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LABOR LAW-JURISDICTION OF NLRB UNDER SELF-IMPOSED LIMITATIONS

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COMMENTS

LABOR LAW—JURISDICTION OF NLRB UNDER SELF-IMPOSED LIMITATIONS—Under the original National Labor Relations Act of 1935[1]

[1] 49 Stat. L. 449 (1935), 29 U.S.C. (1946) §§151-166.

and that act as it stands amended by Title I of the Labor-Management Relations Act of 1947,[2] Congress has conferred upon the National Labor Relations Board regulatory authority in certain areas of industrial relations, the jurisdictional extent of which is conterminous with the power of the federal government under the commerce clause of the Constitution.[3] At an early date, however, the Board determined that "budgetary limitations as well as the need to avoid diffusion of its time and energy . . . [justified] it in not exerting its jurisdictional authority to the legal hilt."[4] Accordingly, the Board has consistently declined jurisdiction whenever in its estimation either a question of representation or an alleged unfair labor practice "affects,"[5] but has no pronounced impact upon, interstate commerce.[6]

Consistency has been confined, however, to the principle, rather than to the test for its application, and until October of 1950 each decision upon non-assertion of statutory jurisdiction only confounded the confusion in this field. In recognition of this fact and "in the interest of certainty," the Board at that time sought, by a series of selected decisions,[7] to construct a "minimum jurisdictional yardstick." Under this "yardstick," it declared that it would thereafter exert jurisdiction over the following:

(1) Instrumentalities and channels of interstate and foreign commerce;

(2) Public utility and transit systems;

(3) Establishments which operate as integral parts of a multi-state enterprise;

(4) Establishments which produce or handle goods destined for out-of-state shipment, or which perform services outside the state in

[2] 61 Stat. L. 136 (1947), 29 U.S.C. (Supp. IV, 1951) §§141-197.

[3] NLRB v. Fainblatt, 306 U.S. 601, 59 S.Ct. 668 (1939).

[4] Testimony of Board Chairman Herzog, S. Hearings on S. Res. 248, 81st Cong., 2d sess., p. 120 (1950).

[5] Sec. 9(c) permits the Board to provide for a hearing upon a representation petition only when "it has reasonable cause to believe that a question affecting commerce exists." Sec. 10(a) similarly empowers the Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." Sec. 2(7) provides: "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce . . . or having led or tending to lead to a labor dispute burdening or obstructing commerce. . . ."

[6] NLRB, Fifteenth Annual Report, p. 5 (1951). See also the testimony of Herzog, H.R. Hearings on H. Res. 512, 81st Cong., 2d sess., p. 110 (1950).

[7] Dorn's House of Miracles, 91 N.L.R.B. 632 (1950); Local Transit Lines, 91 N.L.R.B. 623 (1950); Federal Dairy, Inc., 91 N.L.R.B. 638 (1950); The Borden Co., 91 N.L.R.B. 628 (1950); WBSR, Inc., 91 N.L.R.B. 630 (1950); Hollow Tree Lumber Co., 91 N.L.R.B. 635 (1950); Rutledge Paper Products, 91 N.L.R.B. 625 (1950); Stanislaus Implement and Hardware Co., 91 N.L.R.B. 618 (1950); Westport Moving and Storage Co., 91 N.L.R.B. 902 (1950).

which located, if the goods or services are valued at not less than $25,000 per year;

(5) Establishments which furnish services or material valued at not less than $50,000 per year and necessary to the operation of establishments falling within categories (1), (2), or (4) above.

(6) Any other establishment which:

(a) purchases outside the state in which located at least $500,000 in goods or services annually; or

(b) purchases inside the state at least $1,000,000 in goods which originate outside the state; or

(c) has a combination inflow or outflow of goods or services which add up to at least a total of 100% of the amounts required to satisfy categories (4), (5), (6)(a) and (6)(b) above.[8]

(7) Establishments which substantially affect the national defense. Even before the announcement of these standards,[9] however, the then general counsel of the Board challenged the Board's right so to limit its own jurisdiction,[10] and "issued complaints . . . with full knowledge that the Board would dismiss them later."[11] This administrative conflict soon precipitated litigation and so put the Board's authority to test.

I. The Legal Basis

As a purely practical matter, one may readily agree that so little limitation remains upon the scope of the Board's jurisdiction, in the requirement that it determine whether a question "affecting commerce" exists, that the Board should have available some other means for restricting itself to those cases whose consideration will really effectuate

[8] Thus, in Rutledge Paper Products, 91 N.L.R.B. 625 (1950), the employer annually shipped $22,500 worth of goods directly to points outside the state (approximately 90% of $25,000 minimum "outflow" figure), and annually purchased $65,000 worth of goods shipped directly from points outside the state (approximately 15% of the $500,000 "inflow" figure). The Board in this case asserted jurisdiction because the portion of each of the two "yardstick" categories add up "in excess of 100 per cent."

