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Labor Law—Labor Management Relations Act—Sections 9(b) and 9(c)(5) —Extent of Organization as Controlling Factor. —Metropolitan Life Ins. Co. v. NLRB

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clause against a non-signer is much different from enforcing the entire agreement against him. When a dispute is sent to an arbitrator, it is assumed that he will render the most equitable decision possible. Flatly enforcing other parts of the agreement such as fixed wage rates or seniority terms against the successor may not be a terrible burden on him where he takes over an intact operation. In cases, however, where employees have been moved into the successor's work force, inequities within the plant will soon lead to industrial strife. The existence of separate agreements covering workers whose duties and qualifications do not differ can lead at least to poor morale and at most to strikes.

Even if the *Reliance* court were to limit its broad holding to cases where no transfer of employees has taken place, it must be kept in mind that *Wiley* is not the basis for any case following the *Reliance-Wackenhut* dicta. The courts of the Third and Ninth Circuits seem to have forgotten in their zeal to enforce collective bargaining agreements against non-signers that the initial decision to abrogate contract theory and to compel a non-signer to arbitrate was founded on the policy favoring ***arbitration*** as a means of achieving industrial peace.

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Labor Law—Labor Management Relations Act—Sections 9(b) and 9(c)(5)—Extent of Organization as Controlling Factor.—*Metropolitan Life Ins. Co. v. NLRB.*[1]—Insurance Workers International Union, AFL-CIO, requested the National Labor Relations Board to certify it as bargaining representative for all twenty-three[2] debit agents at the Woonsocket, Rhode Island, district office of the petitioner, a nation-wide insurance corporation with over 1,000 district offices.[3] Woonsocket was one of eight district offices maintained in Rhode Island by petitioner, all of which are within greater Providence. The nearest district office to Woonsocket is twelve miles away, in Pawtucket. The Board certified the union, but petitioner claimed that the only appropriate certifiable units would be (1) all its offices in the United States, (2) all its offices in its New England Territory, or (3) all its offices in Rhode Island. Petitioner asserted that in certifying this unit, the Board treated as *solely* controlling the extent of employee organization, in violation of Section 9(c)(5) of the Labor Management Relations Act.[4] On petition to review and set aside the Board's order, the Court of Appeals for the First Circuit HELD: Order set aside and enforcement denied; the Board had violated section 9(c)(5) of the Act since extent of organization appeared to control the Board's decision, no other basis appearing therein.

A vague and ambiguous term, extent of organization can mean either the geographical extent to which a union has been organized, or the intensive

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[1] 327 F.2d 906 (1st Cir. 1964), cert. granted, 32 U.S.L. Week 3115 (U.S. Oct. 12, 1964) (No. 98).

[2] Brief for Respondent, p. 4.

[3] Brief for Petitioner, p. 6.

[4] 61 Stat. 143 (1947), 29 U.S.C. § 159(c)(5) (1958).

blanketing of a single plant or district by a union seeking to organize. For its use as a standard in determining the certifiability of a union as bargaining representative, the latter definition alone has meaning.[5] It was in this sense that the Taft-Hartley Act used the phrase when it provided:

> Sec. 9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof. . . .
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> Sec. 9(c)(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) . . . the extent to which the employees have organized shall not be controlling.[6]

Extent of organization was one of many factors early considered by the NLRB to test petitions for certification.[7] Other factors were, for example, whether there had been a history of informal collective bargaining among the employees involved,[8] whether the employees were segregated according to skill,[9] and whether there was present a functional coherence[10] or a similar method of paying wages.[11] It also looked to the administrative structure of the employer's business,[12] and to the employees' own preferences.[13]

Prior to 1944, the Board had at times allowed extent of organization to control its certification of single-district office units[14] and city-wide units.[15] In *Prudential Ins. Co.*,[16] a case in which a petition for a unit comprising a single district office was denied, the Board, in dictum, noted that:

> the ultimately appropriate unit of insurance agents is the company-wide unit; and we have established less comprehensive units *solely* on the basis of the limited extent of self-organization among the employees affected. (Emphasis supplied.)[17]

In a later case, also by way of dictum, the Board said:

