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# Labor Law -- NLRB Jurisdiction Over Law Firms -- Bodle, Fogel, Julber, Reinhardt & Rothschild

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## CASE NOTES

**Labor Law—NLRB Jurisdiction Over Law Firms—*Bodle, Fogel, Julber, Reinhardt & Rothschild*.**<sup>1</sup>—The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (union or petitioner) sought to represent certain employees of Bodle, Fogel, Julber, Reinhardt & Rothschild (Bodle or employer), a California law firm.<sup>2</sup> Bodle resisted these efforts and the union filed a petition with the National Labor Relations Board (Board). The employer filed a motion to dismiss, contending that its operations were essentially local in nature and that any impact they might have on interstate commerce was remote, and therefore insufficient to warrant the assertion of the Board's jurisdiction.<sup>3</sup> The Board agreed with the employer<sup>4</sup> and dismissed the petition.<sup>5</sup> However, the Board did not limit the scope of its decision to the facts presented. It deemed it appropriate to decide "whether we ought to decline jurisdiction over law firms generally or whether we ought to attempt to establish jurisdictional standards and to assert jurisdiction over certain classes of law firms."<sup>6</sup> The Board HELD: it would decline to assert jurisdiction over law firms as a class.<sup>7</sup>

This casenote will examine the Board's decision in *Bodle, Fogel, Julber, Reinhardt & Rothschild (Bodle)* regarding jurisdiction over law firms. Two questions will be posed. First, did the facts presented in *Bodle* provide an appropriate occasion for the Board to decline to assert jurisdiction over law firms as a class? Second, does the decision of the Board, and the reasoning employed in reaching it, withstand close analysis? It will be submitted that both of these questions must be answered in the negative. Before posing these questions, however, a brief overview of the history and scope of NLRB jurisdiction is in order.

### I. HISTORY AND SCOPE OF NLRB JURISDICTION

Since first enacted in 1935, the National Labor Relations Act (NLRA or the Act)<sup>8</sup> has empowered the Board<sup>9</sup> "to prevent any person from engaging in any unfair labor practice . . . [as defined by

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<sup>1</sup> 206 N.L.R.B. No. 60, 84 L.R.R.M. 1321 (1973). This decision, by Chairman Miller and Members Jenkins and Kennedy, was subject to a strong dissent by members Fanning and Penello. 84 L.R.R.M. at 1323.

<sup>2</sup> 84 L.R.R.M. at 1321.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id. at 1323.

<sup>6</sup> Id. at 1322.

<sup>7</sup> Id. at 1323.

<sup>8</sup> 29 U.S.C. §§ 151-68 (1970).

<sup>9</sup> The National Labor Relations Board was created by § 3(a) of the Act, 29 U.S.C. § 153(a) (1970).

the Act<sup>10</sup>] affecting commerce."<sup>11</sup> In section 1 of the Act Congress declared that the denial by employers of the right of employees to organize, and the refusal by employers to accept the procedure of collective bargaining, had led to strikes and unrest which had the effect of obstructing interstate commerce.<sup>12</sup> The jurisdiction of the Board was therefore extended to "labor disputes,"<sup>13</sup> which include representation questions and unfair labor practices "affecting" interstate commerce.<sup>14</sup>

In enacting the NLRA "Congress intended to . . . vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause."<sup>15</sup> The Board, however, is not *compelled* to exercise this jurisdiction. Section 10(a) of the Act<sup>16</sup> empowered but did not require the Board to prevent all unfair labor practices in all industries.<sup>17</sup> The Board may properly decline to assert jurisdiction over an employer in a particular industry if, in its discretion, it considers that "the policies of the Act would not be effectuated by its assertion of jurisdiction."<sup>18</sup> The reason for the existence of such discretion is that the Board is not a court whose jurisdiction must be exercised, but rather an administrative agency whose function it is to protect public rights in a manner that will effectuate the policies of the Act.<sup>19</sup> As the Supreme Court noted in *Polish National Alliance v. NLRB*,<sup>20</sup> "Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce . . . ."<sup>21</sup>

The Board has never exercised the full measure of its jurisdiction.<sup>22</sup> For the first fifteen years of its existence, the Board decided on a case-by-case basis whether or not to assert jurisdiction over the employer.<sup>23</sup> Thereafter, the Board utilized varying sets of jurisdictional standards to aid it in making such determinations. In 1950 the Board, in *Hollow Tree Lumber Co.*,<sup>24</sup> concluded that "experience warrants the establishment and announcement of cer-

<sup>10</sup> "Unfair labor practices" are defined in § 8 of the Act, 29 U.S.C. § 158 (1970).

<sup>11</sup> Section 10(a) of the Act, 29 U.S.C. § 160(a) (1970).

