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Unit Determination and the Problem of Craft Severance

CONGRESS through the Wagner Act sought to promote stability in industrial relations by creating for industry's employees a quantum of rights incident to the collective bargaining process. The most significant feature of this Act and its subsequent amendments is that a compromise, albeit an uneasy truce, was effectuated between the competing interests of labor and management. Unfortunately, the administration of this basic policy of compromise has caused both sides to sometimes lose sight of the Act's declared objective.

This is truest in the area of unit determination where management generally favors a plantwide unit for the simple reason that it is easier to contend with one union, rather than a number of unions, at the bargaining table, while organized labor, particularly the American Federation of Labor, has championed separate representation of each identifiable skilled and semiskilled group of employees. Of course, this is an oversimplification because the unions themselves often become embroiled in deadly conflict over the question of representation within the plantwide unit. Nowhere is this struggle better manifested than in the field of craft severance where two unions fight for the allegiance of workers who, because of their specialized skills, attempt disassociation from the larger plantwide unit and seek inclusion in a smaller craft unit. This problem of craft severance is by no means a creature of recent origin. However, the immediacy of the problem has been accentuated by the proliferation of skills and trades in the postwar years and the increased sophistication of manufacturing methods which calls for the services of skilled employees.

The National Labor Relations Board, in whose discretion the problem of unit determination has been posited, has recently reevaluated its standards in deciding questions of craft severance, but in so doing may have opened the door to a myriad of additional complications. It is the purpose of this Note to review the background of this problem, to relate the law as it now stands, and, fi-

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2 See generally P. Taft, ORGANIZED LABOR IN AMERICAN HISTORY (1964).

3 See generally H. Harris, LABOR'S CIVIL WAR (1st ed. 1940).
nally, to offer suggestions for a solution which both recognizes the conflicting interests of labor and management, and, at the same time, promotes general industrial stability which, as in all situations falling within the purview of the Act, is the end to be served in craft severance cases.

I. HISTORY OF CRAFT SEVERANCE

A. Congressional Intent

To grasp and appreciate the complex, and sometimes competing, rationales employed in craft severance cases it is necessary to review briefly the legislative background of unit determination in general. Through section 9(a)\(^4\) of the National Labor Relations Act (NLRA) Congress granted to the appropriate bargaining unit the exclusive right to represent all members of that unit. Then, in section 9(b), it was provided that the National Labor Relations Board should:

> Decide in each case whether, in order to assure to employees the full benefit of their right to self organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.\(^5\)

Section 9(b), while thus manifesting congressional concern for employee free choice and the appropriateness of the unit selected, is devoid of any instructive guidelines and, instead, leaves the determination of bargaining units to the Board's discretion.\(^6\) This result is laudable in that it insures administrative flexibility, but it has also caused problems, confusion, and with each shift in the Board's position, has brought criticism. Specifically, the difficulty inherent in the section 9(b) mandate is reconciling employee free choice with the selection of a unit deemed appropriate for collective bargaining purposes. If absolute free choice were sanctioned then it would follow that every identifiable group of employees could designate its own unit. Clearly, such a policy, if realized, would lead to chaos because it would place the employer in the unfavorable position of dealing with any number of employee representa-

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\(^5\) NLRA § 9(b), 29 U.S.C. § 159(b) (1964) (emphasis added).
\(^6\) Not only did Congress avoid giving any touchstones to be followed in severance cases, but unit determination questions are also not reviewable by the federal courts because their jurisdiction extends only to "final orders" and a unit determination is not such an order. See Inland Empire Dist. Council v. Millis, 325 U.S. 697 (1945); NLRB v. Falk Corp., 308 U.S. 453 (1940); AFL v. NLRB, 308 U.S. 401 (1940).
tives at the bargaining table. The probability of reaching a consensus of agreement would become a mere possibility. Likewise, such a policy would lead to a sort of "open season" for rival unions competing for the allegiance of a plant's workers. Therefore, it does not appear realistic that this freedom of choice should be without some reasonable limitations if the NLRA's raison d'etre, industrial relations stability, is to be attained. The question arises whether Congress really meant what it said.

In fairness to the promulgators of the NLRA several points should be emphasized which provide at least a partial answer to the apparent conflict between the purpose of the Act and section 9(b). First, section 9(a) provides for exclusive representation which forecloses the possibility of a minority of dissident employees seeking a bargaining representative different from the one chosen by the majority. Second, the Board is to determine the appropriate unit for purposes of collective bargaining and it would be only reasonable to anticipate that factors other than an unfettered right of employee free choice would be deemed relevant in making such a determination. Third, in 1935, the American Federation of Labor (AFL) appeared to be a fairly cohesive body and the self-restraint exercised by it probably was expected to neutralize rival, interunion organizing campaigns. Only in the latter half of the decade, with the formation of the Congress of Industrial Organizations (CIO) and that federation's gradual split with the AFL, did the realities of the kind of interunion warfare that arises in craft severance cases become commonplace. In fact, the original split

