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THE DURATION OF CERTIFICATIONS BY
THE NATIONAL LABOR RELATIONS BOARD AND
THE DOCTRINE OF ADMINISTRATIVE STABILITY*

Bernard Cushman†

The National Labor Relations Act* has recently celebrated its
tenth anniversary. A decade is a short time in the life of a statute
and the process of interpretation of an act which marked a new ap­
proach to labor relations problems is far from ended. In fashioning
the mosaic of statute and decision which constitutes the basic law for our
varied industrial communities, the National Labor Relations Board
has had to deal with difficult and diverse problems. Not the least im­
portant of these questions comprise those involving the duration of the
validity of its certifications.

The board in resolving such problems has had to maintain the
delicate balance between the twin statutory goals of freedom of em­
ployees to organize and the need for the promotion and maintenance
of industrial stability. In this connection, the board has evolved a
doctrine of administrative stability, a unique and important contribu­
tion to our labor law.

The act is silent as to the length of time a certification of an em­
ployees' representative by the board remains effective. Questions as
to the effective duration of certifications arise in two types of cases.

* The views expressed in this article are entirely those of the writer and nothing
herein is to be construed as representing the opinion of the Department of Labor.
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lative and Bureau Services Section of the Solicitor's Office, Department of Labor.
"Whenever a question affecting commerce arises concerning the representation of
employees, the Board may investigate such controversy and certify to the parties, in
writing, the name or names of the representatives that have been designated or selected.
In any such investigation, the Board shall provide for an appropriate hearing upon
due notice, either in conjunction with a proceeding under section 10 or otherwise, and
may take a secret ballot of employees, or utilize any other suitable method to ascertain
such representatives."
The validity of the certification may be questioned in unfair labor practice cases involving charges by a certified union to the effect that the employer has refused to bargain with it. Such issues may also be presented in proceedings for the investigation and certification of representatives.

I

UNFAIR LABOR PRACTICE CASES

Unfair labor practice cases involving the question of the duration of a certification likewise may be divided into two groups. The first class may be described as cases involving a loss of majority by the certified union subsequent to a refusal to bargain or to other unfair labor practices by an employer. The second class comprises cases in which the refusal to bargain occurs allegedly because of a loss of majority by the certified union subsequent to certification but prior to the date of the refusal to bargain.

At least since the case of *Franks Bros. Company v. NLRB* was decided by the Supreme Court, it seems well settled that where the loss of majority occurs after the date of the employer's refusal to bargain, the board's order that the employer bargain collectively with the certified representative is a valid exercise of administrative discretion. Under such circumstances, it is immaterial whether the union involved is one certified by the board prior to the refusal to bargain or one which demonstrated its majority at the time of the refusal to bargain by some other appropriate method.

In *Oughton v. NLRB* the court said:

"But, aside from the immateriality of an inquiry into a bargaining agent's status, except as already noted, where the agent's ma-

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8 Sec. 8 of the NLRA provides, inter alia, that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."  
5 (C.C.A. 3d, 1941) 118 F. (2d) 486, 118 F. (2d) 494 at 497.
The theory of the presumption of continuity of majority representation has been advanced in many court cases. In the Whittier Mills case, the board certified the union on November 1, 1937. The unfair labor practices found by the board took place in June and July of 1938, after there had been a material change due to a curtailment of operations in the composition of the bargaining unit found appropriate by the board. The respondent resisted the 8(5) order on the ground, inter alia, that certification was no longer valid in view of the changed circumstances. The court stated:

"The statute does not say how long a certificate of representation shall stand good. It is not intended to be ephemeral, nor should it be perpetual. On general principle, since it ascertains a status as existing, the presumption is that the status continues until shown to have ceased. The employer is, in theory at least, not much concerned, since the employees are to choose their representative unhindered. So long as the employees make no contention that they are not correctly represented, it would seem that the employer could safely continue to deal indefinitely with the designated bargaining agent. In the present case the employees have not protested at all, and the employer has raised the question belatedly. Assuming the question duly raised, the Board decided it adversely. There is no certain evidence that a majority of the present employees do not now desire representation by the Committee. . . . The present wishes of a majority of the employees are not established either way. The presumption of the continuance of the established status justifies the Board's finding that the Committee is still the representative designed and selected by the majority."  

In several early cases, the courts regarded the presumption of continuing majority status as a rebuttable one. The validity of the order to bargain was bottomed upon a failure of the employer to demonstrate

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7 (C.C.A. 5th, 1941) 111 F. (2d) 474.
that the union with which the employer was ordered to bargain was a minority union.

In Valley Mould and Iron Corp. v. NLRB, however, the court advanced the theory that the presumption was conclusive. The court was of the opinion that the board's certification is valid until set aside by the board itself or by the courts. The more recent cases have recognized the principle that a loss of majority due to unfair labor practices will not operate to overturn a representative freely selected by a majority of employees. The validity of the order to bargain is not to be sustained on a theory of presumption, however, but on the reasonableness of the board's exercise of its discretion in determining how the effects of unremedied unfair labor practices may be dissipated. In Franks Bros. Co. v. NLRB, the Court held that, upon a finding that the employer had unlawfully refused to bargain with the duly designated representative of his employees, the board could properly order him to bargain with that labor organization even though, after the refusal to bargain, the majority status of the organization had been lost due to normal personnel turnover. The Court stated that a bargaining relationship once legally established must be operative for a reasonable period and thus afforded a fair opportunity to succeed. The Court also pointed out that the policy of the act to promote collective bargaining would be defeated and the employer would profit from his own wrongdoing if he were allowed to question the continued majority status of the bargaining representative after his unlawful refusal to bargain.

The question as to the duration of the board's certification has been squarely presented in a group of cases wherein the employer has attempted to justify a refusal to bargain upon the theory of an uncoerced loss of majority occurring subsequent to the issuance of certification by the board, but prior to the refusal to bargain. In those cases both the board and the courts held that in the interests of sound administration the board's certification must be held to have a reasonable degree of durability, and that, at least for a reasonable period subsequent to certification, the duty to bargain on the part of the employer remains.

8 (C.C.A. 7th, 1940) 116 F. (2d) 760.
In *NLRB v. Appalachian Electric Power Co.*, approximately ten weeks after certification, a petition signed by the employees, indicating that a majority of the employees in the appropriate unit no longer desired the certified representative as their bargaining agent, was presented to the company. Thereafter, the company refused to bargain with the certified union on the ground that the union had lost its majority. The court stated:

"Accordingly, when the Board, after following the proper statutory procedure, has given certification to a unit, this certification must be honored by the company so long as it remains in force, at least for a reasonable time. To assume that the Board's certification speaks with certainty only for the day of its issuance and that a Company may, with impunity, at any time thereafter refuse to bargain collectively on the ground that a change of sentiment has divested the duly certified representative of its majority status would lead to litigious bedlam and judicial chaos."

The court further said:

"Since the Act does not prescribe the length of time for which any given certification shall remain valid, we accept the legal conclusion of the Board that the Company must recognize the certified representative for a reasonable period of time after the issuance of the certification, or until the certification is either set aside or replaced by an appropriate action of the Board in accord with the Act."

Similarly, in *NLRB v. Botany Worsted Mills*, a petition by a majority of the employees purporting to revoke prior authorizations of a certified union and presented to the employer approximately one week after certification was held to be insufficient ground to dissipate the validity of the board's certification. In *NLRB v. Century Oxford Mfg. Corp.*, a petition signed by a majority of the employees, stating that they no longer desired the union to represent them where the union had previously won a consent election, was held to be insufficient to undermine the validity of the result of the election conducted by the board. The petition was completed and presented to the employer.

10 (C.C.A. 4th, 1944) 140 F. (2d) 217.
11 Id. at 221.
12 Id. at 222.
shortly after the consent election was held. The board, in its decision found that the union's majority was not affected as a result of the consummation of the petition. The board said:

"Normally the administrative processes of the Act afford the best method of resolving doubts concerning employees' sentiment, once such sentiment has been tested in an election and a reasonable time has not since elapsed. Problems arising from alleged shifts of allegiance following Board elections are among the most difficult with which this Board is confronted. In considering such allegations, the Board must balance the advantages of stability in collective bargaining against the desirability of affording employees full freedom of choice of representatives. The Board has attempted to achieve a balance between these conflicting policies by refusing to entertain representation petitions within a reasonable period after an election, except where unusual circumstances intervene. Without such a rule, collective bargaining would be deprived of stability, and administrative determinations would become ephemeral. In a case such as this, where no such unusual circumstances are present, no reasonable doubt can be entertained concerning the continued efficacy of a certification."  

