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The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice

Ridgway M. Hall, Jr.

The basic policy considerations enunciated in the Wagner Act for guiding the National Labor Relations Board in its determinations of the appropriate unit for collective bargaining are discussed by the author. He then proceeds to analyze the factors which the Board has weighed in determining the appropriate bargaining unit. Mr. Hall describes the conflict faced by the Board between the desire to maximize employee freedom by self-determination elections (which leads to small units) and the Wagner Act aim of promoting collective bargaining (which in many cases results in large units). The statute and economic realities, the author concludes, indicate that unit determinations should be made on the basis of which unit will best serve the desired end of stable industrial relations.

ONE OF THE MOST problematic areas of labor law, and one which is repeatedly before the National Labor Relations Board, is the determination of an appropriate bargaining unit under section 9 of the National Labor Relations Act (NLRA).¹ Representation cases, in each of which the Board must certify the unit of employees appropriate for collective bargaining purposes, have accounted for approximately forty percent of all cases before the Board in recent years.² Yet there has been persistent and often vociferous dissatisfaction with the confus-

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¹ 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159 (1964) [hereinafter cited as NLRA].

² The following compilations are based on Appendix A, Table I, in the Annual Report of the National Labor Relations Board for each year shown:

Fiscal Year	Total Cases on N.L.R.B. Docket	Representation Cases
1963	32,075	13,176
1962	31,731	13,694
1961	29,698	12,650
1960	29,190	12,360
1959	28,018	11,070

ing reasoning by which the Board concludes that a particular group of employees is or is not an appropriate unit.

Much of the discontent with the representation decisions arises from the difficulty of discerning what the Board is saying. The problem was highlighted by the recent Supreme Court decision in *NLRB v. Metropolitan Life Ins. Co.*³ The Board had found an appropriate unit of all debit insurance agents in respondent's district office in Woonsocket, Rhode Island, despite the presence of nine other Metropolitan offices in the state.⁴ The Court of Appeals for the First Circuit found the decision arbitrary and inconsistent with prior Board determinations.⁵ Concluding that in reality the Board was basing its unit finding not on collective bargaining factors but on whatever the union was able to organize, the court denied enforcement of the Board's order to bargain.⁶ The Supreme Court vacated the decision by the First Circuit, but, finding no clear statement of the reasoning behind the Board's determination and therefore finding itself unable to review the decision, the Court remanded the case to the Board for clarification.⁷

While the Board was puzzling out its insurance unit findings, the Seventh Circuit in *NLRB v. Frisch's Big Boy Ill-Mar, Inc.*⁸ overturned one of its major restaurant-chain decisions. Brushing aside all customary deference to administrative expertise, the court rejected on its merits the Board's conclusion that one out of the employer's ten restaurants in a city could be an appropriate unit.⁹ With these two decisions, *Metropolitan Life* and *Frisch's Big Boy*, a once tranquil field of labor relations has burst wide open.

To discuss the bargaining unit determination with employers and labor unions is to discover that each side has very different ideas

³ 380 U.S. 438 (1965).

⁴ Representation Case No. 1-RC-7024 (1962) (unreported); *Metropolitan Life Ins. Co.*, 142 N.L.R.B. 491 (1963). Because the statute affords no direct review of a representation case, the only way an employer can get the appropriateness of the Board's unit determination before a reviewing court is to refuse to bargain, thereby incurring an unfair labor practice charge. Upon review of the Board's order to bargain, the unit determination may be challenged.

⁵ *Metropolitan Life Ins. Co. v. NLRB*, 327 F.2d 906 (1st Cir. 1964), *vacated and remanded*, 380 U.S. 438 (1965).

⁶ *Id.* at 910-11. Section 9(c)(5) of the National Labor Relations Act states in its relevant parts: "In determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(c)(5) (1964).

⁷ 380 U.S. at 442-44.

⁸ 356 F.2d 895 (7th Cir. 1966).

⁹ *Id.* at 896-97. For a similarly brusque reversal, see *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926 (1st Cir. 1965).

regarding what Congress intended that an appropriate bargaining unit should be. Indeed, the differences in views and interests are often great between several unions or from one employer to the next. While the Board is aware of dissatisfaction on both sides, its attempts at clarification of basic policy seem to have become bogged down in the tangle of conflicting considerations.

It is the purpose of this article to examine this tangle and its development and particularly to explore the problems with which the Board must deal and the objectives towards which it should work in a unit determination. After a brief consideration of the legislative delegation of authority to the Board, the criteria for appropriateness which the Board has developed will be examined. These criteria will then be related to the particular problems in two of the most controversial areas of the Board's unit decisions, namely, the insurance and the retail chain and department store industries. Finally, the discussion will focus upon a reconciliation between the Board's dual functions of encouraging harmonious and effective bargaining relations while protecting the legitimate interests of distinct employees or groups, for it is this balancing or reconciliation which is the ultimate problem in every unit determination.

Throughout the analysis it is well to bear in mind that the determination of an appropriate unit is at least as much a political decision as a legal or statutory one. This is meant not in the sense that the Board is subject to political pressure (which it may be) or that members are political appointees (as they often are), but in the sense that the determination itself, which consists of grouping or separating people for decision-making purposes, is by nature an exercise in political science. For this reason the Board's decisions under section 9 are fraught with a number of problems which do not exist in the more strictly legal determination involved in an unfair labor practice case.

I. THE STATUTE

Section 9(a) of the NLRA provides in 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.¹⁰

¹⁰ 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(a) (1964).

Section 9(b) states:

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.¹¹

In 1947 Congress added section 9(c)(5), which provides as follows:

In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.¹²

Under this broad and general delegation, the only affirmative standard by which the Board is to determine the size and membership of a group which is "appropriate" for collective bargaining is the 9(b) mandate "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act." These rights are essentially contained in capsule form in section 7 of the act,¹³ which assures employees the right to organize, bargain collectively, and engage in certain concerted activities, or to abstain from all such organizational activity. The Delphic admonition of section 9(c)(5) is generally interpreted to mean that although the extent of organization may not be the only factor in support of a Board determination, it may be one of several factors to be considered (which necessarily means that in some cases it may be the tie-breaking factor).¹⁴ This construction seems reasonable, since if Congress had wanted extent of organization not to be considered at all, it could easily have said so.

There is a latent conflict between section 9(b) and section 9(c)(5) in that while the former says "assure . . . the fullest free-

¹¹ 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(b) (1964).

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

¹³ NLRA § 7, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1964).

¹⁴ This is the interpretation adopted by the Supreme Court. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965). It is also supported by the legislative history, as evidenced by the following language in the House Report covering section 9(f)(3) of the original bill, H.R. 3020, which survived as section 9(c)(5) of the final act:

Section 9(f)(3) strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as a group for holding such units to be appropriate While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and, as section 9(f)(3) provides, is not to be controlling. H.R. REP. NO. 245, 80th Cong., 1st Sess. 37 (1947).

dom," the latter prevents the Board from simply allowing the employees any grouping they desire.¹⁵ Abstractly, it would seem that the way to maximize freedom would be to let everyone who wants a union join one, and let everyone who does not want a union abstain. This rule would clearly make extent of organization the determining factor. Yet as a practical matter it is impossible to give every employee what he wants and also maintain stable and effective collective bargaining relationships. To allow every employee in a given group to have his own union or to be unrepresented, as he chooses, might maximize short-run freedom of choice, but it would also maximize long-run chaos. If, for example, a small minority in a group of employees, all of whom perform identical work on identical terms for the same wages, were allowed to unionize, the impact on the unorganized workers would be great. If the union exacted high wages, the employer might feel bound to meet the raise as to the unorganized group. On the other hand, there might be very little left for the unorganized group, who might therefore have to seek work elsewhere. If the union received a shortened work day, the employer might have to shut the entire operation earlier, again directly affecting all workers. Separate pension funds, grievance procedures, holidays, and other terms as between workers ostensibly performing identical work would be likely to generate antipathy between them. And of course the strike, boycott, or slowdown would directly affect the working conditions of all. To avoid such disruption of a majority by the minority, Congress has concluded in section 9(a) that where there exists such a unity of employment interests, the entire group must abide by the decision of the majority.¹⁶

This does not tell us what an appropriate unit is or how a unity of employment terms and interests is to be delineated. The statute gives some exemplary indication in the four possibilities mentioned in section 9(b): "the employer unit, craft unit, plant unit, or subdi-

¹⁵ There are other conflicts within the statute. For example, NLRA § 8(a)(1), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) (1964) makes it an unfair labor practice for an employer to coerce employees into exercising their § 7 rights (see note 21 *infra* for the text of this section), yet this was not intended to smother all employer interests in regulating or disciplining employee conduct. A difficult frontier is reached when under NLRA § 8(c), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(c) (1964) an employer expresses a strong preference for one union over another; if the expression is too strong the employer may fall within § 8(a)(1). Similarly, while § 7 gives each employee the right to join or abstain from a union, § 9(a) imposes majority rule. The § 7 right to abstain is also somewhat at odds with the general statutory policy in favor of organization set forth in NLRA § 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

¹⁶ For text of the section, see the text accompanying note 10 *supra*.

vision thereof."¹⁷ Beyond this general suggestion, Congress has left the determination entirely to the Board. This broad delegation may have been motivated by a desire to leave the development of standards or tests for appropriateness to the Board's expertise and experience. Congress might well have been reluctant to shackle the agency to standards which might later prove misguided or obsolete. Or, from the point of view of *realpolitik*, the legislators may have wanted to avoid the thorny political issue presented by the struggle between craft and industrial unionism which was raging in 1935.¹⁸ In any case, it is clear from the legislative history of the Wagner Act¹⁹ that Congress was handing the problem in the broadest possible terms to the Board.²⁰

The Board's task has been complicated by the fact that while the union will generally file a petition only for a group which it can successfully organize, the employer, who is usually opposed to any union at all, is arguing for a unit of employees which will be most difficult for the union to organize or win. Neither Congress nor the Board is prepared to give controlling weight to either of these interests. Indeed, the employer's anti-union disposition will get no weight at all. Consequently, the parties are forced to produce other reasons to support a finding in favor of the unit which they want. While some of the considerations which have been presented by the parties have had much validity, others have been totally disingenuous and have served only to confuse the Board and retard the development of reliable guidelines.

The task has been further obscured by the fact that the position of the union as the statutory collective bargaining representative frequently cuts across the idea of employee democracy embodied in sections 7²¹ and 9.²² That is to say that although the union pre-

¹⁷ For text of the section, see the text accompanying note 11 *supra*.

¹⁸ PELLING, *AMERICAN LABOR* 164-65 (Boorstin ed. 1960).

¹⁹ 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-66 (1964).

²⁰ The following language from the House Report on section 9(b) is indicative:

This matter [the choice of the appropriate bargaining unit] is obviously one for determination in each individual case, and the only possible workable arrangement is to authorize the impartial government agency, the Board, to make that determination. H.R. REP. NO. 972, 75th Cong., 1st Sess. 20 (1935).

²¹ Section 7 in its entirety states:

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

sumably represents the best interests of the employees, it also has a life of its own. It is looking for additional dues-paying members, often at the expense of another union. Therefore, it frequently has objectives independent of employee rights, so that in requesting a particular unit the union may be seeking not so much to vindicate employee interests as to sweep additional employees into its jurisdiction or simply to prevent a rival union from organizing a group of employees which it wants for itself. The extent to which the Board has floundered about before the array of inconsistent arguments has prompted criticism that it has abdicated its statutory function. Kenneth C. McGuinness, a veteran of the NLRB staff, concludes: "The unit decisions consistently encourage the growth of unionism as such, rather than protect the rights of employees."²³

In order to meet the problems just outlined, the Board has evolved a set of standards,²⁴ which are very loosely applied, to be sure. These standards are so often given varying priority, and the results have been so disparate from one case to another, that they may be more accurately termed "factors." These factors will be examined in the next section, both in the light of the statute and in light of the legitimate interests which the various parties to unit disputes would like protected.

II. THE FACTORS CONSIDERED BY THE BOARD IN FINDING A UNIT TO BE APPROPRIATE

The factors which are usually cited by the Board in support of its unit determinations are "community of interests" (normally defined in terms of common employee skills, working conditions, and employment interests); geography and physical proximity; the employer's administrative or territorial divisions; functional integration; interchange of employees from one job site to another (notably in and out of the proposed unit); bargaining history; and extent of organization.²⁵ Each of these factors will be separately considered;

right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). NLRA § 7, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1964).

²² For pertinent text of § 9, see text accompanying note 10 *supra*.

²³ MCGUINNESS, *THE NEW FRONTIER* NLRB 97 (1963).

²⁴ See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863 (1962); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 364 (1947).

²⁵ For a general statement of these factors, see *Metropolitan Life Ins. Co.*, 147 N.L.R.B. 69 (1964); *Continental Baking Co.*, 99 N.L.R.B. 777 (1952); Senator Taft's analysis of § 9(c)(5) in 93 CONG. REC. 6860 (1947).

however, it should be noted at the outset that with the exception of the rather conceptual "community of interest," none of the factors is consistently elevated over another. Emphasizing a case-by-case approach,²⁶ the Board has simply found the factors relevant and has refused to adopt a hierarchy of tests. Although this approach has the merit of avoiding woodenness in favor of judging each case on its own terms, it produces a lack of predictability. Yet predictability would seem to be a desirable objective for an administrative agency,²⁷ particularly one which handles a steadily increasing docket exceeding thirty thousand cases per year.²⁸

A. *Community of Interest*

Frequently the Board has stated that the "community of interest" among the employees is the primary consideration in delineating a bargaining unit.²⁹ This community is usually defined in terms of similarity of work and conditions, wages, terms of employment, and other common collective bargaining interests, as indicated in section 9(a).³⁰ Yet it at once becomes apparent that there can be more than one community of interest. Common collective bargaining interests have been found among such groups as: all employees performing a single kind of job in one store,³¹ all employees in a store,³² all employees in an employer's metropolitan³³ or administrative regional area,³⁴ all employees in a state,³⁵ all similar employees of a

²⁶ MCGUINNESS, *op. cit. supra* note 23, at 2, with particular reference to the bargaining unit at 97-113.

²⁷ See Friendly, *supra* note 24, at 867, 874; Grooms, *The NLRB and Determination of the Appropriate Bargaining Unit: Need for a Workable Standard*, 6 WILLIAM & MARY L. REV. 13 (1965); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

²⁸ See compilations cited note 2 *supra*.

²⁹ FWD Corp., 138 N.L.R.B. 386 (1962); New Orleans Bd. of Trade, Ltd., 1962 CCH NLRB 18572; Continental Baking Co., 99 N.L.R.B. 777 (1952); 27 NLRB ANN. REP. 63 (1962).

³⁰ See text accompanying note 10 *supra*.

³¹ G. Fox & Co., 5 CCH LAB. L. REP. (1966 CCH NLRB) ¶ 20032 (1965); F. W. Woolworth Co., 144 N.L.R.B. 307 (1963).

³² Sav-On Drugs, Inc., 138 N.L.R.B. 1032 (1962); Bullock's, Inc., 119 N.L.R.B. 642 (1957) (dictum).

³³ Metropolitan Life Ins. Co., 138 N.L.R.B. 512 (1962); Great Atl. & Pac. Tea Co., 99 N.L.R.B. 1500 (1952).

³⁴ Father & Son Shoe Stores, 117 N.L.R.B. 1479 (1957); Safeway Stores, Inc., 96 N.L.R.B. 998, 1000 (1951).

³⁵ Allstate Ins. Co., 118 N.L.R.B. 855 (1957).

particular employer throughout the nation,³⁶ or all of a particular craft or class of employees throughout a region.³⁷

The question then arises as to what should characterize the community. One aspect of community among the employees would emphasize homogeneity of employee skills. Thus it is not uncommon in the railroad industry to find a single unit which includes all of a particular class of one employer's workers, even though the individuals represented are geographically scattered. Another dimension of the employee community is the intramural aspect, which emphasizes functional integration and frequent physical contact. Even though two employees perform very different jobs, if they work nearby and take their lunch breaks together, there may be cogent reasons for placing them in the same bargaining unit if stability and harmony are desirable objectives.

A study of political groupings for the purposes of state and local government furnishes some interesting analogies. In fact the comparison has been made between the bargaining unit and the legislative voting district,³⁸ and in at least one important respect this is sound: the "constitutional draftsmen," *i.e.*, the employer and the union under the supervision of the Board, are in a position to draw the lines of the "district" so as to give maximum effect to their own interests. In short the unit can be gerrymandered. Just as legislative district lines may be drawn so as to keep a party in or out of power, so the unit lines may determine whether an employee is represented by a craft union, an industrial union, or no union at all yet possibly directly affected by union activity in another group. Moreover, the results of the election will have a tremendous impact on the employer's policy and consequently on the employees' working conditions.

