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Labor Law -- Authority of National Labor Relations Board -- Consolidation of existing Bargaining Units through Unit Clarification Proceedings -- United Glass & Ceramic Workers v. NLRB

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only when a party is involved in a sales transaction and does not call for the application of the objective standard in a dispute between two merchants not parties to a sales transaction between themselves.

LEONARD S. VOLIN

Labor Law—Authority of National Labor Relations Board—Consolidation of Existing Bargaining Units through Unit Clarification Proceedings—*United Glass & Ceramic Workers v. NLRB*.[1]—The United Glass and Ceramic Workers and various locals thereof (Union) brought suit in the United States Court of Appeals for the Third Circuit to challenge a decision by the National Labor Relations Board[2] which dismissed an unfair labor practice complaint filed against Libbey-Owens-Ford Co. The Company maintained ten plants at various locations throughout the country, eight of which composed a single multiplant unit; in this unit the Union was certified as the exclusive bargaining representative. Each of the two remaining units was organized as a separate bargaining unit by the Union, and the Union enjoyed voluntary recognition in the two single-plant units.[3] In 1968, after the Company had refused during collective bargaining with the multiplant unit to consent to Union requests for consolidation of all three units, the Union petitioned the Board for a unit clarification to merge the three units into a single multiplant unit. The full Board decided, with Members Fanning and Jenkins dissenting, that the unit clarification proceeding may be used to consolidate existing bargaining units, and ordered a self-determination election in each single-plant unit to ascertain the wishes of the employees.[4] In the elections, a majority in each plant preferred consolidation with the multiplant unit, and the NLRB, subsequent to the elections, ordered the consolidation of the three units.[5] The Company acceded to the merger of one of the single-plant units with the multiplant unit, but, for a number of reasons,[6]

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[1] 463 F.2d 31, 80 L.R.R.M. 2882 (3d Cir. 1972).

[2] Libbey-Owens-Ford Co., 189 N.L.R.B. No. 139, 76 L.R.R.M. 1806 (1971).

[3] Libbey-Owens-Ford Glass Co. v. McCulloch, 67 L.R.R.M 2712, 2714 (D.D.C. 1968). In this case the district court enjoined the Board from conducting the self-determination election hereinafter discussed. On appeal the injunction was dissolved. The dissolution was based upon a lack of jurisdiction in the district court to enter the injunction. McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916, 68 L.R.R.M. 2447 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).

[4] Libbey-Owens-Ford Glass Co., 169 N.L.R.B. 126, 67 L.R.R.M. 1096 (1968). The use of the unit clarification for this purpose was a marked departure from traditional Board usages. See text at notes 13-22 infra.

The official report of the Board indicates a majority consisting of Chairman McCulloch and Members Fanning and Zagoria, with Members Fanning and Jenkins concurring in part and dissenting in part. It seems apparent that Member Brown, not Member Fanning, was a member of the majority, and that there was a misprint in the official report.

[5] Libbey-Owens-Ford Glass Co., 173 N.L.R.B. 1231, 69 L.R.R.M. 1558 (1968).

[6] Brief for Intervenor at 31-33, United Glass & Ceramic Workers v. NLRB, 463

refused to bargain with the second single-plant unit as part of the merged unit. Consequently, the Union brought an unfair labor practice charge under Section 8(a)(5) of the National Labor Relations Act (NLRA)[7] and the General Counsel issued a complaint thereon, which the NLRB dismissed.[8] While Members Fanning and Jenkins maintained their original position that the Board did not have the statutory authority to consolidate the three bargaining units in the unit clarification proceeding, Member Kennedy, who had joined the Board since the initial decision, and Member Brown thought that the Board did have the requisite authority; Chairman Miller agreed that the Board possessed sufficient authority, but thought that the NLRB should voluntarily refrain from imposing consolidation and leave that matter to collective bargaining; in short, Chairman Miller believed that the Board's 1968 order to consolidate should not be the basis of an unfair labor practice.[9]

The Union challenged the Board's dismissal of the unfair labor practice complaint in the instant suit and presented the Third Circuit squarely with the issue: whether the NLRB has the authority to use the unit clarification proceeding to consolidate existing bargaining units into a single multiplant unit. The court of appeals HELD: the NLRB has the authority under the broad powers invested in it by Section 9(b) of the NLRA[10] to use a unit clarification proceeding to consolidate existing bargaining units into a multiplant unit; it also has the power to conduct a self-determination election in the units, but this power is limited to situations in which the NLRB has found either bargaining unit to be appropriate. Since only one member of the current Board had expressed an opinion on the appropriateness of the proposed merged unit,[11] the court remanded to the Board for determination of that issue.[12]

The court's holding greatly increases the potential for use of the unit clarification procedure by the NLRB. It will be emphasized below, however, that at present it is uncertain whether the Board will exercise the authority recognized in the Third Circuit's decision. This doubt is due to the uncertain reaction of the Board members who have not expressed a view concerning use of the unit clarification to merge existing

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F.2d 31, 80 L.R.R.M. 2882 (3d Cir. 1972). In sum, the Company maintained that the plant was a "separate business." Brief at 33.

