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THE TAFT-HARTLEY ACT AND CRAFT UNIT BARGAINING

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ON March 9, 1948, George Q. Lynch, the president of the Pattern-makers League of North America (AF of L), in an oral argument before the National Labor Relations Board bluntly informed the Board members that craft bargaining had been given a green light by the new craft proviso in the Taft-Hartley Act. Wagging an admonitory finger directly under Board Chairman Paul M. Herzog's nose, Lynch warned the NLRB not to attempt to avoid the Act's "clear" intent by "tortuous legal reasoning."¹ No longer could the Board shoulder aside a craft group seeking an election. No more was the Board to sanction a plant-wide or company-wide bargaining unit if craftsmen were to be tossed into this group against their wishes. The AF of L official asserted that the new craft proviso represented victory in the AF of L's long fight for statutory recognition of craft union prerogatives. According to Lynch, if a majority in a craft unit desired to bargain as a unit, and not as a part of a larger unit, the Board must bow to this demand.

The proviso referred to by Lynch appears in Section 9(b) of the Taft-Hartley Act. This section became effective on August 22, 1947, but had not been finally construed by the NLRB when Lynch made his March, 1948 statement on the AF of L's view of its meaning. It provides as follows:

"The Board shall decide in each [election] 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: *Provided*, That the Board shall not . . . (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation"²

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1. Official Report, Oral Argument before NLRB, Central Foundry Company, 22 (case No. 10-R-2377, March 9, 1948).

2. 61 STAT. 136, 143 (1947), 29 U.S.C. § 159(b) (Supp. 1948).

The comparable Section 9 of the Wagner Act merely said in Section 9(b) that:

"The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."³

There was no proviso. The formulation of a policy for dealing with specific cases was left to the Board.

Exactly one month after Lynch's argument before the NLRB, the Board, in the *National Tube* decision,⁴ emphatically rejected Lynch's counsel. It announced that the law's new language did not provide an "open sesame" for the craft unions. The NLRB made it clear that the final say in craft unit v. plant-wide unit disputes remained with the Board. In the *National Tube* decision, the NLRB concluded that the 80th Congress merely forbade the automatic nullification of a craft unit petition when the Board's sole ground for its action was a "prior determination" that craft bargaining for the employees in question was not appropriate.⁵ In other words, the Board was instructed to take a "new look" at the circumstances involved in each case where craft union claims were present.⁶

Shortly after the *National Tube* decision was handed down, an aggrieved group of AF of L attorneys and leaders met privately with Senator Joseph H. Ball of Minnesota, chairman of the joint "watch-dog" committee appointed to keep tabs on the new law's operations, and with the committee's vice chairman, Representative Fred A. Hartley, Jr. of New Jersey. The AF of L delegation was puzzled and angry at the NLRB's action. The decision had come as a shock. Their general counsel, the late Joseph A. Padway, had assured the AF of L that craft unions had been granted separate bargaining rights by the 1947

3. 49 STAT. 449, 453 (1935), 29 U.S.C. § 159(b) (1946).

4. 76 N.L.R.B. 1199 (1948).

5. In support of this view, the NLRB quotes one of the Act's principal sponsors, Senator Robert A. Taft, Republican of Ohio. In floor debate, Taft said:

"[The bill] does not go the full way of giving [craft employees] an absolute right in every case; it simply provides that the Board shall have discretion and shall not bind itself by previous decision, but that the subject shall always be open for further consideration by the Board." 93 CONG. REC. 3836 (1947).

6. In its decision, the NLRB said that this "strict construction" of the proviso meant that:

"The question of the appropriateness of the proposed craft grouping must be independently considered on its merits.

"In this case, therefore, we have explored the entire situation *de novo*, without particular stress upon the certification issued in 1942 at 42 N.L.R.B. 1121." *National Tube Co.*, 76 N.L.R.B. 1199, 1204 n.11 (1948).

amendments to the Wagner Act. According to Padway, this proviso was about the only break for AF of L unions to be found in the new statute.

AF of L representatives who were present at the session with Ball and Hartley privately reported that Senator Ball quickly disabused them of this notion. He conceded that the 80th Congress originally might have favored permitting the crafts to write their own ticket on bargaining units. However, he candidly added: "Well, you know, we did water it [the craft proviso] down a bit later."⁷

The decision by the Board in the *National Tube* case raises some queries: By writing this proviso into the body of the law, did Congress intend to add only an insignificant procedural detail? Did Congress merely say to the NLRB: We indorse your craft unit policy, but we beg of you, when you rule against a craft union in the future, at least be polite and review the facts first. Don't turn down the craft's plea with a curt reference to an earlier anti-craft union decision at the same plant. Stick to your prior ruling if you choose, but do give the parties a new and full hearing and a full explanation.

If this is what happened, it appears that Congress wrote a new proviso onto the face of the law merely to give the NLRB a lesson in etiquette. Does the Act and the legislative history bear out this view?

I

But first, why all the fuss? After all, this issue is only a facet of one of NLRB's duller jobs—the technical one of determining the appropriate bargaining unit. Is there practical significance to this question?

