

THE DETERMINATION OF EMPLOYEE REPRESENTATIVES*

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Any sort of popular action through representatives stands upon decisions as to (1) the constituency (further, if the selection is by ballot, the voters); and (2) the selection of representatives (by balloting or by some other method of indicating choice). These fundamental decisions¹ concerning employee representation under the National Labor Relations Act are left within wide limits to the discretion of the National Labor Relations Board.² Indiscreet treatment of these vital and often

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* Citations herein of labor relations board (national and state) decisions are far from exhaustive. If the writer has missed any significant cases, he begs the reader's indulgence in view of the ever increasing frequency of the decisions of the several boards. Roughly twice as many representation determinations were made by the NLRB in the six months August 1937-January 1938 as in the preceding two years. Representation cases are now far outnumbering unfair labor practice cases. "Before validation of the NLRA by the Supreme Court on April 12, 1937, the Board had conducted 88 elections . . . 5 per month. In the ten months succeeding April 12, 912 elections have been held, an average of 91 per month." NLRB Release R-669 (March 1, 1938).

¹ And others answering: Who may ask for the setting in operation of the procedure itself? What sort of controversy calls for a determination by the Board? What obstacles, such as an existing contract or a recent selection of representatives, may stay the Board's making of decisions?

² National Labor Relations Act, 49 STAT. 449 (1935), 29 U. S. C. A. (1937 Supp.) §§151-166 (hereinafter cited as the "NLRA"), provides:

§9. (a) 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: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or

intricate problems would destroy at its base the structure planned for the furtherance of collective bargaining.

We well know from experience of government that in making these decisions popular will is often perverted. Gerrymandering is our term for one sort of unfair decision regarding the constituency. Stuffing the ballot box is one sort of perversion of the procedure of choice. The employees' representative for negotiating with the employer must be fairly chosen; else the representative will not be respected by the employer or the workers.

Personal duels, party riots, and military wars have been fought over boundaries, systems of government, and choices of rulers times out of mind, because there was no accepted way or no fairly administered procedure for settling these urgent differences of interest. But in the labor relations system that we are evolving in the United States the determination of workers' representation has tended to prevent such outbreaks. For thanks to the combination of flexibility and consistency that characterizes the determinations of the National Labor Relations Board, and the combination of fairness and firmness that marks its administration of elections, partiality and corruption do not enter in to block the democratic process.

These questions of industrial government are settled quasi-judicially; that is, after disinterested persons have heard and weighed all the evidence, they determine who is the desired representative or fix the procedure suitable to get the evidence necessary for their decision. When the evidence is obtained, they certify the representative, whenever any is chosen within the terms of the statute. The election machinery is entirely in the hands of non-contestants and non-partisans whose only desire is to have it work fairly and efficiently to record the wishes of the employees. This is a perfection of *cadre* never yet attained in popular government; it assures avoidance of the cruder forms of maladministration of elections.

But neutrality alone is not enough. Elections require of the election commission something more than honesty. Only a wise solution of the problems they present can establish a satisfactory representation of the employees' interests.³

I. HOW FAR IS REPRESENTATION WITHIN THE NLRB'S EXCLUSIVE AUTHORITY?

Jurisdiction over these problems must be centralized. If they were left to the courts, there would undoubtedly emerge at first so great a disparity of decision as to

10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The equivalent legislation covering railroad workers is §2 (g) of the Railway Labor Act, 44 STAT. 577 (1926), as amended, 48 STAT. 1186 (1934), 45 U. S. C. A. (1937 Supp.) §152.

³ Similar problems arise on the investors' side, particularly in corporations: classification of stockholders; voting rights; procedure of elections; etc., generally settled in detail in advance by articles of incorporation. Owing to personal vicissitudes of employees, outside pressures causing expansion or contraction of the business, and changes of policy of management, participation of employees can be successful only if the pattern can be varied to fit the various and ever changing situations of different enterprises. Whereas fixity of property interest is basic for investors, flexibility of the sort found in the NLRB's application of NRLA §9 is just as indispensable for employees' collective participation in the government of any enterprise.

produce much discontent and criticism of the courts; and later, perhaps, a reaction, marked by so little imagination and so blind an adherence to past decisions without regard to differences in industrial conditions that the whole system would in the end collapse. As it is, these special problems are made the province of expert bodies whose decisions are reviewed by the courts with great respect⁴—a province which the courts in the first instance scrupulously avoid.⁵

Representation determinations of the NLRB are reviewable⁶ in connection with the fifth unfair labor practice. In *United Employees' Ass'n v. NLRB*⁷ it has recently been held that they are not reviewable otherwise. This is the opinion of the Board itself:

"Since no order against an employer is issued in such a proceeding [under section 9(c)], there is no right of review of such certification [or refusal to certify?] in any court. If, however, such certification of a labor organization is subsequently used . . . to prove . . . [the unfair labor practice of] refusing to bargain collectively with the labor organization so certified, and a cease and desist order is issued . . . , the investigation and certification under section 9(c) become reviewable . . . as part of the record in the case."⁸

⁴In the longer history of the Railway Labor Act, representation decisions of the National Mediation Board have been rarely upset. The Supreme Court has approved its certification of the union receiving the majority of votes cast in an election, though less than a majority of those qualified to vote. *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515, 560 (1937): "Those who do not participate are presumed to assent to the expressed will of the majority of those voting." This is the present rule of the NLRB; *The Associated Press*, 1 N.L.R.B. 686, 697 (1936); *R. C. A. Mfg. Co.*, 2 *id.* 159, 173 (1936). Probably the earlier practice of both boards of requiring a majority of those eligible to vote, would likewise have been acceptable. Compare treatment of furloughed employees. *Three Years of the Railway Labor Act* (1937) 5 I. J. A. MONTHLY BULL. 143, 146. The decision of the district court in *Virginian Ry. Co. v. System Fed. No. 40*, 11 F. Supp. 621 (E. Va., 1935) (car men) that, for a choice, a majority of the qualified voters must have voted, was not appealed. It has not been followed by the NLRB. *R. C. A. Mfg. Co.*, *supra*.

There are some other unappealed district court cases overruling the NMB in representation determinations. *Three Years of the Railway Labor Act*, *supra*. But it appears to have been overruled only twice by appellate courts, and never by the Supreme Court. In *Brotherhood v. NMB*, 88 F. (2d) 757 (App. D. C., 1936), the court, while disclaiming any desire to curtail the Board's "large discretionary powers in the conduct of elections" (p. 761), rejected its determination for failure to hold an adequate hearing. In *Brotherhood of Ry. Clerks v. Nashville, Chattanooga, & St. Louis Ry.*, 94 F. (2d) 97 (6th, 1937), there being no finding by the Board, the facts found by the court showed that the Board's certificate should be disregarded. On the other hand, great leeway is expressly accorded to the NMB in *Ass'n of Clerical Employees v. Brotherhood*, 85 F. (2d) 152, 157 (7th, 1936) (courts will interfere in Board's determination of unit only if there is "fraud or other gross impropriety"); *Brotherhood v. Kenan*, 87 F. (2d) 651 (5th, 1937); *Nashville, C., & St. L. Ry. v. Railway Employees Dept.*, A.F.L., 93 F. (2d) 340 (6th, 1937). One may expect a like treatment of the NLRB, which, unlike the NMB, does not act without a hearing except by stipulation of all interested parties.

⁵*Cole v. Atlanta Terminal Co.*, 15 F. Supp. 131 (N. Ga., 1936); *Lund v. Woodenware Workers Union*, 19 F. Supp. 607, 610 (Minn., 1937). The NLRB insists on its exclusive right. *National Electric Products Corp.*, 3 N.L.R.B. No. 40 (1937). *Contra: McNulty v. NMB*, 18 F. Supp. 484 (N. N. Y., 1936) (action dismissed but problem not recognized as exclusively for the Board); *Grace Co. v. Williams*, 20 F. Supp. 263, 266, and *Cupples Co. v. AFL*, *id.* 894, 897 (both E. Mo., 1937). Compare *Oberman and Co. v. United Garment Workers*, 21 *id.* 20, 26 (W. Mo., 1937). Comment (1938) 36 MICH. L. REV. 844. Since the courts may not prevent the NLRB from holding §10 hearings, *Myers v. Bethlehem Shipbuilding Corp.*, 58 Sup. Ct. 459 (1938), *Newport News Shipbuilding Co. v. Schaufler*, *id.* 466 (1938), they surely may not prevent §9 hearings, which eventuate in no order. *Heller Bros. Co. v. Lind*, 86 F. (2d) 862 (D. C., 1936); *United Employees' Ass'n v. NLRB*, C. C. A. 3d, March 18, 1938, 2 LABOR REL. REP. 132 (1938).

⁶NLRA §9 (c).

⁷*Supra* note 5.

⁸NLRB, SECOND ANNUAL REPORT (1937) 105. In Wisconsin, with the same statutory provisions, the State Board's refusal to hold an election was sustained, the court saying: "This court has no authority

If this interpretation of the Act is correct, there seems to be need of an amendment permitting the Board's final action on representation petitions to be reviewed, but only upon demand of employees. (Review at the instance of employers seems superfluous at any time.) Court consideration of the Board's decision at this stage would have three advantages. (1) It would avoid the needless involvement of the employer in a (labor practice) proceeding which basically concerns a controversy between employees. (2) It would enable the candidate which the Board has *not certified* as exclusive representative, to obtain redress if the Board has abused its authority; whereas if the only review is via Section 8(5), the position of such a union is hopeless (a) because the Board has no *duty*, but only *power*, under Section 10(b), to issue complaints; (b) because a proper election is often the only possible means of obtaining the evidence that the union is the choice of the employees which is necessary to prove conduct within Section 8(5); and (c) because the right of an uncertified claimant is not clearly reviewable even in an unfair labor practice proceeding.⁹ (3) For the protection of the *certified* union and of the employer, the certificate of the Board ought to be conclusive until revoked by the Board; for attack in a collateral proceeding direct attack should be substituted.

Though the National Labor Relations Act gives the Board but slight guidance in performing this function, the Board is not altogether a pioneer. Under the Railway Labor Act,¹⁰ as amended in 1934, the National Mediation Board was making representation determinations, often based on elections. And this technique had been widely used also under the National Industrial Recovery Act.¹¹ In applying its Section 7(a), the Petroleum Labor Policy Board, the National Steel Labor Relations

under the statutes to order an election (nor to stop one, so far as we can see). This discretion is committed to the Labor Board, subject to the restraint—if any—that there must be some evidence to sustain its determination that the majority representation is or is not in substantial dispute. Finding that evidence, the Board's action or non-action thereon is conclusive." *United Shoe Workers v. Wisconsin LRB* (Freeman Shoe Corp.), Dane County Circuit Court, Dec. 24, 1937. Review by the employer is of course denied. *Ex parte Wallach's, Inc.*, N. Y. Ct. App., March 18, 1938, 2 LABOR REL. REP. 135 (1938). Under the Wisconsin LRB Rules, art. III, §3, the employer is not automatically a party.

⁹ *NLRB v. Pac. Greyhound Lines*, 91 F. (2d) 458, 460 (9th, 1937) (dictum, not an unfair labor practice to refuse to bargain with uncertified agency); *Pfister Hotel* (Wis. LRB, Aug. 30, 1937) (in case of real doubt it is not unfair for employer to refuse to deal with uncertified union). But compare *Globe Mail Service, Inc.*, 2 N.L.R.B. 610, 620 (1937) (by reason of the fact, though apparently then unknown to employer, that on Sept. 29 union was choice of majority, "the respondent had a duty to bargain collectively with the representatives of the union when they called on Sept. 29"); and *The Triplett Electrical Instrument Co.*, 5 *id.* No. 112, p. 21 (1938) (after careful investigation Board found that unit comprised 246 persons and held that from the day the union membership reached 124 the employer's refusal to bargain was an unfair practice).

¹⁰ *Supra* note 2.

¹¹ 48 STAT. 195 (1933). The President's direction for the conduct of elections by the National Labor Board, Executive Order 6580, Feb. 1, 1934, is the first official recognition of the procedure of election, though even before then elections had been held by the NLR and other agencies charged with the enforcement of NIRA §7(a).

Public Resolution 44, June 19, 1934, 48 Stat. 1183, under which the President set up the first National Labor Relations Board, gave to boards he might create the power to subpoena payrolls, without which elections in large plants are not feasible. The election procedure of this first NLRB is detailed in *Functions of the NLRB and the Regional Labor Boards*, §§X, XI, issued Oct. 31, 1934, and Instructions of March 19, 1935. On elections conducted by this and the several agencies enforcing NIRA §7(a), see LORWIN AND WUBNIG, LABOR RELATIONS BOARDS (1935).

Board, the National Labor Board, and, above all, its successor, the first National Labor Relations Board (1934-35) made well considered decisions concerning employee representation and developed methods for the determination of choice of bargaining agents, with or without balloting, as the case might require. When the *Schechter* case¹² destroyed the codes of fair competition which were the base on which these labor boards stood, they soon disappeared. Congress, however, filled the breach by promptly enacting the National Labor Relations Act, which under various forms and names had had its consideration for over a year.¹³ Five states have followed suit by creating labor relations boards with like powers.¹⁴

2. THE RELATION OF NLRB TO STATE BOARDS

If there is overlapping jurisdiction of national and state labor relations acts,¹⁵ it is nowhere more likely to cause difficulties than in the determination of representatives, not so much because the national and state acts differ,¹⁶ as because the state and national boards may, in the exercise of their separate discretions, come to different conclusions—particularly about appropriate bargaining units; about the means of obtaining trustworthy evidence of the employees' choice; about the duration of the choice. Determinations by a state board in cases within the competence of the NLRB (assuming such determinations are constitutionally admissible) are worth making only if the state board has some assurance in fact that the NLRB will respect them. Without this assurance, state boards could not make such determinations without exposing their work to risk of complete discrediting by the NLRB. Actually such a working arrangement has been made between the NLRB and Wisconsin LRB, the only state board that is substantially operating in a field to which NLRB competence extends.¹⁷

¹² *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

¹³ See LORWIN AND WUBNIG, *op. cit. supra* note 11, particularly c. 9.

¹⁴ The five state labor relations acts are almost identical with NLRA in their provisions relating to representation. These statutes (with date of enactment) are: Utah Laws 1937, c. 55 (March 22); Wis. Laws 1937, c. 51 (April 15); N. Y. Laws 1937, c. 443 (May 20, effective July 1); Mass. Laws 1937, c. 436 (May 29); Penn. Acts 1937, No. 294 (June 1).

¹⁵ This possibility is greatest in Wisconsin. *The State Labor Relations Acts* (1938) 51 HARV. L. REV. 722, 729; 1938 WIS. L. REV. 160; Note (1938) 32 ILL. L. REV. 732; Wis. LRB v. Fred Rueping Leather Co., now under advisement of the Wisconsin Supreme Court.

¹⁶ Some differences are these: (1) The Wisconsin Act, §111.09(3), contains the clause "but no company union or officer thereof shall appear upon any ballot taken by the board" (or presumably, be certified as representative). The NLRB would exclude such a union probably only after a hearing and finding that the employer had dominated, interfered with, or supported the union (see notes 127 and 128, *infra*), whereas this formality might not be required by the Wis. LRB. Rice, *The Wisconsin Labor Relations Act in 1937*, 1938 WIS. L. REV. 229, 252. (2) The New York Act, §705.2, requires the recognition of a craft unit whenever the majority of the craftsmen so desires. This seems not to differ, however, from the existing practice of the NLRB. (3) The New York Act, §705.5, provides for run-off elections between the two leaders when there are three or more nominees and none gets a majority vote. Thus it impliedly calls for a ballot *not* offering an opportunity to vote against all candidates (i.e., against collective bargaining); whereas the NLRB since August, 1937 offers employees this option (see p. 000, *infra*). (4) The definition of employees (voters) varies slightly in different acts. See note 150, *infra*. Other differences are noted in *The State Labor Relations Acts, supra* note 15, esp. note 19.