<sup>12</sup> 29 U.S.C. § 151 (1970).

<sup>13</sup> "Labor dispute" is defined in § 2(9) of the Act, 29 U.S.C. § 152(9) (1970). In the absence of a "labor dispute" the Board cannot act. *NLRB v. International Longshoremen's Ass'n*, 332 F.2d 992, 56 L.R.R.M. 2244 (4th Cir. 1964).

<sup>14</sup> ABA Section of Labor Relations Law, *The Developing Labor Law* 761 (C. Morris ed. 1971) [hereinafter cited as *The Developing Labor Law*].

<sup>15</sup> *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). See also *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 647 (1944); *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

<sup>16</sup> 29 U.S.C. § 160(a) (1970).

<sup>17</sup> *The Developing Labor Law*, supra note 14, at 762.

<sup>18</sup> *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684 (1951).

<sup>19</sup> *Guss v. Utah Lab. Rel. Bd.*, 353 U.S. 1, 13 (1957).

<sup>20</sup> 322 U.S. 643 (1944).

<sup>21</sup> *Id.* at 648.

<sup>22</sup> *Guss*, 353 U.S. at 3.

<sup>23</sup> *Id.*

<sup>24</sup> 91 N.L.R.B. 635, 26 L.R.R.M. 1543 (1950).

tain standards" to govern the assertion of jurisdiction over the employer.<sup>25</sup> Shortly thereafter, minimum standards for assertion of jurisdiction<sup>26</sup> were published in terms of yearly dollar amounts of outflow and inflow between the employer's operation and the stream of interstate commerce.<sup>27</sup> In 1954 the Board narrowed the scope of its discretionary jurisdiction by increasing the minimum dollar amounts necessary to invoke its jurisdiction,<sup>28</sup> although members of the Board were sharply divided as to the propriety of so narrowing the Board's jurisdiction.<sup>29</sup>

In 1957 the Supreme Court, in *Guss v. Utah Labor Relations Board*,<sup>30</sup> held that section 10(a) of the Act foreclosed state jurisdiction over labor disputes where the Board possessed the authority to assert jurisdiction, but in its discretion had declined to exercise its statutory authority.<sup>31</sup> The Court recognized that this would create "a vast no-man's-land subject to regulation by no agency or court"<sup>32</sup> but noted that "the National Labor Relations Board can greatly reduce the area of the no-man's-land by reasserting its jurisdiction. . . ."<sup>33</sup> In response to the *Guss* decision the Board decreased its minimum monetary jurisdictional standards in *Siemons Mailing Service*.<sup>34</sup> In *Siemons* the Board concluded:

that it will best effectuate the policies of the Act if jurisdiction is asserted over all nonretail enterprises which have an *outflow or inflow across State lines of at least \$50,000, whether such outflow or inflow be regarded as direct or indirect*.<sup>35</sup>

The Board defined outflow and inflow to include the flow of services as well as goods.<sup>36</sup>

In addition to setting minimum jurisdictional standards, the Board has also declined, as a matter of policy, to assert jurisdiction over certain classes of employers.<sup>37</sup> However, in 1957 in *Office*

<sup>25</sup> Id. at 636, 26 L.R.R.M. at 1543.

<sup>26</sup> Board Press Release of October 5, 1950, 26 L.R.R.M. 50-51 (1950).

<sup>27</sup> *Guss*, 353 U.S. at 3-4.

<sup>28</sup> Board Press Release of July 15, 1954, 34 L.R.R.M. 75-78 (1954).

<sup>29</sup> *Breeding Transfer Co.*, 110 N.L.R.B. 493, 498-500, 506-08, 35 L.R.R.M. 1020, 1023, 1026-27 (1954). Member Murdock, for instance, feared that the new standards would drastically "slash" the scope of the Board's jurisdiction. Id. at 506-08, 35 L.R.R.M. at 1026-27.

<sup>30</sup> 353 U.S. 1 (1957).

<sup>31</sup> Id. at 9.

<sup>32</sup> Id. at 10.

<sup>33</sup> Id. at 11.

<sup>34</sup> 122 N.L.R.B. 81, 43 L.R.R.M. 1056 (1958).

<sup>35</sup> Id. at 85, 43 L.R.R.M. at 1058.

<sup>36</sup> Id.

<sup>37</sup> *Office Employees*, 113 N.L.R.B. 987, 36 L.R.R.M. 1408 (1955) (issue of whether to assert jurisdiction over labor unions functioning as employers of employees); *Virgin Isles Hotel, Inc.*, 110 N.L.R.B. 558, 35 L.R.R.M. 1068 (1954) (issue of whether to assert jurisdiction over an employer operating a hotel).