In the Matter of Grieder Machine Tool and Die Company approximately two months after certification, the respondent, during the course of negotiations with the certified union ceased negotiations because of a petition filed with the board by a rival union. The Regional Director for the Eighth Region refused to issue notice of hearing on the petition, and a subsequent appeal by the rival union was dismissed by the board. Negotiations were never resumed thereafter nor did either the respondent or the union communicate with each other. The Trial Examiner found that the respondent was under an absolute duty to bargain collectively with the union as the exclusive bargaining agent so long as the certification remained in effect. A majority of the board affirmed the Trial Examiner's findings.

The board's doctrine of administrative stability has been criticized by Justice Rutledge as vesting in a union rights overriding the freedom of choice guaranteed to employees under the National Labor Relations Act. In Medo Photo Supply Corp. v. NLRB, a majority of the em-

\[15\] 47 N.L.R.B. 835 at 846 (1943).
\[17\] 321 U.S. 678, 64 S. Ct. 830 (1944).
ployees in a small business establishment had designated a collective bargaining representative. Shortly thereafter, and before any agreement had been reached between the representative and the employer, a majority of the individual employees in the unit, without revoking the designation of the union as their representative, requested the employer to bargain directly with them as a group. The board and the Court, Justice Rutledge dissenting, found that the employer’s acquiescence in this request constituted a refusal to bargain.

Justice Rutledge felt that employees were entitled to change or dismiss their representative whenever they desired to do so. He suggested that a limitation might be imposed on this freedom with reference to large units in the interest of industrial stability because of the difficulty of ascertaining in such situations whether a majority exists at any given time. He distinguished cases involving small units since majority status is ordinarily easily determinable in such establishments.

Justice Rutledge considers the designation of a union and bargaining agent as governed by common-law doctrines of agency. If this is true, it would, of course, follow that since the agency is not one coupled with an interest, the agency is revocable at will. Such a concept would seem to be totally inapplicable to the rapidly changing field of labor relations. Attempts to apply common-law concepts to that field have traditionally been ineffectual.

Historically, the trade union, as an institution, has developed along lines incompatible with common-law notions applicable to ordinary business relationships. The role of the labor organization in our evolving industrial community would appear to be more closely analogous to that of an elected public official rather than to that of the familiar commercial representative. Generally speaking, a collective bargaining agreement, if for a reasonable duration, fixes the term of office and operates as the statutory law governing the industrial relationship in a particular plant for a given period of time. Frequently, a public official’s constituents become dissatisfied with his conduct in office.

See, for example, the recent reversal of the Maryland Drydock decision, 49 N.L.R.B. 733 (1943), holding that foremen could not constitute appropriate collective bargaining units. Matter of Packard Motor Co., 61 N.L.R.B. 4 (1945). The attempt in the Maryland Drydock case to apply common-law doctrines applicable to the trustee-beneficiary relationship to the employee-employer relationship resulted in widespread work-stoppages and, as a practical matter, failed to stem increased organizational efforts on the part of foremen.

The legislative history of the political analogy and the development of the principle of majority rule under the NLRA are discussed in a recent article, Weyand, “Majority Rule in Collective Bargaining,” 45 Col. L. Rev. 556 (1945).
Nevertheless, in the absence of impeachment or a statute permitting recall, the incumbent, in the interest of administrative stability, has, under our American system, been expected to complete his term of office. Similar considerations would seem to require that once a bargaining representative has been duly designated, that designation, except in extraordinary circumstances, must, in the interest of stability, remain operative for a reasonable period of time and cannot be revoked at every whimsy of the electorate.

The function of the union has been described as legislative.\(^2^0\) The National Labor Relations Act was designed to encourage collective bargaining as well as to protect individual freedom of choice. Clearly, collective bargaining would be rendered ineffectual if the majority status of a recently certified union were to be subject to daily scrutiny by an employer. Legal concepts rooted in an era of emerging capitalism with its numerous small individual employer-units have little application to the collective employer-employee relationship as it exists today in giant modern corporate establishments employing large numbers of persons.

It is true, of course, that employees should be substantially as free to abandon a labor organization as they are to join it. But freedom of choice does not postulate the indulgence of every caprice which an employee may entertain. Labor law must be adapted to the dynamic structure of industrial relationship. The board has recognized that the right to change representatives is not an unqualified one. Successful application of the principles of industrial democracy guaranteed in the act require that the choice of a representative carry with it a degree of durability. The right to recall the statutory representative may properly be suspended for a reasonable period. The price of freedom to bargain collectively is responsibility in the exercise of the privilege of choice.

Majority status may change from day to day in a particular company due to fluctuations in employment. Without a degree of durability, a collective bargaining relationship cannot operate successfully. And this would seem to be as true of small establishments as of large ones. Accordingly, unless the defection from the union encompasses virtually the entire membership of the union, the NLRB has refused to direct an election during the life of an agreement for a reasonable period of time and cannot be revoked at every whimsy of the electorate.

term. Where, however, almost the entire membership of the union has transferred to a rival union so that the administration of industrial government has broken down completely, the board has directed an election.21 This theory, in substance, recognizes the fact of revolution in the industrial community. In such a context the stability induced by the application of the doctrine would be illusory. The revolutionary impulse induced by the virtually complete switch of affiliation, in the absence of an orderly avenue for realization, might well express itself through the medium of the strike, a result the act was intended to obviate.22

Insofar as a loss of majority is concerned, the board has distinguished between the effect to be given to the act of voluntary recognition of a labor organization by an employer as the exclusive bargaining representative of his employees and the effect to be given to a certification of a bargaining representative by the board. In Matter of Joe Hearin, Lumber,28 the board held that a loss of majority subsequent to


22 The NLRB has refused to entertain a "no-union" petition. Matter of Tabardrey Manufacturing Company, 51 N.L.R.B. 246 (1943). The board rested its decision on the ground that the act makes no provision for an employee petition for decertification. Despite a lack of express statutory authority, the board has permitted an employer, however, to interplead two rival unions through the medium of a representation petition where each union has claimed bargaining rights. NLRB, RULES AND REGULATIONS, Series 3, as amended, art. III, sec. 1, 2 (b) (1944). By refusing to permit employees to petition the board for a revocation of an existing certification the board has, in effect, construed the act in favor of the retention of collective bargaining. The result has been, of course, to favor union organization and to render difficult the abandonment of a union. Presumably, the board regards the absence of organization as a state of industrial anarchy and will refuse to recognize revolution resulting in the absence of industrial government.

28 66 N.L.R.B., No. 150 (March 28, 1946); affirmed, Supplemental Decision, Matter of Joe Hearin, Lumber, 68 N.L.R.B., No. 21 (May 21, 1946). The Regional Director, after he conducts a cross-check showing that the union involved has been designated by a majority of the employees in an agreed unit, posts notices to that effect on the employer's premises for a period of five days during which the employees or any interested party can show cause to the Regional Director why he should not issue a Report on Cross Check finding that the union has been designated as the
recognition of a union based upon a card check conducted by an NLRB official demonstrating that the union had been designated as their representative by a majority of the employees in an agreed unit, excused a refusal to bargain by the employer even though the refusal to bargain took place less than four months from the date of the card check. The board stated that a card check did not represent as valid an indication of the employees' true desire with respect to representation as does an election conducted by secret ballot under the auspices of the board.

It might be contended that the exercise of choice through the medium of a secret ballot affords guarantees of integrity of selection not present in other methods of union designation. On the other hand, an employer's voluntary recognition of a union is presumably legitimate. To give greater weight to certification in the absence of any evidence of unlawful assistance, would place a premium on resort to the administrative processes of the act and would discourage voluntary recognition. Industrial stability is as desirable in cases of voluntary recognition as in cases of certification. The doctrine of administrative stability has equally great usefulness in situations involving voluntary recognition. The National War Labor Board has given the same effect to employer recognition as it has to certification. That position, in the absence of any suggestion of unfair labor practices, seems to reflect the better view.

II

REPRESENTATION CASES

The doctrine of administrative stability has its most varied applications in representation cases. In many cases the certified bargaining agent has entered into a contract with the employer covering the employees whom a rival labor organization seeks to represent. In such situations the board has attempted to balance the conflicting interests of employees and the public in maintaining the stability of relationships previously established by collective bargaining contracts and the inter-

exclusive representative of the employees in the unit. If the Regional Director, at the conclusion of the five-day period, is of the opinion that no valid cause to the contrary has been shown and issues such a Report, no distinction will be made between the effect to be given to a certification and the effect to be given to a Regional Director's Report. This procedure was not followed in the Hearin case.