> Based upon the extent of organization among employees of an employer, we have frequently found appropriate for bargaining purposes small groups of employees with a provision for revision of a unit upon a later showing of broader organization.[18]

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[5] See Mueller, Labor Law & Legislation 598 (1949).
[6] 61 Stat. 142, 143 (1947), 29 U.S.C. § 159(b) and (c)(5) (1958).
[7] R.C.A. Communications, Inc., 2 N.L.R.B. 1109, 1115 (1937).
[8] Birge & Sons Co., 1 N.L.R.B. 731 (1936).
[9] Canton Enameling & Stamping Co., 1 N.L.R.B. 402 (1936).
[10] Atlantic Ref. Co., 1 N.L.R.B. 359 (1936).
[11] Bendix Prod. Corp., 1 N.L.R.B. 173 (1936).
[12] Bell Oil & Gas Co., 1 N.L.R.B. 562 (1936).
[13] Chrysler Corp., 1 N.L.R.B. 164 (1936).
[14] Life Ins. Co. of Va., 29 N.L.R.B. 246 (1941); John Hancock Mut. Life Ins. Co., 26 N.L.R.B. 1024 (1940)
[15] Life Ins. Co. of Va., supra note 14.
[16] 49 N.L.R.B. 450 (1943).
[17] Id. at 456-57.
[18] Metropolitan Life Ins. Co., 56 N.L.R.B. 1635, 1639 (1944).

The Board rationalized its use of extent of organization as a controlling factor in cases which, though not concerning insurance workers, would support the certification of a single-district office or city-wide unit. Thus, in *Gulf Oil Corp.*, in which a small unit was certified, the Board stated that it was "desirable that, in the determination of the appropriate unit, we render collective bargaining of the Company's employees an immediate possibility."[19] In another case, *NLRB v. Hearst Publ., Inc.*, the United States Supreme Court, without noting whether extent of organization should be allowed to control either alone or together with other factors, said that it could find no "plausible reason . . . for withholding the benefits of the Act from those here seeking it (sic) until a group of geographically separated employees becomes interested in collective bargaining."[20]

In 1944, in *Metropolitan Life Ins. Co.*,[21] the Board announced a policy change in the factors deemed to be of controlling value in certifying bargaining units for insurance agents. While denying a petition to certify a unit composed of four of Metropolitan's forty-one district offices in Ohio, the Board stated that certification would hereafter be granted to state-wide units but denied to single-district offices, city-wide, and all other less than state-wide units of insurance agents that the Board had formerly certified on an extent of organization basis.[22] The Board was led to change the controlling standard because of a belief that the collective-bargaining trend in the insurance industry was toward state-wide units.[23]

Following the 1944 *Metropolitan Life* decision, the Board adhered to its policy of finding only state-wide units of insurance agents appropriate for bargaining purposes,[24] and dismissing representation petitions filed by unions seeking representation on a less than state-wide basis.[25]

The passage of the Taft-Hartley Act in 1947 did for all industries what the *Metropolitan* rule of 1944 had done for the insurance industry: it prevented extent of organization from being treated as the controlling factor in unit determinations. Therefore, the Board was restrained from returning to the pre-1944 certification practices insofar as they related to the recognition of extent of organization as controlling.

According to Senator Taft, one of the sponsors of the Act, section 9(c)(5) was aimed at eliminating (or preventing the return to) the practice of the Board in allowing extent of organization to control where all other valid tests failed to give the union the unit it desired. Responding to those who might say that it will now be impossible for unions to organize the insurance industry, Senator Taft said:

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19 4 N.L.R.B. 133, 137 (1937).

20 322 U.S. 111, 135 (1944).

21 Supra note 18, at 1640.

22 Id. at 1639. In an earlier case, Metropolitan Life Ins. Co., 43 N.L.R.B. 962, 968 (1942), the Board had noted that the manner of supervision of the states over the insurance industry (e.g., requirements to be an agent, tests which the prospective agent must pass, etc.) made state-wide units particularly appropriate in this field.