8 For an interpretation of "appropriate" unit consider the following: There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be "appropriate." It must be appropriate to ensure to employees, in each case, "the fullest freedom in exercising the rights guaranteed by this Act." Morand Bros. Beverage Co., 91 N.L.R.B. 409, 418 (1950) (footnotes omitted).
10 Cf. Hall, The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice, 18 W. RES. L. REV. 479, 482-83 (1967), where the author discusses the conflict between sections 9(b) and 9(c) (5), but raises the same points mentioned in the text accompanying this footnote.
12 For an excellent treatment of this subject see H. HARRIS, supra note 3. An attempt to settle the dispute among rival unions was made in 1955 and is evidenced by the AFL-CIO CONST. art. XXI, § 2 no-raiding agreement. The circumstances that led to its adoption are discussed in H. HARRIS, supra note 3, at 656-60.
within the AFL which led to the formation of the CIO was caused by the former's insistence on craft unit representation and the latter organization's inability to reconcile this stand with its notion of the industrial unit. Also, several of today's most ambitious unions, such as the United Auto Workers and the Teamsters, were in their infancy at the time of the passage of the NLRA.

Stated briefly, the Congress that drafted and passed the NLRA did not have reason to foresee the intricate problems of craft severance. Determination of the appropriate bargaining unit was left, with few guidelines, to the Board and it is that agency that is largely responsible, with one exception, for the present standards formulated with respect to craft severance.

B. Development of a Rule by the Board

In 1939, the Board's American Can Co. decision, the first important unit severance case, introduced the theory that craft severance from a larger unit was inappropriate if there had been prior history of bargaining on a plantwide basis. The Board's position was that if experience showed that labor-management stability had been achieved by employee representation on an industrial, plantwide pattern, then the status quo would be maintained and the carving out of smaller bargaining units would be denied. The American Can rule was eventually modified by the Board in International Minerals & Chemical Corp., wherein the importance of bargaining...
history was deemphasized while the relevancy of the craft group's opportunity for self-determination was emphasized. Also, the Board at this time was laying special emphasis on the craft group's maintenance of an identity separate from that of the larger unit. Nevertheless, whatever may have remained of American Can was dealt a final deathblow in 1947 when the Senate Committee on Labor and Public Welfare criticized the American Can rule as "inequitable."

This admonition was reflected in two of the Taft-Hartley amendments to section 9(b). First, Congress reworded the body of section 9(b) by deleting the assurance of the employees' "full benefit of their right to self organization" and replacing it with a guarantee of the employees' "fullest freedom" in exercising their rights under the NLRA.

Secondly, in a proviso added to section 9(b), Congress focused on the American Can doctrine and handed the Board its first guideline in severance cases by stipulating that: "The Board shall not . . . decide that any craft unit is inappropriate for such purposes as severance on the ground that a different unit has been established by a prior Board determination, unless the majority of employees in the proposed craft unit vote against separate representation."

Although at face value the new Taft-Hartley amendments seemed to give a "green light" to craft severance, such a purpose was clearly not the intention of its cosponsor, Senator Robert A. Taft, and the House's proposal that craft severance be made a man-

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10 See Krislov, Administrative Approaches to Craft Severance, 5 LAB. L.J. 231, 233 (1954).
20 The following is indicative of Congress' displeasure with that decision:
Since the decision [American Can] . . . the Board . . . has virtually compelled skilled craftsmen to remain part of a comprehensive plant unit. The committee regards the application of this doctrine as inequitable. S. REP. NO. 105, 80th Cong., 1st Sess. 25 (1947).
21 Compare § 101(b), 61 Stat. 143 (1947), as amended, 29 U.S.C. § 159(b) (1964) (emphasis added): "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." with text accompanying note 5 supra.
23 Consider the following words of Senator Taft:
It [9(b)] does not go the full way of giving them [craft units] the absolute right [to sever] in every case: it simply provides that the Board shall have discretion and shall not bind itself by previous decision, but that the subject shall always be open for further consideration by the Board. 93 CONG. REC. 3836 (1947).
datory right was dropped by the Senate. Nevertheless, considerable freedom was accorded to craft severability.

Interpretation by the Board of the new subsection 9(b)(2) proviso was soon reached in National Tube Co., where bricklayers were denied craft severance from the larger representational unit, in part because of the Board's prior certification of a plantwide unit, and also because of the high degree of integration of operations in the basic steel industry. National Tube, through its "integration of operations" theory, in effect ended craft severance in highly integrated industries, such as basic steel, where the ordinary pattern of bargaining was industrial. Thus prior bargaining history was only a factor, but when coupled with something as relevant as the functional coordination of an employer's operations, it outweighed the right of skilled workers to be separately represented. The National Tube rule was adopted in subsequent cases involving the basic aluminum, wet-milling, and lumber industries.

Then, in American Potash & Chemical Corp., the Board re-


Congressional intention on this point was further clarified in the following dictum: "The addition of subsection 2 of 9(b) created no ambiguity . . . Congress clearly did not command the Board, as it could have done, to establish a craft unit whenever requested by a qualified craft union." NLRB v. Pittsburgh Plate Glass Co., 270 F.2d 167, 172-73 (4th Cir. 1959), cert. denied, 361 U.S. 842 (1960). Furthermore, it has been suggested that Congress tried to avoid alienating either the CIO or the AFL and therefore followed a middle-of-the-road course in craft severance. Rathbun, supra note 15, at 1030.