25 Hook Motor Lines, No. 111-4734-D (Sept. 9, 1944); Steffens Ice & Ice Cream Co., No. 111-1568-D (Feb. 11, 1944) (both unreported).
est in the freedom of employees to change their representatives whenever they choose to do so.  

The board has said that its certifications will be considered operative for a reasonable time, usually one year. In representation cases, it has been the board's general practice to dismiss petitions where substantially less than a year has elapsed since the issuance of certification by the board or since the execution of a contract with a certified union covering the employees sought to be represented by a petitioning rival organization. A review of the board's decisions demonstrates the so-called one year rule is in reality a yardstick rather than a fixed rule of procedure. As in comparable situations in other fields of law, what is a reasonable time is to be determined on the basis of the facts of the particular case. However, the board's holdings indicate certain rules of decision evolved by the agency which may be applied to particular types of cases.

A. Cases in which a Certification is Operative for a Period of Longer than One Year. Where a written contract has been entered into between an employer and a labor organization which is for a reasonable term, the board will not disturb the status of the certified union during the life of the contract. Accordingly, where the contracting union has been certified prior to the execution of the original contract, the certification is, as a practical matter, effective for a period of more


27 Matter of Aluminum Company of America, Newark Works, 57 N.L.R.B. 913 (1944); Matter of Bohn Aluminum and Brass Corporation, 57 N.L.R.B. 1684 (1944) (the board refused to direct an election on petition of rival organizations, approximately four and one half months after certification although all employees in the unit had notified the company they had withdrawn their membership in the certified organization); Matter of Aluminum Company of America, 52 N.L.R.B. 1040 (1943); National Labor Relations Board, Fifth Annual Report 55 (1940).

than one year. Likewise, a written agreement renewed for a further
term as a result of the operation of an automatic renewal clause, in the
absence of a claim by a rival union, asserted prior to the date of auto-
matic renewal, will be treated as a new agreement.

If it is the custom in a particular industry to make long-term con-
tracts, an agreement for a longer period than one year will be held a
bar to a representation petition filed one year after the execution of a
contract.

In order to operate as a bar to an election, an agreement must be
in writing, grant recognition to the contracting union as exclusive bar-

29 The board has stated that ordinarily the certified union has a one year period
in which to negotiate an agreement, and has held that a contract executed ten months
after certification, and subsequent to the filing of a representation petition by a rival
union, is a bar to a direction of election for the contract term. Matter of Con P.
effect is Matter of Omaha Packing Company, 67 N.L.R.B., No. 40 (April 12, 1946),
where a contract for a term of approximately fifteen months entered into between the
employer and the certified union about nine months after certification was held a bar
to a direction of election.

28 Matter of Marvel-Schebler Division Borg-Warner Corporation, 56 N.L.R.B.
105 (1944); Matter of The Cleveland Container Company, 47 N.L.R.B. 1309
(1943); Matter of North Range Mining Co., 47 N.L.R.B. 1306 (1943); Matter of
Mill B, Inc., 40 N.L.R.B. 346 (1942). Recently the board has held that the mere
informal assertion of a claim of majority representation ordinarily will not be sufficient
to prevent the operation of an automatic renewal clause in an existing valid contract
as a bar to a determination of representatives. The automatic renewal will not be
deemed effective, however, if within ten days of the assertion of a claim of majority
representation prior to the automatic renewal of the contract, a formal representa-
tion petition is filed with the board. Matter of Henry and Allen, Inc., 68 N.L.R.B., No.
121 (April 30, 1946), the board departed from its former practice of according equal
weight to informal claims and informal petitions in determining whether subsequently
executed agreements constitute a bar to a direction of election, holding that when a
petition is filed more than ten days after the assertion of a bare claim, and no extenu-
ating circumstances appear, an otherwise valid agreement which is executed in the
interval will bar a determination of representatives.

23 Matter of Ball Brothers Company, 54 N.L.R.B. 1512 (1944); Matter of
Daniel Burkhardtmeier Cooperage Co., 49 N.L.R.B. 428 (1943); Matter of Joseph
P. Cattie and Brothers, Inc., 47 N.L.R.B. 81 (1943); Matter of Eicor, Inc., 46
N.L.R.B. 1035 (1943).

22 Matter of Crescent Bed Co., Inc., 29 N.L.R.B. 34 (1941); Matter of Pressed
Steel Car Company, Inc., 7 N.L.R.B. 1099 (1938); Matter of Santa Fe Trails
Transportation Co., 7 N.L.R.B. 358 (1938); Matter of Unit Cast Corporation, 7
N.L.R.B. 129 (1938); Matter of Diamond Iron Works, 6 N.L.R.B. 94 (1938);
Matter of City Auto Stamping Company, 3 N.L.R.B. 366 (1937); Matter of General
Mills, Inc., 3 N.L.R.B. 730 (1937); Matter of Northrop Corporation, 3 N.L.R.B.
228 (1937); Matter of Pennsylvania Greyhound Lines, 3 N.L.R.B. 622 at 640
(1937).
gaining agent, provide for substantive terms covering conditions of employment, and cover an appropriate unit.

The board's recognition of the significance of the inauguration of wartime controls has occasionally resulted in the extension of the usual one-year rule. Where a newly recognized or certified collective bargaining agent has failed to obtain an initial contract because of the necessity of securing approval or determination of the National War Labor Board with respect to important terms of the contract, the board has refused to entertain a representation petition from a rival organization. This has been true, even though the circumstances are such that in peacetime the board normally would direct an election.

In Matter of Allis-Chalmers Manufacturing Company, shortly after a C.I.O. union won a consent election, the company and the union adopted an agreement between the company and a prior bargaining representative until such time as a new agreement was negotiated and executed by the parties. The parties reached agreement on some issues but not on others. The issues on which the parties could not reach an agreement had been submitted to the National War Labor Board for determination in connection with disputes between the C.I.O. and the company at other plants of the company. The parties in the instant case agreed in writing to accept in principle the War Labor Board rulings on the disputed issues. Shortly before the War Labor Board issued its final directive order in these cases, a rival union filed a petition for certification with the NLRB. The parties soon after receipt of the War Labor Board order executed a contract for one year embodying, in substance, the War Labor Board's decision on the disputed issues. The NLRB held that the contract thus executed was a bar to a new determination of representatives although well over a year had elapsed since the parties had entered into a contractual relationship and almost two years had expired since the holding of the election. The board dismissed the rival union's petition for an election stating: 


50 N.L.R.B. 306 (1943).

Id. at 312. The board has applied the Allis-Chalmers doctrine in the following cases: Matter of Wentworth Bus Lines, Inc., 64 N.L.R.B. 65 (1945); Matter of
... Under the circumstances of this case we are of the opinion that it would not effectuate the policies of the Act to order an election at the present time. Such an election might serve to negate the proceedings of the War Labor Board, require new proceedings before that Board, and create uncertainty and unsettled bargaining conditions for an additional indeterminate period. From the standpoint of stable labor relations, it is undesirable to penalize a certified bargaining representative for unavoidable delays consequent upon its voluntary acceptance of orderly procedures established by governmental authority for the adjustment of differences with an employer. To charge a certified bargaining representative with such delays would have the effect of discouraging resort to such orderly procedures and promoting industrial strife and unrest which the Act was designed to avoid."

Subsequent decisions of the board make it clear, however, that the Allis-Chalmers doctrine will not be extended by the board to every case in which proceedings are pending before the War Labor Board involving a dispute between a previously recognized or certified union. Where the recognized or certified union has in fact enjoyed the benefits of exclusive representation for a reasonable period of time the board will entertain an appropriate representation petition. The mere fact that a proceeding is pending before the War Labor Board in which an intervening union is concerned is not sufficient to bar a new determination of representatives. The Allis-Chalmers doctrine applies only when the organization involved in War Labor Board proceedings is newly recognized or newly certified.

