William & Mary Law Review

Volume 19 (1977-1978)
Issue 3

Article 8

March 1978

NLRB v. Annapolis Emergency Hospital Association: The Propriety of Conditional Certification as a Means of Avoiding Employer Domination in the Collective Bargaining Unit

NLRB v. ANNAPOLIS EMERGENCY HOSPITAL ASSOCIATION: THE PROPRIETY OF CONDITIONAL CERTIFICATION AS A MEANS OF AVOIDING EMPLOYER DOMINATION IN THE COLLECTIVE BARGAINING UNIT.

In *NLRB v. Annapolis Emergency Hospital Association,*[1] the Court of Appeals for the Fourth Circuit overruled the National Labor Relations Board's (NLRB) certification of the Maryland Nurses Association, Inc. (MNA) as the exclusive bargaining representative for the registered nurses employed at the Anne Arundel General Hospital. The Board had conditioned its certification of the state association on the latter's delegation of its collective bargaining powers to the local Anne Arundel Chapter. Delegation was intended to protect the employee organization conducting the collective bargaining negotiations from any improper employer control that presumably could have been exercised by the nurses' supervisors, who, as members of the MNA, occupied a number of powerful positions within that organization. Although the Anne Arundel Chapter membership included no supervisors, the specter of employer control was raised by the employer-hospital, which had refused to bargain collectively with the local chapter.

In overruling the NLRB's certification, the court rejected long-established Board policies developed to resolve the problem of employer influence through supervisor membership in labor organizations. This Comment will discuss the evolution of those policies as well as the manner in which they were applied in *Annapolis Emergency Hospital.* The analysis will focus on the Fourth Circuit's treatment of the case in relation to the Board's objectives and within the context of the legislative intent of the National Labor Relations Act (NLRA).[2]

---

1. 561 F.2d 524 (4th Cir. 1977) (en banc). The case originally was decided by a three-judge panel voting two to one in favor of enforcing the Board's order to the employer-hospital to bargain with the certified nurses' labor organization. The late Judge Craven prepared the majority opinion in which Judge Hall concurred. Judge Winter wrote a dissenting opinion. These opinions were reprinted as an appendix to the Fourth Circuit's en banc opinion. *See id.* at 528-39. On rehearing, the court voted five to one to deny enforcement, and it adopted Judge Winter's earlier dissent as the majority opinion [hereinafter cited as Majority Opinion]. Judge Hall adopted Judge Craven's original majority opinion as his dissent [hereinafter cited as Dissenting Opinion]. *Id.* at 526.

2. 29 U.S.C.A. §§ 151-168 (1973 & Supp. 1977), *as amended by* Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395.

DEVELOPMENT OF BOARD POLICY

Soon after its creation in 1935 the NLRB determined that a labor organization controlled by an employer could not serve as the employees' collective bargaining representative.[3] In accordance with this principle, employer-dominated organizations were denied certification as exclusive bargaining agents.[4] The Board subsequently extended this rule when it recognized that the presence of the employer's supervisors in a labor organization is a manifestation of employer control.[5] Because these supervisors potentially were subject to employer influence,[6] their inclusion in a bargaining unit could render it incapable of negotiating at arm's length with the employer.[7] In 1944 the NLRB applied this principle in *Rochester & Pittsburg Coal Co.*,[8] finding that an entity attempting to represent the technical and clerical employees of a mining company was subject to employer control because its membership included the workers' supervisors.[9] The Board noted specifically that supervisors

---

3. *See* Phelps Dodge Corp., 6 N.L.R.B. 624 (1938), in which four craft unions of Phelps Dodge sought certification as the collective bargaining representatives of the corporation's respective craft employees. Although the Board ultimately defined the craft units so that they constituted approriate bargaining units, it considered inappropriate the inclusion of Employees Committees, which were controlled by the employer, within the craft unions:

> It is obvious from . . . the Articles that the Employees Committees cannot be considered as bona fide representatives of the employees for purposes of collective bargaining. This conclusion is compelled . . . by the entire scheme of the Articles, and especially by the provisions empowering the Company to terminate the plan at any time. Under the Act we cannot certify an organization as representative of employees for purposes of collective bargaining, when the Articles governing its existence and operation on their face evidence the *complete subjection of the organization to the employer.* Such an organization is patently incapable of bargaining at arm's length with the employer.

