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Determination of Appropriate Bargaining Unit by the NLRB: Principles, Rules, and Policies

Cover Page Footnote

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DETERMINATION OF APPROPRIATE BARGAINING UNIT BY THE NLRB: PRINCIPLES, RULES, AND POLICIES

WALTER L. DAYKIN*

THE statutory provisions in section 9(b) of the Taft-Hartley Act¹ give to the National Labor Relations Board the power or the exclusive jurisdiction to determine the appropriate unit for collective bargaining purposes when such a decision is required in a representation case or an unfair labor practice case brought before it.² However, in making the determination, the Board's discretion is subject to various limitations. Section 9(b)(1) prohibits the certification of any unit as appropriate for collective bargaining if it is composed of both professional and nonprofessional employees unless the majority of the professional employees vote to be included in such a unit. Section 9(b)(2) states that no craft unit can be declared inappropriate for collective bargaining purposes on the grounds that a different unit has been recognized by an earlier Board determination. Furthermore, section 9(b)(3) provides that no unit can be certified as appropriate for bargaining if it includes guards and watchmen with other employees; and a unit of guards cannot be certified if this labor organization admits employees other than guards to membership or if it either directly or indirectly affiliates with any other labor organization that admits members other than guards. Section 9(c)(5)³ prevents making the extent of organization the controlling factor in the determination of the appropriate unit.

It has long been an accepted principle that the bargaining unit determination authority of the Board is not reviewable by the federal courts.⁴ However, in the recent case of *Leedom v. Kyne*,⁵ the Circuit Court of Appeals for the District of Columbia modified somewhat this

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1. 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1952).

2. The type of bargaining unit is of great importance to the establishment of stable industrial relations. Decisions by the NLRB may determine how many sets of bargaining negotiations an employer must enter and how many bargaining contracts he must help administer. An NLRB unit decision can be of great importance in any bargaining relationship. See Rathbun, *The Taft-Hartley Act and Craft Unit Bargaining*, 59 *Yale L.J.* 1023 (1950).

3. 61 Stat. 143 (1947), 29 U.S.C. § 159(c) (1952).

4. An NLRB certification of a bargaining representative or a Board order dismissing a petition for a representation election is not regarded as a "final order" of the Board which under § 10(f) of the Taft-Hartley Act is reviewable by the federal courts. The Supreme Court has held that the only "final orders" of the NLRB are those issued in unfair labor practice cases. *Inland Empire District Council v. Millis*, 325 U.S. 697 (1945).

5. 249 F.2d 490 (D.C. Cir. 1957), cert. granted, 355 U.S. 922 (1958).

practice by ruling that if the determination violated the statutory requirements and resulted in injury it was subject to court review. In this case the Board had permitted professional and nonprofessional workers in the same unit without allowing the professionals to vote as required by section 9(b)(1) of the statute.

WHO ARE INCLUDED IN THE UNIT

The statute requires that the Board in its administration of this phase of the law determine the composition of the units or who shall be included and who excluded from the bargaining unit. The law establishes standards to be used in the performance of this function and designates that certain employees be excluded from bargaining units. For example, agricultural workers, supervisors, and independent contractors are not to be included in bargaining units under the protection of the statute. Moreover, watchmen and guards are permitted to organize unions of their own but are restricted by law from belonging to a union of production and maintenance employees. Employees who work exclusively out of the United States are excluded from bargaining units because of the general principles established in international law.⁶

In addition, the Board has established policies of its own which exclude various employees from collective bargaining units. Temporary and seasonal workers are excluded from units unless there is a chance for continued employment after their jobs have been terminated, largely because they lack community of interest.⁷ However, regular part time workers and probationary employees who do the same work and ordinarily are continued as regular employees are included in the units.⁸ Confidential employees are often excluded from bargaining units composed of production and maintenance workers because of their closeness to management.⁹ In fact, if the interests of the employees are more closely identified with management than with the other workers in the industry, such persons are barred from participating in the bargaining unit.¹⁰ The policy of excluding from units employees who rarely have contact with other workers or spend little time in the plant has also been established.¹¹ Office clerical employees have been excluded from the

6. Detroit & Canada Tunnel Corp., 83 N.L.R.B. 727 (1949).

7. Celotex Corp., 118 N.L.R.B. 1020 (1957); Individual Drinking Cup Co., 115 N.L.R.B. 947 (1956); Swift & Co., 115 N.L.R.B. 755 (1956); Montgomery Ward & Co., 110 N.L.R.B. 256 (1954).

8. H. A. Rider & Sons, 117 N.L.R.B. 517 (1957); Minneapolis Star and Tribune Co., 115 N.L.R.B. 1300 (1956); Central Operating Co., 115 N.L.R.B. 1754 (1956).

9. Denton's, Inc., 83 N.L.R.B. 35 (1949).

10. General Tel. Co., 112 N.L.R.B. 46 (1955); Potomac Elec. Power Co., 111 N.L.R.B. 553 (1955).

11. Superior Bakery, 78 N.L.R.B. 1172 (1948).

production and maintenance units, and plant clerical workers have been excluded from the office clerks unit, but may be included in the production and maintenance workers appropriate bargaining unit. Technical employees are excluded from plant-wide units if one party objects to the inclusion, but may form a separate unit which will be certified if it conforms to the standards established by the law and the Board.¹²

