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Labor Law—Labor Management Relations Act—Section 9(b)(2)—Requirements for Severance of Craft Workers.—Mallinckrodt Chem. Works

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that which is generally accepted by courts holding that the amount of paid-in capital required by the incorporation statute is not conclusive of adequate capitalization, but merely a prerequisite to legal recognition of the corporation. However, this "minimum requirement" argument does not have the same validity when applied to the New York mandatory-insurance statute. In the latter case, the legislature has established a specific insurance figure for the taxicab industry, not a general figure applicable to all corporations, as is the paid-in capital figure.

The legislature must be deemed to have known that most cab operators are incorporated for the purpose of preventing personal responsibility, and the minimum-insurance statute must be regarded as a clear indication of what the legislature thought was adequate protection for the public. Thus, for the purposes of limited liability, a $10,000 insurance policy should be considered an adequate asset to compensate tort claimants. The legislature's intent to have it so is clear, especially when it is noted that the liability insurance was increased from $5,000 to $10,000 in 1959, and that the statute has been twice amended since then without further increases. It is extremely difficult to say that the court would be protecting legislative policy by judicially increasing the minimum amount of insurance needed by taxicabs. The incorporators are not using the corporate form to defeat or avoid any legislative policy, but are only taking advantage of a legitimate form of organization. If the $10,000 figure set by the legislature is not sufficient, it should be raised by the legislature.

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Labor Law—Labor Management Relations Act—Section 9(b)(2)—Requirements for Severance of Craft Workers.—*Mallinckrodt Chem. Works.*[1]—Mallinckrodt Chemical Works, Uranium Division, Waldon Springs, Missouri, was engaged in the manufacture of uranium metal and in the purification of uranium ore under a cost-plus-fixed-fee contract with the Atomic Energy Commission. Of its 560 employees, 280 were engaged in production and maintenance, and were represented by the Independent Union of Atomic Workers. Local 1 of the International Brotherhood of Electrical Workers petitioned the National Labor Relations Board to sever twelve instrument mechanics from the unit represented by the Atomic Workers.

The IBEW claimed to have been a traditional representative of the type of craftsmen involved in the suit. Petitioner demanded severance on the basis of the need for separate representation of the instrument mechanics as a "functionally distinct and homogeneous traditional departmental group."[2] HELD: Petitioner does not qualify as a traditional representative of instrument mechanics of the type involved in this case, nor does the record indicate that the interests of the mechanics have been neglected by the Atomic Workers. Although the instrument mechanics do constitute a group of skilled journeymen mechanics,

[1] 162 N.L.R.B. No. 48, 64 L.R.R.M. 1011 (1966).

[2] Id., 64 L.R.R.M. at 1012.

> the separate community of interests which these employees enjoy by reason of their skills and training has been largely submerged in the broader community of interests which they share with other employees by reason of long and uninterrupted association in the existing bargaining unit, the high degree of integration of the employer's production processes, and the intimate connection of the work of these employees with the actual uranium metal-making process itself.[3]

In deciding this case, the Board considered many of its prior decisions as well as the legislative history of Section 9(b)(2) of the Taft-Hartley Act.[4]

One of the earliest cases which had a significant influence on the craft worker was *American Can Co.*[5] The Board there held that it would not allow craft severance if the industrial union could demonstrate, in a unit which included the craft, a successful history of bargaining, together with adequate representation of the interests of all members. To allow severance in such situations, the Board felt, would only lead to internal turmoil in the industry: "To permit such small groups to break up an appropriate unit established and maintained by a bona fide collective bargaining contract against the will of the majority of the employees who are bound by the contract would make stability and responsibility in collective bargaining impossible."[6] The Board concluded that it would look to "established custom and practice as embodied in collective bargaining agreements for the appropriate units, and not to theoretical principles that appeal to the members of the Board as being fair."[7] A strong dissent argued that

> once the industrial union has obtained an exclusive contract on a plant-wide basis, either by organizing before the advent of the craft union or by capturing the craft union's majority in a later election, thereafter the craft employees are irrevocably part of the industrial unit. The effect is, therefore, to crystalize the industrial form of organization and prevent the craft employees from ever thereafter changing their minds.[8]

In the cases immediately following *American Can*, its impact was somewhat lessened.[9] In *General Elec. Co.*,[10] the Board declared that severance would be permitted provided that (1) the group constituted a true craft, (2) it had maintained its identity while bargaining in the more comprehen-

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[3] Id., 64 L.R.R.M. at 1017.

[4] "The Board shall not . . . (2) decide that any craft unit is inappropriate . . . on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft group vote against separate representation. . . ." Labor Management Relations Act (Taft-Hartley Act) § 9(b)(2), 61 Stat. 143 (1947), 29 U.S.C. § 159(b)(2) (1964).

