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# THE NLRB AND DETERMINATION OF THE APPROPRIATE UNIT: NEED FOR A WORKABLE STANDARD

T. L. GROOMS*

## INTRODUCTION

The National Labor Relations Act, as amended,[1] Section 9 (c),[2] provides for the filing of a petition when a substantial number of the employees wish to be represented for collective bargaining and the employer refuses to recognize them. The Board then investigates to see if there exists a reasonable ground to believe that a question of representation exists, and if so it orders an election by secret ballot. Thereupon the representative designated or selected by the majority of the employees in a unit appropriate for such purposes becomes the exclusive representative for collective bargaining.[3]

It can be said then, that Section 9 (c) recognizes and provides a solution for disputes over questions of representation. Section 9 (a),[4] states the representative must be chosen by a majority of the employees in a *unit appropriate* for such purposes, and herein lies the basis for dispute. To the extent that management can show that the union's claim of a majority includes men with job classifications not appropriately within that union, it may destroy the union's claim to representation. If the union can show the converse, i.e., that their claim of a majority includes only those men of job classifications appropriately

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1. 29 U.S.C.A. §§ 141 et seq.

2. *Id.* § 159(c): Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice . . . If such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

3. *Id.* § 159(a): Representative designated or selected for the purpose 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 . . . [*italics* added].

4. *Id.*

included, they are entitled to representation, and it would be an unfair labor practice for management to refuse to bargain with it.[5] It is for this reason that the question of what is an appropriate unit is of importance and concern to labor and management.

With this realization, certain questions present themselves. What is an appropriate unit? Who determines what is an appropriate unit? And, by what test is it determined?

As to the first two questions raised, the Act is explicit in stating the Board shall decide the unit appropriate for the purpose of collective bargaining, and that it shall be the employer unit, craft unit, plant unit, or subdivision thereof.[6] By what tests the Board determines the appropriate unit is the subject of this article. Since the employer must bargain with a union representing a majority of employees of job classifications appropriately within that union, he must first decide whether the alleged "majority" includes employees of job classifications not appropriately included, before determining whether he must, in fact, bargain. To do so intelligently the employer must be aware of the factors the Board uses to make a correct determination. The first *proviso* of Section 9 (b)[7] states what the Board may *not* do, when determining the question, but offers nothing of the positive factors involved.

Before proceeding farther, three areas must be stated to place the inquiry of this paper in its proper perspective. First, is the extent of the Board's determination. The Board's determination of what constitutes an appropriate unit is binding, unless it is arbitrary or capricious

5. *Id.* § 158(a)(5).

6. *Id.* § 159(b): The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . .

7. *Id.* . . . Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decided that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees others than guards.

or "lacking in a rational basis".[8] With such force behind the Board's decision, it is necessary to reveal the factors it employs in arriving at its decision. Second, is the nature of the different types of units the Board may decide appropriate. "Unit" is generally used to describe the area of job classification from which employees are grouped for purposes of bargaining with management. Examples of these "units" range in size from the Multi-Employer, where all of the employees of an industry bargain collectively with the various employers, through the Single-Employer Unit, the Multi-Plant Unit, Single-Plant Unit, Plant-Wide Unit, Departmental-Unit, Craft-Unit, and Special employees. The latter groups, it may be noted, may be composed of only three men. In each of the above units, the three factors will be considered by the Board. However, it is apparent that some of the units mentioned will necessitate the consideration of new factors in determining the appropriate unit, because of their unique characteristics. Finally, how does the Board interpret the word "appropriate"?

> There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate'. It must be appropriate to ensure the employees *in each case* 'the fullest freedom in exercising the rights guaranteed by this Act'.[9]

### SIMILARITY OF SKILLS, WAGES, HOURS, AND OTHER WORKING CONDITIONS AMONG THE EMPLOYEES INVOLVED.

This factor used by the Board is the most important factor. It is the Board's responsibility to determine the unit which will best act to represent the employees involved for the purposes of collective bargaining. The factor—Skills, Wages, Hours, etc.,—is important only when there exists a similarity among the employees involved. They are important because they indicate a common interest, and thus a responsibility common to all members, is imposed upon the representative.