DETERMINATION OF THE TYPE AND SCOPE OF APPROPRIATE UNIT

The law delegates to the Board the power and the obligation to determine the type of unit that will be appropriate and the scope of the unit. This permits the certification of a craft unit, an industrial unit or some other unit that fits into the legal structure, and authorizes the determination of whether the unit shall be established on the craft, skill or plant residual basis and whether it should be plant-wide, employer-wide or multi-employer-wide.¹³ In the course of its functioning and experience in handling the problems in these areas this semijudicial body has developed a group of standards. In dealing with the problem of the appropriate bargaining units a great deal of emphasis has been placed upon such factors as the history of bargaining, group homogeneity, community of interest or like mindedness existing among the employees, the integration of operations, the centralization of the control of labor relations, the interchange of employees, the distinct functions performed by the employees involved and their identity as a distinct subdivision of the plant, the similarity of the skills, wages, and working conditions of employees, the eligibility of the union involved to represent the workers, and the desires of the employees.¹⁴ It is a general practice to conduct a self-determination election among the eligible employees in order to obtain the desires of the majority as to the form of representation that is preferred by them if an attempt is made by a union or other interested parties to enlarge the bargaining unit or to establish separate units.¹⁵ If a group of employees meet the requirements of a separate craft unit or a distinct departmental group they are often given the privilege of either remaining part of the plant-wide unit or of forming a craft unit or a department unit.¹⁶

12. Pollock Paper Corp., 115 N.L.R.B. 231 (1956); United States Gypsum Co., 114 N.L.R.B. 523 (1955).

13. 61 Stat. 143 (1947), 29 U.S.C. § 159(b) (1952).

14. W. M. Kellogg Co., 110 N.L.R.B. 51 (1954); David Max and Co., 109 N.L.R.B. 1308 (1954); Wm. P. McDonald Corp., 83 N.L.R.B. 427 (1949).

15. Royal McBee Corp., 117 N.L.R.B. 741 (1957); Rathbun Molding Corp., 116 N.L.R.B. 1002 (1956); Remington Rand Div., 116 N.L.R.B. 137 (1956); Great Lakes Pipe Line Co., 92 N.L.R.B. 583 (1950).

16. Bagwell Elec. Steel Castings, Inc., 117 N.L.R.B. 1770 (1957); Chase Aircraft Co., 91 N.L.R.B. 288 (1950); Swift & Co., 86 N.L.R.B. 1329 (1949); John F. Jelke Co., 83 N.L.R.B. 442 (1949).

Some difficulties and differences of opinion have resulted from the attempts to apply section 9(c)(5) which limits the use of the extent of organization or collective bargaining history as the controlling factor in the determination of the appropriate bargaining unit for collective bargaining purposes. For example, it has been ruled that it is contrary to the statute to base the establishment of a proposed collective bargaining unit upon the extent of organization, or to certify units as appropriate for bargaining purposes if they can be justified only on the grounds of extent of the organization or the history of bargaining.¹⁷ However, while the law prohibits the extent of bargaining from controlling the determination of appropriate units, the use of this factor is not entirely eliminated by the statute.¹⁸ It can be weighed but it cannot be given controlling weight.¹⁹ Furthermore, while section 9(c)(5) prohibits the determination of bargaining units on the basis of the extent of organization alone, it does not prevent the establishment or certification of a unit which coincides with the extent of organization attained by the union if the unit is appropriate because of its distinct functions, its homogeneity, and its identity as a subdivision of the plant.²⁰ Consequently, extent of organization and the history of bargaining can be used in connection with other established standards in the determination of the unit with which the employer is to deal for collective bargaining purposes.²¹

The available decisions clearly reveal that in a number of cases dealing with the composition and the scope of appropriate bargaining units much emphasis is focused upon the history of collective bargaining. In fact, the policy has been formulated that a long history of collective bargaining definitely establishes a fixed pattern of bargaining.²² Pursuant to this, craft units and other types of units have been refused certification because the pattern and nature of negotiation of contracts established a history of bargaining that was controlling, or because the long years of bargaining resulted in a controlling history on another basis.²³ Multi-

17. *Endicott Johnson Corp.*, 117 N.L.R.B. 1886 (1957); *American Relay and Controls, Inc.*, 81 N.L.R.B. 178 (1949); *C. Pappas Co.*, 80 N.L.R.B. 1272 (1948).

18. *United States Rubber Co.*, 91 N.L.R.B. 293 (1950); *Marshall Field & Co.*, 90 N.L.R.B. 1 (1950); *Waldensian Hosiery Mills, Inc.*, 83 N.L.R.B. 742 (1949).

19. *Thalhimer Bros. Inc.*, 83 N.L.R.B. 664 (1949); *O. G. Kelley Co.*, 78 N.L.R.B. 1166 (1948); *Delaware Knitting Co.*, 75 N.L.R.B. 205 (1947).

20. *Glen Raven Knitting Mills, Inc.*, 115 N.L.R.B. 422 (1956), enforcement denied, 235 F.2d 413 (4th Cir. 1956).

21. *General Metalcraft Inc.*, 106 N.L.R.B. 1131 (1953).

22. *Wisconsin Elec. Power Co.*, 107 N.L.R.B. 1204 (1954); *Furniture Employer's Council, Inc.*, 96 N.L.R.B. 1002 (1951).

23. *Baltimore Towage & Lighterage Co.*, 117 N.L.R.B. 1031 (1957); *Westinghouse Elec. Corp.*, 115 N.L.R.B. 185 (1956), enforcement granted, 236 F.2d 939 (3d Cir. 1956); *American Broadcasting Co.*, 114 N.L.R.B. 7 (1955); *Jewel Food Stores*, 111 N.L.R.B. 1368 (1955); *Missouri Transit Co.*, 111 N.L.R.B. 156 (1955).

employer units have been accepted because this pattern has been established and the employers have expressed no desire to change the practice.²⁴ Furthermore, certification has been refused to units if no history of bargaining has been established, or if there is no effective history of bargaining on the basis of such units.²⁵

On the other hand, it has been determined that separate units can be certified and that smaller units can be severed from larger units regardless of the history of bargaining that has been formulated in the areas. For example, despite an extensive history of bargaining on a company-wide basis a newly acquired plant was allowed to constitute a bargaining unit,²⁶ and in spite of a long history of bargaining on a plant-wide basis the appropriateness of a single unit was accepted by the Board.²⁷ In dealing with the problem of severance of smaller units from larger ones the policy has been established that collective bargaining history does not bar the severance of craft groups,²⁸ and that the history of bargaining is not controlling if employees constitute a homogeneous, or identifiable functionally coherent group.²⁹