Three principal reasons suggest that substantial interests are closely tied into the craft issue:

1. The type of bargaining unit can be very important to the establishment and maintenance of stable industrial relations. Employers, large and small, reportedly feel even more strongly about the unit question than do unions in many cases. Decisions by NLRB may determine how many separate sets of bargaining negotiations an employer must enter, how many unions he must recognize and how many bargaining contracts he must help administer. This is not to say that bargaining with a group of small craft units is normally less stable than company-wide bargaining. The question is complex. It is enough to say here that an NLRB unit decision can be of great practical importance in the history of any bargaining relationship.⁸

7. This account is based on interviews with two AF of L attorneys, and was confirmed by an aide to Senator Ball.

8. For a brief discussion of the inevitable problems produced by a law permitting both industrial and craft bargaining, see Fitzpatrick, *The Settlement of Contract Negotiation Disputes: A Business Viewpoint*, 12 LAW & CONTEMP. PROB. 346 (1947).

2. A division on the craft unit v. industrial unit issue was the one and only major reason for the original divorce between the AF of L and the CIO in November 1935. The CIO held its first informal meeting immediately after the AF of L's 1935 convention at Atlantic City refused to back away from the following stand taken at San Francisco the previous year: "We consider it our duty . . . to protect the jurisdictional rights of all trade unions organized along craft lines."⁹ And this failure to reach a compromise on the representation rights of craftsmen in mass production plants remains an important impediment to labor unity in the United States.¹⁰

3. Special focus on the craft question as handled by Congress and administered by the NLRB is important also because the Board's craft decisions usually are the last word. Representation decisions by the NLRB, unlike unfair labor practice rulings, are not reviewable by the federal courts.¹¹

Congress originally made no effort to provide the NLRB with guiding rules for the determination of appropriate bargaining units. The craft policy evolved under the Wagner Act was the NLRB's own, fashioned without advice from the 74th Congress. Because the NLRB had been on its own in this area since 1935, the amended Act of 1947 contained the first authoritative review of the Board's use of its broad authority in this field during the past 12 years. It is true that the Board's craft policy was vigorously attacked in pre-war hearings held by the House Labor Committee and the special Committee investigating the NLRB

9. HARRIS, *LABOR'S CIVIL WAR* 43 (1940).

10. Although the AF of L contains most of the United States craft unions, the impression should not be left that the AF of L is an exclusively craft union organization. Among the AF of L unions which usually seek industrial bargaining units are the International Ladies Garment Workers' Union, the United Textile Workers of America, the International Chemical Workers Union, and the United Automobile Workers of America. Furthermore, a number of other AF of L unions represent both craft and industrial units. For example, the United Brotherhood of Carpenters and Joiners most typically represents craft units in the building and construction industry, but it also attempts to organize entire factories making fabricated houses and other wood products. See *Gunnison Homes, Inc.*, 72 N.L.R.B. 940 (1947).

11. An NLRB certification of a bargaining representative or a Board order dismissing a petition for a representation election is not regarded as a "final order" of the Board. Under § 10(f) of both the Wagner Act and the Taft-Hartley Act, a "final order" of the Board is reviewable by the federal courts. The Supreme Court has held that the only "final orders" of the NLRB are those issued in unfair labor practice cases. See *Inland Empire District Council v. Millis*, 325 U.S. 697 (1945); *AF of L. v. NLRB*, 308 U.S. 401 (1940); *NLRB v. Falk Corp.*, 308 U.S. 453 (1940).

Under this interpretation, representation decisions can be reviewed only if a representation case subsequently becomes part of an unfair labor practice case, usually as the result of an employer's refusal to bargain with the union certified by the Board. See *Mueller Brass Co. v. NLRB*, 180 F.2d 402 (D.C. Cir. 1950). See also *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941).

headed by Rep. Howard W. Smith of Virginia.¹² But nothing definite was enacted as a result of those hearings and the NLRB appeared justified in continuing to rule without taking particular notice of the findings of those two committees.

II

Before considering the Taft-Hartley Act developments, however, a brief word on the Wagner Act history on craft policy is necessary. First, it should be noted that the 74th Congress was not aware when it wrote the Wagner Act that the NLRB was being placed in a statutory "no man's land" between the AF of L's craft unions and the CIO's industrial unions. The Act went on the statute books in July 1935 and the first informal organization meeting of the CIO was not held until November 1935, about four months later. To be sure, the craft v. industrial union fight was in progress during the Wagner Act deliberations but it had not yet spread beyond the AF of L's territory.

Whether or not the 74th Congress sensed the implications of this gathering struggle, the Board itself was in operation only briefly before it realized its exposed position. During its first several years the NLRB accumulated a few powder burns and the realization that it was the referee in a political scrap between two powerful labor groups. Having recognized the fundamental problem and its resistance to easy solution, the Board inched its way along on a case-by-case basis, committing itself as infrequently as possible and avoiding rulings labelled "craft policy." Even the rare decisions of significance on the craft problem were delivered in a plain wrapper, so to speak, with the result that the NLRB's rules, definite indeed in their outlines but capable of considerable flexibility, must be pieced together from a raft of decisions.

