. 1103 (1963), discussed pp. 190-91 infra.

⁴⁸ See cases cited in *Metropolitan Life Ins. Co. v. NLRB*, 328 F.2d 820, 827 n.17 (3d Cir. 1964).

⁴⁹ 96 N.L.R.B. 998 (1951).

retail store trade "should embrace all employees within the categories sought who perform their work within the Employer's administrative division or area."⁵⁰ Thus, where a union petitioned for a unit of employees at a single store and the employer established a larger scope of administrative control and community of interest, the Board would normally dismiss the union's petition.⁵¹ For some reason, the presumption in favor of the appropriateness of the single-plant unit, declared at least as early as 1954,⁵² did not influence the rationale of retail store collective bargaining until 1962.

In *Sav-On Drugs, Inc.*,⁵³ a decision similar to the *Quaker State* case of the previous year,⁵⁴ the Board decided to abandon the *Safeway* approach in favor of the "same unit policy which we apply to multi-plant enterprises in general."⁵⁵ After analyzing "all the circumstances of the case," the Board in *Sav-On Drugs* overruled the Regional Director and ordered an election in a single-store unit. The principal reasons for discarding the *Safeway* policy were: (1) that it impeded the right of the employees to self-organization; and (2) that it had ignored the extent of relevant union organization as a factor.⁵⁶ Member Rodgers, dissenting, felt that the second factor was the controlling one:

I certainly have no desire to frustrate the employees' right to self-organization. But that right must be accommodated by the Board to the prohibition in Section 9(c)(5) of the Act that, in deciding the unit appropriate for the purposes of collective bargaining, "the extent to which the employees have organized shall not be controlling." In short, what the present change signifies, in my opinion, is that the union's extent of organization has now become, and will be, a decisive factor in determining the appropriate unit for retail store operations.⁵⁷

It is interesting to note that in 1949 the Board had declared that the designation of a single-store unit as appropriate, in a case where

⁵⁰ Id. at 1000. This policy was actually anticipated prior to its specific declaration. See *Great Atl. & Pac. Tea Co.*, 85 N.L.R.B. 680 (1949); *Grand Union Co.*, 81 N.L.R.B. 1016 (1949).

⁵¹ E.g., *Weis Mkts., Inc.*, 125 N.L.R.B. 148 (1959); *Paxton Wholesale Grocery Co.*, 123 N.L.R.B. 316 (1959). The same result was reached when the union sought a unit composed of only some of the stores in a larger employer division. E.g., *Great Atl. & Pac. Tea Co.*, 132 N.L.R.B. 797 (1961); *Robert Hall Cothes, Inc.*, 118 N.L.R.B. 1096 (1957).

⁵² See note 39 *supra*.

⁵³ 138 N.L.R.B. 1032 (1962).

⁵⁴ See note 44 *supra* and accompanying text.

⁵⁵ 138 N.L.R.B. at 1033.

⁵⁶ *Ibid.*

⁵⁷ Id. at 1037.

management control over a group of stores was centralized, would violate section 9(c)(5).⁵⁸

The present policy in this area is still undergoing clarification. In *Weis Mkts., Inc.*,⁵⁹ for example, the Board denied that the *Sav-On Drugs* case had abandoned the preference for an administrative or geographical grouping; it had merely added the *possibility* that a single-location unit *could* be appropriate.⁶⁰ Thirteen months later, however, in *Frisch's Big Boy Ill-Mar, Inc.*,⁶¹ the Board further refined its retail store policy:

[T]he Board [in *Sav-On Drugs*] abandoned the approach that a multistore unit alone could be appropriate and adopted the view that the general unit criteria should apply to retail store units. Under such criteria a single-plant unit is *presumptively appropriate* unless it be established that the single plant has been effectively merged into a more comprehensive unit so as to have lost its individual identity.⁶² (Emphasis added.)

This reaffirmance of the single-plant presumption culminated a substantial modification of the four-year-old *Sav-On Drugs* policy, which had merely *allowed* a single-location unit to be considered appropriate.⁶³ The dissent in *Frisch* saw no reason to change the former doctrine and felt that the Board's decision violated section 9(c)(5).⁶⁴

In order to test the validity of the *Frisch* decision, the employer refused to recognize or to bargain with the union. The Board found this to be a violation of sections 8(a)(1) and (5) of the act⁶⁵ and petitioned the Seventh Circuit for enforcement of its order. The appel-

⁵⁸ Grand Union Co., *supra* note 50, at 1017.

⁵⁹ 142 N.L.R.B. 708 (1963).

⁶⁰ *Id.* at 710.

⁶¹ *Supra* note 41.

⁶² *Id.* at 551 n.1.

⁶³ *Sav-On Drugs, Inc.*, *supra* note 53, at 1033-34 n.4.

⁶⁴ Members Leedom and Jenkins, dissenting, stated:

Although the majority agrees that the "optimum" unit for collective bargaining would, in this case, be citywide in scope, it finds the single-restaurant unit appropriate essentially on the ground that the Petitioner seeks to represent only the employees in the smaller unit. But since, as we have shown, no other factors support the appropriateness of the single restaurant, this determination rests solely on the Petitioner's extent of organization, a result which is specifically forbidden by Section 9(c)(5) of the Act.

147 N.L.R.B. at 556. Compare the dissent of Member Rodgers in *Sav-On Drugs, Inc.*, *supra* note 53, at 1037, where a fear was voiced that just such a result as later occurred in *Frisch* had become inevitable.

