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Craft Severance: NLRB's New Approach

CRAFT SEVERANCE: NLRB'S NEW APPROACH

Introduction to the Problem of Craft Severance

Section 9(b) of the National Labor Relations Act provides that the National Labor Relations Board[1] "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof. . . ."[2] A fundamental problem raised by this provision is under what circumstances a craft unit is the appropriate unit. The problem frequently arises when a group of employees who are members of an existing plant-wide union seek to be represented separately. The group of employees, or the labor union seeking to represent that group, files a petition under section 9(c) of the act,[3] and requests that the Board sever a craft or departmental unit from the plant-wide unit.

Craft employees usually seek separate representation because they believe that their unique problems and interests are not adequately considered by the industrial unit,[4] and that their economic position is weakened by inclusion in the larger unit.[5] This belief is well-founded since there is empirical evidence to indicate that craft employees who have obtained severed units are better represented than they were while members of the industrial unit.[6] Most employers resist severance because it tends to create problems for them. Often the fragmentation of the industrial bargaining unit in a highly integrated industry reduces production efficiency[7] and creates the possibility of jurisdictional disputes regarding work assignments.[8] When there are two or more unions in a single plant, there is a greater possibility of strikes.[9]

Section 9(b), as originally enacted, allowed the Board considerable discretion to determine under what circumstances a craft unit should

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1. Hereinafter referred to as the Board.
2. National Labor Relations Act § 9(b), 49 Stat. 453 (1935), added by 61 Stat. 143 (1947), as amended, 29 U.S.C. 159(b) (1964).
3. National Labor Relations Act § 9(c), 49 Stat. 453 (1935), added by 61 Stat. 143 (1947), as amended, 29 U.S.C. 159(c) (1964).
4. Jones, *Self-Determination vs. Stability of Labor Relations*, 58 MICH. L. REV. 313, 334 (1960).
5. *Id.* at 334-35.
6. *Id.* at 335, 341.
7. *Id.* at 326-33; American Potash & Chem. Corp., 107 N.L.R.B. 1418, 1422 (1954).
8. Jones, *supra* note 4, at 326-33; American Potash & Chem. Corp., *supra* note 7, at 1422; 35 GEO. WASH. L. REV. 586, 589 (1967).
9. Jones, *supra* note 4, at 326; American Potash & Chem. Corp., *supra* note 8, at 1422; 54 COLUM. L. REV. 1159, 1160-61 (1954).

be severed. In *Matter of American Can Company,* the Board adopted the position that the bargaining history of the employer might provide a suitable basis for denying craft severance.[10] Congress, however, felt that the *American Can* doctrine unduly restricted the rights of craft employees to be fairly represented.[11] Therefore, in order to make separate craft representation more easily obtainable by craft employees, while preserving the Board's discretion to determine when craft severance in inappropriate,[12] Congress enacted a provisio to section 9(b). That proviso precludes the Board from deciding "that any craft unit is inappropriate . . . 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."[13]

In construing the section 9(b)(2) proviso the Board developed the *National Tube*-[14]*American Potash* doctrine.[15] Under that doctrine craft severance was available to any true craft group in which a majority of the members voted for craft severance.[16] A large number of craft units

10. 13 N.L.R.B. 1252 (1939).

11. "Since the decision in the American Can case (13 N.L.R.B. 1252), where the Board refused to permit craft units to be 'carved out' from a broader bargaining unit already established, the Board, except under unusual circumstances, has virtually compelled skilled artisans to remain part of a comprehensive plant unit. *The committee regards the application of this doctrine as inequitable.*" (Emphasis added.) S. REP. No. 105, 80th Cong., 1st Sess. (1947), 1 LEGISLATIVE HISTORY OF THE LMRA 417-18 (1947).

"[T]he legisative history indicates that this proviso grew out of Congressional concern that the American Can doctrine unduly restricted the rights of craft employees to seek separate representation. . . ." Mallinckrodt Chem. Works, Uranium Div., 5 CCH LAB. L. REP. (162 N.L.R.B. No 48) ¶ 20981, at 27162 (Dec. 28, 1966) [hereinafter cited as *Mallinckrodt,* with page number references to 5 CCH LAB. L. REP.].