*Employees*<sup>38</sup> and in 1958 in *Hotel Employees*,<sup>39</sup> the Supreme Court held that the Board could not, as a matter of policy, refuse to assert jurisdiction over entire classes of employers.<sup>40</sup> The Court reasoned that while it was proper for the Board to decline to assert jurisdiction in a particular case, it was beyond the power of the Board to exclude all employers in a given field from the coverage of the Act.<sup>41</sup> As a result of the Court's decision in *Hotel Employees*, the Board, in *Floridian Hotel of Tampa, Inc.*,<sup>42</sup> asserted jurisdiction over a specific hotel and adopted minimum jurisdictional standards applicable to hotel and motel enterprises generally.

After the Supreme Court's decisions in *Guss, Office Employees* and *Hotel Employees*, Congress passed the Labor-Management Reporting and Disclosure Act of 1959,<sup>43</sup> which added section 14(c)<sup>44</sup> to the National Labor Relations Act. In section 14(c)(1) Congress granted the Board discretion to decline to assert jurisdiction over an entire class of employers, subject to the qualification that it could not do so with respect to any labor dispute over which it would have asserted jurisdiction under the standards prevailing on August 1, 1959. Congress thereby approved the Board's newly adopted minimum jurisdictional standards, but proscribed future increases of such minimums.<sup>45</sup> Section 14(c)(2) also eliminated the no-man's-land by granting state courts and agencies jurisdiction over disputes over which the Board declines to exercise its statutory jurisdiction.<sup>46</sup>

Since the passage of section 14(c) the Board has exercised its discretion to decline to assert jurisdiction over entire classes of employers over which it had not been asserting jurisdiction as of August 1, 1959.<sup>47</sup> The Board has also asserted jurisdiction over

<sup>38</sup> *Office Employees v. NLRB*, 353 U.S. 313 (1957).

<sup>39</sup> *Hotel Employees v. Leedom*, 358 U.S. 99 (1958).

<sup>40</sup> 353 U.S. at 318-20; 358 U.S. at 99.

<sup>41</sup> 353 U.S. at 318-20.

<sup>42</sup> 124 N.L.R.B. 261, 44 L.R.R.M. 1345 (1959).

<sup>43</sup> 29 U.S.C. §§ 401-531 (1970).

<sup>44</sup> 29 U.S.C. § 164(c) (1970). Section 14(c) provides:

(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

<sup>45</sup> 29 U.S.C. § 164(c)(1) (1970).

<sup>46</sup> 29 U.S.C. § 164(c)(2) (1970).

<sup>47</sup> E.g., *Hialeah Race Course, Inc.*, 125 N.L.R.B. 388, 45 L.R.R.M. 1106 (1959) (race track); *Seattle Real Estate Bd.*, 130 N.L.R.B. 608, 47 L.R.R.M. 1348 (1961) (real estate board).

classes of employers over which it had previously declined to assert jurisdiction.<sup>48</sup> Recently, the Board reiterated its discretionary authority not to exercise its jurisdiction to the fullest extent authorized by the Act, but to limit its exercise to enterprises whose operations have a pronounced impact upon the flow of interstate commerce.<sup>49</sup>

## II. NLRB JURISDICTION OVER LAW FIRMS

In over thirty-five years of existence the Board has never asserted jurisdiction over a law firm.<sup>50</sup> In *Evans & Kuntz, Ltd.*,<sup>51</sup> the only other case in this area, the Board declined to assert jurisdiction over a small, six-attorney law firm which practiced almost solely within the state of Arizona.<sup>52</sup> The complaint in *Evans* alleged that the employer engaged in unfair labor practices by discharging three secretaries for engaging in concerted activities. The Board found that the law firm was engaged in operations affecting interstate commerce within the meaning of section 2(6) and (7) of the Act.<sup>53</sup> Notwithstanding this finding, it also found, pursuant to section 14(c)(1) of the Act, that it was empowered to decline to assert jurisdiction in *Evans* since the effect of the labor dispute on interstate commerce was not sufficiently substantial.<sup>54</sup> However, the Board in *Evans* limited its decision "solely to the facts of the instant case and not to law firms as a class."<sup>55</sup> On the other hand, in *Bodle*, the Board did not limit itself to the facts presented, but rather announced that it would decline to assert jurisdiction over law firms as a class of employers.