¹⁷ Rice, *supra* note 16, at 276. Since the NLRB, under §9(c), has no *duty* to determine representation questions, it seems proper for it to leave them to settlement by a competent state agency. Even under state acts that deny jurisdiction to the state agency where the NLRB may act, the state agencies are handling cases which, it would seem, may be within the NLRB's competence.

3. FORMAL RULES

Before hearing any controversies the Board adopted, in September, 1935, rules relating to its work, which give further definition to the terms of the Act. These rules¹⁸ relate largely to formal proceedings and to the part played therein by the Board's regional offices (of which there are twenty-two) and its field examiners. They make the employer a party to representation cases, as well as those who claim to represent employees. In this sort of proceeding, unlike the unfair labor practice proceeding, the Board itself is not a party. It serves no complaint; only a notice of hearing. But it is habitually represented by counsel and "counsel for the Board, and the trial examiner [chairman of the hearing acting for the Board], shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence."^{18a}

Later the Board issued instructions¹⁹ to its field staff concerning their duties, including eventually very detailed instructions²⁰ about the conduct of elections. As the decisions of the Board are understandable without preliminary discussion of procedure, we may at once turn to them.

4. THE EXISTENCE OF A REPRESENTATION QUESTION

Though the Act is vague,²¹ the NLRB in practice rarely, if ever, embarks upon an investigation except when requested to do so by some union.²² Employees, though unorganized, might ask the Board to act.²³ But the asserted unit must comprise more than one employee, for the Board interprets the Act as giving to a sole employee no bargaining rights.²⁴

¹⁸ The Rules of April 27, 1936, 1 N.L.R.B. 1032, are still in force. Art. III relates to Procedure for the Investigation and Certification of Representatives. These rules, superseding those (of April 15, 1935) of the first National Labor Relations Board (of which the present Board was the statutory successor), were announced Sept. 14, 1935, and supplemented in a minor respect Oct. 16, 1935. Since neither the statute nor the rules have been changed in any way since, the law relating to representation has been developed entirely through adjudication of controversies by the Board.

^{18a} Rules, *supra* note 18, art. III, §5.

¹⁹ Instructions to Staff Members, 9/17/35, Part III, Duties in Connection with the Certification of Representatives under Section 9(c).

²⁰ Conduct of Elections, C-49 (undated).

²¹ "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate." NLRA §9(c).

²² Recently it ordered elections, apparently not due to a petition, in Industrial Rayon Corp., 3 N.L.R.B. No. 2 (1937); Chicopee Mfg. Corp., *id.* No. 88 (1937); Cudahy Packing Co., *id.* No. 100 (1937); and Erwin Cotton Mills, 4 *id.* No. 134 (1938). But I am informed that the Board has never ordered the holding of an election in the absence of a petition filed by employees or their representatives. (Personal letter from NLRB Assistant General Counsel, March 14, 1938.) In these cases the "direction of election," which never mentions the petition, was issued without the usual accompanying "decision" stating the circumstances. I understand that a "decision" will follow in time. The Wisconsin Board ordered an election without such a petition in Pfister Hotel, Aug. 30, 1937. Its Rules, art. III, §3, authorize this.

Cf. Wadsworth Watch Case Co., 4 N.L.R.B. No. 67 (1937); Standard Oil Co. of Calif., 5 *id.* No. 98, p. 6 (1938).

²³ According to the Board's Rules, art. III, §1, the petition may be filed by "any employee or any person or labor organization acting on his behalf." By the New York Act, §705-3, petitions by employers are permitted. *The State Labor Relations Acts, supra* note 15, at 725.

²⁴ One man is not a unit, for he is said to be unable to be bargained for "collectively." Hildinger-Bishop Co., 1 (first) N.L.R.B. 127 (1934); Luckenbach S. S. Co., 2 N.L.R.B. 181, 193 (1936); Schick Dry Shaver Co., 4 *id.* No. 35, p. 7 (1937). NLRB, SECOND ANNUAL REPORT (1937) 117.

There may be no need of investigation, of course, if the employer already recognizes, and no one denies, that the petitioner is the exclusive representative²⁵ of the unit of employees that it claims to represent.²⁶ But where the employer refuses this recognition either absolutely or until the petitioner presents proof of its mandate, or where there is a difference of opinion between employees or unions, there is a case for the Board's determination.²⁷ This determination means the answering of the two principal questions stated at the outset—what is the appropriate unit of representation; and who is the desired representative, if any.²⁸

A. *Intra-Federation Disputes*

The Board refuses to adjudicate representation controversies in which the contestants have a common superior competent to settle them. Thus a "jurisdictional" dispute between two unions within the AFL will not be investigated by the Board, whether the question is that of the appropriate representative (*e.g.*, Is a local or a national organization the proper agency to bargain?²⁹) or that of the appropriate boundary between bargaining units (Are certain employees in one craft or the other?³⁰). But the principle has been realistically applied, for after the AFL-CIO cleavage became unquestionable, the Board determined representation controversies between AFL unions and CIO unions even when the CIO union, though suspended, was not expelled by the AFL.³¹

B. *The Effect of Existing Contracts*

While the Board has thus properly recognized the possibility of obtaining settlement of controversies through union self-government as a bar to its intervention, it has repeatedly refused to recognize the existence of contracts, individual or collective, concerning conditions of work or representation as a substantial (if any) impediment to a determination by the Board. Unlike the National Labor Board and the first National Labor Relations Board,³² the present Board has never yet^{32a} let contracts

²⁵ Whatever the rights of minorities under the Act, they are not considered here. See *The Labor Board and the Courts* (1938) 32 ILL. L. REV. 568, 595, and Rice, *supra* note 12, at 276.

²⁶ See note 133, *infra*.

²⁷ NLRB, SECOND ANNUAL REPORT (1937) 105-108.

²⁸ Both questions arise also in cases where the employer is charged with having refused to bargain under §8(5). See, *e.g.*, Standard Lime & Stone Co., 5 N.L.R.B. No. 15, p. 8 (1938). Such cases, which raise these questions as to the past, whereas representation cases raise them as to future bargaining, are sparingly referred to herein as they appear to fall within the field of other writers. Compare note 144, *infra*.

²⁹ Aluminum Co. of America, 1 N.L.R.B. 530 (1936). Compare Alaska Juneau Gold Mining Co., 2 *id.* 125, 142 (1936): "It is neither the business of the Board nor [that] of an employer to inquire into the manner in which labor organizations conduct their internal affairs."

³⁰ Axton-Fisher Tobacco Co., 1 N.L.R.B. 604 (1936).

³¹ Interlake Iron Corp., 2 N.L.R.B. 1036 (June 26, 1937); Stone Knitting Mills Co., 3 *id.* No. 22 (1937); Curtis Bay Towing Co., 4 *id.* No. 53, p. 7 (1937); Showers Bros. Furniture Co., *id.* No. 77 and 77b (1937).

³² Cleveland Knitting Mills, 2 N.L.B. 17 (1934); E. F. Caldwell and Co., 1 (first) N.L.R.B. 12, 14 (1934); Omaha and Council Bluffs Ry., *id.* 190, 2 *id.* 45 (1934).

^{32a} (Postscript) The text has not been rewritten since the Board held in Superior Electric Products Co., March 17, 1938, 2 LABOR REL. REP. 130 (1938), that a contract duly made by a union empowered by the Act (though not certified by the Board) to bargain for all would not be disturbed. See note 56(6), *infra*.

stand in the way; though its theory of what becomes of them is not clear. In *New England Transportation Co.*³³ existing individual (or possibly collective) contracts were disregarded by the Board, which proclaimed "the freedom of employees to change their representatives while at the same time continuing the existing agreements."³⁴ In *Black Diamond Lines*,³⁵ *Swayne & Hoyt, Ltd.*³⁶ and *Panama R.R. Co.*³⁷ the Board, while not allowing contracts to impede certification, did not clarify its theory regarding them. And in the *R. C. A. Manufacturing Co.* case,³⁸ wherein the Board decided that a majority of those voting suffices to elect, it rejected the provision of a contract (between the company and the contesting unions) which, as construed by the company, declared a majority of those in the unit to be necessary to a choice, because, so construed, it was "tantamount to a violation of the Act and its declared policy and therefore cannot be given any effect by the Board."³⁹ If the provision is regarded as a declaration of the union's intention not to claim exclusive bargaining rights unless it should get an absolute majority, it is "subject to change at any time, for a binding agreement preventing it from representing employees in accordance with the Act would likewise be . . . of no effect. Nor could the union be said to be estopped by reason of any such agreement." The Board accordingly certified, as exclusive bargaining representative, the union that had received the majority of votes cast.

Last summer the Board made several significant decisions refusing to let collective agreements prevent determinations of representation. In *Interlake Iron Co.*⁴⁰ a contract to deal exclusively with the AFL did not stop the Board from directing an election. In *International Mercantile Marine Co.*⁴¹ and *American France Line*⁴² involving many ship lines, the National Maritime Union (CIO) with respect to its

³³ 1 N.L.R.B. 130, 138 (1936). Relying on the National Mediation Board's views regarding the effect of a new certification on an existing collective agreement, the Board declared: "The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of employees to change their representatives while at the same time continuing the existing agreements under which the representatives must function." (This seems to make the contract one between the employer and an entity consisting of his employees, though collective contracts purport to be between the employer and a union.)

³⁴ In *John Blood & Co.*, 1 N.L.R.B. 371 (1936), the Board was not hindered by a certification of individuals two years before by the National Labor Board. Though these representatives had made an agreement, it was not carried out by the employer and the representatives themselves then joined the union. Practically the slate was clean. Compare *Showers Bros. Furniture Co.*, *infra* note 77.

³⁵ 2 N.L.R.B. 241, 245 (1936): "The mere holding of the election will in no way affect the rights and duties, if any, arising out of the contract. . . . Since that contract is shortly subject to termination and the representatives . . . who will have been ascertained prior to that date, may elect to terminate it, we deem it unnecessary to determine what would otherwise be the effect of the contract on the petition before us." In *Atlantic Footwear Co., Inc.*, 5 *id.* No. 35 (1938), a collective agreement to expire in three days, said the Board, "presents no problem."

³⁶ 2 N.L.R.B. 282, 287 (1936). The *New England Transportation Co.* doctrine is repeated. And the Board adds: "Whichever organization is chosen as representative of the employees . . . will be free to continue the existing agreement, to bargain concerning changes in the existing agreement, or to follow the procedure provided therein for its termination."

³⁷ 2 N.L.R.B. 290 (1936). The status of the earlier contract with the defeated union is not discussed.

³⁸ *R. C. A. Mfg. Co.*, 2 N.L.R.B. 159 (1936). See note 4, *supra*, and p. 220, *infra*.

³⁹ 2 N.L.R.B. 179, citing *Weil v. Neary*, 278 U. S. 160 (1929); *Miller v. Ammon*, 145 U. S. 421 (1892); *Norman v. B. & O. R. R.*, 294 U. S. 240 (1935).

⁴⁰ 2 N.L.R.B. 1036 (1937).

⁴¹ 2 N.L.R.B. 971 (1937).

⁴² 3 N.L.R.B. No. 7 (1937).

contracts with certain companies, and the International Seamen's Union (AFL) with respect to its contracts with certain other companies, were each deemed, by petitioning for determination of representation, to have "waived its rights to assert the existence of these contracts as a bar to elections."⁴³ But the Board did not rely on waiver alone; the existence of contracts between employers and employees or representatives of employees that had *not* filed petitions likewise did not "preclude the holding of elections."⁴⁴ Again in *City Auto Stamping Co.*⁴⁵ the Board ordered an election despite existing contracts. As the union in making them acted for its members only, it was "unnecessary to decide what the effect on the holding of an election would be if the contracts purported to name the exclusive bargaining agent for the employees," said the Board. "For the present" it held these contracts to remain in force, while their continued existence "after the certification of exclusive bargaining agents by the Board can be made the subject of agreement between the company and such agents." This seems to indicate that if a new agent is designated, the new agent steps in not to administer the old agreement, but rather to make a new one (if the union and the employer can agree). It is uncertain, however, how long "the present" lasts. Is it till a new agent is certified or is it till the new agent and the employer agree to terminate the existing agreement; or has the new agent an option, regardless of the employer's wishes, to continue the agreement (substituting itself as administrator of it?) or to terminate it? In the next case⁴⁶ where contracts were alleged to bar a determination of representatives, the Southeastern Greyhound Lines had made three contracts whereby it agreed to recognize the other party's officers as "representatives of the members of said association in negotiations with the company." But the Board merely says, "Regardless of the status of these contracts prior to an election and certification by the Board, it is clear that their survival is subject to the outcome of such election." And of course any other view of contracts of this character would fatally clog the operation of the Act. In *Northrop Corporation*,⁴⁷ the Board turned to the *R. C. A.* case⁴⁸ as precedent for its refusal to give any effect to an agreement between the employer and the union by which the latter, though known by an unofficial election to be the choice of the majority, was expressly recognized as the representative only of its members for collective bargaining. "The Act and not the particular agreement furnishes the rule that must guide the Board in its determination. The agreement in this case cannot foreclose the claim of the Union to be certified as the exclusive representative. . . . Nor can the Union be said to be estopped by reason of such agreement. The agreement therefore has no effect upon the determination of the issues in this proceeding."

In *The Texas Oil Co.*⁴⁹ the Board was asked by the International Association of

⁴³ *Id.*, p. 8.

⁴⁴ *Ibid.*

⁴⁵ 3 N.L.R.B. No. 24 (1937). The quotations are from pages 6 and 7. Accord: *McKesson & Robbins*, 5 *id.* No. 12, p. 12 (1938).

⁴⁶ *Penna. Greyhound Lines*, 3 N.L.R.B. No. 69, p. 25 (Sept. 14, 1937).

⁴⁷ 3 N.L.R.B. No. 19a (Oct. 6, 1937). Contracts of the same sort, but with a proviso looking to an eventual NLRB determination, existed in *Allis-Chalmers Mfg. Co.*, 4 *id.* No. 24 (1937), and other cases.

⁴⁸ *Supra* note 38.

⁴⁹ 4 N.L.R.B. No. 27 (1937).

Machinists (AFL) to give effect, in determining the unit for bargaining, to a nationwide contract between it and the petitioning Oil Workers (CIO).⁵⁰ The Board said:

"The contention of the I. A. M., that the appropriate unit for collective bargaining is the craft unit, is based upon an agreement between the Oil Workers and the I. A. M., in which the Oil Workers agreed not to accept or retain in their membership, men employed in the petroleum industry over whom the I. A. M. had been granted jurisdiction by the American Federation of Labor. The agreement was entered into on October 26, 1935, when the Oil Workers were still affiliated with the American Federation of Labor. The question of whether this agreement is still in effect, since the two parties to it no longer recognize the jurisdiction of the same parent body, does not concern us here. At least in the absence of a parent body to which the parties might look for the enforcement of such an agreement, it cannot be given controlling weight."⁵¹

But whether there be such a change in the identity of a party as to destroy the existence of the contract or such a change of circumstances as to amount to impossibility or as to come within an implied *rebus sic stantibus*,⁵² matters little; for such a contract, any more than a contract of like sort with the employer, can not control a determination of representation. Such an agreement might be significant as showing the preference of the employees.⁵³ Here it was not, for no employee at these particular works was a member of the I. A. M.

The *Kinnear* case,⁵⁴ relying on the *Northrop* case,⁵⁵ excludes supervisory employees from the bargaining unit in which an election was ordered, despite their having been counted in to establish the majority behind a contract which the company had signed with the Independent Union. The majority thus destroyed, an elec-

⁵⁰ Such a stipulation between unions was followed by the Board in fixing unit boundaries in *Associated Press*, 5 N.L.R.B. No. 6, p. 6 (1938).