CERTIFICATION OF SEPARATE CRAFT UNITS

In dealing with the problem of the size or scope of the bargaining unit it is necessary to realize that the statute does not restrict the right of separate craft units. It does, however, demand that craft employees retain their status or identity as craft workers, and this status must not be lost by intensive mingling with other noncraft employees. They must be identifiable, coherent groups performing distinct and similar craft work or they must maintain separate homogeneity, identity, and community of interest. Craft workers are not disqualified from separate bargaining because they work close to production workers and at times operate the same machines.³⁰ The petitions for separate craft bargaining must show

24. Parker Bros. & Co., 117 N.L.R.B. 1462 (1957); Cody Distributing Co., 113 N.L.R.B. 863 (1955); Des Moines Packing Co., 106 N.L.R.B. 206 (1953).

25. American Can Co., 114 N.L.R.B. 1547 (1955); Burns Detective Agency, 110 N.L.R.B. 995 (1954); L. C. Beauchamp, 87 N.L.R.B. 23 (1949).

26. Rockingham Poultry Cooperative, Inc., 113 N.L.R.B. 376 (1955).

27. Columbia Broadcasting System, Inc., 108 N.L.R.B. 1468 (1954); Capehart-Farnsworth Co., 111 N.L.R.B. 800 (1955).

28. Kuhns Bros. Co., 106 N.L.R.B. 146 (1953); Weber Showcase & Fixture Co., 96 N.L.R.B. 358 (1951); United States Pipe and Foundry Co., 87 N.L.R.B. 115 (1949); The Wooster Rubber Co., 77 N.L.R.B. 1044 (1948).

29. Moe Light, Inc., 109 N.L.R.B. 1013 (1954); Union Carbide & Carbon Corp., 107 N.L.R.B. 1486 (1954), enforcement granted, 244 F.2d 672 (6th Cir. 1957); Chase Candy Co., 88 N.L.R.B. 27 (1950); Brown-Ely Co., 87 N.L.R.B. 27 (1949).

30. Harvey Aluminum, 114 N.L.R.B. 935 (1955); Kennard Corp., 114 N.L.R.B. 150 (1955); Raytheon Mfg. Co., 98 N.L.R.B. 785 (1952); General Elec. Co., 86 N.L.R.B. 327 (1949).

that the proposed craft unit is composed of a distinct group functionally and that the employees involved can be effectively represented apart from other employees. One of the important criteria used to determine a true craft is the type of training or apprenticeship program used in the trade. If the program for learners is vague and indefinite it is not equal to complete or full apprenticeship.³¹ However, a sufficiently skilled craft group for collective bargaining purposes can exist even if the employer has no formal and regular apprenticeship program.³² Separate bargaining has been granted to employees engaged in work which has come to be traditionally regarded as similar to crafts even though the work does not require craft skill.

At present crafts cannot be certified in a number of industries because such units in these industries would have a negative effect upon production and would defeat effective representation. For example, separate crafts are not appropriate in various phases of the lumber industry because the workers are highly integrated, there has been a continual history of bargaining on the industrial basis and the nature of the industry has resulted in specialists rather than skilled workers who would be considered craftsmen in terms of the craft tradition.³³ Also the severance of craft maintenance units in the basic steel industry has been denied because of the extensive degree of integration that has developed among the maintenance craftsmen and the production employees.³⁴ In the aluminum industry collective bargaining on the craft basis was rejected and bargaining exclusively on the industrial basis was accepted because of the historical pattern that had been established, and because of the similarity of the conditions in this industry and basic steel where craft units were ruled to be inappropriate.³⁵

Employees are not homogeneous, or identifiable if their work is part of a highly integrated production operation, and consequently they do not constitute a craft unit appropriate for collective bargaining.³⁶ Groups of workers have not attained craft status and cannot be certified if their work involves no skills of a traditional craft, if their interests are comparable to those of production and maintenance employees in the plant, and if they serve no apprenticeship or have no special training.³⁷ At first

31. Allis-Chalmers Mfg. Co., 77 N.L.R.B. 719 (1948).

32. General Tire and Rubber Co., 79 N.L.R.B. 580 (1948).

33. Nettleton Timber Co., 87 N.L.R.B. 1319 (1949); Weyerhaeuser Timber Co., 87 N.L.R.B. 1076 (1949).

34. National Tube Co., 76 N.L.R.B. 1199 (1948). This ruling does not apply to the tin processing industry. Tin Processing Corp., 80 N.L.R.B. 1369 (1948).

35. Permanente Metals Corp., 89 N.L.R.B. 804 (1950).

36. Welding Shipyards, Inc., 81 N.L.R.B. 936 (1949).

37. Endicott Johnson Corp., 116 N.L.R.B. 446 (1956); Sylvania Elec. Products, Inc., 113 N.L.R.B. 375 (1955); Reynolds Metals Co., 108 N.L.R.B. 821 (1954).

welding was not considered a separate and distinct craft for severance purposes because of the absence of a specified period of training before doing the work of a welder, and the Bureau of Apprenticeship did not list this work as an apprenticeable occupation.³⁸ However, in later decisions, welding workers have been permitted to become separate and distinct craft units because of the new and advanced welding techniques that have been devised, and the training of these employees is now considered equivalent to a formal apprenticeship program.³⁹ This same reasoning was applied relative to automotive mechanics because, due to the change in the nature of the machines, it took approximately four years to require the skill necessary to adjust and maintain them.⁴⁰

On the other hand, separate craft groups or units are appropriate even if the plant operations are highly integrated,⁴¹ or if there is a long history of bargaining on a broader plant-wide basis, or if there is no history of bargaining at all and some of the work of the group is routine, if most of the duties require skill.⁴² In fact, it is a policy to permit or certify craft groups for collective bargaining purposes, with the exception of certain designated industries, if these groups are distinct, homogeneous and skilled, or if they perform distinct craft work, and if their interests are different from those of other employees.⁴³ It should also be noted that in determining the appropriateness of a craft group for collective bargaining purposes the "nucleus of skills" doctrine has often been applied. In terms of this philosophy a craft unit is allowed to be appropriate even though not all the employees in the group possess definite craft skills if there is a nucleus of skilled craftsmen in the unit with whom the unskilled work.⁴⁴ In the application of this policy such factors as the absence of employee interchange with other departments, the differential pay basis, and the fact that employees are supervised separately are relied upon for their evidential value.

