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James N. Adler
University of Michigan Law School

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LABOR LAW—APPROPRIATE BARGAINING UNIT UNDER SECTION 9 (b) OF THE TAFT-HARTLEY ACT—DETERMINATION REQUIRES NLRB TO EXERCISE DISCRETION—Petitioner union sought to represent maintenance and construction electricians employed by plate glass manufacturer at a new plant. How-

ever, employer and intervenor union entered into an agreement extending to the new plant an existing contract covering employees at certain of employer's other plants. At hearings upon petitioner's application to determine the "appropriate" bargaining unit under criteria established by section 9 (b) of the Taft-Hartley Act,¹ employer and intervenor urged that the highly integrated nature of the plant and the history of plantwide bargaining at employer's other plants made a single bargaining unit covering all plant's employees the only appropriate one.² Relying upon a previously developed rule³ which denied consideration of these elements in all but four industries,⁴ the Board granted petitioner's request for severance.⁵ Nevertheless, employer refused to bargain with petitioner. Finding this refusal to be an unfair labor practice, the Board ordered employer to bargain.⁶ On petition for enforcement of the NLRB's order,⁷ *held*, enforcement denied. Section 9 (b) (2) requires the Board to use discretion in every case, and it is arbitrary to attempt to exercise this discretion by the application of a discriminatory rule. *NLRB v. Pittsburgh Plate Glass Co.*, (4th Cir. 1959) 270 F. (2d) 167, cert. den. 28 U.S. LAW WEEK 3217 (1960).

The selection of standards to be used to determine the appropriate bargaining unit has plagued the NLRB since its inception. The Wagner Act, which created the Board, directed it to make this determination, but gave little indication of the criteria to be employed.⁸ A 1947 amendment added section 9 (b) (2)—a proviso which forbids the Board to "decide that any craft unit is inappropriate . . . [because] . . . a different unit has been

¹ Labor-Management Relations Act, 1947, 61 Stat. 143, 29 U.S.C. (1958) §159 (b) (2). Section 9 (b) provides: "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 purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not . . . (2) decide any craft unit is inappropriate for such purposes 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 vote against separate representation. . . ."

² This argument is based upon *National Tube Co.*, 76 N.L.R.B. 1199 (1948), noted, 61 HARV. L. REV. 1457 (1948). A craft unit of bricklayers and apprentices in highly integrated basic steel industry was sought and denied.

³ This rule originated in *American Potash & Chemical Co.*, 107 N.L.R.B. 1418 (1954), noted, 54 COL. L. REV. 1159 (1954).

⁴ Basic steel, wet milling, lumbering, and aluminum. See notes 2 *supra* and 12 *infra*.

⁵ *Pittsburgh Plate Glass Co.*, 117 N.L.R.B. 1728 (1957).

⁶ *Pittsburgh Plate Glass Co.*, 121 N.L.R.B. 758 (1958).

⁷ The petition was brought pursuant to §10 (e) of the Labor-Management Relations Act, 1947, 61 Stat. 146, 29 U.S.C. (1958) §160 (e). This procedure, though awkward, is the only one by which the company can obtain judicial review, for the NLRB's initial determination is not reviewable. *AFL v. NLRB*, 308 U.S. 401 (1940).

⁸ Section 9 (b) of the Wagner Act, 49 Stat. 449 at 453 (1935) provides: "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." The NLRB's decisions under this act are discussed in Rathbun, "Taft-Hartley Act and Craft Unit Bargaining," 59 YALE L.J. 1023 at 1027 (1950).