At the time the case was brought before the Board, the employer was a twelve-member law firm composed of five partners and seven associates and engaged in the practice of law in California.<sup>56</sup> With its principal office in Los Angeles, the firm also maintained a subsidiary office in Wilmington, California, to accommodate its maritime clients. Engaged primarily in the practice of labor law, the employer represented various local, national and international labor unions.<sup>57</sup> In connection with its labor relations law practice, the employer engaged in proceedings under numerous acts of Congress,<sup>58</sup> and appeared before a number of federal regulatory

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<sup>48</sup> E.g., *American Guild of Variety Artists*, 155 N.L.R.B. 1020, 60 L.R.R.M. 1403 (1965) (artist guild).

<sup>49</sup> *Evans & Kuntz, Ltd.*, 194 N.L.R.B. 1216, 1218, 79 L.R.R.M. 1181 (1972).

<sup>50</sup> *Id.*

<sup>51</sup> 194 N.L.R.B. 1216, 79 L.R.R.M. 1181 (1972).

<sup>52</sup> *Id.* at 1216, 79 L.R.R.M. at 1182.

<sup>53</sup> 29 U.S.C. §§ 152(6), (7) (1970).

<sup>54</sup> 194 N.L.R.B. at 1216, 79 L.R.R.M. at 1182.

<sup>55</sup> *Id.*

<sup>56</sup> *Bodle, Fogel, Julber, Reinhardt & Rothschild*, 206 N.L.R.B. No. 60, 84 L.R.R.M. 1321 (1973).

<sup>57</sup> 84 L.R.R.M. at 1323 (dissenting opinion).

<sup>58</sup> *Bodle* engaged in proceedings under the Jones Act, the Federal Employers

agencies<sup>59</sup> in addition to state and federal courts. Each of the twelve attorneys employed by the firm made a number of business trips each year outside of California.<sup>60</sup>

A. *The Propriety of the Board's Declination of Jurisdiction on the Facts of Bodle*

The existence of the statutory jurisdiction of the Board was not disputed in *Bodle*.<sup>61</sup> The employer was engaged in operations affecting commerce within the meaning of sections 2(6) and (7) of the Act.<sup>62</sup> The majority itself found that "the commerce data presented would clearly be enough to satisfy the 'affecting commerce' test"<sup>63</sup> as it is customarily liberally construed. Nor did the firm fail to meet the *Siemons* \$50,000 outflow-inflow standard.<sup>64</sup> It was stipulated that the firm annually received gross revenues of \$500,000, of which more than \$50,000 was for legal services furnished to various clients, each of whom met the Board's *Siemons* standards, and that the firm represented a defense contractor in Vietnam from which it received in excess of \$50,000 annually.<sup>65</sup> However, notwithstanding *Bodle's* involvement with interstate commerce, the Board is empowered by section 14(c) of the Act to decline to assert jurisdiction over entire classes of employers. In *Bodle* the Board exercised this power.

A strong argument can be made that the *Bodle* case was not the appropriate occasion for the Board to decide whether or not to exercise jurisdiction over law firms as a class. First, even though *Bodle* engaged in a larger volume of legal business than did *Evans & Kuntz*,<sup>66</sup> the *Bodle* law firm was still only of moderate size. There are numerous large firms across the country with fifty or more attorneys—with many firms exceeding 100 attorneys. Second, despite the impressive litany of interstate dealings, the greater part of *Bodle's* practice was carried on within the state of California.<sup>67</sup> The practice of the *Evans* firm was even more localized in nature.<sup>68</sup> There are numerous firms whose practice is predominantly or exclusively interstate in character. These larger firms, with enormous

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Liability Act, the National Labor Relations Act, the Landrum-Griffin Act, the Equal Employment Opportunity Act of 1972, the equal employment titles of the Civil Rights Act of 1964, and the Railway Labor Act. *Id.* at 1324 (dissenting opinion).

<sup>59</sup> *Bodle* had appeared before the NLRB, Department of Labor, Equal Employment Opportunity Commission, United States Coast Guard, Federal Aviation Agency and the Systems Board of Adjustment. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1321.

<sup>62</sup> *Id.* Section 2(6) and (7) of the NLRA are codified in 29 U.S.C. §§ 152(6), (7) (1970).

<sup>63</sup> 84 L.R.R.M. at 1321.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

interstate practices, have a far greater potential impact upon commerce. Yet, *Bodle* and *Evans* represent the only two cases in which the Board has been confronted with the question of whether or not to assert jurisdiction over law firms as a class. Arguably the Board should have withheld its decision to refuse to assert jurisdiction over law firms as a class until presented with a labor dispute involving a large firm with a large interstate practice. In this way, the Board would have been better able to judge the impact of law firms as a class on commerce. Thus, *Bodle* appears to have been premature.