[9] See N.L.R.B. Press Release No. 342, 26 L.R.R.M. 50 (1950). It should be noted that those tests which are not defined in terms of specific dollar amounts are still subject to some indefinite dollar limitation by virtue of the *de minimis doctrine*. "Examining the Act . . . we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis*." NLRB v. Fainblatt, 306 U.S. 606 at 607, 59 S.Ct. 668 (1939). There is nothing in the 1947 amendment to the NLRA which would detract from the applicability of this holding.

[10] See General Counsel Denham's letter to the attorney for the National Auto Dealers' Association, dated March 9, 1948, 21 LAB. REL. REP. 235 (1948).

[11] Testimony of Board Chairman Herzog, S. Hearings on S. Res. 248, 81st Cong., 2d sess., p. 120 (1950).

the policy of the act. No other means are provided for in the act, however, and it is difficult to conceive how the Board, as a judicial type of administrative tribunal, can create one without statutory authority, either by analogy to the procedure of courts or by exercise of its administrative discretion. It would seem, moreover, that whereas in the original NLRA of 1935 there was only an absence of provision for additional jurisdictional limitations, the effect of at least two changes made by the LMRA in 1947 is expressly to forbid them. First, with respect to representation petitions, section 9(c), which formerly provided that "the Board *may* investigate," was changed to read: "(1) Whenever a petition shall have been filed . . . the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide for an appropriate hearing. . . ."[12] Second, with respect to unfair labor practice charges, whereas the original NLRA gave the Board the discretionary power to issue a complaint upon the filing of such a charge, the LMRA, in section 3(d), creates the office of General Counsel and gives to the occupant thereof *"final authority,* on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board," and, in section 10(c), apparently limits the function of the Board itself to that of determining whether an unfair labor practice was committed and of ordering accordingly.[13]

In effect, however, this apparently mandatory language has been read out of the act in the two cases thus far to arise relating to the right of the Board to dismiss a proceeding upon policy grounds despite the existence of a question "affecting commerce." The Court of Appeals for the Ninth Circuit, in *Haleston Drug Stores v. NLRB,*[14] upheld dismissal of an employer's charge that a union had committed an un-

[12] Emphasis supplied.

[13] The pertinent portion of §10(c) provides: "The testimony [taken at the preliminary hearing on the complaint, which is conducted by a trial examiner as provided by §10(b)] shall be reduced to writing and filed with the Board. Thereafter in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practices. . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged or is engaging in any such unfair labor practices, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. . . ." See also the proviso to §10(a), infra at note 70.

[14] (9th Cir. 1951) 187 F. (2d) 418, cert. den. 342 U.S. 815, 72 S.Ct. 29 (1951).

fair labor practice;[15] and the Seventh Circuit, in *Local No. 12, Progressive Mine Workers of America v. NLRB*,[16] upheld dismissal of a union charge against an employer. In each case the Board had found that the practice complained of "affected commerce." Dismissal in *Haleston* had been prior to the formulation of the "minimum jurisdictional yardstick," but on grounds equivalent to those "codified" therein; dismissal in the *Progressive Mine Workers* case had been on the basis of an express finding that the nature and volume of the employer's business satisfied none of the criteria of the "yardstick." The reasoning of the *Haleston* case, which was approved and relied upon by the court in the *Progressive Mine Workers* case, emphasized not the changes which were made in sections 9(c) and 10(c), but the fact that the initial sentence of section 10(a) still stood as it had prior to 1947: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce." Such language, the court held, conferred discretionary authority in the original NLRA, and it did not become directive by the enactment of the LMRA. Notwithstanding the vesting in the general counsel of absolute authority with respect to the issuance of complaints, the retention in section 3(a) of the Board as an "agency of the United States" negated any possibility that it had been "transmuted into a court,"[17] and made apparent the intention of Congress that administrative discretion should persist at the hearing stage. A contrary holding, the court concluded, would be inconsistent with the Board's function of adjudicating "public rather than private rights."[18]

Assuming that the premises of *Haleston* and *Progressive Mine Workers* are correct, it is by no means certain that they compel the conclusion reached by those courts. Even if the purpose of section 10(a) be admitted to be the grant of only a discretionary authority, one cannot therefore conclude that a proceeding can be dismissed on policy grounds after once commenced pursuant to a duly issued complaint, without considering these questions: (1) In what body does that discretion lodge? (2) How far does that discretion extend? In respect to

[15] Dictum in an earlier opinion of the same circuit, NLRB v. Townsend, (9th Cir. 1950) 185 F. (2d) 378, pointed to this result. "Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised. Many factors such as lack of funds or the imminence of a more drastic disruption of commerce in another industry might dictate that in a particular case power explicitly granted should not be exercised." 185 F. (2d) at 383.

[16] (7th Cir. 1951) 189 F. (2d) 1, cert. den. 342 U.S. 868, 72 S.Ct. 109 (1951).

[17] 187 F. (2d) 418 at 421.