[5] 13 N.L.R.B. 1252 (1939).

[6] Id. at 1256-57.

[7] Id. at 1257.

[8] Id. at 1260.

[9] See, e.g., Bendix Aviation Corp., 39 N.L.R.B. 81 (1942).

[10] 58 N.L.R.B. 57 (1944). See Jones, Self-Determination vs. Stability of Labor Relations, 58 Mich. L. Rev. 313, 316 (1960).

sive unit, and (3) it had protested its inclusion in the broader unit or, in the alternative, that the broader unit was established without its knowledge and there had been no previous consideration of the merits of a separate unit.[11] As a result of this case, the requirement that craft workers bargain on a separate basis became known as the "identity concept." Actually, under this new doctrine, the workers' own insistence on severance was considered crucial, and "as a result of their failure to establish that they had retained their identity, many groups normally regarded as crafts were denied permission to sever. . . ."[12]

The "identity concept" was disregarded by the Board in 1946 in the *International Minerals & Chem. Corp.* case, in which it was said that

> the circumstance that collective bargaining on a more inclusive basis has existed for a number of years is not sufficient in itself to deny the employees in the craft group the opportunity of deciding . . . whether they desire to continue to be represented as part of the production and maintenance unit or whether they desire to bargain as a separate unit. This is particularly true because these employees have never previously had an opportunity to vote on this issue.[13]

One factor the Board considered, closely paralleling an important factor in *Mallinckrodt*, was the necessity of balancing two opposing interests—"stability and certainty in labor relations [favoring] . . . adherence to existing bargaining patterns; [and] on the other hand, the cohesiveness and special interests of a true craft group often [indicating] . . . the appropriateness of groups limited to members of a particular craft."[14]

As a result of its dissatisfaction with Board decisions in the area, Congress in 1947 considered the adoption of what was to become Section 9(b)(2) of the Taft-Hartley Act. The majority of the Senate Committee on Labor and Public Welfare wished to grant craft employees the fullest measure of protection available. In its report, the committee observed that

> since the decision in the *American Can* case . . . , where the Board refused to permit craft units to be "carved out" from a broader bargaining unit already established, the Board, except under unusual circumstances, has virtually compelled skilled artisans to remain parts of a comprehensive plant unit. The committee regards the application of this doctrine as inequitable.[15]

As a result, the committee stated the purpose of the new subsection in the following way:

> The several amendments to this subsection propose to limit the Board's discretion in determining the kind of unit appropriate for collective bargaining . . . . In determining whether members of a

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[11] See also 11 NLRB Ann. Rep. 25 (1946).

[12] Krislov, Administrative Approaches to Craft Severance, 5 Lab. L.J. 231, 233 (1954).

[13] 71 N.L.R.B. 878, 881-82 (1946).

[14] Id. at 881.

[15] S. Rep. No. 105, 80th Cong., 1st Sess. 12 (1947).

> craft may be separated from a larger unit the Board may not dismiss a craft petition on the ground that a different unit has been established by a prior determination. This overrules the *American Can* rule. . . .[16]

By thus limiting the Board's discretion, in the sense that it could no longer dismiss a craft petition simply on the basis of a prior contrary determination, Congress was granting significantly more freedom for severance.

The House Committee on Education and Labor also voiced the need for adequate representation of craftsmen:

> The Board seems to have wished to make bargaining units as large as it could, notwithstanding that its policy deprived large minorities of that freedom to decline to bargain collectively that the Labor Act and the Norris-LaGuardia Act both declare to be our national policy. . . . The Board has gone far in this. Although the employees in several plants or mines may wish one union, or no union at all, to represent them, the Board may include these employees in a single unit with employees in other plants or mines who wish another union as their representative and who, by greatly outnumbering them, can force upon them a bargaining agent they do not choose. . . .
>
> Carrying out the national policy to assure full freedom to workers to choose, or to refuse, to bargain collectively, as they wish, is an important task for this Congress.[17]

One frequently quoted statement of the bill's intent is the remark by Senator Taft that the bill did not give craft employees "an absolute right in every case; it simply provides that the Board shall have discretion and shall not bind itself by previous decision but that the subject shall always be open for further consideration by the Board."[18] While it is arguable that Senator Taft's statement was in contradiction to the congressional reports cited above, it seems obvious that it is at least narrower in scope than the intent shown in the legislative reports, for Taft only cautioned the Board not to rely on its prior determinations.