⁵¹ 4 N.L.R.B. No. 27, p. 4-5. This change of affiliation of the (inter-)national, not changing its identity, should be distinguished from a change of affiliation of a local. There is authority for the view that a local exists by virtue of its charter; if the charter is surrendered or withdrawn, the entity is extinguished, even though its members individually or collectively join or form a local of some other national union. *Penna. LRB v. Red Star Shoe Repairing Co., Inc.*, 3 MONTHLY BULL. L. IND. RIGHTS 16 (Ct. of Com. Pleas, Phila. Cty., Dec. 15, 1937) (reversing determination of Oct. 14, 1937 of the LRB which had treated as valid the substitution, in an AFL closed shop contract, of a CIO local, to which the employees had switched); *M & M Woodworking Co. v. Plymouth & Veneer Workers*, 1 LABOR REL. REP. 607 (D. Ore. Jan. 7, 1938). *Contra*: *World Trading Corp. v. Kolchin*, 2 N. Y. S. (2d) 150 (Sup. Ct., 1938) citing cases; *Cassetana v. Filling Station Operators Union* (Cal. Super. Ct., 1937) 3 MONTHLY BULL. L. IND. RIGHTS 57 (closed shop agreement with AFL union and "successors," protects members of both AFL and CIO rival successor unions!)

⁵² LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933) Pt. IV, §11.

⁵³ The existence of a practice of collective bargaining by crafts is of course highly persuasive in the Board's determination of units for bargaining. See, e.g., *Pittsburgh Plate Glass Co.*, 4 N.L.R.B. No. 30 (1937). But the Board is not concerned with preserving contracts so much as with respecting employees' self-organization for bargaining. *Curtis Bay Towing Co.*, *id.* No. 53, p. 8 (1937); *American Hardware Corp.*, *id.* No. 58, at p. 7-9 (1937); *Worthington Pump and Machinery Corp.*, *id.* 61 (1937) (with dissent). A stipulation of the company (with whom?) regarding units was, however, said to have been given some effect in *Santa Fe Trail Transportation Co.*, 2 *id.* 767, 769 (1937). See *Penna. Greyhound Lines, Inc.*, 3 *id.* No. 69, p. 13 (1937); *Pacific Greyhound Lines*, 4 *id.* No. 72, p. 17 (1937). But in the *Santa Fe* case the petitioner, whose wish was respected, was the only group of employees heard from, while in the later cases there was employee opposition to the unit proposed (bus drivers).

⁵⁴ *Kinnear Mfg. Co.*, 4 N.L.R.B. No. 95 (1938).

⁵⁵ *Supra* note 47. Also *Wilmington Transportation Co.*, 4 N.L.R.B. No. 132, p. 5 (1938), rejects a collective contract "especially since the agreement was entered into subsequent to the time that the petition in this case was filed" and refers to the *Northrop* case as authority.

tion was ordered. Nothing was said about the interim validity of the contract, which by its terms applied to all employees who signed the contract, the union to become *exclusive* representative (and apparently the contract to be extended to all) only in the event of majority adherence.⁵⁶

There are also several cases in which the Board has disregarded contracts purporting to bind all employees when they have been made by a group not authorized by the requisite majority.⁵⁷ These contracts are void; whereas those previously mentioned are merely subordinate to the due procedure for making collective agreements and are superseded by these agreements.⁵⁸ Agreements induced by fraud have likewise been disregarded.⁵⁹

All through its determinations the Board insists that the right of employees to choose bargaining representatives can not be affected by contracts which purport to restrict the means or effect of such designation, or by contracts not based on the statutory authority to bind all in a bargaining unit. But the Board is not yet sure what should be done with existing collective contracts *lawfully made and applying*

⁵⁶ Contracts were considered also in the following recent cases: (1) In *Novelty Slipper Co.*, 5 N.L.R.B. No. 40 (1938), the contract of the *A* union had been taken over by the *B* union after winning a consent election in July 1937, under an agreement between the unions giving each other clearance for "existing or future contracts made, or to be made, where the other union represents a majority of the votes cast." Now the *A* union, claiming a majority, seeks a new election, which the Board directs. (2) In *Waterfront Employers Ass'n*, 4 *id.* No. 143 (1938), there was a collective agreement with a union other than petitioner; but the evidence on this and other matters being vague, the Board refused to certify the petitioner (despite its majority in the unit it contended for) and remanded the proceeding. (3) In *News Syndicate Co., Inc.*, *id.* No. 119 (1938), the Newspaper Guild obtained a certification by presenting membership application cards as evidence of majority choice: Its slight margin perhaps would have disappeared if certain border groups had been added to the unit. The Board, in sustaining the exclusion of the editorial workers, which the Guild desired, pointed to the lack of objection by the employer and to the employer's contract with that group, and concluded by confining its decision to "the present special circumstances." (4) In *Daily Mirror, Inc.*, 5 *id.* No. 59, p. 5 (1938), the Board found that the respondent after negotiation with the Newspaper Guild had made not a contract but a *unilateral declaration* regarding demands of editorial employees. Hence it did not express an "opinion as to what effect, if any, an actual agreement covering only editorial employees would have" had. (5) In *Postal Telegraph Cable Co.*, cases R-329, etc., the Board issued Feb. 12, 1938, and soon withdrew, a decision which involved collective contracts. (6) Finally there is *Superior Electric Products Co.*, *supra* note 32a, in which the Board dismissed a petition due to the existence of a contract governing all. It did so because the duration of the contract (one year, with four months still to run) was not so long "as to be contrary to the policies and purposes of the Act" and because a majority of the employees in the craft which the petitioner asked to have set up as a unit had favored the execution of the contract when it was made. "Under these circumstances we will not proceed . . . until . . . the contract is about to expire."

⁵⁷ This rule antedates the present Board. *Tamaqua Underwear Co.*, 1 (first) N.L.R.B. 10 (1934). Among recent cases the following are typical. *Stone Knitting Mills*, 3 N.L.R.B. No. 22 (1937), treated a collective contract as negligible in considering a petition because of "the interference and coercion on the part of the companies." So *Friedman Blau Farber Co.*, 4 *id.* No. 23 (1937), and *Zenite Metal Corp.*, 5 *id.* No. 73 (1938). In *American-West African Line*, 4 N.L.R.B. No. 123 (1938), the NLRB found a closed shop agreement was worthless because made by a non-majority agency. The Board disregarded closed shop contracts made with a non-majority agency in *Hill Bus Co.*, 2 *id.* 781 (1937) (contract does not justify discharge of employees who refuse to join), and in *National Electric Products Co.*, 3 *id.* No. 47 (1937) (contract does not prevent an election), though specific performance of each of these contracts had already been decreed by a court. In the last case the union that had made the contract won the election, *id.* 47b (1937). Was the contract then always valid, despite the Board's first decision?

⁵⁸ But see *NLRB v. Delaware-New Jersey Ferry Co.*, 90 F. (2d) 520 (3rd, 1937), *cert. denied*, 58 Sup. Ct. 141 (1937) (individual contracts with all employees made without observing NLRB's order to bargain collectively make the order moot). Criticized in (1937) 51 *HARV. L. REV.* 358.

⁵⁹ *McKesson & Robbins, Inc.*, 5 N.L.R.B. No. 12, p. 12 (1938).

to all. Will it increase stability to let them temporarily delay (if they run for only a limited period) a new designation? Or to allow them to be taken over by a new representative? Or to treat them as ended by the designation of a new representative?

In fact the status of all employment contracts after a statutory bargaining agency, or a new statutory bargaining agency, has been selected but before it has reached an agreement with the employer for canceling, continuing, or superseding the contracts, remain quite uncertain. And the answer may of course be different for contracts which an employer has made: (1) with individual employees; (2) with a union for its members or with a group of employees through a union as their agent; (3) with a statutory collective bargaining representative (designee of majority, bargaining for all). In the last situation, there is the subsidiary question whether the new representative takes over the administration of the old contract. Probably all lawful contracts, or at least all except those between the employer and an agency which at the time was acting as statutory representative of all the employees, remain in force according to their terms until overruled by some new agreement between the employer and the new representative. Though from one point of view a contract which has been made in fulfillment of the statute is entitled to greater respect than any other, yet after the naming of a new representative (with or without drawing of new unit boundaries) the continuation of the old agency as representative of all employees (within the old unit) in the administration of the pre-existing contract is incongruous with the status of the new agency as the sole agency for bargaining with the employer. Yet the substitution of the new agency in the administration of the old contract is an impossible compromise between its termination on the naming of the new representative (or at the option of the new representative) and its continuation until the new representative and the employer together agree to terminate it. Obviously this is so, if the new certification involves a change of unit boundaries; and, even if the unit is unchanged, the employer may be unwilling to be bound by the same contract with one organization as with another, and its terms may be quite inconsistent with the principles or frame of organization of the new bargaining agency. So, despite what the Board at first said, I believe the substitution doctrine can not stand. The problem of the obliterative effect, on existing (or subsequent) contracts relating to employment, of the designation of a statutory representative or of the making of a statutory agreement, is a problem beyond the scope of this article.^{59a} But it is now quite clear that contracts, with the possible exception of statutory agreements (as to which it has not yet clearly ruled^{59b}), do not and should not bar the Board's determining representation questions.

C. Recent Investigation

Another possible temporary obstacle to making a determination of representation is that the Board has recently held an election or made a certification.⁶⁰ If the elec-

^{59a} NLRA §9(a), like the corresponding provisions of the Railway Labor Act, is said by the Supreme Court not to preclude the making of individual contracts. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937).

^{59b} But see notes 32a and 56(6), *supra*.

⁶⁰ Though neither the Act nor the Rules make a certification conclusive, "in the absence of proof to

tion has been inconclusive or negative, resulting in no certification, it is evidence for a while that another election would be equally futile. But as soon as conditions are shown to have changed, so that a choice would be probable, the Board should not refuse to proceed. If, on the other hand, a determination has been made, it would seem unduly disturbing to good employment relations to give opportunity to overthrow that determination until there arises and continues for some time a probability that the majority of employees desires such an opportunity.⁶¹

D. Instability of Conditions

Another temporary obstacle which has been recognized by the Board is the impossibility of holding a fair election until unfair labor practices have been righted. Typical is *Lenox Shoe Co.*,⁶² where the Board said:

"We shall not at this time set the date for holding an election but shall direct that the election be delayed until such time as the Board is satisfied that there has been sufficient compliance with its order to dissipate the effect of the unfair labor practices of the respondent and to permit an election uninfluenced by the respondent's conduct."

Two months later the election was ordered.⁶³

Even a state of flux in employee organization not due to any unfair practices of the employer would seem a ground for postponement, for the purpose of an election (or determination by other means) is to establish a degree of stability in collective bargaining without which a mutually satisfactory scheme of employment relations can not be achieved.

5. THE CONSTITUENCY

Particularly in a period of rivalry between two national groupings of workmen, embodying somewhat diverse patterns of organization, the determination of the unit of employee representation is of outstanding importance. But the Board in delimiting the bargaining unit is by no means confined to deciding between a craft and an industrial set-up. Every case presents special problems—problems of geography and history, as well as problems of anatomy of the business' structure and the employees' self-organization. It is impossible to say, "These are the rules," for one can not go much beyond what the Board itself has done in stating several principal considera-

the contrary, there is a presumption that a majority secured by the union in the election . . . continued." U. S. Stamping Co., 5 N.L.R.B. No. 29, p. 11 (1938). Compare N. Y. LRB Rules, art. III, §11 ("certification shall remain in effect for a period of one year" unless . . .) and Wis. LRB Rules, art. III, §6 ("this certificate shall be conclusive until revoked by the Board . . .").

⁶¹ See notes 32 and 56 (1), *supra*. Cf. Showers Bros. Furniture Co., 4 N.L.R.B. No. 77 (1937); N. Y. & Cuba Mail S. S. Co., 2 *id.* 585, 605 (1937). Compare *The State Labor Relations Acts*, *supra* note 15, at 726. At present it is not customary to choose representatives for a stated period; collective contracts, however, usually have terminal dates. A contrary practice in both respects would have advantages when labor conditions become more settled.

⁶² 4 N.L.R.B. No. 54 (1937). On its facts this case is rather closely paralleled by the Freeman Shoe case, note 8, above, now before the Wisconsin Supreme Court. The national and the state acts are susceptible of different constructions, however, particularly as to closed shop agreements. See Rice, *supra* note 16.

⁶³ 5 N.L.R.B. No. 18 (1938). Another case of postponement is Todd Shipyards Corp. *id.* No. 9, p. 6 (1938).

tions, above all, that the wishes of the employees themselves if they are clear, should prevail. Where different employee groups⁶⁴ propose different unit boundaries, based on different considerations, the Board is more and more often leaving the determination of the unit itself to the outcome of the election of representatives, thus giving the greatest possible reach to self-determination. If Newfoundland prefers to stay out of the Dominion of Canada and the other colonies of the federation are willing, if Norway and Sweden both wish to separate, there is no problem. The problem arises when thirteen colonies in 1776 declare their independence and Great Britain won't agree to it; when the Confederate States wish to secede and the United States fights "to preserve the Union." And though there is no doubt that Ireland is entitled to "home rule," there still remains the question whether the emerald isle should consist of two units of government or one. In such a case the National Labor Relations Board, having made a preliminary judgment that Ireland should not be united unless both Ulster and the South desire it, conducts simultaneous votes in both parts of Ireland and unites them only if both votes are favorable to unification. The plebiscites of the NLRB take the form, however, of votes for or against, not separation itself, but the labor union which favors separation, for in labor relations such desires are embodied in the union. Thus if the question is whether the *A* group of employees should be a bargaining unit, as contended for by the petitioning union, or should form part of a larger *AB* unit (perhaps desired by another union), the Board frequently orders an election by electoral units which it considers possible bargaining units. If the *A* group is such, the Board announces that if this electoral unit is carried by the petitioner, it will be recognized as a separate bargaining unit; otherwise it will form part of the *AB* unit.⁶⁵

⁶⁴ Views of the employer are not disregarded but they rarely prevail if they differ from those of the candidate—or candidates. Merchants' & Miners' Transportation Co., 2 N.L.R.B. 747, 750, is exceptional in this respect. As examples of the usual treatment, see Edward G. Budd Mfg. Co., 1 N.L.B. 58 (1933); Ely & Walker Dry Goods Co., 1 (first) N.L.R.B. 94, 97 (1934); Luckenbach S. S. Co., Inc., 2 N.L.R.B. 181, 187 (1936); Mergenthaler Linotype Co., 3 *id.* No. 51 (1937); Hoffman Beverage Co., *id.* No. 64 (1937). The desire of the employer, where unions disagree, seems to count especially for large geographical units. American Woolen Co., 5 *id.* No. 24 (1938); Standard Oil Co. of Calif., 5 *id.* No. 98 (1938).

⁶⁵ This device was first set forth in cases decided Aug. 11, 1937, City Auto Stamping Co., 3 N.L.R.B. No. 24, and The Globe Machine and Stamping Co., *id.* No. 25 (1937). (In both cases the industrial union carried the craft electoral units and the Board thereupon found the larger unit appropriate and certified accordingly. *Id.* No. 24a, No. 25b.) The device has been repeatedly used to resolve this sort of conflict of rival unions differing in structure. It is in general a determination for the smallest unit that desires autonomy in bargaining, and, as actually applied, in particular a determination for craft unionism wherever the employees in a craft group are more craft-conscious than plant-conscious. For a more complicated application of this technique, see Pacific Gas & Electric Co., *id.* No. 87, p. 16 (1937); 4 *id.* No. 26 (1937); 5 *id.* No. 50 (1938) (several unions).