Three of these Wagner Act rulings are indispensable to a general comprehension of the Taft-Hartley Act events. The first was the 1937 ruling in the *Globe Machine and Stamping Company* case.¹³ In this opinion, issued while the Board members were still getting their bearings, the NLRB decided to leave the final say in disputed cases to a vote of the craft employees themselves, thus relieving the pressure on the Board. For example, if an industrial union claimed a plant-wide unit, and a craft union sought a craft unit which was composed of employees also claimed by the industrial union, the Board generally would direct a so-called *Globe* election. Under this rule of the *Globe* case, the employees in the craft group would vote separately from the other employees in

12. *Hearings before the Committee on Labor, House of Representatives, on Proposed Amendments to the National Labor Relations Act*, 76th Cong., 1st Sess. 659, 668, 735, 854 (1939); *Hearings before the Special Committee to Investigate the National Labor Relations Board and Operation of the National Labor Relations Act*, 76th Cong., 1st Sess. 281-9 (1939-40).

13. 3 N.L.R.B. 294 (1937).

the broader unit. In this separate election, the craft employees might vote for either the craft union or the industrial union. If the craft union won this election, a separate craft unit would be approved by the NLRB. If the vote went against the craft union, the craftsmen would be included in the big unit; providing, of course, that a union was selected in the main election as representative of these workers.

The *Globe* election procedure was modified by a July 1939 ruling in the *American Can Company* case,¹⁴ the most controversial craft decision ever issued by the Board. In this decision the Board partially abandoned its strictly hands-off practices characterized by the *Globe* elections. That sort of election was continued in quite a few cases, but it no longer was automatic that a craft union might get a separate election. Instead, the NLRB boldly said it would refuse to break up industrial units by permitting so-called craft severance elections when the industrial union could demonstrate a successful "history" of bargaining on a broad basis without crafts. The twin rewards of "stability and responsibility" in bargaining relations would best be encouraged by not upsetting the "unity" of a going and successful industrial bargaining relationship between a union (usually CIO) and an employer, the Board's majority said. The practical effect was to freeze AF of L units out of the big mass production plants and others where the CIO was entrenched. A dissent by Board Chairman J. Warren Madden warned against crystallizing "the industrial form of organization" and thereby forbidding the craft employees from ever thereafter using the Board election process as a means of escape from the industrial unit.¹⁵

AF of L craft union leaders were outraged when the *American Can* decision came down. The AF of L's craft chiefs protested that a craftsman never even had a chance to cast a vote against being tucked into a big bargaining unit composed largely of the unskilled and the semi-skilled workers. The timing of this decision made the AF of L's protests understandable. Until June 1938 a reconciliation between the AF of L and its rebellious offshoot, the CIO, had continued to be a definite possibility. But in that month the AF of L slammed the door, and the drive to cut the CIO down to splinter size began in earnest. A year later, however, the *American Can* decision in effect told the AF of L to stay clear of the CIO's newly organized units in steel, auto, rubber, electrical equipment and other mass production plants.

At first the AF of L's energetic opposition to this Board policy was largely ineffective. Although modifications and exceptions to the *American Can* rule occurred periodically, beginning in 1942,¹⁶ the

14. 13 N.L.R.B. 1252 (1939).

15. *Id.* at 1259.

16. Bendix Aviation Corp., 39 N.L.R.B. 81 (1942); Aluminum Co. of America, 42 N.L.R.B. 772 (1942); Santa Cruz Portland Cement Co., 52 N.L.R.B. 444 (1943); General

American Can doctrine continued to dominate the NLRB's rulings in craft severance cases, despite the AF of L's protests. But by the close of World War II in August 1945, a new line-up of Board members, containing no holdovers from the 1939 period, developed an almost radar-like sensitivity to the noises of its critics. As the post-war clamor for new labor legislation increased, the NLRB already was on the move toward refurbishing several of its most sharply attacked policies, including its rules on craft elections. The face-lifting in the craft policy area was begun in a significant decision approving craft severance elections at potash mines owned by the *International Minerals & Chemical Corporation*.¹⁷

This decision followed closely after the 1946 elections which sent the 80th Congress to Washington. In its ruling issued on November 27, 1946, the Board quietly buried its *American Can* rule. In this new decision, issued routinely and bearing few of the marks of a policy-making ruling, the Board announced its great concern for the right of a craftsman to have at least a vote on separate bargaining. The stable and responsible union-employer relationship fostered by a successful history of plant-wide bargaining became overnight a factor to be treated with coolness. It was intimated that bargaining history might still be a factor in these proceedings, but by no means a dominant factor.

In the *International Minerals* case and in several rulings issued shortly thereafter,¹⁸ ostensibly the Board simply changed its emphasis by stressing the right of a craftsman to a vote in representation elections. In effect, the Board adopted the philosophy on craft unions rights contained in former Chairman Madden's dissenting opinion in the *American Can* case.¹⁹ Under this approach, the craft union seeking separate representation rights in competition with a larger unit had

Electric Co., 58 N.L.R.B. 57 (1944); Electric Sprayit Co., 67 N.L.R.B. 780 (1946). Of these decisions, the *General Electric* case was the most significant. It involved an attempt by the Board to establish a set formula for permitting craftsmen to gain severance from an industrial unit despite the bargaining history. The Board suggested that the craftsmen must demonstrate their retention of craft "identity" while they were functioning as part of an industrial bargaining unit. By retention of identity, the Board indicated, for example, that the craft workers might handle their own grievances instead of permitting the industrial union to do so, abstain from becoming officers of the industrial local, and continue to pay dues to their craft union even though it wasn't their official representative. This effort to modify the *American Can* rule was a failure. Its principal limitation was the fact that it placed the Board in the role of encouraging certain members of a bargaining unit to play havoc with the bargaining relationship by making nuisances of themselves.