12. Congress did not intend to take away the Board's discretionary authority to find craft units to be inappropriate for collective-bargaining purposes if a review of all the facts, both pro and con severance, led to such result. Thus, as stated in Senate Report No. 105 on S. 1126, submitted by Senator Taft:

". . . OUR BILL STILL LEAVES TO THE BOARD DISCRETION TO REVIEW ALL THE FACTS IN DETERMINING THE APPROPRIATE UNIT, but it may not decide that any craft unit is inappropriate on the ground that a different unit has been established by a prior Board determination." [Emphasis supplied.]

Mallinckrodt at 27162.

A statement by Senator Taft on the floor of the Senate is to the same effect: "In effect I think it (Section 9(b)(2)) gives greater power to the craft units to organize separately. It does not go the full way of giving them the 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." 93 Cong. Rec. 3952; 2 Leg. Hist. 1009.

Mallinckrodt at 27162 n.9.

13. National Labor Relations Act § 9(b)(2), 49 Stat. 453 (1935), added by 61 Stat. 143 (1947), as amended, 29 U.S.C. 159(b) (1964).

14. 76 N.L.R.B. 1199 (1948).

15. 107 N.L.R.B. 1418 (1954).

16. American Potash & Chem. Corp., 107 N.L.R.B. 1418, 1423 (1954).

were successfully severed under the doctrine,[17] often with resulting disruption of labor relations in those plants affected.[18]

Experience with the *National Tube-American Potash* doctrine indicated that it did not provide a satisfactory solution to the craft severance problem.[19] Therefore, in the recent *Mallinckrodt Chemical Works, Uranium Division* case the Board reevaluated its rules governing craft severance and abolished the doctrine. Under the new standard, requests for craft severance are treated on a case-by-case evaluation of all relevant criteria.[20] An examination of the Board's experience with the *National Tube-American Potash* doctrine reveals its inadequacies and indicates potential problems under the *Mallinckrodt* doctrine.

The National Tube-American Potash Doctrine

The Board first interpreted the section 9(b)(2) proviso in the *National Tube* case which involved a petition for craft severance in the steel industry.[21] After a detailed analysis of the proviso and its legislative history, the Board concluded that the only restriction it imposed was that neither a prior Board determination nor the bargaining history of the employer could be the *sole* basis for denying craft severance.[22] The Board dismissed the petition because the steel industry was highly integrated and because there was a tradition of plant-wide and industry-wide bargaining.[23] In subsequent cases the Board applied the rationale of *National Tube* to other industries: aluminum,[24] wet milling,[25] and lumber.[26] The Board then consistently refused to extend the *National Tube* doctrine to any other industries.[27]

In time, however, it became apparent to the Board that the *National Tube* doctrine "had the effect of permanently foreclosing units in an entire industry by freezing that industry into an industrial unit for bargaining purposes."[28] A view developed that craft severance should not be denied merely because the production process was integrated or be-

17. For example, in the three years from March 1, 1954, to June 1, 1957, at least forty-three craft units were severed from production units. Jones, *supra* note 4, at 324-25.
18. *Id.* at 336-40.
19. NLRB v. Pittsburgh Plate Glass Co., 270 F.2d 167 (4th Cir. 1959), *cert. denied*, 361 U.S. 943 (1960).
20. *Mallinckrodt* at 27164-65.
21. 76 N.L.R.B. 1199 (1948).
22. *Id.* at 1205.
23. *Id.* at 1207.
24. Permanente Metals Corp., 89 N.L.R.B. 804 (1950).
25. Corn Prods. Refining Co., 87 N.L.R.B. 187 (1949).
26. Weyerhauser Timber Co., 87 N.L.R.B. 187 (1949).
27. Monsanto Chemical Co., 119 N.L.R.B. 69 (1957); Dow Chemical Co., 116 N.L.R.B. 1602 (1956); North American Aviation, 115 N.L.R.B. 1090 (1956); American Potash & Chem. Corp., 107 N.L.R.B. 1418 (1954).
28. American Potash & Chem. Corp., *supra* note 27, at 1420.