In equally significant respects, the bargaining unit resembles a local improvement district. Improvement districts make a narrower range of decisions than does a legislature. They are generally constituted for such specific purposes as providing water or schools or disposing of sewage. Their boundary lines are drawn with a view towards efficiently performing a function which is physical rather

³⁶ Paxton Wholesale Grocery Co., 123 N.L.R.B. 316 (1959); Western Elec. Co., 98 N.L.R.B. 1018 (1952); Prudential Ins. Co. of America, 81 N.L.R.B. 295 (1949).

³⁷ Great Atl. & Pac. Tea Co., 128 N.L.R.B. 342 (1960) (multi-store unit of meat cutters found appropriate).

³⁸ See opinion of Judge Madden in *S. D. Warren Co. v. NLRB*, 353 F.2d 494, 498 (1st Cir. 1965); Note, *The Board and Section 9(c)(5): Multilocation and Single-location Bargaining Units in the Insurance and Retail Industries*, 79 HARV. L. REV. 811 (1966).

than representative, and consequently they rarely conform to legislative districts. Collective bargaining likewise involves a specialized area of decision-making. It is true that different decisions may be implemented at different levels of the employer's administration. Thus a pension fund may be nation-wide, while grievances are handled at the local level and working hours may be fixed on a regional level. Yet the way in which the terms are administered, as well as their substance, is largely contained in the collective bargaining agreement which is negotiated and administered by the representative of a particular bargaining unit, together with the employer.³⁹ Because the range of decisions is relatively narrow and because the decision-making process between the employer and one or more unions hinges not on voting power but on negotiating power, certain special interests among the employees may be legitimately considered. Aggregate employee interests may be effectively served by a single monolithic representative, or they may be better served by separate representation of remote or specially skilled groups.

In short the community of interests must be defined with the realization that the unit is not created merely for an election but for a continuing working relationship. After the election, despite the fact that the particular terms of collective bargaining may have an impact on a broad or narrow level, the unit determination has a permanent effect on the employer's operations and on the employees both within and without the unit. It will also define a power base for the union, both at the negotiating table and in a subsequent election campaign among other employees. Not surprisingly, the Board has emphasized both homogeneity and contiguity in defining a community of interest. It might well apply the improvement district analogy and look for the grouping of employees likely to lead to the net improvement of bargaining conditions and relations.

Because there are many possible communities of interest, the Board's decision must be guided by other factors which support one or another community. The determination is also likely to be guided by what the parties request. In general, however, to select either a very large or very small unit invites problems. For example, if the Board determines that only an employer-wide unit is ap-

³⁹ Were the entire employee complement of an employer divided at once into units which voted on policy or employment terms, then the election-district analogy would have greater force at this point. Yet, as a practical matter, organization almost always proceeds on a piecemeal basis. Often, therefore, only a part of an employer's operations are unionized, and the bargaining agreement applies only to those units for which the representative is certified. Therefore, as to the bargaining process, the improvement district analogy seems more apt.

propriate for a national chain store, it would be most unlikely that any union could ever mount an organizing campaign at such an extensive level. Consequently, such a determination might delay or totally deny the rights of employees to be represented by a union. In addition there might be a dilution of distinct and special interests which could be better served by separate representation.

On the other hand, to encourage a large number of very small units, which would mathematically appear to maximize employee freedom, might produce a highly unstable, factious bargaining relationship which would be inefficient from the employer's point of view, and which might well not be conducive to long-range employee interests.⁴⁰ While the presence of many different job categories under a single employer is often cited by smaller or specialized unions as justification for small units, common collective bargaining interests do not necessarily require similarity of jobs. It might be thought that if each job classification were separately represented by a union thoroughly versed in the nature of the work and the employee interests, the objectives of all employees would be most satisfactorily attained. While this theory lies behind craft unionism, as a practical matter small groups may be subject to greater pressures by the employer, since he can negotiate with each union separately. Likewise a plurality of unions can produce gross inequities in the wage scales, as evidenced by the railroads. Thus the greater bargaining power of a more broadly representative union may in many cases produce better terms for all. This is particularly true where a larger unit finding would reduce the dangers of inter-union rivalry and whipsawing⁴¹ of the employer. Different job classifications then may be set forth separately within a single bargaining agreement, with separate wage scales and terms provided. These are the more general considerations which the Board must balance in reaching a decision. In fact, the community of interests takes more precise form in the light of the factors discussed in the succeeding subsections.

B. *Geography and Physical Proximity*

It has just been observed that in defining a community of interests in terms of collective bargaining objectives, several potentially

⁴⁰ See Jones, *Self-Determination vs. Stability of Labor Relations: The Effect of American Potash*, 58 MICH. L. REV. 313 (1960).

⁴¹ "Whipsawing" is the process of striking one at a time the employer members of a multi-employer association." *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 90 n.7 (1957). For the purposes of this article, it will also be used to mean the striking by one of several bargaining units of a single employer.

appropriate units may result. Yet the fact that numerous employees perform similar jobs does not mean that they must be included in the same unit. A perennial consideration in defining a community of interest is physical proximity. While the employees of one factory in New York might have little in common with the employees in another plant in El Paso, they are likely to have more in common with the employees in another New York plant a mile away. This may be due to variations in values and customs from region to region with respect to employment terms and conditions. Wage scales alone may differ so that to link two distant groups in a single unit might pull one group's wages below its area norm while giving the other group an unexpected boost. On the other hand, where there are several plants or stores in the same area, the employees may see one another on or off the job, so that different terms between the two groups might arouse antagonism between the groups or between one group and the employer. This parallels the intramural situation in which the more closely stationed are two employees doing similar kinds of work, the greater will be the friction and animosity if their terms of employment are different. To avoid this potential animosity, proximately located employees should be included in the same unit, especially where they are performing similar jobs.

The walls of a plant or store and the territorial gaps between metropolitan areas are two natural boundaries for bargaining units. Therefore it seems entirely reasonable that the Board should be inclined to group employees into a single unit where they are working in the same store, city, or geographic territory.⁴² Unfortunately, there is no calculus by which to determine at what point geographic compactness should yield to dissimilarities of skills and bargaining interests, which may cut in favor of separate units within a single store, plant, or region.

C. *Administrative or Supervisory Division*

In a great many cases, the Board has stated its desire to find a

⁴² Weis Mkts., Inc., 142 N.L.R.B. 708 (1963) (two separate city-wide units of meat department employees); Dixie Belle Mills, 139 N.L.R.B. 629 (1962) (single plant unit); Sav-On Drugs, Inc., 138 N.L.R.B. 1032 (1962) (single store); Metropolitan Life Ins. Co., 138 N.L.R.B. 512 (1962) (all nine insurance offices in the greater Cleveland area); Great Atl. & Pac. Tea Co., 128 N.L.R.B. 342 (1960) (all three of the employer's stores in Atlanta, Georgia); Great Atl. & Pac. Tea Co., 119 N.L.R.B. 603 (1957) (all seven stores in Knoxville, Tennessee, together with two additional stores in Oak Ridge and Alcoa, fifteen and twenty miles distant from Knoxville respectively); Olin Mathieson Chem. Corp., 114 N.L.R.B. 948 (1955) (a multi-plant city-wide unit).

unit which corresponds to an employer's administrative division.⁴³ Although the Board rarely indicates precisely why an administrative division provides an appropriate grouping of employees for collective bargaining purposes, the reasons are not hard to guess. If an employer has a highly centralized and integrated operation in which all labor relations policy decisions come from a single administrative office, it would seem reasonable to meet this uniform, central employer policy by organization of that group which is directly affected by the decisions. Thus in the field of public utilities it has been held that the employer's operations are so centralized that a system-wide or employer-wide unit should be granted whenever the employees or a union request it.⁴⁴

Frequently a large employer divides the country into territories, each of which are under the supervision of a different officer or manager. Where a single supervisor handles the hiring and firing, the first steps in the grievance procedure, and the determination of which employees will do which jobs, this may provide strong evidence that the employment interests of those under his direction are in community. In some instances these various administrative functions are sufficiently vested in a single person or within a single division so that the Board will infer a corresponding community of bargaining interests and find an appropriate unit of all employees within the division. Thus during the 1950's, regarding retail department store chains, a decision such as that in *Paxton Wholesale Grocery Co.*⁴⁵ was not uncommon:

In view of the highly centralized administration of all the Employer's operations, and as the single-store units sought by the Petitioner do not conform to any administrative division of the Employer's operations, we find that the single-store units sought are inappropriate and that a company-wide unit is appropriate.⁴⁶

One of the two major problems with giving substantial weight to administrative divisions is that, as observed earlier,⁴⁷ different aspects of labor policy may be located at different levels. In the insurance industry, for example, an employer often has an administrative

⁴³ Drug Fair-Community Drug Co., 1961 CCH NLRB 16067; Paxton Wholesale Grocery Co., 123 N.L.R.B. 316 (1959); Father & Son Shoe Stores, Inc., 117 N.L.R.B. 1479 (1957); Sparkle Mkts., 113 N.L.R.B. 790 (1955); Safeway Stores, Inc., 96 N.L.R.B. 998 (1951).

⁴⁴ Western Elec. Co., 98 N.L.R.B. 1018 (1952); Niagara Hudson Power Corp., 79 N.L.R.B. 1115 (1948).

⁴⁵ 123 N.L.R.B. 316 (1959).

⁴⁶ *Id.* at 317.

⁴⁷ See text accompanying notes 44-45 *supra*.

division which includes six to fourteen states. Many policy decisions are made at that level. Wage scales are often set on a nationwide level while hiring and firing may be controlled by a district director whose authority is less than state-wide. Grievances are usually initially handled at the office level. In such a context the boundaries of an administrative division may have little relevance in defining a community of collective bargaining interests.⁴⁸ Indeed, the territories are established for administrative convenience, with little concern for labor policy. Finally, the establishment of a bargaining unit coextensive with an administrative unit leads to considerable confusion when the employer shifts his territorial divisions.

The second problem with the administrative unit is that it is frequently too large for a union to successfully organize. This may in itself indicate that any community of interest at that level is rather loosely knit. If the Board on its own initiative or at the employer's request declares that only an administrative division is an appropriate unit, this may operate to forestall organization or deny it entirely. A trend away from the restrictive administrative unit was announced in the landmark *Sav-On Drugs, Inc.*⁴⁹ case, and administrative supervision was made a factor on a more localized level in the equally significant though more problematic case of *Frisch's Big Boy Ill-Mar, Inc.*⁵⁰ In the latter case sufficient supervisory autonomy was found by the Board in each of ten restaurants located in a single city to warrant a finding that a single restaurant was an appropriate unit.

From the employer's point of view, the advantages which flow from a unit which conforms to a large administrative district are generally those which are traditionally associated with large units: stability and minimal whipsawing by rival unions. To split up an administrative district for bargaining unit purposes does not of itself adversely affect an employer's operations. Consequently, the disruptiveness which small units may cause simply goes to the question of big versus small units, without regard to administrative boundaries.⁵¹

⁴⁸ Thus it is not surprising that the Board has repeatedly declined insurance company requests to certify an administrative unit as alone appropriate.

⁴⁹ *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032 (1962).

⁵⁰ 147 N.L.R.B. 551 (1964), *unfair labor practice proceeding*, 151 N.L.R.B. 454 (1965), *enforcement denied*, 356 F.2d 895 (7th Cir. 1966) (unit found inappropriate).

⁵¹ Many employers find successful bargaining not only where the unit is less than administrative in scope but also where it combines parts of several different adminis-

Thus the Board today is giving little if any weight to administrative divisions, except where, at the supervisory level, the degree of control vested in a local manager may indicate a similarity of treatment and interest with respect to terms of employment.⁵² Quite rightly, the Board is unwilling to shackle employee organizational interests to divisions which have no apparent relevance to collective bargaining factors. Indeed, where common supervision is cogent, it is usually because other factors, such as common skills or conditions, proximity, or interchange, are present.

D. Functional Integration

Functional integration may frequently overlap several of the considerations already discussed, notably, physical or geographic proximity, similarity of conditions, and occasionally common supervision. Yet it can exist independently of these other related factors, and it is frequently cited by the Board as a significant criterion. In *Borden Co., Hutchinson Ice Cream Div.*,⁵³ in spite of the hiring and firing authority of a plant manager, the lack of employee interchange, the prior history of single-plant bargaining, and the variance of working hours based on different local practices, the Board granted a petition by the Teamsters Union requesting a unit of three manufacturing-and-distribution plants and seventeen distribution plants. Said the Board: "[T]he integration of the Employer's operations bespeaks the appropriateness of the broad overall unit."⁵⁴ The integrated processes to which the Board referred are production, distribution, and sale. Yet it is far from clear that the fact that several classes of employees happen to handle the same piece of merchandise itself indicates common collective bargaining interests. The *Borden* case is further questionable in view of the presence of the other factors cutting in the opposite direction.

More recently in *Potter Aeronautical Corp.*⁵⁵ the Board, reversing the Regional Director, denied a request by Local 47 of the International Association of Machinists (IAM) for a unit of the employer's machine shop employees (fifty-five to sixty men) and held that a unit which included both the machine shop and the twenty

trative divisions. See *First Nat'l Stores, Inc.*, 27 N.L.R.B. 518, *supplementing* 26 N.L.R.B. 1275 (1940).

⁵² *Spartan Dep't Stores*, 140 N.L.R.B. 608 (1963); *Martin Marietta Corp.*, 139 N.L.R.B. 925 (1962); *Challenge-Cook Bros.*, 129 N.L.R.B. 1235 (1961).

⁵³ 89 N.L.R.B. 227 (1950).

⁵⁴ *Id.* at 229.

⁵⁵ 5 CCH LAB. L. REP. (1966 CCH NLRB) § 20037 (1965).

to twenty-five employees in the electronics department was appropriate instead. The case was remanded with instructions authorizing an election in the broader group if the union showed an interest.⁵⁶ The two groups were under separate foremen and held separate job classifications. While the result might have been logically based on physical proximity and common working conditions, the Board instead grounded its finding entirely on the fact that various components of the employer's products pass back and forth from one group to another.⁵⁷ On this rationale it would seem that a highly skilled electronic technician, a lathe operator, and a janitor, all with radically different skills, wages, and interests, could be grouped in a single unit. Indeed, such a motley unit was found appropriate in *S. D. Warren Co.*⁵⁸

It is submitted that what is really behind the functional integration factor is the possibility that a work stoppage by one group will tie up the employees in the other groups. Although the several groups performed different work in *Potter Aeronautical* and *S. D. Warren*, each was very much dependent upon the other. Thus it seems only fair that such employees should abide by a majority decision of all those directly affected by the activities of one component group.

In *Borden*, the Board may well have been motivated simply by the fact that single-location bargaining would have produced a lack of bargaining power and possible attempts by the employer, who was requesting smaller units, to play one group off against the other, thereby creating highly unstable conditions.

The functional integration factor has been used to support groupings in other contexts where the underlying objective seems to have been stability. In *American Factors, Ltd.*,⁵⁹ a combined unit of four departments of a building materials supplier was found appropriate based on integrated operations. In *Overton Mkts., Inc.*,⁶⁰ the Board found appropriate two ten-store units encompassing meat department employees in one, and selling and miscellaneous em-

⁵⁶ *Id.* § 20037, at 25116.

⁵⁷ *Ibid.*

⁵⁸ 144 N.L.R.B. 204 (1963), *approved*, *S. D. Warren Co. v. NLRB*, 353 F.2d 494 (1st Cir. 1965). The Board granted a joint petition by the International Brotherhood of Electrical Workers, IAM, United Brotherhood of Carpenters and Joiners, and the International Brotherhood of Firemen and Oilers. The unit corresponded roughly to an administrative grouping and included a wide array of skills ranging from electrical workers to janitors.

⁵⁹ 1960 CCH NLRB 13738.

⁶⁰ 142 N.L.R.B. 615 (1963).

ployees in the second. The majority felt that certain integrated aspects of the employer's operations, namely joint advertising, common purchasing, and group profit-sharing and insurance plans, outweighed the asserted lack of overall bargaining history, absence of employee interchange, and variance of wages and hours which cut in favor of separate smaller units.⁶¹ Moreover, as to the second unit, the Retail Clerks had petitioned for a unit limited to grocery, produce, and dairy products employees. But the Board insisted that this unit include warehousemen and separately located bakery employees solely on the theory that because the bakers supplied all ten stores, did some selling, and took the same holidays, the entire group was functionally integrated and therefore an appropriate unit.⁶²

The converse of the factor, namely, functional separation from a logical or established unit, was the subject of a recent split decision by the Board in *Kalamazoo Paper Box Corp.*⁶³ A majority made up of Chairman McCulloch and Members Fanning and Brown denied a petition by the Teamsters to sever truckdrivers from an existing production and maintenance group represented by the Paper Mill Workers on the grounds that the wage scales, hours, benefits, and seniority for the entire group were similar. Members Leedom and Rodgers in dissent argued that the drivers were functionally entirely distinct from the other employees and that their true community of interest was with other Teamster drivers. However, in view of the diverse kinds of employees whom the Teamsters represent, many of whom are not drivers, this argument is not as strong as it might be in a different context. On the other hand, it was the functional distinctness argument upon which the Board later based its holding in *Dixie Belle Mills, Inc.*,⁶⁴ where the two employee groups in question were in separate plants and the requested single location unit was granted. The greater physical separation in *Dixie Belle Mills* makes the case easily reconcilable with *Kalamazoo Paper Box Corp.*

Of course the presence of functional integration alone does not require that the functionally integrated employees be placed in the same unit. The notable exception is craft severance from a broader

⁶¹ *Id.* at 618-19. *But see id.* at 622 (dissenting opinion).