17. 71 N.L.R.B. 878 (1946).

18. American Fork and Hoe Co., 72 N.L.R.B. 1025 (1947); Food Machinery Corp., 72 N.L.R.B. 483 (1947); Allied Chemical and Dye Corp., National Aniline Division, 71 N.L.R.B. 1217 (1946).

19. See note 15 *supra*.

to show (1) that the craft workers had never had a chance to express themselves in an NLRB election on the type of representation desired, or (2) that they had not had a vote on the issue for the past 3 or 4 years. If this sort of showing were made, and the NLRB was satisfied on other technical and procedural grounds, it was unlikely that an impressive industrial-type bargaining history would serve to deter the NLRB from holding a separate poll for the craft workers. In this series of cases the Board even reached into highly integrated automobile assembly and airframe production plants, and sanctioned craft severance elections.²⁰ Only basic steel plants seemed immune.²¹ It was the CIO's turn to howl, and the opportunity was not neglected.²²

But the NLRB was not done with its policy reshaping. In another line of cases which began appearing in 1947, the Board added a new wrinkle. It began to be more critical about the claims of craft union officials that actual craftsmen made up the bulk of their proposed craft units. For example, it started to ask questions about skills and apprenticeship. This seemingly basic line of inquiry had been pursued only superficially in the pre-1947 period. During that time, the Board appeared to have no working definition of a craftsman and no inclination to develop one. Also, any tendency to go further presumably was discouraged by the fact that pronouncements by the AF of L hierarchy that certain workers were craftsmen were generally advanced as findings made in Heaven which were not subject to challenge by outsiders, particularly NLRB members.²³ In fairness to the AF of L position, however, it should be said, that technological changes, plus sometimes overlapping jurisdictional specifications contained in various AF of L union constitutions, made it practically impossible, and also inexpedient for AF of L representatives to provide an authoritative definition.

But the NLRB finally took a stiffer attitude in 1947. In a quiet way, in decision after decision,²⁴ the Board began to inform the craft union

20. *Kaiser-Frazer Co.*, 73 N.L.R.B. 109 (1947) ; *Lockheed Aircraft Corp.*, 73 N.L.R.B. 220 (1947).

21. In March 1942, in the *Tennessee Coal, Iron and Railroad Co.*, 39 N.L.R.B. 617 (1942), the Board announced its refusal to certify craft units in the basic steel industry. Its decision said: "Self-organization of employees and collective bargaining both within the Company and within the steel industry as a whole has been essentially on an industrial and multiple-plant basis since 1937. Such a development is consonant with the integrated nature of the industry." *Id.* at 623-4.

22. Writing in the May 26, 1947 issue of the *CIO News*, Lee Pressman, then CIO's general counsel, charged the NLRB with ordering a craft severance election "in every single case [since November 1946] involving the issue of a craft against an industrial unit."

23. A student of the AF of L-CIO struggle during the Wagner Act period made the following comment on the AF of L's craft policy: "What the AFL is really aiming at is to have the Board automatically recognize any type of union structure that the Federation may find or imagine to be a craft." HARRIS, *LABOR'S CIVIL WAR* 200 (1940).

24. *Smiths Bluff Refinery, Pure Oil Co.*, 79 N.L.R.B. 51 (1948) ; *Monsanto Chemi-*

of the NLRB's definition of craftsman. Proposed craft units failing to meet these increasingly rigorous standards were denied recognition.

What was the practical meaning of the two phases of this new approach? In effect, the *International Minerals* case took the Board back to the original *Globe* election procedure. Under the 1947 policy, members of proposed craft units invariably were granted the ultimate say on the separate bargaining issue. The *Globe* decision had approved substantially the same thing. But there was an important variation involved in the 1947 rulings; namely, the more skeptical investigation of claims to craft skills. Like the situation in 1938, the NLRB was freely approving craft unit elections, but—unlike 1938—approval was withheld until the alleged craftsmen's credentials were given a long, hard look.

This overall policy left one large question unanswered. It did not indicate whether the NLRB intended to retain its pre-1946 power to set aside a few entire industries as exceptions to the general rules. As indicated above,²⁵ the basic steel industry had been protected against the establishment of any new craft units since the *Tennessee Coal, Iron and Railroad* case of March 1942. By the time this issue was squarely presented in the *National Tube* case,²⁶ an added question was present: How would the Taft-Hartley Act proviso affect the NLRB's rules in all craft cases?

The NLRB's response, already noted above, to the query on the overall effect of the proviso sharply devalued the AF of L's estimate of Section 9(b)(2). The Board said it would continue to call the shots on craft issues but that it would refrain from deciding new cases simply on the basis of past decisions involving the same general issue. In spelling out its reasons for this conclusion, the NLRB said:

" . . . the statute clearly states that the Board's action in finding a craft unit inappropriate shall not be based upon the fact that a different unit has been established by a prior Board determination. Because the phrase '*a prior Board determination*' contains no substantial ambiguity, and because Section 9(b)(2) is a proviso, as distinguished from an affirmative statement of duties imposed by the statute, we believe that we should not strain to give this proviso an interpretation unwarranted by its express language. This conclusion is consistent with the general rule that a proviso must be the subject of strict construction. We find, therefore, that Section 9(b)(2) does not itself limit the Board's discretion to find a craft unit inappropriate in certain situations, so long as there is no reli-

cal Co., 79 N.L.R.B. 1035 (1948); *Wilson Foundry & Machine Co.*, 81 N.L.R.B. 293 (1949).

