

The court also must determine whether or not the land devoted to the new use will greater benefit the public. The burden of proving that the proposed use would render greater benefit should be on the condemnor. However, if the statute grants the general power to condemn property already devoted to public use, then the burden of proof should shift to the property owner, for it seems the legislature has thereby created a presumption that the new use is superior. The power of eminent domain exists to promote the general welfare; the burden of safeguarding this purpose is on the courts.

DISESTABLISHMENT: NLRB'S WANING REMEDY AND THE INTERNATIONAL UNIONS

Triumph for the local union affiliated with an organized labor movement independent of employers was not an historical inevitability. Varied and subtle forces, among which governmental policy has played a much disputed role, have conspired to defeat its rival, the company union.¹ That rival's "wayward cousin," the company-dominated union, has long been the object of statutory prohibition, but many critics have believed that prior to 1947 the National Labor Relations Board did not sufficiently distinguish between the two.² Congress, in 1948, demanded that unions affiliated with national organizations be treated as harshly or as lightly as their independent competitors; the Board has since attempted to be nondiscriminatory. Nevertheless, the considerations introduced by affiliation with a national union change the nature of the problem, and, unless past endeavors to cope with employer domination are correctly understood, present efforts may cause more difficulties than they resolve.

While the origin of company unionism in the United States can be attributed to several factors,³ periods of expansion were undeniably due

1. The term "company union" is used to denote an organization of employees existing for the purpose of dealing with management and confined to one company or one plant of a company. It is not to be confused with the term "company-dominated" union.

2. Hereafter referred to as the "Board" or as "NLRB".

3. "One of these was a growing demand that something should be done to provide in large-scale industry a substitute for the immediate personal contact between worker and employer which existed in the days of small establishments. Employers felt the need of some machinery for the adjustment of grievances and complaints and for collective discussion about work and working conditions. Some adopted the company union, believing this provided the avenue for better understanding between management and employees, which would bring benefits not only to the workers but also to the employer in improved morale.

"Another important factor contributing toward the movement was the insistent

to a series of statutes which recognized the right of employees to bargain collectively with employers concerning grievances and conditions of employment.⁴ Employers, forced to allow some form of organization by their employees, turned to the company union as an alternative to the established union movement.⁵ From their viewpoint, the "outside" affiliated union, as opposed to an "inside" representative for their employees, was a more serious threat to management prerogatives. This was particularly true where the "inside" union was a mere tool in the hands of the employer—ineffective in representing employee interests.

In 1935, the Wagner Act made collective bargaining the national labor policy and employer domination of a union an unfair labor practice subject to a cease and desist order from the NLRB.⁶ The Board, however, felt that, in addition to this negative order, an affirmative remedy was necessary.⁷ It determined that an employer who had, in fact, dominated a labor organization should completely disestablish that organization as the bargaining representative of his employees.⁸

The language of the Board in the early cases did not establish clearly what the result of such an order might be. "Loose terms" and "ambiguous language," as described by at least one writer,⁹ left one to wonder if the union had to be dissolved or merely not recognized by the employer as an organization for collective bargaining. At that time one could also have questioned whether the order entailed a permanent withdrawal of recognition or only withdrawal until the organization was free from the employer's domination and could be freely selected by the employees as their bargaining representative.¹⁰

demand of workers for collective bargaining through trade-unions, and the employers growing recognition that this demand must either be met or a substitute found for it. In the opinion of many employers the company union offered a desirable means for group dealing, without the other characteristics of trade-unions which they considered onerous." *Characteristics of Company Unions 1935*, DEP'T LABOR BULL. No. 634 2(1937), hereafter cited as "*Characteristics of Company Unions*."

4. See, e.g., Railway Labor Act, 44 STAT. 577 (1926), 45 U.S.C. § 151 (1946); National Industrial Recovery Act, 48 STAT. 195 (1933); *Characteristics of Company Unions* 19-28; Note, 40 COL. L. REV. 278, 279 (1940) and literature cited in notes 3, 4, and 5 therein; Comment, 36 MICH. L. REV. 1131, 1132-1135 (1938).

5. Note, 40 COL. L. REV. 278 (1940).

6. 49 STAT. 449, 452, 454 (1935), as amended, 29 U.S.C. §§ 158(a), 160(c), (Supp. 1951); the sections in the Wagner Act pertaining to employer unfair labor practices were only slightly changed by the subsequent enactment of the Taft-Hartley Amendment.

7. Section 10(c) authorizes the Board "... to take such affirmative action . . . as will effectuate the policies of this Act. . . ."

8. For an analysis of the development of affirmative remedies for employer domination previous to the Wagner Act, see *Characteristics of Company Unions* 209-256.