Though the doctrine that employees' wishes must prevail is almost as clearly recognized by the states, particularly Massachusetts, Dorothy Muriel, Inc. (Mass. L. R. Comm'n, Dec. 10, 1937), the technique of provisional classification and election is not in use. The Wisconsin Board, in the Simmons Co. (Kenosha plant) election (Oct. 15, 1937), by agreement of the contesting unions, each of which had a majority in one of the two units that might be established in the plant, put to the vote of the employees whether they would prefer to have an *A* unit and a *B* unit, or a single *AB* unit. Naturally the members of the union which believed it had an over-all majority voted for the *AB* unit, and established it in the plant. This use of the plebiscite, whereby the vote in the inclusive unit determines whether there should or should not be smaller bargaining units, has nothing to recommend it, unless all candidates agree to it:

The one exact rule that the Board has laid down, to wit, that a collective bargaining unit must comprise more than one employee,⁶⁶ seems to me objectionable. It emphasizes unduly, or construes too etymologically, the word "collective." What the Act does is to establish a new system of employment relations—a fixing of conditions of work by joint action of employer and employees (acting, if they will and as they normally do, through organizations), thereby strengthening the pre-existing "agreement system." The method of negotiating the agreement is called "collective bargaining."⁶⁷ Though the term implies that many employees are affected by the negotiation, the essence of the term is not the number affected but the method of joint deliberation and agreement of the employer and the representative of his employees. The word "collective" is merely descriptive of the usual situation.^{67a} Surely one man in dealing with the employer is, if anything, in greater need than a group of employees of the backing of an act which seeks to redress "the inequality of bargaining power between employees . . . and employers."⁶⁸ Moreover, the fact that there is one man in the unit at a particular moment does not mean that this situation will prevail for the period for which a certification will normally establish a régime. The number of employees fluctuates, but bargaining representation remains constant unless the majority of employees desires a change. The mere fact that the majority may change more suddenly when few employees are concerned is a consideration adverse to the setting up of small units but not one for denying the possibility of a unit in which there is only one member.⁶⁹ Bargaining is for the future as well as the present. A bargaining unit is not merely the persons who vote for a representative nor those allowed to vote in the event of an election;⁷⁰ it is all those who at any time work within the boundaries of the municipality, if one may so call it, which is established by the Board. It would, in my opinion, be entirely proper for the Board to establish or recognize a bargaining unit consisting of one employee.

On the other hand, the unit normally comprises only employees of *one* employer. Nevertheless there are several cases where two or more employers act together to such an extent that employees of both together form a unit for bargaining.⁷¹ Though such a unit appears to be larger than that which the Act prescribes, no objection to it has been raised in any of these cases.

⁶⁶ See note 24, *supra*.

⁶⁷ "Collective bargaining is simply a means to an end. The end is an agreement." Houde Engineering Co., 1 (first) N.L.R.B. 35, 39 (1934), referring to NIRA §7(a).

^{67a} *Cf.* Piedmont & Northern Ry. Co. v. I. C. C., 286 U. S. 299, 306 (1933) ("interurban electric railway").

⁶⁸ NLRA §1, par. 2.

⁶⁹ Compare (1935) 10 Wis. L. Rev. 406.

⁷⁰ Thus eligibility to vote is usually determined by employment during the payroll period preceding the filing of the petition. Pacific Greyhound Lines, 4 N.L.R.B. No. 76 (1937); Canadian Fur Trappers Corp., *id.* No. 109 (1938).

⁷¹ International Mercantile Marine Co., 1 N.L.R.B. 384 (1936); Lykes Bros. S. S. Co., Inc., 2 *id.* 102 (1936); American-Hawaiian S. S. Co., *id.* 424 (1936); Canadian Fur Trappers Corp., 4 *id.* No. 109 (1938); Mackay Radio Corp. of Del., Inc., 5 *id.* No. 89 (1938); The Triplett Electrical Instrument Co., *id.* No. 112, p. 19 (1938). But compare Penna. Salt Mfg. Co., 3 *id.* No. 74, p. 5 (1937), and Red River Lumber Co., 5 *id.* No. 90, p. 10 (1938). So several employers may be jointly liable for unfair labor practices. Clark & Reid Co., Inc., 2 *id.* 516 (1936); William Randolph Hearst, *id.* 530 (1937); Bell Oil & Gas Co., *id.* 577 (1937); *id.* 886 (1937).

A. Classification Based on Geography

Let us take up the simplest question first, that of physical distance. Though the plebiscite device mentioned above might be used for deciding whether physically separated groups of employees should form one or several bargaining units, actually it has not been so used, the Board having always decided upon testimony given at the hearing whether remoteness demanded separation of employees into two or more bargaining units. But no measure of distance can be laid down, for the decision is ruled by considerations of current personnel practice (particularly interchange of workers), recent bargaining customs and above all by present desires of employees. Thus in *Chase Brass & Copper Co.*,⁷² the Board recognized that the desire of the employees for the single plant unit should prevail over that of the employer for a larger one. In transportation employment physical separation means less than in other undertakings.⁷³ But even among workers engaged in transport itself, geographical limitations desired by them are respected.⁷⁴

But where the situation is complicated by interunion rivalries, the Board makes its own appraisal based on several factors. Soon after the *Chase* case it had to bound the bargaining units for the employees of the American Hardware Corporation which had four plants in one city.⁷⁵ Here there were several unions, all open to employees in all plants and three of them desiring the four plants not to be separated. Two others asked that one plant be made a separate unit. In the *Chase* case, said the Board, it had "held the employees of two plants in the same city with a common management to be separate units on the ground that the employees had organized and bargained on that basis. No organization along the lines of a multiple plant unit had commenced in that case. Such is not the situation here. . . . To hold that each plant in New Britain constituted a separate unit would hamper organization already started along broader lines. Further the plants are not situated so far apart geographically that there is any difficulty in holding meetings of the employees from all four plants. The factors of centralized management of all plants and of organization among employees of all plants . . . lead to the conclusion that no distinction should be made along plant lines in determining the unit."⁷⁶

⁷² 4 N.L.R.B. No. 8 (1937) (petitioner had members at only one of two plants, two miles apart, under common management and, in part, doing the same type of work; another union was established at the other plant).

⁷³ Even when the unit consists only of garage workers. *New England Transportation Co.*, 1 N.L.R.B. 130 (1936) (employees in 13 garages in 4 states constitute a unit—no disagreement on unit). In countless maritime cases, each ship has never been treated as a bargaining unit, all of a company's employees in a particular occupation being the unit.

⁷⁴ *Motor Transport Co.*, 2 N.L.R.B. 492 (1937).

⁷⁵ *American Hardware Corp.*, 4 N.L.R.B. No. 58 (1937) (four plants, situated in two groups three-quarters of a mile apart; respondent does not transfer employees between plants; "some plants fabricate materials used by the other plants. . . . To a great extent, however, each plant is independent of the others. . .").

⁷⁶ *Id.*, at p. 6. So in other cases where unions disagree the Board inclines to the larger unit. *Ohio Foundry Co.*, 3 N.L.R.B. No. 71 (1937) (one union desired a unit comprising three plants; another union, a unit of one plant; a third union, a unit of another plant; on the basis of the kind of work done, the Board set up one unit of one plant; one of the other two). And see *American Woolen Co.*, 5 *id.* No. 24 (1938) (three mills within a radius of three or four miles; petition for election in one mill dismissed

The Board in two recent meat packers' cases seems at first sight to have come to somewhat inconsistent conclusions. In *Swift & Co.*⁷⁷ the Board found that the company had 375 branch houses in the United States of which two were in Los Angeles. At one of these, the one which the petitioning (nationally affiliated) union desired to have recognized as a bargaining unit, there was slaughtering, processing, and distribution, and at the other, two miles away, processing and distribution. A rival (non-affiliated) union and the company both urged a single unit for both plants, which had common management. It further appeared that transfers of employees from one plant to the other were frequent and that the company had completed plans for the consolidation of the two plants by the enlargement of the second plant, which the company expected to have completed within a year. In the *Chase case*⁷⁸ also consolidation of the two plants was being considered but had "admittedly not reached the status of a definitely scheduled move." In the *Swift case*, the greater probability of consolidation seems to have been an important factor in bringing the Board to dismissal of the petition, without prejudice to the presentation of a petition for the investigation and certification of representatives of employees at both plants together. (The Board does not certify for a larger unit than the one asked by the petitioner,^{78a} though it will for a smaller one when it deems it appropriate.) But only a few days later in *Armour & Co.*,⁷⁹ without referring to any earlier case, the Board treated each of 11 branch houses doing processing and distributing in Greater New York (there being 28 meat packing houses and about 300 branch houses throughout the United States) as a separate bargaining unit, according to the desire of the only union in the field, the company offering no objection. There is no inconsistency between the cases, however, when we note that here the wishes of the only articulate employees prevailed.⁸⁰

From this review of the chief cases it is obvious that physical separation of some workers from other workers, is a minimal factor in unit determination. It affects the Board only indirectly, that is, through its influence on management arrangements and bargaining practices and desires of employees. Where there is unity of opinion

as it is not a separate unit); *Standard Oil Co. of Cal.*, *id.* No. 98 (1938); and *American Steel and Wire Co.*, *id.* No. 116 (1938). Notwithstanding some discussion of geographical separation in *Hoffman Beverage Co.*, 3 *id.* No. 64 (1937), and *Shell Chemical Co.*, 4 *id.* No. 36 (1937), these decisions rest chiefly on functional or craft separation of a group found at only one plant.

⁷⁷ 4 N.L.R.B. No. 96 (1938).

⁷⁸ *Supra* note 72, at p. 4.

^{78a} See also *American Woolen Co. and Standard Oil Co. of Cal.*, both *supra* note 76. For craft boundaries the rule is perhaps less absolute. *Great Lakes Engineering Works*, 5 N.L.R.B. No. 106 (1938).

⁷⁹ 4 N.L.R.B. No. 115 (1938).

⁸⁰ This, too, is clearly the ground of *Canadian Fur Trappers Corp.*, 4 N.L.R.B. No. 109 (1938). And only the Board's respect for the wishes of the employees harmonizes other cases. Compare *Shell Oil Co.*, 2 *id.* 835 (1937) (all California one unit), and *Mackay Radio Corp. of Del., Inc.*, 5 *id.* No. 89 (1938) (all U. S. one unit), with *R.C.A. Communications, Inc.*, 2 N.L.R.B. 1109, 1115 (1937) (New York metropolitan unit); *Associated Press*, *id.* No. 6 (1938) (separate units for Washington, Boston, and Philadelphia); and *Spray Woolen Mills*, *id.* No. 63 (1938) (five mills in three towns; each to be a separate unit). The gradual emergence of the preponderant importance of the wishes of any organized group of employees (as against unorganized employees) seems to account for the change from a two-plant unit in *Gordon Baking Co.*, 2 N.L.B. 53 (June 1934), to two units on reconsideration of the same case, 1 (first) N.L.R.B. 102 (Oct. 1934).

as to the appropriate unit, among the employees concerned, that opinion will prevail, however widely spread the unit may be. Where there is disunity, the Board considers physical factors, but only as they affect management arrangements and would be likely to affect the stability of collective dealing.

B. Classification by Craft

Vertical classification of employees is more frequently on a craft basis than on one of geographical separation. Again the preference of the employees is the chief determinant.⁸¹ But, under present circumstances, there is likely to be a sharp conflict of opinion between employees, some for, some against, craft separation. It is now habitual for the Board to resort to the use of balloting by employees to decide such conflicts,⁸² thereby giving to the employees' wishes a controlling effect in favor of the craft,⁸³ or at least the less inclusive, unit, wherever a majority of its voters so desire. Thus when the United Electrical and Radio Workers petitioned for a determination of representation of the employees of the American Hardware Corporation, and it appeared that there were craftsmen who desired craft union representatives, an election, offering a choice between the petitioner and the International Association of Machinists was ordered⁸⁴ in an electoral unit comprising machinists, tool makers and die makers.⁸⁵ Later, upon the U.E.R.W.'s asking to be withdrawn from the ballot in this election, the Board modified its direction of election so that the ballot offered the employees a Yes-No choice as to the I. A. M.⁸⁶ The majority vote having been Yes, the Board made a supplemental finding of fact that the machinists, tool makers and die makers constituted "a unit appropriate for the purpose of collective bargaining" and certified the I. A. M.⁸⁷

Examination of early cases would add little to what has already been written.⁸⁸ But some recent decisions should be mentioned, particularly because they have given

⁸¹ Penna. Greyhound Lines, Inc., 4 N.L.R.B. No. 69, p. 13 (1937). And, where the Board might "find either the smaller or the larger unit to be appropriate for collective bargaining," it "will be governed by the wishes of the employees [in the proposed smaller unit] themselves." Wilmington Transportation Co., *id.* No. 132 (1938). Though in News Syndicate, Inc., *supra* note 56, the Board (unwisely?) overruled a craft's desire for exclusion, and though in Pacific Greyhound Lines, quoted at note 99, below, it speaks of the results of an election as only "in part" decisive, yet it will be seen that the Board almost always gives the employees' desire to bargain through a craft union preponderant effect. The Board's cautious language may be due in part to fear of the unconstitutionality of subdelegation. See Notes (1932) 32 COL. L. REV. 80; (1937) 37 COL. L. REV. 447; Jaffe, *Law Making by Private Groups* (1937) 51 HARV. L. REV. 201.

⁸² See note 65, *supra*.

⁸³ The New York LRA, §705.2, requires craft units if the craftsmen so desire: "In any case where the majority of employees of a particular craft shall so decide the Board shall designate such craft as a unit appropriate for the purpose of collective bargaining."

⁸⁴ 4 N.L.R.B. No. 58 (Dec. 4, 1937), E. S. Smith explaining in a separate opinion that he concurred because the craft union was organized and bargaining a year before the industrial union organization was started in the respondent's plants.

⁸⁵ The election by the employees in these groups was to determine whether they desired to be represented by the industrial or the craft union, "or by neither."

⁸⁶ 4 N.L.R.B. No. 58a (Dec. 17, 1937). See note 94, *infra*. ⁸⁷ 4 N.L.R.B. No. 58b (Jan. 17, 1938).

⁸⁸ See, e.g., NLRB, FIRST ANNUAL REPORT (1936) 112-120; SECOND ANNUAL REPORT (1937) 104-140; (1937) 12 Wis. L. REV. 367; *The Labor Board and the Courts* (1938) 32 ILL. L. REV. 568, 593-610; Stix, *The Appropriate Bargaining Unit under the Wagner Act* (1938) 23 WASH. U. L. Q. 156 (summarizing many cases not covered herein, especially unit determinations made in §8 cases). In weighing NLRB decisions before last August, as well as all state board decisions, one needs to be mindful of the NLRB's present practice of polling employees to learn their wishes.

rise to dissenting opinions by Mr. Edwin S. Smith, ending a two year record of unanimity in the Board's pronouncements.⁸⁹

One of the most difficult representation cases that the Board has handled was that initiated June 14, 1937, by a petition of Local 248 of the United Automobile Workers (CIO) asking for a determination of representation at the West Allis, Wisconsin, plant of the Allis-Chalmers Mfg. Co.⁹⁰ The main contest was between the petitioner and several AFL craft unions. An AFL federal union, formed in 1936, absorbed a large share of some of these unions' membership and thereby came into such conflict with the national craft organizations that its members voted to join the CIO in a body in March, 1937 and in substance transformed themselves into Local 248, the petitioner. There was also an Independent Association composed of technical engineers and draftsmen employed by the company, which wished to represent those groups of employees.

The Board made a careful investigation of the history of these organizations in the respondent's plant. The CIO local which had made a contract, only for its members, in May, 1937, asked for a single unit, inclusive of all production and maintenance workers. The Board, however, gave opportunity to the employees in particular crafts to assert their autonomy, and ordered elections where there was doubt as to a group's preference.