25. See note 21 *supra*.

26. See note 4 *supra*.

ance upon the fact that a different unit has already been established by a prior Board determination." ²⁷

In answering the other query on industry-wide exceptions to general craft policy, the Board adhered to its earlier decisions, insisting that craft unit bargaining was not the thing for the basic steel industry. It also was made clear that the NLRB retained the right to set up similar fences around other industries in the future if it saw fit.

This is the Board's most authoritative statement on the craft proviso and no significant elaborations have appeared subsequently. That the decision is in line with—or, at least, does not subvert—Congressional intent seems borne out by an examination of the Act's legislative history.

This history is somewhat confusing for, as Senator Ball's above quoted remark indicates, Congressional thought shifted during the course of the debate. There is little doubt, however, that Congress was not happy with the *American Can* rule.²⁸ The House Labor Committee's majority report on H.R. 3020 (the original Hartley bill) refers favorably to the *Globe* decision and, by implication, is critical of the *American Can* rule.²⁹ The Senate Labor Committee's majority report on S. 1126 called the *American Can* doctrine "inequitable,"³⁰ and asserted that this bill "overrules the *American Can* Rule."³¹

It appears to be clear from these statements that Congress was not aware that the NLRB had largely nullified this rule in the *International Minerals* case. There is no mention of the *International Minerals* decision in the legislative records of the Act and the decision was brought to the attention of the Congress only once when it was mentioned casually without having its significance pointed up.³² But the remarks of the House and Senate majority reports, plus Senator Taft's floor statement that the proviso, as ultimately approved, "gives greater power to the crafts to organize separately,"³³ suggest that Congress wanted to give the craft unions a better break. Furthermore, these statements in the history indicate that Congress' notion of a better break was the reversal or substantial modification of the *American Can* decision.

But, granting that Congress favored the result of the *International*

27. 76 N.L.R.B. 1199, 1203, 1204 (1948).

28. See note 14 *supra*.

29. H.R. REP. NO. 245, 80th Cong., 1st Sess. 37 (1947).

30. SEN. REP. NO. 105, 80th Cong., 1st Sess. 12 (1947).

31. *Id.* at 25.

32. NLRB Chairman Herzog cited the *International Minerals* case as one of the "many exceptions" which the Board had made in favor of craft unions despite the *American Can* doctrine. *Hearings before Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess. 1916* (1947).

33. 93 CONG. REC. 3836 (1947).

Minerals case, although it was unaware of the decision, why then did they not write a clear and unambiguous proviso to that effect into the Act? The informal accounts of this chapter suggest that for reasons both of politics and policy, Congress did not want to bind the Board's hands irrevocably. On the one hand, it wanted to win AF of L support by adding the craft proviso, thereby implying that the craft unions were to benefit by the new language. But at the same time it knew that a clear-cut proviso would have touched off powerful opposition from the almost unique combination of the CIO and big industry. Congressmen, previously inclined to favor a section similar to the unrestricted licenses granted craftsmen in the New York³⁴ and Wisconsin labor laws,³⁵ became aware that the issue of a federal craft grant was more complex. Small local enterprises might lend themselves to craft bargaining sponsored by the state, but it might be another proposition when considered from the point of view of a federal law applicable, for instance, to the U. S. Steel Corporation. In fact, 1947 testimony before the Senate Labor Committee³⁶ suggested the probability of industrial turmoil, particularly in the larger production plants, if Congress gave a blank check to the crafts. Sponsors of the Taft-Hartley Act were not anxious to be designated as the promoters of such conditions. As a result, they decided to make the proviso vague enough to require the NLRB to write its own decisions as to what actually was intended. In this way, if the decisions continued to displease craft union leaders, the Board would be responsible. And it has turned out this way. In his testimony on February 14, 1949 before the Senate Labor Committee, AF of L President William Green said that the Board had aborted Congress' clear intent.³⁷

34. The New York law contains the following provision:

"The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purposes of collective bargaining." N.Y. LABOR LAW § 705(2).

35. The Wisconsin Employment Peace Act says:

"The term 'collective bargaining unit' shall mean all of the employees of one employer (employed within the state), except that where a majority of such employees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05(2) to constitute such group a separate bargaining unit they shall be so considered. . . ." WIS. STAT. § 111.02(6) (1947).

36. *Hearings before Senate Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess. 1167, 1916* (1947).

37. Green told the committee that the Eightieth Congress "tried" to make it "obligatory" on the part of the Board to grant each craft group the right to select its own bargaining agent, "but the NLRB destroyed it [the proviso]." Senator Taft asked the AF of L chief if he thought that the Board had destroyed the proviso "completely." Green answered:

These factors were coupled with another more basic reason for leaving the big decisions on craft issues up to the Board. Congress discovered that the craft question did not lend itself to legislative fiat. The problems—differing greatly from plant to plant and from industry to industry—were the type to be resolved administratively. This consideration may safely be regarded as the inarticulate major premise which ultimately came to dominate the legislative resolution of this issue.³⁸

Thus it appears clear that Congress backed down on its original determination to overrule the *American Can* decision and to strip the Board of a great part of its Wagner Act discretion. Senator Taft's remarks bear out this view. He first subscribed to a Senate Labor Committee report which expressly announced that the *American Can* doctrine was overruled.³⁹ But later, in his floor statement cited by the NLRB as an important determinant in the *National Tube* decision, Taft abandoned the more sweeping language of the Committee report by saying that the proviso "simply provides that the Board shall have discretion and shall not bind itself by *previous determination* but that the subject shall always be open for further consideration by the Board."⁴⁰

III

Of basic importance to a discussion of NLRB craft policy are the various tests of a craft unit laid down in the line of Board decisions beginning about 1947.⁴¹ These tests deal principally (1) with an employee's skills, and (2) with the homogeneity of the proposed unit (common interests among unit members on wages, hours and working conditions, special supervision, segregation from other workers, etc.).