B. Cases in which a Certification is Effective for a Period of Less than One Year. Where the contracting or certified union has formally dissolved subsequent to the issuance of certification or the execution of


the contract, or where, due to the existence of a schism in the union or the defection of substantially the entire membership the continued existence or the identity of the union was in doubt, the board has directed elections.\textsuperscript{41} The board has, likewise, directed an election where, during the life of a contract for a reasonable term, the contracting union has become defunct.\textsuperscript{42}

The requirements of the war emergency necessarily have quickened the ordinary process of industrial expansion. The advent of the war economy compelled the rapid construction and expansion of industrial establishments. The manpower requirements of these new or expanded plants were filled by the gradual acquisition of a working force. The question arose as to the period at which the board would permit elections to be held in these so-called expanding unit situations. In such circumstances, the board was required to decide whether to proceed to a determination of representatives prior to the time a full complement of employees is hired so that the employees already at work might immediately enjoy the benefits of the collective bargaining procedures provided by the NLRA or to postpone for an indefinite period the holding of an election and deny to a large group of employees the rights guaranteed in the act. A correlative problem posed by the ex-


\textsuperscript{42} Matter of Black-Clawson Company, 63 N.L.R.B. 773 (1945); Matter of The Swartwout Company, 61 N.L.R.B. 832 (1945); Matter of Container Corporation of America, 61 N.L.R.B. 823 (1945); Matter of Vulcan Corporation, 58 N.L.R.B. 733 (1944); Matter of Sunshine Mining Company, 48 N.L.R.B. 301 (1943); Matter of Precision Casting Co., Inc., 48 N.L.R.B. 835 (1943). In Matter of Helena Rubenstein, Inc., 47 N.L.R.B. 435 (1943), on July 27, 1942 the board issued an order requiring the employer to bargain with a local of the United Mine Workers, District 50. In September, 1942 the local became defunct. On February 11, 1943 the board directed an election on petition of a C.I.O. union and stated that, under the circumstances, the order to bargain was no longer operative.
panding unit was the question as to the period for which a certification issued under these circumstances should be considered as operative.

Where a substantial and representative group of employees was presently employed and the circumstances were such that a refusal to hold an election would unduly delay collective bargaining for such employees, the board has proceeded to an immediate determination of representatives but has provided that under appropriate circumstances it would entertain a representation petition within less than one year after certification. In Matter of Aluminum Company of America, the company had in its employ at the time of the hearing approximately 30 per cent of its anticipated full complement of employees. It was expected that the full complement of employees would be reached in about seven months after the hearing. The board ordered an election. The evidence revealed that 50 per cent of the quota might not be reached for two or more months after the issuance of the decision. The board stated that:

"... Accordingly, we shall entertain a new representation petition affecting the employees involved herein within a period less than 1 year, but not before the expiration of 6 months, from the date of any certification which we may issue in the instant proceedings, upon proof (1) that the number of employees in the appropriate unit is more than double the number of employees eligible to vote in the election hereinafter directed; and (2) that the petitioning labor organization represents a substantial number of employees in the expanded unit."

Where, however, the company has in its employ approximately one-half of the contemplated full roster, the board has certified the


The board has also taken cognizance of the requirements of the reconversion period and has entertained a representation petition filed less than one year after issuance of a certification when it has been demonstrated that an employer's operations as a result of the transition from war to civilian production have been materially changed and there has been a substantial reduction in personnel. Matter of Electric Sprayit Company, 67 N.L.R.B., No. 101 (April 25, 1946) (Board Member Houston dissenting); Matter of American Radiator and Standard Sanitary Corp., 67 N.L.R.B., No. 147 (May 3, 1946); Matter of M. P. Mollar, Inc., 56 N.L.R.B. 16 (1944).

44 52 N.L.R.B. 1040 (1943).
45 Id. at 1046, 1047 (1943).
designated union without any limitation of the so-called one year rule. 46

III
THE EFFECT OF A DIRECTION OF ELECTION UPON AN EXISTING CERTIFICATION

The board recently has considered the problem of the application of the doctrine of administrative stability to situations in which an election is directed upon petition of a rival union at or near the expiration of a contract between a certified union and the employer. 47

In Matter of Phelps Dodge Copper Products Corporation, Habirshaw Cable and Wire Division, 48 an American Federation of Labor union was certified by NLRB on February 4, 1941. Thereafter, the employer and the union executed two successive contracts containing, inter alia, maintenance of membership provisions.

Approximately two months prior to the expiration date of the second contract a C.I.O. union filed a representation petition with the NLRB. Immediately prior to the expiration date of the contract the board directed an election. The board found that upon the expiration date of the contract with the A.F. of L. union, the substantive provisions of the agreement, as well as the grievance machinery provided in the contract, were tacitly continued in effect pending the outcome of the election proceeding. The employer continued to deal with the A.F. of L. with reference to grievances during the pre-election period in accordance with the established grievance procedure. The board found, however, that the C.I.O. had never requested an opportunity to take up grievances with management in behalf of its adherents and was never denied that privilege. The board was of the opinion that, under these circumstances, there was nothing in the employer's conduct in dealing with the A.F. of L. concerning grievances that was inconsistent with the provisions of the act.

The board went on to say, however, that: 49

"... We are of the opinion that if, during the pendency of an


47 The effect of the issuance of a board certification upon the legal status of a contract between the employer and a rival union is a question which is not within the scope of this article.


49 17 LAB. REL. REP. 48 at 49 (1945). The statement is obiter for the question of extension of contract as an unfair labor practice was not raised before the board.
election directed by the Board to resolve a question concerning representation, an employer extends or renews an existing contract with a labor organization, or makes a new one, he violates the Act insofar as that organization is accorded recognition as exclusive bargaining representative or employees are required to become or remain members thereof as a condition of employment."

In the course of the Phelps-Dodge opinion the board had to consider three problems: (1) whether, during the pendency of an election directed by the board, it is proper for an employer to extend the terms of an expiring contract pending the outcome of the representation proceeding; (2) the extent to which, under such circumstances, an employer may treat, concerning grievances, with either or both of two competing unions; (3) whether, under similar circumstances, it is permissible for an employer to extend a union security provision of an expiring contract pending the determination of the representation question.

A. Extension of Contracts during the Pendency of a Representation Proceeding. The board made it clear that it considered that an employer who, subsequent to a direction of election among rival unions, extends an expiring contract calling for exclusive recognition of one of the rival unions until the representation question is determined by the board is guilty of an unfair labor practice. In support of its holding the board referred to three cases previously decided by it: Matter of Elastic Stop Nut Corporation,50 Matter of Keystone Steel and Wire Company,51 and Matter of John Engelhorn and Sons.52

In the Engelhorn case the employer had been in contractual relationship with an A.F. of L. union. The contract expired. A rival C.I.O. union filed a representation petition with NLRB. Thereafter, and prior to the determination of the representation question, the employer and the A.F. of L. union executed a new agreement, providing for a closed shop, for a one year term. The board found that the execution of the agreement in the face of a pending representation petition constituted, per se, a violation of section 8(1) of the act.53 The board

53 Sec. 8 provides, in part, that it is unfair labor practice for an employer "1. To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7."
also found, however, that the employer had unlawfully assisted the A.F. of L. union prior to the execution of the agreement through the medium of statements by supervisors to employees indicating the employer’s preference for the A.F. of L. as bargaining agent. The board found that a contract made under these circumstances was subject to the board’s determination in the representation proceeding and set it aside.

The Circuit Court of Appeals for the Third Circuit enforced the board’s order but specifically left open the question as to whether the execution of the agreement in the face of a prevailing representation petition constituted an independent violation of the act. The board’s order and finding of violation of section 8(1) could be sustained, of course, on the basis of the violations of section 8(1) presented by the supervisors’ statements in favor of the A.F. of L. The finding that the execution of a contract with a union previously certified by the board in the face of a petition for certification filed by a rival union is in itself an unfair labor practice seems a doubtful result.

The board has said that a neutral employer, upon being confronted with conflicting representation claims by two rival unions, “would not negotiate a contract with one of them until its right to be recognized as the collective bargaining representative had been finally determined under the procedures set up under the Act.”54 That statement, however, appears to be too broad. Where there has been no contractual relationship with either of two unions and the employer in the face of an assertion of majority status by each chooses to execute a contract with one of these unions he clearly indicates to the employees his preference. Where, however, the employer has had contractual relations with a union which possesses a board certification it is a fair inference that he is following an apparently appropriate course of action in dealing with a union which still holds the statutory indicia of majority status. The mere filing of a petition by a rival labor organization should not, under these circumstances, operate to divest the certification of all effect. A contrary ruling affords the petitioning union a very real advantage in any struggle for employee favor.