Congress, however, did not formulate a clear policy statement in this area. Fearing the possible effect on industry of giving craft employees a blank check to sever from the industrial union, and yet not wanting to offend either the craft or the industrial employees, Congress wrote section 9(b)(2) so as to give the Board only general guidelines rather than burdensome restrictions and tests.[19] In addition, the practical problems of the various industries could be better solved by the Board than by the Congress. As stated in *Mueller Brass Co. v. NLRB*, "Congress recognized, in both the National Labor Relations Act of 1935 and the Labor-Management Relations Act of 1947, that an appropriate bargaining unit can hardly be ascer-

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[16] Id. at 25.
[17] H.R. Rep. No. 245, 80th Cong., 1st Sess. 36-37 (1947).
[18] 93 Cong. Rec. 3836 (1947).
[19] See Jones, supra note 10, at 314.

tained by means of some neat statutory formula and, therefore, decided to furnish only minimal standards to guide the Board."[20]

Whether or not Congress meant to give the Board discretion in this field, the Board took it upon itself to exercise some discretion. In the cases immediately following the enactment of section 9(b)(2), there was a marked tendency to limit the opportunities for severance. This was accomplished by placing an increased amount of weight on two factors: the prerequisites for classification as a true craft[21] and the degree of integration in the industry. Indicative of the latter was the landmark case of *National Tube Co.*[22] In this case, the Board determined that its action in finding a craft unit inappropriate could not be based on the fact that a different unit was established by a prior Board determination. In reaching this decision, the Board stated that the only restriction imposed by 9(b)(2) was that neither a prior determination nor bargaining history "may . . . be the sole ground on which the Board may decide that a craft unit is inappropriate without an election."[23] *National Tube* revealed the Board's uncertainty as to exactly how far Congress had gone in overruling the *American Can* doctrine. While the Board concluded that the legislative history disclosed some intent to overrule *American Can*, it also felt that at other points Congress seemed only to intend that prior Board determinations be eliminated from consideration.[24] The Board argued that since Senator Taft spoke of the 9(b)(2) rule only in terms of prior Board determination—and indeed since these were the very words used in the statute—that

> the *American Can* doctrine cannot be considered synonymous with the phrase "prior Board determination," [and] . . . the legislative history preceding the enactment of Section 9(b)(2) does not adequately establish a certain Congressional intent to eliminate the use of bargaining history by a particular employer as a controlling factor in determining the issue of separate craft representation.[25]

In addition, the Board felt that any consideration of the legislative history of the act was entirely unnecessary, since

> the statute clearly states that the Board's action in finding a craft unit inappropriate shall not be based on the fact that a different unit has been established by a prior Board determination. Because the phrase *"a prior Board determination"* contains no substantial ambiguity, and because Section 9(b)(2) is a proviso, as distinguished from an affirmative statement of duties imposed by the statute, we believe that we should not strain to give this proviso an interpretation unwarranted by its express language.[26]

On the facts of *National Tube*, the Board denied a separate unit for the

[20] 180 F.2d 402, 404 (D.C. Cir. 1950).
[21] See, e.g., National Container Corp., 75 N.L.R.B. 770 (1948).
[22] 76 N.L.R.B. 1199 (1948).
[23] Id. at 1205.
[24] Ibid.
[25] Ibid.
[26] Id. at 1203.

petitioners, a group of bricklayers, because of the high degree of integration between the bricklayers and the unskilled workers in the production unit. This integration was held to preclude severance, and the decision was to weigh heavily against craft unions in highly complex industries.[27] Studies in the field, however, have shown ample reason to question the argument that severance would tend significantly to disrupt manufacturing efficiency in a highly integrated industry.[28]

In addition to restricting the opportunity for severance through its "integration" theory, the Board imposed other restrictions on severance in subsequent cases. For example, the group claiming severance had to be essentially homogeneous. The workers had to be primarily skilled and could not frequently work interchangeably at skilled and unskilled jobs.[29] Furthermore, workers seeking craft-union representation had to possess skills which required substantial training.[30]

In 1954, the Board limited its policy towards highly integrated industries. In *American Potash & Chem. Corp.*,[31] the Board stated that if the workers seeking severance constituted a true craft, and if the union seeking to represent them was a traditional representative of that type of worker, the craft group should be afforded the opportunity to decide for itself the issue of separate representation. The Board's ruling, however, did not extend to the so-called *National Tube* industries, because the Board did not wish to disrupt an established bargaining relation.[32] The Board stated, however, that the *National Tube* decision would not be further extended in that it "permanently [forecloses] . . . the possibility of establishing . . . craft units in an entire industry by freezing that industry into an industrial unit for bargaining purposes."[33] The Board admitted that "a small cohesive craft group, by striking, closes down a large industrial plant employing thousands of workers," but it also felt that "to deny crafts separate representation [is] . . . no less productive of labor unrest."[34]