Unanimously the Board decided that the engineers and draftsmen together were entitled to separate bargaining if a majority so desired. It was shown that their bargaining agency had negotiated with the employer for some years and had made a contract, for its members only, in June, 1937. They were provided a ballot which offered them the choice of representation by Local 248, by the Independent Association, or by neither.

Leaving clerical workers aside (though Local 248 wanted them included) because their functions and problems differed so from those of production workers that it would be inappropriate to include them "in the absence of . . . evidence" (apparently, of some desire on their part to participate in collective bargaining), the Board (Messrs. Madden and D. W. Smith) found two craft groups sufficiently self-conscious to warrant separation if they so desired. One consisted of maintenance electricians. Though the International Brotherhood of Electrical Workers could show no remaining strength among the electrical production workers, it claimed a majority of "this well-defined group" of maintenance employees. The Board also recognized as a possible unit a group of operative engineers, among whom the International Brotherhood of Firemen and Oilers (though its local was not organized till 1937) had become strong enough to make a contract, for its members only, with the employer in June 1937. Each ballot offered the choice between CIO Local 248, the AFL local, or neither.

⁸⁹ His first recorded dissent was in Allis-Chalmers Mfg. Co., 4 N.L.R.B. No. 24 (Nov. 20, 1937). He had once before delivered a separate opinion (on another question). *Matter of Pacific S. S. Co.*, 2 *id.* 214, 230 (1936). No other Board member has announced individual views.

⁹⁰ Allis-Chalmers Mfg. Co., 4 N.L.R.B. No. 24 (1937). The hearings took over two weeks.

Mr. Edwin S. Smith objected to these dispositions, insisting that a choice vitally affecting all employees should not be entrusted to these small groups. "If the oilers and firemen and the skilled maintenance electricians bargain separately, by so much is the united economic strength of the employees as a whole weakened. Anything which weakens the bargaining power of the employees will tend to lessen reliance upon peaceful collective bargaining as the means for achieving the workers' economic ends. Such a tendency is plainly contrary to the purposes of the Act." In short he is for unitary government rather than "states' rights," though he stands for employee self-determination⁹¹ as valiantly as his colleagues. But self-determination means to him unification if the majority of all desire it; while to them it means segmentation to whatever extent a segment desires autonomy.

Allis-Chalmers Mfg. Co. thus led to four elections which resulted in four certifications, for each of the three craft groups won its sectional election, while Local 248 prevailed in a Yes-No election in the rest of the plant.⁹²

*Schick Dry Shaver Co.*⁹³ is a very similar conflict between a CIO industrial union and a group of craft unions. The maintenance employees (electricians, carpenters and machinists) desired separate craft units. Tool production makers also petitioned to be separate and were put into the same voting unit as machinists in the maintenance department, being eligible to the same AFL union. Accordingly for the election these three craft units and a residual unit were set up, the bargaining units to depend on the outcome of the vote.⁹⁴ Mr. Smith dissented briefly, referring to what he had said in the *Allis-Chalmers* case.

In *American Hardware Corporation*,⁹⁵ the situation was similar, but this time Mr. Smith agreed with the craft separation because of the bargaining activities of the International Association of Machinists (AFL) in the plant before the United Electrical & Radio Workers (CIO) began to organize. Machinists, tool makers, and die makers were accordingly given a chance to choose between the two unions (or neither) while the rest of the workmen voted Yes or No as to the United.⁹⁶

⁹¹ "The decision vests in the hands of a small group of employees the choice of determining whether in this mass-production plant, employing nearly 10,000 workers, a complete industrial unit, or one from which one or more crafts have been severed, is most appropriate to promote collective bargaining. By this pseudo-democratic method a determination of the greatest consequence to the other employees in the plant is left in the hands of groups known to be hostile to industrial organization. The wishes of the great majority of the employees are ignored. The device of holding such an election to resolve the conflict between industrial union adherents and craft conscious groups, as here represented by the oilers and firemen, is obviously inadequate to throw any light on the problem of what is the most appropriate bargaining unit. Permitting minorities to set themselves off, as all the indications are they would do in this instance, succeeds in providing full self-determination for the minority but only at the expense of entirely disregarding the interests of the majority." ⁹² 5 N.L.R.B. No. 26 (1938).

⁹³ 4 N.L.R.B. No. 35 (Nov. 29, 1937). One painter was denied unit standing. See note 24, *supra*.

⁹⁴ Before the election the CIO local withdrew its petition. The Board thereupon called the general election off, found the craft units appropriate, and directed that the three craft elections be by Yes-No ballot. 4 N.L.R.B. No. 35a (Dec. 15, 1937). In each case the craft union won and was certified. *Id.* No. 35b (Jan. 14, 1938).

⁹⁵ 4 N.L.R.B. No. 58 (1937). Another phase of this case has been discussed, note 75, *supra*.

⁹⁶ If, after the United's withdrawal from the craft unit election, note 86, *supra*, the craft union had not won, it is not clear how the Board would have handled the unit question. But it did win. 4 N.L.R.B. No. 58b (1938). See also Pacific Greyhound Lines, quoted at note 99, *infra*.

But because of the absence of any such history of craft bargaining before the coming of the CIO, Mr. Smith again dissented in *Worthington Pump Corporation*.⁹⁷ Here no election was directed because the evidence obtained at the hearing showed a majority preference for the Pattern Makers Association (AFL) on the part of the unit, found by the other two Board members to be appropriate, consisting of wood pattern makers and their apprentices. There was no petition for a determination as to the rest of the employees, for the respondent had already made a contract with the Steel Workers Organizing Committee, recognizing its authority to represent all employees, but containing the proviso: "It is understood that the wood pattern makers are excluded from this agreement pending the settlement of their status by the NLRB."

In *Pacific Greyhound Lines*⁹⁸ Mr. Smith again dissented, this time favoring the smaller unit (bus drivers) because the union desiring the larger unit had been "the recipient of the Company's illegal favors."⁹⁹ But the other members decided otherwise and gave the bus drivers the usual option of deciding which union they preferred and said that "upon the results of this election will depend in part the determination of the unit appropriate for the purposes of collective bargaining. If the bus drivers choose the Brotherhood, bus drivers alone will constitute an appropriate unit; if they choose the Amalgamated, they will have expressed their preference for a single larger unit consisting of all the employees."

C. The Significance of Union Membership Rules

Since collective bargaining is necessarily, or at least customarily, carried on through unions, the Board has from the beginning almost invariably decided that employees shall not be included in a unit unless they are eligible to the union designated as the representative of the unit (or, where there is an election, to every union that is a candidate).¹⁰⁰ Thus a union by its membership rules often affects the definition of units. Rules of the union limiting its membership also limit the membership of the unit it seeks to represent, for, as the Board has said, "the rules of eligibility to membership in the union which the employees form or join constitute one of the

⁹⁷ 4 N.L.R.B. No. 61 (1937).

⁹⁸ 4 N.L.R.B. No. 72 (1937). The passage quoted is at p. 18. Bus drivers were to be separate unit if they so voted, according to *Penna. Greyhound Lines*, 3 *id.* No. 69, pp. 14, 25, 29, 38, 41, 44, 46, 48, 50 (1937).

⁹⁹ Where the situation was reversed, that is, where the union contending for the plant-inclusive unit had been favored by the employer, Mr. Smith concurred, for this reason, with his colleagues in setting up the smaller unit desired by the other candidate. *Zenite Metal Corp.*, 5 N.L.R.B. No. 73 (1938). But he continues to adhere to the view he took in the *Allis-Chalmers* and similar cases and dissented accordingly in *Armour & Co.*, *id.* No. 75 (1938).

¹⁰⁰ *International Mercantile Marine Co.*, 1 N.L.R.B. 384 (1936); *International Filter Co.*, 1 N.L.R.B. 489. *Luckenbach S. S. Co.*, 2 *id.* 181 (1936). Contrary decisions in *Grace Line, Inc.*, *id.* 369, 374 (1936), and *N. Y. and Cuba Mail S. S. Co.*, *id.* 595, 598 (1937), were reversed upon reconsideration, *id.* at 382 (1937) and 605 (1937), the Board thus reverting to the classification it had made in the *I.M.M.* case, *supra*. Another contrary decision is *Richardson Co.*, 4 *id.* No. 94 (1938), where, though one of the unions excluded maintenance employees, the Board included them with production employees. Thereupon a majority of the employees in the unit voted against both unions. 5 *id.* No. 43 (1938). A policy of not organizing certain employees is sometimes given the same effect as a membership rule. *Red River Lumber Co.*, *id.* No. 90, p. 9, n. 9 (1938).

clearest manifestations of the manner in which they desire collective bargaining to take place."¹⁰¹

This requirement that the unit be no larger than the membership reach of the union that wishes to represent the unit operates as a limitation on both the vertical and the horizontal classification of employees, excluding, for example, from craft units noncraftsmen that are excluded from one or more of the unions seeking to represent the unit; from units of production employees clerks when any of the candidate unions excludes clerks; and supervisory employees from units composed of the men they oversee when the union which wishes to represent the men they oversee will not admit them also. In vertical classification, particularly when there is a struggle between craft unions and industrial unions, the larger group usually wants to swallow the smaller group. But in horizontal classification, the larger group usually rejects the smaller; that is, the foremen or the watchmen or the office staff ordinarily are not the ones who object to being part of the mass unit (or at least would be willing to be included if they might belong to the union also). It is the mass of employees that prefer to be apart from their more employer-minded comrades, as is shown by the union membership qualifications. "Home rule" is not a question of the size of the group: it is mostly a question of union rules.

This principle is illustrated by a series of cases concerning employment at sea. The petitioner in *Grace Line, Inc.*,¹⁰² was a local of the National Marine Engineers' Beneficial Association (MEBA), then belonging to the Brotherhood of Railway Locomotive Engineers, with a membership limited to marine engineers, licensed by the United States. The unaffiliated United Licensed Officers, consisting of licensed marine engineers and licensed deck officers, and the International Union of Operating Engineers, an AFL affiliate, admitting both licensed and unlicensed marine engineers, were also parties. The Board formed a unit consisting of the marine engineers, whether or not licensed (there being few unlicensed engineers), and put all three organizations on the ballot. The two unions not accepting unlicensed personnel obtained no satisfaction on a rehearing; and the election was held.¹⁰³ But when, before the results of the balloting had been announced, the International Seamen's Union, another AFL affiliate, petitioned for a determination of representation of unlicensed personnel, the Board decided that unlicensed engineers should be included in that unit.¹⁰⁴ The ballots of the unlicensed engineers in the previous elections not having been segregated and the elections having been close, the Board thereupon ordered in the *Grace Line* case new elections for licensed personnel

¹⁰¹ SECOND ANNUAL REPORT (1937) 129; U. S. Testing Co., Inc., 5 N.L.R.B. No. 93 (1938). Though no case has altered boundaries once established, several intimate that changes in union membership would be good ground for redefinition of units. See M. H. Birge & Sons Co., *id.* No. 51 (1938); R. C. A. Communications, Inc., *supra* note 80; News Syndicate Co., Inc., *supra* note 56(3); Great Lakes Engineering Works, 3 N.L.R.B. No. 85 (1937); Daily Mirror, Inc., 5 *id.* No. 59, p. 7 (1938).

¹⁰² 2 N.L.R.B. 369 (1936-7). N. Y. and Cuba Mail S. S. Co., *id.* 595 (1937), is a closely parallel case, in which the United Licensed Officers petitioned for a determination of representation of both licensed deck officers and licensed marine engineers.

¹⁰³ 2 N.L.R.B., at 380.

¹⁰⁴ American France Line, 3 N.L.R.B. No. 7 (1937). The case covers the *Grace Line* and many others.

only.¹⁰⁵ So many elections¹⁰⁶ have now been held on steamships with the personnel thus divided into one or more units of licensed, and one or more of unlicensed, personnel¹⁰⁷ that this unit boundary is a fixed frontier in labor relations.

D. Other Bases of Classification

Employees who represent peculiarly the interest of the employer or whose higher wages or stated periodic salary or other conditions of work (office clerks, draftsmen, laboratory workers) dissociate them from the rest of the workers are ordinarily not desired, as we have seen, in a union predominantly of production employees. Such a separation of supervisors and clerks from other workers is therefore made by the Board as a matter of course.¹⁰⁸ But in cases where they are eligible to membership in the union (or every union) that may be chosen as representative, and where neither their own group nor the less employer-minded worker group shows a desire to be separate, the Board has several times allowed their inclusion.¹⁰⁹ With the exception of this line¹¹⁰ and that between licensed and unlicensed personnel on ships, the Board has not drawn what may be called horizontal lines between bargaining units.¹¹¹

¹⁰⁵ 2 N.L.R.B., at 383. The MEBA (which meanwhile had joined the CIO) received a majority of all ballots and was certified. 4 *id.* No. 90 (1938).

¹⁰⁶ There have been over fifty elections conducted in carrying out this decision and those named in notes 104, *supra*, and 107, *infra*. Such elections, because of the movement of the ships, present special problems to be discussed later.

¹⁰⁷ Radio operators comprise a unit; so do licensed deck officers. Lykes Bros. S. S. Co., 2 N.L.R.B. 102, 106-8 (1936). The former were so recognized also in Southgate-Nelson Corp., 4 *id.* No. 44 (1937), and in Clyde-Mallory Lines, Inc., 5 *id.* No. 72 (1938). And the latter in American-Hawaiian S. S. Co., 2 *id.* 424 (1936). Deck officers and electrical engineers were excluded from the unit of licensed marine engineers in International Mercantile Marine Co., 1 *id.* 384, 388-390. Presumably electrical engineers form a unit. Cf. American France Line, 3 *id.* No. 7 p. 7. Licensed marine engineers, to the exclusion of unlicensed, were recognized as a bargaining unit in the Lykes and I.M.M. cases, *supra*, and in Black Diamond S. S. Co., 2 *id.* 241, 244 (1936); Swayne & Hoyt, Ltd., 2 *id.* 282, 286 (1936); and Panama R. R. Co., 2 *id.* 290, 294 (1936), before the Board tried combining licensed and unlicensed marine engineers in Grace Line, Inc., and N. Y. & Cuba Mail S. S. Co., both *supra* note 102. Before reverting (Sept. 8, 1937) to its earlier segregation of licensed engineers, it had drawn that line in several new cases. Ocean S. S. Co. of Savannah, 2 *id.* 588 (1937); Merchants & Miners Transportation Co., 2 *id.* 747 (1937) (unless permanently employed in positions where a license is unnecessary). And more recently it has drawn the same unit boundary in tugboat employment. Curtis Bay Towing Co., 4 *id.* No. 53, p. 8 (1937). Under General Petroleum Corp. of Cal., 5 *id.* No. 129 (1938), unlicensed personnel of the engine departments forms a unit; so does unlicensed personnel of the stewards' departments.

¹⁰⁸ Richardson Co., 4 N.L.R.B. No. 94 (1938) (foremen, other supervisory employees, clerical employees, and watchmen excluded); Ontario Knife Co., 4 *id.*, No. 4 (1937) (same); Huth & James Shoe Mfg. Co., 3 *id.* No. 20 (1937) (clerks excluded though unions willing to leave them in); Alabama Drydock Co., 5 *id.* No. 25 (1938) (same, though one union wished to leave them in); Atlantic Basin Iron Works, 5 *id.* No. 65 (1937) (office and clerical employees, timekeepers, and draftsmen excluded).

¹⁰⁹ Luckenbach S. S. Co., Inc., 2 N.L.R.B. 181, 187 (1936) (watchmen); J. G. McDonald Chocolate Co., 5 *id.* No. 77 (1938) (same); Sweet Candy Co., 5 *id.* No. 76 (1938) (same); Goldstein Hat Mfg. Co., 4 *id.* No. 13a (1937) (foremen); Allis-Chalmers Mfg. Co., 4 *id.* No. 24b (1937) (clerks in production dept.). Compare Michaels Bros. (N. Y. LRB, Oct. 17, 1937) (no separation of furniture store clerks from other employees, though one union so requested).