[18] Id. at 422.

the first question, the body referred to in section 10(a) is "the Board," but the meaning of even so definite a term as that does not remain constant throughout the act. As "continued" by section 3(a), "the Board" consists of but five "members," and not the general counsel, whose office is separately created by section 3(d).[19] In section 9, relating to the settlement of representation questions, no function is given the general counsel, and in conferring powers and duties upon "the Board" only the five "members" are comprehended. But in section 10, relating to all phases of prevention of unfair labor practices from issuance of the complaint through issuance of a "cease and desist" order to enforcement or review of such an order in the courts, reference once again is only to "the Board," yet it is certain that in this context the term must include the general counsel as well as the five "members" because of section 3(d)'s express delegation to him of certain functions of "the Board" under section 10.[20] Accordingly, mandatory language could not have been used in section 10(a) without taking away the discretion Congress undoubtedly intended the general counsel to have, and the use of discretionary phraseology therefore compels in no wise the conclusion that the "members" of the Board have discretion to dismiss cases properly presented to them by the general counsel. With regard to the second question, even if the "members" of the Board be said to have some discretion under section 10(a) in the prevention of unfair labor practices, a preferable construction of that section would limit such discretion to the area of enforcement of orders already issued, and would not extend it to the hearing stage. This construction would seem appropriate, from a comparison of the language of section 10(a) with that of section 10(k), in which the Board is not merely "empowered," but "empowered and directed to hear and determine" jurisdictional disputes out of which an unfair labor practice is charged to have arisen: apparently the only difference intended in Board operation under the two sections is that section 10(e) enforcement of the usual "cease and desist" order is to be discretionary with the Board, but that such enforcement is required of every order issued under section 10(k).

[19] Supra.

[20] Thus §10(b) provides now, as it did in the original act, that "whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint"; yet §3(d) gives the general counsel "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board...."

Furthermore, reference to the legislative history of the creation of the office of general counsel impels dissent from the *Haleston* conclusion that "there is simply no evidence of a Congressional purpose to take from the Board the power of dismissal on grounds having to do with the effectuation of the policy of the Act."[21] The House report on the final draft of the LMRA stated that section 3(d) would give the general counsel complete power "to act . . . independently of any direction, control, or review by, the Board,"[22] in regard to all his functions therein, but it is hardly possible for him to *prosecute* a complaint before the Board if the Board can dismiss it on policy grounds not going to the merits of the controversy. Similarly, Senator Taft referred to the same section as intended "to make an effective separation between the judicial and prosecuting functions of the Board," and compared the function of the general counsel to "that of the Attorney General of the United States or a State attorney general."[23] Accordingly, in spite of the fact that the Board has not been "transmuted into a court,"[24] it would seem beyond question that Congress intended the members of the Board to *function like* a court and to have power only to determine unfair labor practice controversies on the merits, not to dismiss them on the basis of extra-legal considerations which the general counsel must already have made.

The intent of Congress would seem no less clear, and considerably harder to avoid, in regard to representation cases, under the language

[21] 187 F. (2d) 418 at 422.

[22] H.R. Conf. Rep. No. 510, 80th Cong., 1st sess., p. 37 (1947).

[23] 93 CONG. REC. 6859 (1947). Such officers have the exclusive power, as a necessary incident to their enforcement authority, to determine what cases falling within their jurisdiction shall be heard by their respective tribunals.

In response to a query by Senator O'Mahoney, Senator Ball remarked: "That is correct. The House bill [from which section 3(d) was taken] has separated completely the judicial and prosecuting functions of the National Labor Relations Board." 93 CONG. REC. 5013 (1947).

Those opposed to the Taft-Hartley amendments agreed with this interpretation. Thus Senator Murray stated, "One person will determine . . . which cases shall be enforced. . . . No real power is vested in the Board in order that their collective common sense may be brought to bear on these serious problems." 93 CONG. REC. 6496 (1947). And President Truman in his veto message stated, with reference to section 3(d): "It would invite conflict between the National Labor Relations Board and its general counsel, since the general counsel would decide, without any right of appeal . . . whether charges were to be heard by the Board. . . . By virtue of this unlimited authority a single administrative official might usurp the Board's responsibility for establishing policy under the act." 93 CONG. REC. 7487 (1947).

See also Senator Morse, at 93 CONG. REC. 6455 (1947) and Senator Taft, at 93 CONG. REC. 6442 (1947).

[24] The significance of which is, that unlike a court of law, the Board cannot enforce its own orders by issuance of an injunction or punishment for contempt, §10(e); nor can it compel the attendance of witnesses, §11(2).

of section 9(c), already noted, and in regard to the holding of union-shop elections,[25] yet the Board considers its "yardstick" again applicable.[26] Section 9, however, makes no provision as it now stands for review of any order issued thereunder, and there is consequently no opportunity for judicial review of the application of the "yardstick" in this context, except under the remote possibility that a court would issue mandamus to compel the Board to discharge its statutory duty.

Accordingly, one must conclude that practical considerations have once again overcome the technical ones, in the resolution of ambiguities inherent in the LMRA,[27] especially since the denial of certiorari by the Supreme Court to the *Haleston* and *Progressive Mine Workers* decisions.[28] It remains, then, to consider the effect of these self-imposed jurisdictional limitations.