23 Metropolitan Life Ins. Co., supra note 18, at 1639.

24 United Ins. Co., 108 N.L.R.B. 843, 848 (1954).

25 Home Beneficial Life Ins. Co., 89 N.L.R.B. 392, 393-94 (1950).

> It is sufficient answer to say that the Board has evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographical considerations, etc., any one of which may justify the finding of a small unit.[26]

Representative Hartley, the other sponsor of the Act, noted that "While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and, as section 9(f)(3)[27] provides, it is not to be controlling."[28] Use of extent of organization had resulted in certification of improper units. Other internationals often were allowed to organize the remainder of the natural unit, the result being the establishment of two or more inappropriate units.[29]

In view of the policy enunciated by the Board in the *Metropolitan Life* case in 1944, section 9(c)(5) had no observable impact on the insurance industry. With statewide organization a requirement, it was impossible for the individual factor of extent of organization to be considered, let alone to control.

In 1961, in *Quaker City Life Ins. Co.*,[30] the Board abandoned the requirement of state-wide organization.[31] In that case, the Board certified a unit

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[26] 93 Cong. Rec. 6860 (1947).

[27] The provision dealing with extent of organization was absent in the Senate version of the bill, 1 Legislative History of the Labor Management Relations Act, 1947, 552 (1948), but was contained in the House version under § 9(f)(3). 1 Legislative History of the Labor Management Relations Act, 1947, 62, 189 (1948). The final version of the bill, as reported out of the conference committee, contained the provision under § 9(c)(5). 2 Legislative History of the Labor Management Relations Act, 1947, 1542 (1948).

[28] 1 Legislative History of the Labor Management Relations Act, 1947, 328 (1948).

[29] 93 Cong. Rec. 6860 (1947) (remarks of Senator Taft). Of course, many legislators disagreed with Senator Taft and Representative Hartley. Senator Murray: "By the adoption of section 9(c)(5) they have precluded unions from starting collective bargaining until an entire business is organized, which is, as in the case of Nation-wide insurance companies, frequently impossible." 93 Cong. Rec. 6497 (1947). Senator Morse: "[I]t will hereafter be difficult and perhaps impossible for unions to organize highly integrated enterprises like insurance and public utility companies, which necessarily maintain separate and widely dispersed small operational units." 93 Cong. Rec. 6454 (1947).

[30] 134 N.L.R.B. 960 (1961).

[31] In 1959, in Life Ins. Co. of Va., 123 N.L.R.B. 610 (1959), the Board adhered to its requirement of state-wide organization, but the majority was achieved with the vote of Member Fanning, who, in a separate opinion, at 614-15, gave different views from the other members of the majority for his vote denying certification:

> I would apply to units of insurance agents the same criteria of appropriateness the Board applies to units in retail establishments, such as the administrative structure of the Employer's operations, geographical separation, centralization of operations, interchange of personnel, and uniform wages, duties, and working conditions. . . .
>
> In the present case, on the facts detailed in the majority opinion I would find that the unit sought does not conform to an administrative division of the Employer's organization, and the operations are highly centralized, and the wages, duties, and working conditions are uniform as far as possible throughout the Employer's organization. Accordingly, I would and do find that a unit limited to Danville, Virginia, is inappropriate.

representing one of six district offices operated by the company in Virginia. The Board stated that its decision to drop the seventeen-year-old rule was based on the realization that the expected trends in the insurance industry had "not materialized, and the result of the rule has been to arrest the organizational development of insurance agents."[32] With the departure of the state-wide requirement, extent of organization was again available to the Board for use as a factor in unit determinations. Under section 9(c)(5), however, it could not be controlling and was to be allowed only minimal weight.

The Fourth Circuit affirmed the Board's decision in *NLRB v. Quaker City Life Ins. Co.*[33] The court found evidence in the record that (a) the job specifications of the agents were highly standardized, (b) working conditions were similar, (c) the office operated in an isolated manner with little or no contact with other branch offices, (d) no administrative offices operated between the local offices and the main office, and (e) the district manager had at least some control over the operating conditions of each employee. Therefore, over the objection of the company, the court decided that even though this was not a state-wide unit, extent of organization had not been allowed to control by the Board. State-wide organization had not been required by the Board in other industries, and the other factors upon which the Board based its decision in *Quaker City* had long since found legislative and judicial approval.[34]