Finally, one authority has come to the conclusion that Congress, in its zealous effort to reverse the American Can Co. doctrine, overlooked the International Minerals case which had modified the earlier decision by placing far less weight on prior history. Jones, supra note 11, at 316. See also text accompanying note 18 supra.

25 76 N.L.R.B. 1199 (1948). It was the Board's view that Congress had not really intended to encourage craft severance, but instead only precluded the possibility of automatic denial of severance because of a prior Board unit determination. Id. at 1204 n.11.

26 Permanente Metals Corp., 89 N.L.R.B. 804 (1950). An example of the changes of position that resulted is contained in the following history by which the aluminum industry was eventually included in the National Tube type industries: Permanente Metals Corp., 89 N.L.R.B. 804 (1950), and Kaiser Aluminum & Chem. Corp., 119 N.L.R.B. 695 (1957), overruling Reynolds Metal Co., 85 N.L.R.B. 110 (1949). In Permanente the Board held that the National Tube rule restricting craft severance should be applied to the basic aluminum industry because, like the basic steel industry, it was "highly integrated." 89 N.L.R.B. at 811. However, severance was allowed where the operation was not considered to be "basic." Harvey Mach. Co., 114 N.L.R.B. 935 (1955) (manufacturer of aluminum forgings); Revere Copper & Brass Inc., 111 N.L.R.B. 1241 (1955) (aluminum products fabrication); Reynolds Metals Co., 93 N.L.R.B. 721 (1951) (reclamation of aluminum scrap).


29 The "integration of operations" doctrine was also applied to production areas within a larger unit. See Ford Motor Co., 78 N.L.R.B. 887 (1948).

versed the *National Tube* interpretation of section 9(b)(2), concluding that the intent of Congress was to make craft elections mandatory whenever the group seeking severance was a "true craft" group, and whenever the union representing these employees was a "traditional representative" of their interests. These standards were made applicable to all craft severance questions in every industry except in the so-called "National Tube industries" (basic steel and aluminum, wet-milling, and lumber) where, because of the highly coordinated manufacturing processes involved, a prior Board certification of a plantwide unit was presumed appropriate. In short, the *American Potash* Board enunciated a new two-part doctrine for severance determination, but, as a corollary to its new rule, denied that any retroactive effect be given to its decision by holding that where *National Tube*’s "integration of operations" theory already had been applied, no question of severance would be allowed.

By only inquiring into the identity of the group seeking severance, and by not considering the appropriateness of splitting up an existing unit, the Board was looking only at the arguments of the craftsmen for severance. Under its interpretation of section 9(b)(2) the *American Potash* case came closer to giving full weight to the "fullest freedom" mandate than any previous case. Of course, as for skilled craftsmen in the *National Tube* industries, the liberality of the *American Potash* doctrinal tests did not apply, but this arbitrary corollary was not seriously challenged. In fact, until recently, the only attack levelled at the *American Potash* rule came from the Fourth Circuit in *NLRB v. Pittsburgh Plate Glass Co.* in which the Board’s interpretation of section 9(b)(2) was rejected. The court denied enforcement of the Board’s decision because it had not considered all of the factors relevant to the issue of severance. Of particular importance to the court was the Board’s failure to consider the factors militating against severance.

Except for the court’s criticism in *Pittsburgh Plate Glass*, the *American Potash* decision remained unchallenged until the Board

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31 Id. at 1422. Elements of the “true craft” test are defined in Reynolds Metals Co., 108 N.L.R.B. 821 (1954); Mathieson Ala. Chem. Corp., 101 N.L.R.B. 1079 (1952); Allis-Chalmers Mfg. Co., 77 N.L.R.B. 719 (1948). Once the particular craft is recognized as “true,” all craftsmen in the group are to be included in the unit. Monsanto Chem. Co., 78 N.L.R.B. 1249 (1948); Caterpillar Tractor Co., 77 N.L.R.B. 457 (1948).
32 Elements of the “traditional representative” test are set out in Industrial Rayon Corp., 128 N.L.R.B. 514 (1960), enforcement denied, 291 F.2d 809 (4th Cir. 1961).
33 107 N.L.R.B. at 1420.
34 270 F.2d 167 (4th Cir. 1959), cert. denied, 361 U.S. 943 (1960).
in \textit{Mallinckrodt Chemical Works}\textsuperscript{35} reversed its stand, adopted the Fourth Circuit’s reasoning, and then established new standards.\textsuperscript{36}

\section*{II. THE NEW RULES}

\subsection*{A. Mallinckrodt Chemical Works}

It was to redress this arbitrary state of the law and to effectuate a result more within the overall purpose of the NLRA that \textit{Mallinckrodt Chemical Works} was decided. In this case the Board denied craft severance to instrument operators for the following reasons: their union was not a traditional representative of the employees’ interests, and the workers were integrally connected with the production processes of the employer. In the interest of labor stability this smaller unit was not to be carved out of the larger unit. Through this recent decision the Board effected a vast restructuring of its standards for determining the appropriate unit for craft severance from larger, even plantwide, bargaining groups. Henceforth, the Board will consider \textit{all} relevant factors such as prior bargaining history, integration of employer’s operations, and workers’ community of interests, \textit{regardless} of the industry involved.\textsuperscript{37}