⁶⁵ 151 N.L.R.B. 454 (1965).

late court found that the Board had determined an inappropriate bargaining unit and therefore denied enforcement.⁶⁶

The Seventh Circuit's opinion is significant because it casts doubt on the validity of the Board's presumption in favor of single-store units. The court examined all the circumstances of the case and implied dissatisfaction with a presumption which was so contrary to the objective factors.⁶⁷ The Board's persistence on the presumption, even in the face of convincing factual evidence, calls attention to the very real possibility of a lack of objectivity and thorough reasoning.

IV. THE RIGHTS OF NON-UNION EMPLOYEES

The Supreme Court has recently ruled that, notwithstanding section 9(c)(5), the extent of union organization can properly be considered by the Board when making unit determinations.⁶⁸ Still unresolved, however, is the significance which the Board can attribute to this factor. Since the Board can easily rationalize a biased result through manipulation of the inferences to be drawn from other relevant factors, it is not yet clear whether this standard will ever be clearly defined.⁶⁹ In determining the relative weight to be accorded organizational factors, it is critical to analyze and balance pre-Taft-Hartley Board decisions, the amendments themselves, and the subsequent case law.

Prior to the passage of section 9(c)(5), the Board had consistently declared that it would not rely solely on organizational factors when making its unit determinations.⁷⁰ As the Board stated in *Hudson Hosiery Co.*:⁷¹

Extent of organization can be most important, but it can never be controlling in the full sense of that term. It must also appear that the unit sought is composed of a well-delineated and functionally coherent group of employees, and that it has some objective support over and above the petitioning union's momentary preference. Where the unit sought has

⁶⁶ 356 F.2d 895 (7th Cir. 1966).

⁶⁷ Cf. *Black & Decker Mfg. Co.*, 147 N.L.R.B. 825 (1964), in which the Board approved a bargaining unit of one plant of a two-plant subdivision, even though the "operations of the two plants are integrated with respect to executive, managerial, and engineering activities." *Id.* at 827.

⁶⁸ *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 441-42 (1965).

⁶⁹ The Board's opinion on remand of the *Metropolitan Life* case may signify a partial withdrawal. There the Board asserted that § 9(c)(5) "prohibits the establishment of a bargaining unit which would not be appropriate under traditional criteria apart from extent of organization." *Metropolitan Life Ins. Co.*, 156 N.L.R.B. No. 113, 61 L.R.R.M. 1249, 1253 (1966).

⁷⁰ See, e.g., *Saks & Co.*, 68 N.L.R.B. 413, 415 (1946); *Greyhound Terminal, Inc.*, 66 N.L.R.B. 1285, 1286 (1946); *Paulus Bros. Packing Co.*, 62 N.L.R.B. 1171, 1173 (1945).

⁷¹ 74 N.L.R.B. 250 (1947).

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not met such prerequisites, petitions have been dismissed, despite the limited extent of organization.⁷²

If prior Board policy gave only limited weight to organizational factors, what then was the gravamen to be eliminated by section 9(c)(5)? The answer may be provided by the report of the House Conference Committee,⁷³ in which it is stated:

[T]he conference agreement guarantees in express terms the right of employees to refrain from collective bargaining or concerted activities if they choose to do so. This additional guarantee—recognizing and protecting as it does the rights and interests of individuals and minorities—will, it is believed, through wise administration result in a *substantially larger measure of protection of those rights when bargaining units are being established than has heretofore been the practice.*⁷⁴ (Emphasis added.)

In other words, the Board was to place even less reliance on union organizational success than it had before and was to give additional consideration to the rights of all other employees. Implementation of this purpose was effected by Congress in at least three amendments to the act: (1) section 7 was amended to provide the right to *refrain* from exercising the privilege of self-organization;⁷⁵ (2) section 9(b) was amended to require the Board to select bargaining units which would guarantee the exercise of *all* rights under the act, not just self-organization;⁷⁶ and, (3) section 9(c)(5) was added as a clear expression of the de-emphasis desired.⁷⁷

In its decisions subsequent to the enactment of the amendments, the Board indicated a misunderstanding or lack of acceptance of this change in emphasis. Taft-Hartley language was often used to support adherence to pre-Taft-Hartley policies.⁷⁸ As a result, phrases which were never intended to be synonymous were treated exactly as if they were, and became precedent for future rulings.⁷⁹ Despite the clear

⁷² Id. at 252.

⁷³ H.R. Rep. No. 510, 80th Cong., 1st Sess. (1947), in U.S. Code Cong. Serv. 1135 (1947).

⁷⁴ Id. at 1153.

⁷⁵ 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964). Compare 49 Stat. 452 (1935).

⁷⁶ 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1964). Compare 49 Stat. 453 (1935).

⁷⁷ 61 Stat. 143 (1947), 29 U.S.C. § 159(c)(5) (1964).

⁷⁸ Compare, e.g., *Garden State Hosiery Co.*, 74 N.L.R.B. 318, 324 (1947), with *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 418 (1950). Both decisions reject, for the same reason, the necessity of approving only the optimum bargaining unit, and both claim to be thus adhering to § 9(b) of the act. Between the rendering of these two decisions, however, that section was amended. Yet the Board apparently made no distinction between the different provisions.