Id. at 630 (emphasis supplied).

4. *Id.; see, e.g.,* Buckeye Village Mktg., Inc., 175 N.L.R.B. 271 (1969); Baltimore Transit Co., 59 N.L.R.B. 159 (1944); Rochester & Pittsburgh Coal Co., 56 N.L.R.B. 1760 (1944); Toledo Stamping & Mfg. Co., 55 N.L.R.B. 865 (1944); Douglas Aircraft Co., 53 N.L.R.B. 486 (1943).

5. Rochester & Pittsburg Coal Co., 56 N.L.R.B. 1760, 1763 (1944); *see, e.g.,* Alaska Salmon Indus., Inc., 78 N.L.R.B. 185 (1948) (solicitation of union membership cards by supervisors of employer disqualified organization); Toledo Stamping & Mfg. Co., 55 N.L.R.B. 865 (1944) (certification denied to organization because employer's supervisor obtained employee application cards); Douglas Aircraft Co., 53 N.L.R.B. 486 (1943) (certification denied to unit organized by employer's supervisor).

6. *See, e.g.,* Rochester & Pittsburgh Coal Co., 56 N.L.R.B. 1760, 1763-64 (1944).

7. *Id.* at 1764.

8. 56 N.L.R.B. 1760 (1944).

9. *Id.* at 1763.

not only outnumbered the employee organization members but also actively participated in the organization's management.[10]

The Board regarded these two factors as controlling in *Columbia Pictures Corp.*,[11] a 1951 decision in which it refused to certify an organization seeking to represent all employees, including supervisors, in motion picture studio art departments.[12] Noting that the entity was "predominately composed of supervisors and that these supervisors have materially participated in the organization of the employees,"[13] the Board concluded that it was supervisor-, and therefore employer-, dominated.[14] As in *Rochester & Pittsburg Coal,*[15] the supervisors in *Columbia Pictures* whose membership caused disqualification were employed by the particular employer with whom the organization would bargain.[16]

The mere presence of supervisors in the membership of a labor organization has not been sufficient to establish employer domination of that entity.[17] Rather, as suggested by the two factors developed in *Rochester & Pittsburgh Coal* and *Columbia Pictures,* the Board has focused on whether the supervisors actually control the organization.[18] In the 1968 decision of *International Paper Co.*,[19] for

10. *Id.*

11. 94 N.L.R.B. 466 (1951).

12. *Id.* at 467.

13. *Id.* at 470.

14. *Id.*

15. 56 N.L.R.B. at 1761.

16. 94 N.L.R.B. at 466-67. *See generally* Oak Ridge Hosp., 220 N.L.R.B. 49 (1975) (organization not disqualified when three of 13 directors were supervisors because none working for employer); Carle Clinic Ass'n, 192 N.L.R.B. 512 (1971) (supervisors on board of directors did not disqualify organization because none employed by employer); New York City Omnibus Corp., 104 N.L.R.B. 579 (1953) (Board's reference to supervisors meant those hired by employer).

17. *See, e.g.,* NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571 (6th Cir. 1948) (employees must participate in labor organization but it need not be composed exclusively of employees); International Paper Co., 172 N.L.R.B. 933 (1968) (certified state nurses' organization included supervisors in its membership); International Organization of Masters, Mates & Pilots, Inc., 144 N.L.R.B. 1172 (1963) (entity in which employees participate constitutes labor organization despite membership of many supervisors).

18. *See, e.g.,* Brunswick Pulp & Paper Co., 152 N.L.R.B. 973, 975 (1965) (local union disqualified because bylaws provided that only supervisors or "producers" who are independent contractors could be officers); New York City Omnibus Corp., 104 N.L.R.B. 579, 584 (1953) (union president and 93 of 113 members were supervisors employed by employer); Columbia Pictures Corp., 94 N.L.R.B. 466, 470 (1951) (supervisors of the employer with whom organization was to bargain materially participated in and were the predominant members of the labor unit).