⁶² *Id.* at 620.

⁶³ 136 N.L.R.B. 134 (1962).

⁶⁴ 139 N.L.R.B. 629 (1962). In that case the employer had two plants in Georgia twenty miles apart with highly centralized management and personnel policies. A single plant unit was declared appropriate at the request of the Textile Workers Union not because of physical separation but because of functional separation.

unit.⁶⁵ However, there may be special considerations in permitting craft severance which do not apply to non-craft employee groups. These considerations are examined later,⁶⁶ and in general it may be said that the existence of craft severance does not substantially detract from the principle that interdependent employee groups have an important community of interest.

E. *Employee Interchange*

Where employees are frequently transferred in and out of the proposed bargaining unit, it makes little sense to find such a unit appropriate for collective bargaining purposes. No worthwhile purpose is served by negotiating a contract for employees A, B, and C if within a few months they will be replaced by X, Y, and Z. Moreover, the administration of such a collective bargaining agreement would be disorderly if not impossible. To have an employee on a different wage scale and possibly different hours as he moves from unit to unit is irrational. Moreover, a grievance procedure would become unmanageable if an employer could readily transfer an aggrieved employee to a unit where there was no grievance procedure. Likewise, a seniority system and a pension fund covering such a unit would be chaotic. Thus the Board weighs the frequency with which employees are transferred in and out of the proposed unit as a factor in determining the appropriateness of the unit.⁶⁷

The counterargument is that where the excluded employees are left without a union the employer will often give them the same terms which he gives those within the unit in order to eliminate the incentive of the former group to unionize. Yet if this does happen, it is often only with respect to wages and other tangible benefits and then perhaps for a short period. But even if there were a widespread benefit in wages and terms, it is far from clear that it would be desirable to encourage a system by which a small minority would dictate the terms which would in effect be applied to the majority as well. In any case, such speculation as to what an employer might do if a single store were certified should carry

⁶⁵ There are four exceptions to the craft severance rule in the following four highly integrated industries: National Tube Co., 76 N.L.R.B. 1199 (1948) (steel); Permanente Metals Corp., 89 N.L.R.B. 804 (1950) (aluminum); Weyerhaeuser Timber Co., 87 N.L.R.B. 1076 (1949) (lumber); Corn Prods. Ref. Co., 80 N.L.R.B. 362 (1948) (wet-milling). The Board has declined to extend further the *National Tube* line of exceptions. American Potash & Chem. Corp., 107 N.L.R.B. 1418 (1954).

⁶⁶ See text accompanying notes 197-211 *infra*.

⁶⁷ Meijer Supermarkets, Inc., 142 N.L.R.B. 513 (1963); Daw Drug Co., 127 N.L.R.B. 1316 (1960).

little weight when matched against the high probability that workable bargaining will be frustrated where there is substantial interchange.

One consequence of placing great weight on employee interchange is that it may give employers a tool with which to forestall organization. That is to say, by frequently transferring employees between a large group of stores or offices the employer may create a situation in which the Board is forced to determine that the large group alone is an appropriate unit. This large unit is likely to be more difficult for a union to organize.⁶⁸ Although there is some indication that in a few instances this has happened,⁶⁹ the argument can be overemphasized. An employer who transfers often pays a price in terms of efficiency, particularly when the jobs in question involve dissimilar or unfamiliar work. Moreover, in moving employees from location to location the management may sufficiently inconvenience and annoy them so as to furnish a fresh incentive to unionize. Consequently, an employer is likely to think twice before indulging in excessive and unnecessary transfers.

F. Bargaining History

The Board has repeatedly asserted that it will give considerable weight to any significant collective bargaining history.⁷⁰ Of course, the history may apply to an industry, an area, or a particular employer. The first of these may give some indication of what has

⁶⁸ It is submitted that it would be exceedingly difficult to make out an unfair labor practice case against the employer under NLRA § 8(a)(1), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) (1964) (coercion of an employee with respect to the exercise of organizational rights), under NLRA § 8(a)(2), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(2) (1964) (interference with union organization), or under NLRA § 8(a)(3), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1964) (discrimination in order to discourage unionization), since the employer could almost invariably produce a valid business purpose in defense.

⁶⁹ In *Peerless Store*, Case No. 1-RC-3498 (1965) (unreported), the Regional Director denied a petition by the Retail Wholesale Department Store Union seeking to represent a unit of ninety-six selling employees. The Regional Director found that a unit of selling, non-selling, and warehouse employees would be appropriate instead. The RWDSU feels that this result was brought about by the employer's stepped up interchange between the groups. Interview with Mr. Max Steinbock, Public Relations Director, RWDSU, Dec. 27, 1965. Mr. Ernest Modern, who is in charge of unit determinations for the First Region and is highly regarded by both management and labor, feels that at least one insurance company, in response to recent Board determinations that single office units are appropriate, has been increasing its transfers significantly. Interview with Mr. Ernest Modern, Assistant to the Regional Director, First Region NLRB, Nov. 24, 1965.

⁷⁰ *Meijer Supermarkets, Inc.*, 142 N.L.R.B. 513 (1963); *Eaton Mfg. Co.*, 121 N.L.R.B. 813 (1958); *General Motors Corp.*, 120 N.L.R.B. 1215 (1958); 27 NLRB ANN. REP. 63 (1962); 26 NLRB ANN. REP. 55 (1961).

proven workable for other employers. The second may indicate the expectations of the parties in light of local practice. Yet because any rule based on determinations in other contexts is likely to overlook particular variations in key factors or different employee preferences, the Board has used the term "bargaining history" to denote only the history of bargaining with respect to a particular employer.⁷¹

There are several reasons why the nature of a unit's bargaining experience with a particular employer is worth considering. First, it provides empirical evidence of a workable collective bargaining relationship (unless of course it has completely broken down). Second, although a community of interest might not have existed prior to the establishment of the earlier unit, years of bargaining collectively may well have established such a community. These arguments are especially persuasive where severance, as distinguished from initial representation following a lapse of collective bargaining, is sought. Where a collective bargaining relationship already exists, the incumbent union invariably feels that it ought not to be harrassed by the possibility that, if it considers long-term interests at the potential expense of short-run concerns, another union might come in and gain representation of a dissenting faction within the larger unit. Thus the Board has held that a five-year multiplant history will prevent severance of a single plant,⁷² and that after twelve years of employer-wide bargaining the appropriate unit was all seventeen of the employer's stores.⁷³

Yet by way of counterargument, as a practical matter a union generally stays in unless it is doing an especially bad job. This is due in part to the fact that as the incumbent representative it has far greater opportunity to impress, or at least to communicate with, the employees. It is also due in part to employee apathy. Moreover, although section 9(c)(3)⁷⁴ provides only that at least a year must transpire between representation elections, the danger of organizational activity by rivals has been vastly reduced beyond the possibility of annual harrassment by the AFL-CIO itself through a series

⁷¹ Occasionally the Board does declare a "presumptively appropriate unit," usually to its subsequent regret, based on accumulated cases involving similar industries with similar considerations presented. See, e.g., Safeway Stores, Inc., 96 N.L.R.B. 998 (1951); Metropolitan Life Ins. Co., 56 N.L.R.B. 1635, 1639-40 (1944).

⁷² Firestone Tire & Rubber Co., 103 N.L.R.B. 1749 (1953); *accord*, Mengel Co., 104 N.L.R.B. 58 (1953).

⁷³ Meijer Supermarkets, Inc., 142 N.L.R.B. 513 (1963).

⁷⁴ NLRA § 9(c)(3), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 159(c)(3) (1964).

of no-raiding agreements which are binding on all affiliates. The most recent and far-reaching of these is the "Internal Disputes Plan" which was adopted as an amendment to the AFL-CIO Constitution in 1961.⁷⁵ Although this pact does not cover such non-affiliates as the United Mine Workers or the Teamsters, it does govern a substantial majority of the unions usually involved in unit disputes and has gone far to alleviate the problems of union rivalry which have plagued the labor movement for so many years. Under this no-raiding pact, which has been supplemented by a number of jurisdictional agreements between unions, virtually the only way in which an incumbent union can be threatened by a rival is through a decertification petition by a majority of the employees in the unit or in a subdivision which by itself would be an appropriate unit. Owing to the advantages with which the incumbent is already blessed, it is highly unlikely that a large group of employees will organize a successful decertification movement on their own. Moreover, if this should happen, one can infer that the employees really have something to complain about concerning the quality of the representation which they are getting. To this remote extent at least, perhaps the possibility of rivalry offers a wholesome incentive to the union to do its best job of representing the employees.

If such a decertification petition is presented by a group which would be an appropriate unit and which seeks severance from a larger existing unit, the Board should consider that to bind a group of employees by a decision which may have been made in favor of a larger unit many years ago, and by substantially different individuals, may not maximize employee freedom.⁷⁶ In addition the

⁷⁵ The AFL-CIO Constitution, art. XXI, provides in part:

SECTION 2. Each affiliate shall respect the established collective bargaining relationship of every other affiliate. No affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate. For purposes of this Article, the term "established collective bargaining relationship" means any situation in which an affiliate . . . has either (a) been recognized by the employer . . . or (b) been certified by the National Labor Relations Board. . . .

SECTION 3. Each affiliate shall respect the established work relationship of every other affiliate. For purposes of this Article, an "established work relationship" shall be deemed to exist as to any work of the kind which the members of an organization have customarily performed at a particular plant or work site.

⁷⁶ Many units are determined through "consent" elections where the union and the employer agree on the appropriate unit, often without consideration of the interests of particular employee groups. The Board has held that such "consent" determinations are not binding on the Board. *Kaiser Aluminum & Chem. Corp.*, 100 N.L.R.B. 107, 113 (1952); *Sperry Gyroscope Co.*, 94 N.L.R.B. 1724, 1725 (1951).

relevant factors may have changed so that a unit which a decade ago would not have been certified is now eligible.

It would appear from the discussion thus far that the Board should not allow the mere presence of broad bargaining to automatically prevent severance of employees in a smaller component unit which would by itself be appropriate in the absence of any bargaining history. Yet frequently the presence of broad bargaining is accompanied by physical proximity or contiguity, common collective bargaining interests, and even employee interchange. Even in the absence of such established determinants, there may be additional reasons for not disrupting the existing bargaining relationship. For example, if a pension fund has been established and the withdrawal of a large group of employees would not only cause major accounting problems but also cost the other employees the benefits which accrue from the reduced rates at which such funds are available when a large number of employees are contributing, then arguably the cost of severance is too great. The result forecast by this suggestion may at first seem anomalous: a group of employees (for example, one store of a fifteen-store unit) may be appropriate to establish a bargaining unit but not to sever. Yet the situations are reconcilable when it is realized that in each case the Board must, under section 9(b), consider the freedom of not only the employees within the proposed unit but also those on the outside who will be affected, since only in that way can aggregate employee freedom be "the fullest." It is not unreasonable that with no bargaining history a single store out of fifteen would be appropriate but that after many years in a fifteen-store unit the interests of the employees in the single store would have become so enmeshed with and interdependent upon the interests of the other employees that severance at this point could cause far greater harm to the employees in the other fourteen stores than would separate representation at the outset. This injury might well be so substantial that the single store unit would no longer be appropriate.

In most cases the Board's application of the rule that prior bargaining history is significant and that an existing bargaining relationship should not be disturbed is sound. Indeed the only consistent exception to the prohibition of severance from an existing larger unit is the craft severance exception, which has express

Such a stipulated unit may bind the employer and union, however. *Montgomery Ward & Co.*, 123 N.L.R.B. 135 (1959).

support in the statute.⁷⁷ Although the Board is justifiably reluctant to extend this exception, a *caveat* should be expressed that the general rule is sound only so long as it is invoked to preserve an existing and proper community of interest.

Finally, where amalgamation into a larger unit is sought by employees in an existing smaller unit, the disruption is likely to be minimal, and consequently the weight given to the prior history in that case should be correspondingly reduced.

G. *Extent of Organization*

It has already been pointed out that under section 9(c)(5) the extent to which the employees have organized may be a factor in the Board's determination, but it may not be the only factor.⁷⁸ Often it is virtually impossible to tell when the Board is giving controlling weight to the extent of organization. The writers of the majority opinion are reluctant to mention the words. This difficulty is compounded by the organizational factor which is built into any union petition, namely, that the union will seek only a group of employees among whom it thinks it can win a majority. In general an administrative agency is presumed to be acting within its statutory authority,⁷⁹ yet the recent shift in Board policy towards greater flexibility has produced a marked rise in the number of union petitions which are granted, often by a three-to-two decision in which the dissenters charge that the majority is being controlled by the extent of organization in violation of section 9(c)(5).⁸⁰ Employers have begun to complain bitterly of a "sellout" to the unions. These developments have caused reviewing courts to take an increasingly skeptical view of the Board's reasoning.⁸¹

One set of circumstances which has been cited as evidence of a 9(c)(5) violation is that in which a union has sought to organize a

⁷⁷ NLRA § 9(b)(2), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 159(b)(2) (1964). See *Celotex Corp.*, 105 N.L.R.B. 815 (1953); *W. C. Hamilton & Sons*, 104 N.L.R.B. 627 (1953); see also text accompanying notes 197-211 *infra*.

⁷⁸ See text accompanying notes 12-14 *supra*. See generally the able studies of this factor in Note, *supra* note 38, at 819-26; Note, *Section 9(c)(5) and Bargaining Unit Determination in the Insurance Industry*, 19 RUTGERS L. REV. 739 (1965).

⁷⁹ See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947).

⁸⁰ *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032, 1037 (1962); *Metropolitan Life Ins. Co.*, 138 N.L.R.B. 565, 567-68 (1962); *Quaker City Life Ins. Co.*, 134 N.L.R.B. 960, 962 (1961).

⁸¹ See *Metropolitan Life Ins. Co. v. NLRB*, 327 F.2d 906, 909 (1st Cir. 1964), *vacated and remanded*, 380 U.S. 438 (1965). For a discussion of the case, see text accompanying notes 3-7 *supra*. See also *NLRB v. Pittsburgh Plate Glass Co.*, 270 F.2d 167 (4th Cir. 1959), *cert. denied*, 361 U.S. 943 (1960).

large group of employees, has failed, and then seeks a determination by the Board that a smaller subdivision of the original group constitutes an appropriate unit. *NLRB v. Glen Raven Knitting Mills, Inc.*,⁸² presented such a case. In 1951 the petitioning union sought to organize the employer's entire plant but lost. In 1954 the union unsuccessfully tried to organize all production employees. Thereafter, at the union's request, the Board permitted a smaller unit of knitting employees. The Court of Appeals for the Fourth Circuit held that this sequence demonstrated that the extent of organization was the only factor considered, and consequently the Board's order to bargain was not enforced.⁸³ This ruling indicates that although a unit may be appropriate for any other union which has not previously sought a larger group,⁸⁴ once a union tries for a different unit and fails, it is disqualified from the game. Surely it must be clear that although prior unsuccessful attempts may suggest the reason why the union filed a petition for the smaller group, it by no means follows that in granting the request the Board was also motivated by organizational factors.

Appellate exasperation was more justified in Judge Woodbury's opinion for the First Circuit in *Metropolitan Life Ins. Co. v. NLRB*.⁸⁵ There the court reviewed a series of decisions in which the Board had grouped insurance offices in less-than-state-wide units of varying size and compactness, with what appears to have been no common rational theme, save that in each case the union got what it requested.⁸⁶ At least one inference which can be drawn from this pattern is that extent of organization was controlling. Yet as the Supreme Court later observed, this is not the only reasonable inference.⁸⁷ Because different results may reflect different fact situations or simply shortsighted reasoning by the Board, as well as the possibility that extent of organization has been controlling, the jump by Judge Woodbury to the latter conclusion was not upheld.⁸⁸

⁸² 235 F.2d 413 (4th Cir. 1956). See also the dissent in *Allied Stores, Inc.*, 150 N.L.R.B. 799 (1965).

⁸³ 235 F.2d at 416.

⁸⁴ A unit of knitting employees in a similar unit was in fact upheld by the Fourth Circuit a year later, when there was no showing of prior attempts to organize on a broader level. *NLRB v. Morgantown Full Fashioned Hosiery Co.*, 241 F.2d 913, 915-16 (4th Cir. 1957).

⁸⁵ 327 F.2d 906 (1st Cir. 1964), *vacated and remanded*, 380 U.S. 438 (1965).

⁸⁶ *Id.* at 907-11. For a discussion of these cases, see the text accompanying notes 105-19 *infra*.

⁸⁷ *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442 (1965).

⁸⁸ *Id.* at 444.