In the interval between *Quaker City* and the instant case, courts of appeals in two other circuits denied petitions brought by Metropolitan asking that Board decisions in cases similar in fact and issue to the instant case be set aside. The Third Circuit affirmed[35] the Board's certification of a unit consisting of two of the three district offices of Metropolitan in Delaware. In ruling that extent of organization had not been allowed to control, the court noted:

> [W]e believe the effect of 9(c)(5) is to require the Board to determine whether a unit is in and of itself appropriate, apart from the extent to which the employees are organized. Whether the employees were controlled by the extent of their organization when they petitioned the Board is not the issue. Rather, it is whether the Board in determining a unit's appropriateness was so controlled.[36]

The Sixth Circuit also chose to affirm a Board decision[37] certifying Metropolitan's nine district offices in greater Cleveland, believing that the "cogent geographical considerations" cited by the Board were not just "simulated grounds" designed to avoid the prohibition against the use of extent of organization as a controlling factor.[38]

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[32] Quaker City Life Ins. Co., supra note 30, at 962.

[33] 319 F.2d 690 (4th Cir. 1963).

[34] See Senator Taft's comments, supra note 26. See also NLRB v. Moss Amber Mfg. Co., 264 F.2d 107 (9th Cir. 1959); NLRB v. Smythe, 212 F.2d 664 (5th Cir. 1954); NLRB v. Armour & Co., 154 F.2d 570 (10th Cir. 1946).

[35] Metropolitan Life Ins. Co. v. NLRB, 328 F.2d 820 (3d Cir. 1964).

[36] Id. at 825-26.

[37] Metropolitan Life Ins. Co., 138 N.L.R.B. 512 (1962).

[38] Metropolitan Life Ins. Co. v. NLRB, 330 F.2d 62, 65 (6th Cir. 1964).

In the instant case, the Board rested its decision on the basis that there had been no recent history of informal collective bargaining among any of Metropolitan's employees in Rhode Island, that no union was currently seeking a larger unit, that the desired unit was located in a separate and distinct geographical area, and that each district office of petitioner was a separate administrative entity. The First Circuit answered that not only did the cases cited by the Board fail to support its conclusions "but also the criterion of location in a separate and distinct geographical area is not a criterion consistently applied by the Board" in its decisions.[39] In a specific case, one or several factors may lead to certification, but there has never been a requirement that in all cases, the petitioned unit must be measured against each and every factor ever used by the Board as a basis for making unit determinations in that industry. Further, one of the cases cited by the Board to support its position was the Delaware representation proceeding, the record of which had been incorporated by reference into the record in the instant case by stipulation of the parties. In that case the Board concluded that the individual district office of Metropolitan "is in effect a separate administrative entity through which the Employer conducts its business operations, and therefore is inherently appropriate for purposes of collective bargaining."[40]

The First Circuit went beyond the record to note that the union had previously tried unsuccessfully to organize the entire state of Rhode Island, and that it had "not found a single instance since Quaker City wherein the majority of the Board refused the debit insurance agent unit petitioned for by the Union."[41] Merely because the Board had chosen to dispense with its requirement of state-wide organization in insurance cases, however, need not lead to a presumption (made, apparently, by the First Circuit) that it had returned to the policy which had been in effect before the state-wide requirement was introduced in 1944. Rather, according to the Third Circuit:

> There is a vast difference between taking away an obstacle to wider union organization and collective bargaining which is the explicit legislative purpose and mandate of the Act, and determining appropriate units on the basis of employee organization.[42]

The decision of the First Circuit shows that it chose to go off the record and attempt to prove a subservience of the Board to unions rather than, as the other circuits chose, to look into the record and determine if there were facts present to support the Board's conclusions. In ignoring these and deciding that the real basis of certification in this case was extent of organization, the First Circuit is in direct disagreement with its two sister circuits. Had the court fully considered all the grounds for certification found by the Board, it could have well aligned itself with the positions taken by the other circuits.

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[39] Metropolitan Life Ins. Co. v. NLRB, supra note 1, at 909.
[40] Metropolitan Life Ins. Co., 138 N.L.R.B. 565, 567 (1962).
[41] Metropolitan Life Ins. Co. v. NLRB, supra note 1, at 910.
[42] Metropolitan Life Ins. Co. v. NLRB, supra note 35, at 828.