19. 172 N.L.R.B. 933 (1968).

example, the NLRB certified a state nurses' association, which included supervisors in its membership, as the bargaining agent for nurses employed by an industrial plant. The basis for the certification was the employees' substantial participation in the association's affairs.[20] Furthermore, none of the employer's supervisors occupied positions of authority within the association, thereby negating that employer's ability to control the labor organization by influencing its supervisors. Finally, the Board accepted the association's statement that all collective bargaining matters would be handled by the local chapter, in which no supervisors held membership.[21]

When coverage of the NLRA was extended to health care institutions in 1974,[22] the Board followed the principles outlined in *International Paper* for certifying professional associations as nurses' collective bargaining agents. Because the state associations have included supervisor nurses in their membership, the NLRB has been forced to contend with the possibility of supervisor domination in these organizations. Three recent cases, *St. Rose de Lima Hospital,*[23] *Sisters of Charity of Providence,*[24] and *Sierra Vista Hospital, Inc.,*[25] illustrate the Board's treatment of this situation.

In the three decisions, the NLRB certified state affiliates of the American Nurses Association (ANA),[26] all of which admitted supervisors as members, as collective bargaining agents for nurses at local hospitals. The Board found no danger that these local hospitals

---

20. *Id.*

21. *Id.*

22. Labor-Management Relations Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395 (amending 29 U.S.C. §§ 151-168 (1970)). As a result of this legislation, labor-management disputes involving for-profit as well as nonprofit health facilities became subject to the full body of statutory and decisional labor law. The term "health care institution" as defined by the amendments includes "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons." 29 U.S.C.A. § 152(14) (Supp. 1977).

For an exposition of the legislative history and extended coverage of the Health Care Amendments, see Carroll, *Health Care Institution Coverage Under the National Labor Relations Act,* 38 TEX. B.J. 257 (1975); Feheley, *Amendments to the National Labor Relations Act: Health Care Institutions,* 36 OHIO ST. L.J. 235 (1975); Pointer, *Toward a National Hospital Labor Relations Policy: An Examination of Legislative Exemption,* 23 LAB. L.J. 238 (1972); Vernon, *Labor Relations in the Health Care Field Under the 1974 Amendments to the National Labor Relations Act: An Overview and Analysis,* 70 NW. U. L. REV. 202 (1975).

23. 223 N.L.R.B. 1511, 92 L.R.R.M. 1181 (1976).

24. 225 N.L.R.B. 799, 93 L.R.R.M. 1155 (1976).

25. 225 N.L.R.B. 1086, 93 L.R.R.M. 1172 (1976).

26. The Maryland Nurses Association, the organization involved in *Annapolis Emergency Hospital,* is also an affiliate of the ANA.

could influence the associations through their supervisors, because none of their supervisors occupied positions of managerial control within the organizations.[27] Of greater significance, as in *International Paper*, the associations had delegated control over collective bargaining to local chapters that excluded supervisors from membership,[28] thereby further insulating the collective bargaining process from potential employer control. In *Sisters of Charity* and *Sierra Vista* this delegation was the central issue.[29] In both cases, the Board considered a motion to revoke certification on the grounds that the state association had failed to delegate control of collective bargaining to the local chapter. In denying these motions,[30] the NLRB indicated that its prior certification was conditioned on the existence of this delegation.[31]

NLRB policies for dealing with employer control over labor organizations through membership of supervisors, therefore, have focused on the particular employer's capability to assert authority. Clearly, the mere presence of supervisors among its members has not disqualified an organization, and if a particular employer's supervisors have been in no positions of control, the Board has granted certification. To protect employees further, the NLRB has developed the practice of requiring parent organizations that include supervisor members to delegate collective bargaining authority to local chap-

27. Sierra Vista Hosp., Inc., 225 N.L.R.B. at 1086, 93 L.R.R.M. at 1172; Sisters of Charity of Providence, 225 N.L.R.B. at 799 n.6, 93 L.R.R.M. at 1156 n.6; St. Rose de Lima Hosp., Inc., 223 N.L.R.B. at 1512, 92 L.R.R.M. at 1182.

28. Sierra Vista Hosp., Inc., 225 N.L.R.B. at 1087-88, 93 L.R.R.M. at 1173-74; Sisters of Charity of Providence, 225 N.L.R.B. at 800, 93 L.R.R.M. at 1156; St. Rose de Lima Hosp., Inc., 223 N.L.R.B. at 1512, 92 L.R.R.M. at 1183.