Some critics attack the Board's approval of small units as though small units were by nature inappropriate. Yet the legislative history suggests that Congress was primarily concerned about fragmentation of a unit into several inappropriate units. In addition to the language of the House Report cited earlier,⁸⁹ the following remarks by Senator Taft, explaining the form of the bill adopted by the joint conference, support this view:

Subsection 9(c)(5) adopts the House amendment written to discourage the Board from finding a bargaining unit to be appropriate even though such unit was only a fragment of what would ordinarily be appropriate, simply on the extent of organization theory.⁹⁰

Subsequently, Senator Taft further explained the purpose of 9(c)(5) in reply to criticism that this section might prevent the Board from finding small groups to be appropriate units:

This amendment . . . overrules the "extent of organization" theory sometimes used by the Board in determining appropriate units. Opponents of the bill have stated that it prevents the establishment of small operational units and effectively prevents organization of public utilities insurance companies and other businesses whose operations are widespread. It is sufficient answer to say that the Board has evolved numerous tests to determine appropriate units, such as community of interests of employees involved, extent of common supervision, interchange of employees, geographic considerations, etc., *any one of which may justify the finding of a small unit*. The extent-of-organization theory has been used where all valid tests fail to give the union what it desires and represents a surrender by the Board of its duty to determine appropriate units. Its use has been particularly bad where another union comes in and organizes the remainder of the unit which results in the establishment of two inappropriate units.⁹¹

Clearly Congress had no antipathy to small units as such. Congress asked only that the Board find that at least one of its non-organizational criteria support its decision.

Although small units may be entirely appropriate, in many instances the Board has encouraged organization at the larger of two appropriate unit levels. This is especially true where the Board finds that stability is highly desirable either in the industry or with respect to a particular employer. Yet the argument might be made that to arbitrarily grant a petition for the larger unit which comprises several smaller units which, if separately requested, might themselves be appropriate, would violate 9(c)(5). The argument

⁸⁹ See note 14 *supra*.

⁹⁰ 93 CONG. REC. 6444 (1947).

⁹¹ *Id.* at 6860. (Emphasis added.)

is that to permit the union to have a small unit (for example a single store) when it requests it and in another case to permit it to have a larger unit (all the stores in a region) would be to base the decisions on what the union could organize. However, the language of 9(c)(5) seems to apply only to the determination that a unit is or is not appropriate and not to a choice between two appropriate units. As to the smaller units, the legislative history makes clear that 9(c)(5) was designed to prevent fragmentation into a unit inappropriate on its merits, not the breaking down of a large unit into lesser component appropriate units.⁹² Consequently, the Board should not fear a violation of 9(c)(5) by choosing the broader or the narrower appropriate unit, depending upon which is likely to produce the most effective bargaining relationship.

III. THE FACTORS IN THEIR CONTEXT

A. *The Insurance Industry*

(1) *Historical Developments in the Board's Rulings.*—The history of the appropriate bargaining unit in the insurance industry might be written with the Board as the tragic hero. Early in its career it made a small mistake. Seventeen years later it realized the error but, instead of acknowledging it, the Board garbled its lines, bringing a storm of brickbats upon its subsequent decisions.

Although initially the union organization of insurance companies was sporadic, the Board decided in a 1944 case involving the Metropolitan Life Insurance Company that a state-wide grouping of debit insurance agents⁹³ was the most appropriate unit.⁹⁴ Because a number of insurance companies have nation-wide operations, with multi-state administrative divisions, employers have habitually insisted that successful collective bargaining could only take place on one of these broader levels. In the light of subsequent experience, it would appear that this position was taken largely to forestall unionization. Nevertheless, in response to the suggestion, the Board frequently encouraged the establishment of larger units. In *Prudential Ins. Co. of America*,⁹⁵ the Board found a thirty-one-state unit

⁹² It is well settled that a union need not seek the largest of several alternatively appropriate units. P. Ballantine & Sons, 141 N.L.R.B. 1103 (1963); Ballantine Packing Co., 132 N.L.R.B. 923 (1961).

⁹³ The "debit" agent is so called because his geographic territory of primary responsibility is called a "debit."

⁹⁴ Metropolitan Life Ins. Co., 56 N.L.R.B. 1635 (1944). A similar result was reached in Metropolitan Life Ins. Co., 43 N.L.R.B. 962 (1942).

⁹⁵ 80 N.L.R.B. 1583 (1948), *amended*, 81 N.L.R.B. 295 (1949).

appropriate, and in *John Hancock Mut. Life Ins. Co.*,⁹⁶ a nation-wide unit was certified as appropriate, excepting offices in three states which had previously been organized by other unions. Indeed, the Board was so impressed with the drive by the CIO to organize John Hancock on a nation-wide level that, prior to the 1949 decision just cited, the Board denied a petition by a rival AFL union requesting state-wide units in Maryland and Delaware.⁹⁷

During the 1950's the unions were able to organize some receptive employees on a large scale, but they were unsuccessful in a number of companies. This was largely due to the great difficulty in sustaining union enthusiasm at a high pitch in a large number of offices across a state at the same time, particularly since the employees were exposed daily to the employer's anti-union propaganda. Although the Board continued to deny petitions for less than state-wide units of debit agents, it did not extend the rule to insurance adjusters⁹⁸ or to clerical employees,⁹⁹ among whom units of less than state-wide scope were permitted. Further evidence of dissatisfaction with the rather wooden *Metropolitan Life* rule appeared in 1959 in *Metropolitan Life Ins. Co.*,¹⁰⁰ wherein a union sought recognition of a single office. Although the petition was dismissed, based on *Metropolitan Life*, Member Fanning wrote a separate concurring opinion in which he urged abandonment of the rule in favor of a more flexible approach based on the traditional factors.¹⁰¹

Two years later Fanning's position was adopted in the landmark case of *Quaker City Life Ins. Co.*¹⁰² Granting a petition for a single-office unit in Alexandria, Virginia, the Board overruled the *Metropolitan Life* doctrine in these terms:

[T]he rule was adopted solely in anticipation of broader organization on a companywide or statewide basis, which at the time seemed imminent. As a practical matter, however, such statewide or companywide organization has not materialized, and the result has been to arrest the organizational development of insurance agents to an extent certainly never contemplated by the Act, or for

⁹⁶ 82 N.L.R.B. 179 (1949).

⁹⁷ *John Hancock Mut. Life Ins. Co.*, 64 N.L.R.B. 541 (1945). As of this time the CIO represented 166 of Hancock's 189 district offices, while the AFL represented only fifteen.

⁹⁸ *Travelers Ins. Co.*, 116 N.L.R.B. 387 (1956).

⁹⁹ *Texas Prudential Ins. Co.*, 109 N.L.R.B. 319 (1954).

¹⁰⁰ 123 N.L.R.B. 610 (1959).

¹⁰¹ *Id.* at 613, 614 (concurring opinion).

¹⁰² 134 N.L.R.B. 960 (1961), *aff'd*, 319 F.2d 690 (4th Cir. 1963), *enforcing* 138 N.L.R.B. 61 (1962).

that matter, by the Board that decided the Metropolitan Life case.¹⁰³

The Board acknowledged that the *Metropolitan Life* rule was forestalling organization to an extent not contemplated by the statute. Nevertheless, it strongly suggested that the reason why it was abandoning the rule was not so much that smaller units might be inherently appropriate and that the state-wide minimum requirement was actually denying employees organization rights contrary to sections 7 and 9(b); rather, the suggestion was that by allowing smaller units the Board would make it easier for the unions to organize. In short, the Board gave every appearance that it was this organizational consideration which, as the two dissenting Members asserted, controlled the decision in violation of section 9(c)(5).

In terms of statutory construction and application, the Board had made a serious mistake in allowing its 1944 *Metropolitan Life* holding to become a hard and fast rule. The effect of that rule in the view of most employers and many observers was that under the established criteria used by the Board there could not be a sufficiently marked community of interest among insurance agents in groups of less than state-wide scope to warrant a finding of an appropriate bargaining unit. This rule by 1961 carried the sanction of seventeen years of rigid application. Criticism could have been averted only by a carefully written opinion, strongly emphasizing the language and purpose of section 9(b) and setting forth in considerable detail the factors by which the Board concluded that a community of interest as to collective bargaining objectives could be found in the single office. The Board, working under a back-breaking case load and possibly unaware of the significance which its decision was to have, was not up to the task.

In retrospect, it seems that state-wide units had been in fact a compromise between employer demands for multi-state units and union demands for units of less than state-wide scope. Spokesmen for the insurance companies, the Insurance Workers International Union (IWIU), and the Board acknowledged this.¹⁰⁴ Indeed, the state-wide unit, when tested against established factors, is remarkably

¹⁰³ *Id.* at 962.

¹⁰⁴ The writer has verified this "compromise" through a series of interviews. Employers who have expressed such a view have understandably requested anonymity, since they are currently involved in collective bargaining and organizational activity, not to mention the fact that the appropriateness of the less than state-wide unit is still under litigation at this writing. Mr. Ernest Modern of the NLRB strongly asserts that the state-wide rule was in fact such a compromise. Interview with Mr. Ernest Modern of the NLRB, Nov. 24, 1965.

inappropriate. No large company has administrative divisions corresponding to state boundaries. Labor policy is formulated either at the local or employer-wide level. Employment terms and conditions have no relationship to state lines, except for the fact that there are occasionally state licensing requirements. Finally, offices separated by a state border may be geographically closer to one another and may experience more contact or interchange than offices within the same state.

(2) *The Impact of Quaker City*.—The departure from the *Metropolitan Life* compromise is not likely to injure legitimate employer interests. The usual employer argument that a large unit is easier to negotiate with and is administratively more efficient is not supported by the facts. An employer can negotiate with many units just as easily as he can with one, since the many units can be covered by a single master contract. Moreover, since the insurance field is dominated by a single union, the IWIU, the employer has not the frictions of rival unionism and multi-union bargaining which characterize the retail chain store industry. Although the employer may be angry that the Board turned its back on him in *Quaker City*, his efficiency is not impaired by smaller unit determinations.

This does not mean, however, that indiscriminate unit determinations of less than state-wide scope may not be injurious to legitimate employee interests. To approach this aspect of the problem it is worth examining the crazy-quilt of decisions which followed *Quaker City*. In 1962 the Board found appropriate a unit consisting of all six Metropolitan Life Insurance Company offices in the city of Cleveland, together with its three suburban offices.¹⁰⁵ The rationale behind this decision was that, since in *Quaker City* the Board had found a single office appropriate, it would also be appropriate to group several proximately located offices into a single unit. In appraising this conclusion, it is worth noting that the company divided the nation into fourteen administrative territories and that its operations were highly centralized, with nation-wide uniformity as to wages and terms. Labor policy decisions, including final hiring and firing, were handled at the home office in New York City. The "central" administrative territory, which includes Cleveland, comprises sixty-eight offices. Rejecting the employer's preferred units of (1) nation-wide, (2) territorial, and (3) state-wide,

¹⁰⁵ Metropolitan Life Ins. Co., 138 N.L.R.B. 512 (1962), *unfair labor practice*, 141 N.L.R.B. 1074 (1963), *enforced*, 330 F.2d 62 (6th Cir. 1964), *vacated and remanded per curiam*, 380 U.S. 525 (1965).

the Board furnished some of the information which it had omitted in *Quaker City*:

[W]e rely particularly upon the fact that each such office is a complete, self-contained operating unit; that there is a substantial distance between the district offices here involved and the home office; that each office is in certain respects autonomous in its day-to-day operations; that there is separate, immediate supervision in each such office; and that there is no transfer or interchange among offices. Although we have found that the individual district offices may constitute separate appropriate units, we do not believe that such a finding should preclude the grouping of such offices where such grouping is justified by cogent geographic considerations.¹⁰⁶

Shortly after this Cleveland decision, the Board found appropriate a unit of both offices of the Metropolitan Life Insurance Company located in Wilmington, Delaware.¹⁰⁷ Metropolitan had a third office in the state, but it was located forty-six miles away. At approximately the same time, the Board found two out of seven offices in greater Pittsburgh to be separate appropriate units, even though the two offices were only seven miles apart.¹⁰⁸ The geographic considerations make the latter decision look at odds with *Metropolitan (Cleveland)*, but the Third Circuit affirmed the decision per curiam, based on its earlier acceptance of the Delaware case.¹⁰⁹

In other cases, the Board has found the following insurance units appropriate: all debit agents in the greater Detroit area;¹¹⁰ a single office in Woonsocket, Rhode Island;¹¹¹ two offices in Cleveland and a detached office twenty-eight miles away in Lorain (a "detached" office is under the administrative control of the urban office);¹¹² a single office in Sioux City, Iowa, together with detached offices in Fargo, North Dakota, and Sioux Falls, South Dakota, 284 and 120 miles distant, respectively;¹¹³ and all thirty-three of the

¹⁰⁶ *Metropolitan Life Ins. Co.*, 138 N.L.R.B. 512, 515 (1962). (Footnote omitted.)

¹⁰⁷ *Metropolitan Life Ins. Co.*, 138 N.L.R.B. 565 (1962), *unfair labor practice*, 141 N.L.R.B. 337 (1963), *enforced*, 328 F.2d 820 (3d Cir. 1964), *vacated and remanded per curiam*, 380 U.S. 523 (1965).

¹⁰⁸ *Western & So. Life Ins. Co.*, 138 N.L.R.B. 538 (1962), *aff'd per curiam*, 328 F.2d 891 (3d Cir. 1964), *vacated and remanded per curiam*, 380 U.S. 522 (1965).

¹⁰⁹ *NLRB v. Western & So. Life Ins. Co.*, 328 F.2d 891 (3d Cir. 1964), *vacated and remanded per curiam*, 380 U.S. 522 (1965).

¹¹⁰ *Metropolitan Life Ins. Co.*, 146 N.L.R.B. 1577 (1964).

¹¹¹ *Metropolitan Life Ins. Co.*, 142 N.L.R.B. 491 (1963) (*unfair labor practice*), *enforcement denied*, 327 F.2d 906 (1st Cir. 1964), *vacated and remanded*, 380 U.S. 438 (1965).

¹¹² *Equitable Life Ins. Co.*, 138 N.L.R.B. 529 (1962).

¹¹³ *Metropolitan Life Ins. Co.*, 138 N.L.R.B. 734 (1962).

employer's offices within the political city limits of Chicago, Illinois, excluding suburban offices, despite the fact that six of the city offices had territory extending beyond the city limits and three of the fourteen suburban offices had territory extending into the city.¹¹⁴ What was so magic in the Chicago city boundary which was not present in *Metropolitician (Cleveland)*? The First Circuit, in comparing these two cases, fumed:

Why there should be a community of interest among Metropolitan's agents working from both city and suburban offices in Cleveland but no community of interest among its agents working in both city and suburban offices in Chicago is not explained by the Board majority and is beyond our comprehension.¹¹⁵

Had the Board found extensive interchange within the Chicago city limits but not across the line or bargaining terms common to the urban offices but not the suburban offices, this might have offered some justification. If a self-determination election had shown that the employees within the city favored a union and those in the suburbs rejected it, this would have provided a rational basis. Yet in its Chicago opinion, which reversed the Regional Director's selection of a metropolitan area unit, the Board alluded briefly to geographic considerations — which seem far from cogent — and made no further attempt to meet the charge of arbitrariness.¹¹⁶

Powerful evidence that the Board has been simply giving the union whatever it wants was supplied by the Metropolitan attorneys in their brief to the Supreme Court in the *Metropolitan (Woonsocket)* case. In an appendix, they diagrammed the forty-six cases involving bargaining unit disputes in the insurance industry since the *Quaker City* decision.¹¹⁷ In all forty-six the IWIU was the petitioner, and in each case the petition was granted for whichever unit the union had requested.¹¹⁸

Since the Supreme Court has not yet passed on the merits of the less than state-wide insurance unit, the *Quaker City* rule remains unsettled. In February 1966, the Board issued its revised opinion in the *Woonsocket, Rhode Island*, case on remand from the Su-

¹¹⁴ *Metropolitan Life Ins. Co.*, 144 N.L.R.B. 149, 151 (1963), *enforcement denied*, 327 F.2d 906 (1st Cir. 1964), *vacated and remanded*, 380 U.S. 438 (1965).

¹¹⁵ *Metropolitan Life Ins. Co. v. NLRB*, 327 F.2d 906, 910 (1st Cir. 1964).

¹¹⁶ *Metropolitan Life Ins. Co.*, 144 N.L.R.B. 149, 150-51 (1963).

¹¹⁷ Brief for Appellee, app. A, *Metropolitan Life Ins. Co. v. NLRB*, 380 U.S. 433 (1965).

