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ESTABLISHING THE COLLECTIVE BARGAINING RELATIONSHIP UNDER THE LABOR MANAGEMENT RELATIONS ACT, 1947

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INTRODUCTION

Title I of the Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act, like its predecessor, the Wagner Act, has as its prime objective, the promotion of collective bargaining. As a means to accomplishing this result, the Act creates certain basic rights and obligations.

The Act guarantees to employees of employers engaged in interstate commerce "the right to self-organization, . . . to bargain collectively through representatives of their own choosing;"[1] and imposes upon employers the obligation to recognize this right by making it an unfair labor practice for an employer "to refuse to bargain collectively[2] with the representatives of his employees, subject to the provisions of Section 9 (a)"; and imposes upon labor organizations the duty to bargain collectively by making it an unfair labor practice for a labor organization "to refuse to bargain collectively[3] with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a)." Section 9(a) provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ."

While the Act does not require that any particular procedure be followed in the selection of the exclusive bargaining representative so long as the representative is clearly the choice of the majority, one method is through a secret ballot election conducted by the National Labor Relations Board. The Board processes are invoked by the filing of a representation petition.[4] Once a petition has been

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1. § 7. All references to sections in this article are to the Labor Relations Act of 1947.
2. § 8(a)(5).
3. § 8(b)(3).
4. § 9(c)(1).

filed, the Board[5] has full statutory power to determine the exclusive representative.

Petitions may be filed by a labor organization or other employee representatives seeking exclusive representative status;[6] an employer when faced with one or more claims for recognition;[7] by a labor organization or other employee representative seeking exclusive representation; or by employees or their representatives seeking to oust the currently recognized or certified bargaining agent.[8]

After the filing of the petition with the Regional Director in the region where the proposed or actual bargaining unit exists, an investigation is conducted.[9] This investigation seeks to determine *inter alia,* (1) whether the employer's operations affect commerce within the meaning of the Act; (2) the appropriateness of the unit; (3) whether there exists a question concerning representation; (4) whether the election would effectuate the policies of the Act; (5) whether the petitioner, if it be a labor organization seeking recognition, has sufficient interest among the employees to warrant further proceedings; or whether sufficient interest has been shown by a labor organization or person seeking decertification of an existing bargaining relationship.[10]

Should as a result of the preliminary investigation it be determined that the petition lacks merit because, among other reasons, the employer's operations do not affect commerce, or no question of representation exists, or because of inappropriateness of unit, or improper showing of interest, the Regional Director will ask that the petition be withdrawn. Should the petitioner fail to withdraw the petition, the Regional Director will dismiss the petition stating the reasons for dismissal and also notify the petitioner of his right to appeal to the Board in Washington.[11]

The Board, upon receipt of appeal, reviews the file and either sustains the Regional Director's dismissal or orders the Regional Director to take further action.[12]

5. The Board is the quasi-judicial arm of the agency with exclusive jurisdiction over representation matters. The General Counsel has exclusive jurisdiction over unfair labor practice charges and complaints. § 3(d).
6. § 9(c)(1)(a)(i).
7. § 9(c)(1)(b).
8. § 9(c)(1)(a)(II).
9. § 101.16, NATIONAL LABOR RELATIONS BOARD STATEMENT OF PROCEDURE, Series 6, as amended.
10. See § 101.17, NATIONAL LABOR RELATIONS BOARD STATEMENT OF PROCEDURE, Series 6, as amended.
11. § 101.17(c), NATIONAL LABOR RELATIONS BOARD STATEMENT OF PROCEDURE, Series 6, as amended.
12. See note 11 *supra.*

CONSENT ELECTIONS[13]

In the event the preliminary investigation discloses that the petition has merit, the Regional Director will attempt to dispose of the representation issues on an informal basis. These informal procedures are known as consent election agreements. Under the terms of these agreements, the parties stipulate generally that there is a question concerning representation; that the unit is appropriate; that the eligibility to vote shall be determined by an agreed-upon pay roll date; and they agree upon the date, place, and hours of balloting.