29. Sierra Vista Hosp., Inc., 225 N.L.R.B. at 1086, 93 L.R.R.M. at 1172; Sisters of Charity of Providence, 225 N.L.R.B. at 799, 93 L.R.R.M. at 1155. In *St. Rose*, as in *International Paper*, the Board merely found that because control over collective bargaining had been delegated to bodies excluding supervisors from membership, the labor organization was not dominated by the employer's supervisors. 223 N.L.R.B. at 1512, 92 L.R.R.M. at 1183.

30. Sierra Vista Hosp., Inc., 225 N.L.R.B. at 1088, 93 L.R.R.M. at 1174; Sisters of Charity of Providence, 225 N.L.R.B. at 801, 93 L.R.R.M. at 1157. In denying these motions, the Board found proper delegation despite contentions that the state associations were required to execute all agreements and that the associations had been involved in the collective bargaining process. Addressing the first objection, the NLRB determined that the state associations' approval was only a formality after an agreement had been accepted by the local chapter. As to the second contention, the Board found the associations' participation to be merely advisory. *See* Sierra Vista Hosp., Inc., 225 N.L.R.B. at 1087, 93 L.R.R.M. at 1173; Sisters of Charity of Providence, 225 N.L.R.B. at 800-01, 93 L.R.R.M. at 1156-57.

31. Sierra Vista Hosp., Inc., 225 N.L.R.B. at 1086, 93 L.R.R.M. at 1172; Sisters of Charity of Providence, 225 N.L.R.B. at 799, 93 L.R.R.M. at 1155; *see* Majority Opinion, 561 F.2d at 534-35.

ters that exclude supervisors. This was the context of decisional law and policy in which *NLRB v. Annapolis Emergency Hospital Association*[32] was decided.

NLRB v. Annapolis Emergency Hospital Association

The Maryland Nurses Association, Inc. (MNA) filed an election petition with the NLRB, requesting certification as the collective bargaining representative of the registered nurses employed by the Anne Arundel Hospital.[33] A state affiliate of the American Nurses Association (ANA), the MNA extended its membership to include all registered nurses, regardless of their status as supervisors. As a result, approximately one-third of the MNA's members were supervisors within the meaning of the Act.[34]

Ten supervisors were on the MNA board of directors; no supervisor-directors, however, were employed by Anne Arundel General Hospital.[35] Moreover, although local chapters were formed at the employer level as vehicles for implementing MNA policies, the MNA claimed that its bylaws delegated all collective bargaining authority to the local chapters.[36] Finally, because the Anne Arundel Chapter excluded supervisors from its membership,[37] it mandated that all collective bargaining with the Anne Arundel General Hospital be conducted and controlled by non-supervisor employees.

Finding MNA to be a labor organization within the meaning of the Act,[38] the NLRB ordered that an election be held and that the

32. 561 F.2d 524 (4th Cir. 1977).

33. *Id.* at 526. For an explanation of the procedures for Board certification of a collective bargaining representative, see note 39 *infra*.

34. Majority Opinion, 561 F.2d at 534; *see* 29 U.S.C. § 152(11) (1970), which provides:

> The term "supervisor" means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

35. Dissenting Opinion, 561 F.2d at 529. In addition, no supervisor of the hospital-employer currently was serving as an MNA officer. Majority Opinion, 561 F.2d at 534.

36. Majority Opinion, 561 F.2d at 538.

37. Dissenting Opinion, 561 F.2d at 529.

38. Annapolis Emergency Hosp. Ass'n, 217 N.L.R.B. 848, 849, 89 L.R.R.M. 1173, 1174 (1975); *see* 29 U.S.C. § 152(5) (1970), which provides:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

MNA be placed on the ballot.[39] The MNA won the election and was certified as the bargaining representative, but the Anne Arundel General Hospital refused to negotiate with the local unit. In response to this failure to bargain, the MNA filed an unfair labor practice charge.[40]

In considering the charge, the Board rejected the hospital's argument that supervisor membership rendered the MNA an inappropriate labor organization. Because none of the hospital's supervisors were in management positions within the MNA and because the MNA had delegated all control over collective bargaining to a local chapter containing no supervisors in its membership, the inclusion of supervisors within the organization did not subject the MNA to the hospital's control.[41]