⁷⁹ In recent years, for example, the Board has explicitly equated the "rights guaran-

mandate of section 9(c)(5), the Board has exhibited an increasing propensity to seek results which would accommodate the union's organizational success. This tendency has produced consistent disagreement among the Board members themselves, with several dissents accusing the majority of blatantly violating the act.⁸⁰

Board dependence upon the union's organizational success has had a significant detrimental effect upon the exercise of majority rule among employees. Where the majority of employees in the *most* appropriate unit opposed the petitioning union,⁸¹ the carving out of *an* appropriate unit may place a segment of the majority in a minority status within the unit. Under the rubric of "majority rule," this minority must then accept a union they do not want—a union which could not otherwise win. The segment of the majority which remains outside the unit also suffers, for subtle but intense pressures now emerge to infringe upon the freedom of choice. For example, the employer will frequently try to promote the entrenched union, either because he prefers to deal with one union rather than many, or because he has received an implied promise of future sympathetic treatment. He may shift work from one unit or plant to another in order to increase his negotiating strength. In addition, it is often the remaining, non-union employees who absorb the cost of union gains. Employers inevitably budget future wage increases, and where the union-controlled unit wins more than its allotted share, the non-union employees' share frequently will be reduced proportionately. Members Leedom and Jenkins, dissenting from a decision which was subsequently denied enforcement,⁸² warned the Board that approving a single-restaurant unit within a chain would dilute the rights of the non-unionized majority:

[T]he 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

teed by this Act" with the "rights to self-organization and to collective bargaining." E.g., *Sears, Roebuck & Co.*, 152 N.L.R.B. 45, 47 (1965); *Bamberger's Paramus*, 151 N.L.R.B. 748, 751 (1965); *Montgomery Ward & Co.*, 150 N.L.R.B. 598, 600 (1964); *Bagdad Copper Co.*, 144 N.L.R.B. 1496, 1498 (1963); *P. Ballantine & Sons*, 141 N.L.R.B. 1103, 1106 (1963).

⁸⁰ See, e.g., *Frisch's Big Boy Ill-Mar, Inc.*, 147 N.L.R.B. 551, 556 (1964) (Members Leedom and Jenkins, dissenting); *F. W. Woolworth Co.*, 144 N.L.R.B. 307, 310 (1963) (Members Rodgers and Leedom, dissenting); *Hot Shoppes, Inc.*, 130 N.L.R.B. 138, 144 (1961) (Member Rodgers, dissenting).

⁸¹ The majority may not oppose unionism in general or all unions. It is more likely that they will oppose that particular union which seeks to represent them. This opposition may be due simply to the union's distasteful methods or totalitarian regime.

⁸² *Frisch's Big Boy Ill-Mar, Inc.*, 147 N.L.R.B. 551 (1964) (representation), 151 N.L.R.B. 454 (1965) (unfair labor practice), enforcement denied, 356 F.2d 895 (7th Cir. 1966).

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of all other employees in the chain. Further, . . . if the employees in the single-restaurant unit have a dispute with the Employer and go on strike, they may lawfully picket any of the restaurants in the chain, even though the union does not represent employees in such other units. In other words, under the majority decision, although the employees in the single-restaurant unit alone are entitled to vote as to whether the Petitioner should represent them, this vote will be an effective determinant in the labor relations pattern for other employees in the chain who have had no voice in deciding whether or not they wished to be represented by the Petitioner.⁸³

These results, it is submitted, do not conform to the present neutral balance established by the act. Section 9(c)(5) was intended to equalize two protagonists—the union and the employer; but, more importantly, it was designed to protect the forgotten man—the individual employee himself. Protection of his rights often may not coincide with the institutional interests of a particular labor union. By carving the optimum unit into smaller ones, the Board often acts against the interests of a majority of employees. These employees may find that their “free choice” is effectively narrowed to either rejecting the possibility of any union or accepting a particular one, because the union, once entrenched, will seek to absorb the remaining employees.⁸⁴ In fact, this is precisely what the Board apologists anticipate. They argue that an election unit need not be a negotiating unit; rather election units should be “starting points” and “building

⁸³ 147 N.L.R.B. at 557. See *D'Armigene Co.*, 29 R.C. 6 (1965) (unreported), in which the Board designated two “cutters” and a “sorter” as an appropriate bargaining unit, thereby enabling three of the company's eighty employees to subsequently bring to a halt, by a strike, the entire production chain of a fully integrated plant. Compare *Morganton Full Fashioned Hosiery Co.*, 115 N.L.R.B. 1267 (1956), enforced, 241 F.2d 913 (4th Cir. 1957); *Glen Raven Knitting Mills, Inc.*, 115 N.L.R.B. 422, enforcement denied, 235 F.2d 413 (4th Cir. 1956).

⁸⁴ Not only will the resistance of the remaining employees weaken, but the union will solidify and increase its support within the unit. In *Century Elec. Co.*, 146 N.L.R.B. 232 (1964), the Board held that a self-determination election was not required for a residual group of employees:

[W]e find that the employees heretofore excluded from the production and maintenance unit at Century Foundry were excluded by virtue of historical accident rather than upon the basis of any real difference in function or interest from those of the production and maintenance employees. In accordance with the Board's established policy, such employees are appropriately a part of the production and maintenance unit and on proper request will be included in such unit without being granted a self-determination election.