Consent election agreements are of two types: (a) those in which the parties agree to be bound by the determinations of the Regional Director regarding any election issues such as eligibility to vote, challenges to ballots, and objections to the conduct of the election; and, (b) those in which the parties agree that the Board shall determine election issues and certify. Should informal adjustment of the question concerning representation be found impossible, the Regional Director will issue a notice of formal hearing.

FORMAL HEARING[14]

These hearings are usually conducted by a field examiner or attorney attached to the regional office, are open to the public, and are non-adversary in character. At the hearing, the parties are afforded an opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most instances, a substantial number of uncontested items are stipulated. Parties may examine and cross examine witnesses and at the conclusion of the hearing present oral argument. The hearing officer at these hearings performs only a fact finding mission. He is prohibited from making recommendations.[15] It is his duty to see that a record is made which will enable the Board properly to decide the case. At the conclusion of the hearing, the entire record is forwarded to Washington for review by the Board. After review of the entire record, the Board renders a decision either dismissing the petition or directing an election.

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13. § 9(c)(4), and § 101.18, NATIONAL LABOR RELATIONS BOARD STATEMENT OF PROCEDURE, Series 6, as amended.

14. § 9(c)(1)(b), and § 101.20, NATIONAL LABOR RELATIONS BOARD STATEMENT OF PROCEDURE, Series 6, as amended.

15. § 9(c)(1)(b) provides: "Such hearing may be conducted by an officer or employee of the regional office who shall not make any recommendations with respect thereto."

ISSUES ARISING IN A REPRESENTATION CASE

Sections 9(f), (g) and (h):[16]

Unless a union has complied with the filing requirements of Sections 9(f), (g) and (h), the Board may not process any petition filed by such union, certify it as the collective bargaining agent, or investigate any question concerning representation. Therefore, the Board will dismiss any petition filed by a non-complying union.[17]

If a non-complying union seeks to intervene in a representation proceeding, the Board will deny intervention unless the non-complying intervenor has a contractual interest covering employees affected by the petition.[18] Once granted the right to intervene, the non-complying union will be heard on all questions raised by the petition even to the extent of raising its contract as a bar to the election. However, a non-complying intervenor will not be placed on the ballot in any election.[19]

In a decertification proceeding a non-complying union is treated in a different light. The Board will investigate the question concerning representation, as it is the employees, not the non-complying labor organization, who raise the question. In such case, the non-complying union will be placed on the ballot, for as the Board said in *Harris Foundry and Machine Co.*:[19a] "To hold otherwise would confer upon non-complying unions the power to immunize themselves against decertification proceedings by their refusal to comply with the registration and filing requirements of the amended act." Should the non-complying union win the decertification election, the Board will not certify the union but only the arithmetical results of the election.[20]

The Board will not place a non-complying union on the ballot in an election initiated by an employer's petition.[21] The Board reasoned that although the employer filed the petition, the question concerning representation was in fact raised by the non-complying union's claim for recognition which was essential in order to invoke the Board's processes on a petition filed by an employer.

In order to prevent circumvention of the filing requirements, the Board will not allow non-complying locals to receive the benefits of

16. The sub-sections require, in general, the filing by labor organizations of certain financial and other data with the Secretary of Labor, and refiling of such material annually; furnishing their memberships with annual financial statements; and filing with the Board non-communist affidavits by their officers.
17. Rite-Form Corset Co., Inc., 75 NLRB 174, 176 (1947).
18. Schneider Transportation Co., 75 NLRB 870 (1948).
19. New Indiana Chair Co., 80 NLRB 1686 (1948).
19a. 76 NLRB 118, 120 (1948).
20. See Harris Foundry and Machine Co., *supra* note 19a., note 6.
21. Herman Lowenstein, Inc., 75 NLRB 377, 381 (1947).

the Act by proceeding through their National or Internationals. The Board in such cases will not put the National or International on the ballot until the local achieves compliance.[22]