In the *Breman Steel Company* case the Board stated the criterion of the similarity factor:

> For a group of employees to constitute an appropriate bargaining unit, such group must be at least a readily identifiable and homogeneous group apart from other employees.[10]

8. N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944).
9. Morand Bros. Beverage Co., 91 N.L.R.B. 409, 412 (1950).
10. 93 N.L.R.B. 720, 725 (1951).

When this factor is used it merely determines what is appropriately included, as well as excluded. In the *Brown Cigar Company* case[11] the employer was a wholesaler who received, sold, and distributed cigars, drugs, and beach sundries. Its operation consisted of receiving merchandise at its warehouse, assembling orders, loading its trucks, and delivering its products to retail distributors. The employer had three cigar driver-salesmen, and one cigar and drug driver-salesman. Each of them loaded his own truck and traveled assigned routes, delivering merchandise and soliciting new business. The only difference between the two was that the cigar and drug driver-salesman did not receive a commission. There was also a full-time man who performed duties in the warehouse, and delivered cigars. He spent about 50% of his time delivering as opposed to the other driver-salesmen who spent 75% of their time selling. The Board stated:

> Although the driver-salesmen, including the drug salesman work on a salary basis, while the other employees are hourly paid, all employees of the Employer enjoy a community of interests . . . [and] the overall unit requested by Employer is appropriate.[12]

If it could be said that an employee who works at one job 50% of his time acquires the characteristics of that job, could the employee who works two different job classifications under the same employer (equal time at each) have characteristics of both jobs for purposes of classification? The Board has never decided the problem.

In *John R. Figg, Incorporated*,[13] a union sought to include truckdrivers, warehousemen, *excluding* all office employees, professional employees, guards, supervisors, as defined in the Act and "all other employees". The employer, who was engaged in the wholesale grocery business, was in general agreement with the proposed unit, but objected to the exclusion of "all other employees", on the grounds that it would exclude a fruit market loader (in another town), a regular summer employee, and a janitor who sometimes aided in loading. The Board found that the janitor and fruit market loader should be included because their employment interests were substantially the same as those of the other employees. It stated that there was not a sufficient community of

11. 124 N.L.R.B. 1435 (1959).

12. *Id.* at 1158.

13. 124 N.L.R.B. 913 (1959).

interests between the college student who worked as a regular summer employee, and the other employees.

The foregoing cases illustrate that all too often the Board does not clearly show the similarity of wages, hours, etc., but rather finds that they did or did not exist. In this respect, the cases are of little aid in indicating what will be considered similar, for guiding the union or employer in determining this question.

While the Board considers the similarities of interests factor important, it recognizes its limitation. In the *Smythe* case, the court affirmed the Board's decision, stating:

> It is true that similarities of duties and working conditions are factors which are proper for consideration . . . however, mutuality of interests is by no means the 'primary and controlling' test to be applied. Where, as here, the employees engaged in similar pursuits widely separated from each other geographically, and are under local supervision, a determination of the Board of a unit comprised of only those employees who work within a comparatively small area neither excludes the remaining employees from the benefits of the Act nor offends the statute which authorizes the Board to establish an appropriate unit . . .[14]

The Board has stated that the fact that certain employees have been excluded from one unit because of lack of similarities does not indicate that they constitute a separate unit.[15] On the other hand, the fact that certain employees are excluded from one unit because of a lack in similarity does not prevent their inclusion in another appropriate unit.[16] What the Board determines when using the "similarity of interests" factor is that certain employees from certain job classifications either are or are not appropriately included within a unit—no more, no less.

The similarity of interests factor is employed in cases involving special classifications and circumstances. For example homeworkers were excluded from a production unit since they had none of the interests or working conditions of regular employees.[17] However, when the determination involves special classifications or circumstances, such as temporary, part-time, or seasonal employees, the Board inquires into the regularity of employment; the difference in pay; possibility of

14. N.L.R.B. v. Smythe, 212 F.2d 664, 667 (5th Cir. 1954).

15. Paramount Shoe Mfg. Co., 72 N.L.R.B. 866 (1947).

16. Continental Steel Corp., 61 N.L.R.B. 97 (1945).

17. Howell Electric Motors, 59 N.L.R.B. 1171 (1944), R. L. Polk & Co., 91 N.L.R.B. 443 (1950). *But cf.*, J. R. Osherenko, 73 N.L.R.B. 670 (1947).

permanent employment; and rate of turnover.[18] At least to the extent that other factors are involved here, the similarity of interest factor is more forceful in that the analysis is deeper. When the decision is based upon deeper analysis, more facts are recited as relevant, and the Board states the facts which give rise to its conclusion. Such a decision provides a basis for an employer's future use. He may research the question and come up with what are considered pertinent facts, and what facts were determinative of the question. It is to this extent that special classification cases provide a better aid to an employer for his future use.