SINGLE PLANT UNITS

In the determination of single plant units several significant policies or standards have been formulated. For instance the union must show

38. Clayton & Lambert Mfg. Co., 111 N.L.R.B. 540 (1955).

39. Hughes Aircraft Co., 117 N.L.R.B. 98 (1957).

40. International Harvester Co., 119 N.L.R.B. No. 218 (1958).

41. Southwestern Portland Cement Co., 110 N.L.R.B. 1388 (1954).

42. National Carbide Corp., 85 N.L.R.B. 103 (1949); The Lamson and Sessions Co., 81 N.L.R.B. 12 (1949); Hughes Tool Co., 77 N.L.R.B. 1193 (1948); General Motors Corp., 77 N.L.R.B. 1159 (1948).

43. National Gypsum Co., 116 N.L.R.B. 1005 (1956); The Berger Bros. Co., 116 N.L.R.B. 439 (1955); General Elec. Co., 112 N.L.R.B. 839 (1955); Southern Paperboard Corp., 112 N.L.R.B. 302 (1955).

44. Alamo Refining Co., 88 N.L.R.B. 505 (1950); Schultz Die Casting Co., 85 N.L.R.B. 1019 (1949); International Harvester Co., 82 N.L.R.B. 740 (1949); General Elec. Co., 81 N.L.R.B. 476 (1949).

that it has sufficient representative relationships and an interest among the employees involved before it can be certified as a plant unit. A unit that is too limited in scope will undoubtedly not be certified as a separate bargaining or appropriate unit. A union cannot be too arbitrary in its exclusions or inclusions in the plant unit or any bargaining unit if it wishes to be certified.⁴⁵ A department unit or a plant unit will not be certified if the union desires to include only a portion of the eligible employees, that is, the employees who perform similar work and possess similar interests.⁴⁶ In fact, a union that has been certified as the legal representative of a unit may have the certification revoked if it fails to properly represent all the eligible employees who were originally included in the certification.⁴⁷

An analysis of the decisions reveals that in the determination of the appropriateness of a single plant unit much stress is placed, either on an individual basis or in combination form, upon such factors as the independent character of the plant operations, geographic separation of the plant, variation in production methods, interchange of employees, the degree of plant autonomy with reference to management and operations involved, the nature of the contract, the conditions of employment, and the bargaining history that has been developed.⁴⁸ Separate units for plant employees are denied if their work is closely related to the work of other employees and if there is a similarity of hours, wages, and working conditions of employees in the plant.⁴⁹ However, groups of employees omitted from established bargaining units can organize into appropriate residual units if they include all the employees unrepresented who are legally entitled to be in the unit. These residual units are ordinarily composed of fringe employees who are allowed to form units so as not to be deprived of collective bargaining privileges.⁵⁰

EMPLOYER-WIDE UNITS

In determining whether or not an employer-wide unit is appropriate some important principles or standards have been established. These standards are generally used in a combined form but on occasion one

45. Celanese Corp., 84 N.L.R.B. 207 (1949).

46. Charles Smith Nash Co., 83 N.L.R.B. 511 (1949).

47. A. O. Smith Corp., 119 N.L.R.B. No. 82 (1957).

48. General Shoe Corp., 114 N.L.R.B. 381 (1955); Gulf Oil Corp., 90 N.L.R.B. 1607 (1950); Chadbourn Hosiery Mills, Inc., 89 N.L.R.B. 1256 (1950); Sani-Aqua Shower Curtains, Inc., 88 N.L.R.B. 1289 (1950).

49. Peoria Journal Star, Inc., 117 N.L.R.B. 708 (1957); Melrose Hosiery Mills, Inc., 114 N.L.R.B. 1166 (1955); Gaspro, Ltd., 114 N.L.R.B. 883 (1955); Consolidated Rendering Co., 112 N.L.R.B. 163 (1955).

50. The Carborundum Co., 115 N.L.R.B. 216 (1956); S. D. Warren Co., 114 N.L.R.B. 410 (1955); Red Dot Foods, Inc., 114 N.L.R.B. 145 (1955).

of them may become controlling. In solving this important problem the integrated nature of the employer's place of business (or the organizational integration of operations which involve interdependence and similarity of operations, centralized supervision or centralized management, and centralized control of personnel) and common labor policies are emphasized. A great deal of weight is also placed upon the similarity of skills and functions of employees involved and upon the uniformity of working conditions.

Furthermore, in solving this problem of the appropriateness of employer-wide units, such factors as the amount of interchange of employees between the places of business involved, the homogeneity or the degree of community of interest of the workers and the type of unit in the area among comparable employers are important.⁵¹ Some emphasis is placed upon the proximity or the geographic separation of the employer's plants because this factor often affects the homogeneity of the employee group and the management of the various divisions.⁵² However, geographic separation is not controlling if the separated plants of the employer are highly integrated, if common over-all supervision prevails, if the working conditions of the employees are comparable, if employees have substantial common interests and if centralized control of sales and wage policies are maintained.⁵³ Some weight is also given to the history of collective bargaining and the fact that no other labor organization desires to represent the workers.⁵⁴

In the recent *Wildwood Lumber* case,⁵⁵ the Board denied an employer-wide bargaining unit because: the plants were separated geographically; there was a great degree of autonomy vested in each plant manager; each plant did its own maintenance work; there was a difference in the job categories at each plant; there was little exchange of employees between the plants of the company; there existed a history of bargaining on a single plant basis; and no union desired to represent the employees in a single employer-wide unit. In *Central Carolina Farmers Exchange, Inc.*,⁵⁶ an employer-wide unit was declared to be appropriate for collective bargaining purposes on the grounds that a single corpora-

51. Poultry Producers Ass'n, 114 N.L.R.B. 1186 (1955); Sidney Blumenthal & Co., 112 N.L.R.B. 579 (1955); Sears Roebuck & Co., 112 N.L.R.B. 559 (1955); General Tel. Co., 112 N.L.R.B. 46 (1955).