Id. at 243-44. It appears, then, that a union, with an eye to electoral success, can carve out any appropriate unit, leaving only a fringe group outside. Later, when the support of the union employees has intensified, the union can petition for a larger unit and sweep in the remaining employees.

blocks."⁸⁵ Such an attitude renders hollow the protection guaranteed in section 9(b) of the act.⁸⁶ This hollowness is clearly revealed by a comparison of the two *P. Ballantine & Sons* cases.⁸⁷

In 1958, Local 153 of the Office Employees International Union (AFL-CIO) petitioned for an election in a unit consisting of all "outside salesmen" working out of the branch sales offices of P. Ballantine & Sons in Newark, New Jersey and New York City. The employer moved for dismissal of the petition on the ground that the only appropriate unit would be one that included the outside salesmen of *all* of its ten branches. The Board noted the following facts: sales quotas for the branches were set by the home office, although individual quotas for the salesmen were fixed locally; personnel and payroll records were kept both in Newark (the central office) and in the branch offices; salary checks for virtually all salesmen were prepared at the main office; the final responsibility for hiring and firing was actively exercised by a central sales manager; policies as to labor relations, methods of compensation, vacations, holidays, and fringe benefits were formulated by the home office, which also handled grievances and arbitration proceedings in all of the branches; and finally, there was some history of transfers between the branches and the regions. In summary, the Board stated that "the Employer's sales operations are centrally directed from Newark by a general sales manager."⁸⁸ Consequently, the requested unit was "too narrow" in scope to constitute an appropriate bargaining unit, and the Board dismissed the union's petition.

Five years later, the same union, seeking to represent the same salesmen of the same employer, petitioned the Board for a unit even more narrow in scope than that sought in 1958.⁸⁹ Although the Board was made aware of and in fact mentioned the earlier case, it could point to *no change in circumstances* since that decision. As a matter of fact, the Board again noted that "there is a substantial degree of centralization and integration in the Employer's sales organization."⁹⁰

⁸⁵ Note, The Board and Section 9(c)(5): Multilocation and Single-Location Bargaining Units in the Insurance and Retail Industries, 79 Harv. L. Rev. 811, 835 (1966).

⁸⁶ The employees may not be the only sufferers. The employer may be forced to negotiate with several unions, each pushing in a different direction. These separate unions will often fail to appreciate the total picture and to understand the employer's problems. Jurisdictional disputes often follow. Negotiations being numerous, are more time-consuming and tedious. The number of strikes increases, and, with them, the public inconvenience.

⁸⁷ 120 N.L.R.B. 86 (1958); 141 N.L.R.B. 1103 (1963).

⁸⁸ 120 N.L.R.B. at 87.

⁸⁹ The unit requested by the union consisted of all branch salesmen at the employer's Newark branch. This same unit was an alternative request in the 1958 case and was dismissed as well.

⁹⁰ 141 N.L.R.B. at 1104. The Board attempted to establish the existence of some

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Nevertheless, the Board explicitly reversed its precedent and granted the union's petition. The reasons given are revealing:

Although the Board necessarily has wide discretion in the exercise of [its] authority, the statute does provide certain explicit guidelines. First and foremost is the requirement that each appropriate unit determination should "assure to employees the fullest freedom in exercising the rights guaranteed by this Act," i.e., *the rights to self-organization and to collective bargaining*. In order to effectuate this fundamental policy declaration of the Congress, the Board must be wary lest its unit determinations unnecessarily impede the exercise by employees of these rights. Such would be the result in the instant case if the Board were to continue . . . as it did in [the 1958 case]. . . .⁹¹ (Emphasis added.)

What about the right of the employees "to refrain from any or all of such activities" guaranteed by section 7 of the act since 1947? This provision seems to have been neglected by the Board.

There can be no easy rationalization of this decision. Because of its conclusions in the earlier case, the Board was not free to manipulate inferences from the objective criteria as it had done in other decisions, but was forced to reveal its true guidelines. It clearly appears that the Board's action in specifically overruling the first *Ballantine* case was based solely on the fact that the union had been unable to organize the larger unit.⁹² This approach is prohibited by section 9(c)(5) of the act.

V. MANIPULATION OF OBJECTIVE CRITERIA

Four fundamental criteria are cited by the Board almost every time they are asked to approve a bargaining unit composed of em-

autonomy in the branch offices by noting that day-to-day decisions were generally left "in the hands of the individual branch managers." Id. at 1105. Such supervision seems a weak foundation upon which to build an argument for autonomy, however, since all businesses, no matter how centralized, leave daily policy decisions to section heads.

⁹¹ Id. at 1106.

⁹² The Board seemed disturbed by the fact that no union had been able to organize the company:

The failure of any labor organization to file a petition for, no less win an election in, a branchwide unit of salesmen employed by P. Ballantine & Sons since that 1958 decision, vividly attests to its adverse impact on organizational development. It was not contemplated by the Act that Board unit determinations would frustrate the organization of employees, and this result could not have been either intended or anticipated by the Board in deciding the aforementioned case.

Ibid. This statement provoked the following question from Member Rodgers, dissenting:

Do my colleagues also deprecate the Board's traditional production and maintenance unit rule as unduly impeding the organization of the myriad number of unorganized plants in this country as to which petitions have never been filed?

Id. at 1110 n.27.

ployees from more than one plant within a multi-plant operation. They are: (1) history of bargaining; (2) employee interchange or transfer; (3) degree of autonomy at each location; and, (4) distance between locations. These criteria are rarely given equal weight in any one decision, and any one criterion is rarely given the same relative weight in different cases. Instead, the Board considers each set of circumstances in its entirety, and renders a decision appropriate for the particular case only. Thus, it is exceedingly difficult to establish a misuse of these criteria.⁹³ Adding to this difficulty is the Board's annoying habit of using its "short-form" opinion and decision in the treatment of such objective criteria. For example, the Board will often evaluate the degree of employee interchange without citing figures;⁹⁴ it will frequently appraise the distance between two locations as "significant" without analyzing its effect on a suburban, mobile work force;⁹⁵ and it will consistently conclude that supervision at one location is "autonomous" without explaining its test.⁹⁶ An excellent example of the way the Board can manipulate the "objective criteria" is seen in the *Liebmann Breweries, Inc.* cases.⁹⁷

In the most recent *Liebmann* case (1963), the petitioning union sought a unit of the employer's salesmen located at one New Jersey sales office. The employer contended that only an overall unit of the sales personnel at its seven locations would be appropriate. The Board ruled in favor of the union, and an analysis of its four principal reasons points to their speciousness.