### HISTORY OF COLLECTIVE BARGAINING

This factor is based upon the presumption that what the parties have done in the past in respect to collective bargaining, is evidence of what should be done in the future. If a particular union has successfully represented a certain group of employees in the past, it will be presumed that they can continue to do so in the future. This presumption is overcome when there exists strong reasons for doing so. While the "history of collective bargaining" usually concerns bargaining between the parties, the history of similar groups in similar industries and localities is sometimes used.[19] The history used need not be that immediately preceding the dispute[20] if there is some reason for doing so.

The Board's discretionary power in applying the "history of collective bargaining" factor has varied over the years. As early as 1945, a Federal Court[21] held that a determination by the Board that a particular unit was appropriate for collective bargaining will not be overturned by the courts unless the determination appears arbitrary or capricious. The Court concluded that a determination made solely on the basis of collective bargaining history was not arbitrary, where prior contracts indicated an established pattern of collective bargaining, and where no special circumstances existed. When the "history of collective bargain-

18. Marvel Roofing Products, Inc., 108 N.L.R.B. 292 (1954); Callaghan-Cleveland, Inc., 120 N.L.R.B. 1355 (1958); Economy Food Center, Inc., 142 N.L.R.B. 901 (1963); Dow-Jones & Co., 142 N.L.R.B. 421 (1963); L. Weimann Co., 106 N.L.R.B. 1167 (1953); Mission Pack Co., 127 N.L.R.B. 1097 (1960); Tol-Pac, Inc., 128 N.L.R.B. 1439 (1960).

19. Toffenetti Restaurant Co., 133 N.L.R.B. 640 (1956).

20. National Carbon Co., 107 N.L.R.B. 1486 (1954). Though there was an absence of bargaining history for the preceding five years, the Board looked to the earlier nine years, and stated such would not preclude a change. See also, Safeway Stores, 129 N.L.R.B. 1000 (1960).

21. N.L.R.B. v. National Broadcasting Co., 150 F.2d 895 (2d Cir. 1945).

ing" factor is stated as a "presumption", it does not shock the senses that past human action is being considered as relevant evidence from which future conduct is to be predicted. Is not the true inquiry whether or not certain job classifications are appropriately within a unit? What possible relevancy exists between successful representation and whether or not a certain job classification is within an appropriate unit? It seems conspicuous that the Board has never concerned itself with the issue of relevance.

A case of great influence upon the Board's discretion in applying the "history of collective bargaining" factor was set forth in the *Matter of the American Can Company*,[22] which was later to be referred to as the *American Can Doctrine*. The essence of this doctrine was that the bargaining history of an employer, for a long period of time, might provide a sufficient reason for denying a later request for separation for craft representation, since it has been thoroughly assimilated with the industrial unit. It was later held that if the craft group has successfully preserved its identity as such throughout the period of its inclusion in the production and maintenance unit, a craft unit could be carved out of the larger industrial unit.[23]

Subsequently, Section 9 (b) (2)[24] of the N.L.R.A. was passed, providing that the Board may not decide that any craft unit is inappropriate for purposes of insuring the employee rights guaranteed by Section 7[25] of the Act on the ground that "a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation." Interpreting this statutory change, the Board stated that the *American Can Doctrine* made no distinction as to whether the bargaining history was predicated upon voluntary recognition by the employer or from the Board's determination.[26] The Board, being aware that the legislative history preceding the enactment of Section 9 (b) (2)[27] indicated a Congressional intent to overrule the *American Can Doctrine*, stated that the *American Can* case was not synonymous with the phrase "prior Board determination", because the history could be predicated upon agreement. Consequently the Board stated:

22. 13 N.L.R.B. 1252 (1939).
23. General Electric Co., 58 N.L.R.B. 57 (1944).
24. 29 U.S.C.A. § 159(b) (2), effective 1947.
25. *Id.* § 157.
26. National Tube Co., 76 N.L.R.B. 1199 (1948).
27. *Supra*, note 24.