The employer Mallinckrodt Chemical Works filed a motion with the Board for a review of a Regional Director’s decision ordering an election to determine the severability of 12 instrument mechanics from a larger bargaining unit of 280 maintenance and production workers. The International Brotherhood of Electrical Workers, AFL-CIO, was seeking certification as bargaining representative. Upon a rehearing of the facts, the Board found that the mechanics were a “true craft” group\textsuperscript{38} as defined under the first part of the \textit{American Potash} standard. Following a further review of the factors presented, the Board concluded that the IBEW had not met the “traditional representative” requirement,\textsuperscript{39} the second part of the \textit{American Potash} doctrine. At this juncture the question of severability could therefore have been answered; craft severance would be denied because the union was not the ordinary representative of the mechanics’ interests. However, in order to lay the

\footnotesize{\textsuperscript{35} 1967 CCH NLRB Dec. \textsuperscript{FT 20}, 981 (1966).}

\footnotesize{\textsuperscript{36} Id. at 27,169-71.}

\footnotesize{\textsuperscript{37} Id. at 27,159.}

\footnotesize{\textsuperscript{38} Id. at 27,160.}

\footnotesize{\textsuperscript{39} Id. at 27,161. Although the facts showed that the IBEW did represent instrument mechanics in other industries, and did provide for craft apprenticeship programs, the conclusion was inescapable that the primary purpose of these trainee programs was devoted to preparing electricians and not mechanics.}
foundation for a new policy, the Board treated the union's failure as not controlling and proceeded to discuss the *American Potash* and *National Tube* doctrines.40

There were three untenable conclusions reached in the *American Potash* decision that the Board sought to correct. First, the Board stated that the *American Potash* Board had misconstrued the meaning of *National Tube* because the former opinion was "predicated in substantial part on the view that *National Tube's* construction of section 9(b)(2) virtually foreclosed discretion and compelled the Board to grant severance."41

A second objection was directed at the two affirmative tests postulated by *American Potash*.42 Under these formulas, coupled with its erroneous interpretation of *National Tube*, the Board had been virtually deprived of its opportunity to scrutinize those policy factors which could challenge severance. Here the *Mallinckrodt* Board was clearly on firm ground, since inquiry under *American Potash* was only one sided and the interests of the employer, the other employees, and the public's concern for maintaining labor stability were ignored. However, these two "tests" were not completely emasculated; henceforth they are to be utilized to the extent that they may be useful in identifying the class of employees seeking severance and the union claiming representative status.43 The third *American Potash* rule that the Board attacked was the arbitrary exclusion of craft severance in the "*National Tube* industries"44 whereby the Board was to presume a plantwide unit to be appropriate without regard for the legitimate interests of identifiable craft groups.

In short, *Mallinckrodt* overturned the *American Potash* tests because it was difficult for an alleged craft group not to meet these qualifications; conversely, the classification of "*National Tube* industries" was arbitrary and made craft severance unduly difficult for skilled workers in the basic steel and aluminum, wet-milling, and lumber industries. *National Tube* did not remain unchanged either; to the extent that that decision limited review of all relevant factors it was overruled.45

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40 Id.
41 Id. at 27,163. Thus, in light of legislative history the rationale upon which *American Potash* was premised was erroneous.
42 For a discussion of these tests, see text accompanying notes 30-32 supra.
43 1967 CCH NLRB Dec. at 27,164.
44 For a discussion, see text accompanying notes 25-29 supra.
45 1967 CCH NLRB Dec. at 27,165 n.17.
Dissenting in part, Member Fanning thought that the instrument mechanics should have been granted severance. He thought that the majority was relying too much on the company’s 25-year bargaining history and the highly integrated nature of its operations. However, in light of the public’s interest in preventing a fracturing of the collective bargaining process into a multiplicity of representative units the majority’s result seems sound. This would appear to be especially true since the union was not an ordinary representative of the employees and the only real countervailing interests were those of the skilled workers.

B. The Companion Cases

Indications of Mallinckrodt’s effect upon the interpretation of severance matters were not long in coming. In the first of two companion cases decided on the same day, the full Board in E.I. duPont de Nemours & Co. allowed craft severance of 40 electricians from a larger unit of 70 employees. The Board reiterated its new policy of considering all relevant factors including the interests of the employer, the employees seeking severance, and those outside the proposed unit.