In addition to the fact that the Board's decision appears to have been premature, there was a peculiar factor present in *Bodle* which mitigated against extending the decision of the Board to law firms generally in the instant case. The facts in *Bodle* were somewhat unique in that the union which sought to represent *Bodle's* employees appeared to be in direct competition with certain of the firm's union clients, thus producing a conflict of interest. As will be developed herein, the Board relied upon this factor in reaching its decision concerning law firms as a class. Yet, such a conflict of interest would be present in only a small percentage of cases involving law firms. Given the uniqueness of this factor, perhaps it would have been more advisable for the Board to confine its decision to the facts of the case, as it did in *Evans*.

Nevertheless, pursuant to its discretionary authority under section 14(c)(1) of the Act, the Board declined to exercise its jurisdiction. In so doing, the Board reasoned that, in view of what it considered to be the insubstantial impact of law firms on interstate commerce, and the policy and administrative problems that would be attendant on the regulation of law firms, the assertion of jurisdiction over law firms would not serve to effectuate the policies of the Act.

#### B. *Analysis of the Reasoning Employed by the Board in Bodle*

In *Bodle* the Board found that the policies of the NLRA would not be effectuated by the assertion of jurisdiction over law firms.<sup>69</sup> Before considering the specific contentions of the Board, two points should be noted. First, it appears to have been the legislative intent of Congress that the coverage of the Act be extended to attorneys. Section 2(12) of the Act specifically defines "professional employee[s]" covered by the Act.<sup>70</sup> This definition encompasses legal, scientific and medical personnel together with their junior professional assistants.<sup>71</sup> The Board failed to take note of this congressional judgment in reaching its decision. Second, in the past the Board has not hesitated to certify labor organizations as the

<sup>69</sup> Id. at 1323.

<sup>70</sup> 29 U.S.C. § 152(12) (1970).

<sup>71</sup> H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947).



bargaining representatives of professional employees,<sup>72</sup> and this practice has been inferentially endorsed by the Labor-Management Relations Act of 1947, which contemplated the establishment of separate units of professional employees.<sup>73</sup>

In reaching its decision in *Bodle*, the Board reasoned (1) that the nature of the work of the legal profession renders minimal the degree of impact upon interstate commerce of potential labor disputes between law firms and their employees, and (2) that there are serious policy and administrative problems suggesting the undesirability and unfeasibility of any attempt to assert jurisdiction over lawyers and law firms.<sup>74</sup> With regard to the first reason set forth by the Board, the dissenting members noted that the mere recital of facts concerning *Bodle*, "including the nature of the clients served, the industries involved, and the amount of travel outside the State of California, immediately casts doubt on the conclusion there is only a minimal impact on commerce."<sup>75</sup> However, the application of the Act is not determined by the magnitude of the business<sup>76</sup> nor the comparative amount of interstate sales.<sup>77</sup> In deciding whether or not to assert jurisdiction over a particular class of employers, the test of the Board's jurisdiction is "whether the stoppage of business by reason of labor strife would tend substantially to affect commerce."<sup>78</sup> The Board must determine whether there exists between employer and employee such a relationship to commerce that an unfair labor practice would lead, or tend to lead, to a labor dispute between the employer and the employees obstructing the free flow of commerce.<sup>79</sup> The test is one of degree.<sup>80</sup>

The Board should assert jurisdiction where the unfair labor practice involved is found to have such a close and substantial relationship to the free flow of interstate commerce that the practice tends to obstruct that commerce.<sup>81</sup> In making this determination the Board must not confine its judgment to the quantitative effect of the activities before it.<sup>82</sup> Appropriate for judgment "is the fact that the immediate situation is representative of many others throughout the

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<sup>72</sup> E.g., *Wagner Elec. Corp.*, 67 N.L.R.B. 1104, 18 L.R.R.M. 1044 (1946) (professional accountants and engineers); *Aluminum Co.*, 62 N.L.R.B. 318, 16 L.R.R.M. 259 (1945) (professional chemists and engineers).

<sup>73</sup> *Lumbermen's Mutual Cas. Co.*, 75 N.L.R.B. 1132, 1135, 21 L.R.R.M. 1107, 1109 (1948).

<sup>74</sup> 84 L.R.R.M. at 1323.

<sup>75</sup> *Id.* at 1324 (dissenting opinion).

<sup>76</sup> *J.L. Brandeis & Sons v. NLRB*, 142 F.2d 977, 980, 14 L.R.R.M. 759, 761 (8th Cir. 1944).

<sup>77</sup> *Id.*

<sup>78</sup> *Service Stores Corp.*, 62 N.L.R.B. 1161, 1162-63, 16 L.R.R.M. 278 (1945).