The petitioner can make capital by using campaign propaganda pointing to its rival’s inability to obtain a contract from the employer. In addition, the board’s holding encourages the filing of frivolous pe-

tions and consequently promotes instability. It would appear to be sufficient to regard the contract as defeasible if the board directs an election and the petitioning union is certified as the winner of such an election.\footnote{Cf. Matter of Walgreen Company, 44 N.L.R.B. 1200 (1942).}

In the \textit{Elastic Stop Nut Corporation} case, where there was no previous bargaining history with either of two rival unions each of which was attempting to organize the company's employees, the employer's execution of a contract with one of the two unions was held by the board to constitute a violation of section 8(1) of the act.

In the \textit{Keystone Steel and Wire} case, the board found that the execution of a contract with an illegal successor to a company-dominated union in the face of a claim of majority representation by another union was violative of the act. In this case, the contracting union was an unlawful organization and the contract was illegal in any event since made with an assisted labor organization.\footnote{NLRB v. Electric Vacuum Cleaner Co., Inc., 315 U.S. 685, 62 S. Ct. 846 (1942); NLRB v. Premo Pharmaceutical Laboratories, Inc., (C.C.A. 2d, 1943) 136 F. (2d) 85; Louis F. Cassoff doing business as Central Paint and Varnish Works, 43 N.L.R.B. 1193 (1942), enforced in NLRB v. Louis F. Cassoff doing business as Central Paint and Varnish Works, (C.C.A. 2d, 1943) 139 F. (2d) 397; Matter of Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727 (1939) enforced, as modified, in Eagle-Picher Mining & Smelting Co. v. NLRB, (C.C.A. 8th, 1941) 119 F. (2d) 903.}

In none of these cases were the contracts held invalid by the board limited in duration to the determination of a representation proceeding. These contracts were, in fact, for either a one-year period or of indefinite duration.

It is accepted practice for the parties to a collective agreement to extend the terms of the expired agreement pending the outcome of negotiations. The National War Labor Board in numerous cases has issued interim orders extending the terms of the expiring agreements between the parties pending the resolution of the dispute before the board. The National War Labor Board has followed this practice in cases in which representation proceedings were pending before the NLRB. In such cases, the War Labor Board normally has made its interim order subject to the outcome of the NLRB proceeding.\footnote{In re Montgomery Ward & Co., 13 War Lab. Rep. 454 (1944); United States Automatic Transp. Co., Case No. 2570—CSD (Dec. 14, 1944) (unreported); Western Union Telegraph Co., 13 War Lab. Rep. 297 (1943); Lamson & Sessions Co., 8 War Lab. Rep. 295 (1943).}
of extension agreements contributes to the maintenance of industrial peace. In the National Carbon Co. case, Public Member, later Chairman, Taylor speaking for the board said:

"It has become increasingly evident that lack of contractual relationship between employers and employees defining wages, hours, and working conditions in the interim pending the completion of a new contract, creates a feeling of uncertainty on the part of employees which adversely affects production and harmonious relations within the plant. Experience has demonstrated, furthermore, that this uncertainty reflects itself in the atmosphere of collective bargaining and lessens the chances for a peaceful and speedy disposition of issues in dispute. For these reasons, the Board believes that as a general rule the status quo at the expiration date of a collective bargaining agreement should be maintained pending the completion of a new agreement of final settlement of any issues in dispute. This policy reflects the consistent attitude of governmental authorities in similar situations and is identical with the procedure voluntarily adopted by many employers as a means of maintaining stable and harmonious relations with responsible unions which represent their employees in collective bargaining.

By following this policy the Board does not prejudge contests over such matters as majority status or union responsibility but merely postpones final argument and decision thereon until after the case has been fully argued on the merits before a panel or other instrumentality of the Board. The policy of the Board, as thus outlined, corresponds with the traditional practice of our courts to maintain the status quo of the subject matter in dispute pending a final determination of the case on its merits." 58

It has become increasingly clear that the establishment of a collective bargaining relationship results in the institution of a form of industrial government for the particular industrial community. That the act was intended to promote industrial peace by the establishment of industrial democracy cannot be doubted. 59 With reference to each industrial community, the collective agreement becomes the basic law,

59 The Fourth Circuit Court of Appeals has stated, "The establishment of such industrial democracy is the avowed purpose of the National Labor Relations Act, which declares it to be in the public interest because of its tendency to preserve industrial peace and prevent interference with interstate commerce." NLRB v. Standard Lime & Stone Co., (C.C.A. 4th, 1945) 149 F. (2d) 435 at 438, cert. denied, 326 U.S. 723, 66 S. Ct. 28 (1945).
the constitution by which the community is governed.\textsuperscript{60} The Circuit Court of Appeals for the Fourth Circuit has said, "The purpose of the written trade agreement is, not primarily to reduce to writing settlements of past differences, but to provide a statement of principles and rules for the orderly government of the employer-employee relationship in the future. . . . it provides a framework within which the process of collective bargaining may be carried on."\textsuperscript{61} The Supreme Court has had occasion to point out the effective contribution to industrial stability resulting from the existence of a written trade agreement.\textsuperscript{62} The National Labor Relations Board likewise has recognized the importance of stability in industrial government. Considerations of the desirability of promoting stability have led the board to refuse to entertain a representation petition where the petitioning union's claim for recognition was asserted after an automatic renewal clause in a collective agreement with a rival union had become operative, even though the claim was made prior to the anniversary date of an agreement which had already been in effect for substantially a one-year period.\textsuperscript{63}

As indicated elsewhere in this article,\textsuperscript{64} the board has developed a doctrine of administrative stability in accordance with which it normally has refused to consider a certification of less than one year's duration as inoperative despite an uncoerced loss of majority by the certified union.

\textsuperscript{60} "The trade agreement . . . is a written constitution of a new type of government, an industrial government, established by bargaining as an organized group . . . The industrial government envisaged by unionism was a highly integrated government of unionized workers and of associated employer-managers, jointly conducting the government with 'laws' mandatory upon the individual employer and employee." \textsc{Perlman and Taft, History of Labor in the United States, 1896-1932, p. 10 (1935)}; "The collective agreements are in effect industrial constitutions and laws adopted by carriers and their employees for the government of their joint relations . . ." \textsc{The Railway Labor Act and the National Mediation Board 43, (1940)}.

\textsuperscript{61} \textit{NLRB v. Highland Park Mfg. Co.}, (C.C.A. 4th, 1940) 110 F. (2d) 632 at 638.

\textsuperscript{62} \textit{H. J. Heinz Co. v. NLRB}, 311 U.S. 514 61 S. Ct. 320 (1941). The National Mediation Board has commented that: "The absence of strikes on the railroads and air lines is to be explained primarily not so much by the mediation machinery of the Railway Labor Act, as by the existence of these collective labor agreements, for, while they are in existence, these contracts provide orderly, legal processes of settling all labor disputes as a substitute for strikes and industrial warfare. . . ." \textsc{The Railway Labor Act and the National Mediation Board 43 (1940)}.

\textsuperscript{63} \textit{Matter of Mill B., Inc.}, 40 N.L.R.B. 346 (1942). The board pointed out that the prevention of a hiatus between contracts tended to promote industrial stability.

\textsuperscript{64} Supra, part I.
The average lapse of time between a direction of election and the issuance of a certification is approximately thirty days. The board's concept of a thirty day period of industrial anarchy seems inconsistent with the doctrine advanced in Matter of Tabardrey Manufacturing Company. There the board's refusal to entertain a petition by a substantial number of employees requesting that the existing statutory representative be decertified appears to have been predicated on the notion that the act was intended to favor the growth of collective bargaining. If that viewpoint is sound, the adoption of a practice which results in the absence of collective bargaining, even for a limited period, is at odds, not only with the history and purpose of the act, but also with sound industrial relations practice.

The upshot of the board's ruling in the Phelps-Dodge case is to make for a period of industrial anarchy. For approximately thirty days the industrial community is without its basic law. Thirty days is a substantial period in the life of an industrial establishment. In the light of the history of the act, and the extensive application of the concept of administrative stability in cases involving automatic renewal contracts and in other situations, the creation of a hiatus in industrial relations of such extent seems doubtful practice.