1. *Single-Office Units Are Presumptively Appropriate.* As the discussion above indicates,⁹⁸ the Board's reasons for this presumption completely break down where, as here, the employer has argued for an employer-wide unit, since both are specified in the act.⁹⁹

2. *Geographic Separation of the Sales Offices.* In its statement of the facts, the Board cited "a substantial geographic separation between the branches and sales offices, ranging from 27 to more than

⁹³ "There are so many good reasons one may easily find for the propriety of any particular unit's serving as the bargaining agency that anyone attacking the appropriateness of a certified bargaining unit wages an uphill fight." *NLRB v. Schill Steel Prods., Inc.*, 340 F.2d 568, 574 (5th Cir. 1965). The Supreme Court has similarly recognized the difficulty of evaluating the Board's dependence on particular factors. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-43 (1965).

⁹⁴ E.g., *Weis Mkts., Inc.*, 142 N.L.R.B. 708, 710 (1963); *P. Ballantine & Sons*, 141 N.L.R.B. 1103, 1105 (1963).

⁹⁵ E.g., *Black & Decker Mfg. Co.*, 147 N.L.R.B. 825, 828 (1964) (24 miles); *Dixie Belle Mills, Inc.*, 139 N.L.R.B. 629, 632 (1962) (20 miles); *Michele Frocks*, 121 N.L.R.B. 1273, 1277 (1958) (12 miles).

⁹⁶ E.g., *McCoy Co.*, 151 N.L.R.B. 383, 384 (1965); *Dixie Belle Mills, Inc.*, supra note 95, at 632-33.

⁹⁷ 92 N.L.R.B. 1740 (1951); 101 N.L.R.B. 616 (1952); 142 N.L.R.B. 121 (1963).

⁹⁸ See p. 182 supra.

⁹⁹ 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1964).

140 miles."¹⁰⁰ Yet this same distance failed to affect the Board's rationale in an earlier case between the same parties which reached an opposite result.¹⁰¹ Furthermore, the Board has often stated that it does not consider geographical separation of controlling weight.¹⁰² In fact, it is impossible to anticipate just how the Board will, at any given time, interpret the distance factor. A distance of twenty miles between plants has contributed to a finding of single-plant units,¹⁰³ while the same distance has also been ignored and a two-plant unit preferred.¹⁰⁴ A single-location unit has been approved even where the stores were situated "within a few blocks of one another,"¹⁰⁵ although multi-plant units have been required where the plants were thirty miles apart¹⁰⁶ and eighteen miles apart.¹⁰⁷

It was previously noted that for many years the Board found a strong community of interest among insurance agents¹⁰⁸ and among retail market employees,¹⁰⁹ even though they were separated by hundreds of miles. Noted also was the ease with which the Board reversed itself, without reanalyzing its specific conclusions as to the significance of these distances.¹¹⁰ When the Board speaks about "substantial" distance, what, then, is its index of values? "Substantial" in regard to what? While conceivably there may be material differences from industry to industry, the Board never bothers to articulate any. Similarly, while the Board's prior lack of concern about particular distances may be sufficient grounds for overruling precedent, the Board never troubles to explain why.

Given the abundance of relevant considerations, the Board is not to be criticized for reaching general conclusions on the totality of facts; but the public in general, and the reviewing courts in particular, must be told the reason for a specific factor's relevance and why it was assigned "substantial" significance in one case and almost none in the next. The Board's refusal to do this in *Liebmann* (1963) leaves

¹⁰⁰ 142 N.L.R.B. at 124.

¹⁰¹ 101 N.L.R.B. 616 (1952).

¹⁰² See, e.g., *Veeco Instruments, Inc.*, 29 R.C. 474 (1966) (unreported); *Herpolsheimer Co.*, 100 N.L.R.B. 1452, 1453 (1952); *Grand Union Co.*, 81 N.L.R.B. 1016, 1017 (1949).

¹⁰³ *Dixie Belle Mills, Inc.*, supra note 95.

¹⁰⁴ *Russel Co.*, 107 N.L.R.B. 668 (1953).

¹⁰⁵ *Frisch's Big Boy Ill-Mar, Inc.*, 147 N.L.R.B. 551, 554 (1964) (Members Leedom and Jenkins, dissenting).

¹⁰⁶ *Boland Mfg. Co.*, 83 N.L.R.B. 1254 (1949).

¹⁰⁷ *Textron, Inc.*, 117 N.L.R.B. 19 (1957).

¹⁰⁸ See discussion of *Metropolitan Life Ins. Co.*, 56 N.L.R.B. 1635 (1944), and subsequent cases, pp. 182-83 supra.

¹⁰⁹ See discussion of *Safeway Stores, Inc.*, 96 N.L.R.B. 998 (1951), and subsequent cases, pp. 183-86 supra.

¹¹⁰ See *Quaker City Life Ins. Co.*, 134 N.L.R.B. 960 (1961); *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032 (1962).

unsupported its mystical conclusion that, although unimportant in 1951 and 1952, the same distance is "substantial" in 1963.