[7] 29 U.S.C. § 158(a)(5) (1970):

(a) It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

[8] Libbey-Owens-Ford Co., 189 N.L.R.B. No. 139, 76 L.R.R.M. 1806 (1971).

[9] Id. at —, 76 L.R.R.M. at 1807.

[10] 29 U.S.C. § 159(b) (1970).

[11] Member Kennedy has found both units presumptively appropriate. See 169 N.L.R.B. at 126, 67 L.R.R.M. at 1096; 189 N.L.R.B. at —, 76 L.R.R.M. at 1808 (Member Kennedy dissenting). Chairman Miller and Members Fanning and Jenkins have never reached the issue. Member Penello joined the Board after the final *Libbey-Owens-Ford* decision.

[12] 463 F.2d at 38, 80 L.R.R.M. at 2886.

units or who have steadfastly denied the existence of this power. If these members adopt the position that the Board, in an exercise of its discretion, should refrain from exercising this power, the effect of the court's decision will be negligible.

This note will review the background of the unit clarification procedure and discuss the statutory basis for consolidation of bargaining units. The court's decision will then be discussed in light of the policy considerations attendant upon the merger of bargaining units, particularly those regarding the use of the unit clarification for this purpose. Finally, the effect of *Glass Workers* upon future NLRB consideration of unit clarification petitions will be assessed.

To obtain a better understanding of the use of the unit clarification petition in *Glass Workers*, it will be helpful to review the background of the procedure and its use.[13] Prior to 1964, a party desiring a unit clarification or an amendment of certification[14] was required to move for clarification or amendment during a representation proceeding under Section 9(c)[15] of the NLRA.[16] In 1964, the NLRB promulgated the Unit Clarification Rule.[17] This rule delineates a procedure whereby, in the absence of a 9(c) question of representation,[18] and even during the term of an existing collective bargaining agreement,[19] either party to the collective bargaining relationship can petition for a unit clarification pursuant to section 9(b). Despite the potentially broad scope of petitions permissible under the rule, the unit clarification procedure evolved only in two general areas: first, in cases of disputed job classifications;[20]

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13 For an extensive discussion of this background, see Abodeely, The NLRB and the Unit Clarification Petition, 117 U. Pa. L. Rev. 1075 (1969).

14 Technically, the amendment of certification is used in a situation in which a union has been certified by the NLRB as the exclusive bargaining representative, and the unit clarification is used when an employer has voluntarily recognized, and entered into collective bargaining with, the union. In practice, however, these terms are used interchangeably. Goslee, Clarification of Bargaining Units and Amendments to Certifications, 1968 Wis. L. Rev. 988, 989 n.3.

15 29 U.S.C. § 159(c) (1970).

16 Goslee, supra note 14, at 990. Initially, a prerequisite for such a motion was the previous certification of the union. Bell Tel. Co., 118 N.L.R.B. 371, 40 L.R.R.M. 1179 (1957), overruled, Bhd. of Locomotive Firemen & Enginemen, 145 N.L.R.B. 1521, 55 L.R.R.M. 1177 (1964). This is now explicitly covered by the Unit Clarification Rule, discussed in text at notes 17-22 infra.

17 29 C.F.R. § 102.60(b) (1972): "A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer."

18 The terms "question of representation" and "questions concerning representation" are used interchangeably by the courts. They are § 9(c) phrases which must be distinguished from "representational dispute" and "representative question," which are more general terms used in conjunction with Sections 9(a) and 9(b) of the Act. See, e.g., Westinghouse Elec. Corp., 162 N.L.R.B. 768, 64 L.R.R.M. 1082 (1967).

19 Goslee, supra note 14, at 991.

20 This typically occurs when a union claims that it should represent those employees who perform a particular function and the employer assigns the job to a class of employees that the union does not normally represent. See, e.g., Westinghouse Elec. Corp., 162 N.L.R.B. 768, 64 L.R.R.M. 1082 (1967).

and second, in cases of accretions to an existing bargaining unit.[21] In these areas, unit clarification is a convenient procedure providing the Board with flexibility in adjusting the scope of bargaining units as conditions change.[22]

In unit clarification decisions, the Board traditionally has relied on such factors as administrative coherence, geographic cohesiveness, employee interchange, and uniformity of terms of employment, wage systems, fringe benefits, and seniority rights in determining whether a community of interest exists between groups of employees sought to be included in a bargaining unit.[23] Generally, the Board rejects petitions for clarification in situations in which the community of interest is not found,[24] although the traditional factors have not always been applied consistently.[25] *Bath Iron Works Corp.*,[26] decided prior to the first *Libbey-Owens-Ford* decision, illustrates the Board's reluctance to consolidate units when its traditional requirements have not been met; at the same time, it presaged the use of the unit clarification procedure to consolidate existing bargaining units. The Bath Company and its wholly-owned subsidiary, which were organized into separate bargaining units by the same union, merged their operations. The union then petitioned for a unit clarification to merge the two existing bargaining units, but the Board denied the petition because of an absence of the traditionally required community of interest between the two existing units. The basis for this decision was that although Bath and its subsidiary had merged, the workers in the two plants still maintained separate and distinct functions.[27] However, even though the Board found that a single consolidated unit would be inappropriate, the Board's opinion implicitly assumed the statutory authority to use the unit clarification proceeding to consolidate existing bargaining units. In 1968, the NLRB used the authority which it had implicitly claimed in *Bath Iron Works* when it granted the clarification petition of the United Glass and Ceramic Workers.