cause the pattern of collective bargaining was industry wide.[29] Thus, in *American Potash* the Board held that in order to give the proper effect to the section 9(b)(2) proviso every true group must have the opportunity to choose in a craft severance election whether to be represented on an industry-wide or a craft basis.[30] The standard adopted was that craft severance was appropriate in every case "where a true craft group is sought and where, in addition, the union is one which traditionally represents that craft."[31]

However, instead of totally abolishing the *National Tube* doctrine in *American Potash,* the Board adopted the inconsistent position that severance should not be permitted in the four "favored" industries because it was not "wise or feasible to upset a pattern of collective bargaining already firmly established. . . ."[32] The effect was to permanently foreclose the possibility of establishing craft units in the four "favored" industries.[33]

Board adherence to the *National Tube* doctrine for the four "favored" industries became the principal criticism of the *American Potash* decision. For example in *NLRB v. Pittsburgh Plate Glass Co.*[34] the court recognized that the only factors that the Board had relied upon to distinguish the four "favored" industries from other industries were the integrated nature of the industries and the historical pattern of plant-wide bargaining in those industries.[35] The court argued that since other industries have production processes which are highly integrated and have consistent histories of plant-wide bargaining the Board's distinction was arbitrary and capricious.[36] In addition, the court argued that re-

29. "[T]he right of separate representation should not be denied the members of a craft group merely because they are employed in an industry which involves highly integrated production processes and in which the prevailing pattern of bargaining is industrial in character." American Potash & Chem. Corp., *supra* note 28, at 1421.

30. *Id.* at 1422, 1423.

31. *Id.* at 1422.

32. *Ibid.*

33. The *American Potash* decision automatically precluded severance of craft units in the National Tube industries. *Mallinckrodt* at 27164.

34. 270 F.2d 167 (4th Cir. 1959), *cert. denied,* 361 U.S. 943 (1960).

35. *Id.* at 174.

36. Instead of selecting an appropriate bargaining union after a study of the circumstances of the case before it, it [the Board] followed its announced policy of acceding to the wishes of a small group of employees, comprising a craft, for separate representation, although potent reasons existed for the plantwide representation desired by the employers and the great majority of the workers. Conceivably such a decision could be justified by the circumstances of a given case, but in this instance it must be condemned as discriminatory, in view of the conflicting policy and action of the Board in denying craft representation and direct plantwide representation under precisely similar circumstances in certain selected fields.

Ibid.

Three years later the same court was presented with essentially the same problem.

tention of the described policy violated the express provisions of the section 9(b)(2) proviso.[37]

Another criticism of the *American Potash* decision was that its "traditional representative" test was inadequate. It soon became apparent that this test had the effect of preventing new craft organizations from representing a craft unit.[38] Therefore, the Board held that if a craft organization was newly created for the "sole and exclusive" purpose of representing craft employees, it qualified as a traditional craft union.[39] The "traditional representative" test of *American Potash* was, in effect, abandoned.[40]

The *American Potash* doctrine was criticized because it ignored the interests of employees ineligible for a craft unit of the plant-wide unions and of the employer.[41] Those employees ineligible for the proposed craft group and the plant-wide union have vital interests in maintaining the "collective strength" of the union,[42] and the employer and the plant wide

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Again the court of appeals refused to enforce the Board's bargaining order and emphasized the Board's inconsistent and arbitrary opinion in *American Potash*. Royal McBee Corp. v. NLRB, 302 F.2d 330 (4th Cir. 1962).

Eventually the Board recognized that the *American Potash* decision was arbitrary and capricious. "Furthermore, the American Potash decision makes arbitrary distinctions between industries by forbidding the application of the National Tube doctrine to other industries whose operations are as highly integrated, and whose plantwide bargaining patterns are as well established, as is the case in the so-called 'National Tube' industries." *Mallinckrodt* at 27164.