3. *Autonomous Supervision in Daily Operations.* In *Liebmann* (1963), the Board explicitly found that there was a single employer involved, and that

all matters related to labor relations and employee terms and conditions of employment are determined by the appropriate management officials in the Brooklyn headquarters office, and are uniform throughout the sales department. In addition, all hiring, firing, and other personnel matters must be approved by the Brooklyn headquarters.¹¹¹

The Board mysteriously concluded, however, that "the branches and sales offices are, *within the limits of certain instructions and policies laid down by the management of the Company*, essentially autonomous operations."¹¹² (Emphasis added.) The authority of the branch managers was delineated to show the autonomy of supervision. They had been given authority to discipline employees for "minor infractions" only; to supervise and attempt to improve employee performance; to make recommendations concerning merit increases when the employee's records are reviewed by the central office; to make recommendations with respect to hiring and firing and other personnel action. These recommendations were followed "in the main" and apparently rejected the rest of the time. The managers also held weekly sales meetings and "watched sales and merchandising results."

If this company's operations are not totally integrated, whose are? How is it possible to place less responsibility in the hands of office managers? Surely it would be difficult to devise a multi-branch sales organization with more centralized control. Is the Board saying that every multi-branch sales operation has "autonomous supervision" per se? If so, this criterion is a constant and should never be cited by the Board.

The Board's argument becomes even more disturbing when it is compared to the 1951 *Liebmann* opinion. In that case, the Board had characterized virtually the same operational situation in terms diametrically opposed to the instant conclusion. The Board had previously stated that because of the

marked centralization of the Employer's sales organization, *the virtual absence of local autonomy* in hiring and discharge, the central control exercised with respect to supervision, wages, working conditions, and general policies, and

¹¹¹ 142 N.L.R.B. at 123.

¹¹² *Ibid.*

on the basis of the entire record in the case, we find that both the primary and alternative units sought by the Petitioner are too narrow in scope and therefore inappropriate for collective bargaining purposes.¹¹³ (Emphasis added.)

This earlier case involved precisely the same parties and precisely the same facts. There is no assertion that *any* condition has changed, and the Board even explicitly accepted its previous fact-finding.¹¹⁴ The only reason even hinted at for this startling turnabout is that the earlier *Liebmann* cases had been "reversed on other grounds."¹¹⁵ The reason for this reversal, as stated in *P. Ballantine & Sons*,¹¹⁶ had been the implication in the *Liebmann* cases that single-plant units were inappropriate. Examination of the earlier *Liebmann* cases, however, fails to reveal any consideration other than the factual circumstances. Indeed, the Board in the 1963 case also attempted to rationalize that decision solely on the basis of the facts. Not one of the three cases discussed a presumption for or against single-location units.¹¹⁷

4. *Lack of Employee Interchange Between Locations.* In the 1963 *Liebmann* case, the Board stated: "While there have been occasional temporary transfers of salesmen between the branches or sales offices, permanent transfers have been rare—six in the past five years."¹¹⁸ The implication is that this lack of permanent interchange supports a single-location unit finding. The Board, however, failed to explain why temporary transfers are less significant than permanent ones. Indeed, the reverse would seem to be true: recurring, temporary transfers, by preventing the establishment of a definite community of interest among employees at one location, would impede successful collective bargaining far more than permanent ones. In addition, frequent temporary transfers evidence functional integration among different locations.

The Board's preference is even more surprising when compared to its pronouncement a year later in *Black & Decker Mfg. Co.*¹¹⁹ The Board there stated:

With respect to the transfer and interchange of employees between the plants, the most relevant evidence in

¹¹³ 92 N.L.R.B. at 1742.

¹¹⁴ 142 N.L.R.B. at 123. Member Rodgers, dissenting, stated: "No legally significant distinction can be made between the earlier cases and the instant case." Id. at 125 n.11.

¹¹⁵ Id. at 122 n.4, 123 n.6.

¹¹⁶ 141 N.L.R.B. 1103, 1108 n.22 (1963).

¹¹⁷ The 1963 case does include this presumption among the reasons for the decision, 142 N.L.R.B. at 125, but it is never mentioned in the opinion, and would therefore appear to be subordinate to the factual determinations and objective criteria.

¹¹⁸ Id. at 124.

¹¹⁹ 147 N.L.R.B. 825 (1964).

the record indicates that there were approximately 136 inter-plant transfers in the period from September 1962 to September 1963. Of that total, however, 83 were transfers of 30 days or less.¹²⁰

The Board continued in a footnote:

As transfers of more than 30 days in length approach a semipermanent change of status, we find the shorter transfer periods more significant in determining the integrated nature of the two plants.¹²¹

Why does the Board neglect to explain its departure from the contrary implication in the *Liebmann* (1963) case? Furthermore, how does it arrive at an automatic rule for the relevancy of a one-month cut-off? Why is it that transfers for thirty days are significant, but transfers for thirty-one are not?¹²² There is no need here for an arbitrary line. The Board prior to *Black & Decker* made assessment on the totality of circumstances; it still does.¹²³

The foregoing analysis of the *Liebmann* problem reveals the type of inconsistent application of objective criteria which frustrated the First Circuit and the Supreme Court in the *Metropolitan Life Ins. Co.* case.¹²⁴ Such criteria are undeniably essential in the determination of appropriate bargaining units; however, until the Board clearly articulates the relative significance of each of the tests, biased or pre-determined decisions may be camouflaged by superfluous discussion.