SHOWING OF INTEREST

The Board has administratively determined that, in the absence of special circumstances, the petitioner, in order to show a "substantial" interest,[23] must have been designated by at least 30 per cent of the employees it seeks to represent.[24] The Board adopted this rule because experience had shown that it would result in a useless expenditure of time and effort to conduct an election where there was little likelihood that the petitioner would achieve its goal.[25] However, the rule is different in regard to employer petitions, for the Board has held that no proof of interest was required of the interested labor organizations.[26]

Labor organizations seeking to intervene in representation proceedings are required to show their interest. A 30 per cent interest is not required unless the intervenor seeks a unit substantially different from that of the petitioner.[27] Adequate interest to intervene is usually found where the intervenor has a current or recent contractual[28] or representative interest in the employees.[29]

EXISTENCE OF A QUESTION CONCERNING REPRESENTATION

Although there may be on file a proper petition, the Board must determine that there exists a valid question concerning representation before it proceeds to an election and certification.[30]

Ordinarily the Board has found that there is such a question if the employer has refused a union's request for recognition as the statutory agent, or in a decertification proceeding, the employees in the unit challenge the representative status of a union which maintains that it is the statutory bargaining agent by virtue of a previous certification or current recognition.[31]

22. Prudential Insurance Co. of America, 81 NLRB 295, 296 (1949).
23. The Board has consistently held that showing of interest is exclusively an administrative matter and its determination of the question is not subject to challenge. This position has been upheld. NLRB v. J. I. Case Co., 201 F. 2d 597, Enfg. 95 NLRB 1493 (1951).
24. § 9(c)(1)(a) provides that a petition be supported by a "substantial number of employees".
25. *E. g.*, Consolidated Steamship Co., 75 NLRB 1254 (1948).
26. O. E. Felton, d/b/a Felton Oil Co., 78 NLRB 1033 (1948).
27. *E. g.*, Boeing Airplane Co., 86 NLRB 368, 369 (1949).
28. *E. g.*, Holland Furnace Co., 95 NLRB 1339, 1340 (1951). Note 2.
29. *E. g.*, Cadillac Motor Car Division, 94 NLRB 217, 218 (1951).
30. § 9(c)(1)(b) states ". . . if it [the Board] has reasonable cause to believe that a question of representation affecting commerce exists . . ."
31. Thirteenth Annual Report of the National Labor Relations Board, 26.

The Board has, however, found a question concerning representation where the petition was filed by a union which was admittedly recognized by the employer.[32] The purpose of the petition was to obtain the benefits that flowed from formal certification by the Board.[33] The Board directed an election stating *inter alia:* "In this case, we are of the opinion that there is such a question, created by the petitioners' assertion of majority standing, its expressed desire to secure a certificate, and its formal petition that the Board investigate its status by the statutory method of conducting an election."

However, the Board will not find a question concerning representation where the petitioning union has been certified by the Board and is currently recognized.[34]

Under circumstances where a petitioning union, or a union claiming to represent employees of an employer who has filed a petition, or an incumbent union faced with a decertification petition, requests permission to withdraw or disclaims any further interest in the employees as the case may be, the Board has generally dismissed the petition without prejudice.

However, the Board has recently decided three cases in which a new rule on withdrawals and disclaimers is laid down. From now on the dismissal will be with prejudice to the filing of a petition by the withdrawing or disclaiming union for a period of six months, absent good cause shown to the contrary. Also the Board stated it would entertain a motion by the employer, petitioner, or the person filing a decertification petition, to reinstate such petitions should the union involved make a claim upon the employer within six months of the dismissal order.[35]

The Appropriate Unit

The Act requires the Board to determine what unit of employees is the appropriate unit for the purposes of collective bargaining.[36] This is an important function, for the exclusive representative status spoken of in Section 9(a) is conditioned upon the unit being appropriate. Therefore, in any unfair labor practice proceeding charging a refusal to bargain, one of the elements which must be estab-

32. General Box Co., 82 NLRB 678 (1949).
33. See § 8(b)(4)(b), (c), and (d), and discussion in General Box Co., *supra* note 32.
34. Botany Mills, Inc., 101 NLRB 293 (1952).
35. Sears Roebuck and Co., 107 NLRB No. 162 (1954); Campos Dairy Products, 107 NLRB No. 163 (1954); Little Rock Road Machinery Co., 107 NLRB No. 164 (1954).
36. § 9(b) provides: "The Board shall decide in each case whether, . . . the Unit appropriate . . . shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . ."

lished is that the unit is appropriate. Otherwise there is no refusal to bargain.