¹¹⁰ Of the countless recent cases, American Sugar Refining Co., quoted at note 115, *infra* is typical. See also Hubinger Co., 4 N.L.R.B. No. 31, p. 6 (1937); Fedders Mfg. Co., Inc., 3 *id.* No. 86 (1937); Marlin-Rockwell Corp., 5 *id.* No. 31 (1938).

¹¹¹ In International Mercantile Marine Co., 1 N.L.R.B. 384, 388 (1936), the company's plea for separate units for chief engineers, assistant engineers, and junior engineers was rejected, but one reason for separating engineers from deck officers was that "the chief engineer is subordinate to and takes orders from the master."

In one case a line was drawn between production employees and maintenance employees, where there was an employee demand for such segregation.¹¹² Likewise occasional employees are sometimes separated, probably pursuant to the desire of the regular employees.¹¹³ There has been no separation and no demand for separation on race or sex or nationality lines. What would the Board do if a union having such a limitation of membership¹¹⁴ should ask the Board to set up a unit containing some of the excluded class?

In sum, unit lines are drawn: (1) where there is substantial geographical separation and an employee desire for bargaining separation; (2) where there is craft or some other functional difference and an employee desire for bargaining separation; (3) to prevent employees from being represented by a union which they can not join. Other criteria are often mentioned (wages, skill, organization of business, history of labor relations in the industry or in the plant, close connection with interests of employer, authority to hire and fire, etc.). They are tests of functional difference, of employees' desire, or of both; frequently they merely emphasize a line that is also fixed by the union's (or unions') own rules of membership.

A substantial quotation from a recent case¹¹⁵ will show the Board's present attitude; how it decides many exclusion questions without actual evidence of the wishes of the employees and without precise interpretation of union membership rules, but in accordance with the Board's understanding of the probable wishes of the employees. This case was initiated by two petitions, one from the CIO and the other from the AFL United Sugar Workers Union, Local 21023, referred to as the Federal Union, each asking for a determination "concerning the representation of employees of American Sugar Refining Co." The International Longshoremen's Association intervened but did not ask for a certification of representatives as the other unions did.

¹¹² Allis-Chalmers Mfg. Co., 4 N.L.R.B. No. 24 (1937) (maintenance electricians, at desire of craft union to which most of them belonged, separated from production electricians; but forge shop engineers, with assent of craft union to which most of them belonged, not separated from main power house engineers). In Schick Dry Shaver Co., 4 *id.* No. 35 (1937), and Waterbury Mfg. Co., 5 *id.* No. 42 (1938), the unit comprised highly skilled maintenance workers and a few highly skilled production workers. *Contra*: Richardson Co., *supra* note 100; International Harvester Co., 5 N.L.R.B. No. 30 (1938); News Syndicate Co., Inc., 4 *id.* No. 119 (1938). In horizontal exclusions the Board apparently does not care whether there is another organization likely to organize the excluded employees; but in vertical exclusions this appears to be a factor, though the Board does not expressly say so. Thus in American Sugar Refining Co., quoted at note 115, *infra*, though several "higher up" groups were excluded without consideration of their opportunity for collective bargaining, there was only one vertically excluded group, longshoremen, almost half of whom had joined the International Longshoremen's Union. So existence of suitable unions for excluded employees is a consideration in I.M.M., *supra* note 111, and in Daily Mirror, Inc., 5 N.L.R.B. No. 59, p. 9 (1938).

¹¹³ Canadian Fur Trappers Corp., 4 N.L.R.B. No. 109 (1938) (Saturday extra help excluded); Bishop & Co., 4 *id.* No. 71 (1937) (seasonal help excluded, as desired by sole union). *Contra*: Richards-Wilcox Mfg. Co., 2 *id.* 97 (1936) (temporary employees included contrary to desire of sole union).

¹¹⁴ Such as the Brotherhood of Locomotive Firemen and Enginemen (excluding Mexicans, Negroes and Indians). Pacific Greyhound Lines, Inc., 4 N.L.R.B. No. 72, p. 4 (1938). By definition of the Pa. LRA §3(f) this would be no "labor organization." See (1937) 86 U. OF PA. L. REV. 79, and *Negroes and the Labor Relations Acts* (1937) 6 I. J. A. MONTHLY BULL. 46.

¹¹⁵ American Sugar Refining Co., 4 N.L.R.B. No. 108 (1938). The passage quoted is from pp. 3-6. The Board's discussion of the checkers, samplers, and chauffeurs is omitted. It included each of these groups in the unit. For result of the election, see 5 *id.* No. 45 (1938).

"The Federal Union maintains that all employees of the Company at its Baltimore, Maryland, refinery, exclusive of executives, supervisory and office workers, constitute a unit appropriate for the purposes of collective bargaining. The C. I. O. contends that there should be excluded from the unit supervisory and clerical employees, longshoremen, weighers, checkers, samplers, guards, chauffeurs, and laboratory workers. . . .

Longshoremen. Testimony offered by the Company indicates that it employed 67 longshoremen during the week of October 16, 1937. The Federal Union contends that the longshoremen of the Company should be included within the bargaining unit since they work as production workers in the raw sugar sheds of the Company when not engaged as longshoremen. However, since April 1937, at which time the I. L. A. began to organize the Company's longshoremen, the practice of working in the refinery when longshoremen's work was not available has diminished considerably. At the time of the hearing, an average of only six longshoremen per day worked in the raw sugar sheds. The Federal Union also stated that the longshoremen employed by a sugar refinery in Boston had participated with production employees in an election held to choose representatives for the purposes of collective bargaining.

Other considerations persuade us to the view, however, that the longshoremen should not be included in the same bargaining unit with the production employees of the Company. The longshoremen of the Company are eligible to membership in the I. L. A. and almost 50 per cent of them are members of the I. L. A. The president of the Federal Union testified that at the time of the hearing no longshoremen were members of the Federal Union. The Company pays the longshoremen \$1.05 per hour, which is the I. L. A. scale for longshoremen in the Baltimore area, whereas the production workers of the Company are paid only 50 or 55 cents per hour.

Upon the basis of all the evidence, we find that the longshoremen should not be included in the unit.

Weighers. The C. I. O. contends that the two weighers employed by the Company are part of the clerical force and as such should be excluded from the bargaining unit. Such employees are paid weekly wages, whereas the production employees are paid on an hourly basis. The weighers check the results obtained by public weighers or seller's representatives who weigh the raw sugar when a cargo arrives at the docks of the Company. In addition to checking the weights, they record them as well. When there is no ship cargo which requires weighing and checking, the weighers perform other duties such as running electric trucks on the dock, and taking slings of sugar from storage to the place where the sugar bags are cut and emptied for refining purposes. On occasion, they also do some check weighing of refined sugar.

We feel that, under all the circumstances, the duties and interests of the weighers are closely related to those of the production workers, and that the weighers should be included in the bargaining unit. . . .

Guards. The Company employs seven uniformed men who are charged with the duty of protecting its property. It is evident that these employees are closely associated with management and that their interests differ materially from those of the production employees. In accordance with our decisions in other cases, we find that the guards should be excluded from the unit. . . .¹¹⁶

Laboratory workers. . . . One worker keeps the laboratory records; the other three are routine analysts who make tests during the various stages in the production of refined sugar. The three employees also at times make other tests incidental to the operation of the refinery. All four employees are paid on a weekly salary basis. In so far as possible,

¹¹⁶ See R. C. A. Mfg. Co., Inc., 2 N.L.R.B. 159 (1936). And see also Bendix Products Corp., 3 *id.* No. 68 (1937). [Note by NLRB]

the Company fills vacancies in the laboratory by promoting refinery employees who possess a high school education. We find that the qualifications and activities of the laboratory workers differ essentially from those of the other workers whom we have included in the unit, and such employees should not be included within the bargaining unit.¹¹⁷

We find that the production employees of the Company, including weighers, checkers, samplers, and chauffeurs, but excluding longshoremen, guards, laboratory workers, and supervisory and clerical employees, constitute a unit appropriate for the purposes of collective bargaining. . . .”

6. THE CHOICE OF REPRESENTATIVES

A. Candidates

“The term representatives includes any individual or labor organization.”¹¹⁸ This definition was put in the Act to assure that a labor organization could be the representative of employees. For in proceedings before the NIRA labor boards it had been repeatedly, but unsuccessfully,¹¹⁹ argued that only fellow employees could be representatives. At that time the argument that “representative” meant natural person could find some support in the Railway Labor Act,¹²⁰ which is so important a precedent in interpreting later labor relations legislation.¹²¹ Moreover the Automobile Labor Board, in attempting to set up collective bargaining on the basis of committees, on which different “districts” of employees were represented by individuals, was giving “representative” the exclusive meaning of human being.¹²²

But experience under the NLRA shows that while individuals may be chosen,¹²³ none ever is. The only real question now is: what organizations are eligible? The New York¹²⁴ and Wisconsin¹²⁵ statutes expressly exclude “company unions,” but there is no express restriction in the NLRA.

The Board has now been unanimously sustained by highest authority in requiring employers to “disestablish,” as representatives of their employees, unions which they

¹¹⁷ See *Southern Chemical Cotton Co.*, 3 N.L.R.B. No. 90 (1937). [Note by NLRB]

¹¹⁸ NLRA §2(4).

¹¹⁹ *Berkeley Woolen Mills*, 1 N.L.B. 5 (1933); *Hall Baking Co.*, 1 *id.* 83 (1934). But see note 122, *infra*.

¹²⁰ *Supra* note 2, §2, Third, 45 U. S. C. (1934) §152, Third: “Representatives for the purposes of this act, shall be designated by the respective parties * in such manner as shall be provided for in their corporate organization or unincorporated association.” The words following the asterisk were omitted when the Act was amended in 1934 and the following sentence added in which, as in the rest of the Act, the word representative is used to mean not the natural person who negotiates but the legal entity that is engaged in making the contract: “Representatives of employees for the purpose of this act need not be persons in the employ of the carrier, and no carrier shall . . . prevent the designation by its employees as their representatives of those who *or which* are not employees of the carrier.” U. S. C. A. (1937 Supp.) §152, Third. (Italics added)

¹²¹ Note, for instance, the strong reliance on the Railway Labor Act and decisions thereunder in *NLRB v. Penna. Greyhound Lines, Inc.*, 58 Sup. Ct. 571 (1938).

¹²² *LORWIN AND WUBNIG, op. cit. supra* note 11, at 372-377.

¹²³ The Wisconsin LRA, §111.00(3), prohibits the appearance of any company union *or officer thereof* upon any ballot.

¹²⁴ By the implication that a representative may be only a labor organization or an individual, §701.4, and by defining “labor organization” to exclude a company union, §701.5, as defined therein, §701.6.

¹²⁵ *Supra* note 123. Though the exclusion is from the ballot, it surely means that no company union may be certified by the Board. “Company union” in both statutes means, briefly, a union dominated, through fear or favor, by the employer.

influence or control in violation of NLRA, Section 8(2).¹²⁶ In a situation where the Board would forbid the employer to bargain with such a union, it will not, of course, recognize the candidacy of such a union for bargaining representative. In *S. Blechman & Sons, Inc.*,¹²⁷ the Board both set aside the tally of a consent election which the employer-dominated union had won, and denied it inscription on the ballot to be used in the new election which the Board ordered. In no case has an organization been excluded from candidacy without a finding in a *complaint* case of unfair labor practices by which it was favored or controlled by the employer,¹²⁸ though it is hard to believe that the powers of the Board are not sufficient to exclude it without such a proceeding. Under the present rule a union might be certified in a representation proceeding and then be "disestablished" immediately afterwards in an unfair labor practice proceeding. Proceedings like the *Blechman* matter, under both section 9 and section 10, are few.

In *Swayne and Hoyt, Ltd.*,¹²⁹ after balloting was in progress, the petitioner filed charges against the employer of employer-support of a rival union. The petitioner was for this reason granted leave to withdraw its petition for a determination of representation. In *Lenox Shoe Co., Inc.*,¹³⁰ the Board, considering both a complaint and a representation petition, found conduct within Section 8(1) and (3) but none within Section 8(2), perhaps because the employer-favored union in this case was nationally affiliated, and announced the holding of an election, in which this union might participate as a candidate.^{130a} But it postponed the election "until such time as the Board is satisfied that there has been substantial compliance with its order to dissipate the effects of the unfair labor practices of the respondent and to permit an election uninfluenced by the respondent's conduct." There has been postponement in other cases also.¹³¹

¹²⁶ *NLRB v. Penna. Greyhound Lines, Inc.*, *supra* note 121; *NLRB v. Pacific Greyhound Lines, Inc.*, 58 Sup. Ct. 577 (1938). In both cases the part of the Board's order to this effect was set aside by the lower court, 91 F. (2d) 178 (3d, 1937); 91 F. (2d) 458 (9th, 1937). Before it was restored by the Supreme Court, the Board directed an election and, probably in deference to the C. C. A., allowed the employer-favored union a place on the ballot. *Pacific Greyhound Lines, Inc.*, 4 N.L.R.B. No. 72 (1937).

¹²⁷ 4 N.L.R.B. No. 3 (1937). *Accord*: *Industrial Rayon Corp.*, 3 *id.* No. 2 (1937); *New Idea, Inc.*, 5 *id.* No. 62 (1938). In *The Greer Steel Co.*, 4 *id.* No. 50 (1937), the employer-dominated union was excluded from the ballot by stipulation of the respondent.

¹²⁸ See note 16, *supra*. In its SECOND ANNUAL REPORT (1937) 113, the Board, citing cases, says that it has directed that the kept union be given a place on the ballot, unless, upon a charge of violation of §8(2), the Board has sustained the complaint. When it found in a *representation* case that "the Association is dominated and controlled by the Company," it let it go on the ballot. *Dwight Mfg. Co.*, 1 *id.* 309, 313 (1936). But in *American France Line*, 3 *id.* No. 45 (1937), the Board says one organization may show that another is "not entitled to a place on the ballot" because it exists in violation of NLRA §8(2).

¹²⁹ 2 N.L.R.B. 282, 289 (1937). Compare *E. S. McNary, Inc.*, Pa. LRB, Dec. 23, 1937 (Board "loath to certify" employer-dominated petitioner and does not because employer is bargaining with it; reason for not setting bounds of unit, as requested, not explained).

¹³⁰ 4 N.L.R.B. No. 54, p. 18 (1937). See notes 62 and 63, *supra*.

^{130a} Compare *National Electric Products Corp.*, 3 N.L.R.B. No. 47 (1937) (election was not postponed despite unfair labor practices) and *Consolidated Edison Co. of N. Y., Inc.*, 4 N.L.R.B. No. 10 (1937) (no petition for determination of representation), *aff'd*, *Consolidated Edison Co. v. NLRB*, 2 LABOR REL. REP. 97 (C. C. A., 2d, March 14, 1938). In both these cases the Board found conduct within §8(1) and (3) but none within §8(2) and accordingly did not order the "disestablishment" of a nationally affiliated union.

¹³¹ *Todd Shipyards Corp.*, 5 N.L.R.B. No. 9, p. 6 (1938). *Cf.* *Pacific Greyhound case*, *supra* note 126.

B. Determination of Choice Without Balloting

The Board in making its determinations of representatives acts upon evidence. If evidence produced at the hearing is adequate to enable the Board to reach a decision, it will not order an election, for an election is just a means whereby it may get more accurate evidence on which to base its determination.

The question of unit has, until recently, always been decided without an election. Now the unit decision, as we have seen, is sometimes made dependent on the outcome of balloting for representative.