In *Glass Workers*, the court found a statutory basis for Board use of the unit clarification proceeding to merge existing units in the broad congressional mandate to the Board to determine appropriate units under section 9(b).[28] It will be submitted below that the court's

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21 This situation occurs when an employer gains employees through expansion or merger. See, e.g., Humble Oil & Refining Co., 153 N.L.R.B. 1361, 59 L.R.R.M. 1632 (1965).

22 Goslee, supra note 14, at 996-1004. The unit clarification has been used primarily when there have been changes in the work force of a particular employer or industry due to technological advances, employer reorganization, or economic growth. Id.

23 See, e.g., PPG Industries, Inc., 180 N.L.R.B. 477, 480, 73 L.R.R.M. 1001, 1004 (1969).

24 See, e.g., Babcock & Wilcox Co., 156 N.L.R.B. 316, 61 L.R.R.M. 1068 (1965).

25 Abodeely, supra note 13, at 1086.

26 154 N.L.R.B. 1069, 60 L.R.R.M. 1082 (1965).

27 Id. at 1070, 60 L.R.R.M. at 1083.

28 463 F.2d at 35-37, 80 L.R.R.M. at 2884-85. Section 9(b) gives the Board wide discretion to determine appropriate units. For example, in NLRB v. Hearst Publications,

result is correct. In reaching this result, the court gave little attention to the contentions of Libbey-Owens-Ford that the Board lacked the statutory authority to conduct an election in the absence of a question of representation,[29] and that the Board was without statutory authority to consolidate bargaining units by use of a unit clarification.[30] In support of its argument that the Board lacked authority to conduct an election in the absence of a question of representation, the Company maintained that all unit determinations must be made in relation to representation proceedings under section 9(c).[31] Supplementing this point, the employer had argued, in the original Board case, that because section 9(b), which gives the Board authority to determine the appropriate bargaining unit, is specifically limited by section 9(c)(5),[32] all unit determinations are necessarily restricted to cases arising under section 9(c).[33]

While the court did not accept this contention, its failure to address it directly suggests that the court's reasoning was faulty. The language of the court's opinion[34] shows that it assumed that section 9(c) could not limit section 9(b) to cases in which there is a question of representation under 9(c) because the "U[nit] C[larification] rule, by its terms, is inapplicable where a question of representation, as opposed to a representational dispute, is involved."[35] The court's reasoning seems to be circular. To establish that the Board's power to make unit determinations under section 9(b) is not restricted by section 9(c), the court relied upon the Unit Clarification Rule, which explicitly states that it can be used only "in the absence of a question concerning representation."[36] However, the Unit Clarification Rule was promulgated by the NLRB pursuant to its power under section 9(b);[37] and the Board rejects the argument that its 9(b) power to determine

Inc., 322 U.S. 111, 134 (1944), the Supreme Court stated: "Wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as a test of an appropriate unit. Congress . . . gave the Board wide discretion in the matter."

29 Brief for Intervenor at 22-29, United Glass & Ceramic Workers v. NLRB, 463 F.2d 31, 80 L.R.R.M. 2882 (3d Cir. 1972).

30 Id. at 21.

31 Id. at 22-29.

32 29 U.S.C. § 159(c)(5) (1970): "In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

33 Brief for Employer for Rehearing and Oral Argument, Libbey-Owens-Ford Glass Co., 169 N.L.R.B. 126, 67 L.R.R.M. 1096 (1968), as cited in Abodeely, supra note 13, at 1095.

34 "The mere absence of such a 9(c) representational issue in the instant case does not deprive the Board of the authority to conduct the proceeding in view of the existence of a representational issue under § 9(a) and (b)." 463 F.2d at 36-37 n.14, 80 L.R.R.M. at 2885 n.14.

35 Id.

36 29 C.F.R. § 102.60(b) (1972).

37 29 C.F.R. § 102.60(b) is entitled "Petition for clarification of bargaining unit or petition for amendment of certification under section 9(b) of the Act. . . ."

appropriate units is limited by or subordinate to section 9(c).[38] Thus the court seems to substantiate its conclusion merely by citing the same conclusion as applied by the NLRB.

A better reason, it is submitted, for rejecting the argument that the Board's power to determine the appropriate unit under section 9(b) is limited to cases in which there is a question of representation under section 9(c), is that it is highly doubtful that Congress intended so to restrict the application of section 9(b). First, since section 9(b) precedes section 9(c), it seems reasonable to assume that 9(b) was not intended to be used exclusively in conjunction with 9(c).[39] Second, the authority given to the NLRB by section 9(b) contains several express limitations,[40] but none of these restrict the Board from adjusting unit determinations as conditions in the bargaining unit change, in the absence of a question of representation. In fact, Section 10(d) of the NLRA gives the Board the authority to "modify . . . any finding or order made or issued by it."[41] Third, in regard to the contention that the Board's power under section 9(b) is limited to questions of representation because it is expressly limited by section 9(c)(5), it seems more reasonable to argue the converse: since 9(c)(5) expressly limits section 9(b), Congress would also have expressly stated any other intended limitations.[42] Furthermore, section 9(c)(5) was not included in the original Act in 1935, but was added to the Act in the 1947 Taft-Hartley Amendments.[43] The sole purpose of 9(c)(5) is to prevent use of the extent of organization as the controlling factor in determining the appropriate bargaining unit.[44] Thus section 9(c)(5) was not intended to transform the remainder of 9(c) into a limitation of 9(b).[45] These three reasons demonstrate that a statutory foundation for Board