II. Applying the "Yardstick"

It is unlikely now that any court will hold the Board to lack the power to withhold its jurisdiction on policy grounds, and the present general counsel has demonstrated his willingness to let the same criteria control in his issuance of complaints in unfair labor practice cases as were incorporated in the Board's "minimum jurisdictional yardstick."[29] Accordingly, it will be profitable to inquire into the Board's interpretation and application of that "yardstick," in order to perceive the present practical scope of the Board's authority.

First of all, it is clear that history of assertion of jurisdiction in an industry, or even over a particular concern, is now largely immaterial.

[25] Sec. 9(e)(1) provides: "Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer."

[26] It is interesting to note that the Board constructed its "yardstick" in disposing of nine representation cases. See cases cited in note 7 supra, and see NLRB Press Release No. 329, 2 LAB. L. REP., ¶14,105 (1950), where the Board indicated it would conduct union-shop elections only if "we are to continue to exercise jurisdiction over the . . . industry."

[27] Cf. the application of the §9(h) non-Communist affidavit to officers of the C.I.O. and A.F.L. despite a logically sound argument to the contrary, NLRB v. Highland Park Manufacturing Co., 341 U.S. 322, 71 S.Ct. 758 (1951). See comment, 49 MICH. L. REV. 1210 (1951); and the judicial limitations on the application of the "secondary boycott provisions" of the act, see comment, 50 MICH. L. REV. 315 (1951).

[28] 342 U.S. 815, 72 S.Ct. 29 and 342 U.S. 868, 72 S.Ct. 109 (1951).

[29] Administrative Decisions of General Counsel, Cases 28-32, 2 LAB. L. REP., ¶10,573 (1951). See also 1 LAB. L.J. 1129 (1950).

Thus, although prior to the construction of the "yardstick" the Board has withheld jurisdiction in cases involving similar enterprises, it has asserted jurisdiction over a novelty store[30] and over a fraternal organization,[31] each of which satisfied one or more of the criteria of the "yardstick." And although in 1950 the Board held it would not effectuate the policy of the act to consider whether a New York city taxicab company had committed an unfair labor practice,[32] it held otherwise in 1951 and asserted jurisdiction over the same taxicab company, upon finding that it satisfied one of the criteria of its newly-established "yardstick."[33]

On the other hand, the Board has on several occasions held the "yardstick," although constructed "in the interest of certainty," nevertheless inapplicable because of overriding considerations. Thus the Board has ruled that it would not assert jurisdiction in the hotel industry, notwithstanding satisfaction of the "yardstick" criteria in a particular case,[34] because of its firmly entrenched practice not to do so, a practice it saw to have received congressional endorsement.[35] Similarly, jurisdiction has been withheld from non-profit associations, even though as employers they do measure up to the "yardstick."[36] Conversely, when the employees of a labor union succeed in bringing a case before the Board in which the union appears in the role of employer, apparently jurisdiction will be asserted by the Board without regard for whether there has been satisfaction of any of the criteria of the "yardstick."[37]

[30] Dorn's House of Miracles, 91 N.L.R.B. 632 (1950).

[31] Oklahoma State Union of the Farmers' Educational and Cooperative Union of America, 92 N.L.R.B. 248 (1950).

[32] Skyview Transportation Co., 90 N.L.R.B. 1895 (1950).

[33] Skyview Transportation Co., 92 N.L.R.B. 1664 (1951). See also note 44 infra.

[34] Hotel Association of St. Louis, 92 N.L.R.B. 1388 (1951).

[35] 92 N.L.R.B. at 1389-1390. Senator Taft has expressed the view that the hotel industry is not covered by the act, 95 CONG. REC. 12,469 (1947). But this conclusion emanated from the Senator's view that a dispute or representation question in the hotel industry does not "affect" commerce, rather than from the Board's view that it does, but that settling it does not effectuate the policy of the act. See also White Sulphur Springs Co., 85 N.L.R.B. 1487 (1949). But in Roy C. Kelley, 95 N.L.R.B. No. 7 (1951), jurisdiction was asserted over a hotel located in the Territory of Hawaii, the Board seeing this result compelled by the definition in §2(6) of "commerce" as including "commerce . . . within the District of Columbia or any Territory." It would seem, however, that since in the Board's view previously the question was not whether "commerce" was "affected," but whether the policy of the act would be served, this decision is inconsistent with that in the St. Louis Hotel case.

[36] Trustees of Columbia University, 97 N.L.R.B. No. 72 (1951); Philadelphia Orchestra Association, 97 N.L.R.B. No. 80 (1951). In the latter case, the Board held: "The effect on interstate commerce of the activities of a nonprofit organization like the Respondent Association, devoted to the presentation of musical performances of artistic merit, is too remote to warrant taking jurisdiction in a field where we have not previously asserted it."