In determining unit the Board has rather broad discretion, except where such discretion has been limited by the statute itself.[37] Throughout the years, the Board has developed some rather well-defined formulas in determining the appropriate unit. These formulas, however well-defined, are, of course, subject to deviation as the need arises in a particular case. In deciding the appropriate unit, the Board is usually confronted with one or more of the following issues. (1) type, (2) scope, and (3) composition.

In relation to the type of unit, the Board considers whether it should find a general overall unit, embracing, for example, all employees, such as a production and maintenance unit, or find a craft unit confined to a small specialized group within the class of production and maintenance employees. Scope of unit requires consideration of whether all employees should be embraced in a given class at only one plant or establishment of one employer, or at several plants of the same employer, or, at all or several plants of a group or an association of employers. Composition requires consideration of whether to include in the unit certain employee groups not clearly within the occupational group which will make up the unit as a whole. In such fringe groups are found clerks, inspectors, technical employees, and many others.

In its determination of the appropriate unit, the Board has developed certain criteria. Chief among these are: (1) Mutuality of interest; (2) History of collective bargaining; (3) Extent of organization; (4) Nature of employer's operations; and (5) Desires of employees concerned.

The extent to which the Board considers mutuality of interest as a controlling element in deciding the unit issue is stated in *Continental Baking Co.* where it said: "First and foremost is the principle that mutuality of interest in wages, hours, and working conditions is the prime determinant of whether a given group of employees constitute an appropriate unit."[37a]

The Board places great emphasis on the history of collective bargaining in arriving at a unit finding. Where collective bargaining relationships have been harmonious, resulting in stability, the Board is loathe to upset such relationships. The Board in *Baltimore Transit Company* stated: "As a matter of policy, the Board is ordinarily

37. See proviso to § 9(b).
37a. 99 NLRB 777, 782 (1952).

reluctant to disturb a prior unit determination or a contract unit established as a result of collective bargaining, in the absence of compelling circumstances."[37b]

However, history of collective bargaining to be given controlling weight in unit determinations must be of substantial duration. Thus, the Board refused to find a collective bargaining history of only two months controlling.[38] Nor will the Board find collective bargaining history controlling where the bargaining has been for union members only.[39] Moreover, the Board will not base a unit finding on bargaining history where there is no written agreement containing a fixed term or substantive provisions;[40] or where the union, party to the relationship, has been found to be company dominated;[41] or where the bargaining history conflicts with well-established Board policy.[42]

While the Act[43] precludes the extent to which employees have been organized as controlling in unit determinations, the Board still considers extent of organization as a factor.[44]

In considering the nature of the employer's operation, the Board is usually faced with a situation where the employer operates more than one plant or establishment. In such situations, the Board takes into consideration the following factors: (1) past bargaining practices of the employer; (2) the extent of interchange of employees between plants or sections of the company, and contacts between the various groups of employees; (3) the extent of functional integration of operations between the plants or sections; (4) differences in the products of the plant or in the skills and types of work required; (5) the centralization, or lack of centralization, of management and supervision, particularly in regard to labor relations and the power to hire and discharge; and (6) the physical or geographical location of the plants in relation to each other.[45]

The desires of employees are considered only when the Board is faced with claims for representation by two or more unions each seeking different but equally appropriate units. In this situation, the Board will conduct a self-determination election among the employees involved. This type of election is commonly called a *"Globe"*