37. The policy that the four favored industries should be immune from craft severance "is solely based . . . on its [the Board's] prior determination that in these industries craft representation will not be tolerated. This position . . . plainly constitutes a violation of the express provision of § 9(b)(2) of the statute, which forbids the Board to decide that any craft unit is inappropriate on the ground that a different unit has been established by a prior Board determination." NLRB v. Pittsburgh Plate Glass Co., *supra* note 36, at 175.

38. To hold to the contrary, as under our dissenting colleagues' interpretation of the *American Potash* decision, would mean that craft employees who desire craft representation are forever wedded to the past. They could no longer create new craft organizations. We do not think it proper for a governmental agency to grant monopoly rights to particular labor organizations to the point of preventing new craft unions desired by employees from coming into being. Friden Calculation Mach. Co., 110 N.L.R.B. 1618, 1619-20 (1954).

39. *Id.* at 1619.

40. By its decision in this case, the majority has, for all practical purposes, abandoned the "traditional union" test and reinstated the rule in effect prior to the *American Potash* decision which permitted craft severance irrespective of whether or not the petitioning union was by history, tradition, and experience equipped to serve and advance the special interests of the specific craft involved.

Id. at 1622-23 (dissenting opinion).

41. *Mallinckrodt* at 27162, 27164.

42. In short, application of these mechanistic tests [of *American Potash*] leads always to the conclusion that the interests of craft employees always prevail. It does this, moreover, without affording a voice in the decision to the other employees, whose unity of association is broken and whose collective strength is weakened by the success of the craft or departmental group in pressing its

union have an interest "in maintaining overall plant stability in labor relations and uninterrupted operation of industrial or commercial facilities."[43] In *American Potash* the Board disregarded the interests that might favor continuance of the established bargaining relationship.[44]

These criticisms made it obvious that the *American Potash* doctrine did not provide "a satisfactory resolution of the issues posed in craft severance cases."[45] The *Mallinckrodt* doctrine was conceived to meet these criticisms.

The Mallinckrodt Doctrine

In developing a new doctrine the Board hoped to avoid the lack of uniform application that characterized the *American Potash* doctrine by applying the same rules to each industry and to each employer.[46] Second, the Board wanted to conform its craft severance practice as nearly as possible to the congressional intent expressed in the legislative history of the section 9(b)(2) proviso.[47]

To achieve uniformity, the Board in *Mallinckrodt* abolished the *American Potash* tests and the "favored" status of the four industries within the *National Tube* rule.[48] The Board interpreted the legislative history of the section 9(b)(2) proviso as rejecting the view that craft employees should have the absolute right to a severance election in every case and as giving the Board discretionary authority to determine the appropriateness of craft units.[49] The Board held that each petition should be decided on the basis of all the relevant criteria in the case. The Board enumerated the specified criteria that it deemed to be relevant.[50]

The first criterion enumerated is whether the proposed unit is a true craft group working in a trade "for which a tradition of separate representation exists."[51] Another revelant criterion is the history of collective bargaining of the employees, of the employer (including the history at the plant involved), and of the industry.[52] A consideration in weighing this criterion is the effect of craft severance on the stability of labor rela-

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own special interests.
Id. at 27164.

43. *Id.* at 27162.
44. *Id.* at 27162, 27164.
45. *Id.* at 27164.
46. *Id.* at 27158, 27165.
47. *Id.* at 27163-64.
48. "It is patent, from the foregoing, that the American Potash tests do not effectuate the policies of the act. We shall, therefore, no longer allow our inquiry to be limited by them." *Id.* at 27164.
49. *Id.* at 27163-64.
50. *Id.* at 27164-65.
51. *Id.* at 27164.
52. *Id.* at 27165.