52. B. G. Wholesale, Inc., 114 N.L.R.B. 1429 (1955); General Shoe Corp., 113 N.L.R.B. 905 (1955).

53. Franklin Limestone Co., 114 N.L.R.B. 747 (1955); Texas Constr. Material Co., 114 N.L.R.B. 378 (1955).

54. Western Elec. Co., 108 N.L.R.B. 396 (1954); Wolverine Shoe and Tanning Corp., 97 N.L.R.B. 592 (1951); The Ohio Power Co., 77 N.L.R.B. 320 (1948).

55. *Wildwood Lumber Co.*, 114 N.L.R.B. 986 (1955).

56. 115 N.L.R.B. 1250 (1956).

tion existed, the Board of Directors formulated and controlled the policies on an over-all basis, the general manager carried out the policies and uniform work policies had been formulated. In another recent decision a chain store unit of sales employees in forty-eight retail stores was accepted as appropriate on the grounds of the centralization of operations, the interchange of employees, and the uniformity of wages and other working conditions.⁵⁷ The reasoning in these cases is fairly typical of that used in the determination of the appropriateness of employer-wide units. Generally multi-plant units are accepted in public utilities and transportation industries because system-wide units are considered more appropriate in these areas.

MULTI-EMPLOYER UNITS

After the passage of the Taft-Hartley Act it was ruled that this statute did not require the giving of preferential treatment to separate units.⁵⁸ Attempts were made to develop some standards for the establishment of multi-employer units. If the extent of organization was the only basis for such a unit the certification was generally refused. It was reasoned that the essential element for such a unit is the engagement in joint bargaining negotiations, either personally or through representatives, by a group of employers who are either members of a multi-employer association or nonmembers of such an organization.⁵⁹ On the basis of this standard multi-employer units have been refused certification even though the employers were members of a trade association because they bargained with the union individually.⁶⁰ It has also been ruled that there is no basis to include employees in an employer association unit if their employer does accept the association-wide contract but does not participate in the negotiations himself or through representatives.⁶¹ A multi-employer unit is not considered appropriate even though collective bargaining is conducted by an employer's association for a year if bargaining has been conducted for a longer period of time on an individual-employer basis.⁶²

The justifications for the refusal to accept multi-employer units contained in the *Armour Co.* ruling⁶³ summarize the Board's point of view relative to this problem. In this case the existence of multi-plant contracts covering the employees of four meat packing companies did not

57. *Father & Son Shoe Stores, Inc.*, 117 N.L.R.B. 1479 (1957). See also *Robert Hall Clothes, Inc.*, 118 N.L.R.B. 1096 (1957).

58. *Chrysler Corp.*, 76 N.L.R.B. 55 (1948).

59. *Associated Shoe Industries, Inc.*, 81 N.L.R.B. 224 (1949).

60. *Blue Diamond Corp.*, 81 N.L.R.B. 484 (1949).

61. *Morley Mfg. Co.*, 83 N.L.R.B. 404 (1949).

62. *Norcal Packing Co.*, 76 N.L.R.B. 254 (1948).

63. *Armour & Co.*, 101 N.L.R.B. 1072 (1952).

bar the establishing of single plant units in the industry. It was argued that no distinct or special community of interest existed between the employees in the plants, there was no interchange of employees, no administrative or functional grouping was involved, no pattern of multi-plant bargaining had been established in the industry and the multi-plant contracts failed to reveal any distinct intention on the part of participants that they desired to eliminate the original plant units.

It has been decided that if an employer withdraws from an association and makes it known that he desires to bargain on an individual basis then a single-employer unit is appropriate.⁶⁴ An employer can withdraw entirely from a multi-employer bargaining unit at the appropriate time. He cannot partially withdraw and remove from the larger unit some of his employees covered by the multi-employer agreement.⁶⁵ For example, an employer cannot remove his drivers from the association-wide unit and continue to bargain on the association-wide basis for his production workers.⁶⁶ In order to protect the stability of collective bargaining, a single employer-unit was denied where a multi-employer contract existed even though the employer had intended to function on an individual basis in the area of labor relations.⁶⁷

On the other hand, multi-employer units have been considered appropriate even in the absence of employer associations or any formal organization when employers participate in collective bargaining through delegated representatives or negotiating committees as a group and not on an individual basis,⁶⁸ and the results of the bargaining are incorporated in separate contracts⁶⁹ or if the employers desire to be governed by the joint group action rather than bargain on an individual basis.⁷⁰ Maintenance employees who cannot constitute an appropriate bargaining unit are permitted to be included in a multi-employer unit if the employees are governed by the same contractual arrangement negotiated for similar employees who are in the broad unit.⁷¹

SEVERANCE OF CRAFT OR DEPARTMENTAL GROUPS

It is recognized that one of the most controversial areas in the determination of the appropriate bargaining unit is that of the severance of

64. *Amalgamated Meat Cutters Workmen, AFL*, 81 N.L.R.B. 1052 (1949).

65. *Pioneer, Inc.*, 90 N.L.R.B. 1848 (1950).

66. *Coca-Cola Bottling Works Co.*, 91 N.L.R.B. 351 (1950).

67. *Engineering Metal Products Corp.*, 92 N.L.R.B. 823 (1950).