established by a prior Board determination. . . ."⁹ The effect of this proviso was extensively examined in *National Tube Co.*,¹⁰ in which the Board held that the history of successful plantwide bargaining and the high state of integration in the basic steel industry made a craft unit undesirable. It found that neither the words of the new proviso nor its legislative history required a craft unit in every case, that the Board would, and should, continue to exercise discretion,¹¹ and that the proviso did not prohibit the Board from considering bargaining history, but that it merely precluded the Board from making that history the *sole* basis of its determination. Subsequently, craft units were found inappropriate, under the *National Tube* doctrine, in three other highly integrated industries,¹² but allowed in less integrated ones.¹³ In 1954 the Board made a major policy reversal. In *American Potash & Chemical Co.*¹⁴ the NLRB concluded that the *National Tube* doctrine foreclosed the possibility of craft severance and froze an entire industry into an industrial unit. Finding this "freeze" inconsistent with the purpose of the act, the Board re-examined the legislative history and decided that the act required an initial craft unit, or craft severance, in *every* case where the prerequisites for separate representation are present.¹⁵ However, the NLRB announced that craft units would continue to be denied in those four industries in which they had previously been denied.¹⁶ The court in the principal case is the first court since the Board's about-face in the *American Potash* case to examine comprehensively and interpret section 9 (b) (2).¹⁷ The Fourth Circuit, like the Board in *National Tube*, found the section unambiguous. The court concluded that the new provision does not limit the NLRB's discretion; it simply precludes basing a decision upon a prior determination and commands the Board to

⁹ Note 1 *supra*.

¹⁰ Note 2 *supra*.

¹¹ Under the Wagner Act the Board had exercised broad discretion in determining the appropriate bargaining unit. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947).

¹² *Permanente Metals Corp.*, 89 N.L.R.B. 804 (1950) (aluminum industry); *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 1076 (1949) (lumbering industry); *Corn Products Refining Co.*, 80 N.L.R.B. 362 (1948) (wet milling industry). See also *Carbide & Chemical Co.*, 102 N.L.R.B. 1175 (1953) (a single chemical plant).

¹³ E.g., *Kellogg Co.*, 104 N.L.R.B. 302 (1953) (dry milling plant); *Ford Motor Co.*, 100 N.L.R.B. 813 (1952) (automobile engine plant).

¹⁴ Note 3 *supra*.

¹⁵ "In the view of the Board's majority [in *American Potash*], the Congressional intent requires that once the prerequisites for separate representation are present—*viz.*, true craft status of the group and traditional craft experience of the proposed representative—the Board must afford the group an opportunity to decide the issue of separate representation for itself." NLRB, NINETEENTH ANNUAL REPORT 39 (1955). Thus the Board decided that it would look at the employee group and their proposed representative, but would not attempt to balance this group's interest against those of management or the larger industrial group.

¹⁶ *American Potash & Chemical Co.*, note 3 *supra*, at 1422.

¹⁷ Previously, *Mueller Brass Co. v. NLRB*, (D.C. Cir. 1950) 180 F. (2d) 402, and *New Bedford Loomfixers' Union v. Alpert*, (D.C. Mass. 1953) 110 F. Supp. 723, had approved the interpretation of § 9 (b) (2) reached by the Board in *National Tube Co.*

examine in each case all relevant factors. This interpretation is strengthened by comparing the language of section 9 (b) (1), which expressly forbids a unit containing unwilling professionals, with that of section 9 (b) (2), which does not expressly preclude the inclusion in a unit of unwilling craft employees. Nevertheless, some ambiguity does arise upon an examination of the section's legislative history. The Senate¹⁸ committee's majority report states that the proviso is intended to leave "to the Board discretion to review all the facts in determining the appropriate unit. . . ."¹⁹ The minority views,²⁰ too, believed it desirable for the Board to have discretion in this area, but feared none was allowed by the precise language of section 9 (b) (2). In short, the entire committee agreed upon what the statute *should* say. Surely, even were the statute and its legislative history ambiguous, this common desire of the legislators should control.²¹ In fact, the Board itself might not deny that it was vested with this discretion, for in the principal case the Board contended, in an alternative argument, that the *American Potash* doctrine was merely the embodiment of this discretion into a rule which was designed to effectuate the Board's policy. The court, conceding that in some circumstances an agency may carry out a statutory mandate in this manner, nevertheless found the Board's rule not only arbitrary because two industries could be precisely similar in bargaining history and degree of integration and yet be treated differently, but also contrary to the commands of Congress because in dealing with four industries the Board's decisions are based solely upon past decisions in express defiance of section 9 (b) (2). Congress itself did not prescribe a rigid rule, for not only would it have been politically inexpedient to do so,²² but also the nature of the problem does not lend itself to legislative fiat.²³ Whether the NLRB will accept the Fourth Circuit's interpretation of section 9 (b) (2) and decide each case by an ad hoc exercise of its discretion²⁴ depends largely upon the Board itself, for it is not bound, at least in the other judicial circuits, by the court's decision. Moreover, there is a possibility that the Board could accept the court's interpretation, and yet