> We believe that the legislative history preceding the enactment of 9 (b)(2) does not adequately establish a certain Congressional intent to eliminate the use of bargaining history by a particular employer as a controlling factor in determining the issue of separate craft representation.[28]

In essence the Board held that although craft units may not be found inappropriate because of a "prior Board determination" establishing a different unit, they may still consider the history of collective bargaining in determining the appropriateness of a proposed craft unit. To say it differently, the amendment was held not to impose a mandatory duty on the Board to carve craft units out of pre-existing industrial unions.

### DESIRE OF THE EMPLOYEES

The wishes of the employees, the third factor, becomes important when either of two or more units is otherwise appropriate. In such a situation the Board usually withholds determination until an election among the employees involved is held and some expression of their desires is available. This is the *Globe Doctrine*.[29] In *Globe*, three separate craft unions sought recognition, as did an industrial union, for the same employees. The Board stated:

> In view of the facts described . . . it appears that the company's pro-

28. National Tube Co., *supra*, note 26 at 1205. Seven years later the Board, in considering the appropriateness of a craft union, emphasized that a craft shall not be considered inappropriate on the ground that a different unit had been established by prior certification, and that craft unions would be deemed appropriate where a true craft is sought and where the union concerned had traditionally represented crafts. American Potash & Chemical Corp., 107 N.L.R.B. 1418 (1954). Notwithstanding, a Board order finding a unit of electricians appropriate was refused enforcement on a failure to bargain charge because in National Tube the Board had excluded steel, lumber, aluminum and wet milling industries from the craft union rule, such industries being highly integrated and having long histories of plant-wide bargaining and because the industry in question (plate glass) involved the same conditions. N.L.R.B. v. Pittsburgh Plate Glass Co., 270 F.2d 167 (4th Cir. 1959).

Where the question of appropriateness has become important in actions seeking severance which involve not crafts, but units claiming to be functionally distinct, the Board has rejected the concept that traditional job classifications are controlling. Instead, predominate community of interest is the criterion. In making this determination, the test is: is the unit seeking severance a functionally distinct group? Does this group have overriding special interests? Kalamazoo Paper Box Corp., 136 N.L.R.B. 134 (1962). For a discussion of the concept of appropriateness relative to geographic spread of the unit in the retail stores industry, see Sav-on Drugs, 138 N.L.R.B. 1032 (1962).

29. Globe Machine and Stamping Co., 3 N.L.R.B. 294 (1937).

> duction workers can be considered either as a single unit appropriate for the purposes of collective bargaining . . . or as three such units as claimed by the petitioning unions. The history of successful separate negotiations at the company's plant, and also the essential separateness of polishing and punch press work at that plant, and the existence of a requirement of a certain amount of skill . . . are proof of the feasibility of the latter approach . . . In such a case where the considerations are so evenly balanced, the determining factor is the desire of the men themselves . . . We will therefore order elections to be held . . .[30]

In *W. C. Hamilton and Sons*,[31] the Board ordered a severance of various craft units from the production and maintenance unit, despite a sixteen year history of bargaining on a broader basis, illustrating the interrelation of the "history of collective bargaining" factor with the "desires of the employees" factor. *Hamilton* also illustrates how much weight an employer should give to the "history of collective bargaining" factor. Sixteen years of bargaining on a broader basis was cast aside without any reference to what "strong reasons" impelled the Board to so rule. The *Globe Doctrine* is a permissive doctrine. It permits a self-determination election, but the Board has held an election unnecessary where the desires of the employees are clearly demonstrated from the evidence.[32]

The factor of "the desires of the employees", though it is determinative of the issue of appropriateness of the unit, is limited in use because it is employed only where two or more units otherwise appropriate seek recognition. Collective bargaining is, by its name, a group action, and whether it functions effectively might well depend upon whether the employees desire to be in that unit. Yet the *Globe Doctrine* has not escaped criticism. Edwin S. Smith, dissenting in *Allis Chalmers Mfg. Company* case stated:

> The decision vests in the hands of a small group of employees the choice of determining whether in this mass-production plant, employing nearly 10,000 workers, a complete industrial unit, or one from which one or more crafts have been severed, is most appropriate to promote collective bargaining . . . The wishes of the great majority are ignored. The device of holding such an election to resolve the

30. *Id.* at 303.
31. 104 N.L.R.B. 627 (1958).
32. Worthington Pump and Machine Corp., 4 N.L.R.B. 448 (1937).