Following the *American Potash* decision, the Board further liberalized its attitude towards severance. In *Beaunit Mills, Inc.*,[35] although the employer did not recognize or designate any of his employees as journeymen

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[27] See, e.g., Permanente Metals Corp., 89 N.L.R.B. 804 (1950) (aluminum industry); Weyerhaeuser Timber Co., 87 N.L.R.B. 1076 (1949) (lumber industry); Corn Prods. Ref. Co., 87 N.L.R.B. 187 (1949) (wet milling industry). These industries became known as the *National Tube* industries.

[28] See, e.g., Jones, supra note 10.

[29] E.g., Borden Corp., 83 N.L.R.B. 765 (1949); Monsanto Chem. Co., 78 N.L.R.B. 1249 (1948); George S. Mepham Corp., 78 N.L.R.B. 1081 (1948); Kimberly-Clark Corp., 78 N.L.R.B. 478 (1948); Caterpillar Tractor Co., 77 N.L.R.B. 457 (1948); Lockheed Aircraft Corp., 57 N.L.R.B. 41 (1944).

[30] Mathieson Ala. Chem. Corp., 101 N.L.R.B. 1079 (1952); Allis-Chalmers Mfg. Co., 77 N.L.R.B. 719 (1948); American Mfg. Co., 76 N.L.R.B. 647 (1948).

[31] 107 N.L.R.B. 1418 (1954).

[32] But see NLRB v. Pittsburgh Plate Glass Co., 270 F.2d 167, 174-75 (4th Cir. 1959), in which the court rejected the exclusion of the *National Tube* industries from the craft-union rule.

[33] 107 N.L.R.B. at 1240.

[34] Id. at 1422.

[35] 109 N.L.R.B. 651 (1954).

and maintained no apprentice system, severance was allowed on the basis that the workers possessed the "range of skills and perform[ed] the duties of journeymen in [the pipefitters] . . . craft."[36] In addition, the requirement that the petitioning union be a traditional representative of the type of workers seeking severance was strained in *Friden Calculating Mach. Co.*,[37] where severance was allowed although the petitioning union had only recently been formed. The Board argued that it could be determined whether a union is a craft union by examining its history. However, "a union newly organized for the sole and exclusive purpose of representing members of that craft . . . can be as much a craft union as an older organization which has been representing craft members for many years."[38]

The Board at this point had gone full circle in its attitude towards severance. Beginning with its reliance on bargaining history in *American Can*, it had moved toward a policy of protecting highly integrated industries from severance, because it felt that craft workers could, by their separate representation, paralyze entire industries through strike action. The latter doctrine, proclaimed in *National Tube*, had been severely limited by *American Potash*, which rejected the stress placed on integration and favored craft severance through a new test. This test simply required a true craft and a union which had traditionally represented this type of worker, factors easily met by most petitioners.

With this fluctuating set of standards behind them, the Board in the instant case attempted to strike a mean. *Mallinckrodt Chem. Works*[39] rejected the *American Potash* test as too mechanical in "confining consideration solely to the interests favoring severance, [and precluding] . . . the Board from discharging its statutory responsibility to make its unit determination on the basis of all relevant factors, including those factors which weigh against severance."[40]

However, the Board did not revert to a *National Tube* doctrine in which a single factor would be fatal to severance, but contemplated a weighing of considerations, listing the following as examples:

> 1. Whether or not the proposed unit consists of a distinct and homogeneous group of skilled journeymen craftsmen performing the functions of their craft on a nonrepetitive basis, or of employees constituting a functionally distinct department, working in trades or occupations for which a tradition of separate representation exists.
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> 2. The history of collective bargaining of the employees sought and at the plant involved, and at other plants of the employer, with emphasis on whether the existing patterns of bargaining are productive of stability in labor relations, and whether such stability will be unduly disrupted by the destruction of the existing patterns of representation.

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[36] Id. at 656.
[37] 110 N.L.R.B. 1618 (1954).
[38] Id. at 1619.
[39] 162 N.L.R.B. No. 48, 64 L.R.R.M. 1011 (1966).
[40] Id., 64 L.R.R.M. at 1016.