tions.[53] The Board has consistently felt that bargaining history is relevant to determining whether a unit is appropriate.[54] A third criterion is the amount and quality of effort that the employees in the proposed unit have expended to maintain a separate identity while submerged in a plant-wide unit.[55] Analysis of this criterion involves an examination of the amount of participation, or lack of participation, by the employees' previous efforts to obtain a craft union.[56] A fourth criterion is the extent to which the employer's production processes have been integrated.[57] This criterion recognizes that the interests of the employer might favor continuing the established bargaining units.[58] The last relevant criterion is the "qualifications" of the union that wants to sever the group of employees.[59] Weighing this criterion involves an examination of the union's experience in representing other employees similar to those it seeks to represent.[60]

Although the Board enumerated these specific criteria, it was careful to emphasize that it intends to remain flexible in considering such questions.[61] The criteria are not to be deemed "an inclusive or exclusive listing of the various considerations involved in making unit determinations in this area."[62] Thus all relevant criteria will be considered when determining the appropriate unit.[63]

A Prognosis of the Mallinckrodt *Doctrine*

The Board formulated the *Mallinckrodt* doctrine in an attempt to eliminate the problems left unsolved by the *American Potash* doctrine. The natural question is whether those problems will be satisfactorily eliminated and whether any additional problems will develop.

Mallinckrodt seemingly does not completely eliminate the lack of uniformity in craft severance. The *Mallinckrodt* doctrine was formulated primarily to regulate requests for craft severance elections[64] and will probably be restricted to that purpose as was the *American Potash* doctrine.[65] Thus, those employees who have had craft bargaining units

53. *Ibid.*
54. *Ibid.*
55. *Ibid.*
56. *Ibid.*
57. *Ibid.*
58. *Ibid.*
59. *Ibid.*
60. *Ibid.*
61. *Ibid.*
62. *Ibid.*
63. *Ibid.*
64. "[W]e have undertaken in this and other cases a review of our present policies regarding severance elections." *Id.* at 27161.
65. "'American Potash is an exception to the general rule permitting freedom of choice to the employees. As such, it has been narrowly construed by the Board as limited

severed from an original plant-wide unit will not be able to obtain a plant-wide unit under *Mallinckrodt,* whereas employers operating under similar conditions but without severed craft units (because the *American Potash* doctrine was never applied to them) might be able to retain their industrial unit. *Mallinckrodt* does not provide a procedure by which an employer who has had craft units severed by an original plant-wide unit can request the Board to reopen the unit determination question. Thus, *Mallinckrodt* has created a pool of employers, largely ignored by the Board, whose original plant-wide units have been permanently broken down into two or more units.

Even if the *Mallinckrodt* doctrine were applied on the reopening of a unit determination, the severed unit would probably be retained. An analysis of the *Mallinckrodt* criteria[66] suggests that an established craft unit would be an appropriate unit. The fact that the craft unit had been severed would make it difficult for the employer to show that a plant-wide union is more appropriate because if the Board had decided it was appropriate under the *American Potash* doctrine it probably was a true craft group. Even if it was an erroneous decision originally, by the time of the redetermination the group would constitute a true craft under the *American Potash* criteria; at least, since the original severance and passage of time would in itself provide those requirements. Thus, in most cases the true craft group would exist, the craft employees would have maintained their separate identity, and the union would be qualified to represent those employees. The history of collective bargaining of the employer would show a pattern of multi-unit bargaining instead of plant-wide bargaining. The only relevant criteria that might support the employer's position would be the bargaining history of the industry and the degree of integration of its production process. These factors would probably not be sufficiently persuasive to overcome the craft union's arguments. Even if the bargaining history of the industry reflected plant-wide bargaining, the bargaining history of the employer would still reflect multi-unit bargaining. This would make bargaining history an inconclusive factor. Also, it is implicit in a prior Board opinion that the integration of the industry is not sufficient to outweigh other criteria.[67]

Employers having severed craft units should be afforded an opportunity to obtain a reevaluation of the appropriate bargaining unit for their plants. Clearly, the Board recognized in *Mallinckrodt* that the *American*

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only to severance cases i.e. to situations where a smaller craft or departmental unit is to be carved out of an established broader unit.'" NLRB v. Industrial Rayon Corp., 291 F.2d 809, 811 (4th Cir. 1961) (quoting from the Board's opinion below).