After the hospital again refused to negotiate, the NLRB petitioned the Court of Appeals for the Fourth Circuit for enforcement of its order to bargain. Holding that the MNA was not a labor organization within the meaning of the Act, the court overturned the Board's decision and refused enforcement.[42] Inasmuch as the Board required the MNA to delegate its bargaining authority, the court reasoned, the association impliedly was not a bona fide labor organization.[43] Moreover, the court inferred that the Board recognized the inherent threat in certifying a labor unit containing a large number of the employer's supervisors as members.[44] Consequently,

---

39. The procedures for NLRB certification of a collective bargaining representative generally are invoked through the filing of a petition by a labor organization attempting either to become the representative for a group of unrepresented employees or to supplant the existing representative. If the Board determines that a "question of representation" exists, it orders an election by secret ballot. The organization receiving a majority of the votes becomes the collective bargaining representative, upon its certification by the Board. For further detail on the procedures for determining representation, see 29 U.S.C. § 159 (1970). To be placed on the ballot and ultimately to gain certification, an entity must be a bona fide labor organization. For the statutory definition of "labor organization", see note 38 *supra*.

40. 561 F.2d at 527. The MNA's charge alleged violations of §§ 158(a)(1) and 158(a)(5) of the NLRA. Under § 158(a)(1) "[i]t [is] an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1970). Section 157 provides that "[e]mployees 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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1970). Section 158(a)(5) makes "[i]t . . . an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5) (1970).

41. 217 N.L.R.B. at 849, 89 L.R.R.M. at 1174.

42. 561 F.2d at 526. For the statutory definition of "labor organization", see note 38 *supra*.

43. Majority Opinion, 561 F.2d at 535.

44. *Id.*

the Fourth Circuit determined that the NLRB's issuance of a conditional certification to an organization subject to supervisor domination was illegal as a matter of law.[45]

CONFLICT BETWEEN NLRB AND FOURTH CIRCUIT

In *Annapolis Emergency Hospital* the Fourth Circuit rejected two important concepts developed by the NLRB in its attempts to resolve the problems associated with the certification of labor organizations containing supervisor members. First, the decision ignored the Board's policy of focusing on the control a particular employer could exercise through the domination of his supervisors, and, instead, expanded this concept to create a general disqualification of organizations in which any supervisor maintains some degree of power. Second, the court held illegal the NLRB's developing practice of extending conditional certification as a means of mitigating possible supervisor influence.[46] The court's rejection of these Board policies, although apparently designed to protect employees, actually legitimized the employer-hospital's refusal to bargain with its employees. Whether this repudiation can be justified in the context of the policies and the legislative intent of the NLRA is questionable.

Employer Control

In *Annapolis Emergency Hospital* the Fourth Circuit reasoned that, although the supervisors were employed by hospitals other than Anne Arundel General, their presence within the MNA hierarchy raised a conflict of interest problem sufficient to disqualify the association as a bona fide labor organization.[47] Presumably, the court adopted and expanded the Board's rule excluding labor organizations subject to supervisor control; nevertheless, the NLRB's policy had focused on the dangers inherent in allowing supervisors of the particular employer with whom the organization would bargain to participate in its management.[48] The court, on the other hand, applied this rule to supervisors working for other employers and

45. *Id.* at 536-37.

46. 561 F.2d at 528.

47. Majority Opinion, 561 F.2d at 535-36. Although the opinion does not articulate a conflict of interest standard, such a criterion can be inferred from the court's apparent conclusion that a labor organization could not include any supervisors as members. *Id.*

48. *See* notes 15-21 *supra* & accompanying text.

having no relationship with the employees in the local Anne Arundel Chapter.