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38 See, e.g., Bhd. of Locomotive Firemen & Enginemen, 145 N.L.R.B. 1521, 1523 n.5, 55 L.R.R.M. 1177, 1177-78 n.5 (1964).

39 But cf. 2 J. Sutherland, Statutes & Statutory Construction § 4812 (3d ed. 1943).

40 29 U.S.C. § 159(b)(1)-(3). Subsection 9(b)(3) prevents inclusion of guards in a unit which also includes other employees. Subsections 9(b)(1) and (2) involve situations in which the Board *must* conduct an election to ascertain the employee's views concerning the appropriateness of the unit; these subsections do not purport to delineate all circumstances when the Board *may* ascertain employee preference, in fact they demonstrate that elections may be used to determine questions other than those posed under 9(c). Cf. Libbey-Owens-Ford Glass Co. 169 N.L.R.B. 126, 128, 67 L.R.R.M. 1096, 1099 (1968).

41 29 U.S.C. § 160(d) (1970).

42 The "expressio unius est exclusio alterius" rule of statutory construction provides that mention of one excludes all others. See, e.g., Continental Casualty Co. v. United States, 314 U.S. 527, 533 (1942).

43 Labor-Management Relations Act, 1947, Pub. L. No. 101, 61 Stat. 144 (1947).

44 See, e.g., Metropolitan Life Ins. Co. v. NLRB, 328 F.2d 820, 822-25, 55 L.R.R.M. 2448, 2449-52 (3d Cir. 1964).

45 "Section 9(b) is not made subordinate to Section 9(c), and no limitation exists on the Board's Section 9(b) power to define unit composition other than in Section 9(c)(5) where it is stated that the extent of employee organization may not be controlling in such a determination." Bhd. of Locomotive Firemen & Enginemen, 145 N.L.R.B. 1521, 1523 n.5, 55 L.R.R.M. 1177, 1177-78 n.5 (1964).

merger of units over employer opposition does exist within the broad authorization of section 9(b).

Despite the power under section 9(b) which seems to authorize Board merger of units, it could be argued that the absence of precedent[46] militates against recognition of Board authority to compel merger. The dissenters in the original *Libbey-Owens-Ford* decision maintained that there was a statutory void which did not permit the Board to use the unit clarification proceeding, absent a 9(c) question of representation, to conduct a self-determination election to obtain the preference of the employees regarding the merger, and, should the election so dictate, to consolidate the existing units.[47] However, this argument is clearly fallacious since the Board can innovate within the limits of its statutory authority through its power to legislate by adjudication.[48] This process enables the Board to formulate new rules and policies informally through its decisions, without undergoing the formalities of promulgating an official rule. For example, the Board has exercised its administrative power to legislate by adjudication in the unit clarification area itself. Prior to the enactment of the Unit Clarification Rule, the Board overruled precedent and extended its power to alter its original unit determination, by unit clarification, to cases in which the union had been voluntarily recognized by the employer.[49] It is obvious that the Board is not rigidly constrained, and, where it has statutory authority to do so, may innovate and legislate by adjudication when it deems innovation desirable. It is submitted that in light of its broad 9(b) power to determine appropriate units, the Board in its 1968 *Libbey-Owens-Ford* decision justifiably legislated by adjudication when it extended the use of the unit clarification to include the merger of existing bargaining units and to conduct a self-determination election.

The *Glass Workers* court, in effect, accepted the power of the Board to legislate by adjudication; however, it would appear that it reached this position by a semantically confused reasoning process. It further appears that the court's approach was due, at least in part, to its confusion of the term "question of representation" with a "representational dispute," and its inability to extricate itself from the semantic puzzle which it created. The court stated that in *Carey v. Westinghouse*,[50] the Supreme Court had sanctioned the use of the unit clarification procedure. The court reasoned that *Carey* had involved a representational dispute, *i.e.*, a dispute involving the 8(a)(5) duty of

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[46] For an argument that precedent does in fact exist see text at notes 69-78 infra.

[47] 169 N.L.R.B. at 129-30, 67 L.R.R.M. at 1099-1100 (opinion of Members Fanning and Jenkins, concurring in part and dissenting in part).

[48] For discussion of the power of the NLRB to legislate by adjudication, see, e.g., NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 350-52 (1952); NLRB v. Pittsburgh Plate Glass Co., 270 F.2d 167, 174, 44 L.R.R.M. 2855, 2860 (4th Cir. 1959); see also 2 K. Davis, Administrative Law Treatise § 15.03 (1958).