66. *Mallinckrodt* at 27164-65.

67. American Potash & Chem. Corp., 107 N.L.R.B. 1418, 1420-24 (1954).

Potash doctrine was erroneous[68] and did not give proper effect to the 9(b)(2) proviso.[69] If the doctrine was erroneous, the severed units resulting from its application are probably inappropriate. To allow those unit determinations to remain unmodified is to perpetrate the ill-considered approach of *American Potash*.

A procedure for redetermination would be similar to an original unit determination proceeding. The employer, or the prior plant-wide union, would file the representation petition. The petition would allege that the employer, or the union, has been arbitrarily discriminated against by the *American Potash* decision. The petition would request a hearing to redetermine the appropriate unit. At the hearing the bargaining history of the employer or the plant should be given little significance since the bargaining history would have been adversely altered by the previous application of the *American Potash* doctrine. Following the hearing, the Board would determine the appropriate unit in accord with the *Mallinckrodt* criteria. A new statute is probably necessary to create this type of procedure.

Another issue is whether a new employer, or an unorganized employer, should be entitled to a plant-wide union. The problem arises when a craft union wants to organize a segment of an unorganized plant and the employer resists such partial unionization on the ground that a plant-wide unit is more appropriate. The employer's argument is that the *Mallinckrodt* criteria must be applied in determining whether or not a plant-wide unit is appropriate at an unorganized plant. Thus if an employer can show that the criteria favorable to a plant-wide unit exist in his plant, he argues that the craft unit should be denied. Although the employer's argument appears reasonable and persuasive, it will probably be rejected. Since *Mallinckrodt* was decided, the Board has permitted the establishment of a craft unit in an unorganized plant and has rejected this argument by an employer.[70] Also, an unorganized employer should not be able to resist partial unionization of his plant by a craft union on the theory that a plant-wide union, which is presently unavailable, is perhaps more appropriate.

> [I]t is not the responsibility of the . . . Board to keep the field open for some hypothetical future plant-wide union by keeping out craft unions or departmental unions, which if they got in, might at some indefinite time in the future mar the sym-

68. *Mallinckrodt* at 27163, 27164.
69. *Id.* at 27164.
70. E. I. Depont de Nemours & Co., 5 CCH LAB. L. REP. (162 N.L.R.B. No. 49) ¶ 20982 (Dec. 28, 1966).

metry of plant-wide bargaining.[71]

If this type of resistance were allowed, the employer might continuously resist unionization of his plant by craft unions, a tactic which is contrary to the policy of the NLRA.

The problem of achieving uniformity among all industries might not be as serious as indicated because of the tendency of the Board to apply the "true craft group" test at the initial unit determination. By using that test when a union first attempts to organize a plant the Board will achieve some measure of uniformity in its craft unit determinations. This will provide equal treatment, at least in the future, for all industries.

Another problem which can be anticipated under the *Mallinckrodt* doctrine is that craft workers will be denied the right to determine for themselves which union will represent them. This right of self-determination is one of the fundamental reasons for the 9(b)(2) proviso and for the decision in *American Potash.* It was the desire of Congress and the Board to afford to the employees every opportunity to choose their own collective bargaining representative.[72] When craft severance is denied without an election, the employees affected are precluded from determining which labor organization is best able to represent their interests. The principle of self-determination is recognized, and the employees are given the opportunity to choose, by election, their own representative when a labor organization first attempts to organize an unorganized plant or group within a plant. It has been argued that the employees should have the same freedom to choose their representative when they are already members of a labor organization.[73] Therefore, to the extent that *Mallinckrodt* denies craft severance without an election, it has the effect of denying the employees the right to choose their own bargaining representative.