[37] Air Line Pilots Association, 97 N.L.R.B. No. 172 (1951). The decision is susceptible of an interpretation that the employer-union constituted an "integral part of a multi-state enterprise" (third criterion of the "yardstick," supra): the Board cited The

Aside from the foregoing, the Board's jurisdictional "yardstick" has not undergone any major alterations, although it has been stretched somewhat beyond the normal 36 inches by a very liberal interpretation of some of its provisions. Thus the seventh criterion,[38] relating to "establishments substantially affecting national defense," has been construed as encompassing a dry-cleaning and laundry business having no appreciable (dollar-wise) relation to interstate commerce, but licensed to do business on a government reservation by the Atomic Energy Commission.[39] Similarly, all of the following have been held to be "instrumentalities and channels of interstate and foreign commerce" and therefore within the first criterion of the "yardstick": a local radio station affiliated with a national network,[40] a newspaper employing a national wire service,[41] a bank which finances interstate enterprises,[42] a construction company whose operations are limited in scope but which is engaged in work on an interstate highway,[43] and a taxicab company operating entirely within the state in which located, which derives a small part of its revenue from servicing interstate transportation terminals.[44] No less liberally has the Board defined "public . . . transit systems," so as to include transit companies within the second criterion without consideration for their size or the scope of their operations, but on the basis solely that they supply transportation for some of the employees of one or more interstate enterprises.[45]

Borden Co., supra note 7 and infra note 47, where this criterion was originated, holding: "As the Board normally assumes jurisdiction over enterprises which are multi-state in character, and as no valid reason has been advanced for applying a different standard here, we find that the Employer is engaged in commerce within the meaning of the Act and that it would effectuate policies of the Act to assert jurisdiction." What was left unclear was whether the "multi-state enterprise" by relation to which the local union involved was covered was the national union of which the local was a part, or the interstate business enterprise whose employees the union represented. It would seem that the important relation is the latter, but so to hold would carry the "integral part of a multi-State enterprise" too far, for it could hardly be said seriously that the maintenance of a local union's own relation to, much less is necessary for, the operations of such an enterprise. Accordingly, it is better to frame an additional jurisdictional criterion relating to unions acting as employers.

[38] Supra.

[39] Richland Laundry & Dry Cleaners, 93 N.L.R.B. No. 102 (1951). See also Westport Moving and Storage Co., 91 N.L.R.B. 902 (1950).

[40] WBSR, Inc., 91 N.L.R.B. 630 (1950).

[41] Press, Inc., 91 N.L.R.B. 1360 (1950).

[42] Amalgamated Bank of New York, 92 N.L.R.B. 545 (1950).

[43] R. B. Guerin & Co., 92 N.L.R.B. 1698 (1951).

[44] Red Cab, Inc., 92 N.L.R.B. 175 (1950), overruling Yellow Cab Co. of California, 90 N.L.R.B. 1884 (1950). Red Cab derived only 5% of its revenues from operations of this nature. Similarly, jurisdiction was asserted in Skyview Transportation Co., 92 N.L.R.B. 1664 (1951) (see also note 33 supra), on the basis of the fact that 6% of the cabs' trips were to or from such terminals. See also note 74 infra.

[45] Local Transit Lines, 91 N.L.R.B. 623 (1950). See also Wentworth Bus Lines, 92

Although most of the criteria of the Board's "yardstick" merely narrow the jurisdiction which the Board clearly has according to current interpretation of the federal government's commerce power, at least one circuit of the court of appeals has expressed concern lest the application of the third criterion, to determine when an establishment is an "integral part of a multi-State enterprise," carry the Board's assertion of jurisdiction beyond the constitutional limit.[46] Clearly within this criterion, and probably the principal type of establishment the Board had in mind in framing it, is the individual chain store, retailing entirely within the state and buying an insufficient volume of goods out-state to satisfy (a) or (b) of the sixth criterion, but nevertheless subject to a high degree of control from above, the result of which is the coordination of its business operations with those of its sister stores in other states. Similarly, any subsidiary wholly owned by, and engaged in the same "line of commerce," as an interstate parent, could readily be fitted within this criterion.[47] The same considerations led the Board next to assert jurisdiction over even an independently owned establishment which operates on a local scale, when such an establishment plays an important part in the distribution of the products of an interstate enterprise to which it is closely related, as, e.g., by a contract of exclusive dealership. In particular, jurisdiction was asserted over automobile dealers, without regard to whether the volume of their purchases from the interstate manufacturer equalled the jurisdictional minimum of the sixth criterion[48]—and in every such case where the Board's jurisdiction has been tested, it has been upheld.[49] But the Board has not considered exclusive dealing an essential element, and has asserted jurisdiction over independent retailers who remain free to deal in the products of any supplier but are subject to some lesser control by an interstate enter-

N.L.R.B. 1356 (1951). Making assertion of jurisdiction over a local transit company depend on the destinations of its customers is apparently a departure from former Board practice, which was to withhold jurisdiction simply because of the local nature of the company actually involved, Rapid Transit Co., 88 N.L.R.B. 875 (1950); and cf. Chicago Motor Coach Co., 62 N.L.R.B. 890 (1945), where jurisdiction was withheld though the system concerned was appreciably more interstate in character than was that in the Local Transit Lines case. The Board's present policy has been upheld, however, as not extending jurisdiction beyond the limit under the commerce clause, NLRB v. El Passo-Ysleta Bus Line, Inc., (5th Cir. 1951) 190 F. (2d) 261.