9. 13 ST. JOHN'S L. REV. 178, 181 (1938).

10. For example, in at least three early cases, Pennsylvania Greyhound Lines,

Courts, asked to enforce disestablishment orders, were somewhat perplexed by the ambiguity in the Board's usage of the term. One court intimated that the order was not permanent and that a disestablished union might in the future be recognized by the employer as the bargaining agent for the employees.¹¹ Another circuit court of appeals modified a previous Board order which had required a company-dominated union to be completely disestablished.¹² The court decreed that the employees should be free at any election to choose the company union to represent them and that the employer must be permitted to add to the posted notices the qualification the company union would be disestablished only until or unless it should be chosen by the employees to represent them.

The question of the permanence of the disestablishment order, however, was settled by the U. S. Supreme Court when it reversed the lower court's decision and stated, ". . . the Board justifiably drew the inference that this company-created union could not emancipate itself from habitual subservience to its creator, and that in order to insure employees that complete freedom of choice guaranteed by § 7, Independent must be completely disestablished and kept off the ballot."¹³ After this decision the Fifth Annual Report of the NLRB could declare without qualification: "Disestablishment must be complete, unconditional and perma-

1 N.L.R.B. 1 (1935), *aff'd sub nom.*, NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938), Wheeling Steel Corp., 1 N.L.R.B. 699 (1936), and Carlisle Lumber Co., 2 N.L.R.B. 248 (1936), the respondents were ordered to withdraw all recognition from the dominated labor organizations as the representatives of their employees for purposes of collective bargaining. The term "disestablishment," which later came to have a technical meaning, was apparently used in a dictionary sense. In one of two other early cases, Atlas Bag & Burlap Co., 1 N.L.R.B. 292, 307 (1936), the Board ordered the dominated organization to ". . . be dissolved and cease to exist"; in the other, Lukens Steel Co., 2 N.L.R.B. 1009, 1013 (1937), the employer was ordered to ". . . take every possible legal means to secure the surrender of the Charter of . . . [the] Association and to do everything in its power to secure its dissolution. . . ." Again, "disestablishment" was not mentioned in any technical sense.

Yet, each of these cases involved employer domination of a labor organization in violation of Section 8(2) of the Act, for which the Board, in other cases involving similar fact situations, issued the standard order requiring the employer to completely disestablish the labor organization as the collective bargaining representative of the employees.

11. "We are of the opinion that the meaning of the order is sufficiently clear. It does not direct that the League shall be dissolved, but merely that the petitioner cease to recognize it as the collective bargaining representative of petitioner's employees. If it should be established in the future, after the Board's order has become operative and effected its purpose, that the League has been freely chosen by petitioner's employees as their collective bargaining representative, we do not construe the order as preventing proper recognition of the League as such." *Swift & Co. v. NLRB*, 106 F.2d 87, 95-96 (10th Cir. 1939).

12. *NLRB v. Falk Corp.*, 106 F.2d 454, 456 (7th Cir. 1939), *modifying Falk Corp.*, 6 N.L.R.B. 654 (1938).

13. *NLRB v. Falk Corp.*, 308 U.S. 453, 461 (1940).

ment,"¹⁴ meaning that once a union is disestablished, it can never be certified by the Board.¹⁵ The employees were left to the alternatives of a rival union or no union at all.¹⁶

The policy of the NLRB has been to issue the disestablishment order only upon finding a violation of Section 8(2) of the Act.¹⁷ Under the Wagner Act, when the Board found employer interference contravening Section 8(1) and also concluded that affirmative action was necessary in addition to the negative "cease and desist" order,¹⁸ it employed a lesser remedy, ordering that the respondent employer "withhold recognition" from the labor organization unless it was later certified by the Board;

14. 5 NLRB ANN. REP. 105 (1940).

Also it is interesting to note comment by the circuit court of appeals concerning disestablishment in *Sperry Gyroscope Co. v. NLRB*, 129 F.2d 922, 931 (2d Cir. 1942), as follows: "Nothing is gained and much time and effort is lost by a discussion of the correct definition of 'disestablishment.' That word occurs nowhere in the Act. One suspects that it is attractive because mouth-filling. We should not be bewitched by it. It is merely a label for the allowable means to achieve enforcement where there has been a violation of § 8(2) through 'domination' or 'interference,' in which event the Board has broad statutory powers to prevent its continuance. In some cases the Board may consider that posting of a notice of cessation of relations with a previously dominated union is enough; in others, it may consider that it is sufficient if such relations stop for a 'breathing spell.' In such a case as this the Board may lawfully decide that nothing short of a permanent ban on company dealings with the tainted union will effectuate the enforcement of the Act. The choice of remedies is for the Board."