Ordinarily the unit question must first be settled, and, when it is, in a large proportion of cases, a disposition can be made without resorting to an election.¹³² Thus the Board will dismiss the case on the ground that there is "no question concerning representation" if the employer is already in proper bargaining relations with the union that the majority clearly desires.¹³³ Or it might dismiss a case, though apparently it never has dismissed one without an election,¹³⁴ if it appears that the majority does not wish to bargain collectively at all.

But more usually the evidence¹³⁵ adduced at the hearing will enable the Board to certify the petitioner (or sometimes an intervening union). Where there is only one union, the admission of the employer that it is the choice of the majority in the unit that the Board defines, has been taken as sufficient evidence that such is the fact.¹³⁶ So has testimony of union records or officers when not contested.¹³⁷ More trustworthy are union membership application cards, petitions to the Board, or notices to the employer, signed individually by a majority of the employees in the unit.¹³⁸ But they must be of fairly recent date, signed voluntarily, and otherwise

¹³² Unit questions are sometimes left to settlement after the election, the votes of the employees in the contested area being segregated. *International Mercantile Marine Co.*, 2 N.L.R.B. 971, 975 (1937); *Allis-Chalmers Mfg. Co.*, 5 *id.* No. 26, p. 4 (1938).

¹³³ The cases are of three types. (1) Petition dismissed because petitioner is recognized by the employer as bargaining representative of the employees: *Williams Dimond & Co.*, 2 N.L.R.B. 859, 867 (1937); *Pacific S. S. Co.*, 2 *id.* 214, 230 (1936) (E. S. Smith doubting); *M. H. Birge & Sons Co.*, 5 *id.* No. 51 (1936) (after refusal to enlarge bargaining unit as requested by petitioner); *E. S. McNary, Inc.*, *supra* note 129. (2) Petition dismissed because another union is properly so recognized. *Todd Seattle Dry Docks, Inc.*, 2 N.L.R.B. 1070 (1937); *The National Sugar Refining Co. of N. J.*, 4 *id.* No. 32 (1937). *Freeman Shoe Corp.*, Wis. LRB, Oct. 23, 1937. (3) Petition dismissed because the employer is being required by an order of the Board in an unfair labor practice proceeding to bargain with the representative entitled to recognition. *Omaha Hat Corp.*, 4 N.L.R.B. No. 106, p. 15 (1938); *The Triplett Electrical Instrument Co.*, 5 *id.* No. 112, p. 23 (1938).
¹³⁴ See notes 171 and 183, *infra*.

¹³⁵ In proceedings before the Board "the rules of evidence prevailing in courts of law or equity shall not be controlling." NLRB Rules, art. II, §26. "The aim is to obtain the facts in as direct and simple a manner as possible." Wis. LRB Rules, art. II, §14.

¹³⁶ *Duplex Printing Press Co.*, 1 N.L.R.B. 82 (1935); *Cosmopolitan Shipping Co., Inc.*, 2 *id.* 759 (1937); *Lunkenheimer Co.*, 4 *id.* No. 131 (1938).

¹³⁷ *Richards-Wilcox Mfg. Co.*, 2 N.L.R.B. 97 (1936); *Lykes Bros. S. S. Co.*, 2 *id.* 102 (1936); *Vicksburg Garment Co.*, 5 *id.* No. 46 (1938); *National Sewing Machine Co.*, 5 *id.* No. 60 (1938). The Board does not require disclosure of union membership, however. *Samson Tire & Rubber Corp.*, 2 *id.* 148 (1936). Sometimes it does not rely on this evidence. *Beaumont Mfg. Co.*, 5 *id.* No. 14 (1938); *Sweet Candy Co.*, 5 *id.* No. 76 (1938).

¹³⁸ See NLRB, SECOND ANNUAL REPORT (1937) 108-109; *Los Angeles Broadcasting Co., Inc.*, 4 N.L.R.B. No. 60 (1937); *Wadsworth Watch Case Co.*, 4 *id.* No. 67 (1937); *McKell Coal Co., Inc.*, 4 *id.* No. 70 (1937); *News Syndicate Co., Inc.*, 4 *id.* No. 119 (1938); *Penna. Shipyards, Inc.*, 5 *id.* No. 8 (1938); *Hood Rubber Co.*, 5 *id.* No. 27 (1938). That an applicant for membership has made no payment

unequivocal.¹³⁹ Even more convincing is the testimony of individual employees at the hearing. If more than half state that they wish to be represented by a particular union, the Board will certify.¹⁴⁰

C. Determination by Balloting

Where the testimony at the hearing does not indicate with sufficient certainty whom the majority desires as representative, the Board directs an election.¹⁴¹ This is mentioned in the Act as a "suitable method to ascertain such representatives"¹⁴² and is now used, as we have seen,¹⁴³ to determine units also. With a modification of the voting list to conform as nearly as may be to the employment situation at the critical date, an election might conceivably serve to throw light on the legitimacy of labor practices at some date in the past.¹⁴⁴

1. *Nomination.* The candidates that may appear on the ballots are only the unions that have participated in the hearing. Though there is no such statutory limitation, for practical reasons the Board does not present to the voters a union that does not take part in the preliminaries.¹⁴⁵ But there is no rule that a union must appear under any particular name. Thus where the Board was faced by two AFL craft unions and a CIO union as candidates in the proposed *Shower Bros. Furniture Co.* election, it directed (to avoid settling a contest internal to the AFL) that the ballot should offer the choice between the "AFL," the United Furniture Workers

does not lessen the credibility of this evidence. Clifford M. DeKay, 2 *id.* 231, 237 (1936). Zenite Metal Corp., 5 *id.* No. 73 (1938). But if an employee has applied for membership in more than one union, the applications will be disregarded. A. Zerega's Sons, Inc., 5 *id.* No. 71 (1938). Clyde-Mallory Lines, *id.* No. 72 (1938).

¹³⁹ NLRB, SECOND ANNUAL REPORT (1937) 109-110; N. Y. Mail & Newspaper Transportation Co., 4 N.L.R.B. No. 118 (1938).

¹⁴⁰ Wilmington Transportation Co., 4 N.L.R.B. No. 132, p. 4 (1938).

¹⁴¹ Frequently the Board superintends "consent" elections, conducted according to agreement of the employer and the candidate union or unions. Where possible, "the parties determined the proper bargaining unit, the form of the ballot, the polling place, the time of election, the eligibility list, the method of tallying, and other similar details." NLRB, SECOND ANNUAL REPORT (1937) 29. These consent elections (23 in 1935-6; 217 in 1936-7) are not preceded by the petition and hearing preliminary to directed elections (8 in 1935-6; 48 in 1936-7). Nor are they followed by any action by the Board, such as certification. If during a hearing on a petition the parties reach a settlement, the stipulation sometimes calls for an election, which is then directed by the Board to be conducted according to the terms of the stipulation. The Board then certifies the winner. Recent examples are The Greer Steel Co., 4 N.L.R.B. No. 50 (1937); Brown Shoe Co., Inc., 5 *id.* No. 32 (1938).

¹⁴² NLRA §9(c).

¹⁴³ Note 65, *supra*.

¹⁴⁴ For example, bargaining between a union and the employer has statutory status (is the employer's duty) if the union was at that time majority representative. Both the lawfulness of a resulting contract purporting to cover all employees, particularly the lawfulness of a closed shop agreement, and, conversely, the lawfulness of an employer's refusal to bargain, depend on a fact that it is now difficult to ascertain. As it happens, the voting list in the election to choose a representative presently is apt to be of that earlier date, for the contract objected to or the refusal to bargain will ordinarily at once lead either to a strike or to a petition to the Board, and the Board's usual rule is to take the payroll next preceding the strike or the filing of the petition as the voting list in the election. See notes 70 *supra*, and 150, *infra*. See, e.g., National Electric Products Co., 3 N.L.R.B. 47 (1937) *supra* note 57 (payroll of May 21; closed shop agreement of May 27).

¹⁴⁵ N. Y. & Cuba Mail S. S. Co., 2 N.L.R.B. 595, 602 (1937); Penna. Greyhound Lines, 4 *id.* No. 69, p. 27-8 (1937). Cf. Grace Line, Inc., 2 *id.* 369, 376 (1936) (refusal to allow space on ballot for writing name of desired representative in).

(CIO), or neither.¹⁴⁶ But when one of the AFL unions protested against this nomenclature, the Board changed the ballot designation from "AFL" to "Upholsterers," that being the AFL union with the larger membership and both unions having agreed that the name of only one or the other of them should go on the ballot.¹⁴⁷ In many cases unions are designated by informal or general names.¹⁴⁸ In view of the Board's policy of not settling controversies between unions that are parts of the same labor federation,¹⁴⁹ the responsibility is upon the parent to give proper effect to any certification made by improper name. But it may sometimes be difficult for the Board in a contest of which it can not completely wash its hands because others than unions in the same federation are involved, to know what name to use when the two co-federationists disagree.

2. *Voters.* Preliminary to the voting, the Board must determine not only the form of the ballot, but the correct list of voters. Not every person in the bargaining unit may vote; often all employees that have been taken on since the petition was filed or since the start of the strike which precipitated the filing of the petition are excluded by directing that the employer's payroll next preceding that event be used as the list of voters.¹⁵⁰ A payroll of later date is selected if the parties or, perhaps, the candidates so agree; sometimes in other cases. It is only persons on the designated roll who are still working for the employer or who otherwise qualify as present employees, that may vote.¹⁵¹ Finally in maritime elections the Board has a special formula: the voter qualifies only if (1) he has been employed at some time between the filing date of the initiating petition and the announcement of the Board's direction of election,¹⁵² and (2) he is employed on the particular voyage during which the poll is taken.¹⁵³ The rules, or rather the Board's flexible practices, concerning

¹⁴⁶ *Showers Bros. Furniture Co.*, 4 N.L.R.B. No. 77 (1937).

¹⁴⁷ *Id.*, 4 N.L.R.B. No. 77b (1937). But the Board warned that it would settle no AFL jurisdictional disputes. There was a change of name also in *Walker Vehicle Co.*, 4 *id.* No. 34b (1937).

¹⁴⁸ *Penna. Shipyards, Inc.*, 5 N.L.R.B. No. 8 (1938) ("Local Metal Trades Council," certified without election); *Alabama Drydock & Shipbuilding Co.*, *id.* No. 25 (1938) ("Local Metal Trades Council," on ballot); *International Harvester Co. Tractor Works*, 5 N.L.R.B. No. 30(a) (1928) (minor changes to make names those by which "these organizations are commonly known to the employees"); *Correct Printing Co.* (N. Y. LRB, Nov. 15, 1937) ("unions affiliated with Allied Printing Trades Council," on ballot).

¹⁴⁹ See p. 194, *supra*.

¹⁵⁰ The definition of employee in NLRA §2(3) requires that strikers and persons discharged because of unfair labor practices should be allowed to vote. *Columbian Enameling & Stamping Co.*, 1 N.L.R.B. 181 (1936). *Cosmopolitan Shipping Co., Inc.*, 2 *id.*, 759, 764 (1937). Persons hired in their place are expressly excluded by the Wisconsin Act, §111.02(3), and persons "employed only for the duration of a labor dispute" by the New York Act, §701.3 and §705.4.

¹⁵¹ Persons who voluntarily quit or are discharged for cause do not vote. The direction of election often so states. *Strain Mfg. Co.*, 5 N.L.R.B. No. 52 (1938). Employees temporarily laid off vote. *Fedders Mfg. Co.*, 3 *id.* No. 86, p. 6 (1937), 5 *id.* No. 41 (1938). If the discharge is more permanent, they do not. *Armour & Co.*, 4 *id.* No. 115, p. 5 (1938); *N. Y. Handkerchief Co.*, 5 *id.* No. 94, p. 3 (1938). Compare *Brotherhood v. Kenan*, 87 F. (2d) 651, 654 (5th, 1937).

¹⁵² Owing to a tie-up of many vessels, an arbitrary period of eighteen months was allowed in *Merchants & Miners Transportation Co.*, 2 N.L.R.B. 747, 751-3 (1937). See also *Alabama Drydock & Shipbuilding Co.*, 5 *id.* No. 25 (1938) (four months' period fixed because single job contract basis of company's business caused constant fluctuation in the number of employees actually working).

¹⁵³ The election notice is usually posted on the ship at the start of the voyage and the election held either at a port of call or at the port of destination, wherever it can be conveniently supervised by the Board. NLRB, SECOND ANNUAL REPORT (1937) 29 and 112. In any discontinuous employment the

voting lists are fully described in its two annual reports,¹⁵⁴ and have undergone very little modification since July 1, 1937.¹⁵⁵

3. *Conduct and Effect of Balloting.* Unless the Board permits voting by mail,¹⁵⁶ the voter must personally cast his ballot at the time and place either designated by the Board in its direction of election or, more usually, left to later designation by the appropriate regional director in charge of the election. Ordinarily all persons vote at the same place, usually but not always off the employer's premises,¹⁵⁷ and on the same day, according to general instructions.¹⁵⁸ But variations in both respects are made depending on circumstances. Most noteworthy is the variant that is used in ship elections. The crews of all the ships of a single corporation are part of the same bargaining units, but each ship is, necessarily, a separate electoral unit and its crew has to be polled at some time and place which is convenient both for the voters, the employer, and the Board. Accordingly such elections often extend over many months and are held in many ports of the United States, as the several ships call there.¹⁵⁹ Because of the time needed to carry out an election of this kind, election arrangements are most elaborate in these cases, and often need to be modified as the voting proceeds.¹⁶⁰ Thus the Board requires equal treatment of rivals in the issuance by employers of passes to organizers.¹⁶¹ In one case, where sailings were interrupted by a strike, it ordered that the ballots be counted before the vote had been taken on 4 of the 58 ships of the employer, on the chance that the ballots already cast would be completely determinative.¹⁶² Just as the Board will act without passing on contested ballots if they could not affect the result; so here it certified the union which this intermediate count revealed to have received votes amounting to a majority of all potential voters.¹⁶³

Any event impairing freedom of choice of the voters is of course a ground for rejecting the tally as evidence of choice. Intimidation, bribery, or lack of secrecy will

determination of eligible voters is difficult. In maritime elections (or any in which each voter does not have a certain polling place) the danger of double voting can not be overlooked. See Mrs. Herrick's statement, *infra* note 159. Double voting is expressly forbidden in Associated Oil Co., 5 N.L.R.B. No. 119, p. 8 (1938). On the other hand entitled persons may get no chance to vote, e.g., if the employee is on ship *A* when ship *B* is polled and on ship *B* when ship *A* is polled. But this is much like a voter's illness or absence on election day in the ordinary type of election.

¹⁵⁴ NLRB, FIRST ANNUAL REPORT (1936) 106; SECOND ANNUAL REPORT (1937) 110.

¹⁵⁵ A presumption in favor of the use of a pre-petition payroll seems to be growing stronger. Such a roll was used in 12 out of 21 elections directed during January, 1938. Rolls of a later date were used in the rest, in four cases by stipulation. See 4 N.L.R.B. Nos. 72b, 108, 115, 118, 121, 123, 134, 139, 141. Use of a pre-petition roll was denied in Gen. Cigar Co., Inc., 6 *id.* No. 13 (1938), a year having elapsed.

¹⁵⁶ As it did in Pacific Greyhound Lines, 4 N.L.R.B. No. 72, p. 20 (1937).

¹⁵⁷ The N. Y. LRA, §705.4, prohibits elections on the employer's premises.

¹⁵⁸ *Supra* notes 19 and 20.

¹⁵⁹ The handling of the many elections directed by American France Line, 3 N.L.R.B. No. 7 (1937), is interestingly told by NLRB Regional Director Elinore Morehouse Herrick in her statement to the Senate Committee on Commerce, Feb. 2, 1938, NLRB Release R-582.