In Holmberg, Inc., the second companion case to Mallinckrodt, the Board denied severance to a group of toolroom workers in the employer’s stamping plant for several reasons. First, the workers’ job functions were integrally connected to the production line processes of the company. Second, and of greater importance, was the 24-year bargaining history of the employer on an industrial basis. The Board considered the workability of the present unit in light of this prior history and determined that the toolmakers’ interests had not been endangered especially since these workers remained the highest paid employees in the unit. Apparently the Board was advancing a notion that the parties seeking severance

46 Id. at 27,169-70.
48 By way of comparison it is interesting to note that several conditions for meeting the Mallinckrodt standards are mentioned. (1) The employer’s highly integrated manufacturing process is important regardless of the rule of American Potash. Compare Mallinckrodt Chem. Works, 1967 CCH NLRB Dec. § 20,981, at 27,159 (1966), with E.I. du Pont de Nemours & Co., 1967 CCH NLRB Dec. § 20,982, at 27,174 (1966). (2) The ability of the members of the craft group to perform their duties independently from other fellow employees. Id. at 27,172-73.
50 To this particular point, Member Fanning took exception. Id. at 27,179.
51 Id. at 27,177.
must defeat a rebuttable presumption that a present unit is appropriate when it appears on the record that this established bargaining unit has fairly recognized the interests of all those whom it has represented. Relatively high wages would be a valid indication that a group had been adequately represented by a larger bargaining unit. Also mentioned, but not discussed at length, was the fact that Holmberg was a one-building operation with only one story of floor-space. Thus the workers' community of interests, for example, their common access to plant facilities, were not only similar but probably identical.

III. THE POST-MALLINCKRODT CASES

The basic purpose of the NLRA is the promotion and maintenance of labor relations stability and the Board, through its "weighing of all relevant factors" test as enunciated in Mallinckrodt, has now taken a significant step toward that end by proposing a workable standard for determining craft severability. There are, however, several points that will require further clarification; namely, what are the relevant factors and, more importantly, what degree of importance may be accorded to each one? The following section will examine the cases decided since Mallinckrodt in an effort to answer these questions.

A. In Search of Relevant Factors

(1) True Craft Group.—Since attainment of true craft status involves some formal or informal training, the Board looks not only to apprenticeship programs, but also to craftlike specialization acquired through work experience. Also considered is the time required to develop proficiency in a skilled job. Of course, lack of an apprentice training program may be a key consideration in denying severance, especially where the skills themselves are not generally considered as apprenticeable.

(2) Traditional Representative.—The traditional representa-

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52 Id. at 27,176-77. This interpretation could render craft severance in the smaller plants more difficult. There is precedent to the effect that close proximity in the plant is not weighed if other factors are equal, for example, that there is a true craft involved. See B.H. Hadley, Inc., 130 N.L.R.B. 1622, 1625-26 (1961).
tive test depends on numerous criteria, the most often mentioned being whether the union has a history of representing such workmen and is not merely trying to expand its jurisdiction. Here the Board focuses specifically on the past record of the union's representation of similar craftsmen. Of course, due weight is given to a new organization if it is created for the express purpose of representing these skilled workers.

However, in *Aerojet-General Corp.* the Board, while recognizing a tool- and diemaker's union as a traditional representative of employees in the tool and die craft, denied severance of Aerojet's diemakers from the larger plantwide unit represented by the United Steel Workers because the latter had represented the bargaining unit since 1951, and there had been a certain stability attained over this period. It bears repeating that the traditional representative test is important insofar as identifying the organization seeking severance of skilled tradesmen, but it may not have much positive value when other factors, such as a stable bargaining history, are present.

(3) Prior Bargaining History.—Perhaps no other factor relevant to the issue of severability has as much importance as a past history of stable industrial relations. This is only proper for in a sense it rewards management and the incumbent union for their collective efforts in achieving labor relations stability while, at the same time, admonishing the upstart organization for disturbing this relationship. The post-*Mallinckrodt* cases reflect this sensitivity towards past history. A typical example is the Board's recent *Good-year Tire & Rubber Co.* decision denying severance to Goodyear's electricians located in plants throughout the country. The Board also turned down an alternative suggestion that the severed unit include electricians at only 16 of the Goodyear establishments. Of pivotal importance to the Board's determination was that for 28

56 Note 32 supra.
58 Id. An IBEW request for severance of instrument repairmen and powerhouse operators was turned down because of the union's failure to show it represented these departmental groups. Bunker Hill Co., 1967 CCH NLRB Dec. § 21,514 (1967).
59 American Bosch Arma Corp., 1967 CCH NLRB Dec. § 21,195 (1967). The fact that the "union" petitioning for severance had no constitution, by-laws, nor history of representing any employees in collective bargaining did not detract from its "labor organization" status under § 2(5), 29 U.S.C. § 152(5) (1964). However, the Board noted, in light of this record, the organization had hardly enhanced its standing as a traditional craft representative. 1967 CCH NLRB Dec. at 27,564.
years all of the employer's 20,000 workers had been included in a multiplant production and maintenance unit. Furthermore, Goodyear and the incumbent union had engaged in companywide negotiations for over 20 years with special provisions in each bargaining agreement for craft employees. In light of this prior record the Board was constrained to "carve out" the electrical craftsmen from the existing unit. Reluctance to disturb a stable bargaining record is especially evident in cases where the Board is petitioned by a craft union for severance of craftsmen from a multiplant unit solely represented by one unit.