[49] Bhd. of Locomotive Firemen & Enginemen, 145 N.L.R.B. 1521, 55 L.R.R.M. 1177 (1964), overruling Bell Tel. Co., 118 N.L.R.B. 371, 40 L.R.R.M. 1179 (1957).

[50] Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).

the employer to bargain collectively with the representative of the employees; in contrast, the *Glass Workers* case was viewed as a representational dispute in the "broader sense that it involves a question of representation for purposes of collective bargaining in an appropriate unit."[51] Thus the court in a single sentence seemed to equate the terms "representational dispute" and "question of representation." However, it is submitted that the equation of these two terms is unfortunate, since the whole thrust of the court's decision is that there does *not* have to be a "question of representation" under section 9(c) in order to grant a unit clarification petition to merge existing units and to conduct self-determination elections.[52] It is further submitted that the crux of the court's analysis is stated in footnote form. Footnote thirteen states: "It follows that a *question involving unit scope is a representational one* since a refusal to bargain with a unit found to be appropriate could serve as the basis for an 8(a)(5) violation."[53] Similarly, footnote fourteen states:

> A dispute may be representational in the § 9(c) sense and not rise to the level of a question of representation. The mere absence of such a 9(c) representational issue in the instant case does not deprive the Board of the authority to conduct the proceeding in view of the existence of a representational issue under § 9(a) and (b).[54]

When the court wanted to refer to the term "representational dispute," it used the term "representational question." It thus appears that in its rationale the court was not attempting to equate "question of representation" under 9(c) and "representational dispute" under 9(b). However, the court unfortunately became bogged down in semantics. Once the opinion is stripped of its unfortunate verbiage, it becomes clear that the court authorized the Board to merge the three existing units through a unit clarification proceeding pursuant to its 9(b) power. That is, the court authorized an example of Board legislation through adjudication under section 9(b).

Assuming the validity of the finding of statutory authority in *Glass Workers* regardless of the method by which the court reached its decision, the next question is whether the consolidation of existing bargaining units over employer opposition should ever be allowed as a matter of policy under the NLRA. Employer opposition has historically been the principal obstacle to widespread union organization and collective bargaining.[55] One of the principal purposes of the NLRA is to

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51 463 F.2d at 36, 80 L.R.R.M. at 2885.

52 Id. at 36-37 n.14, 80 L.R.R.M. at 2885 n.14. The language in the court's footnote 14 that reveals the essence of the court's opinion is quoted in text at note 54 infra.

53 Id. at 36 n.13, 80 L.R.R.M. at 2885 n.13 (emphasis added). The L.R.R.M. report substitutes the word "representative" for the word "representational" found in this quotation from the Federal Reporter, Second Series.

54 Id. at 37 n.14, 80 L.R.R.M. at 2885 n.14.

55 See generally R. Brooks, When Labor Organizes 64-98 (Reprint Ed. 1971).

enable employees to overcome this obstacle by requiring recognition and good faith bargaining by the employer upon a showing by a union that a majority of the employees desire the union as their exclusive bargaining representative.[56] Hence, an employer cannot prevent the organization of his employees by refusal to assent thereto. In light of this, it seems entirely reasonable for the court to hold that in an appropriate case the NLRB has the authority, under the express and implied powers granted to it in the NLRA, to consolidate existing bargaining units without the consent of the employer. If a bargaining unit may be organized and certified by the Board without employer consent, it follows that it may also be enlarged or merged with another unit even though the employer does not assent.[57] Nevertheless, one disadvantage of consolidation was put forward by Members Fanning and Jenkins in *PPG Industries, Inc.*,[58] a case in which the Board refused to grant a merger of units pursuant to a unit clarification petition. They contended that the merger of bargaining units would tend to disrupt the stable collective bargaining relationship between the company and the union because it would add several more union committeemen to the wage committee of the merged unit, and each committeeman had a veto power over the final collective bargaining settlement, thus making it more difficult to obtain a negotiated agreement.[59] While it must be admitted that the disadvantage posited by Members Fanning and Jenkins is one which may prompt refusal to exercise the power to consolidate in a specific case, it does not invalidate the policy argument advocating recognition of statutory authority to compel merger in an appropriate case. Moreover, even assuming that this argument possesses some validity, it is submitted that it is greatly outweighed by several factors which those members did not note.

These factors demonstrate the desirability of allowing consolidation of bargaining units in an appropriate case. First, when either an employer or a union has the power to prohibit a merger of units by continually refusing to assent, there is a great potential for a prolonged bargaining dispute over this issue.[60] Second, a single multiplant unit compels the parties to a bargaining agreement to deal with each other

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[56] 29 U.S.C. § 158(a)(5) (1970).

[57] In most instances, the effect of consolidation would be to provide the union with greater leverage in bargaining since the union would be able to close more plants and production areas during a strike. On the other hand, it is quite possible for an employer to desire a consolidation of bargaining units when such consolidation would be to his advantage. For example, if a union has organized several units, but it is less strong in some units than in others, or has lost strength in some units, the employer could seek a consolidation of units in hopes that, in a subsequent decertification election, the weakness of the union in some units would prevent it from receiving a majority vote in the single consolidated bargaining unit.

[58] 180 N.L.R.B. 477, 73 L.R.R.M. 1001 (1969).