68. *Belle Vernon Milk Co.*, 90 N.L.R.B. 717 (1950); *Johnson Optical Co.*, 85 N.L.R.B. 895 (1949).

69. *Balaban & Katz*, 87 N.L.R.B. 1071 (1949). Cf. *Furniture Firms*, 81 N.L.R.B. 1318 (1949).

70. *United Productions*, 111 N.L.R.B. 390 (1955).

71. *American Bakeries Co.*, 107 N.L.R.B. 1529 (1954).

craft groups and other groups of employees from a larger established bargaining unit.⁷² In debating the question the CIO developed a craft severance policy. Emphasis was placed upon the point that severance should not be permitted to destroy stable collective bargaining because this would be detrimental to industrial peace. Craft severance, according to this labor organization, should be barred to those groups that were not real craft units and to unions not respecting craft jurisdictional lines. This organization argued that much stress should be placed upon the history of successful bargaining on a plant-wide and industry-wide basis.⁷³

The problem created by severance necessitated the establishment of some standards to determine the appropriateness of severed units. In the interpretation of the law the conclusion has been reached that section 9(b)(2) of the statute limits the Board's jurisdiction in determining craft severance only by preventing the use of earlier or prior determinations by this body.⁷⁴ Bargaining history can not be relied upon as the sole basis for refusing craft severance, but can still be used as an important or a weight factor in this area.⁷⁵

The rule has been adopted that if a union requests severance of a group of employees from the established unit the burden of proof is placed upon this petitioning organization.⁷⁶ It must demonstrate that the group of employees meets the standards established by the Board.⁷⁷ In fact, in determining craft severance cases, such factors as whether the union has produced evidence to justify severance, whether the group of employees is homogeneous, that is whether the employees composing the group possess similar skills and perform similar functions, and whether the petitioning union has historically and traditionally represented the group of employees are given serious consideration.⁷⁸

72. For a discussion of the history of craft severance under the NLRB see Krislov, *Administrative Approaches to Craft Severance*, 5 *Lab. L.J.* 231 (1954).

73. The conflicting viewpoints of the CIO and the AF of L regarding craft severance are discussed in Rathbun, *The Taft-Hartley Act and Craft Unit Bargaining*, 59 *Yale L.J.* 1023 (1950).

74. *National Tube Co.*, 76 *N.L.R.B.* 1199 (1948). The Board pointed out in that case that if Congress desired to deprive the Board of all discretion in that area, it had only to adopt language similar to the mandatory craft proviso of the New York State Labor Relations Act, § 705(2).

75. *National Tube Co.*, *supra* note 74.

76. *American Potash & Chemical Corp.*, 107 *N.L.R.B.* 1418 (1954). The nature of this burden is discussed in *United States Smelting, Refining and Mining Co.*, 116 *N.L.R.B.* 661 (1956).

77. *United States Smelting, Refining and Mining Co.*, 116 *N.L.R.B.* 661 (1956); *Kennecott Copper Corp.*, 114 *N.L.R.B.* 13 (1955).

78. *Standard Oil Co.*, 116 *N.L.R.B.* 1017 (1956); *Baugh & Sons Co.*, 114 *N.L.R.B.* 937 (1955).

Furthermore, while the policy of refusing to permit one-man units to be formed and then severed from the accepted and established unit has been adopted, the fact that a small number of craft employees are involved may not preclude certification.⁷⁹ While one-man units are not considered appropriate for certification purposes small units can be formulated for the purpose of union shop authorization.⁸⁰ Even in the absence of any statutory provision governing the situation, the principle has been established that in conducting elections for severance purposes only, no provision will be placed on the ballot for a "neither" or "no union" choice. It is reasoned that if such votes are counted against representation it could result in decertification in a unit smaller than the certified unit, and severance for decertification purposes is not permitted by the Board.⁸¹

In adjudicating the severance problem in the early period of the Taft-Hartley Act, severed groups were generally certified if they constituted skilled, distinct, homogeneous and identifiable groups, and if they were in reality true craft or departmental groups.⁸² The prevailing and established collective bargaining relations could be modified by the severance of craft units if the employees in the groups possessed qualifications and skills that distinguished them from the other workers in the plant or industry, and if it could be proven that separate units were necessary or that such separate units would protect the special interests of the involved employees more adequately.⁸³ On the basis of this reasoning the severance of true craft and distinct departmental groups has been sustained regardless of bargaining history and even in the absence of an established formal apprenticeship system.⁸⁴

On the other hand, the request of relatively unskilled workers to be severed from larger bargaining units has been denied.⁸⁵ Shoproom employees are not permitted to form individual units and be severed from the plant maintenance and production units because of the absence of clear cut lines of demarcation with other workers in the plant.⁸⁶ Die-

79. American Cyanamid Co., 110 N.L.R.B. 89 (1954); General Textile Mills, Inc., 109 N.L.R.B. 263 (1954); Sinclair Rubber, Inc., 96 N.L.R.B. 220 (1951).

80. Universal Carloading and Distributing Co., 77 N.L.R.B. 1148 (1948).

81. American Tobacco Co., 115 N.L.R.B. 218 (1956); Campbell Soup Co., 111 N.L.R.B. 234 (1955).

82. American Viscose Corp., 84 N.L.R.B. 202 (1949); Reynolds Metal Co., 84 N.L.R.B. 85 (1949); Irvington Varnish and Insulator Co., 84 N.L.R.B. 25 (1949).

83. Republic Steel Corp., 84 N.L.R.B. 483 (1949).

84. Armstrong Tire and Rubber Co., 104 N.L.R.B. 892 (1953); The Atlantic Refining Co., 92 N.L.R.B. 651 (1950); Merck & Co., 88 N.L.R.B. 975 (1950); Meuller Brass Co., 88 N.L.R.B. 431 (1950), enforcement granted, 108 F.2d 402 (D.C. Cir. 1950).