37b. 92 NLRB 688, 693 (1950).
38. Sprague Electric Co., 98 NLRB 533, 535 note 8 (1952).
39. Liggett & Myers Tobacco Co., 98 NLRB 1300, 1302 (1952).
40. Corn Products Refining Co., 52 NLRB 1324 (1943).
41. Albert's Inc., 91 NLRB 522, 524 (1950), and cases cited therein.
42. Bethlehem Pacific Coast Steel Corp., 99 NLRB 115, 116 ftn. 3 (1952).
43. § 9(c)(5) provides that: "In determining whether a unit is appropriate the extent to which the employees have been organized shall not be controlling."
44. Thalhimer Brothers, Inc., 81 NLRB 1175, 1176 (1949).
45. For details see SIXTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 98.

election, the name being taken from the *Globe Machine* case,[45a] where the self determination rule was first established. Such elections are most commonly held in situations where one union is seeking an overall unit embracing the production and maintenance employees, that includes a group of craft employees sought to be represented by another union in a craft unit.[46]

To describe a self determination election, let us assume that union S seeks to represent the smaller or craft unit, and union L seeks to represent the larger unit including the smaller unit. The smaller unit is voted separately with union S, union L and "no union" on the ballot. The remaining employees sought to be represented by union L are then voted with only it on the ballot in a "Yes" or "No" vote. If a majority of the employees in the smaller group vote for union S that indicates a desire for separate representation and union S is certified as their bargaining representative. But if group S votes for union L and union L wins in the larger group, union L is then certified. However, if union L loses in the larger group but wins in the smaller and a pooling of the votes indicates that union L has received a majority of the valid votes cast in both elections, it is then certified for a majority of the employees have indicated a desire for it as their collective bargaining agent.[47]

In making unit determinations concerning professional employees, craft employees, and guards, the Board must consider Sections 9(b)(1), (2) and (3). Section 9(b)(1) prohibits the Board including professional employees in a unit with non-professionals unless the professional employees vote for such an inclusion. The Board has devised election machinery to accomplish this purpose.[48]

Section 9(b)(2) in effect tells the Board to conduct *"Globe"* type elections for craft employees without regard to prior unit determinations. The Board in a very recent decision has decided to grant craft severance elections only in those instances where there exists a true craft and where the union seeking to represent it traditionally represents that craft.[49] This decision marks a departure from previous decisions of the Board where craft severance elections were denied on the "integrations of operations" theory.[50]

45a. 3 NLRB 294 (1937).
46. *Supra* note 45 at p. 92.
47. American Potash and Chemical Corp., 107 NLRB No. 290 (1954). See also the dissenting opinion in Pacific Intermountain Express Co., 105 NLRB No. 54 (1953).
48. Sonotone Corporation, 90 NLRB 1236 (1950).
49. American Potash and Chemical Corp., *supra* note 47.
50. National Tube Company, 76 NLRB 1199 (1948); Permanente Metals Co., 89 NLRB 804 (1950); Weyerhauser Timber Co., 87 NLRB 1076 (1949).

Section 9(b)(3) precludes the Board from including guards in the same unit with other employees and from certifying a union as the bargaining agent for guards if that union or any other union with which it is affiliated admits to membership employees other than guards.

CONTRACT BAR

In cases where it had to decide whether to hold an election where a contract was in existence covering the same group of employees sought by the petitioner, the Board has been called upon to weigh two major considerations, both under the *aegis* of announced policies of the Act. These are (1) the interest of the parties and of the public in stability of labor-management relations, and (2) the statutory right of employees to select and change their collective bargaining representative.[51]

With these considerations in mind, the Board has evolved the general rule that a valid written exclusive bargaining agreement for a definite and reasonable period, signed by the parties embodying substantive terms and conditions of employment for employees in an appropriate unit, bars a petition for an election among the employees covered by the contract until shortly before the contract's terminal date.

Thus, applying this general rule, the Board has held that an oral agreement,[52] an unsigned written one,[53] one failing to establish substantive terms and conditions of employment,[54] one covering only members of the contracting union,[55] one excluding the employees in the unit sought by the petitioner,[56] one placing the employees involved in a unit inappropriate for collective bargaining purposes,[57] one for an indefinite duration or terminable at will,[58] or one con-

51. See FIFTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 60.

52. Eicor, Inc., 46 NLRB 1035, 1037 (1943); Standard Brands, Inc., 81 NLRB 1311, 1312 (1949); American Can Co., 89 NLRB 1220, 1221 (1950).