[59] Id. at 478-79, 73 L.R.R.M. at 1002-03.

[60] A cogent example is presented by the instant case. Before the dispute reached the Third Circuit, it had lasted for twelve years and had been the subject of six other Board or court decisions.

on a centralized basis instead of on an individual plant level, and thus allows centralized management and administration; it also precludes uneven treatment among the units by the employer in order to create employee dissatisfaction with the union and weaken its bargaining position.[61] Third, consolidation into units of the broadest possible scope facilitates the administration of the NLRA by the Board, in that the lack of fragmentation enhances the stability of the collective bargaining relationship.[62] In order to encourage this stability, the Board's initial unit determinations often favor larger units—assuming, of course, that there is a community of interest among the plants.[63] For example, the NLRB has stated that, although it often finds that employees at several plants of an employer could separately constitute appropriate units, it looks with favor upon a consolidation of such units into a single bargaining group in cases where employees have chosen the same bargaining representative and where the single group could constitute an appropriate unit.[64] In sum, the need to encourage stable bargaining relationships necessitates the conclusion that the merger of bargaining units should be allowed as a matter of policy under the NLRA when a sufficient community of interest has been shown. While it is arguable that merger may be a proper matter for Board deferral to collective bargaining, the factors listed above demonstrate the need for Board power—even though that power be usually allowed to lie dormant—to compel merger when the facts of a particular case dictate such a course.

Assuming the existence of a statutory basis of Board authority to merge existing bargaining units through a unit clarification, and that in a given case such a merger is desirable, the next question is whether there are any preferable alternatives to use of the unit clarification procedure. Two potential alternatives are fairly obvious. The union could strike; however, it is unlikely that the refusal of the employer to consent to a merger would be a sufficiently crucial issue to cause a union to commit its resources to a strike.[65] Moreover, a strike is not an alternative that should be encouraged under the NLRA, since one of the principal purposes of the Act is to promote industrial peace.[66] A second possible alternative is a petition to the NLRB for a 9(c) representation election, in conjunction with which the Board could find a single, consolidated unit to be appropriate for collective bargaining. However, it is highly questionable whether it is desirable, as a matter of public policy, to force a union that has been certified or voluntarily recognized as the exclusive bargaining representative in each of the units to subject itself to attacks on its majority status by the employer

[61] See, e.g., Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 164 (1941).

[62] Hall, The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice, 18 Wes. Res. L. Rev. 479, 503 (1967).

[63] Id.

[64] W. Va. Pulp & Paper Co., 53 N.L.R.B. 814, 819, 13 L.R.R.M. 132, 133 (1943).

[65] In the instant case, the requested merger of bargaining units was vehemently resisted in collective bargaining, yet the union never allowed this issue to cause a strike.

[66] 29 U.S.C. § 151 (1970). See also 29 U.S.C. § 141 (1970).

or by other unions during a representation election.[67] Further, a potential legal obstacle to the union's seeking a representation election was pointed out by the majority in the original 1968 *Libbey-Owens-Ford* case: "It is certainly not the best route either, where, as in this case, there is no actual question concerning representation because the Employer does not dispute the Union's representative status in any of the plants."[68] In order to obtain a representation election, there must exist a question of representation under 9(c). Yet, as the Board pointed out, there can not be a question of representation where the union enjoys recognition by the employer. Since a usual condition for consolidation of bargaining units is that the union *already* represents all of the units sought to be consolidated, it would seem to be impossible to use a representation election for this purpose.

Neither a strike nor a representation election, therefore, seems to be a desirable alternative to the unit clarification for consolidating bargaining units. There is, however, a potential third alternative, which was first introduced by the Board in a series of cases involving Chrysler Corporation[69] but which has not been used in recent years. In the *Chrysler* cases, the Board merged several existing bargaining units over employer opposition. Since the cases were decided before the Unit Clarification Rule was promulgated, it is possible to interpret them either as an alternative method by which the Board may compel merger or as a precedent for the first *Libbey-Owens-Ford* decision.

In the original 1939 *Chrysler* decision, in conjunction with a 9(c) representation election in which two factions of the UAW, one affiliated with the CIO and the other with the AFL, claimed to represent the employees, the NLRB found that the production and maintenance workers at various Chrysler plants constituted thirteen appropriate units.[70] The CIO affiliate was victorious in eleven elections, the AFL affiliate won one; neither received a majority in the remaining election.[71] On motion of the CIO-UAW, the Board issued its second decision and altered its initial unit determination by consolidating into a single unit

[67] 29 U.S.C. § 159(e) (1970) establishes a procedure by which employees in a bargaining unit can obtain a decertification election by filing a petition showing that thirty percent of the employees no longer desire that the union representing them continue to be their exclusive representative. As to the timing of representation elections, see 29 U.S.C. § 159(c)(3) (1970) (bar on elections held within twelve months after valid election); see also discussion of contract-bar doctrine in Labor Law Group Trust, Labor Relations and the Law 384-88 (3d ed. 1965).

[68] 169 N.L.R.B. at 127, 67 L.R.R.M. at 1098. But cf. the subterfuge suggested in Bhd. of Locomotive Firemen & Enginemen, 145 N.L.R.B. 1521, 55 L.R.R.M. 1177 (1964); see also Goslee, Clarification of Bargaining Units and Amendments to Certifications, 1968 Wis L. Rev. 988, 990-91.