<sup>79</sup> *Brandeis*, 142 F.2d at 980, 14 L.R.R.M. at 761.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963).

country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."<sup>83</sup>

Under this test, the Board concluded that the probability that labor strife in *Bodle* or any other law firm would result in a disruption of interstate commerce is not sufficient to warrant the assertion of jurisdiction over law firms.<sup>84</sup> The Board reasoned that it is the law firm's client "who is the moving force in commerce"<sup>85</sup> and that the firm itself is not "engaged in the production, distribution, or sale of goods in commerce."<sup>86</sup> However, it has long been settled that an employer may be subject to the Board's jurisdiction although not himself engaged in commerce.<sup>87</sup> The jurisdictional standards of the Board, as the dissent noted, have always encompassed enterprises furnishing services to other enterprises engaged directly in interstate commerce,<sup>88</sup> even when the services furnished are intangible.<sup>89</sup>

Nevertheless, the majority of the Board reasoned that the services furnished by law firms have "little direct or immediate impact" on the commerce in which its clients are engaged.<sup>90</sup> A realistic assessment of the effect that the operation of law firms have on commerce, however, compels the opposite conclusion. In appraising whether an industry has an impact on commerce, the Board must consider the totality of operations of all employers (large and small) in the class.<sup>91</sup> In 1967 there were over 324,000 attorneys in the United States, and almost 70,000 law firms with over 200,000 employees.<sup>92</sup> Thousands of secretaries, typists and receptionists are included in the latter figure.<sup>93</sup> In addition, many law firms are developing paralegal staffs at the present time. Law firms reported receipts of \$6.4 billion in 1967.<sup>94</sup> The operation of a modern law firm encompasses the rendering of many services well beyond the traditional functions of preparing and bringing cases to trial.<sup>95</sup> Law firms frequently assist large corporations, labor unions and other institutions in their interstate commerce activity. The legal profes-

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<sup>83</sup> *Id.*

<sup>84</sup> *Bodle*, 84 L.R.R.M. at 1322.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *NLRB v. Fainblatt*, 306 U.S. 601, 604 (1939).

<sup>88</sup> See, e.g., *Siemons Mailing Serv.*, 122 N.L.R.B. 81, 43 L.R.R.M. 1056 (1958) (mailing service); *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635, 26 L.R.R.M. 1543 (1950) (logging and processing lumber).

<sup>89</sup> See, e.g., *Truman Schlup, Consulting Engineer*, 145 N.L.R.B. 768, 55 L.R.R.M. 1044 (1963) (engineering services); *Hazelton Laboratories, Inc.*, 136 N.L.R.B. 1609, 50 L.R.R.M. 1063 (1962) (research services).

<sup>90</sup> *Bodle*, 84 L.R.R.M. at 1322.

<sup>91</sup> *Fainblatt*, 306 U.S. at 607-08.

<sup>92</sup> 84 L.R.R.M. at 1324 n.4.

<sup>93</sup> *Evans & Kuntz, Ltd.*, 194 N.L.R.B. 1216, 1218, 79 L.R.R.M. 1181 (1972).

<sup>94</sup> See 84 L.R.R.M. at 1324 n.4.

<sup>95</sup> *Id.* at 1322.

sion plays a vital role in all stages of interstate commerce including the obtaining of licenses needed for governmental approval of rates and routes, the issuance of stocks and bonds, real estate transactions, purchase and sale contracts for materials and products, and the negotiation and formulation of complex interstate trade and business agreements. With the emergence of new areas in the law, such as environmental and fair-employment practices, and of a powerful new weapon to expand the use of the law, namely the class action, the corporate enterprise has become increasingly reliant upon legal advice.<sup>96</sup> The annual legal bill for all American corporations at this time is approximately \$3 billion.<sup>97</sup> This figure represents a 75% increase of legal expenses in the past six years, and an increase of 150% over the previous six.<sup>98</sup> Contrary to the Board's statements, it is far more reasonable to argue that without such services corporations would be unable to engage in commerce to the degree they do so today, and that as a result, if law firms, due to a labor dispute, were unable to provide such services, there would be a very direct and immediate impact on interstate commerce.<sup>99</sup> As the dissenting members of the Board noted, "[w]ithout the services of the legal profession, American business as we know it today could not function."<sup>100</sup>

Finally, the majority attempted to distinguish law firms from other entities which render services to businesses engaged in interstate commerce, such as engineering<sup>101</sup> and architectural firms,<sup>102</sup> and over which the Board has asserted jurisdiction, on the basis that the services rendered by law firms relate directly "to the law rather than commerce."<sup>103</sup> The distinction drawn, especially with regard to architectural firms, is not at all convincing. In *Wurster, Bernardi & Emmons, Inc.*<sup>104</sup> the Board asserted jurisdiction over an architectural firm, 95% of whose work was located in the San Francisco Bay area.<sup>105</sup> The firm, however, performed work on projects for corporations engaged in interstate commerce.<sup>106</sup> The Board found that "[a]rchitecture plays an irreplaceable role in the construction industry, a major factor in commerce, and it is apparent that disputes involving architects would have serious and far-

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<sup>96</sup> Carruth, *The "Legal Explosion" Has Left Business Shell-Shocked*, *Fortune*, April 1973, at 66.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Bodle*, 84 L.R.R.M. at 1324 (dissenting opinion).