VI. JUDICIAL REVIEW OF BARGAINING UNIT DETERMINATIONS

It is to be remembered that most of the decisions which are cited as precedent from case to case are decisions that cannot reach the courts on a direct appeal, since representation cases are administrative rulings that are not subject to judicial review.¹²⁵ The indirect route that is available for procuring review by the courts is not, as a prac-

¹²⁰ Id. at 827.

¹²¹ Id. at 827 n.3.

¹²² It is also interesting to note that the Board has frequently discussed employee interchange in terms of an annual percentage. Yet, inconsistencies in the application and significance of these figures detract from their evidentiary value. See Note, 79 Harv. L. Rev. 811, 829-31 (1966).

¹²³ See, e.g., *Guyan Mach. Co.*, 155 N.L.R.B. No. 47, 60 L.R.R.M. 1373, 1378 (1965) (unfair labor practice).

¹²⁴ 142 N.L.R.B. 491 (1963), enforcement denied, 327 F.2d 906 (1st Cir. 1964), remanded, 380 U.S. 438 (1965), aff'd on rehearing, 156 N.L.R.B. No. 113, 61 L.R.R.M. 1249, 1253 (1966). Compare *NLRB v. Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895 (7th Cir. 1966).

¹²⁵ *American Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940). See *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *Daniel Constr. Co. v. NLRB*, 341 F.2d 805 (4th Cir. 1965); 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(f) (1964).

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tical matter, readily accessible to the employer who is unhappy with the Board's determination of a bargaining unit. This route requires that the employer refuse to recognize the union which has won an election in the approved unit, and thereby subject himself to a section 8(a)(5)¹²⁶ charge by the union; the result, as an unfair labor practice controversy, could then be appealed to the courts. Such a route would finally allow the employer his day in court on the bargaining unit dispute at the time the Board seeks enforcement of its order in the section 8(a)(5) violation.

Obviously, this indirect method of review, aside from the extended time involved,¹²⁷ imposes dangers of interim strikes and additional unfair labor practice charges, coupled with the possibility of orders requiring reinstatement of employees and back pay awards. These dangers may pose too great a gamble for even the soundest of companies in the face of the odds against winning a reversal of the Board's determination of the appropriate bargaining unit. The Board's decision, if not final, is rarely to be disturbed.¹²⁸

Judicial reluctance to upset Board decisions can be seen in a comparison of *NLRB v. Glen Raven Knitting Mills, Inc.*¹²⁹ and *NLRB v. Morganton Full Fashioned Hosiery Co.*¹³⁰ Both cases, decided by the same court, involved substantially identical fact situations:

In both the employees were engaged in the manufacture of ladies' full fashioned hosiery involving a variety of operations, superintended by one man, which included knitting performed by approximately one-third of the total employees. In both the Board originally determined that an appropriate bargaining unit should consist of all the production and maintenance employees on a plant-wide basis, and in both, several years after, it was ascertained that the union did not represent a majority of these employees; and years later those who worked in the knitting group were organized and the Board certified them alone as an appropriate bargaining unit.¹³¹

¹²⁶ 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1964).

¹²⁷ The Supreme Court has recognized the "significant delays" caused by lack of direct review of representation hearings, but felt that "Congress explicitly intended to impose precisely such delays." *Boire v. Greyhound Corp.*, supra note 125, at 477-78.

¹²⁸ See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); *NLRB v. Hurley Co.*, 310 F.2d 158, 161 (8th Cir. 1962); *Texas Pipe Line Co. v. NLRB*, 296 F.2d 208, 210 (5th Cir. 1961).

¹²⁹ 235 F.2d 413 (4th Cir.), denying enforcement to 115 N.L.R.B. 422 (1956).

¹³⁰ 241 F.2d 913 (4th Cir. 1957), enforcing 115 N.L.R.B. 1267 (1956).

¹³¹ *Id.* at 915.

Despite the "marked similarity in the two cases,"¹⁸² the court reached opposite results. In *Glen Raven*, the court felt that "there can be no reasonable doubt that the Board's action was controlled by the extent to which the employees of the company had been organized."¹⁸³ In *Morganton*, however, the court was unable to assume this position. The two cases should be distinguished, the court said, because involved in *Glen Raven* was a *single* union which had altered its immediate goals; the union in *Morganton* was not the same union that had previously attempted to organize the entire plant. In addition, the *Morganton* union's attorney had stated to the Board examiner that the union would not be interested in an over-all unit in the future.

If the distinction is not compelling, it must be remembered that the courts, no matter how convinced of the Board's parochialism in a particular case, cannot overturn such a decision unless it is arbitrary or capricious¹⁸⁴ or not "supported by substantial evidence on the record considered as a whole . . ."¹⁸⁵ Even such restrained judicial review presumably "does not extend to those issues on which the Board's specialized experience equips it with major premises inaccessible to judges . . ."¹⁸⁶ The court must not substitute its own wisdom or discretion for that of the Board.

The rare situation in which a reviewing court can hear a *direct* appeal from a bargaining unit determination is exemplified by the case of *Leedom v. Kyne*.¹⁸⁷ In that case, the Board approved a bargaining unit consisting of professional and non-professional employees and refused to direct a vote which would have ascertained whether the former would accept such a unit.¹⁸⁸ Section 9(b)(1) of the act gives to professional employees the right to accept or reject, by majority vote, inclusion in a unit with non-professionals.¹⁸⁹ The president of the association of professionals brought suit in the federal district court to strike down the Board's order as beyond its powers

¹⁸² Ibid.