53. National Chair Co., Inc., 74 NLRB 1014, 1018 (1947); Solar Mfg. Corp., 80 NLRB 1358 (1948) note 1.

54. Corn Products Refining Co., *supra* note 40; Rice-Stix Dry Goods Co., 78 NLRB 311, 312 (1948) note 4.

55. Birmingham Tank Co., 25 NLRB 1306, 1308 (1940); Liggett and Myers Tobacco Co., 98 NLRB 1300, 1301 (1952).

56. Philadelphia Co. and Associated Co's., 84 NLRB 115, 116 (1949); W. H. Anderson Co., Inc., 99 NLRB 820 (1952).

57. Lockheed Aircraft Corp., 90 NLRB 685, 686 (1950), and case cited therein.

58. Food Machinery Corp., 67 NLRB 1049, 1051 (1946); Mid-Continent Coal Corp., 82 NLRB 261, 262 (1949).

taining an illegal union-security clause,[59] will not operate to bar an election.

From these decisions, it can readily be seen that with contracts which do not meet the requirements of the general rule little or no problem is presented to the holding of an election. But what of those contracts which do meet the requirements of the rule but nevertheless present a problem affecting the two principles of stability and employee rights? Such contracts would be those providing for automatic renewal unless notice to the contrary is given at a stated time and no such notice is given; those reopened for modification during their term; those for a duration of more than two years; those in effect when a change in the bargaining unit has taken place; those in effect when there is a split-up within a union's ranks; and those prematurely extended.

The landmark decision of the Board in situations involving an automatic renewal clause contract where no notice of modification or termination was given was the decision in 1942 in the *Mill B.* case.[59a] Prior to this decision, the general rule had been that on a claim to majority representation made before the expiration date of the contract but after the automatic renewal date — no notice to forestall renewal having been given — the contract was not a bar.[60] But, the *Mill B.* decision effected a change in this rule, holding that the contract was a bar if it had been renewed by operation of its automatic renewal clause even though a claim for representation was made before the contract's original expiration date.[61]

Thus, the Board required that a claim for representation to be timely and to operate to prevent a contract from being a bar to an election must antedate not only the execution date of an agreement but the automatic renewal date as well, in those cases where the contract contained such a clause and it had not been rendered inoperative by notice.

But it soon became apparent that this "timely claim" rule was subject to abuse where a union made a mere naked claim of majority representation but did not substantiate the claim with a petition with-

59. C. Hager Hinge and Sons Hinge Mfg. Co., 80 NLRB 163 (1948); Eagle Lock Co., 88 NLRB 970 (1950).

59a. 40 NLRB 346 (1942).

60. *E. g.,* a one year contract executed on March 15, 1950 contains an automatic renewal clause absent 30 days notice. No notice is given. A claim for representation is made on March 10, 1951. The contract is not a bar since the claim was made prior to its expiration date of March 15, 1951, though after the automatic renewal date.

61. *E. g.,* Assume same facts as in note 60. The contract would be a bar even though the claim was prior to its expiration date since it was after the automatic renewal clause date had passed and the contract was thus renewed.

in a reasonable time. Thus any contract executed after such a claim was made pursuant to the *Mill B.* doctrine would not bar an election.

To meet these abuses the Board in the *General Electric X-ray Corporation* case[61a] established the doctrine that the mere naked assertion of majority claimed must be followed within 10 days by a representation petition filed with the Board or the contract executed subsequent to the claim will be a bar to an election. The Board reasoned that by compelling the claimant to file a formal petition, it soon could be determined if its claim to representation was well founded. Thus if its interest was less than 30 per cent, the petition would be dismissed and the existing contract would be undisturbed. Of course, if the claimant's interest is substantial, the contract executed within the 10 days between the claim and the petition would be no bar and an election would be held.