In conclusion, it appears that past history is probably the most important of all the factors relevant to craft severability. Understandably, it has become a threshold inquiry that the Board must take into consideration; in fact, the Board even makes special note of the absence of prior bargaining history in many of the post-Mallinckrodt Chemical Works cases.

(4) Community of Interest.—In each plant there may exist a certain similarity of working conditions, wages, benefit plans, job promotion procedures, and other incidental subjects of collective bargaining which are shared by all of the employees. This common denominator of working conditions and terms of employment is referred to as the employees' community of interest. Because this community may include a wide variety of employee interests, it is expected that, as a standard, community of interest is rather elastic when applied in craft severance cases. Often a community of interest results after the plant or bargaining unit has acquired a pattern of representation or, in other words, after a history of labor relations stability has developed. Therefore, common interests would seem to be a natural outgrowth of the crystallization of labor-management relations.

In Goodyear Tire & Rubber Co. the Board noted that fringe benefits were similar for all employees throughout the Goodyear enterprise and thus constituted a point of common interest which could be upset if severance were allowed. Another important element of

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62 Id. at 27,959-61.
63 See, e.g., id.
the community of interest criteria, bumping procedure, arose in the *Aerojet-General Corp.* decision.\(^6\) If the existing unit were gerrymandered and another bargaining agent recognized, different job security provisions with regard to layoff and callback practices could be introduced, thus causing jurisdictional lines to be drawn between rival unions. For the employer and the employee such a result would mean that job interchange and promotion would be disrupted, and seniority rights arbitrarily terminated. It was precisely these considerations that prompted the Board in *American Bosch Arma Corp.*\(^6\) \(^8\) to deny severance to toolroom employees. In particular, recognition of a new union for these employees would have effectuated at least one undesirable result; namely, employees who possessed skills similar to those of the tool- and dieworkers, but who were outside the proposed craft unit, would have been denied promotion through the established merit program.\(^6\) \(^9\) Likewise, in *Dura-Containers, Inc.*,\(^7\) a Teamster's severance petition was turned down because the Board found that the proposed truckdriver group lacked “separate interests” different from the overall community of interests shared by the existing bargaining unit. Here all employees were paid roughly the same wages, were entitled to the same fringe benefits, and had the same chance to bid for jobs.\(^7\)

Situations exist where the skilled workers do maintain an identity separate from the present industrial group. In ruling that tool- and diemakers' interests had not been “submerged” in the production unit's community of bargaining interests, the Board, in *Jay Kay Metal Specialties Corp.*,\(^7\) \(^2\) focused on the plantwide agreement which accorded separate wage classifications and other conditions of employment to the toolroom employees. In this case severance was granted despite a 13-year history of industrial representation. Arriving at a similar result in *Mc-Mor-Han Trucking Co.*\(^7\) \(^3\) the Board noted a difference in job classifications, hours of employment, and overtime practices applicable to drivers and mechanics.

Finally, to emphasize the elasticity of the community of interests the recent *St. John's Associates, Inc.* case\(^7\) \(^4\) should be mentioned.

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\(^8\) 1967 CCH NLRB Dec. § 21,195 (1967).
\(^9\) *Id.* at 27,563-64.
\(^7\) 1967 CCH NLRB Dec. § 21,299 (1967).
\(^7\) *Id.* at 27,734-35.
\(^3\) 1967 CCH NLRB Dec. § 21,609 (1967).
There the Board mentioned, among other things, the fact that the truckdrivers seeking severance wore uniforms more often than did other employees, especially the dispatchers.\(^7\)

(5) Integration of Operations.—A final factor considered here is the employer's functional coordination of operations.\(^7\) While at one time this factor was dispositive of the issue of craft severance in certain industries under the National Tube doctrine,\(^7\) this factor, in the new post-Mallinckrodt Chemical Works cases, is clearly not determinative.\(^7\) In addition it is worthwhile to mention that, in general, the relative physical proximity of employees in the plant is important to a finding of functional integration of operations.\(^7\)

Similarly, employee interchange and common supervision, while sometimes considered separately, or under community of interests,\(^8\) are treated here because it is basic to employee interchange and unitary supervision that the employer's operations be technically sophisticated enough to permit such practices.

Generally, the more interchange between employees in the proposed craft unit and production and maintenance workmen, the less likelihood there is for severance.\(^8\) To the same effect is the degree of job assignment cooperation required.\(^8\) Thus, it is detrimental to a showing of severability if skilled employees, such as toolmakers, must, in order to perform their duties, coordinate their activities with production and maintenance workers. This concept of "teamwork" was considered in *Alton Box Board Co.*,\(^8\) where the Board denied severance to electricians because the latter were part of a "troubleshooting" team which included pipefitters, machinists, millwrights, and production and maintenance workers. Just as the proposed severance group's craft status may be diluted by the need for cooperation with less skilled employees, so also, automation may reduce the craft characteristics of the subgroup of the skilled workers.

Employee interchange and common supervision often occur to-

\(^{75}\) Id. at 28,194.

\(^{76}\) See Hall, supra note 65, at 493.

\(^{77}\) See text accompanying notes 25-28 supra.


\(^{80}\) Hall, supra note 65, at 486-97.