¹¹⁸ See *Metropolitan Life Ins. Co. v. NLRB*, 327 F.2d 906, 910 (1st Cir. 1964), *vacated and remanded*, 380 U.S. 438 (1965), to the same effect.

preme Court.¹¹⁹ Although the employer had revised its administrative structure in the hope of having the single-office unit held inappropriate in favor of broader "regions," the Board adhered to its prior decision. Yet despite a lengthy discussion of its decisions and an admission of the difficulty of the problem, the Board added nothing new by way of guidance. If ever the case reaches the Supreme Court again, it will probably be approved in much the same fashion as *SEC v. Chenery Corp.*¹²⁰

Assuming that *Quaker City* and its progeny survive, it would be erroneous to conclude, as a recent commentator has done, that section 9(c)(5) will have in effect been read out of the insurance industry, and "therefore, that cohesive groupings of individually appropriate units should be permitted without regard to the albatross of 'extent of organization.'"¹²¹ Bearing in mind that 9(c)(5) is aimed at preventing fragmentation, it might reasonably prohibit an attempted grouping of the employees in a fraction of an office.¹²² Moreover, if the Board responds to the Supreme Court's admonition with respect to grouping of several offices,¹²³ it is not unlikely that alternative units of a single office or a city-wide grouping might be appropriate. If so, an attempt by a union to split a city down the middle or to arbitrarily pick less than all the offices within the city would be clearly prevented by section 9(c)(5). Perhaps the most unsatisfactory aspect of the 1966 *Metropolitan (Woonsocket)* decision is that the Board failed to indicate a position on this question.

Yet there are strong reasons why the Board should hold that where there is more than one insurance office in a single city the union must take all or none. Although there tends to be very little interchange between offices, there is considerable contact between the debit agents of the several offices within a city. Frequently there is competitive bidding for policy contracts between employees of different offices, thereby producing informal jurisdictional agree-

¹¹⁹ *Metropolitan Life Ins. Co.*, 156 N.L.R.B. No. 113 (1966).

¹²⁰ 332 U.S. 194 (1947). In a prior case, *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), the Supreme Court held that an order by the Securities and Exchange Commission could not be supported on the basis of the agency's vague and insufficient reasoning. The Commission thereafter recast its reasoning and reached the same result. This time the Court held that the rationale was sufficiently clear, and sustained the Commission's ruling. 332 U.S. at 199, 209.

¹²¹ Note, *supra* note 78, at 758 (1965).

¹²² Fractured offices may become a problem in the near future, for the IWIU is planning to organize clerical employees as well as the debit agents. Yet in this area it has a threatening rival, the Office and Professional Employees International Union.

¹²³ *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-43 (1965).

ments or compromises between the employees. Geographic considerations would likewise support a city-wide unit. Nearly all the Board's single-office units have involved cases where the office requested is the employer's only office in that city.¹²⁴ Nor has the IWIU ever petitioned for a fragmented city unit, leaving aside the *Metropolitan Life (Chicago)*¹²⁵ case which involved a city-wide unit that excluded suburban offices and which is to that extent open to attack. That the union feels the interests of effective collective bargaining favor a city-wide unit was exemplified in the IWIU campaign to organize the three Metropolitan Life Insurance offices in Albany, New York.¹²⁶ By the early spring of 1965, one of the offices clearly showed a majority for the union, a second was about even, and the third office was so completely against the union that it doubted that it could win a three-office election. Rather than request a unit of the one office where it was assured of victory, the union decided not to petition until such future date as there might be city-wide interest in organization. Where the employers and the dominant union are in general agreement that fractured city units are undesirable, there is little reason for the Board not to concur.

Section 9(c)(5) may be of further use operating together with section 9(b) to prevent a union or employer from "sweeping in" an unwilling office under the impact of majority support in other offices. A grouping of offices which in some cases may comprise several smaller appropriate units on a "building-block" theory might be highly appropriate in itself, or it might be inappropriate either because of the prejudicial impact on those excluded or on the related theory that the unit is a fragment of a larger appropriate unit. Following an examination of the somewhat more complex problems presented by retail chain and department store units, it will be con-

¹²⁴ *Metropolitan Life Ins. Co.*, 147 N.L.R.B. 688 (1964) (a single office in Holyoke, Mass.); *Metropolitan Life Ins. Co.*, 142 N.L.R.B. 491 (1963), *enforcement denied*, 327 F.2d 906 (1st Cir. 1964), *vacated and remanded*, 380 U.S. 438 (1965); *Quaker City Life Ins. Co.*, 134 N.L.R.B. 960 (1961), *aff'd*, 319 F.2d 690 (4th Cir. 1963).

¹²⁵ *Metropolitan Life Ins. Co.*, 144 N.L.R.B. 149 (1963); *accord*, *Western & So. Life Ins. Co.*, 138 N.L.R.B. 538 (1962) (allowing two suburban office units near Pittsburgh).

¹²⁶ This position was confirmed in an interview with Mr. Robert J. Nicholson, Vice President of the IWIU, Jan. 22, 1966. Mr. Nicholson furnished the information concerning the Albany Campaign which follows, and observed that his union "has never petitioned for a single district office within a city where more than one district office is located in the same city." In view of the IWIU's understandable desire to preserve maximum flexibility with respect to unit scope, however, it does not wish to take a position which might impair the Board's present view that a single office is an appropriate unit.

sidered to what extent "sweep-ins" should be minimized through separate elections.

B. *Retail Chain and Department Stores*

Retail store unit selections may involve a multi-location choice or an intramural choice. These two levels of the problem are represented by the chain stores on the one hand and the department stores on the other, and each is discussed separately in the next two subsections. The balance of the section is devoted to problems which are more or less common to both.

(1) *Developments in the Choice of Units in Chain Store Cases.*—The unit findings in retail store cases have been almost as varied as in the insurance industry. As with the insurance cases, the trend is clearly towards an increased willingness on the part of the Board to find small units appropriate.

Prior to the Taft-Hartley Act,¹²⁷ the Board avoided rigid rules and certified employee groups of many sizes, openly acknowledging that there could be appropriate communities of interest at different levels of the employer's operations. A single-store unit was found appropriate in *Koppers Stores*,¹²⁸ while a twenty-four-store city-wide unit requested by the Amalgamated Meatcutters was granted in a 1944 case involving First National Stores.¹²⁹ Administrative divisions could be fractured along state lines.¹³⁰ Even a single department of bushelers in a May Department Store was found appropriate.¹³¹

Following the passage of the Act with its admonitory section 9(c)(5) in June 1947, the Board showed a marked reluctance to find small units appropriate. Single-store requests were often denied,¹³² although they were granted where there was a high degree

¹²⁷ 161 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1964).

¹²⁸ 73 N.L.R.B. 504 (1947).

¹²⁹ First Nat'l Stores, Inc., 55 N.L.R.B. 1346 (1944). This was a "wall-to-wall" unit and included all employees, not just the meat departments.

¹³⁰ First Nat'l Stores, Inc., 27 N.L.R.B. 518, *supplementing* 26 N.L.R.B. 1275 (1940). The employer's Providence division covered employees in Rhode Island, Connecticut, and Massachusetts. Following a self-determination election, the Amalgamated Meatcutters were certified as representative of the employees in the Rhode Island stores while the Industrial Union and Mercantile Beneficial Association of Providence were certified as representatives of the Massachusetts and Connecticut stores respectively. The Meatcutters have subsequently expanded their jurisdiction to include both of these units plus New Hampshire and much of Maine.

¹³¹ May Dep't Stores Co., 50 N.L.R.B. 669 (1943).

¹³² *E.g.*, Grand Union Co., 81 N.L.R.B. 1016 (1949), which was overruled by V. J. Elmor 5c, 10c & \$1.00 Stores, Inc., 99 N.L.R.B. 1505, 1506 (1952). The request

of local autonomy and geographic isolation.¹³³ The single department unit, which had been approved in the *May Dep't Stores*¹³⁴ case, was rejected in a 1948 request for a unit of men's alteration department employees.¹³⁵ "Building-block" units comprised of stores in various communities purporting to be neither a regional nor an administrative grouping were flatly rejected on the grounds that the only basis for such a combination would be extent of organization.¹³⁶ Petitions for city-wide units were, however, granted.¹³⁷ The Board seemed primarily interested in encouraging groupings based on territorial compactness or administrative division. Its frequent rejection of single-store and departmental units suggests that at least for a few years after the arrival of 9(c)(5) the Board felt that there were rarely, if ever, sufficient non-organizational factors which could support such units.

During the 1950's the Board's policy became somewhat more stabilized. Units consisting of an employer's administrative division were generally found appropriate. In 1951, in *Safeway Stores, Inc.*,¹³⁸ the Board said:

[A]bsent unusual circumstances, the appropriate collective bargaining unit in the retail grocery trade should embrace all employees within the categories sought who perform their work within the Employer's administrative division or area.¹³⁹

This rule was by no means hard and fast. Frequently units comprised of stores within a metropolitan region were also found appropriate.¹⁴⁰ Where the Board found a highly centralized employer-wide operation, it found an employer-wide unit appropriate and rejected a petition for single-store units.¹⁴¹

In the early 1960's with the appointments by President John F.

was for the employer's only store in Pittsfield, Massachusetts. In rejecting the petition, the Board found that broader centralized management control outweighed the stores' geographic separateness and the dearth of employee interchange.

¹³³ *E.g.*, *American Stores Co.*, 82 N.L.R.B. 882 (1949).

¹³⁴ 50 N.L.R.B. 669 (1943).

¹³⁵ *Mandel Bros.*, 77 N.L.R.B. 512 (1948).

¹³⁶ *E.g.*, *C. Pappas Co.*, 80 N.L.R.B. 1272 (1948). The employer had twenty-one Massachusetts stores. The union sought a unit of some stores in the Boston area together with others as much as thirty miles away, while excluding stores which were more nearby.

¹³⁷ *Great Atl. & Pac. Tea Co.*, 85 N.L.R.B. 680 (1949).

¹³⁸ 96 N.L.R.B. 998 (1951).

¹³⁹ *Id.* at 1000. *Accord*, *Father & Son Shoe Store*, 117 N.L.R.B. 1479 (1957).

¹⁴⁰ *Daw Drug Co.*, 127 N.L.R.B. 1316 (1960); *Great Atl. & Pac. Tea Co.*, 119 N.L.R.B. 603 (1957); *Great Atl. & Pac. Tea Co.*, 99 N.L.R.B. 1500 (1952).

¹⁴¹ *Paxton Wholesale Grocery Co.*, 123 N.L.R.B. 316 (1959).

Kennedy of Chairman McCulloch and Member Brown to the Board, smaller units were allowed under an express change in the Board's policy. Two cases involving Hot Shoppes, Inc., a multi-location cafeteria and restaurant employer, were decided on February 10, 1961. In one case¹⁴² the union sought a unit of the employees at the Washington, D.C., airport, including food and dishroom employees, switchboard operators, cashiers, truckdrivers, hallmen, laundry employees, porters, and station attendants. The petition was granted despite the fact that there were forty-six other Hot Shoppes and seventeen related Pantry House outlets in the greater District of Columbia metropolitan area. Member Rodgers dissented, finding the metropolitan area appropriate in view of centralized management, administrative integration, uniform conditions of employment, geographic proximity, and substantial employee interchange.¹⁴³ The Board apparently felt that despite the different kinds of work involved, there was a community of interest among the employees at the single location which distinguished them from employees located at separate sites, even though the others were performing similar jobs.

In the other *Hot Shoppes* case decided on the same day, the Board dismissed a petition for a unit of all truckdrivers and helpers at the employer's Midway Airport location in Chicago.¹⁴⁴ The Board held that here the appropriate unit would have to also include the employees at the employer's O'Hare Airport operation, located twenty miles away.¹⁴⁵ As to multi- versus single-location considerations, the two decisions seem contradictory. What the Board seems to have said is that if a union seeks a "wall-to-wall" unit of all employees, a single location unit is appropriate, but if it seeks only a particular class of workers, it may be required to include similar employees at other nearby locations. Such a rule strains logic, because if a single class of workers is appropriate for separate representation and a single location constitutes a community of interest distinct from other locations, it is difficult to see why both principles should not operate together in a single case. There is language in the second decision suggesting that its true basis was the fact that the petitioning union had three times failed to win elections, twice in units including employees at both airports, leading the Board

¹⁴² *Hot Shoppes, Inc.*, 130 N.L.R.B. 138 (1961).

¹⁴³ *Id.* at 143-44.

¹⁴⁴ *Hot Shoppes, Inc.*, 130 N.L.R.B. 144 (1961).

¹⁴⁵ *Id.* at 146-47.

to believe that the union itself felt that the only appropriate unit would have to include both airport locations and that a single-location unit would therefore be a fragment. However, to base a decision on these prior failures rather than on the true issue of whether the requested single-location unit is appropriate in itself is a clearly misguided concession to the reasoning of *NLRB v. Glen Raven Knitting Mills, Inc.*¹⁴⁶ which was rejected as being illogical in the preceding analysis of the Board's factors.¹⁴⁷

Some of the confusion raised by the *Hot Shoppes* cases was removed by the leading case of *Sav-On Drugs, Inc.*,¹⁴⁸ decided the following year. Here the Board held that a single store in an employer's chain was an appropriate unit. The Board in effect rejected the rule in *Safeway Stores, Inc.*¹⁴⁹ and the associated line of cases which held that the administrative or regional unit was to be encouraged as presumptively appropriate.¹⁵⁰ The rejection of the administrative unit presumption seems sound on the basis of earlier analysis of this factor.¹⁵¹ As in *Quaker City Life Ins. Co.*,¹⁵² the Board's reason for altering its established rule was that the presumption in favor of a large unit was forestalling some groups of employees in their section 7 right to organize.¹⁵³ In support of the *Sav-On Drugs* rule is the Board's more time-honored holding that a single plant in a manufacturing context is presumptively appropriate.¹⁵⁴ This presumption has support in the statute in view of the fact that it is one of the several units specifically mentioned in section 9(b),¹⁵⁵ and accords with geographic and common-sense notions of a community of interest as existing among all the employees within the walls of a single factory. It would seem, moreover, that the single retail store is closer to a single plant than is a lone insurance office, since the single store typically has a large and di-

¹⁴⁶ 235 F.2d 413 (4th Cir. 1956).

¹⁴⁷ See text accompanying notes 82-84 *supra*.

¹⁴⁸ 138 N.L.R.B. 1032 (1962).

¹⁴⁹ 96 N.L.R.B. 998 (1951).

¹⁵⁰ 138 N.L.R.B. at 1033.

¹⁵¹ See text accompanying notes 43-52 *supra*.

¹⁵² 134 N.L.R.B. 960 (1961), *aff'd*, 319 F.2d 690 (4th Cir. 1963), *enforcing* 138 N.L.R.B. 61 (1962). See text accompanying notes 102-03 *supra*.

¹⁵³ 138 N.L.R.B. at 1033.

¹⁵⁴ *Gordon Mills, Inc.*, 145 N.L.R.B. 771 (1963); *Dixie Belle Mills, Inc.*, 139 N.L.R.B. 629, 631 (1962).

¹⁵⁵ "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(b) (1964).

versified group of employees, while the insurance office does not. Partly in view of this analogy, the single-location retail unit was more readily accepted than the single insurance office unit.

Particularly with respect to supermarket chains, the impact of the *Sav-On Drugs* ruling does not seem to be so great as to prevent multi-store units where traditional criteria support such a determination. In *Weis Mkts., Inc.*,¹⁵⁶ the Board found two multi-store, city-wide units appropriate. In *Meijer Supermarkets, Inc.*,¹⁵⁷ where there was a twelve-year history of chain-wide bargaining and a highly centralized administration, an employer-wide unit was held appropriate. In *Overton Mkts., Inc.*,¹⁵⁸ the Amalgamated Meatcutters were granted a unit of all meat department employees while the Retail Clerks International Association was granted a unit of all grocery and produce employees, bakers, and warehousemen. Both units comprised all ten of the employer's stores in Norfolk, Virginia.

(2) *The Large Department Stores.*—While *Sav-On Drugs* has severely restricted the administrative unit presumption in chain store cases, further narrowing of the unit size has taken place with respect to the larger department stores. During the 1950's the Board frequently stated that the store-wide unit was presumptively appropriate in department store cases.¹⁵⁹ However in 1965 the Board held in *Allied Stores, Inc.*¹⁶⁰ that this store-wide presumption will not preclude a unit of a particular category of employees within the single store. The store in question had 695 employees and 130 departments. Separate units of 470 selling employees, thirty non-selling employees, and seventy restaurant and kitchen workers were found appropriate at the request of the Retail Wholesale and Department Store Union (RWDSU), which had previously lost an election in a store-wide unit.

In an earlier case, the Board had granted a petition seeking a unit limited to restaurant and kitchen workers.¹⁶¹ Moreover, the departmental distinction within a grocery supermarket, which was

¹⁵⁶ 142 N.L.R.B. 708 (1963).

¹⁵⁷ 142 N.L.R.B. 513 (1963).

¹⁵⁸ 142 N.L.R.B. 615 (1963).

¹⁵⁹ *Bullock's Inc.*, 119 N.L.R.B. 642 (1957); *May Dep't Stores*, 97 N.L.R.B. 1007 (1952) (holding the store-wide unit optimum but nonetheless granting a petition for a departmental unit of hair stylists and beauticians because they were a homogeneous, previously unrepresented group).