> conflict between industrial union adherents and craft conscious groups, as here represented . . . is obviously inadequate to throw any light on the problem of what is the most appropriate bargaining unit. . .[33]

Mr. Smith believed that self-determination elections would not effectuate the policy of the Act (to foster and obtain industrial peace) because of strikes by strong craft unions bringing the entire factory to a standstill.

The Act states that the "Board shall determine in each case" [34] what the "appropriate unit" is. It seems inescapable that the *Globe Doctrine* delegates from the Board to the employees the power to determine the appropriate unit. Granted, the Board finds two or more unions appropriate, and the employees choose which they prefer. Can it be that one job classification can be considered to be appropriately in either of two units, and yet assure to the employees involved fullest freedom in exercising the rights guaranteed by the Act? Did not Congress expect the Board to determine the appropriate unit *most likely* to ensure the employees their freedom in exercising their rights? The Act says "the fullest freedom." [35] Congress has not often exhibited an intent to be satisfied with second best, and there is nothing in the Act to evince such an intent.

### EVALUATION

The employer may find himself in a dilemma on questions of representation by virtue of two provisions of the N.L.R.A. On the one hand the Act makes it an unfair labor practice for an employer to refuse to bargain with a representative of a majority of the employees of an appropriate unit.[36] On the other hand, if there is a real question as to whether the union represents a majority, the Act makes it an unfair labor practice to recognize such a representative.[37]

The Board has held that a neutral employer on being confronted with conflicting representation claims by two rival unions, cannot recognize one of them until its rights to be recognized have been finally de-

33. 4 N.L.R.B. 159, 176-177 (1937).

34. 29 U.S.C.A. § 159(b).

35. *Id.*

36. *Id.* § 158(a)(5).

37. *Id.* §§ 158 (a)(1), (2); N.L.R.B. v. Standard Steel Spring Co., 180 F.2d 942 (6th Cir. 1950). Since the employer recognized the union with the majority, it was held no violation as there was no real dispute.

termined by the Board.[38] In *Midwest Piping and Supply Company, Inc.*,[39] the employer violated Section 8 (a) (1) and 8 (a) (2)[40] by executing a "union shop" contract with one union when representation proceedings were pending before the Board. The Board stated the Employer's conduct accorded unwarranted prestige to the union, and encouraged membership in one union while discouraging it in another, and otherwise restrained and coerced employees in the exercise of their rights guaranteed by Section 7[41] of the Act.

Nevertheless the Board recognized an exception to the *Midwest Pipe Doctrine* in the *William D. Gibson* case.[42] It was here held that an employer could lawfully execute a new collective bargaining contract with an incumbent labor organization even though a rival union had filed a representation petition with the Board. The *Gibson* case cannot be read to license the employer to bargain with the incumbent union on *any* matter.

Further, *St. Louis Independent Packing Company*,[43] imposed a limitation on the *Gibson* exception, though it did not refer to the case. The Board here held that the employer violated Section 8 (a) (1) and 8 (a) (2)[44] of the Act when it entered into a temporary wage increase with the incumbent union five days before a self-determination election, stating:

> The Act forbids interference by an employer with the rights of his employees to bargain collectively, and, for that purpose, to select their own bargaining representative. When two unions are vieing [sic] for majority support of his employees, an employer must, of course, maintain a position of strict neutrality. He must refrain from any action which tends to give either an advantage over its rival; he may do nothing which tends to coerce his employees to join or refrain from joining a particular union. Recognition of one competitor as bargaining agent during this contest period, absent proof of majority support, is a proscribed act.[45]

38. Matter of Elastic Stop Nut Corp., 51 N.L.R.B. 694 (1943); Matter of Keystone Steel and Wire Co., 62 N.L.R.B. 683 (1945).

39. 63 N.L.R.B. 1060 (1945).

40. *Supra*, note 37.

41. *Supra*, note 25.