[69] Chrysler Corp., 13 N.L.R.B. 1303, 4 L.R.R.M. 398 (1939); Chrysler Corp., 17 N.L.R.B. 737, 5 L.R.R.M. 338 (1939); Chrysler Corp., 42 N.L.R.B. 1145, 10 L.R.R.M. 221 (1942).

[70] 13 N.L.R.B. 1303, 4 L.R.R.M. 398 (1939). Twelve units were single plants. One unit included two plants. Id. One of the twelve single plants also included a fourteenth unit, discussion of which is omitted, as it is of no analytical value to this note.

[71] 17 N.L.R.B. at 738-41, 746-47, 5 L.R.R.M. at 338-39.

the eleven units represented by the CIO-UAW.[72] In 1942, after the CIO-UAW had also become the exclusive bargaining agent for the two single-plant units which had denied the CIO-UAW such status in the 1939 elections, the Board issued a third decision which merged the multiplant unit and the two single-plant units.[73] It is true that during this series of decisions the Board never used the term unit clarification; nevertheless, it did consolidate the bargaining units, over the objections of the employer, by a redetermination of the appropriate unit.[74] The *Chrysler* cases were followed in 1945 by another case, *Western Union Tel. Co.*, in which the NLRB consolidated existing bargaining units.[75]

In each of these cases, the Board in effect found that the extent of union organization necessitated recognition of the larger unit. However, during this period the Board did not feel that in every case the *only* appropriate unit should be the largest possible based on extent of organization, but thought that another unit, in a given case, could also be presumptively appropriate.[76] Thus it is submitted that these cases are analogous to and precedent for *Glass Workers* in that *both* the merged and separate units were presumptively appropriate.[77] It is submitted, then, that the procedure used in the *Chrysler* cases was essentially the same as a unit clarification, lacking only the name,[78] and that the unit clarification procedure codifies and supersedes this past practice of the Board. The Board in its 1968 *Libbey-Owens-Ford* decision did not in fact effect a radical extension of its authority under section 9(b),

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72 17 N.L.R.B. 737, 5 L.R.R.M. 338 (1939). The single unit included twelve plants.

73 42 N.L.R.B. 1145, 10 L.R.R.M. 221 (1942).

74 These earlier cases are distinguishable from *Glass Workers* in that they do not involve Board-ordered elections to determine employee sentiment towards merger. In this regard, they are more extreme than the *Glass Workers* decision since employee sentiment may have been against consolidation. The election ordered in the first *Libbey-Owens-Ford* decision has been characterized as "the only practical means to aid the Board" in determination of the propriety of merger in the affected units. Comment, 1968-1969 Annual Survey of Labor Relations Law, 10 B.C. Ind. & Com. L. Rev. 785, 801 (1969). It would be incongruous to deny this aid to the Board while allowing the Board to redesignate appropriate units; merger could be effectuated on a union petition despite employee and employer opposition, and the Board would thus be forced to search in the dark. But see Libbey-Owens-Ford Glass Co., 169 N.L.R.B. 126, 130, 67 L.R.R.M. 1096, 1099 (1968) (opinion of Members Fanning and Jenkins).

75 61 N.L.R.B. 110 (1945). See also W. Va. Pulp & Paper Co., 53 N.L.R.B. 814, 13 L.R.R.M. 132 (1943) (recognition of de facto merger of units based upon bargaining history).

76 W. Va. Pulp & Paper Co., 53 N.L.R.B. 814, 819, 13 L.R.R.M. 132, 133 (1943).

77 An attempt has been made to distinguish the third *Chrysler* case from the factual situation in *Glass Workers* in Abodeely, The NLRB and the Unit Clarification Petition, 117 U. Pa. L. Rev. 1075, 1092-93 (1969). However, it is felt that the factual distinctions that do exist are not significant.

78 Alternatively, the *Chrysler* cases could be viewed as providing an existing independent means for the Board to merge units, since the method used in the *Chrysler* cases has never been specifically disapproved. Such an interpretation would have provided a subterfuge by which a court holding that prevented use of the unit clarification proceeding to compel merger could have been evaded. This subterfuge would consist of characterization of the merger as occurring under 9(c). Cf. Pac. Coast Shipbuilders Ass'n, 157 N.L.R.B. 384, 61 L.R.R.M. 1362 (1966); Goslee, supra note 68, at 990-91.

but merely revalidated a position on merger which it had never abandoned.