¹⁶⁰ *Allied Stores, Inc.*, 150 N.L.R.B. 799 (1965). Similar results were reached in two companion cases: *Arnold Constable Corp.*, 150 N.L.R.B. 788 (1965); *Lord & Taylor*, 150 N.L.R.B. 812 (1965).

¹⁶¹ *F. W. Woolworth Co.*, 144 N.L.R.B. 307 (1963).

seen in *Overton Mkts., Inc.*,¹⁶² has been common in department stores for many years, even where a single location is involved.¹⁶³ However, the *Allied Stores, Inc.* decision was in total opposition to the general rule of *T. P. Taylor & Co.*¹⁶⁴ that

The Board has long regarded all selling and nonselling employees as a basically appropriate unit in the retail industry. This is particularly apparent in department store cases where the Board has had numerous occasions to pass upon issues with respect to the appropriate unit.¹⁶⁵

The Board's rationale in departing from this rule was that there are recognizable differences between selling and nonselling employees: sales employees usually receive classroom training whereas nonselling employees are trained on the job; the nature of the work is different and requires different skills; in this case there was separate supervision, little interchange, and the groups were generally physically separate; finally, the groups dressed differently. Plainly, the Board is drawing finer lines than ever before in finding separate communities of interest. The case was followed in *G. Fox & Co.*,¹⁶⁶ in which the Teamsters were allowed a separate unit of all truck drivers and delivery department helpers, as well as a second unit of all mechanics and washermen, despite the employer's claim that the unit should include all selling and nonselling employees. The Board stated "that while the store-wide unit is presumptively appropriate for collective bargaining, it is not the only appropriate unit."¹⁶⁷

In discount stores, where the departments are often run by lessees of the employer who frequently hire and prescribe terms for the employees in their particular department, the Board has held not only that the single department is an appropriate unit but also that a store-wide unit is not appropriate.¹⁶⁸ However, where the employer exercises substantial control over the lessees and their employees, as evidenced by uniform hours and working conditions or

¹⁶² 142 N.L.R.B. 615 (1963).

¹⁶³ See *American Stores Co.*, 82 N.L.R.B. 882 (1949). The separation is by no means universal. See note 129 *supra*.

¹⁶⁴ 118 N.L.R.B. 376 (1957).

¹⁶⁵ *Id.* at 378. In *Root Dry Goods Co.*, 126 N.L.R.B. 953 (1960), the Board allowed a separate unit of selling employees where the employer and union were in agreement that this unit was appropriate.

¹⁶⁶ 5 CCH LAB. L. REP. (1966 CCH NLRB) ¶ 20032 (1965).

¹⁶⁷ *Id.* ¶ 20032, at 25108.

¹⁶⁸ *S.A.G.E., Inc.*, 146 N.L.R.B. 325 (1964).

regulations which apply strictly to all employees in all departments, the store-wide unit has been found appropriate.¹⁶⁹

As the foregoing cases have illustrated, the Board is willing to find communities of interest worthy of separate representation on a wide variety of levels in the retail industry. While the outcome from case to case will differ, the criteria for appropriateness should remain constant.

(3) *Rival Unionism.*—As to the choice between several possible appropriate units, the retail industry is complicated by a feature which does not presently characterize the insurance industry, namely, the presence of many rival unions. Where there are several unions competing for representation of various groups of employees, a number of administrative considerations cut more effectively against encouraging small units than in an industry which is largely dominated by a single union. In the insurance industry, a finding of several small units may be justifiable if the reasonably foreseeable result is piecemeal organization of many small units into an ultimately broad bargaining base represented by one union. In the retail chain store field, however, an employer may have one store or group of stores organized by the Retail Clerks, the next by the Amalgamated Meatcutters, and a third by the RWDSU, with warehousemen organized by the Teamsters, and certain other small groups such as bakers or tailors represented by still different unions. Thus to grant a petition by one union for a single store in a city in which the employer has many stores may lead not to piecemeal organization by the petitioning union but to multiple organization by its rivals.

The latter result will not only produce less harmonious industrial relations than will a broader unit, but it will also cost the employer more in negotiating time since he must deal with a multiplicity of unions. While this impact on employer efficiency is generally not recognized under the statute, it may have considerable bearing on whether an effective collective bargaining relationship is likely to result, and this certainly is an important consideration in terms of the purpose of the statute. Where an employer must deal with many unions and devote substantial resources to pacifying or playing off one union against another, the loss is ultimately passed along to the employees, both through smaller profits avail-

¹⁶⁹ Spartan Dep't Stores, 140 N.L.R.B. 608 (1963); Frostco Super Save Stores, Inc., 138 N.L.R.B. 125 (1962).

able for wage increases and through the inability to attain the requisite stability to consider long-range employee interests.

Whipsawing of an employer for better terms, often in the hope of impressing employees in another unit with the whipsawer's power and ousting a rival union of jurisdiction in a later election, has proven destructive to the interests of all the parties concerned. This was recognized in the AFL-CIO No-Raiding Agreement of 1954,¹⁷⁰ the objectives of which were extended by the Internal Disputes Plan which in 1961 became a part of the AFL-CIO Constitution.¹⁷¹ While these pacts have largely reduced problems presented by one union's attempting to oust another as the representative, they have heightened the efforts of rival unions in vying for better terms. The bitter and age-old rivalry between the Amalgamated Meatcutters and the Retail Clerks, for example, manifests itself through substantial pressures upon the employer to grant one something more than was given to the other. If one union can at least give the appearance that it is more effective than its rival, there remains the possibility of a decertification proceeding initiated by the employees themselves if they are sufficiently impressed by a union other than the one which represents them. A more promising objective is to build a record and a following which will enable the union to win elections in other stores not yet organized. This latter opportunity provides a tremendous impetus for rivalry today.

The ensuing pressure upon the employer caught in the crossfire is not only disruptive but also results in his being unable to differentiate between two groups of employees even where there is a legitimate reason to do so. It is a common employer complaint that he dare not give a needed wage raise to one group since another group will be at his throat for the same.¹⁷² This often produces distorted wage scales, exemplified in the extreme by the factious railroad industry.

There are inevitably lesser administrative problems as well, particularly where the employees at a single location are represented by several unions. One retail employer, for example, customarily

¹⁷⁰ This agreement was followed up after the merger of the AFL and CIO in 1955 by a revised No-Raiding pact in that year. 3 CCH LAB. L. REP. § 5230.95 (1966).

¹⁷¹ The relevant sections of the Internal Disputes Plan are set forth in note 75 *supra*. Similar objectives are reflected in the context of work assignments under the National Joint Board for the Settlement of Jurisdictional Disputes, binding on AFL-CIO building and construction unions.

¹⁷² Interview with Mr. J. David Fine, Director of Industrial Relations, Stop & Shop, Inc., Dec. 16, 1965. See Jones, *Self-Determination vs. Stability of Labor Relations: The Effect of American Potash*, 58 MICH. L. REV. 313 (1960).

had his meat department employees assist the checkout clerks in servicing customers during the rush periods. Once the meat department employees and the checkout clerks became represented by separate unions, this temporary interchange was impossible, even though the resulting deterioration in customer service at the peak periods could only reduce sales and thereby injure all the parties concerned.¹⁷³

A further disruptive force to stable industrial relations which ought not to be overlooked is the multiple-site strike threat. The employer's chances of being struck increase with the number of unions representing his employees. Moreover, the impact of a strike can be disproportionately severe where a small unit forces the shutdown of an entire store, or a whole chain. The Board in *Frisch's Big Boy Ill-Mar, Inc.*¹⁷⁴ held that one of the employer's ten restaurants in Indianapolis constituted an appropriate unit. The Board found a weekly transfer rate of three percent minimal, cited the authority of the individual restaurant managers to hire, fire, and discipline as well as to purchase food, admitted that the city-wide unit might well be optimum, and granted the petition, since no union sought a wider unit.¹⁷⁵ In a scorching dissent, Members Leedom and Jenkins argued that the single restaurant was inappropriate not only because interchange was in their view substantial and working conditions were uniform but also because, under the Board's holding in *Alexander's Warehouse & Sales Co.*,¹⁷⁶ the representative at one restaurant could picket all the others.¹⁷⁷ This leverage would give the union greatly disproportionate bargaining power which would directly affect the terms and working conditions of the employees at the nine other locations. In the view of the dissenters, this would not at all maximize employee freedom but would shackle the interests of the majority of the affected employees to the decision of a small minority.¹⁷⁸

From the position of the employer, one may well ask whether it is advisable to give the union such disproportionate power as to be able to tie up the entire chain based on single site representation.

¹⁷³ This happened at Stop & Shop, Inc. Interview with Mr. J. David Fine, note 172 *supra*.

¹⁷⁴ 1964 CCH NLRB 21035, *unfair labor practice*, 151 N.L.R.B. 454 (1965), *enforcement denied*, 356 F.2d 895 (7th Cir. 1966).

¹⁷⁵ *Id.* at 21036-37.

¹⁷⁶ 128 N.L.R.B. 916 (1960).

¹⁷⁷ 1964 CCH NLRB at 21037-39.

¹⁷⁸ *Id.* at 21039.

On the other hand, perhaps the only way to insure against a union picketing sites where it is not the representative is to require employer-wide representation or none at all. Yet this suggestion proves too much and must be rejected as unduly inhibiting organizational rights. As a practical matter, multi-location picketing tends to be geographically restricted, since most representation disputes are with the union local rather than with the international, and large scale picketing can be expensive. In addition, picketing at locations where the union is not represented may well annoy rather than impress employees whom the union ultimately hopes to organize. Finally, the unions are aware that employers can be permanently embittered by such multi-site picketing, which they regard as outside the legitimate arsenal of coercion on behalf of the particular group represented. Many unions are coming to feel that there may be more to be gained today by a relatively amicable approach rather than a warlike one.¹⁷⁹ If at some point multi-site picketing does become a serious problem, the proper solution would seem to be further legislation on picketing rather than adoption by the Board of an unduly restrictive unit rule. In fact, when *Frisch's Big Boy Ill-Mar*¹⁸⁰ came before the Seventh Circuit on review, the court bluntly reeled off a series of employment terms which were identical from one location to the next, emphasized the highly centralized supervision, and held the unit plainly inappropriate, without reference to the multi-site picketing problem.¹⁸¹

One possible variation of the facts presented in *Frisch's Big Boy Ill-Mar* would be a situation in which the employer has several stores in a metropolitan area and the union seeks to organize the single store which is the distributor for the others or is in some other way the nerve center of the city-wide operation. A work stoppage at this store would have the direct effect, without picketing, of stopping the work at the other stores. As a practical matter this would be rare, since most retail operations are not set up in

¹⁷⁹ If an employer is on friendly terms with a union, he may express a favorable opinion of this union in a subsequent election at a different location. Unions appreciate the covert assistance which an employer can give by "opening his doors" to a union which he prefers while making difficult the campaign of a rival which he dislikes. This mild interference at the fringe of NLRA § 8(a)(2), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(2) (1964) (for text of this section see note 184 *infra*), can be of tremendous assistance to a union, yet very difficult to prove at a hearing; moreover, non-coercive speech alone enjoys broad protection under NLRA § 8(c), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(c) (1964).

¹⁸⁰ 356 F.2d 895 (7th Cir. 1966).

¹⁸¹ *Id.* at 897.

this fashion.¹⁸² Should the case arise, however, the direct impact on the employees excluded from the requested unit would suggest that on grounds of functional integration, the group of stores should not be split up. The employment interests of the outlying stores are so directly tied to the work conditions at the central store that the Board might be well-advised even in the absence of significant interchange to find the city-wide community of interest the smallest appropriate unit.

(4) *The Accretion Clause.*—The foregoing discussion has attempted to point out some of the dangers in small retail units. One of the most recent devices on the part of the labor unions to avoid factious rivalries is the use of a broad accretion clause in the collective bargaining contract. The Amalgamated Clothing Workers, the Retail Clerks, and the Amalgamated Meatcutters, to name three of the more dominant occupants of the retail industry, have all found it desirable where possible to obtain recognition from an employer as the bargaining representative for all stores in an entire region, including stores which may be opened in the future. Employers, eager to avoid whipsawing, are frequently willing to grant this recognition. A typical broad accretion clause provides:

The company recognizes and acknowledges the Union as the sole collective bargaining agency and representative of all Meat, Fish, Delicatessen and Poultry Department employees in New England for all stores operated by the Company and all of the stores that may hereinafter be operated by the Company throughout the life time of this Agreement.¹⁸³

Thus when a new store is opened in the stated region, it is automatically, and without an election, covered by the bargaining agreement. This minimizes harassment of the employer and provides a broad bargaining base for the union.

It can be argued that the prior recognition of employees in an accretion clause is an improper interference by the employer with employee organization, in violation of section 8(a)(2),¹⁸⁴ and that it inhibits the free choice of a bargaining representative. However,

¹⁸² However, for such a factual situation, see Hudson Co., 155 N.L.R.B. No. 133 (1965).

¹⁸³ Collective Bargaining Agreement between Stop & Shop, Inc., and Locals 2, 33, 314, 328, 371, 592, Amalgamated Meatcutters and Butcher Workmen of No. America, art. 1, § 2, effective Aug. 10, 1964.

¹⁸⁴ This section provides in part that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." NLRA § 8(a)(2), 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(2) (1964).

section 8(a)(2) seems to be aimed primarily at company unions rather than independent international unions which have won initial recognition pursuant to an election or a series of elections.¹⁸⁵ Thus while the Board has not definitively ruled on the applicability of section 8(a)(2), its recent decisions have permitted reasonable accretions.¹⁸⁶

In at least one earlier case, *Anheuser-Busch, Inc.*,¹⁸⁷ the Board did suggest that where following an election but prior to the execution of a contract the union and employer by consent included an additional and different group of employees into the unit, this might be an unfair labor practice.¹⁸⁸ But since the rival union was attacking only the increase in numbers in the unit and not the accretion itself, the Board rejected the claim and made no further mention of an unfair labor practice.¹⁸⁹

The accretion clause used in the retail industry would seem to fall somewhere between the addition of similar employees to an existing unit in the normal turnover of hiring, which is clearly lawful without an election, and the addition, by stipulation, of an entire group whose skills are different from those in the initial unit. The latter practice was regarded ominously in *Anheuser-Busch* but is distinguishable from the situation under discussion in which the accreted employees perform work similar to the old employees. The Board's recent tendency to permit automatic inclusion of employees in a new store who are performing similar work and whose inclusion into the existing unit will provide a territorially compact and contiguous bargaining base seems correct. The only difference between such an accretion and the hiring of new employees is that in the former case the employees are taken as a group and separated by the walls of a store and might, absent the

¹⁸⁵ Of course, if an independent union won recognition at the employer's sole plant and the parties then executed a nation-wide accretion clause and thereafter the employer established a dozen additional plants across the country, this begins to look like a company union, so that the Board should require separate elections.

¹⁸⁶ *Continental Can Co.*, 127 N.L.R.B. 286 (1960); *Brooklyn Union Gas Co.*, 129 N.L.R.B. 361 (1960); *Borg-Warner Corp.*, 113 N.L.R.B. 152 (1955), *enforced*, 231 F.2d 237 (7th Cir. 1956), *cert. denied*, 352 U.S. 908 (1956) (holding that reasonable accretions of employees in new departments and buildings do not violate §§ 8(a)(1) or 8(a)(2), even though there is a union-shop clause); *Saco-Lowell Shops*, 107 N.L.R.B. 590 (1953). Occasionally the Board has required self-determination elections offering employees the choice of inclusion in the existing unit or separate representation, where such separation would itself produce two appropriate units. See *Allied Chem. & Dye Corp.*, 120 N.L.R.B. 1026 (1958).

¹⁸⁷ 102 N.L.R.B. 800 (1953).

¹⁸⁸ *Id.* at 815.

¹⁸⁹ *Ibid.*

prior bargaining relationship, constitute an appropriate unit by themselves. While the proposed accretion may be different in degree from normal turnover, it is very different in kind from the *Anheuser-Busch* accretion. Moreover, the very existence of the prior bargaining relationship would seem to bring the case within the principle, if not the rule, of *Eaton Mfg. Co.*¹⁹⁰ in which the Board held that where there is an established history of multi-location bargaining, a unit limited to employees at a single location is not appropriate, even though such a single-location unit might otherwise have been appropriate.¹⁹¹

In the Meatcutters' contract provision referred to before,¹⁹² the parties have established a territorial unit of similarly skilled employees which is appropriate by existing Board standards. There is little to be said for allowing the employees of a newly opened store to split off from this unit, even if the store by itself would be an appropriate unit. Admittedly, to thus risk subordination of the interests of a single store to those of the regional majority may appear to restrict the freedom of an accreted employee who did not vote in the initial election. Nevertheless, it may be said in reply that, first, he does not accept his new job blind to the fact that he is also accepting an existing bargaining representative and is free to work elsewhere; second, in practice there has appeared no significant employee complaint, while the system has proven highly effective in reducing the evils of rival unionism; third, the stable industrial relations which are likely to ensue, together with the broad power base of the union, will almost certainly provide as great or greater benefits for the accreted employees as would separate representation.