85. The Green Lumber Co., 77 N.L.R.B. 1004 (1948).

86. Iron Fireman Mfg. Co., 77 N.L.R.B. 1378 (1948).

makers are denied severance from plant-wide units unless they are skilled craftsmen or journeymen diemakers, especially if their interests are not different from those of the other employees in the plant.⁸⁷ Furthermore, multi-craft groups have been refused the right to sever from the appropriate bargaining unit mainly because of the dissimilarity of skills.⁸⁸ In solving the severance problem, it has also been ruled that no separate state-wide units can be carved from multi-state units unless substantial changes have been made in the nature or extent of the employer's working operations.⁸⁹

The American Potash Case

In the *American Potash* case,⁹⁰ the Board explicitly outlined standards to be used to determine when a group of employees would be appropriate for severance purposes. In this ruling it was decided to continue the established practices of not permitting craft severance in such industries as basic steel, aluminum, lumber, and the wet milling industries. However, it was determined not to extend this policy to other industries. Furthermore, it was ruled that employees of a craft group should not be denied separate representation because they were employed in an industry where the production processes were highly integrated and where bargaining on an industrial basis had been established or was the prevailing pattern.

In this decision the policy was promulgated that a craft group can be severed and be acceptable as an appropriate bargaining unit if the objective is to be a true craft group and if the union that desires to represent the craft group is one that has previously or traditionally been its representative. Also it is required that the groups include all craftsmen of the same or similar type functioning in the plant. The only exception is that those in the traditional departmental units may be properly excluded. Those who work with or associate with the craft group but are not true craftsmen, or do not work in the direct operation, are generally excluded from the unit. A true craft unit is defined as a distinct and homogeneous group consisting of skilled journeymen, craftsmen who are employed as such, apprentices and helpers.⁹¹ The journeyman craftsman must have a distinct and definite skill which he acquires through a substantial apprenticeship training program or some other related or comparable working or training experience. Furthermore, a departmental group is appropriate for severance purposes if the group

87. *Container Corp.*, 85 N.L.R.B. 837 (1949).

88. *Fort Die Casting Corp.*, 115 N.L.R.B. 1749 (1956); *Munro-Van Helms Mfg. Co.*, 81 N.L.R.B. 129 (1949).

89. *The Prudential Ins. Co.*, 80 N.L.R.B. 1583 (1948).

90. *American Potash & Chemical Corp.*, 107 N.L.R.B. 1418 (1954).

91. *Id.* at 1423.

of employees involved in the department is distinct and separate from the functional point of view, and if the petitioning union or the union wishing to represent them has historically and traditionally represented the group. The departmental group to be certified must include all eligible employees in the department.

After this important decision the standards that such groups must be true craft groups or distinct department units and that the union seeking to represent these employees must have traditionally represented them have been weighted heavily in determining the right of groups to be separated from larger units.⁹² It has been held that the severance of craft units will not be precluded even if the company involved has had a long history of bargaining on a production and maintenance basis and the past experiences of bargaining with craft units have created disruptive problems in the area of collective bargaining if the employees constitute a true craft.⁹³ For example, shipyard electricians and pipefitters were allowed to sever even though the severance might intensify jurisdictional disputes or create other serious problems.⁹⁴

However, on occasions the Board has been liberal in the application of the rules established to determine craft severance. For example, groups of employees have been allowed to sever even though they did not constitute a true craft but worked throughout the plant and the plant operations were highly integrated.⁹⁵ Groups have also been allowed to be severed as craft groups from a larger unit in the absence of an apprentice system and in spite of the routine nature of their work if it took a lengthy period for an inexperienced worker to become eligible for top rating in the field.⁹⁶ Skilled men have been permitted to sever and form a unit regardless of the fact that the petitioner union represented a broader unit if it had traditionally represented this craft.⁹⁷ Tool and die men were also allowed to sever from the larger production and maintenance group even if they were not appropriate for severance as a craft unit because of the existing homogeneity and the petitioner union was newly organized to represent the interests of these employees.⁹⁸ This same liberality has been extended to department groups who have met the qualifications established in the *American Potash* case.⁹⁹

92. Crescent Tool Co., 115 N.L.R.B. 1586 (1956); Mallinckrodt Chemical Works, 115 N.L.R.B. 730 (1956); Sutherland Paper Co., 117 N.L.R.B. 622 (1955); American Can Co., 110 N.L.R.B. 1640 (1955); Union Bag & Paper Corp., 110 N.L.R.B. 1631 (1954).

93. Campbell Soup Co., 109 N.L.R.B. 518 (1954).

94. Bethlehem Pac. Coast Steel Corp., 117 N.L.R.B. 579 (1957).

95. The Formica Co., 109 N.L.R.B. 964 (1954).

96. Universal Match Corp., 116 N.L.R.B. 1388 (1956). But see Standard Oil Co., 118 N.L.R.B. 1099 (1957).

97. Crowell Carton Co., 111 N.L.R.B. 528 (1955).

98. Cessna Aircraft Co., 114 N.L.R.B. 1191 (1955).

99. York Corp., 116 N.L.R.B. 191 (1956); Botany Mills, Inc., 115 N.L.R.B. 1497

On the other hand, the administrators have refused to allow severance or to certify a group of employees as a craft unit if it comprises only a segment of a craft group,¹⁰⁰ or if it has not been designated as a true craft¹⁰¹ or if the petitioning union fails to meet the traditional union requirements.¹⁰² Groups of electricians, sheet metal workers, and pattern makers have been refused the right to sever because they did not constitute a true craft or department.¹⁰³ The same reasoning is applied to departmental groups who seek to sever from larger units and be certified as appropriate bargaining units.¹⁰⁴ Since the *American Potash* decision any union seeking to represent workers must prove that it has traditionally done so. Mere affirmative allegation will not be accepted as adequate proof. If the union did represent the employees as a broad unit, this will not justify it in assuming that it is the traditional representative of such employees in a craft or a department unit.¹⁰⁵

JUDICIAL ACTION

In the main, the courts have upheld the Board's determination of the appropriate unit since this function is within the discretion of this semi-judicial body and its decisions are not subject to review unless they are arbitrary, unreasonable or capricious, or unless there is clear evidence of abuse of authority.¹⁰⁶ The courts have justified the Board's reasoning that the wishes of the employees should be an important factor for determining a bargaining unit, and that a single unit or a smaller unit is acceptable. Furthermore, these courts have accepted the philosophy or principles established by this administrative body that the extent of organization of employees is a contributing factor in determining the appropriate bargaining unit but it is not controlling, and that it is

(1956); *Hawley & Hoops, Inc.*, 115 N.L.R.B. 1276 (1956); *North Am. Aviation, Inc.*, 115 N.L.R.B. 1090 (1956); *General Motors Corp.*, 111 N.L.R.B. 1238 (1955).