Not only were supervisors employed by Anne Arundel General Hospital excluded from the local unit, but those individuals also held no official administrative position in MNA.[49] Because the employer with whom the MNA was certified to bargain had none of its supervisors over whom it could exert influence within the MNA's management structure, the court's refusal to enforce the Board's order to bargain apparently rests on a general conflict of interest theory.[50] The Fourth Circuit assumed that the supervisors who were MNA officials, whether or not employed by Anne Arundel General, usually would align themselves with management and would exercise their prerogatives in favor of the employer.[51] Moreover, the court suggested that the MNA had available certain indirect, intra-organizational devices, the most important of which was financial control, that enabled the state association to control directly the local employer unit.[52]

Although the Fourth Circuit purportedly invoked the NLRB's prior decisions in *Annapolis Emergency Hospital,*[53] the Board did not base its opinion in those earlier cases on a broad conflict of interest theory. Instead, as previously demonstrated, it focused on the immediate relationship between the parties to the collective bargaining process; the particular employer, his supervisors, and his employees.[54] The language of the NLRA provides support for the Board's restricted inquiry. In its definition of the term "supervisor", the statute does not include every supervisor but instead refers specifically to an individual who "in the interest of the employer" could affect the employment status of the "other employees".[55] A necessary element in this definition is the establishment of an employment relationship between the particular employer, supervisors, and other employees in question. The Fourth Circuit failed to discuss the NLRA's definition of a supervisor; rather, it relied on the Board's delegation requirement to infer that the Board considered

49. Majority Opinion, 561 F.2d at 534.

50. *See* note 47 *supra* & accompanying text.

51. Majority Opinion, 561 F.2d at 535-36. *See also* Brief for Respondent at 28, NLRB v. Annapolis Emergency Hosp. Ass'n, 561 F.2d 524 (4th Cir. 1977).

52. Majority Opinion, 561 F.2d at 538.

53. *Id.* at 535-36.

54. *See* notes 3-21 *supra* & accompanying text.

55. 29 U.S.C. § 152(11) (1970). For the text of § 152, see note 34 *supra.*

the MNA to be subject to employer control.[56] The court based this inference on the NLRB's willingness, as manifested in its previous decisions, to entertain motions to revoke certifications if the required delegation of bargaining power to the local units did not occur.[57] The Board's acceptance of subsequent review, however, drew no explicit conclusion that the MNA itself had not qualified as a bona fide labor organization. Moreover, the stated policies of the Board do not support this inference; on the contrary, they indicate that, absent proof that the particular employer's supervisors participated in the organization's management, the NLRB will not deny certification to the entity on the ground that it is employer-dominated. Under this standard the MNA was a qualified labor organization because no supervisors of the Anne Arundel General Hospital were in the MNA hierarchy.

Although general influence by supervisors in the MNA is not grounds for a per se disqualification,[58] the general conflict of interest problem noted by the court in *Annapolis Emergency Hospital* is significant. The Board's conditional certification of the MNA may be regarded as a procedure designed to minimize this potential problem rather than as one adopted to circumvent the MNA's improper status.

Delegation of Collective Bargaining

The Fourth Circuit disagreed with the Board's conditional certification of the MNA as a collective bargaining unit asserting that such a procedure was "illogical and illegal."[59] The court based this conclusion on its perception that the NLRB had certified the MNA but had required the delegation of all the MNA's collective bargaining powers and functions to the local unit because the MNA was an inappropriate representative.[60] According to the court, the Board in effect had certified a bargaining representative that was not a qualified labor organization under the NLRA,[61] and then had conditioned that certification by requiring that the MNA refrain from acting as a bargaining representative.[62] The court held this condition insuffi-

56. Majority Opinion, 561 F.2d at 534-35.
57. *Id.; see* notes 29-31 *supra* & accompanying text.
58. *See* note 17 *supra* & accompanying text.
59. Majority Opinion, 561 F.2d at 537.
60. *Id.* at 535.
61. For the statutory definition of "labor organization", see note 38 *supra.*
62. Majority Opinion, 561 F.2d at 536-37.

cient to validate a certification that initially violated the terms of the NLRA.[63]

Although the court's technical analysis in this respect is logical conceptually, it rejects an important, functional procedure developed by the NLRB for implementing the NLRA's legislative purpose.[64] This procedure, conditional certification, provides the Board with the flexibility it requires to promote the essential purpose of the NLRA: the encouragement of the collective bargaining process.[65] It permits the NLRB to regulate the internal conduct of a labor organization and thereby to ensure the organization's proper representation of the employees who selected it. Furthermore, the procedure also provides the Board with an alternative to decertification to protect a labor organization from employer domination.