¹⁶⁰ Lykes Bros. Shipping Co., Inc., 2 N.L.R.B. 102 (1936); Grace Line, Inc., 2 N.L.R.B. 369 (1936); American France Line, 3 *id.* No. 7, p. 9 (1937) ("other questions may arise"), *id.* No. 7a & 7b (1937); and Mrs. Herrick's Statement, *supra* note 159. See also Armour & Co., 5 N.L.R.B. No. 75 (1938), where certification was based on the segregated ballots of a group of employees cast in an earlier plant-wide consent election.

¹⁶¹ American France Line, 3 N.L.R.B. 7a, 7b (1937); Intern'l Freighting Co., 3 *id.* No. 70, p. 7 (1937).

¹⁶² Lykes Bros. Shipping Co., Inc., 2 N.L.R.B. 102, 112 (1936). ¹⁶³ *Id.* at 113.

lead to refusal to recognize the evidential value of the ballots.¹⁶⁴ The policing supplied by the NLRB is so adequate that such occurrences are rare.

A majority of those voting is sufficient evidence of the preference of the majority of the employees in the unit.¹⁶⁵ The Board has never failed to certify when the winning union has received at least 20% of the votes of those on the voters' list; and seems increasingly inclined to certify however small the vote.¹⁶⁶ But the question is one of decreasing importance. Interest in voting seems to be waxing and employer opposition lessening. The Board reports that "more than 80% of the eligible voters cast ballots" in 1935-36,¹⁶⁷ "more than 90%" in 1936-37,¹⁶⁸ in (directed and consent) elections conducted by the Board.

4. *Form of Ballot.* It will be remembered that last August the Board embarked on the new policy of holding elections to help it in delimiting units.¹⁶⁹ That month also saw another major innovation in election procedure, the introduction of the "or by neither" choice on ballots bearing the names of two or more candidates.¹⁷⁰

The form of ballot which the present Board inherited from the earlier National Labor Board and National Labor Relations Board administering Section 7(a) of the

¹⁶⁴ National Sugar Refining Co., 4 N.L.R.B. No. 38 (1937) (consent election upheld because electioneering, if any very near polling place, was only a "slight irregularity"); N. Y. and Cuba Mail S. S. Co., 2 *id.* 603, 604 (1937) (directed election; same); Penna. Greyhound Lines, 4 *id.* No. 37 (1937) (election set aside because blank ballots, not marked as samples, were distributed and at least one voted, impairing secrecy of voting); Mrs. Herrick's Statement, *supra* note 159; Horn & Hardart, N. Y. LRB, Sept. 3, 1937 (consent election upheld; various charges of electioneering insubstantial).

¹⁶⁵ "In the cases under §9(c) where the Board has certified without holding an election, it has required proof that a majority of those eligible had designated the organization which was certified." NLRB, FIRST ANNUAL REPORT (1936) 108. "Those eligible" apparently means "those who would be allowed to vote," though it may mean, "those who are members of the unit," and thus include new employees; at least no voters' list is actually prepared in these cases. It is obvious that if less than this majority is shown, an election should be held. In the election itself, the Board at first followed the same rule. *Ibid.* But with the support of the courts it now certifies on the basis of a majority of votes cast. See note 4, *supra*, and NLRB SECOND ANNUAL REPORT (1937) 114. It is not clear whether a consent election is subject to the new rule or not. As the Board does not certify after a consent election, note 147, *supra*, the question rarely arises. Compare National Sugar Refining Co., 4 N.L.R.B. No. 38 (1937) (new rule applied without discussion), with Marlin-Rockwell Corp., 5 *id.* No. 31 (1938).

¹⁶⁶ Chrysler Corp., 1 N.L.R.B. 164 (1936), was decided while the Board still required "the majority of those eligible." There about 18% of the employees entitled to vote voted; 17½% for the union. Without overruling this case, the Board has in all later cases certified, even where less than half of those qualified have voted. Thus in R. C. A. Mfg. Co., 2 *id.* 159, 168 (1936), about 32½% voted; 31% for the union; in American-Hawaiian S. S. Co., *id.* 195, 196 (1936), about 34½% voted; 31% for the union; in Williams Dimond & Co., *id.* 867, 870 (1937) (Hammond Shipping Co.) 33½% (one man) voted; in Charles Cushman Shoe Co., *id.* 1015, 1034 (1937), about 24% of the Cushman employees voted; all for the union; and about 22% of the Somerset Shoe Co. employees voted; 21⅔% for the union; and between 25% and 30% in several other elections. In certifying the union in this last series of elections, the only ones where the vote for the union fell below 30%, the Board said that "the bitter opposition to the union which has been expressed by the companies" must have caused many who favored the union to abstain from voting. Moreover the rival union, which boycotted the election, should not be heard to complain. Thus, though citing the R.C.A. certification and the Supreme Court decision in the Virginian Railway case, *supra* note 4, the Board intimates that where the vote goes below 30%, it may accept it as a basis for certification only when the employer or a rival union has tried to interfere with the election. Even here there must be a lower limit. Though finding the employer guilty of unfair labor practices, the National Labor Board refused to certify when only 12 out of 1000 employees voted. Fifth Avenue Coach Co., 2 N.L.B. 8 (1934).

¹⁶⁷ NLRB, FIRST ANNUAL REPORT (1936) 44.

¹⁶⁸ NLRB, SECOND ANNUAL REPORT (1937) 29.

¹⁶⁹ See note 65, *supra*.

¹⁷⁰ American France Line, 3 N.L.R.B. No. 45, p. 4 (Aug. 16, 1937): A reason for the rule was first supplied in Interlake Iron Corp., 4 *id.* No. 9d (Dec. 28, 1937), where the rule's implications were further developed.

NIRA, was one which offered, in the case of a single candidate, an opportunity to vote for or against that candidate;¹⁷¹ but in the case of more than one candidate, an opportunity to vote for any one candidate but none to vote against both or all candidates. This was a proper form of ballot so long as a majority vote of those permitted to vote was necessary for certification; for failing to vote or casting a blank ballot was equivalent to a negative vote.¹⁷²

But when the Board in July, 1936¹⁷³ changed its rule and began certifying on the basis of a majority vote of those voting, abstention ceased to be effective as opposition in an election where there were two or more candidates on the ballot. To such an election the rule was first applied in the *R. C. A.* case.¹⁷⁴ Though the Board there discussed only the propriety of certifying despite the fact that less than 50% voted, the decision to certify was really more radical in that it was based on a minority vote for a candidate which it was impossible for employees to vote *against* except by voting *for* another candidate. In other words, employees had no means of saying "a plague on both your houses" or of rejecting collective bargaining altogether.¹⁷⁵

This situation continued till the Board in August, 1937 was confronted by a fierce contest between AFL and CIO in maritime employment. Then the Board must have known that those not voting for one or the other candidate could not be presumed to acquiesce in the choice of the majority of those voting effectively. Hence it added to the ballot the negative option.¹⁷⁶ But even in *Interlake Iron Corporation*¹⁷⁷ where the Board first explains its new practice, it seems not to appreciate fully the significance of its innovation of July, 1936. For it speaks of the casting of a blank ballot as a "rather ambiguous method of expression" of disapproval, whereas actually it is now a wholly ineffective one, a mere "failure to vote by one qualified to do so."^{177a}

The Board's provision of the negative option is the logical corollary of its refusal to consider at all those who fail to vote or who cast invalid ballots.

¹⁷¹ If the majority is against the candidate(s), the Board of course dismisses the petition. The Greer Steel Co., 4 N.L.R.B. No. 50a (1938). After "majority" came to mean "majority of those voting," note 4, *supra*, and before a negative option was provided on ballots listing two or more candidates, dismissal for this reason, though possible if the ballot carried one or three candidates, was impossible if there were two. This situation existed from July 1936 till August 1937.

¹⁷² See *International Mercantile Marine Co.*, 1 N.L.R.B. 384, 390 (1936).

¹⁷³ *The Associated Press*, 1 N.L.R.B. 686, 697 (July 3, 1936). In this election there was only one candidate, but, as no advance notice of a change of rule was given, persons who abstained may have thought they were expressing their opposition as effectively as if they had voted "No," which they could do on the unipartite ballot used.

¹⁷⁴ *R.C.A. Mfg. Co., Inc.*, 2 N.L.R.B. 159 (Nov. 7, 1936). This decision was foreshadowed by the secondary reason given for the certification in *New England Transportation Co.*, 1 *id.* 130, 146 (July 24, 1936).

¹⁷⁵ The suggestion of abstention or voting blank, made in *International Mercantile Marine Co.*, *supra* note 172, was no longer valid.

¹⁷⁶ *American France Line*, *supra* note 170. Up to February, two out of the 36 polls conducted under this direction of election had resulted in a "neither" majority. In three polls the AFL union, and in 31 the CIO union, got a majority. Hence there were no run-off elections. A little over 7% of the valid votes in the 36 polls were against both unions. Mrs. Herrick's Statement, *supra* note 159.

¹⁷⁷ *Supra* note 170, at p. 4.

^{177a} *Accord* (with dictum likewise as to improperly marked ballots) *Ass'n of Clerical Employees v. Brotherhood*, 85 F. (2d) 152, 157 (7th, 1936).

5. *Run-off Election.* Another problem now arises, that of the inconclusive election. Such elections of course were quite possible before the negative option was added. But where there is only one candidate, he either wins or loses; and where there were two candidates, under the pre-1937 dispensation one of them necessarily won if a sufficient vote was cast (otherwise there was a definitive failure to choose); and though, where there were three candidates, a run-off election might have been used,¹⁷⁸ no case presented the occasion for such an election until the introduction of the negative option created three-way splits in two-candidate elections also.

In the *Interlake Iron* case¹⁷⁹ both the candidates moved the Board to delete the phrase "or by neither" in the direction of election. The Board refused because "a free expression of the desires of the majority of the employees . . . demands that the ballot provide for a space in which employees may indicate that they do not desire to be represented by either of the named organizations." At the same time the Board indicated what it would do in the event of "none of the three preferences obtaining a majority of the votes cast," to wit, "we will, upon the request of the labor organization receiving the greater number of votes, promptly direct a run-off election in which the ballot will allow employees the opportunity to vote for or against this organization." Mr. Edwin S. Smith, while agreeing to the negative option, disagreed with holding a second election. Instead, unless the negative votes amounted to a majority, he would have the Board treat the negative (anti-collective bargaining) votes as overcome by the positive (pro-collective bargaining) votes for the rival candidates and count only the positive votes as valid to determine the bargaining agency, thus obtaining the choice in a single election wherever a majority of the voters desired collective bargaining.¹⁸⁰

The Board ordered the first run-off election on January 10, 1938, in *Fedders Mfg. Co.*¹⁸¹ It was held January 28. As in the first election the payroll of July 11, immediately before the filing of the petition, was used. Thus the voters' list was over six months old. This and *Zellerbach Paper Co.*¹⁸² seem to show that, though the leader in the first election does not pick up votes in the second, enough disappointed voters abstain to enable the leader to win. Perhaps if "neither" is the leader in the first election, a run-off election would be futile;¹⁸³ the hatchets of interunion rivalry are not buried quickly.

¹⁷⁸ And must be under the New York Act, §705.5. See note 16(3), *supra*.

¹⁷⁹ *Supra* note 170.

¹⁸⁰ In *Walker Vehicle Co.*, 4 N.L.R.B. No. 34 (1937), the Board reiterated the *Interlake Iron* ruling, and Mr. Smith, accepting the rule laid down by the majority, concurred.

¹⁸¹ 4 N.L.R.B. No. 93 (1938). See also note 110, *supra*. The vote in the original election was: petitioner 400; plant union 369; neither 41. The vote in the run-off election was: petitioner 369, against petitioner 346. 5 *id.* No. 41 (1938). Petitioner thus received 49% of the first vote, 52% of the second.

¹⁸² 4 N.L.R.B. No. 52 (1937) and 52a (1938). Here also the same voters' list was used in both elections. In the first election petitioner received 33 votes, rival 31, neither 2. In the run-off the petitioner won 31 to 26. Petitioner thus received 50% of the first vote, 54% of the second.

¹⁸³ No other run-offs are yet reported. Only in three instances before March 1 had the "neither" vote exceeded the vote of any union. And since "neither" won the suffrage of a majority of the voters, the Board dismissed these cases. *American-France Line*, 4 N.L.R.B. No. 68 (1937); *id.*, No. 75 (1937); *Richardson Co.*, 5 *id.* No. 43 (1938).

7. CONCLUSION

Looking over the representation work of the Board we get a picture of orderly progress in establishing a new system of employment control. Though collective bargaining has become customary in many advanced industrial countries, positive statutory support for it has a rather short history.¹⁸⁴ The United States now gives it the support of a statute and a special agency to see to the application of the statute.¹⁸⁵ Essential to the success of this way of industrial life is a democratic means of expressing the desires of the workers and making them effective factors in the fixing of conditions of employment. In a country dedicated to upholding political democracy, when other countries are forswearing it, it is meet that this form of government should be extended from the political to the economic field. With the helping hand of the national and state labor relations boards we are undergoing a new birth of labor strength and labor responsibility, which may lead to a larger and more vital participation of all men in the building of the world of tomorrow. With machinery for the expression of popular opinion set up in every workplace in the land, not only does the condition of the workers become a greater concern of all who share in controlling mass production and mass distribution, but the workers themselves from the time they leave school (and, one may hope, even before, through similar responsibilities in school government) by their experience of participating in the solution of group problems are preparing themselves for the performance of the broader and more baffling responsibilities of citizenship itself.¹⁸⁶

It is therefore of high civic importance that the representation provisions of the National Labor Relations Act be carried out with fairness, vigor, and wisdom. In thus carrying them out the National Labor Relations Board is doing one of the most significant jobs that government can do within the boundaries of the United States.

¹⁸⁴ FREEDOM OF ASSOCIATION, INTERNATIONAL LABOR ORGANIZATION, STUDIES AND REPORTS, Series A, No. 28-32 (1927-30); COLLECTIVE AGREEMENTS, *id.* No. 39 (1936); Thomas, *European Legislation for Industrial Peace* (1937) 16 FOREIGN AFFAIRS 91. A few countries have gone farther than the United States in legal furtherance of collective agreements. COLLECTIVE AGREEMENTS, *supra*, at p. 78-92. And in extending them to non-contracting persons. *Id.* at p. 186-9.

¹⁸⁵ Some countries that have set up special agencies to protect labor have created labor courts to assure workers that their individual rights, statutory or contractual, are respected. But here statutory rights of labor have been enforced either by the regular courts or by administrative agencies (labor commissions, industrial accident boards, etc.), each with a narrow authority exercised subject to limited review by the regular courts; whereas for the enforcement of (collective or individual) contractual rights a private tribunal is sometimes created by collective agreement, but more often the agreement provides, in the event of controversy, for settlement by *ad hoc* arbitrators or leaves enforcement entirely to the courts. Based on statute, however, is "the National Railroad Adjustment Board, a unique administrative agency," as Lloyd K. Garrison, first chairman of the first NLRB, describes it in the title of a recent article, (1937) 46 YALE L. J. 567. See also Byrer, *The Railway Labor Act and the National Labor Relations Act—A Comparison* (1937) 44 W. VA. L. Q., 1, 6-10, (an article unfairly condemnatory of the NLRB). But the NLRB has not the function of enforcing contracts. (Breach is not an unfair labor practice.) It has the function of freeing the formation and administration of workers' organizations from employer influence and of facilitating their dealing with the employer.

¹⁸⁶ Speaking of the simultaneous development of labor unionism, John Herman Randall, Jr., says in a witty article "on the importance of being unprincipled" (1938) 7 AMERICAN SCHOLAR 131, 142: "The spread of labor organization, especially along industrial lines, in which countless locals and boards really face the problems of their industry as a whole, cannot but be a factor in generating further political intelligence. Only with such political-mindedness can America hope to escape the devastating effects of the essentially unpolitical [*i.e.*, overprincipled] class-struggle that has afflicted Europe."