Moreover, it is the usual practice of the NLRB to direct an election on a prima facie showing by a petitioning union of designation as
bargaining agent by 30 per cent or more of the employees composing the bargaining unit. The petitioning union may, and frequently does, lose in the subsequent election. The board apparently regards a certification as impliedly revoked when a direction of election is issued. That doctrine seems unrealistic, however, for the previously certified union may well retain its majority status. A 30 per cent showing is, in fact, a minority showing. The ordinary rule of law is that a state of things once found to exist is presumed to continue. In the railroad industry which is subject to the provisions of the Railway Labor Act, the parties operate under the contract with the contracting union throughout the pre-election period. The National Mediation Board has held that if the rival union wins the election it must assume the existing contract. To hold that the certified union's majority may be presumed to have been lost on a showing by a rival union that it is now a minority union is illogical.

On the other hand, it might be contended that the board's holding that a direction of election impliedly revokes a previous certification insures attainment of the statutory goal of freedom of choice of a representative. In support of this view, it might be said that the act of an employer in continuing to deal with the contracting union may fairly be regarded as indicating to the employees the employer's preference for dealing with the contracting union.

This concept may properly be regarded as unrealistic. Where there has been no bargaining history and the employer chooses to deal with one of two or more rival labor organizations, the inference is clear as to the employer's wishes. Where, however, an employer has contracted with a union certified by the board and merely extends the contract pending the outcome of an election, the inference, as in the case of contracts executed after the filing of a petition, is at least as strong to the effect that the employer is pursuing a normal course of

67 An unpublished study by the board's staff indicates that in elections ordered for the fiscal years 1941 and 1942 in cases involving two unions and where the petitioner's rival was a party to a previously executed contract, the petitioner won 72 per cent of the elections ordered in non-closed shop cases and 46 per cent in closed shop cases.


69 The Railway Labor Act and the National Mediation Board 19 (1940). The National Mediation Board requires a minimum showing of designation by at least 50 per cent of the potential voting eligibles. Tenth Annual Report of the National Mediation Board 6 (1945).
action in dealing with an organization which still wears the trappings of office in the form of a board certification.

The advantage accruing to the "in-union" under these circumstances is slight. In political elections it is generally thought that the administration has an advantage in attracting the support of the voter accruing from the fact of its incumbency. The governmental analogy has been applied to the administration of a trade agreement. It seems clear that the desirability of preserving stability in the administration of labor relations at a particular plant or establishment during the heated pre-election period outweighs the desirability of insulating the employees against conduct having a doubtful tendency to influence them in the choice of their bargaining representative during the pre-election period. And it may be doubted that employees are more likely to be influenced in the selection of a bargaining agency by this temporary extension of a collective bargaining relationship than is the case in the retention of a particular individual in office pending the selection of a government official in political elections.

If, however, the employer makes an entirely new contract with the certified organization containing more favorable terms and conditions of employment than were contained in the expired agreement, the employer's conduct is susceptible of an inference that he is intending to impress the employees with the efficacy of the contracting union as a bargaining agent. Such conduct may properly be condemned as antithetical to obligations of neutrality imposed by the pendency of an NLRB election. 70

Once the board has directed an election, the problem as to the extension of the expired contract for a period extending beyond the date of determination of the pending representation question is not free from difficulty. Such conduct may be said to extend beyond the area of action indicating solely a desire for the preservation of continuity and stability in industrial relations pending a determination of employee choice of representatives. In such situations, the employer, by extending the contract for a full year or indefinitely, evidences a continuing preference for the contracting union as bargaining agent. Under those circumstances, the employer's conduct may properly be held violative of the act.

B. The Effect of a Direction of Election upon Grievance Repre-

sentation. It seems clear from the board's decision in the Phelps-Dodge case that, for the period during which a board directed election is pending, an employer must, with reference to grievances, deal with each of the rival unions as the representative of its adherents, or deal with neither. Assuming, however, that the board's holdings concerning the effect of the extension of collective bargaining agreements during the pending of representation proceedings are correct, the question as to the propriety of exclusive grievance representation by the certified union during the pre-election period must, nevertheless, be considered.

The importance of an efficiently functioning grievance machinery to good labor relations has often been recognized. Strikes frequently are motivated by the dilatory handling of grievances by employers.

It is often the function of the grievance procedure to resolve disputes concerning the application and interpretation of a collective bargaining agreement. In industries where the provisions of the agreement are customarily comprehensive and detailed, the most important use of the grievance procedure is its value as a technique for interpretation of the agreement. In such industries the grievance procedure

71 SETTLING PLANT GRIEVANCES, U.S. Dept. of Labor, Division of Labor Standards, Bull. No. 60, p. 1 (1943); Freidin and Ulman, "Arbitration and the National War Labor Board," 58 HARV. L. REV. 309 at 312 (1945); LAPP, HOW TO HANDLE LABOR GRIEVANCES 11, 12 (1945). Congress gave statutory recognition to the importance of the disposition of grievances to industrial peace in the Railway Labor Act. One of the purposes of the act was stated as "the prompt and orderly settlement of all disputes growing out of grievances."

72 With reference to the effect of delay in the settlement of disputes involving grievances, the House Report on the 1934 amendments to the Railway Labor Act stated: "Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties." H. Rep. 1944, 73d Cong., 2d sess., p. 3 (1934). Cf. also the testimony of Coordinator Eastman, Hearings before Committee on Inter-state Commerce on H.R. 7650, 73rd Cong., 2d sess., 49 (1934).

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represents the judicial process in the industrial community. In other industries agreements merely deal with the general aspects of the relationship between the parties and the specific aspects are determined by continuous collective bargaining through the mechanics of the grievance procedure. In either case, the disposition of a particular grievance frequently serves as a precedent and weaves the pattern for the settlement of similar grievances.\(^\text{74}\)

If two competing unions are to be allowed to present and dispose of grievances during the pre-election period, an incentive is presented to each organization to press vigorously every grievance, no matter how trivial or lacking in merit, in an attempt to obtain a competitive advantage by using the settlement of frivolous grievances as a means of establishing its prowess as bargaining agent. Undoubtedly, grievances which ordinarily would not be pressed beyond the first step of the grievance procedure would be exaggerated far beyond their importance. The settlement of grievances, ordinarily a method for the elimination of employee unrest, might well provide the soil for the growth of employee friction and dissatisfaction.

Moreover, the precedent setting function of the grievance procedure may be disturbed. The petitioning union and the employer may settle grievances arising under the terms of the agreement with the certified union in a fashion inconsistent either with previous precedent or with the intent of the parties to the agreement.\(^\text{75}\) As the Supreme Court stated in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, deviations from the standard set by the contracting union “introduce competitions and discriminations that are upsetting to the entire structure.”\(^\text{76}\)

Finally, the dual grievance procedure sanctioned by the *Phelps-Dodge* decision appears to overlook the historical foundation of the act. The controversy over the interpretation of section 7(a) of the National Industrial Recovery Act issued by Mr. Richberg and General

\(^{74}\) “Many of the cases handled through grievance procedure may involve similar questions. Such similar cases may frequently be settled more speedly by reference to previous decisions. Often the steward and foreman will be able to agree on settlements in line with precedents already established. These precedents... may develop over a period of years into a body of industrial common law supplementing the basic contract.” [Settling Plant Grievances, U.S. Dept. of Labor, Division of Labor Standards, Bull. No. 60, pp. 37-38 (1943)].

\(^{75}\) For example, an employee may ask the rival union to process a grievance as to the rate of pay due him under the terms of the agreement with the certified union.

\(^{76}\) 321 U.S. 342 at 346, 64 S. Ct. 582 (1944).
Johnson is one of the most vivid in recent labor relations history.\textsuperscript{77} That interpretation permitted proportional representation by labor organizations and encountered the violent opposition of organized labor. The National Labor Board and the first National Labor Relations Board adopted the theory of majority rule\textsuperscript{78} and the legislative history of the NLRA makes it abundantly clear that the proponents of the act and the Congress considered plural representation inconsistent with sound labor relations practices. The Senate Report said in part:

"The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is well-nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions."\textsuperscript{79}

The House Report read in part:

"... There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to non-members of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of the labor organization. On the other hand, if better terms were given to non-members, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

"... If, however, the company should undertake to deal with

\textsuperscript{77} For an account of this controversy see Lorwin and Wubnic, Labor Relations Boards 192-193, 269-271, 373, 396, 397, 313-314, 337, 356, 426 (1935), and Bowman, Public Control of Labor Relations 32-38 (1942).