42. 110 N.L.R.B. 660 (1954).

43. 291 F.2d 700 (7th Cir. 1961).

44. 29 U.S.C.A. §§ 158(a) (1), (2).

45. *Supra*, note 43 at 704, citing N.L.R.B. v. Indianapolis Newspaper, Inc., 210 F.2d 501, 503 (7th Cir. 1956).

The limitation on the application of the *Gibson* exception is that the employer can negotiate with the incumbent if he does not otherwise violate the Act with respect to Section 8(a)[46] of the Act.

When this dilemma presents itself to the employer he must resort to the factors the Board uses in determining the representation question and he must look at the Act for the extent he is permitted to bargain with the incumbent union. The factors have been set forth and discussed. They must now be analyzed in the light of whether they are an adequate means in aiding the employer in determining whom he must recognize, and what course of action he may take.

The three factors may be discussed and analyzed separately, but due to their interrelation, the question of whether or not sufficiently definitive criteria is available for an employer to determine the question of recognition, must be answered by looking to all three of the factors.

The "similarity of interests" factor is recognized as the most important factor. While the factor, as stated, is easily understood, it is difficult of application. The Board's diverse results from its application remove what certainty might otherwise exist. Since the employer finds himself in a position of having to determine what the Board will decide when faced with the same question . . . the problem is apparent. The factor of "similarity of interests" is as difficult of application as the juristic phrases of "reasonableness", "prudent man", "reasonable rate", etc. The courts have, in recognition of this difficulty, stated that what is reasonable under one set of circumstances may be unreasonable in another. What is reasonable to one man is unreasonable to another. From viewing the cases involving the "similarity of interests" factor it is apparent that there is no definitive criterion (outside the factor) available to the employer. The only aid to the employer is that the Board will, in attempting to effectuate the fullest freedom in the exercise of employee rights, construe the factor broadly. Little help this is when it is remembered that the union does not bring affidavits claiming majority representation. Mere allegations are brought, with evidence that would be thrown out of any court for lack of authentication. The Act does not require a union to prove its claim.

It is of no aid to the employer or union that the Board *concludes* that a unit is or is not appropriate upon the application of the "similarity of interests" factor. When the Board makes its decision in such a manner it fails to answer two important questions:

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46. *Supra*, note 44.

1. Upon what particular facts did the Board make its decision?
2. What is the status of the employer to the group of employees excluded from the unit, when they are not otherwise a member of a union?

The first question bears directly upon the employer's ability to be able to make intelligent future determinations. To the extent that the Board fails to set forth the reasons for finding or not finding similarities of interests, it fails to adequately equip both the employer and the union to decide this question. Though the Board is not under the Administrative Procedure Act it would be well if the Board were required to make findings of fact with some degree of particularity. It would aid the employer and the union. It would aid the Board in that it would force the Board to state and consider the case at greater length. It would help a reviewing court in making apparent from the record what the skeleton of the Board's reasoning was.

As to the second question, the Board's failure to define the relationship between the employer and the group excluded from the unit—is analogous to a court's failure to provide complete relief. If the group, previously excluded from the unit, asserts a majority representation, the employer is faced with making the same type of decision, just made, and without any aid from the Board. The Board has stated that the fact certain employees have been excluded from one unit because of lack of similarity of interests does not:

1. indicate that they constitute a separate unit, nor[47]
2. prevent their inclusion in another appropriate unit.[48]

The reasons the Board refuses to make a more definitive statement concerning the status of the excluded employees may well be its refusal to organize labor, as that question is not honestly before it. However sound the reasons, the effect of the Board's refusal to define the relationship between the employer and the group excluded from the unit, is still the same, as it effects the employer. He is unarmed!

The "history of collective bargaining" is premised upon the presumption that the manner in which the parties bargained in the past is evidence of how they should bargain in the future, where the bargaining has been successfully carried out. The history relied upon by the Board may be that between the parties, or that of a similar group in

47. *Supra*, note 15.
48. *Supra*, note 16.

similar industries in similar localities. When the history used is that between the parties, it need not be the history immediately preceding the dispute. Apparently the Board believes that since the history of collective bargaining is irrelevant to the question of what is the appropriate unit, it is irrelevant where the history originates.