The entirely distinguishable question of craft severance is reserved for separate treatment.

(5) *Conflicts in Union Philosophy: The Allied Stores Case.*—Not all unions are in agreement, either on the use of the accretion clause or on other fundamental questions involving bargaining unit determinations. The RWDSU feels, for example, that all employees should be given a free choice, and that the accretion clause simply serves the union's selfish aims of excluding competitors and assuring its own aggrandizement.¹⁹³ Consequently, this union never

¹⁹⁰ 121 N.L.R.B. 813 (1958).

¹⁹¹ *Id.* at 815.

¹⁹² See note 183 *supra*.

¹⁹³ Interview with Mr. Max Steinbock, Public Relations Director, RWDSU, Dec. 27, 1965. Mr. Steinbock also believes that unions pay for accretion clauses by having

uses an accretion clause. Not surprisingly, the emphasis placed by the RWDSU on individual free choice also leads it to favor smaller bargaining units, often in direct opposition to the views of other unions. Serious questions are presented when several unions who regularly represent the same kinds of employees fundamentally disagree on the philosophy, objectives, and means of employee organization.

In the *Allied Stores, Inc.*¹⁹⁴ department store case, the RWDSU was granted three separate units of selling, non-selling, and kitchen and cafeteria employees at a single location, despite the contentions of the employer and the intervening Retail Clerks that a store-wide unit was the smallest appropriate grouping. In convincing the Board that the three requested groups of employees constituted distinct communities of interest, the RWDSU argued that section 9(b) (employee freedom) demands that small but coherent groups be allowed to organize even if other proximately located groups are opposed.

In their amicus curiae brief, the Retail Clerks argued that the wall-to-wall department store unit was historically appropriate and ought not to be splintered. The Clerks contended that a department store is a highly integrated operation and that there is constant contact and frequent interchange among employees, especially between the selling and non-selling groups. Small units, urged the Clerks, lack the bargaining power to make substantial gains. Moreover, they lead to antagonism between organized and unorganized groups, particularly where striking or picketing is involved; they invite the evils of rival unionism producing several weak but factious units instead of one strong one; in the event of a strike the employees can be quickly replaced by the employer, who is happy to be rid of them anyway; and they produce such administrative problems as multi-contract negotiations and inequities in wages and terms between departments, which are costly to both the employer and the union. "The only real justification for segmentized or fragmented organizing in a department store," said the Clerks, "would be to serve as a springboard from which the store as a whole can be organized."¹⁹⁵ However, such piecemeal organization rarely suc-

to accept lower wages, so that in effect the accretion-minded union grows at the expense of the employees.

¹⁹⁴ 150 N.L.R.B. 799 (1965).

¹⁹⁵ Brief for Retail Clerks International Association as Amicus Curiae, p. 18, *Allied Stores, Inc.*, 150 N.L.R.B. 799 (1965). See also the RCIA brief in *Thrifttown, Inc.*, Case No. 24-RC-2761 (1965), making the same argument regarding discount department stores.

ceeds, since the employer usually grants the unorganized employees the same wages and benefits as he gives to the organized group, thereby destroying the incentive of the others to join. Yet when it comes time to negotiate, the union is left with its small bargaining power. The Retail Clerks cited their own experience that such piecemeal attempts were highly unsuccessful. Moreover, they pointed out that their own election victory percentages were considerably higher than those of the RWDSU, interpreting this as a more favorable employee response to broader units. Finally, the Clerks distinguished craft unionism on the ground that while the craft unions seek to protect the integrity and standards of a small and specialized class of employees, such limited organization is not feasible where store-wide organization is the ultimately desired objective.

That the RWDSU indeed was aiming at ultimate store-wide organization is strongly supported by the facts that (1) it had previously lost a store-wide election, and (2) the three requested units, when put together, constitute virtually a store-wide unit. Yet the RWDSU denies the validity of the Retail Clerks' argument, claiming that immediate freedom of choice should not be subordinated to long-range stability which may never materialize if employees are not at first organized. It may be that the Retail Clerks, the largest and most powerful of the retail chain store unions, are moved to their conclusions, at least in part, by the fact that they stand a much better chance of winning elections if large units are required, demanding broad-scale campaigns which their smaller rivals are unable to match. Moreover, if the employer does extend union gains to unorganized employees, perhaps the union is really more worried about free riding by non-dues-paying workers than by the decertification election threat.

Despite possible self-serving aspects of the Retail Clerks' argument, there remains a lot to be said for looking to the long-term objectives of stable and effective collective bargaining as well as harmonious relationships among employees themselves. The notion of countervailing power is also behind the Clerks' preference for city-wide units where the employer has more than one store in a metropolitan area.¹⁹⁶ Thus whether one agrees with the *Allied*

¹⁹⁶ Letter from Samuel J. Meyers, First Vice President of the RCIA, to the writer, Jan. 12, 1966. On the other hand, the Retail Clerks do not always argue that a broad territorial unit is the only appropriate one. After all, it was they who won *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032 (1962), which to a considerable extent opened the door to small unit findings.

Stores decision depends on whether long-term stability or short-term employee free choice is accorded the primary position. Although the latter consideration is a necessary element of a unit determination, the larger units for which the Retail Clerks argue seem generally to be more conducive to effective collective bargaining. The store-wide (or city-wide) unit tends to be more permanent and less prone to disruptiveness. Under such conditions, somewhat paradoxically, the varied interests of the employees, immediate and long-range, are more likely to get fair consideration than when an employer must beat down wages in the face of whipsawing. It is not surprising, therefore, that the Retail Clerks have been more successful at the polls than has the RWDSU.

(6) *Craft Severance and Allied Stores*.—In arguing that smaller than store-wide units need not impair stability, the RWDSU, and the Board itself in the *Allied Stores, Inc.*¹⁹⁷ decision, place substantial weight on the craft severance analogy. If separate representation does not lead to chaos in the craft severance context, the argument goes, why should the principle not be extended to the department store?

In evaluating this position, the results of a survey of employers recently faced with craft severance elections published in 1960 by Professor Dallas Jones are helpful.¹⁹⁸ The survey reports that the great majority of employers felt that separate representation of craft employees by different unions was disruptive to labor relations. Yet it is significant that where craft severance was rejected, 86.6 percent of the employers were opposed in principle, whereas among the employers whose employees had voted in favor of craft severance, only 65.1 percent were opposed.¹⁹⁹ The fact that hostility to severance was less among employers who had had first-hand experience with it suggests that employers tend to overestimate its alleged evils. On the other hand, the consensus that craft severance is not conducive to stable bargaining relations is entitled to considerable weight, particularly in view of the fact that, since all the employers in question were unionized, there is no reason to believe that their expressions were motivated simply by anti-union sentiment. The question posed by such a survey is whether the disruption of employment relations is justified by considerations favoring self-determination.

¹⁹⁷ 150 N.L.R.B. 799 (1965).

¹⁹⁸ See Jones, *supra* note 172.

¹⁹⁹ *Id.* at 325.

A number of reasons may be cited for allowing the employees of a true craft to be represented separately from the overall production and maintenance employees. The skills possessed and required by the craftsman set him apart from the semi-skilled or unskilled production worker. Because he is able to command higher wages, there is danger that his distinct earning power would be diluted by inclusion in a unit of unskilled employees. Moreover, the true journeyman craftsmen undergoes an apprenticeship or training program which is often administered by a craft union. The union is an expert on the craftsman's collective bargaining interests which it can in turn present to the employer. These historically distinctive qualities of the craft employee are reflected in the express statutory authority for separate representation. The "craft unit" is one of those mentioned in the section 9(b) delegation, and section 9(b)(2) further provides that the Board shall not "decide that any craft unit is inappropriate . . . 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."²⁰⁰

The requirements for separate craft representation were set forth by the Board in the leading case of *American Potash & Chem. Corp.*,²⁰¹ which was decided in 1954. Although the case had a liberalizing effect on craft severance,²⁰² the Board's position seems quite restrictive when compared to its decision in *Allied Stores, Inc.*²⁰³ *American Potash* requires that the proposed craft unit comprise "true craft" employees possessing those skills which can only be developed after a substantial period of apprenticeship; the employees must be engaged in work requiring these skills; the unit must include all such employees; finally, the petitioner must be a union which has traditionally represented the special interests of this class of employee.²⁰⁴

²⁰⁰ NLRA § 9(b)(2), 61 Stat. 143 (1947), 29 U.S.C. § 159(b)(2) (1964).

²⁰¹ 107 N.L.R.B. 1418 (1954).

²⁰² Compare the less permissive line of cases under *American Can Co.*, 13 N.L.R.B. 1255 (1939).

²⁰³ 150 N.L.R.B. 799 (1965).

²⁰⁴ *American Potash & Chem. Corp.*, 107 N.L.R.B. 1418, 1423-24 (1954). *American Potash* remains very much the law. See 27 NLRB ANN. REP. 63 (1962). See generally Weiner, *The Appropriate Bargaining Unit*, in N.Y.U. SIXTH ANNUAL CONFERENCE ON LABOR 515 (1953). See also Daykin, *Determination of the Appropriate Bargaining Unit by the NLRB: Principles, Rules, and Policies*, 27 FORDHAM L. REV. 218 (1958); Krislov, *Administrative Approaches to Craft Severance*, 5 LAB. L.J. 231 (1954); Rathbun, *The Taft-Hartley Act and Craft Unit Bargaining*, 59 YALE L.J. 1023 (1950). The "historic" requirement was relaxed almost at once in *Friden Calculating*

The statute shows no such favor to departmental units. Nor do the various semi-skilled and unskilled department store employees possess, from one department to the next, the distinctive qualities and diverse special interests which set craft employees apart from other employees. In most stores the selling and non-selling employees have similar skills, are in constant contact with one another, and experience considerable interchange. Often the wage scales are identical. The possibility of dilution of earning power in a broader unit does not exist. In short, the factors which justify separate craft representation are largely absent from the department store context.

Moreover, the few situations in which the Board has traditionally allowed separate departmental units reflect the vestiges of craft unionism. In *Overton Mkts.*²⁰⁵ it was seen that meat department employees were separately represented by the Amalgamated Meatcutters.²⁰⁶ This is a carryover from the days when the butcher workman was a skilled craftsman who, with his helpers, operated his own shop. When department stores grew up, the butcher workman and his helpers came to be incorporated within the four walls, yet located separately and performing skilled work. During the 1930's the Amalgamated Meatcutters, a craft union, not only organized the butcher workman and his helpers but, flexing its muscles, organized nearby retail employees as well. After a generation of fierce rivalry with the Retail Clerks, a jurisdictional agreement was signed by the two unions in 1955, restricting the Meatcutters to meat department employees and providing for final arbitration by AFL-CIO President George Meany. The *Overton Mkts.* decision reflects this historical development.

The fact that many non-craft employees are represented by a craft union, however, suggests that today the cleavage between craft and unskilled employees may not be as great as it once was. Indeed, a number of craft employees are represented in plant-wide units.²⁰⁷ Such unions as the International Brotherhood of Electrical Workers and the International Association of Machinists represent both unskilled workers and craftsmen.²⁰⁸ The idea that a craft employee can be readily distinguished from a non-craft employee is

Mach. Co., 110 N.L.R.B. 1618 (1954), where severance was allowed even though the union was newly formed.

²⁰⁵ 142 N.L.R.B. 615 (1963).

²⁰⁶ See text accompanying note 158 *supra*.

²⁰⁷ See note 65 *supra*.

²⁰⁸ See *S. D. Warren Co.*, 144 N.L.R.B. 204 (1963), discussed in note 58 *supra*.

further cast in doubt by complaints of gerrymandering and lack of predictability of the Board's craft determinations.²⁰⁹

Yet if employees traditionally represented by craft unions are becoming less distinguishable from ordinary unskilled employees, then it would seem that the reason for the rule is disappearing and therefore the rule of separate representation itself should fall. Indeed, the most stunning blow to craft severance has come from the AFL-CIO itself. By the terms of its Internal Disputes Plan adopted as an amendment to the AFL-CIO Constitution in December, 1961, a craft affiliate is prevented from seeking to sever a group of craft employees from a broader production and maintenance unit already represented by another AFL-CIO affiliate.²¹⁰ Thus the gain which the AFL made in section 9(b)(2) in 1947 has been voluntarily surrendered by the merged organization. Some craft unions are already dissatisfied with this result, and perhaps at some future point the Plan will be revised in the light of experience so as to except craft severance from its broad no-raid terms. If not, the document must be viewed as a clear preference on the part of organized labor for broader, more stable units, with self-determination playing a distinctly subordinate role.

Despite indications that craft severance may be on the wane, it still seems desirable to permit separate representation of true craft employees whose skills and earning power set them clearly apart from the rest of the employees. This is justifiable not simply on the crusty ground of tradition, but by modern notions of community of interest as well. If this be so, then the very fact that organized labor has made severance extremely difficult might suggest that the Board need not add to the anti-craft movement by denying separate representation in the first place.

Yet even though the validity of separate craft representation be accepted, it remains true that the factors which justify separate craft representation do not exist as between groups of department store employees. Consequently the reliance on this analogy is largely misplaced.²¹¹ Whether one calls this a difference of kind or degree is a question of semantics. To reject *Allied Stores* may be simply to draw a line, or cut-off point, beyond which the risk of disruption produced by separate intramural representation is no longer justified by the alleged distinct interests of particular employee groups.

²⁰⁹ See Krislov, *supra* note 204, at 238-40.

²¹⁰ See note 75 *supra*.

²¹¹ The one significant contribution of this analogy to the analysis is the demonstration that the disruption caused by small intramural units need not be intolerable.

Yet if the line is to be drawn in accordance with the Board's factors as they have been evaluated here, this would seem to be the proper place at which to draw it. This is particularly so in view of the antagonism produced by separate unit treatment of proximately located employees doing roughly similar work. If departmental units are to be justified, they must be justified not by analogy but on the very merits which produced craft severance in the first place. This requires a far more distinct array of skills and bargaining objectives than was found in *Allied Stores*.

IV. RECONCILIATION OF SELF-DETERMINATION AND STABILITY

A. *How the Board Does and Does Not Strike the Balance*

It must by now be evident that to cite representation cases is like citing the Bible: you can find some authority for just about any proposition. Although no algebraic formula can reconcile all the decisions, there are some dominant and common currents. The Board tries to encourage bargaining along unit lines which will produce effective bargaining. Very small units are ineffectual and produce strife, whereas very large units may dilute small but distinguishable interests. Therefore, in most cases the Board seems to have struck a flexible balance. The plant-wide manufacturing unit, the regional or city-wide retail chain unit, and the single large department store all reflect this policy. Moreover, the Board will allow smaller units, as in *Sav-On Drugs, Inc.*²¹² and *Quaker City Life Ins. Co.*,²¹³ where it is difficult for the union to organize along broader lines and where the effect of requiring broader organization would be to abridge section 7 organization rights.

In its most recent decisions, the Board seems to have become overly preoccupied with the latter consideration. The survey of the insurance cases shows little consistency in results. This together with the fact that in forty-six out of forty-six cases the union got what it asked for does not make the decisions wrong, but it is some indication that the Board is not taking the initiative in setting forth standards for consistently appropriate units. This passive role was blatantly apparent in the inadequate 1966 decision in *Metropolitan Life Ins. Co. (Woonsocket)*.²¹⁴ Likewise, in such department store

²¹² 138 N.L.R.B. 1032 (1962).

²¹³ 134 N.L.R.B. 960 (1961), *aff'd*, 319 F.2d 690 (4th Cir. 1963), *enforcing* 138 N.L.R.B. 61 (1962).

²¹⁴ 156 N.L.R.B. No. 113 (1966).

decisions as *Allied Stores, Inc.*²¹⁵ and *S.A.G.E., Inc.*,²¹⁶ the opinions are strained, as though the Board were uneasily aware of the fragmentation which it was producing. On the other hand, in the retail chain store cases, although the decisions have not always been consistent, there does not seem to have been great harm to the parties caused by the results. The injury in the chain decisions is to the administrative process. The Board's clumsy and inconsistent use of precedent²¹⁷ has confused and infuriated employers, unions, and appellate courts, for whom "some" or "substantial" interchange is not accurate enough, particularly when, upon close investigation of the facts, "some" turns out to be more than "substantial."

B. What Should the Board Do?

(1) *Adoption of Stability and Effectiveness of Labor Relations as an Explicit Factor.*—Stability seems to have been an implicit factor in many of the Board's decisions. Notably in insurance and public utilities, the Board has been willing to grant very large units where the union can organize them. Stability would seem to be the rationale for metropolitan or regional chain store units and is perhaps the only factor by which the two *Hot Shoppes* decisions²¹⁸ can be reconciled. It is closely related to the functional integration factor, which itself may be regarded as an aspect of the stability factor, as seen in *Potter Aeronautical Corp.*²¹⁹ Stability would also seem to be the driving force behind such decisions as *S. D. Warren Co.*,²²⁰ in which several craft groups and some unskilled employees were lumped together along loose divisional lines in a unit of four hundred of the twenty-seven hundred employees in a plant. Finally, both unions and employers would seem to be interested in stability, as illustrated by the use of the accretion clause in the retail chain industry,²²¹ the AFL-CIO Internal Disputes Plan,²²² and the consistent objections by employers to fragmentation.²²³

By making this factor an explicit part of its analysis, the Board

²¹⁵ 150 N.L.R.B. 799 (1965).