When the Board came to distinguish the skilled from the unskilled workers under the new tough policy toward alleged craftsmen, the following major tests gradually came into use:

1. The most important query: How much training did the employees receive? When a thorough apprentice-training program providing instruction and practice for a year or more is discovered, the Board

"Completely." *Hearings Before Senate Committee on Labor and Public Welfare on S. 249, PART IV*, 81st Cong., 1st Sess. 1902 (1949).

38. This was the conclusion reached by the only federal court to examine this question to date. According to the United States Court of Appeals for the District of Columbia, "Congress recognized, in both the National Labor Relations Act of 1935 and the Labor-Management Relations Act of 1947, that an appropriate bargaining unit can hardly be ascertained by means of some neat statutory formula and, therefore, decided to furnish only minimal standards to guide the Board." See *Mueller Brass Co. v. NLRB*, 180 F.2d 402, 404 (D.C. Cir. 1950).

39. See note 30 *supra*.

40. See note 5 *supra* (emphasis added).

41. See note 24 *supra*.

usually is favorably disposed toward a craft claim. And even in cases where formal apprentice-training is absent, the NLRB generally will approve craft units if the case record shows that these workers receive the equivalent of apprentice-training "in the course of their employment" ⁴² On the other hand, alleged craftsmen who learned their skills in one to three months are likely to be denied separate elections. ⁴³

2. Do the employees possess and use genuine craft skills or merely "quasi-craft skills"? In a *General Motors* case, a leading reason for denying severance to a blacksmiths' group in a ball-bearing production plant was the fact that the employees involved performed only some duties of "the traditional calling of the blacksmith, namely, the shaping and changing of the content of metal." ⁴⁴ In a similar case at *National Carbide Corporation*, ⁴⁵ the Board refused to hold an election because "the electrical maintenance employees spend about 50 per cent of their working time in the performance of electrical duties which are routine and do not require the exercise of the skills generally attributed to the electrical craft. . . ."

3. Are the so-called craftsmen interchanged with semi-skilled or unskilled production or maintenance workers? When frequent examples of interchange are cited, the chances for severance diminish. ⁴⁶

4. Are the craftsmen supervised by their own special foremen and physically segregated from other operations? Separate supervision and physical segregation are two of the craft characteristics looked for by the NLRB. ⁴⁷

5. Does the petition include all the highly-skilled craftsmen of one craft working in the plant covered by the petition? On the theory that the common interests of employees possessing the same skills overreach departmental bounds, the Board has tended to insist that the highly skilled in a single craft all be included in the same unit. Failure of a craft union to seek all the skilled pattern-makers, for example, might result in dismissal of its petition. ⁴⁸

6. Does the craft petition include too many employees of lesser or non-existent skills more suited because of their interests to inclusion

42. *Mueller Brass Company*, 88 N.L.R.B. No. 53 (Feb. 13, 1950).

43. *Westclox Division, General Time Corp.*, 87 N.L.R.B. No. 39 (Dec. 6, 1949); *American Manufacturing Co.*, 76 N.L.R.B. 647 (1948); *Link-Belt Co.*, 76 N.L.R.B. 427 (1948); *Pacific Car and Foundry Co.*, 76 N.L.R.B. 32 (1948); *Allis-Chalmers Manufacturing Co.*, 77 N.L.R.B. 719 (1948).

44. 76 N.L.R.B. 879, 885 (1948).

45. 77 N.L.R.B. 454 (1948).

46. *Philip Morris & Co., Ltd.*, 79 N.L.R.B. 56 (1948); *National Container Corp., Inc.*, 75 N.L.R.B. 770 (1948); *C. A. Dunham Company*, 74 N.L.R.B. 212 (1947).

47. *National Container Corp., Inc.*, 75 N.L.R.B. 770 (1948). But cf. *A. C. Spark Plug Division, General Motors Corporation*, 88 N.L.R.B. No. 220 (1950).

48. *Caterpillar Tractor Co.*, 77 N.L.R.B. 457 (1948).

in a broad production and/or maintenance unit? The present Board discourages the Wagner Act habit of assembling a "craft" unit made up of a "front" of four or five genuine craftsmen surrounded by a supporting cast of semi-skilled workers. The new approach was illustrated in the *Combustion Engineering* case,⁴⁹ where a craft petition was rejected because only 10 of the 21 employees sought for the unit possessed journeymen skills. The others were semi-skilled machine operators.⁵⁰

7. Do the craftsmen in the unit represent more than one craft? A craft unit must be confined to the members of a single craft, according to the Board.⁵¹ There are exceptions on this point, however.⁵²

It is important to note that there are other ways of obtaining a small bargaining unit than by the craft route. The Taft-Hartley Act permits the NLRB to approve "the employer unit, craft unit, plant unit, or subdivision thereof."⁵³ There are three principal types of these subunits in which craft skills on the part of the unit members are not mandatory: the powerhouse or boiler room unit, the truck drivers' unit, and the departmental unit in a plant.⁵⁴

49. 77 N.L.R.B. 72 (1948).