However, as long as the Board has the statutory duty to make unit determinations the employees must be denied the absolute right to self-determination. That right must be balanced against the Board's statutory duty. A denial of a request for an election merely reflects the Board's

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71. Warren v. NLRB, 353 F.2d 494, 500 (1st Cir. 1965), *cert. denied,* 383 U.S. 958 (1966).

72. The lesson which we draw is that, consistent with the clear intent of Congress, it is not the province of this Board to dictate the course and pattern of labor organization in our vast industrial complex. If millions of employees today feel that their interests are better served by craft unionism, it is not for us to say that they can only be represented on an industrial basis or for that matter that they must bargain on strict craft lines. . . . [*T*]*rue craft groups should have an opportunity to decide the issue for themselves.* (Emphasis added.)

American Potash & Chem. Corp., 107 N.L.R.B. 1418, 1422-23 (1954).

73. *Mallinckrodt* at 27167-68 (dissenting opinion).

desire to hold timely elections instead of granting an unfettered right to self-determination.

Application of the enumerated criteria that the Board deemed relevent will present several problems which will call for judicious adjustment to the facts of the particular case. The "true craft group" criterion raises the possibility that no new types of craft groups can be established because the criterion requires that a *tradition* of separate representation exist.[74] A group of employees comprising a new trade that has never before been recognized as a craft or departmental unit would have difficulty demonstrating that it has traditionally been represented by a craft union. Without such a tradition, the group might be precluded from having separate representation. Therefore, in evaluating a petition for a new type of craft unit, the Board should avoid placing too much emphasis on this criterion.

Also, the nonjudicious use of the criterion that looks to the union's "experience" in representing the employees it seeks to represent[75] might preclude the creation of new craft units since a newly organized craft union could not have any experience in representing craft employees. However, since the Board wants to remain flexible in its approach to craft severance, it is doubtful whether this criterion will be misused in this manner.

Two additional criteria that will call for judicious application are the extent of participation by the employees in the plant-wide unit and the extent of their previous efforts to obtain a craft union.[76] The relevance of these criteria is questionable. Since the employees in the proposed craft unit have been in the plant-wide unit they would necessarily have had to participate in that union in order to protect their interests. Thus any participation in the plant-wide union would not make the craft union any less, or any more, appropriate. However, a lack of participation would indicate that the employees were not interested in protecting their interests through the plant-wide unit and might, in fact, reflect their conviction that it was unable or unwilling to protect their interests.

Nor should prior efforts to obtain a craft unit be over-emphasized in making a unit determination. The contemporary industrial climate is one of rapid change in the types of skills used in the production process, and, therefore, in the community of interests among employees.[77] Such

74. *Id.* at 27164.
75. *Id.* at 27165.
76. *Ibid.*
77. "We are in a period of industrial progress and change which so profoundly affect the product, process, operational technology, and organization of industry that a concomitant upheaval is reflected in the types and standards of skill, the working arrangements, job requirements, and community of interests of employees." *Id.* at 27165 n.16.

change means that the desire and the need for a craft unit can vary greatly in a short period of time. As a result, this criterion should be used with caution.

Conclusion

Although there are several problems that the *Mallinckrodt* doctrine has not solved and although there are some weaknesses in the enumerated criteria, it represents the best solution to date to craft severance problems, and more nearly conforms to the legislative intent.[78] All industries and all employers will be subject to the same standards.[79] All relevant criteria will be considered.[80] Each craft severance petition will be decided on its own merits, and both the employer and the union will be given an apportunity to present all of the arguments favorable to their positions.[81] Also, the Board intends to remain flexible in its approach to craft severance.[82] Thus, this doctrine has none of the obvious flaws of the *American Potash* doctrine.

The potential danger in the *Mallinckrodt* doctrine is not in the doctrine itself, but in the *administration* of that doctrine. Unless the Board weighs all of the relevant criteria, weighs them properly, and makes its decision on the merits of each case, the administration of the rule will destroy the flexibility of the doctrine.

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78. *Id.* at 27163-64.
79. *Id.* at 27165.
80. *Ibid.*
81. *Id.* at 27164.
82. *Id.* at 27165.