\textsuperscript{78} Matter of Denver Tramway Corp., 1 N.L.R.B. 64 (1934); Matter of Houde Engineering Corporation, 1 N.L.R.B. (old) 35 (1934).

each group separately, there would result the conditions pointed out by the present National Labor Relations Board in its decision in the Matter of Houde Engineering Corporation [1 N.L.R.B. 35 (Aug. 30, 1934)]:

"It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the object of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the [twenty-one] committees. Secondly, the company's policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks."

Those statements embody the content of testimony of authorities favoring the enactment of the proposed statute.

While these statements relate to situations in which a majority representative is admittedly in existence, their rationale has equal force even during the period subsequent to a direction of election between a certified union and a rival organization. Confusion, unrest, and instability are intensified in such a milieu by a division of representative authority. The wisdom of the board's requirement of the maintenance of a dual grievance procedure or a complete hiatus in bargaining relationships as expressed in the Phelps-Dodge case is open to question. There is no compulsion under the law and little justification in theory for a result so at variance with experience. That, for the interim period between a direction of election and the designation of a representative, the certified union should be permitted to act as the exclusive representative of all employees in the appropriate unit insofar as grievances are concerned is the result indicated both by history and sound practice.

C. Extension of Contracts Containing Union Security Provisions. The extension of union security provisions subsequent to a direction of election by NLRB is subject to somewhat different considerations from

those presented by the extension of contracts devoid of such provisions. The proviso to section 8(3) of the National Labor Relations Act reads as follows:

"By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made."

It is of course familiar law that provisos limiting the scope of remedial legislation ought to be strictly construed.\textsuperscript{82} The Senate Report makes the following comment as to the intent of the proviso:

"The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent law regarding closed-shop agreements. While today an employer may negotiate such an agreement even with a minority union, the bill provides that an employer shall be allowed to make a closed-shop contract only with a labor organization that represents the majority of employees in the appropriate collective bargaining unit covered by such agreement when made.

"Secondly, the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been 'established, maintained, or assisted' by any action defined in the bill as an unfair labor practice. And of course it is clear that no agreement heretofore made could give validity to the practices herein prohibited by section 8."\textsuperscript{83}

The emphasis of the proviso is upon the requirement of majority


status at the time of execution. The statute distinguishes, therefore, between union security agreements and collective agreements devoid of such provisions. While the doctrine of administrative stability may insulate an ordinary collective agreement made relatively soon after certification from the requirement of actual majority status at the time of execution of the contract, the area of protection of union security agreements is narrowly circumscribed. Each such agreement must meet the test of majority status at the date of execution. Moreover, the holding in *Wallace Corporation v. NLRB*\(^{84}\) points to situations in which the extension of union security provisions of a contract may constitute an unfair labor practice.

The board in a series of cases has indicated the narrow confines of statutory protection of union security clauses. In *Matter of Rutland Court Owners, Inc.*,\(^{85}\) it appeared that an A.F. of L. union, while certified as the bargaining representative of the employees, entered into a closed-shop contract which was renewable annually if proper notice was given. Near the termination of the contract all of the employees decided to switch to a C.I.O. union. The A.F. of L. union thereupon directed the company to discharge the entire working force. The company acceded to this request and supplied an entirely new crew of A.F. of L. men. On charges initiated by the C.I.O. union, the National Labor Relations Board held that the company had violated section 8(3) of the act, and that the discharges were not justified by the closed-shop agreement. In explaining its decision, the board said:

"We did not hold that employees were free to withdraw from a union having a closed shop agreement a month or 6 weeks before the agreement expired. We did hold that employees who attempt to retain their membership in the contracting union during the life of the contract may not be foreclosed from doing so for the purpose of justifying their discharge under the contract merely because they have designated a new representative for future bargaining. To hold otherwise would mean that an employer and a union official, acting in concert, could maintain one labor organization in perpetuity as the bargaining representative by the simple device of expelling any employees who wished to have a different

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\(^{84}\) 323 U.S. 248, 65 S. Ct. 238 (1944). The Wallace case is discussed elsewhere in this article in connection with problems arising from the practice of racial discrimination by unions infra, part IV.

\(^{85}\) 44 N.L.R.B. 587 (1942), 46 N.L.R.B. 1040 (1943).
representative when the question of the renewal of the contract arose.

"The express purpose of the Act is to insure employees of their own right of self-organization and a free choice of representatives. We cannot allow the declared intention of Congress to be evaded by permitting an employer and a union thus to combine to preclude the employees from expressing their choice. The proviso in Section 8(3) cannot therefore be considered as an instrument for depriving employees of their statutory right to select another representative for a period succeeding the term embraced by the closed-shop contract. We recognize the force of the arguments in favor of stability, but as we indicated previously the stability intended by the Act is not that involved in perennial suppression of the employees' will." 86

In the Wallace case the board found that the employer violated the act by entering into a closed-shop contract with a certified union, knowing that the union intended to invoke the contract not only for the purpose of requiring the employees to join the union but also to secure the discharge of employees for prior activity in behalf of a rival union.

That the right of an employer and a majority representative to enter into or apply a union security contract under the proviso to section 8(3) may not be exercised in a manner which prevents the free exercise of the right to select a bargaining representative is clear. This is especially true during the critical pre-election period. The doctrine of administrative stability cannot be utilized to prohibit the untrammeled selection of a statutory representative. 87 To this extent the dictum in the Phelps-Dodge case seems sound.

86 46 N.L.R.B. 1040 at 1041-1042 (1943). In Matter of Garod Radio Corp., 47 N.L.R.B. 677 (1943), the NLRB held that a closed-shop agreement with an A.F. of L. union was invalid "because it was made at a time when a question as to representation was pending before the Board, and because the results of the Board's statutory investigation, the exclusive means then available for the determination of the question, did not disclose that...[the A.F. of L. union] had been designated by the majority of the employees in an appropriate unit, as required by the proviso to Section 8 (3) of the Act." (Id. at 678.) In that case, the closed-shop agreement was entered into after the holding of an NLRB election won by a rival C.I.O. union but prior to the issuance of certification.

87 The National War Labor Board appears to have been somewhat insensitive to these considerations. In several cases NWLB has extended contracts containing union security provisions during the pendency of NLRB representation proceedings. While
REVOCATION OF CERTIFICATIONS

The NLRB has recently indicated that it will revoke or modify certifications under certain circumstances. In a series of cases in which allegations were made that a certified or petitioning union would not or did not afford non-discriminatory representation to negro employees embraced within an appropriate unit, the board stated that it would rescind a certification upon a showing that equal representation had been denied to any employees included in the certified bargaining unit.

While admitting its lack of express statutory authority to eliminate undemocratic union practices, the board has said that it "conceived it to be our duty under the statute to see to it that any organization certified under section 9(c) as the bargaining representative acted as a genuine representative of all the employees in the bargaining unit."

It is doubtful that the act was intended to do more than prohibit anti-union activities by employers. The board has recognized that its powers to determine the appropriateness of bargaining units and the extension was made subject to the outcome of such proceedings, no qualification was imposed on the effectiveness of the union security phases of the contracts. National Carbon Co., 13 War Lab. Rep. 236 (1943), 14 War Lab. Rep. 21 (1944); Montgomery Ward & Co., 13 War Lab. Rep. 454 (1944). (Union security award contingent upon success of union in pending NLRB proceedings.) Contra: Interstate S.S. Co., 14 War Lab. Rep. 652 (1944). In the Potlatch Forests case, 14 War Lab. Rep. 6 (1944), the extension of a maintenance of membership provision was defined by the board as subject to an obligation on the part of the contracting union to administer its affairs "in such a way as not to create mass discharge problems interfering with the war effort."

88 Until recently, except where an employer was faced with conflicting representation claims of rival unions, the board consistently refused to allow employers to petition for the holding of elections. Recently, however, the board has allowed employers to petition for decertification of a union. Matter of Marshall, Meadows & Stewart, Inc., 63 N.L.R.B. 233 (1945) (petition dismissed where six months after certification informal petition to employer indicated loss of union's majority); Matter of Wentworth Bus Lines, Inc., 64 N.L.R.B. 65, 17 Lab. Rel. Rep. 228 (1945). (Motion to withdraw certification denied on basis of presence of unfair labor practices leading to loss of majority as well as on application of Allis-Chalmers doctrine.)


statutory representative of the employees in such units are ancillary to the fundamental aim of the protection of the right of employees to organize. In its First Annual Report, the board said:

"... For an employer to refuse to bargain collectively with such representatives is, by virtue of section 8, subdivision (5), an unfair labor practice which the Board is empowered to prevent. Whether or not a majority of the employees in an appropriate unit desire the same organization to represent them is a fact which must be determined before it can be found that an employer has committed an unfair labor practice in refusing to bargain collectively. The purpose of section 9(c) is to give the Board the necessary investigatory power to determine this fact."