[46] NLRB v. Shawnee Milling Co., (10th Cir. 1950) 184 F. (2d) 57.

[47] The Borden Co., 91 N.L.R.B. 628 (1950) (milk and milk products being the common "line of commerce").

[48] Baxter Bros., 91 N.L.R.B. 1480 (1950).

[49] NLRB v. Conover Motor Co., (10th Cir. 1951) 192 F. (2d) 779; NLRB v. Somerville Buick, Inc., (1st Cir. 1952) 194 F. (2d) 56.

prise in whose products they deal[50] or under whose style they trade.[51] In the absence of the control element, however, the Board has considered such a retailer not an "integral part of a multi-State enterprise" from which it buys at an agreed discount and under whose style it does business.[52]

Common ownership of similar establishments in different states, each of which is otherwise local in nature, the Board has considered to render each subject to the assertion of its jurisdiction, when the effect thereof is creation of an interstate distribution system,[53] but not when the principal function of each is rendition of services rather than distribution of goods.[54] Finally, the Board has considered the "integral part" criterion to cover every subsidiary of an interstate parent, without regard for either the character of the subsidiary's own operations, the relation of its "line of commerce" to that of its parent, or the extent of control the parent exercises over it. In *NLRB v. Shawnee Milling Co.*,[55] the Court of Appeals for the Tenth Circuit held the exercise of jurisdiction to be beyond the constitutional power of the federal government when dependent upon such considerations, ruling that jurisdiction by the Board over a subsidiary employer is dependent upon a prior finding that the operations of the subsidiary itself—not those of the parent, even if the parent controls the subsidiary's general labor policies—"affect commerce."[56] The Board has expressed its dissatisfaction with the *Shawnee* decision, however, and has indicated that it will continue to assert jurisdiction over a subsidiary employer by reference solely to the nature of the parent's business.[57]

[50] Hallam & Boggs Truck and Implement Co., 95 N.L.R.B. No. 131 (1951) (farm equipment dealer operating under a non-exclusive dealing arrangement with a manufacturer, the continuance of the arrangement being conditioned upon the dealer's compliance with the manufacturer's price schedules, the sufficiency of his sales-and-service facilities, etc.).

[51] Mil-Bur, Inc., d.b.a. Howard Johnson, 94 N.L.R.B. No. 169 (1951) (restaurant using style and other incidents owned by and associated with a promoter, the continuance of its right to do so being conditioned upon payment to the promoter of a certain royalty and control by the promoter over certain features of the menu).

[52] Ben Franklin Stores, 94 N.L.R.B. No. 112 (1951).

[53] S & L Co. of Pipestone, 96 N.L.R.B. No. 214 (1951) (retail department stores).

[54] Toledo Service Parking Co., 96 N.L.R.B. No. 38 (1951) (parking garages).

[55] (10th Cir. 1950) 184 F. (2d) 57.

[56] Id. at 59: "To hold that under these conditions the common ownership of the two plants subjects Pauls Valley, a purely intrastate operation, to the jurisdiction of the Board would be to hold that one may not operate two businesses, wholly separate and apart—one engaged in interstate business and the other in intrastate operations—without subjecting both to the jurisdiction of the Board."

[57] Basic Lumber Products Div. of the N.Y. Coal Co., 92 N.L.R.B. 874 (1950). As in the Shawnee case, the parent and the subsidiary were engaged in different "lines of commerce." However, the subsidiary shipped approximately $3,000 worth of goods per

The fourth, fifth, and sixth criteria of the Board's jurisdictional "yardstick," each of which is stated in terms of the annual volume of a certain type of interstate transaction in which an establishment engages,[58] are also subject to some elaboration. Apparently the critical year for the purpose of considering the extent of interstate activities is no particular one, but only an "appropriate" one,[59] and there is authority for considering such activities over a period of several years, so as to lessen the possibility that an establishment might be covered by the act one year but not the next.[60] In cases involving secondary boycotts, the Board looks first to the operations of the primary employer, but where those do not satisfy any of the transaction criteria, the Board will still entertain the case if the business of the primary employer and that portion of the business of the secondary employer which is affected by the alleged boycott, when taken together, meet such standards.[61] Similarly, where a group of employers bargain together, or where a union seeks to represent a multi-employer unit, the Board will consider the total volume of interstate activity engaged in by the entire employer group, rather than the individual operations of the enterprise immediately involved in the controversy.[62] But the mere fact that an employer is a member of a larger bargaining unit is not a relevant consideration where the matter which gave rise to an alleged unfair labor practice is foreign to, and beyond the prescribed authority of, such larger unit.[63]

III. The "Yardstick" and State Jurisdiction

Recent decisions of the Supreme Court have struck down attempts by state agencies to regulate phases of industrial relations which are

year in interstate commerce, enough that its operations could be said to "affect commerce," though not up to the amounts on which the sixth criterion of the Board's jurisdictional "yardstick" depends.

[58] Note the difference in dollar volumes required under the "inflow," as compared to the "outflow," criteria. This is probably attributable to the feeling that the "stream of commerce" is more effectively polluted by a labor disturbance occurring at its origin than by one at its terminus.