¹⁸³ 235 F.2d at 416.

¹⁸⁴ *Mountain States Tel. & Tel. Co. v. NLRB*, 310 F.2d 478, 479-80 (10th Cir. 1962); *NLRB v. Hurley Co.*, supra note 128, at 161.

¹⁸⁵ 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(e) (1964). See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Packard Motor Car Co. v. NLRB*, supra note 128, at 491.

¹⁸⁶ *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 430 (2d Cir. 1951) (per L. Hand, J.). Judge Hand continued: "Just where the Board's specialized experience ends it may no doubt be hard to say . . ." Ibid. But see *Singer Sewing Mach. Co. v. NLRB*, 329 F.2d 200 (4th Cir. 1964), where the Board was reversed for failure to admit critical evidence in an unfair labor practice proceeding. The evidence might have revealed a Board violation of § 9(c)(5).

¹⁸⁷ 358 U.S. 184 (1958).

¹⁸⁸ *Westinghouse Elec. Corp.*, 115 N.L.R.B. 1420 (1956).

¹⁸⁹ 61 Stat. 143 (1947), 29 U.S.C. § 159(b)(1) (1964).

and contrary to the act. The district court granted summary judgment in favor of the association,¹⁴⁰ and the court of appeals affirmed.¹⁴¹

The Supreme Court affirmed, with two Justices dissenting.¹⁴² Although the court had declared several years earlier in *American Fed'n of Labor v. NLRB*¹⁴³ that bargaining unit determinations were not subject to direct judicial review, *Kyne* was held to be distinguishable because it was not a suit "to 'review,' in the sense of that term as used in the Act"¹⁴⁴ The Court felt that Congress could not have intended that those injured by agency action in excess of delegated powers would be deprived of direct judicial protection.

Justices Brennan and Frankfurter, dissenting, feared that the majority decision would induce clever lawyers to find "some alleged 'unlawful action,' whether in statutory interpretation or otherwise, sufficient to get a foot in a District Court door"¹⁴⁵ The threatened flood of direct appeals, however, has apparently never materialized.¹⁴⁶ This is due to the strict construction given *Kyne* by the courts,¹⁴⁷ especially the Supreme Court, which at least twice has emphasized the "painstakingly delineated procedural boundaries" of the case.¹⁴⁸

VII. CONCLUSIONS

As a general rule, reviewing courts ought not to psychoanalyze lower adjudicatory bodies. To do so would greatly weaken the administrative process by undermining the authority of, and confidence in, agency determinations. In addition, accurate inferences as to subjective motivation are almost impossible. On the other hand, if the NLRB is to preserve its adjudicatory independence and finality, it must exhibit the objective, neutral reasoning which Congress assumed it would have.

Some judicial review of administrative decisions is, of course, necessary, since agency determinations could involve misinterpretations of relevant law, or inconsistent applications of similar facts.¹⁴⁹ The courts cannot provide a meaningful review of Board decisions,

¹⁴⁰ 148 F. Supp. 597 (D.D.C. 1956).

¹⁴¹ 249 F.2d 490 (D.C. Cir. 1957).

¹⁴² *Supra* note 137.

¹⁴³ 308 U.S. 401 (1940).

¹⁴⁴ 358 U.S. at 188.

¹⁴⁵ *Id.* at 195-96.

¹⁴⁶ But see *Bullard Co. v. NLRB*, 253 F. Supp. 391 (D.D.C. 1966). Compare *Dutchess County Aviation, Inc. v. Administrator*, 251 F. Supp. 426 (S.D.N.Y. 1966).

¹⁴⁷ See, e.g., *Potter v. Castle Constr. Co.*, 355 F.2d 212 (5th Cir. 1966); *Lawrence Typographical Union v. McCulloch*, 349 F.2d 704 (D.C. Cir. 1965).

¹⁴⁸ *Brotherhood of Ry. & S.S. Clerks v. Association For Benefit of Non-Contract Employees*, 380 U.S. 650, 660 (1965); *Boire v. Greyhound Corp.*, *supra* note 125, at 481.

¹⁴⁹ See, e.g., *NLRB v. Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895 (7th Cir. 1966).

however, if the Board refuses to explain its rulings. Discussion of various objective factors is insufficient when these factors acquire different significance in different cases. It is meaningless for the courts to continually offer possible reasons for Board holdings because they must defer to an assumption of agency "expertise." If the Board's decisions are to withstand the challenge of judicial review, it should be due to the Board's open, logical, and rational reliance on the stated criteria. If the courts bend even more to rationalize and apologize for unsupported Board decisions, then the system of judicial review will have failed to provide the salutary objective consideration essential to an effective and fair quasi-judicial administration of the law.

Analysis of the Board's appropriate bargaining unit determinations over the last twenty years reveals an apparent disregard for the neutral balance provided by the framers of the Taft-Hartley Act. The act sought to de-emphasize self-organization and to reestablish the rights and free choice of the individual employee. The Board's lack of attention to this congressional purpose has been difficult to establish through normal judicial review because of the vagueness of Board opinions. And perhaps the resultant lack of admonition has encouraged the Board in the rightfulness of its policies. Judicial insistence on coherent administrative opinions, possibly stimulated by the Supreme Court's recent recognition of the problem,¹⁵⁰ can force the Board to be clear and specific. Until this situation of clarity and specificity is reached, the Board's apparent lack of objectivity, and its apparent dependence on the union's extent of organizational success, will be difficult to detect and control. The Taft-Hartley Act does not deserve such unsatisfactory administration.

¹⁵⁰ *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).