Although not authorized specifically by the NLRA, the use of conditional certification should be within the Board's broad discretion in performing its statutory responsibility of designating the appropriate labor organizations for collective bargaining purposes.[66] In *NLRB v. Jones & Laughlin Steel Corp.*,[67] the Supreme Court recognized that the Board could exercise authority not expressly included in the NLRA, stating that the NLRB "has discretion to place appropriate limitations on the choice of bargaining represent-

63. *Id.* at 536-38.

64. For discussions of the purposes and the legislative history of the NLRA, see, e.g., A. COX, LAW AND THE NATIONAL LABOR POLICY 12-13 (1960); S. MUELLER, LABOR LAW AND LEGISLATION 337-41 (2d ed. 1949); B. SCHWARTZ & R. KORETZ, STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION (1970); Wollett, *Collective Bargaining, Public Policy, and the National Labor Relations Act of 1947*, 23 WASH. L. REV. 205 (1948); *Origins of a National Labor Policy*, 61 CORNELL L. REV. 339 (1976); Comment, *Collective Bargaining Under the National Labor Relations Act*, 17 N.C. L. REV. 173 (1939).

65. *See* 29 U.S.C. § 151 (1970), which provides in pertinent part:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

The Fourth Circuit has articulated the NLRA's purpose as the promotion of "industrial peace and stability, through collective bargaining." NLRB v. Harry T. Campbell Sons' Corp., 407 F.2d 969, 975 (4th Cir. 1969). *See also* Teamsters Local 24 v. Oliver, 358 U.S. 283, 295 (1959).

66. NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 422-23 (1947). *See also* 29 U.S.C. § 159(b) (1970), which provides: "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit . . . ."

67. 331 U.S. 416 (1947).

atives should it find that public or statutory policies so dictate."[68] In addition to the Court's recognition of the Board's broad discretion, great deference traditionally has been granted employees in their choice of bargaining representatives.[69] By conditionally certifying the MNA, therefore, the Board not only had respected the employees' preference for a particular bargaining agent but also had ensured that the labor organization could comply with the statutory requirements.

The Board may have broad discretion in certifying labor organizations, but this discretion must be exercised from a passive position. The Fourth Circuit apparently failed to recognize this requirement when considering the NLRB's conditional certification. In *Annapolis Emergency Hospital,* as in *St. Rose, Sisters of Charity,* and *Sierra Vista,* the NLRB was presented with an organization that unilaterally had decided to delegate its collective bargaining responsibilities to a local chapter that excluded supervisors.[70] Rather than restructuring the organization as a condition to its certification, the Board certified a group that, as constituted, appropriately could represent the employees as their collective bargaining agent. Although the MNA potentially may have been subject to employer interference because its membership included supervisors, its local chapter, which excluded supervisors from membership, qualified unassailably as a labor organization. The possibly questionable status of its parent-organization should have been an insufficient reason to deny the local unit collective bargaining rights.

Certification only of the local chapter may have been the most logical approach in *Annapolis Emergency Hospital;*[71] this option, however, was not proffered to the NLRB. The employees chose the MNA, and under the NLRA, the Board could not impose on the employees its judgment concerning the selection of an appropriate bargaining agent.[72] By requiring that the MNA not restructure itself

68. *Id.* at 422.

69. *See, e.g.,* Morand Bros. Beverage Co., 91 N.L.R.B. 409 (1950), *modified,* 190 F.2d 576 (7th Cir. 1951) (in post-election certification proceeding Board may determine only whether labor organization is appropriate).

70. Dissenting Opinion, 561 F.2d at 529; Sierra Vista Hosp., Inc., 225 N.L.R.B. at 1087, 93 L.R.R.M. at 1173; Sisters of Charity of Providence, 225 N.L.R.B. at 800-01, 93 L.R.R.M. at 1156-57; St. Rose de Lima Hosp., Inc., 223 N.L.R.B. at 1512, 92 L.R.R.M. at 1183.

71. The court apparently would have approved the Board's certification of the local chapter. *See* Majority Opinion, 561 F.2d at 535, 536-37.

72. In Morand Bros. Beverage Co., 91 N.L.R.B. 409 (1950), *modified,* 190 F.2d 576 (7th Cir. 1951), the Board determined that § 159(a) of the NLRA did not mean "the *only* appro-

subsequent to its designation as the exclusive bargaining representative, however, the NLRB's conditional certification both approved the representative organization as it had been selected by the employees and provided that a competent local unit would bargain collectively with the employer-hospital.