[59] United Mine Workers (Mercury Mining and Construction Corp.), 96 N.L.R.B. No. 216 (1951).

[60] Midland Building Co., 78 N.L.R.B. 1243 (1948). But in Jack Smith Beverages, Inc., 94 N.L.R.B. No. 210 (1951), the critical year was said to be that during which the alleged unfair labor practice was committed.

[61] Jamestown Builders Exchange, Inc., 93 N.L.R.B. No. 51 (1951); United Construction Workers (Kanawha Coal Operators' Association), 94 N.L.R.B. No. 236 (1951).

[62] Federal Stores Division of Spiegel, Inc., 91 N.L.R.B. 647 (1950); Davis Furniture Co., 94 N.L.R.B. No. 52 (1951). See also Air Conditioning Co. of Southern California, 79 N.L.R.B. 1396 (1948).

[63] MacFarlane's Candies, 91 N.L.R.B. 1264 (1950).

within the scope of the LMRA, not because the state regulation attempted would conflict with the operation of the national act, but solely on the ground that Congress "occupied the field" and must have intended that there be no state regulation of the matters with regard to which it legislated.[64] Carrying the "occupancy of the field" theory but one step further, it is possible to say that no right should remain to the states in that fringe area of industrial relations which is within the jurisdiction of the National Board but as to which the Board has declined to assert jurisdiction upon policy grounds, and therefore that a "no-man's land" exists where the states cannot and the National Board will not apply regulatory authority. Some writers have expressed the fear that a jurisdictional void thus exists.[65] The Supreme Court has not yet had occasion to rule upon the authority of a state labor board to take jurisdiction over a labor dispute or representation question which "affects commerce," and is therefore within the National Board's jurisdiction, but by the application of the Board's "yardstick" is found to be of so insubstantial effect that such jurisdiction would not be asserted. Dicta in many of its decisions, however, seem to indicate that "occupancy of the field" would not be used to bar the state agency in such a case.

Such dicta are found first in two cases decided under the original NLRA. In *Bethlehem Steel Co. v. New York State Labor Relations Board,*[66] the Court set aside the State board's certification of a foremen's union but made this significant collateral observation:

> "However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject . . . or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to those cases in which the effectiveness of federal super-

[64] International Union of United Auto Workers v. O'Brien, 339 U.S. 454, 70 S.Ct. 781 (1950); Amalgamated Association of Street, Electric Railway, and Motor Coach Employees, Div. 998 v. Wisconsin Employment Relations Board, 340 U.S. 383, 71 S.Ct. 359 (1951).

[65] Garfinkel, "The Conflict between Federal and State Jurisdiction," 1 LAB. L.J. 1027 (1950); Forkosh, "NLRB's New Jurisdictional Rule on Secondary Boycotts," 2 LAB. L.J. 247 (1951); Cox and Serdmain, "Federalism and Labor Relations," 64 HARV. L. REV. 211 (1950). See also New York S.L.R.B., "Twelfth Annual Report," p. 2 (1949); testimony of Denham, S. Hearings, S. Res. 248, 81st Cong., 2d sess., p. 182 (1950).

[66] 330 U.S. 767, 67 S.Ct. 1026 (1947).

> vision awaits federal administrative regulation. . . . The States are in those cases permitted to use their police power in the interval."[67]

Thus it would be possible to argue that marginal cases "affecting commerce" but satisfying none of the criteria of the Board's jurisdictional "yardstick" fall within a "separable segment" of the coverage of the national act, and that therefore the states are left free to act with regard to such cases until such a time as the National Board should decide to alter its policy of withholding jurisdiction therefrom. And some additional weight would seem to be given such an argument by the fact that in *LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board*[68] the Court considered it appropriate to point out that the employer's business was "one over which the National Board has consistently exercised jurisdiction" before striking down the state board's attempt to determine a representation question in regard to its employees.

At least two of the 1947 amendments of the NLRA bear directly on this question of state authority in the area where the National Board has jurisdiction but will not exert it. (1) Section 9(c)(1)[69] was altered in such a way that it is possible to argue that the Board is now without discretion to withhold jurisdiction in representation cases, and that therefore there can be no possibility of a regulatory vacuum in this area, but, as has been noted before, the Board has not so construed the amended section and court review of its construction is unlikely. (2) There has been added to section 10(a) a proviso empowering the Board to cede jurisdiction over unfair labor practice cases "in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character)" by agreement with state agencies operating under statutes which are consistent with the national act.[70] Accordingly, it is possible to contend that this pro-

[67] Id. at 774. The representation provisions of the New York labor act, 30 N.Y. Consol. Laws (McKinney, 1948) §705, closely parallel those of the NLRA, but in the controversy that gave rise to the Bethlehem Steel case the National Board had declined to consider foremen as an appropriate unit for collective bargaining, while the New York S.L.R.B. sought to certify such a unit. These facts led the Court to observe that "If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. . . . The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. . . . We do not believe this leaves room for the operation of the state authority asserted." 330 U.S. at 776. Such an observation implies that if the National Board had indicated that it would not "assert control over" the employer involved, a different result might derive.