²¹⁶ 146 N.L.R.B. 325 (1964).

²¹⁷ See the excellent critique on this point in Note, *The Board and Section 9(c)(5): Multi-location and Single-location Bargaining Units in the Insurance and Retail Industries*, 79 HARV. L. REV. 811, 832-33 (1966).

²¹⁸ *Hot Shoppes, Inc.*, 130 N.L.R.B. 138 (1961); *Hot Shoppes, Inc.*, 130 N.L.R.B. 144 (1961). For a discussion of these cases, see text accompanying notes 142-45 *supra*.

²¹⁹ 5 CCH LAB. L. REP. (1966 CCH NLRB) ¶ 20037 (1965).

²²⁰ 144 N.L.R.B. 204 (1963).

²²¹ See text accompanying notes 183-91 *supra*.

²²² See note 75 *supra*.

²²³ See text accompanying note 172 *supra*.

would make its decisions more clear, consistent, and palatable to the parties and reviewing courts. In applying the factor the Board should consider the impact of its decision on employees both within and without the unit, so that there is a "net" or "aggregate" benefit to employee interests. Effective bargaining power and administrability by the union and the employer are also relevant aspects of stability. This factor has the effect of emphasizing the continuing bargaining relationship.

Having expressly recognized stability as a factor, the Board should then endeavor to follow it more consistently.

(2) *Limited Use of Self-Determination Elections To Prevent "Sweep-ins."*—In order to properly effectuate the section 9(b) mandate, small units should be allowed in many cases where broader organization is difficult. However, since there are often many levels of "community of interest," a petition for a unit of any substantial size may include a large number of component smaller appropriate units, some of which might oppose the union while many of them favor the union. As was seen in the insurance unit discussion,²²⁴ the union may be in a position to "sweep-in" a number of unwilling groups.

The problems of the "sweep-in" can be briefly illustrated by a glance at the local government context. Where a city tries to annex a piece of land with a distinguishable community of interest and where the city's motives are primarily to increase its tax revenues, courts have been quick to set aside the annexation.²²⁵ Likewise, where a state constitution declares that a home-rule city is the appropriate body to make certain kinds of decisions, a court will not allow the legislature to set up a broader district to make such decisions if the effect would be to allow the wishes of one home-rule city to be overridden by the contrary wishes of another larger city.²²⁶ On the other hand, when an outlying area clearly has a community of interest with the city, as evidenced, for example, by use of the city streets, shops, and public facilities, and protection by the city's police and fire departments, the courts allow the annexation of the suburban group even though that group may vote against annexation.²²⁷ Although in some respects the annexed group is distinct, if

²²⁴ See text accompanying note 126 *supra*.

²²⁵ See *Myles Salt Co. v. Board of Comm'rs*, 239 U.S. 478 (1916); *Sugar Creek v. Standard Oil Co.*, 163 F.2d 320 (8th Cir. 1947).

²²⁶ *Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs*, 149 Colo. 284, 369 P.2d 68 (1962).

²²⁷ *County of Norfolk v. City of Portsmouth*, 186 Va. 1032, 45 S.E.2d 136 (1947).

its members participate in city activity they must abide by an overall metropolitan decision on the election of officials, taxation, and other governmental policy.²²⁸

The dangers of the "sweep-in" might be avoided by separate elections in each component unit. This approach has particular merit in that it places the right to abstain from unionization on an equal footing with the right to join a union, as suggested by the language of section 7. A proposal to this effect was recently advanced in a student note in the *Harvard Law Review*²²⁹ which focused largely on maximizing the effect of employee free choice by "narrowing the size of each unit to the greatest extent possible."²³⁰ It was also urged that whenever a multilocation unit is requested, the union should be certified only for those locations in which it wins a majority.²³¹ This proposal seems a bit abstract. First of all, the authors suggest that the self-determination election be stopped at the single location level.²³² Yet this seems arbitrary if their view of maximum free choice is accepted. If, as the authors argue, a right to abstain equals a right to join, then under *Allied Stores, Inc.*²³³ or *S.A.G.E., Inc.*,²³⁴ separate intramural self-determination elections should be held. Indeed the single-location cut-off proposal overlooks the fact that self-determination elections were born on the intramural level in *Globe Mach. & Stamping Co.*²³⁵

Were such a proposal adopted, the harm would lie not so much in the administrative problem of numerous elections but rather in resulting hopscotch, crazy-quilt organization that would bear no relation to geographic contiguity. The proposal completely ignores the desirability of stable and effective bargaining relations. The student note's suggestion that small units should be encouraged as potential building blocks to a broader bargaining base is particularly ill-taken in the retail chain and department store industries, since rival unions are likely to organize the other stores and introduce not

²²⁸ The analogy to the "free ride" is particularly apt, for suburban residents often work in the city and enjoy its benefits while living in suburbia where the tax rates are lower.

²²⁹ Note, *The Board and Section 9(c)(5): Multi-location and Single-location Bargaining Units in the Insurance and Retail Industries*, 79 HARV. L. REV. 811 (1966).

²³⁰ *Id.* at 834.

²³¹ *Ibid.*

²³² *Id.* at 834 n.156.

²³³ 150 N.L.R.B. 799 (1965).

²³⁴ 146 N.L.R.B. 325 (1964).

²³⁵ 3 N.L.R.B. 294 (1937).

breadth and strength but factiousness and whipsawing. The authors predicate their proposal on "the broad Taft-Hartley policy of maximum freedom of choice."²³⁶ This view of the Taft-Hartley Act²³⁷ is hardly supported either by the language or by the legislative history. The authors neglected to point out, for instance, that the proposal in section 9(f)(2) of the initial House version of the bill²³⁸ requiring extensive self-determination elections was flatly rejected by Congress.²³⁹

Omitting the proposal to narrow the size of the units as much as possible as well as the suggested single-location cutoff, there does remain considerable merit in requiring the Board to conduct self-determination elections in component units in any case in which the Board would have granted a petition for one of the component units alone. Indeed, this approach is irresistible if section 7²⁴⁰ really means that, in drawing its unit lines, the Board should foster non-unionism on equal terms with unionism. While the 1947 amendment²⁴¹ to this section expressing the right to abstain from organizational activity might be read as a directive to the Board to consider the impact of its unit determination on those who wish to be outside the unit, an equally plausible reading would be that the section demands respect for component groups within a large unit who wish no union. Either interpretation may read more into the amendment than was intended. The legislative history²⁴² makes it clear that the 1947 amendment was added for the specific purpose of preventing unions from coercing employees to join the union in violation of section 8(b)(1),²⁴³ with no mention of representation or bargaining unit cases. To be sure, sweeping an employee in may be just as effective as coercing him to join. Nevertheless, section 7 does not seem so forceful as to preclude looking elsewhere in the statute for guidance.

Section 1²⁴⁴ of the act, entitled "Findings and Policies," declares

²³⁶ Note, *supra* note 229, at 839.

²³⁷ 61 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1964).

²³⁸ H.R. 3020, 80th Cong., 1st Sess. (1947). For text of the bill, see 93 CONG. REC. 355 (1947).

²³⁹ H. CON. REP. NO. 510 on H.R. 3020, 80th Cong., 1st Sess. (1947). For a description of the congressional vote on the proposal, see 93 CONG. REC. 6392 (1947).

²⁴⁰ NLRA § 7, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1964).

²⁴¹ 61 Stat. 140 (1947).

²⁴² See H. CON. REP. NO. 510 on H.R. 3020, 80th Cong., 1st Sess. 39-40 (1947). See also 93 CONG. REC. 6372 (1947).

²⁴³ 61 Stat. 141 (1947).

²⁴⁴ NLRA § 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

explicitly that it is the national policy to encourage collective bargaining.²⁴⁵ A proposal to amend this declaration in 1947 was rejected by one of the most conservative Congresses in recent decades.²⁴⁶ While it is impossible to tell how far this policy should be allowed to tip the scales in favor of encouraging unionization at the risk of "sweep-ins," it is fair to say that it raises a serious question as to the soundness or desirability of self-determination elections in every component unit.

Reading sections 9,²⁴⁷ 7, and 1 together, it might be reasonably concluded that the unit determinations should effectuate not simply a freedom of choice but a wider range of interests as well, notably the interest in effective collective bargaining. Therefore, instead of mandatory self-determination elections it would be more desirable to allow the appropriateness of the larger unit to guide the Board's choice as to whether or not such separate elections should be used. Where the union requests a broad unit and under the established criteria the larger unit is more appropriate than separate component units, the employees in the more appropriate unit should abide by a majority choice.²⁴⁸ On the other hand, where the larger unit is not more appropriate, *e.g.*, where the requested unit is a building-block combination, then self-determination elections within the component parts should be held. Where the union requests three out of eight stores in a city, the risk that at least one store is being "swept-in" is great; the three-store grouping is clearly not appropriate on its own merits (at least not more so than the single store unit), and therefore it cannot justify the possibility of an accidental "sweep-in." Such a risk might be justifiable, however, were the union to request a city-wide unit of all eight stores — a presumably highly appropriate unit. In the three-store unit, self-deter-

²⁴⁵ It is 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. *Ibid.*

²⁴⁶ H.R. 3020, 80th Cong., 1st Sess. (1947) (original version).

²⁴⁷ NLRA § 9, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159 (1964).

²⁴⁸ It has already been observed that § 9(c) (5) should not prevent the Board from choosing, even based on the union's petition, between two inherently appropriate units of different scope. See text accompanying note 92 *supra*. The adoption of stable and effective bargaining relations as an express factor should provide the Board with an instrument for making an intelligent choice between two such units, free from charges of arbitrariness.

mination elections should be held in each store (the units should not be further fragmented, assuming a store-wide unit is found to be more appropriate than departmental units). In the eight-store unit, such separate elections would not be advisable.

This proposal does not rely solely on the section 1 policy declaration for its validity. It is entirely consistent with the democratic ideas of fairness reflected in the municipal annexation procedure. It is not a significant departure from Board practice, but a shoring up of it, with added safeguards.²⁴⁹ The necessity of subordinating the wishes of a dissenting component unit to the interests of broader, more effective collective bargaining has been recognized in a steady line of decisions beginning with the Supreme Court's approval of the *Pittsburgh Plate Glass v. NLRB*²⁵⁰ decision in 1941 denying separate representation of one plant where a union was willing to represent a unit of all six of an employer's plants. In *Anheuser-Busch, Inc.*,²⁵¹ the Board in 1953 rejected proposed small units in favor of a broader overall unit, citing the "failure of bargaining on the multi-unit basis to achieve stability in day-to-day relationships between all parties affected."²⁵² As recently as 1962, the Board in *Kalamazoo Paper Box Corp.*²⁵³ declared that a vital aspect of its function under 9(b) was to foster "efficient and stable collective bargaining,"²⁵⁴ and that an erroneous determination "could only create a state of chaos rather than foster stable collective bargaining, and could hardly be said to 'assure to employees the fullest freedom in exercising the rights guaranteed by this Act' as contemplated by Section 9(b)."²⁵⁵

²⁴⁹ The Board often permits self-determination elections where one union requests a large grouping and another union requests a smaller component unit. See, e.g., *Morgan Transfer & Storage Co.*, 131 N.L.R.B. 1434 (1961) (allowing dock workers at a new operation to choose between separate representation and inclusion in a broader existing unit); *Matheny Creek Co.*, 85 N.L.R.B. 515 (1949) (to determine whether sawmill workers would be separately represented or included in a broad unit with logging camp employees). However, the Board does not currently direct such elections unless the smaller unit is requested by a union.

²⁵⁰ 313 U.S. 146 (1941), *affirming* 113 F.2d 698 (8th Cir. 1940), *enforcing* 15 N.L.R.B. 515 (1939). A similar position is taken by Freidin, *Craft and Splinter Units*, in N.Y.U. 7TH ANNUAL CONFERENCE ON LABOR 119 (1954). See also Note, *N.L.R.B. Rules for Determining the Appropriate Bargaining Unit in Craft and Departmental Severance Cases*, 45 MINN. L. REV. 391, 409 (1961).

²⁵¹ 102 N.L.R.B. 800 (1953).

²⁵² *Id.* at 812. The idea here suggests the counter-vailing power argument to which the Retail Clerks subscribe. A similar view is taken by Ackerman & Sullivan, *Determination of the Appropriate Unit for Collective Bargaining*, 54 W. VA. L. REV. 17 (1951).

²⁵³ 136 N.L.R.B. 137 (1962).

²⁵⁴ *Ibid.*

²⁵⁵ *Id.* at 139-40.

It may be said that these arguments simply cut against finding a very small unit appropriate in the first place, but once a component unit is found appropriate — that is, had the union requested that unit alone, the Board would have found it appropriate — the component should be allowed to dissent and reject the union. Yet the reply to this must be that the overall purpose of the National Labor Relations Act²⁵⁶ is the promotion of industrial peace. This objective is to be realized primarily not through the exercise of individual free choice, but through the encouragement of collective bargaining.²⁵⁷ Collective bargaining is to be fostered in appropriate units, and the more appropriate the unit, the better. While a less appropriate component unit must not be permitted to disrupt the majority choice in an election held in the broader, more appropriate unit, it is still permissible to allow the smaller unit, even though less appropriate, to organize by itself under the broad policy in favor of collective bargaining. However, when both the units in question are appropriate and there is a direct clash between the policy in favor of collective bargaining and the policy in favor of maximizing the effect of individual free choice, the latter must yield to the former.

V. CONCLUSION

By way of recapitulation it can be said that the Board in each unit determination is trying to draw the lines so as to include employees with common interests. This community is defined in terms of similar or related skills and working conditions as well as physical proximity and contiguity. Where two otherwise distinct communities experience substantial interchange or functional integration which in turn produces interdependence, these two communities should generally be included in the same bargaining unit. Once a bargaining relationship has a successful history, there is justifiable reluctance to break it up at the whim of a dissenting minority. In view of the political nature of the determination, analogies from the context of state and local government may be helpful in breaking a deadlock in the analysis.

Because the statute contemplates industrial stability and effective, harmonious bargaining relationships, and since the Board itself has recognized this consideration in many of its decisions, it is pro-

²⁵⁶ 49 Stat. 449 (1935), 29 U.S.C. §§ 151-66 (1964).

²⁵⁷ For a similar view, see Cohen, *Self-Determination Elections Among Previously Unrepresented Employees in Fringe Groups: A Reexamination*, 50 GEO. L.J. 187, 194-95 (1961).

posed that stability be acknowledged explicitly as a relevant factor in all unit determinations. In order to minimize the possible injury to employee democracy which may result from "sweep-ins," separate self-determination elections should be held whenever a large unit is not a more appropriate unit than one or more of its component parts which, if alone requested, would be appropriate.

Finally, in response to the legitimate request for more clear and consistent guidelines, it first must be observed that just as no two improvement districts look exactly alike, there is bound to be variance from one unit to the next depending on the different fact situations. Indeed, there may be some fundamental differences from one industry to the next. Retail chain and department store units, where rival unionism is widespread, may justifiably differ in size and diversity of content from units in the insurance industry, which is dominated by a single union. Both are likely to differ from manufacturing industries which may involve large numbers of unskilled workers and small groups of highly skilled craft employees.

These legitimate differences do not, however, absolve the Board of its responsibility to hand down clearly written opinions in which the established relevant factors are discussed and the Board's conclusions are supported by precise factual information. This does not require longer opinions, nor should the opinions be entirely devoted to statistics. The parties are entitled to know what kind of skills may be regarded as similar, what geographic considerations are "cogent," how much is "substantial" interchange, in what respects several functions are integrated, and the like. The need for clear guidelines has become especially acute subsequent to the delegation by the Board of the initial unit determination function to the Regional Directors in 1961.²⁵⁸ For if the Board itself can be ambiguous or inconsistent, how much more so will be those thirty-one lesser administrative bodies, each trying to interpret and apply the Board's past decisions. It is hoped that the analysis presented herein may encourage a more effective application of the statute and foster the kind of adjudication which will make the NLRB's administrative process more satisfactory to the legitimate interests of the parties involved.

²⁵⁸ This delegation, which took effect on May 16, 1961, was made pursuant to NLRA § 3 (b), as amended, 73 Stat. 542 (1959), 29 U.S.C. § 153 (b) (1964). The relevant regulations are found at 29 C.F.R. § 101.8 (1965). For a comment by a Regional Director on the delegation, see McLeod, *Bargaining Unit Problems: The Authority of Regional Directors*, N.Y.U. 15TH ANNUAL CONFERENCE ON LABOR 279 (1961).