The Third Circuit's opinion in *Glass Workers* upholds the authority of the Board to merge bargaining units over employer objection by use of the unit clarification procedure, yet it does not require Board use of the procedure. The position of the Board on whether to use this authority has shifted in cases subsequent to its decision in the first *Libbey-Owens-Ford* case in 1968. In *PPG Industries, Inc.*,[79] and *Rohm & Haas Co.*,[80] the Board dismissed petitions for unit clarifications to merge existing bargaining units. In *PPG Industries*, Members Fanning and Jenkins found a lack of statutory authority to consolidate bargaining units in a unit clarification proceeding, while Chairman McCulloch and Member Brown voted to conduct self-determination elections. The case turned upon the opinion of Member Zagoria, who concurred in the result reached by Members Fanning and Jenkins. Zagoria, a member of the original *Libbey-Owens-Ford* majority, adhered to his belief that the Board has the authority to use the unit clarification procedure to consolidate existing units, but found that a consolidated, multiplant unit would not be appropriate in the situation presented. He distinguished the original *Libbey-Owens-Ford* case on the basis that the proposed multiplant unit in *PPG Industries* was not an employer-wide unit, and thus lacked administrative coherence.[81] In *Rohm & Haas*, decided by a three-member panel, Members Fanning and Jenkins adhered to their position, first propounded in their dissent to the initial *Libbey-Owens-Ford* case, that the Board did not have the requisite statutory authority to order consolidation in a unit clarification proceeding and denied the petition.[82]

Subsequent to *PPG Industries* and *Rohm & Haas*, the final *Libbey-Owens-Ford* decision issued.[83] The vote in this decision, as in *PPG Industries*, was 2-1-2. The concurring member, however, was Chairman Miller, one of the new members; his basis of concurrence was different from that of former Member Zagoria in *PPG Industries*. Chairman Miller believed that, while the Board possessed the statutory power to compel merger, consolidation was a proper subject for Board deferral to collective bargaining.[84]

Thus, although a majority of the NLRB has not reversed its first *Libbey-Owens-Ford* decision, which held that the Board has statutory

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79 180 N.L.R.B. 477, 73 L.R.R.M. 1001 (1969).

80 183 N.L.R.B. No. 20, 74 L.R.R.M. 1257 (1970).

81 180 N.L.R.B. at 481, 73 L.R.R.M. at 1005 (concurring opinion).

82 183 N.L.R.B. No. 20, 74 L.R.R.M. at 1258. Member McCulloch concurred; he found the original *Libbey-Owens-Ford* decision factually distinguishable. Id.

83 This case was heard by Chairman Miller and members Brown, Kennedy, Fanning and Jenkins. Member Zagoria's term expired Dec. 16, 1969, and he was replaced by Miller on June 3, 1970. Miller assumed the position of Chairman and did not participate in the June 9, 1970, *Rohn & Haas* decision. Subsequently, Member McCulloch was replaced by Member Kennedy. Since the final *Libbey-Owens-Ford* decision, Member Penello has taken the seat of Gerald Brown.

84 189 N.L.R.B. No. 139, 76 L.R.R.M. at 1807.

authority to use the unit clarification procedure to merge bargaining units, and although the Third Circuit has specifically upheld this authority in *Glass Workers*, the Board has avoided using it. It remains an open, and interesting, question whether the Board will exercise its statutory authority to merge bargaining units when an appropriate case is presented to it, or whether its 1968 *Libbey-Owens-Ford* decision will become an isolated aberration.

The answer to this question may lie in the composition of the Board.[85] At present, none of the three members of the majority in the original *Libbey-Owens-Ford* case remains on the Board. Of their replacements, Member Kennedy agreed with their position that the Board possesses and should exercise the authority to consolidate bargaining units in an appropriate unit clarification proceeding;[86] it can be assumed that he will adhere to this position. A second new member, Chairman Miller, contended in his concurring opinion in the final *Libbey-Owens-Ford* case that consolidation of units should be a matter left to collective bargaining. Presumably, he also will not change his position.[87] Member Penello has not yet expressed an opinion on the consolidation of units in a unit clarification. Members Fanning and Jenkins, who dissented in the original *Libbey-Owens-Ford* case, are still on the Board. As they demonstrated in the final *Libbey-Owens-Ford* case, they had not, as of that time, changed their position that the Board does not have the authority to merge bargaining units in a unit clarification proceeding. It will be interesting to note whether, in light of the Third Circuit's *Glass Workers* decision, these two members will choose to exercise this court-sanctioned authority in an appropriate case.[88] Their views, along with that of Member Penello, will be decisive in determining the future position of the Board on merger of existing units through unit clarification.

MICHAEL D. MALFITANO

Administrative Law—Federal Trade Commission—Lack of Authority to Promulgate Trade Regulation Rules Having the Effect of Law —*National Petroleum Refiners Ass'n v. Federal Trade Commission*.[1]—Plaintiff, a representative of the petroleum industry, brought this suit in the United States District Court for the District of Columbia

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[85] See note 83 supra.

[86] Libbey-Owens-Ford Co., 189 N.L.R.B. No. 139, 76 L.R.R.M. 1806, 1808 (1971) (dissenting opinion).

[87] In Denver, Salt Lake & Pacific Stages, Inc., 198 N.L.R.B. No. 175, 81 L.R.R.M. 1085 (1972), decided after *Glass Workers*, Chairman Miller specifically reiterated his position. Id. at —, 81 L.R.R.M. at 1086 (concurring opinion).

[88] In the sole merger case since the *Glass Workers* decision, Member Jenkins concurred in dismissing the petition. The combined unit was not shown appropriate. Id. at —, 81 L.R.R.M. at 1085 & n.4. Member Fanning was not on the panel.

[1] 340 F. Supp. 1343 (D.D.C. 1972).