50. See also *Link-Belt Co.*, 76 N.L.R.B. 427 (1948); *Dover Appliance Co.*, 76 N.L.R.B. 1131 (1948).

51. *Pepsi-Cola Co.*, 78 N.L.R.B. 790 (1948).

52. Two loopholes in this restriction have been opened up by the Board itself: (1) A multi-craft unit will be approved in the absence of an existing broader grouping or a history of bargaining on a plant-wide basis. *Armstrong Cork Co.*, 80 N.L.R.B. 1328 (1948); (2) If a union wants a multi-craft group of employees, it need only break up the craftsmen into separate units on a craft-by-craft basis. Having made this division, separate petitions should be filed for each group by the same union. *Shell Chemical Co.*, 81 N.L.R.B. 965 (1949); *Potash Co. of America*, 80 N.L.R.B. 1035 (1948).

53. See note 2 *supra* (emphasis added).

54. The following groupings have been fashioned not infrequently by the NLRB without an express finding of the presence of "craftiness" (the NLRB's private expression for the condition of being a craft unit):

Powerhouse or boiler room employees segregated from the main group of production and maintenance workers. The homogeneity of these groups also influences the Board's feeling that special consideration is deserved in their cases. It is suggested informally within the NLRB that the AF of L Operating Engineers, the chief petitioning union for these units, might be driven out of business if the Board abandoned this policy.

Truck driver units. There appears little likelihood that the survival powers of the AF of L Teamsters would be threatened if the Board should deny separate elections to truck driver units. There is even less likelihood that the Board would adopt such an approach toward the drivers. It probably would necessitate a finding that truck drivers are not craftsmen. Thus far, under its new policy toward craft claims, the NLRB has not given a really satisfactory response to the query: Is a truck driver a craftsman? The question has been ducked, although the Board members privately have reported a good deal of meeting-time debate on the point. Practically speaking, there is little point in the Board's facing this issue. The extensive organization of truck drivers across the country in separate Teamster units is a deep-rooted fact in the bargaining picture. Furthermore, even if drivers should not be regarded as craftsmen, the nature of their operations, their

Before concluding the discussion of the NLRB's various tests utilized in unit determinations, a word should be included about the use of the so-called *National Tube* doctrine.⁵⁵ As noted above, in the *National Tube* decision, the NLRB reaffirmed its power to declare its disapproval of craft bargaining for an entire industry, or for an important segment of an industry, particularly when the duties of skilled workmen were intimately tied into an integrated production operation.

Outside of the basic steel industry, this power has come in for sparing use. Numerous employers have urged the extension of this principle to their particular industries, but the only entire industries to sell this argument to the NLRB are the lumbering⁵⁶ and the aluminum-making industries.⁵⁷ Otherwise, the rule has been applied only to certain types of production operations within given industries: an auto assembly plant,⁵⁸ and a forge plant making auto parts.⁵⁹ The Board also has become increasingly sympathetic to the banning of craft bargaining from chemical plants,⁶⁰ but it has declined to approve a flat ban on craft severance elections among chemical workers.⁶¹ Other industries where the NLRB has balked at applying this rule are airframe manufacturing,⁶² steel castings manufacturing,⁶³ tin smelting⁶⁴ and electrical manufacturing.⁶⁵

IV

Today the NLRB's job of serving as referee in craft cases remains one of its most vexing tasks. The Board would be happy to be rid of the chore. As Chairman Herzog told the Senate Labor Committee in 1947, a proviso removing the NLRB's discretion in craft cases "would

remoteness from other production and maintenance workers in most situations, and their successful bargaining history could be cited to justify continuation of their separate units.

Departmental units of essentially non-craft production and maintenance workers. These groupings, which are allowed occasionally, have their best chance of approval if no broader unit is in existence when the petition for the departmental unit is filed. *International Harvester Co.*, 79 N.L.R.B. 1452 (1948).

In addition to these three types of "subdivisions" which the NLRB has recognized, the Taft-Hartley Act in §9(b) expressly encourages another type of small unit: Bargaining groups composed wholly or largely of professional employees.

55. See note 4 *supra*.

56. *Weyerhaeuser Timber Co.*, 87 N.L.R.B. No. 106 (Dec. 1949).

57. *Permanente Metals Corp.*, 89 N.L.R.B. No. 88 (April 27, 1950).

58. *Ford Motor Co.*, 78 N.L.R.B. 887 (1948).

59. *General Motors Corp.*, 80 N.L.R.B. 145 (1948).

60. *American Viscose Corp.*, 84 N.L.R.B. No. 25 (June 13, 1949); *Monsanto Chemical Co.*, 78 N.L.R.B. 1249 (1948).

61. *Monsanto Chemical Co.*, 78 N.L.R.B. 1249 (1948).

62. *Consolidated Vultee Aircraft Corp.*, 75 N.L.R.B. 1276 (1948).

63. *Buckeye Steel Castings Co.*, 75 N.L.R.B. 982 (1948).