The board has relied on several recent Supreme Court decisions as the foundation for its power to withhold or revoke certifications in situations involving discrimination by certified labor unions in the representation of employees on the basis of race, color, creed, or religion. In Wallace Corporation v. NLRB, a majority of the Court upheld an NLRB order which required the reinstatement of several employees who had been discharged under a union shop contract pursuant to the request of the contracting union, where admission to the union had been denied these employees because of prior union activity on behalf of a rival organization and where the employer had knowledge prior to the time he signed the agreement of the union's intention to request

91 NATIONAL LABOR RELATIONS BOARD, FIRST ANNUAL REPORT 103 (1936). Accord: NATIONAL LABOR RELATIONS BOARD, FOURTH ANNUAL REPORT 73 (1940); NATIONAL LABOR RELATIONS BOARD, SIXTH ANNUAL REPORT 54 (1942). In refusing under Section 9(c) to determine a jurisdictional dispute the board, in Matter of Aluminum Company of America, 1 N.L.R.B. 530 (1936), said at 537: "It is preferable that the Board should not interfere with the internal affairs of labor organizations. Self-organization of employees implies a policy of self-management. The role that organizations of employees eventually must play in the structure established by Congress through that Act is a large and vital one. They will best be able to perform that role if they are permitted freely to work out the solutions to their own internal problems. In its permanent operation the Act envisages cohesive organizations, well-constructed and intelligently guided. Such organizations will not develop if they are led to look elsewhere for the solutions to such problems. In fine, the policy of the National Labor Relations Act is to encourage the procedure of collective bargaining and to protect employees in the exercise of the rights guaranteed to them from the denial and interference of employers. That policy can best be advanced by the Board's devoting its attention to controversies that concern such fundamental matters. The petition for certification is accordingly dismissed."

the discharge of these employees. In Steele v. Louisville & Nashville R.R. Co. and the companion case of Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, the Court held that a labor organization has a statutory duty as bargaining agent not to discriminate on the basis of race in the making of agreements against any group it purports to represent. The Court held that the exercise of such discrimination gives rise, in the absence of any administrative remedy, to the normal judicial remedies of the injunction and damages.

None of these cases held that the power to certify labor organizations as a majority representative supports a denial or revocation of a certification on the basis of a potential or actual failure to fulfill a duty of non-discriminatory exercise of statutory bargaining powers. In the Wallace case, Justice Jackson, speaking for the four dissenting justices, suggested, without deciding, that the board might possibly have such power. On the other hand, the history of the statute reveals no support for such a position. One may agree that the right to represent all of the employees in the bargaining unit carries with it a correlative duty to represent all fairly and impartially. It does not necessarily fol-

93 The board considered irrelevant the obligation of the employer under the terms of a pre-election agreement entered into with the competing unions to grant a union shop to whichever union was successful in the election.
96 In the Steele case the court overruled a demurrer to a petition which sought an injunction against the enforcement of a collective agreement restricting the employment and seniority rights of Negro firemen, an injunction against the continued representation of the petitioner and other Negroes by the Brotherhood of Locomotive Firemen and Enginemen, a declaratory judgment, and an award of damages against the Brotherhood.
97 Justice Jackson preceded this suggestion, however, by the following observation, 323 U.S. 248 at 268: "Neither the National Labor Relations Act nor any other Act of Congress explicitly or by implication gives to the Board any power to supervise union membership or to deal with union practices, however unfair they may be to members, to applicants, to minorities, to other unions, or to employers. This may or may not have been a mistake but it was no oversight."

The Wallace, Steele and Tunstall cases are discussed in an excellent note in 58 HARV. L. REV. 448 (1945). The view is expressed that the union's duty to represent all members of the bargaining unit is constitutionally imposed. The decision in Marinship Corp. v. James, (Cal. 1945) 15 LAB. REL. REP. 627, is noted with approval. In that case the discharge of a Negro employee who had been denied admission to a union on equal terms with white employees was requested by the union pursuant to a closed-shop contract. The California Supreme Court held that the union should be ordered either to admit negro employees without discrimination or to refrain from enforcing the closed-shop provisions of the contract against them.
low that Congress intended that the board should be the agency to enforce the obligations flowing from the implied statutory duty of equal representation. The enforcement machinery of the NLRB is directed against the employer only.\(^98\) It would seem more appropriate to consider violations of a duty imposed on a union as statutory bargaining agent as remediable in the courts on the initiation of proceedings by aggrieved employees.

Section 9(c) of the NLRA is modeled upon a corresponding provision of the Railway Labor Act.\(^99\) The court in the Steele and Tunstall cases, supra, noted that the Railway Act provided no administrative remedy for the type of discrimination alleged in those cases. Nothing in the NLRA appears to support a distinction in this respect between the two statutes. The NLRB's remedial powers are found in section 10(c) of the statute which gives the board broad authority to prevent the commission of unfair labor practices by the issuance of cease and desist orders and by the taking of such affirmative action as will "effectuate the purposes of the Act." Section 9(c) gives the board the power to certify representatives but that section and the other sections of the act furnish no express authority for the inauguration of a technique of decertification. Racial discrimination is, of course, abhorrent to instincts of fair play and the board's reluctance to see the mantle of its certification cover unions engaging in such conduct is understandable. The Supreme Court has recently upheld the constitutionality of legislation designed to prevent just such practices by unions.\(^100\) On the other hand, delegations of Congressional power should not lightly be implied. It is difficult to conclude that a function admittedly investigatory in nature furnishes the basis for an implication that it may be used to eliminate

\(^{98}\) Section 10(c) deals with the judicial enforcement of board orders prohibiting unfair labor practices by employers. No other procedures for enforcement are found in the act.

\(^{99}\) Section 2, Ninth of The Railway Labor Act [48 Stat L. 1185 at 1188 (1934)] provides, so far as pertinent: "Ninth [Disputes as to who are employees' representatives, investigation by Mediation Board; elections.] If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and to certify the same to the carrier."

undesirable practices not expressly prohibited by the statute and for which no administrative machinery is provided.

An analogy between a certification and a license might be suggested. Ordinarily, where a governmental agency grants a license, the grantor has been held to have an implied power to revoke or modify the license. Generally speaking, where licenses are issued by a governmental authority, the holding of such a license is a prerequisite to engagement in a particular activity. And usually the carrying on of such activity without a license is subject to criminal or civil sanctions. An NLRB certification, however, is not a condition precedent to recognition of a union as exclusive bargaining agent of the employees within an appropriate unit. If the union represents a majority of the employees, the employer is free to bargain with the union. If a certified union possessing majority status were to discriminate against negroes by failing to represent them fairly, within the meaning of the statutory requirements, as defined in the Steele and Tunstall cases, the employer might continue to deal with the union despite a revocation of the certification by NLRB. In such an event, it does not appear that any unfair labor practice would be presented. If so, the NLRB’s revocation of the certification would constitute an ineffective gesture. In view of the carefulness in draftsmanship which the NLRB reflects, such a result could not have been contemplated by the proponents of the statute. It renders doubtful the validity of an implication of a power to revoke. Similarly, a refusal to certify under similar circumstances, would likewise be ineffective so far as the board’s prohibitory powers are concerned, if voluntary recognition of the union by the employer should take place and if the union enjoyed majority status.

V

Conclusion

An NLRB certification has been defined as “a statement of fact that the union has been designated by a majority of the employees in an appropriate unit as their bargaining representatives and that it is the exclusive bargaining representative of all the employees in such unit.”101 The definition is incomplete. For the certification has become

101 Hearings before the Special Committee to Investigate Executive Agencies on the War Labor Board and the National Labor Relations Board, 79th Cong., 1st sess., p. 1222 (1945).
increasingly an instrument of governmental control of labor relations. The reconciliation of the principles of freedom with those of order and stability is a continuing process. The granting or withholding of the certification has come to be the administrative mechanism for resolving whatever conflicts there may be between these interests in a fashion compatible with democratic growth.

The problem is one which has been met in many and varied phases of the development of social institutions. Not infrequently order and stability have been euphemisms for the results of processes designed to thwart the expression of the majority will. The development of a doctrine of administrative stability within the framework of democratic principles has been a conspicuous achievement of the board in the administration of the act.