The *General Electric X-ray* 10-day rule does not apply, however, where the claim for representation was substantial and had a recognizable foundation.[62]

In respect to contracts which are reopened by the parties during the contract's term, the Board will hold the contract a bar to an election on a petition for representation filed at the time of the reopening negotiations. This is so whether or not the contract contains a reopening clause and regardless of the scope of the modifications.[63]

This ruling extended the Board's former practice of holding a contract to be no bar to an otherwise prematurely filed petition for representation if the contract was "opened up" in the absence of a reopening clause or if the modifications went beyond the scope of such a clause where one existed.

The contract bar question also becomes important in relation to the duration of a contract. For some considerable time, the Board held contracts of one year's duration reasonable and thus a bar to an election.[64] This rule was not absolute in that the contract for a longer period than one year would be a bar if such contracts were customary in the particular industry.[65]

More recently however, in the interests of industrial relations stability, the Board adopted the two year term as reasonable, even where industry custom was to the contrary.[66] Unless longer term contracts

61a. 67 NLRB 997 (1946).
62. Acme Brewing Co., 72 NLRB 1005 (1947); McLeod Veneer Co., 73 NLRB 859 (1947); Chicago Bridge and Iron Co., 88 NLRB 402 (1950).
63. Western Electric Co., Inc., 94 NLRB 54 (1951).
64. National Sugar Refining Co. of N. J., 10 NLRB 1410 (1939).
65. Owens-Illinois Pacific Coast Co., 36 NLRB 990, 995 (1941); *cf.* Uxbridge Worsted Co., Inc., 60 NLRB 1395 (1945).
66. Reed Roller Bit Co., 72 NLRB 927 (1947).

are customary in the particular industry, the Board will hold them a bar for two years only.[67]

In the past year the "custom in the industry" test has been changed by the Board. Now, contracts of more than two years duration will operate as a bar for their entire term rather than just the first two years, if they meet the test that "a substantial part of the industry is covered by contracts with a similar term".[68] Thus, in the cited case, a five year agreement was found to be a bar. The question of whether an agreement for more than five years will operate as a bar under any circumstances after two years of its term has elapsed was left open.

A change in the bargaining unit often raises the question as to whether an existing contract is a bar to an election. These questions arise most frequently in a newly established plant or among employees on a new operation.

Generally, the Board will not hold a contract covering a discontinued plant as barring an election at a new plant.[69] Distance, personnel, and similarity of production are factors to be considered in this situation. Thus a contract will bar an election where a new plant, which is located only a short distance from the closed one, employs a majority of the old plant's employees, and the product of the new plant is substantially the same as the old.[70]

The "schism" situation is another in which the status of an existing contract as a bar to an election is presented. A schism arises usually where all or a large part of the employees under a contract repudiate the union representing them by some act of disaffiliation and selection of another union to represent them. Generally, under such circumstances, the Board would hold a contract no bar where substantial doubt as to the bargaining agent was raised by schism.[71]

A last but important contract bar situation to be considered is that of a prematurely extended contract. A contract whose termination date is extended a considerable time prior to its original termination date is deemed to have been prematurely extended. As a general rule, the Board will not hold such an extended contract a bar to an election beyond its original terminal date where a petition for representation was timely filed before the expiration date of the

67. Cushman's Sons, Inc., 88 NLRB 121, 124 (1950).
68. General Motors Corp., 102 NLRB 1140 (1953).
69. Sylvania Electric Products Co., 87 NLRB 597 (1949).
70. Yale Rubber Mfg. Co., 85 NLRB 131, 133 (1949), and cases cited therein.
71. Boston Machine Works Co., 89 NLRB 59, 60 (1950), and cases cited therein.

original contract.[72] The same rule applies to a contract with an automatic renewal clause except the date of operation of such clause, rather than the contract's expiration date, is applicable.

The 60-day notice requirement of Section 8(d)[73] of the Act, applicable where a modification or termination of an agreement is desired by either party thereto, has required the Board to determine its effect on the "premature extension" doctrine.