\(^{83}\) 1967 CCH NLRB Dec. ¶ 21,386 (1967).
together as a natural consequence of a highly mechanized industrial operation. No definitive percentage of time spent away from the skilled worker's regular job has been formulated as determinative by the Board. In two recent Teamster cases\textsuperscript{84} severance was denied to truck operators who were occupied in noncraft activities from 5 to 25 percent and from 25 to 35 percent of the time respectively.

In conclusion, the present practice affords the advantage of administrative flexibility — the relevant factors, either in favor of, or against craft severance, are necessarily determined on a case-by-case basis.\textsuperscript{85} Nevertheless, there is a measure of reliance placed on the Board's rulings, and therefore the need for some decisional uniformity is desirable.\textsuperscript{86} Specifically, with the likelihood that

\textsuperscript{84}Boyden Logging, Inc., 1967 CCH NLRB Dec. \textsuperscript{8} 21,401 (1967); Dura-Containers, Inc., 1967 CCH NLRB Dec. \textsuperscript{8} 21,299 (1967).

\textsuperscript{85}On the applicability of stare decisis to its decisions the Board said:
The Board must hold fast to the objectives of the statute using an empirical approach to adjust its decisions to the evolving realities of industrial progress and the reflection of that change in organizations of employees. To be effective for that purpose, each unit determination must have a direct relevancy to the circumstances within which collective bargaining is to take place. While many factors may be common to most situations, in an evolving industrial complex the effect of any one factor, and therefore the weight to be given it in making the unit determination, will vary from industry to industry and from plant to plant. We are therefore convinced that collective-bargaining units must be based upon all the relevant evidence in each individual case. American Cynamid Co., 131 N.L.R.B. 909, 911 (1961).

\textsuperscript{86}Although experience will probably show that craft severance will be denied more frequently, problems may arise in the future because the Board has denied severance to several craftlike employee groups. Many unions and employee organizations have not been heard from yet and when they seek severance, the questions which the Board has faced in the last few months in applying the "all relevant factors" doctrine may be multiplied in the near future. Millwrights, for instance, have been a traditional craft group, but they have been included with machinists in larger unit groups. Colgate-Palmolive Co., 120 N.L.R.B. 1567 (1958); General Elec. Co., 118 N.L.R.B. 637 (1957); American Can Co., 110 N.L.R.B. 1640 (1954). It would seem obvious that with the overruling of American Potash and the so-called "National Tube industries" limitation, greater latitude for granting severance in the basic steel and aluminum industries will be allowed. Therefore, millwrights in these industries will probably seek severance from larger units composed of machinists. Likewise, crane operators, numerous in all four of the "National Tube industries," have been denied severance where they were arbitrarily classified as production workers. International Paper Co., 94 N.L.R.B. 483 (1951).

In the relatively new atomic energy industry the very sophisticated nature of the manufacturing process has limited severance, although the Board has never formally included this industry in the National Tube rule. \textit{See} Carbide & Carbon Chem. Co., 102 N.L.R.B. 1175 (1953). \textit{Under Mallinckrodt} greater opportunity for severance may be allowed. Although already recognized as craftsmen, boilermakers, \textit{see} Standard Oil Co., 118 N.L.R.B. 1089 (1957); carpenters, \textit{see} Kennecott Copper Corp., 138 N.L.R.B. 118 (1962); and auto mechanics, \textit{see} Kennecott Copper Corp., 125 N.L.R.B. 107 (1959); Diamond T. Utah, Inc., 124 N.L.R.B. 966 (1959), may strive for separation from more expansive units in the highly integrated industries. Likewise, the previous denial of severance may be challenged in the typewriter, \textit{see} Royal McBee Corp. v. NLRB, 302 F.2d 330 (4th Cir. 1962); and wet-milling, \textit{see} Corn Prods. Ref. Co.,
severance will be denied in the future, the relative weight assigned to each of the relevant factors should be postulated. Also, contained within the relevant factors are interesting counterarguments which will be discussed below. Finally, it is not suggested that the Board adopt a formula, for any easy equation balancing competing interests would undoubtedly lead to arbitrary results. Rather, the purpose of this present discussion is merely to present the problems inherent in each of the relevant factors.

B. The Relevant Factors Upon Closer Examination

A common reason assigned to a finding that the proposed unit is not a true craft group is the lack of an apprenticeship program. Yet it may be that some plan for offering specialized training is warranted because of the employer's continued introduction of complex machinery. Likewise, the employees themselves may justifiably see the need for such specialization in order to insure their own safety. This necessity may be real or imagined and, likewise, the employer's resistance to it may be well or ill founded, but the fact remains that only through severance from the indifferent industrial unit may the skilled employees be able to exert enough pressure at the bargaining table to institute an apprenticeship program. Of course, the Board looks to the existence of a craft training program and not to the reasons why there is not one, and this inquiry is not unfair. However, lack of an apprenticeship program may be a valid indication that separate representation is advisable.