Employer's Refusal to Bargain

Although purporting to benefit the employees by protecting their organization from employer influence, the Fourth Circuit's decision in *Annapolis Emergency Hospital* actually benefited only the employer. Anne Arundel General Hospital has not necessarily avoided the duty to bargain collectively with its nurses; nevertheless, it has been able to delay the process. The court failed to detemine whether an employer could claim, as a basis for refusing to bargain, that a labor organization dominated by the employer's supervisors lacked the capacity to bargain. The Hospital's achievement of this goal, however, suggests that the court would approve such a claim.

Two factors militate against judicial authorization of a defense for an employer's refusal to bargain based on his ability to influence the labor organization. First, Congress statutorily removed supervisors from the group of employees who are protected from employer discipline when engaging in union activities.[73] A supervisor participating in union activities, therefore, acts at his own risk, and his employer lawfully may dismiss him for his unauthorized conduct.[74] If an employer objects to his supervisors' participation in a labor organization's activities, he should be required to exercise his right either to discharge or otherwise to penalize those supervisors; he should not be permitted to avoid his collective bargaining responsibilities,

---

priate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'" 91 N.L.R.B. at 418 (footnote omitted). Section 159(a) provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

29 U.S.C. § 159(a) (1970). *See also* 29 U.S.C. § 157 (1970), which permits employees to select the bargaining representatives "of their own choosing." For the pertinent text of § 157, see note 40 *supra*.

73. 29 U.S.C. § 152(3) (1970).

74. *See, e.g.*, Florida Power & Light Co. v. IBEW, 417 U.S. 790, 808-13 (1974); Beasley v. Food Fair, Inc., 416 U.S. 653, 656-62 (1974).

however, by protesting against the presence of his supervisors in the employees' bargaining unit.

Second, a company's assertion as a defense for refusing to bargain that a labor organization is employer-dominated is inconsistent with the stated purpose of the NLRA. The employer's invocation of such a defense is designed neither to promote collective bargaining nor to protect the rights of workers who attempt to organize.[75] Rather, the company's intent, either to delay collective bargaining or to prevent it altogether by causing the labor organization's decertification, is manifestly irreconcilable with the NLRA's goals.

The anomaly of permitting an employer to invoke his ability to influence a labor organization as grounds for its decertification has not been discussed by the NLRB.[76] If the company actually could dominate the labor group in a manner unrecognized during the certification process, however, it logically would attempt to preserve this power and to use it to obtain favorable results during the collective bargaining process. Consequently, whenever the employer asserts the existence of this power while attempting to avoid collective bargaining, the Board and the reviewing court should recognize that he probably cannot exercise improper control over the organization he is challenging.

CONCLUSION

In *Annapolis Emergency Hospital,* the Fourth Circuit's expansion of the NLRB's rule denying certification as the exclusive bargaining representative to employer-controlled labor organizations is incongruous with established Board policies and with the legislative intent of the National Labor Relations Act. The court inappropriately shifted the focus of its inquiry from whether a particular employer could exercise control over the organization through its supervisors to whether any employer's supervisors could influence the labor group. Furthermore, in its adoption of a strict construction of the NLRA's definition of "labor organization", the court invalidated a procedure, conditional certification, that could remove any taint created by supervisor influence in a parent organization on the local

75. *See* note 65 *supra.*

76. *See* NLRB v. Annapolis Emergency Hosp. Ass'n, 561 F.2d 524 (4th Cir. 1977); Sierra Vista Hosp., Inc., 225 N.L.R.B. 1086, 93 L.R.R.M. 1172 (1976); Sisters of Charity of Providence, 225 N.L.R.B. 799, 93 L.R.R.M. 1155 (1976); St. Rose de Lima Hosp., Inc., 223 N.L.R.B. 1511, 92 L.R.R.M. 1181 (1976).

labor group actually conducting the collective bargaining process. The court neither analyzed sufficiently the nature of this procedure, which enables the NLRB to ensure the competency of the labor organization selected by the employees, nor recognized that such conditional certification is within the Board's discretion in fulfilling its statutory obligations. This inadequate analysis in *Annapolis Emergency Hospital* formed the basis for a decision that should not be adopted in the other circuits.