<sup>100</sup> *Id.*

<sup>101</sup> *Gray, Rogers, Graham & Osborne*, 129 N.L.R.B. 450, 47 L.R.R.M. 1001 (1960) (engineering firm).

<sup>102</sup> *Wurster, Bernardi & Emmons, Inc.*, 192 N.L.R.B. 1049, 78 L.R.R.M. 1050 (1971) (architectural firm).

<sup>103</sup> 84 L.R.R.M. at 1322.

<sup>104</sup> 192 N.L.R.B. 1049, 78 L.R.R.M. 1050 (1971).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

reaching effects upon that industry."<sup>107</sup> This situation appears directly analogous to that of law firms, which are in effect the legal architects of corporate decisions and policies which directly affect interstate commerce. It appears that legal services, like architectural services, play an "irreplaceable role" in enterprises engaged in interstate commerce. Furthermore, it should be noted that the Board has asserted jurisdiction over classes of employers which have had far less an impact on interstate commerce than have law firms. In *City Window Cleaning Co.*,<sup>108</sup> for example, the Board asserted jurisdiction over an employer who was engaged in cleaning windows for industrial and commercial establishments within a single metropolitan area.<sup>109</sup> In *Visiting Nurses Association*<sup>110</sup> the Board asserted jurisdiction over an independent nonprofit charitable corporation whose only function was to provide convalescent care in private homes within the state of California.<sup>111</sup>

The second reason employed by the majority of the Board was that there are serious policy and administrative problems which mitigate against the exercise of jurisdiction over law firms as a class. The first policy consideration advanced by the Board was that the attorney-client relationship is confidential, and employees of law firms must of necessity come into possession of knowledge and information of a confidential nature.<sup>112</sup> The Board foresaw potential problems arising out of the nature of this relationship. For example, the commerce data requisite for establishing jurisdiction might be privileged information.<sup>113</sup> In addition, the litigation of an unfair labor practice allegation might result in a finding adverse to the law firm because of its inability to produce evidence protected by privilege.<sup>114</sup>

Initially it should be noted that legal secretaries and clerical workers are not "confidential employees" as defined by the Board.<sup>115</sup> Secondly, it should be noted that the attorney-client relationship, although confidential, is certainly no more confidential than the doctor-patient relationship, and yet the Board has exercised jurisdiction over medical clinics and hospitals.<sup>116</sup> Finally, the confidential attorney-client relationship has not previously deterred the Board from exercising jurisdiction over attorneys. In *Lumbermen's Mutual Casualty Co.*<sup>117</sup> the Board asserted jurisdic-

<sup>107</sup> *Id.*

<sup>108</sup> 114 N.L.R.B. 906, 37 L.R.R.M. 1062 (1955).

<sup>109</sup> *Id.* at 913, 37 L.R.R.M. at 1063.

<sup>110</sup> 187 N.L.R.B. 731, 76 L.R.R.M. 1096 (1971).

<sup>111</sup> *Id.*

<sup>112</sup> *Bodle*, 84 L.R.R.M. at 1323.

<sup>113</sup> *Evans & Kuntz, Ltd.*, 194 N.L.R.B. 1216, 1218, 79 L.R.R.M. 1181 (1972).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Quain & Ramsted Clinic*, 173 N.L.R.B. 1185, 69 L.R.R.M. 1558 (1968); *Dr. J. C. Campbell & Dr. Walter Boucher, Partners*, 157 N.L.R.B. 1004, 61 L.R.R.M. 1464 (1966).

<sup>117</sup> 75 N.L.R.B. 1132, 21 L.R.R.M. 1107 (1948).

tion over lawyers employed by an insurance company, notwithstanding such a relationship.<sup>118</sup> In *Syracuse University*<sup>119</sup> the Board exercised jurisdiction over a group of law school professors. If the confidential attorney-client relationship can be accommodated when jurisdiction is asserted over attorneys in other industries, there appears to be no reason why it cannot be accommodated in law firms.<sup>120</sup>

The second policy consideration utilized by the Board was that potential conflicts of interest are likely to develop if employees of law firms are represented by a labor union which has interests conflicting with those of the firm's clients.<sup>121</sup> As an example, the Board noted that in the instant case Bodle represented various labor unions which were in competition with the union seeking to represent Bodle's employees.<sup>122</sup> Such conflicts of interest might well deprive the firm's union clients of their right to effective representation under section 10(b) of the Act.<sup>123</sup> This is the most potent argument which the majority advanced against assertion of jurisdiction. However, as noted above, it is an argument which applies to a very small percentage of law firms, and therefore loses much of its force when applied to law firms as a class of employers.