> 3. The extent to which the employees in the proposed unit have established and maintained their separate identity during the period of inclusion in a broader unit, and the extent of their participation or lack of participation in the establishment and maintenance of the existing pattern of representation and the prior opportunities, if any, afforded them to obtain separate representation.
> 4. The history and pattern of collective bargaining in the industry involved.
> 5. The degree of integration of the employer's production processes, including the extent to which the continued normal operation of the production processes is dependent upon the performance of the assigned functions of the employees in the proposed unit.
> 6. The qualifications of the union seeking to "carve out" a separate unit, including that union's experience in representing employees like those involved in the severance action.[41]

The factors listed by the Board are not novel in the sense that no prior Board had considered them. Indeed, each individually had played a role in the decisions discussed above. The true significance of *Mallinckrodt* therefore lies not in the consideration of any of the factors individually but in their collective weight as important elements in determining whether severance should be granted. The presence of one factor should no longer preclude severance; instead, a decision will be reached only after a balancing of many factors.

In *Mallinckrodt* the Board refused to grant severance for several reasons. There was no showing that the craft's interests had been neglected by their bargaining representative, there had been a lack of concern for maintaining and preserving a separate group identity for bargaining purposes, and the petitioner had not traditionally represented the craft. On the basis of these considerations, the Board felt that the interest in maintaining stability in the existing bargaining unit outweighed the interests served by affording the twelve instrument mechanics the opportunity to change their bargaining representative.

In a companion case, *E. I. Du Pont de Nemours & Co.*,[42] the Board agreed to grant severance to a group of electricians despite the fact that their work was intimately related to the successful operation of the employer's production process. In addition to finding that the electricians possessed the skills of true craftsmen and enjoyed a separate community of interest, the Board definitely stated its determination not to extend the *National Tube* doctrine of denying severance in highly integrated industries *solely* on the basis of such integration. In its decision, the Board stated what is, in effect, the basic distinction between the *National Tube* and *Mallinckrodt* doctrines. Whereas *National Tube* regarded a highly integrated production process as a block to severance, *Mallinckrodt* established that a consideration of integration is merely one factor in deciding whether severance will be permitted:

> Integration of a manufacturing process is a factor to be considered

[41] Ibid.
[42] 162 N.L.R.B. No. 49, 64 L.R.R.M. 1021 (1966).

> in unit determinations. But it is not in and of itself sufficient to preclude the formation of a separate craft bargaining unit, unless it results in such a fusion of functions, skills, and working conditions between those in the asserted craft group and others outside it as to obliterate any meaningful lines of separate craft identity.[43]

In *Holmberg, Inc.*,[44] a second companion case, the Board professed to follow the *Mallinckrodt* theory of considering all relevant factors, and arrived at a decision denying severance to a group of tool and die makers because of the overlap in skilled and unskilled work performed by the craft workers, their substantial community of interest with other employees in the existing unit, and a successful twenty-four-year bargaining history. While ostensibly following *Mallinckrodt*, the Board's statement that it had considered all relevant factors seems rather shallow if one examines the two major points on which it based its decision. In stating that there was significant overlap in skilled and nonskilled work, the Board failed to consider the fact that up to eighty per cent of the craftsmen's time was spent in skilled labor, and that the occasional use of tool and die workers in an unskilled capacity was intended primarily to forestall the necessity of laying off the latter. It is also questionable that the craft workers shared a community of interest with the unskilled workers simply because they used common locker room and cafeteria facilities, since the tool and die makers received substantially greater wages and contract benefits. The Board may have been greatly impressed by the twenty-four-year bargaining history in the plant, which substantially benefited the craft workers. This factor alone, however, or even considered jointly with the overlap of work and community of interest, seems insufficient to deny severance under *Mallinckrodt*.

On the basis of *Mallinckrodt* and its two companion cases, it is not certain in what direction the Board is now turning. While a consideration of all relevant factors, as propounded in *Mallinckrodt*, seems to have been followed in *Du Pont*, *Holmberg* looks at these factors in a rather narrow light—straining to find elements that would justify a denial of severance under *Mallinckrodt*. It is commendable that the Board consider many factors, but the whole purpose of section 9(b)(2) could nevertheless be defeated by too narrow an application of any one of them. It would seem more in line with congressional intent to give "greater power to the craft units to organize separately,"[45] and to consider all relevant factors, weighing those favoring severance against those discouraging it, in arriving at a justifiable decision. If each consideration is valued so highly that failure to meet it results in a denial of severance, the legislation would clearly be frustrated.

It is submitted, therefore, that the true test of *Mallinckrodt* lies in its interpretation by future Boards. Only by refusing to limit itself to a definitive set of factors can the Board provide for a sufficient degree of flexibility in each case to meet the changing and intricate conditions in the various industries.

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[43] Id., 64 L.R.R.M. at 1024.
[44] 162 N.L.R.B. No. 53, 64 L.R.R.M. 1025 (1966).
[45] 93 Cong. Rec. 3836 (1947).