15. See *Carpenter Steel Co.*, 76 N.L.R.B. 670, 671 (1948).

16. Some employer representatives have complained that affiliated unions have utilized the Board's disestablishment policies to deprive employees of the right freely to choose a company union. See SMITH, *LABOR LAW* 115 (2d ed. 1953).

17. Section 8(2) makes it an unfair labor practice for an employer "... to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ." Since the Taft-Hartley Amendment, employer unfair labor practices are listed under Section 8(a), but for purposes of convenience this paper will speak of them in the manner in which they are designated by the Wagner Act. *E.g.*, §§ 8(1), 8(2).

In one early case, *Atlanta Woolen Mills*, 1 N.L.R.B. 316 (1936), the Board found that the evidence of an employer unfair labor practice was not sufficient to warrant a finding of a violation of Section 8(2), although the acts were deemed a violation of Section 8(1), which provides that it is an unfair labor practice for an employer "... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Nevertheless, the Board ordered the labor organization to be disestablished and justified its position by declaring that it was within the Board's discretion under Section 10(c) "... to require the taking of such affirmative action as will provide an appropriate and effective remedy for any violations of any subdivision of Section 8." *Id.* at 333. This case was not followed in subsequent decisions, and so it is probable that at the time it was decided the Board was still in the process of devising and testing the effect of various remedial orders prior to adopting a standard policy with respect to each subdivision of Section 8.

18. "Section 8(1) . . . serves as a general statement of unfair labor practices. The Board has consistently held that any of the unfair labor practices specified in the other subdivisions of Section 8 are also interference, restraint, and coercion in the exercise of the rights guaranteed by the Act, and as such are violations of Section 8(1). In addition any specific practices violating the rights of employees, which are not included under the other subdivisions, are covered by these more general terms." 7 NLRB ANN. REP. 45 (1942).

in such a situation the Board would not certify the organization until it became free from illegal interference.¹⁹

The presence of this organization in the plant, however, lent crucial significance to the Board's action with regard to subsequent employer recognition of an exclusive bargaining representative. Generally speaking, there were three alternatives: Where a rival union had a majority of the employees prior to the employer's unfair labor practices, the employer could be ordered to bargain with that union;²⁰ where this was not the case, the Board could order an election;²¹ or it could leave the question of elections to the initiative of the parties, requiring only that the organization with which the employer had interfered not be recognized without Board certification.²²

The comparative severity of the disestablishment remedy is apparent. Its ultimate justification seems to rest on two bases. The first was expressed by the Board in the *Wheeling Steel Corporation* case:²³

"Simply to order the respondent to cease supporting and interfering with the councils would not set free the employee's impulse to seek the organization which would most effectively represent him. We cannot completely eliminate the force which the respondent's power exerts upon the employee. . . . Even though he would not have freely chosen the council as an initial proposition, the employee, once having chosen, may by force of a timorous habit, be held firmly to his choice. The employee must be released from these compulsions. . . ." ²⁴

19. See *Carpenter Steel Co.*, 76 N.L.R.B. 670, 671 (1948). Compare note 10 *supra*. The order of "withhold recognition until certified" should not be confused with those orders which the Board rendered in the very early cases requiring the employer to "withdraw all recognition" from the dominated organization.

20. *E.g.*, *Mt. Vernon Car Mfg. Co.*, 11 N.L.R.B. 500 (1939).

21. This may occur where a certification petition is pending before the Board at the time the decision is rendered, *e.g.*, *Abinante & Nola Packing Co.*, 26 N.L.R.B. 1288 (1940); *Condenser Corp. of America*, 22 N.L.R.B. 347 (1940). It may take place where the Board, on its own motion, provides for a future election, *e.g.*, *South Texas Coaches, Inc.*, 22 N.L.R.B. 502 (1940).

22. *E.g.*, *Gerity Whitaker Co.*, 33 N.L.R.B. 393 (1941).

23. 1 N.L.R.B. 699 (1936).

24. *Id.* at 710. *Cf.*, *e.g.*, *Raybestos-Manhattan, Inc.*, 80 N.L.R.B. 1208 (1948); *Sebastian S. Kresge*, 80 N.L.R.B. 329 (1948), *modifying*, 77 N.L.R.B. 212 (1948), which hold that an order disestablishing an employer-dominated organization existing, in part, for purposes not connected with collective bargaining, does not interfere with its functioning as other than a labor organization.