The final consideration advanced by the Board was administrative. The majority noted that any reasonable jurisdictional yardstick generally applicable to law firms would be extremely difficult to devise and administer.<sup>124</sup> While true, this contention is unpersuasive. It is well settled that however difficult the drawing of lines may be, the Act compels the task.<sup>125</sup> Moreover, as the dissenting members of the Board noted, such difficulty has not deterred the Board in the past.<sup>126</sup> Having analyzed the reasoning employed by the Board, it is submitted that it cannot support the decision reached.

In addition, there are three relevant factors which the Board failed to consider. First, under section 14(c)(2)<sup>127</sup> of the Act, the states are no longer prohibited from assuming jurisdiction over labor disputes over which the Board declines jurisdiction pursuant to section 14(c)(1). In enacting section 14(c)(2), however, Congress failed to specify whether state or federal law should be applied in

<sup>118</sup> *Id.* at 1134-39, 21 L.R.R.M. at 1107-08.

<sup>119</sup> 204 N.L.R.B. No. 85, 83 L.R.R.M. 1373 (1973).

<sup>120</sup> *Bodle*, 84 L.R.R.M. at 1326 (dissenting opinion).

<sup>121</sup> *Id.* at 1323.

<sup>122</sup> *Id.*

<sup>123</sup> 29 U.S.C. § 160(b) (1970).

<sup>124</sup> 84 L.R.R.M. at 1323.

<sup>125</sup> *International Union of Elec., Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 674 (1960).

<sup>126</sup> See, e.g., *Cornell Univ.*, 183 N.L.R.B. No. 41, 74 L.R.R.M. 1269 (1970) (nonprofit universities and colleges); *University Nursing Home, Inc.*, 168 N.L.R.B. 263, 66 L.R.R.M. 1263 (1967) (nursing homes).

<sup>127</sup> 29 U.S.C. § 164(c)(2) (1970).

the state forum.<sup>128</sup> The states have generally applied their own labor law.<sup>129</sup> Each of the fifty states, therefore, in light of the Board's decision in *Bodle*, may assume jurisdiction over law firms and may apply their own state laws in this area. This situation has the potential of creating an unfortunate lack of consistency in the treatment of law firms in the different states. Given the enormous amount of interstate dealings in which law firms are involved, uniform treatment of law firms in this area should be encouraged.

A second policy consideration which the Board ignored is that, not only may a disparity of treatment arise among law firms in different states, but a disparity of treatment may arise within states between in-house and outside counsel. Under the reasoning of *Lumbermen's Mutual Casualty Co.*,<sup>130</sup> it appears that attorneys in the direct employ of interstate enterprises should be subject to Board jurisdiction, while under *Bodle*, attorneys employed by law firms, who may advise the same enterprises, will not. Finally, the Board in *Bodle* failed to make any distinction between professional and clerical employees. If valid reasons exist for denying clerical employees the right to unionize and bargain collectively, the Board should have expressed them.

### III. CONCLUSION

It is not submitted that all attorneys or all law firms should be subject to Board jurisdiction. It is submitted, however, that in deciding in *Bodle* not to assert jurisdiction over law firms as a class, the Board has ignored the realities of the contemporary practice of law. The transaction of business today is very much dependent upon legal advice. Commerce is substantially affected by large law firms with interstate practices. The remaining arguments employed by the Board, involving both policy and administrative considerations, do not withstand the scrutiny of close analysis. Although they may be sound arguments for declining jurisdiction over particular law firms, they are not arguments for declining jurisdiction over law firms generally. Even if these contentions are applicable in a given situation, it is doubtful they are applicable to clerical employees of law firms as well as attorneys. After considering the *Bodle* opinion, the better argument appears on the side of the dissenting members of the Board who contended that the real basis of the majority decision was the judgment that, in some inexplicable way, the regulation of the labor relations of law firms would hamper the practice of law.<sup>131</sup>

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<sup>128</sup> ABA Section of Labor Relations Law, *The Developing Labor Law* 765 (C. Morris ed. 1971).

<sup>129</sup> *Id.* at 765-66.

<sup>130</sup> 75 N.L.R.B. 1132, 21 L.R.R.M. 1107 (1948).

<sup>131</sup> 84 L.R.R.M. at 1327 (dissenting opinion).