64. *Tin Processing Corp.*, 80 N.L.R.B. 1369 (1948).

65. *Westinghouse Electric Corp.*, 75 N.L.R.B. 638 (1947).

have the advantage of lightening . . . [the NLRB's] burden" by removing the necessity for decision "in many delicate craft severance cases where the AFL and CIO differ most sharply." But the Chairman added: "In all good conscience, however, as public servants endeavoring to do that which will best achieve industrial peace through collective bargaining, we cannot urge that we be deprived of discretion to determine the appropriate unit in these difficult craft severance cases."⁶⁶

There is no evidence that this view has changed since 1947. Indeed, while the AF of L and CIO remain as warring labor federations, the issue will continue to require arbitrament by the NLRB or by some other umpire. Neither are there strong assurances that so-called "organic unity" among labor unions will eliminate the problem.⁶⁷

There is little doubt that the NLRB has been successful in administering this section of the law, but there are not enough facts to permit a definitive conclusion about the practical effects of its policy on industrial relations in this country. One indication that the Board has done a good job is the absence of a series of horrible examples of plants where instability in industrial relations is traceable to Board decisions on units. Further evidence that the Board's groping progress toward a craft policy has been effective is the report that neither the employers, nor the CIO, nor the AF of L seems to be up in arms over the Board's performance. It is true that all three groups have their com-

66. See *Hearings on S.55 and S.J. Res. 22, supra*, note 32 at 1915.

67. However, there was a recent development which might point toward future devaluation of the craft issue's importance. In January 1949, Dave Beck, the AF of L Teamsters' influential executive vice-president, told a press conference in New York City that the craft pattern heretofore followed by the Teamsters was out of style. The New York Times' story on the conference said that Teamsters' union planned to alter "its traditional [craft] structure and refashion itself along generally national and industrial lines." Beck candidly expressed the view that the change would be significant for industry because it would "end the turmoil caused by jurisdictional disputes." He said the union would create a "national organization conference structure." In place of the tangled proliferation of small Teamster units, Beck announced the formation of 15 industrial trade divisions. N.Y. Times, Jan. 15, 1949, p. 9 col. 3.

If the performance of other craft unions (like the International Association of Machinists) which have modified their views on craft bargaining in order to permit organization of some industrial units is a reliable criterion, however, the Teamsters will not quickly begin peering haughtily at small units of drivers or other "subdivisions." Instead, the type of unit pursued probably will depend on the organizing situation in each successive case.

But regardless of any future revisions of the non-craft approach announced by Dave Beck, his statement presents a remarkable contrast with Teamster President Dan Tobin's remarks at the AF of L's fateful 1935 Atlantic City Convention. In rising to oppose the arguments for industrial unionism presented to the convention by John L. Lewis and his supporters, Tobin defied the "very gates of hell" to prevail against the "rock of crafts' autonomy, the craft trades." See HARRIS, *LABOR'S CIVIL WAR* 45 (1940).

plaints on this issue but none is sufficiently exercised these days to attack the NLRB publicly.

Because the AF of L has been the sharpest critic of the Board on craft issues in the past, its present relatively mild attitude toward the NLRB's craft policy helps to point up the Board's recent adroitness in this field. In the few years following the issuance of the *American Can* decision, the AF of L engaged in a furious assault on the NLRB. It competed with employers for access to forums where the NLRB might be assailed.⁶⁸ By 1947, however, the AF of L, while far from happy, adopted a much milder attitude. President William Green told the Senate Labor Committee that "our criticisms [in the past] were essentially premised on a biased administration of the act by biased personnel. That condition has since been largely eliminated by the appointment of new Board members who . . . are acting in an equitable and fair manner."⁶⁹

These considerations, and the fact that the 80th Congress decided to continue to entrust the Board with most of the discretionary powers it held under the Wagner Act, are the best available indications that the NLRB has qualified as an experienced and reliable umpire on craft issues. Although the verdict will be received by the Board members with mixed feelings, it seems fair to conclude that the Taft-Hartley Act's aim of industrial peace will best be served if the NLRB keeps this particular job.

68. HARRIS, *op. cit. supra* note 67, at 199.

69. *Hearings on S. 55 and S.J. Res 22 supra* note 32, at 1007, 1008. However, in 1949 Green did tell the Senate Labor Committee that the AF of L's "experience" on craft issues under the Taft-Hartley Act had been "very unsatisfactory" but he avoided calling for the heads of the NLRB members as the AF of L hierarchy had customarily done in the past. *Hearings before the Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess. 1904 (1949).

This remark by Mr. Green appears to be in conflict with the 1949 testimony by the AF of L (see note 37 *supra*) attacking the Board's interpretation of the Taft Act's craft proviso in the *National Tube* case. But the 1949 statement was prompted by the AF of L's disappointment at discovering that the Taft-Hartley Act had not made an automatic affair of the process of craft unit elections. As is indicated above, the AF of L craft unions basically believe that the NLRB ought not to have the authority to deny craft elections.

However, after the Board was made the scapegoat for the failure of the Congress to grant this AF of L desire, the craft union officials have refrained from much criticism of subsequent NLRB decisions in craft union cases. In other words, the position of the craft union leaders seems to be this: It would be far better to leave the final power on craft unit elections up to the craft groups themselves. But if federal regulation is required, the NLRB might as well do the regulating.