100. *CBS-Hytron*, 115 N.L.R.B. 1702 (1956).

101. *Inland Cold Storage Co.*, 115 N.L.R.B. 973 (1956); *Marinette Paper Co.*, 114 N.L.R.B. 1452 (1955); *Ludlow Typograph Co.*, 108 N.L.R.B. 1463 (1954).

102. *Rayonier, Inc.*, 114 N.L.R.B. 17 (1955); *The Dow Chemical Co.*, 113 N.L.R.B. 1247 (1955); *Elgin Nat'l Watch Co.*, 109 N.L.R.B. 273 (1954); *Forstmann Woolen Co.*, 108 N.L.R.B. 1439 (1954).

103. *Hughes Aircraft Co.*, 115 N.L.R.B. 504 (1956); *Precision Castings Corp.*, 114 N.L.R.B. 63 (1955).

104. *John Deere Van Brunt Co.*, 114 N.L.R.B. 340 (1955); *J. I. Case Co.*, 112 N.L.R.B. 796 (1955); *Mountain States Tel. and Tel. Co.*, 110 N.L.R.B. 1076 (1954); *American Can Co.*, 108 N.L.R.B. 1657 (1954).

105. *Baugh & Sons Co.*, 114 N.L.R.B. 937 (1955).

106. *NLRB v. Morganton Full Fashioned Hosiery Co.*, 241 F.2d 913 (4th Cir. 1957); *NLRB v. Glen Raven Knitting Mills, Inc.*, 235 F.2d 413 (4th Cir. 1956); *Foreman & Clark, Inc. v. NLRB*, 215 F.2d 396 (9th Cir. 1954); *NLRB v. West Texas Util. Co.*, 214 F.2d 732 (5th Cir. 1954); *NLRB v. Salant & Salant, Inc.*, 171 F.2d 292 (6th Cir. 1948).

reasonable to sever craft units from larger bargaining units in face of employer objections, even though historically a plant-wide unit of production and maintenance workers has prevailed if the workers involved are skilled, are members of a craft, and the union that is to represent them has traditionally performed this duty.¹⁰⁷ In *Mueller Brass Co. v. NLRB*,¹⁰⁸ the court held that the Board did not violate its discretion when it ruled that die sinkers in a plant could constitute an appropriate bargaining unit even though historically bargaining had been on a broader basis in the plant, and the unit was only a segment of a craft and its work was integrated with that of other employees.

CONCLUSION

By way of conclusion it may be stated that the Board assumed a very significant task when it was not only given the authority or exclusive jurisdiction to determine the appropriate bargaining unit in terms of its type, its scope and its membership, but was required to do so under certain circumstances. In attempting to fulfill these obligations or to perform these functions the few standards incorporated in the statute and others established administratively have been followed or applied. A typical example of the framework and the standards formulated by the Board to be applied in the determination of appropriate craft and departmental bargaining units is found in the *American Potash* case.

A survey of the decisions of this semijudicial body reveals some apparent and real inconsistencies in its efforts to determine the bargaining unit that would be appropriate for collective bargaining purposes. It is obvious that some difficulties have been experienced in attempting to determine the role of the history of bargaining in the determination of the bargaining unit, or the effect of this bargaining history upon the appropriateness of the bargaining unit. In some cases this factor is given controlling weight and in others it is subordinated to other factors. The formulated definition of a true craft has not been followed rigidly as evidenced by the application of the nucleus of skill doctrine. Furthermore, in some decisions this administrative body defines apprenticeship thoroughly and places much emphasis upon this factor as determinative of an appropriate craft unit while in other decisions it applies its apprenticeship rule rather loosely.

However, in determining the appropriate bargaining unit, even where severance is involved, there is little evidence of any attempt to retard the development of large units. Efforts have been put forth to determine the problem in a manner as to protect the rights given to all workers

107. *NLRB v. Libbey-Owens-Ford Glass Co.*, 241 F.2d 831 (4th Cir. 1957); *Westinghouse Elec. Corp. v. NLRB*, 236 F.2d 939 (3d Cir. 1956).

108. 108 F.2d 402 (D.C. Cir. 1950).

covered by the law. Groups of employees who wish to form a separate unit or to be severed from a large unit must show clearly that they can be effectively represented if they are separated from the other employees. In reaching its conclusion the Board has emphasized self-determination or it has attempted to allow the workers to make their choice as to the desired bargaining unit. Statistics from the Division of Administration of the National Labor Relations Board show that from March 1, 1952 to February 28, 1954 the so called *Globe*¹⁰⁹ doctrine of self-determination was applied in 354 decisions.¹¹⁰ From March 1, 1954 to March 31, 1956 various types of self-determination were used in 281 decisions. A survey of the most recent decisions reveals that the Board still considers collective bargaining history as an important factor in its determination of the appropriate unit, and that it gives controlling effect to the community of interest existing among the employees.

109. *Globe Mach. and Stamping Co.*, 3 N.L.R.B. 294 (1937).

110. Administrative Statistics Branch, Division of Administration, NLRB (April 26, 1956).