The assertion that a union petitioning for severance has not met the traditional representative test has another side. If attention were focused on the incumbent union's credentials, reasons for the proposed severance might appear better grounded. For instance, a plantwide unit at a chemical manufacturing establishment being represented by the United Mine Workers (UMW) seems unlikely. Similarly, employees of a manufacturer of clothespressing machines represented on an industrial basis by the UMW seems most untra-

80 N.L.R.B. 362 (1948), industries. Note, however, that dry-milling never was considered a "National Tube industry." See Kellogg Co., 104 N.L.R.B. 302 (1953).

87 The impracticality of such a suggestion has long been recognized. Mueller Brass Co. v. NLRB, 180 F.2d 402, 404 (D.C. Cir. 1950).


Of course, this remark is not meant to totally overlook the industrial nature of the UMW, or the prowess of its late leader, John L. Lewis.
ditional. Likewise, in a recent case, the Machine Printers and Engravers were denied severance of textile machine operators from an industrial unit represented by the Teamsters. With respect to the Teamsters, it must be remembered that for about 20 years it has been their policy to organize whole industrial units and not to limit themselves to a unit of truckdrivers and helpers.

In looking to the traditional representative status of the petitioning union, the Board should perhaps also consider the incumbent union's tradition for representing the workers proposing severance. Naturally, these skilled employees may have opted for an industrial unit originally, but with the introduction of new manufacturing processes and the like, the appeal for separate representation may be greater and more justifiable.

Another problem arises when the Board finds a community of interest among the employees because they share similar working conditions, rates of pay, and fringe benefits. The point has not been raised, but it would appear worthy of inquiry to ask whether this similarity of treatment is not the reason why skilled workers want severance. That is, a skilled group may feel that they are entitled to a larger portion of the monetary benefits than that to which they are presently entitled. Therefore, when the Board says that severance is to be denied because of the skilled group's submergence "in [a] broader community of interests," is not this in fact denying the possibility that the skilled group's individual interests are being slighted?

Community of interest, as stated above, is a concept that permits conceptual elasticity; it may include as many interests as the Board finds common to all the industrial unit's employees. The outer limits appear to have no boundaries.

As stated before, functional integration and employee interchange with less skilled employees are often relied upon to show community of interest and yet this may be a reason why a skilled group would prefer separate recognition and why they would rather

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92 In 1949, Dave Beck, then executive vice president of the Teamsters, announced that his union would commence organizing on an industrial basis. N.Y. Times, Jan. 15, 1949, at 9, col. 3.
93 This is not to suggest that the Board has been unresponsive to charges of unfair representation.
95 See note 65 supra and accompanying text.
have their own helpers assist them rather than the production and maintenance employees.

Finally, there is the matter of prior bargaining history. Reluctance to carve up a bargaining unit that has a history of stable relations with management is understandable.96 However, automation and even normal production innovations may bring changes which did not exist years before when the incumbent union was certified. The fact that the industrial unit has remained intact may mean that the interests of the proposed group are so "submerged" that severance, even if warranted, would not be practical. There is, however, less danger of this occurrence because under the Mallinckrodt Chemical Works doctrine prior bargaining history is only one consideration, but the danger of falling back on this factor as the primary concern has not gone unnoticed.97

In conclusion, the above discussion is not offered as an attack on the Board's new doctrine, but rather it is merely presented to illustrate that factors which at first glance appear to militate against severance, may in fact support it.

IV. CONCLUSION

The Board, through Mallinckrodt Chemical Works, definitely reached an equitable result in attempting to resolve the craft severance muddle. Now all employee groups will be subject to the same examination when the severance issue arises; and the factors deemed relevant in such an inquiry are supposedly the same in each case. The problem, of course, is defining the factors and, more importantly, determining their relative weight without being mechanistic.

Stability in industrial relations is always the goal in all unit determination situations and this most important fact will not be obscured. Undoubtedly, severance shall be more difficult in the future. However, there remains the task of satisfying the employee's freedom to choose his own bargaining representative while safeguarding stability. Perhaps a workable solution that would permit the maximum freedom allowable to skilled artisans, while protect-

96 See Timber Prods. Co., 1967 CCH NLRB Dec. ¶ 21,407 (1967). The Board denied craft severance to a group petitioning through the IBEW and noted that in its decision industrial bargaining "has been conducive to a substantial degree of stability in labor relations." Id. at 27,905.

ing industrial tranquility, is the newly proposed coordinated or unity88 bargaining approach.

Through the unity bargaining process employer associations and coalitions of unions negotiate on an industrywide basis. Conceivably, this system has the merit of tolerating a proliferation of employee units while, at the same time, safeguarding the employer from the onerous task of dealing with each union separately. As a means of reducing interunion rivalry, voluntary arbitration might be utilized to reduce the nuisance of a maverick union's holdingout tactics.

JOHN M. FLYNN

88 Bernard Cushman, Special Assistant to the General Counsel of the NLRB, proposed "unity bargaining" in a speech entitled "Paradoxes in Labor-Management Relations" delivered in New Orleans last October. Although Mr. Cushman's talk was directed primarily to the finding of an alternative to compulsory arbitration, the unity approach has special relevance here for the problems of contract negotiation are intertwined with unit determination questions. 1967 CCH LAB. L. REP. ¶ 8097.