In the *DeSoto Creamery* case,[73a] the Board was presented with a situation which was in effect as follows. A one year contract had a 30 day renewal clause but 60 days before the contract's expiration date, written notice by the union was served of a desire to modify. (The 60-day notice is required by Section 8(d), not by the contract.) And 45 days before the contract's expiration date a new agreement was executed. In this posture, a petition was filed by another union a few days after the execution of the contract. The Board stated the contract would be a bar absent circumstances not here pertinent. In the decision it clearly enunciated a rule to be applicable in the future that, even though a petition was timely under the contract's 30-day renewal clause, the purpose of Section 8(d) was patently designed for negotiation and execution of new contracts during the 60-day period, and, therefore, such contracts would bar elections. The Board, at the same time, made it clear that had a 75-day notice been served and a contract executed within 15 days thereafter, the "premature extension" doctrine would have applied and an election directed on the basis of a timely filed petition.

THE ELECTION

Once the necessary elements of a question concerning representation have been decided, the Board must conduct an election to finally determine whether the particular employees involved desire a bargaining agent.

In general, the conduct of the election, the eligibility of employees to vote, and the certification of the election results are left to the Board's discretion. However, the Act does require that the election be by secret ballot,[74] and prohibits the holding of an election in a bargaining unit where, in the preceeding twelve months, a valid elec-

72. American Steel Foundries, 85 NLRB 19, 20 (1949), and cases cited therein.
73. § 8(d)(1) requires either party to an agreement to give 60 days notice prior to the expiration date of the agreement of an intention to terminate or modify.
73a. 94 NLRB 1627 (1951).
74. § 9(c)(1)(b).

tion shall have been held.[75] Also, voting by employees who are not entitled to reinstatement is prohibited.[76]

The question of which employees are eligible to vote is an important one to all parties concerned in an election. Who is and who is not an employee within the definition of that term in the Act[77] is a question for the Board to decide. In general, though, individuals employed in the appropriate unit during the payroll period immediately preceding the date of the direction of election, including those not working during such period because of illness, or being on vacation, or being temporarily laid-off, are eligible to vote. Those who have quit, been discharged for cause, or are on strike and *not entitled to reinstatement,* are not eligible to vote.

The determination of this important question is not an easy one, and, while prior Board decisions are helpful, the matter of eligibility usually stands or falls on the facts peculiar to each case. As difficult as any, is the problem involving strikes, since it is not always a simple matter to accurately determine which strikers have been validly replaced (the economic strikers only may be replaced) and which are entitled to reinstatement. In those cases where such is not easily determinable the Board will presume both strikers and replacements are eligible to vote and will permit them to vote subject to challenge.[78] The accurate determination of eligibility will then be made if the challenged ballots be sufficient to affect the election result.

In any Board election all parties concerned may have an observer on the scene and may challenge ballots and object to the conduct of an election. Once objections have been made, the investigation will not be confined to those specifically made. Thus any defect or irregularity found in the investigation will void the election if it be substantial.

In the event the election results are inconclusive, *i. e.,* where two or more unions and a no union choice is on the ballot and neither obtains a majority of the valid votes cast, the Board will conduct a run-off election. The Act specifically provides that the ballot in this run-off election shall afford the employees a selection between the two choices receiving the largest and second largest number of valid votes cast in the original election.[79]

75. § 9(c)(3).
76. See note 75 *supra.*
77. § 2(3) defines "employee" and excludes among others agricultural workers and supervisors.
78. The Pipe Machinery Co., 76 NLRB 247, 249 (1948).
79. See note 75 *supra.*

JUDICIAL REVIEW OF REPRESENTATION CASES

The Supreme Court has held that a certification of representation issued by the Board pursuant to Section 9(c) is not directly reviewable by the Courts.[80] However, the Courts are required to review facts certified by the Board in a representation case where the Board in an unfair labor practice case has based its order in whole or in part upon such facts.[81] Usually this review occurs in proceedings before the Court arising from an unfair labor practice finding by the Board of a refusal to bargain.

80. A. F. L. v. NLRB, 308 U.S. 401 (1940).
81. § 9(d).