The employer, when faced with deciding whether to recognize a unit alleging a majority, finds little if any aid from the "history of collective bargaining" factor. What history will the Board use? Will it use a history from some similar industry in some similar locality? Will it use the history between the parties? If it uses the history between the parties, what period of history will be used—the immediate preceding five years, ten years or what? A test such as this is no test at all, but a means by which the Board can attempt to justify its action or inaction. The history of collective bargaining is as irrelevant to the issue of appropriateness of a job classification within a unit, as an employer's claim that other employers are guilty of the same conduct of which he has been charged as being an unfair labor practice.

This factor is even more nebulous than stated, as the Board can disregard whatever history of collective bargaining existed for "strong reasons" which compel an overcoming of that history. What little resemblance to stare decise the *American Can Doctrine* might have borne, Congress, in passing Section 9 (b) (2);[49] coupled with the *National Tube*[50] case, completely irradicated it.

In spite of sixteen years of collective bargaining history, the Board has ordered severance (if the majority so desired).[51] In this case, as in the majority of cases[52] where severance is permitted in the face of a history of collective bargaining on a broader basis, no "strong reason" is stated or referred to by the Board which induced it to overcome the history. This factor is so broad and nebulous that it is of no aid to an employer faced with the problem of recognition. Obviously there are sound reasons why the Board does not define more narrowly this factor, as there are good reasons for not stating the "strong reasons" for overcoming the history. Regardless of the merits of the reasons, this factor remains of little aid to an employer as a means of deciding the question of recognition.

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49. 29 U.S.C.A. § 159(b)(2).

50. *Supra*, note 26.

51. W. C. Hamilton & Sons, 104 N.L.R.B. 627 (1958).

52. Kroger Co., 103 N.L.R.B. 218 (1958); Hudson Pulp and Paper Corp., 94 N.L.R.B. 1018 (1951); Eagle Pencil Co., 82 N.L.R.B. 263 (1949).

When, by application of all the factors, the Board concludes that either of two or more units is otherwise appropriate, it orders a self-determination election to acquire the employees' desires. This is the third factor. Very little can be said about this factor as it relates to the employer's use, because when it is applied the Board has already decided the appropriateness of the unit, and the employer must recognize it.

An employer, for being placed in a "Damned-if-you-do, damned-if-you-don't" position by Congress, is provided with extremely insufficient and vague standards in resolving whether he must, or is forbidden to, recognize a union. The Board has stated:

> There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be appropriate.[53]

The employer must decide what the Board will decide. In other words, if the employer is wise enough to decide the ultimate, or most appropriate unit (and what else should he strive for) he may yet be wrong, and guilty of an unfair labor practice, for the Board must only decide what unit is "appropriate." If a reviewing court had stated that Congress only imposed the burden on the Board of deciding the "appropriate unit", and not the *most appropriate* unit, this language would be understandable. When the Board makes such a statement it amounts to an admission that Congress recognized that the problem of deciding the appropriate unit was onerous enough. Such an admission may well be true, but what in the Act, or common sense, indicates that an employer, who is not expert on labor problems, as is the Board, is any better equipped to decide this onerous question.

In essence, an employer is required, under penalty of an unfair labor practice, to read the Board's mind. And, if this were not impossible enough, he must do so without any definitive aid as to how the Board's mind functions. For the employer it is a lottery and the stakes are high. The two obvious dangers Congress was attempting to remedy, which results in the employer's dilemma, were:

1. refusal to bargain with the employee's representative, and
2. any interference by the employer with the employee's rights as set forth in the Act.

It is not the intent of this article to state that these objectives are not

53. Morand Bros. Beverage Co., 91 N.L.R.B. 409, 418 (1950).

meritorious. But it is intended to state in the alternative that it is an onerous burden placed on the employer without sound reason, or, that if properly placed, that the employer is improperly equipped by Congress and the Board to make a correct determination.

A provision setting forth power in the Board to provide a determination of the question *before* the parties act, as a declaratory judgment does, would greatly aid the parties. When a real question arises it can then be submitted and a decision rendered. The parties would be relieved of having to act at their peril. This would encourage the peaceful solution of labor problems and remove the long-remaining effects of an unfair labor practice charge. At present the employer is a "blind man in a dark room, searching for a black cat that . . ." *is* there—and it is not a domestic cat!