¹⁸ The present language of §9 (b) (2) originated in S. 360, 80th Cong., 1st sess., §9 (b) (2) (1947). H.R. 3020, as reported, 80th Cong., 1st sess., §9 (f) (2) (1947), unequivocally gave craft employees the absolute right to separate representation. In conference, this provision was dropped in favor of the Senate's.

¹⁹ S. Rep. 105, part 1, 80th Cong., 1st sess., p. 12 (1947), 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 418 (1948). Senator Taft, the author of this report, offered a similar explanation from the Senate floor: "It does not go the full way of giving them [craft employees] an absolute right in every case; it simply provides that the Board shall have discretion. . . ." 93 CONG. REC. 3836 (1947).

²⁰ Minority Views on S. 1126, S. Rep. 105, part 2, 80th Cong., 1st sess., pp. 1, 10 (1947), 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 463, 472 (1948).

²¹ For a fuller treatment of this legislative history, see Rathbun, "Taft-Hartley Act and Craft Union Bargaining Act," 59 YALE L.J. 1023 (1950).

²² *Id.* at 1033.

²³ See *Mueller Brass Co. v. NLRB*, note 17 *supra*.

²⁴ For a discussion of the important factors considered by the Board before *American Potash* to determine the appropriate bargaining unit, see *W. C. Hamilton & Sons*, 104 N.L.R.B. 627 (1953), dissenting opinion.

continue to reach substantially the same results as would have been reached under the *American Potash* doctrine. It was not the determination itself, but rather the use of an improper legal standard as the basis for the determination, which caused the court in the principal case to deny enforcement. Were the same result to be placed squarely upon policy considerations within the area of the Board's discretion, it would be virtually unassailable,²⁵ for such decisions must stand unless clearly arbitrary²⁶ or unsupported by "substantial evidence."²⁷ The Board should, however, accept and apply the spirit and philosophy of the principal case, for unit determination is important to—and because of—many competing interests.²⁸ Only by a careful case-by-case balancing of these interests can the cause of industrial harmony best be served.²⁹

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²⁵ Cf. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (SEC ruling reversed because it applied improper legal principles); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (same result affirmed where commission based decision on policy and experience).

²⁶ *NLRB v. Grace Co.*, (8th Cir. 1950) 184 F. (2d) 126 at 129; *NLRB v. Jones & Laughlin Steel Corp.*, note 11 *supra*.

²⁷ 61 Stat. 146 (1947), 29 U.S.C. (1958) §160 (e).

²⁸ See, generally, Rathbun, "Taft-Hartley Act and Craft Union Bargaining," 59 *YALE L.J.* 1023 at 1025 (1950).

²⁹ See, generally, Rathbun, "Taft-Hartley Act and Craft Union Bargaining," 59 *YALE L.J.* 1023 (1950); Cox, "Some Aspects of the Labor-Management Relations Act, 1947," 61 *HARV. L. REV.* 274 at 303-304 (1948); Hearings before the Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st sess., vol. 2, p. 1915 (1947) (testimony of Herzog, chairman of the NLRB).