[68] 336 U.S. 18, 69 S.Ct. 379 (1949).

[69] Supra at note 12.

[70] The proviso does not literally refer only to unfair labor practice cases, but it would seem that its scope must be restricted thereto inasmuch as §10 relates in all other respects

viso sets out the only means whereby the Board can cede jurisdiction to state agencies and precludes state regulation in the marginal area without express agreement by which the Board cedes its jurisdiction, regardless of whether the state statute is consistent with the national act.[71]

Dicta in several cases arising subsequent to the 1947 amendment of the NLRA, however, are in accord with that of the *Bethlehem Steel* case previously noted. Thus, in holding that the Wisconsin E.R.B. could order a union to "cease and desist" from instigating intermittent, unannounced work stoppages of short duration, the Supreme Court pointed out that "the facts of the present case do not bring it within the protection of the Act *as administered by the Board*. . . . We do not find any fixed Board policy to apply the Act to such facts as we have here."[72] And conversely, in invalidating a Wisconsin statute prohibiting strikes in privately owned public utilities as incompatible with the protection given concerted activities in the national act, the Court felt it appropriate to relate that "in the administration of the Federal Act" jurisdiction had been asserted by the National Board over this industry.[73]

Apparently, then, the Supreme Court would consider state agencies to be free to regulate industrial relations cases where the effect upon commerce is adequate to bring them within the jurisdiction of the National Board but not up to the minimum jurisdictional standards of the Board's "yardstick." If that is so, the advantage resulting from the section 10(a) proviso is admittedly slight, except to insure the validity of an arrangement whereby the Board may obtain reasonably uniform regulations respecting all businesses having any effect at all on com-

to such cases exclusively. That a contrary view may find acceptance, however, is suggested by Algoma Plywood and Veneer Co. v. W.E.R.B., 336 U.S. 301, 69 S.Ct. 584 (1949), where the Court saw Congress to have inserted the proviso in order to eliminate the possibility, pointed out in Justice Frankfurter's concurring opinion therein, that the Bethlehem Steel case would put an end to such agreements, for Bethlehem Steel was a *representation* case, not an unfair labor practice case. See also, for the legislative history of the §10(a) proviso, H. Rep. No. 245, 80th Cong., 1st sess., p. 40 (1947), and S. Min. Rep. No. 105, Pt. 2, 80th Cong., 1st sess., p. 38 (1947).

[71] See testimony of Denham, S. Hearings, S. Res. 248, 81st Cong., 2d sess., p.182 (1950).

[72] International Union, UAW-AFL v. W.E.R.B., 336 U.S. 245 at 256, 69 S.Ct. 516 (1949). Italics added.

[73] Amalgamated Association of Street, Electric Railway, and Motor Coach Employees v. W.E.R.B., 340 U.S. 383 at 392, 71 S.Ct. 359 (1951). As a basis for this finding, the Court noted the second criterion of the Board's "minimum jurisdictional yardstick," relating to "public utility and transit systems," 340 U.S. at 392. See also International Union, UAW-CIO v. O'Brien, 339 U.S. 454, 70 S.Ct. 781 (1950), where, in an enterprise over which the Board had already asserted jurisdiction, the Court struck down Michigan's attempt to interfere with concerted activity protected under the NLRA.

merce without having to handle all cases involving such businesses itself. The "yardstick," however, will serve a much more useful function, in indicating the area in which state agencies are to be free to act,[74] and should eliminate a great deal of the confusion as to what agency a charge or representation petition should be presented when only slight or speculative effect on interstate commerce is involved, besides reducing the Board's case load to more manageable proportions.

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[74] Not every state agency will agree with this statement. Thus the New York S.L.R.B. considers the Board to have set up a "rigid policy" under which "it refuses but does not confer jurisdiction upon us" in certain areas, while encroaching "upon purely local business which does not in fact substantially affect commerce" in others. New York S.L.R.B., "Fourteenth Annual Report" (1951). There is a long history of dissension between the New York Board and the National Board, see Bethlehem Steel Co. v. New York S.L.R.B., supra note 67. The National Board recently sought but was denied an injunction against the New York Board, to compel the latter to discontinue exercise of jurisdiction in respect to Skyview Transportation Co., see supra, notes 33 and 44, NLRB v. S.L.R.B., (D.C. N.Y. 1951) 99 F. Supp. 526; the court saw there to be "considerable doubt whether the National Board has jurisdiction of the labor dispute involved," citing United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560 (1947) (the anti-trust case), as authority that "taxicab transportation within the limits of a single city is not interstate commerce," and refusing to determine whether a dispute involving such a company nevertheless can "affect interstate commerce." The New York court subsequently upheld the New York S.L.R.B.'s "cease and desist" order against another New York City cab company, holding that the State Board, not the NLRB, had jurisdiction over the dispute, New York S.L.R.B. v. Chairman Service Corp., 107 N.Y.S. (2d) 41 (1951).

* This comment was originally written by Bernard L. Goodman, and then revised and brought up to date by Robert S. Griggs.—Ed.