A company-dominated organization existing solely for the purpose of providing athletic, social, insurance, or other services for employees is not in violation of the Act. Therefore, the litigious question often is whether or not the organization is a "labor union" within the meaning of Section 2(5) of the Act, which provides: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor

The Board apparently is discussing the employee right to choose freely a bargaining representative. But there is a further problem in the evil of employer domination. A union subject to employer control is not likely to represent employee interests adequately. In most cases an organization, which is allied with the employer to the extent described in the *Wheeling Steel Corporation* case, will also be subject to employer control.²⁵ However, placing the issuance of the disestablishment order on the first ground makes the ultimate issue in such cases turn upon the psychological question of the effect which the presence of a particular organization has upon employees.²⁶

The question of whether the organization is totally subservient to the employer or merely subject to his interference necessarily requires consideration of complex fact situations. As might be expected, the cases do not single out any one activity but rather indicate a combination of acts by the employer which in totality result in a finding of domination.²⁷ To orient attention in the direction of the psychological effect of the situation upon an employee is to throw weight upon the concept of domination at its vaguest point. Indeed, the NLRB was criticized during early administration of the Act for assuming too much employee timidity in the face of employer actions.²⁸

disputes, wages, rates of pay, hours of employment, or conditions of work." For a discussion of this problem, see Note, 27 VA. L. REV. 359, 360 (1941) and cases cited.

25. But see pp. 226-227 *infra*.

26. The Board apparently adopted the rationale of the *Wheeling Steel Corporation* case as the policy reason for issuing the disestablishment order in future decisions. See 1 NLRB ANN. REP. 127 (1936); 2 NLRB ANN. REP. 147 (1937). In that context, the Board's handling of the domination problem is strikingly similar to its approach to control of preelection activities of employers and unions. Analogous issues of the coercive effect of particular practices upon employee choice of a bargaining agent are made the fulcrum upon which cases turn. See *Timken-Detroit Axle Co.*, 98 N.L.R.B. 790 (1952); *Kearney & Trecker Corp.*, 96 N.L.R.B. 1214 (1951); *General Shoe Corp.*, 77 N.L.R.B. 124 (1948); *Chicago Mill & Lumber Co.*, 64 N.L.R.B. 349 (1945).

27. See 3 NLRB ANN. REP. 112 (1938); Compare *Characteristics of Company Unions* 230.

28. See Note, 27 VA. L. REV. 359, 377-378 (1941). No attempt is made here to analyze the detailed fact situations in which the Board has ordered disestablishment. Generally, the Board has issued the disestablishment order where the employer has assisted the employees in forming the labor union or has formal control of it by provisions in its constitution or by-laws; where, without such formal control, he has personally or through representatives, overtly dominated the organization; where the domination once prevailed but has been suspended at the time the unfair labor charges were filed; or where a successor to a previously disestablished organization has been created. *Id.* at 365. As to the "successor union" cases, the Board holds that if any labor organization is, in effect, a successor to a prior organization which has been found to be company dominated, then the subsequent organization has the same disabilities attached to it. If there is no cleavage or clear line of fracture between the "old" organization and the "new" organization and no disavowal by the company of its illegal conduct with respect to the "old" organization, the successor will be considered dominated also. See statement of former Board Chairman Herzog, *Hearings Before Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22*, 80th Cong., 1st Sess. 1912 (1947).

Certainly it can be said that the Board in the early years made extensive use of the disestablishment remedy,²⁹ and there is some indication that it was going to great lengths to do so.³⁰ Within a comparatively few years the number of disestablishment orders issued annually declined precipitously.³¹ This decline can be attributed to several factors, among which undoubtedly is the NLRB's realization of the vagueness of its standards in applying disestablishment.

More basically, as employers realized that they could no longer maintain company-dominated unions, and as employees became more conscious of their own strength and bargaining potential, the Board realized that the drastic remedy was no longer needed.³² In a case decided in 1947,³³ a change in the Board's policy with respect to disestablishment of successor unions may be perceived. The employer had assisted his employees in organizing a social club.³⁴ Three years later the Club voted to reorganize as a formal labor union under the name of an association in order that it might function solely for bargaining purposes. The employer refused to recognize the new organization until a certification election was held to determine if it represented a majority of the employees. The election was held under the direction of the Regional Board, and the Association became the recognized representative.

The Board determined that, although the employer had withdrawn all assistance to the Association after reorganization, it was a successor union to the Club because the reorganization was effected by officials selected by the Club members, the assets of the Club passed directly to the Association, and the officials of the Club continued to direct the Association's affairs during the drive for membership in the Associa-

29. During the years 1939, 1940, and 1941, there were, respectively, 245, 221 and 502 company unions disestablished by NLRB action. "Data for the years 1936, 1937, and part of the data for 1938 is unavailable." 12 NLRB ANN. REP. 88 (1947).

30. This is particularly true where the union disestablished was the successor to a previously dominated union. See Note, 27 VA. L. REV. 359, 376-377 (1941). But, in general, the list of things an employer should have refrained from doing in order to avoid a violation of Section 8(2) during the late 30's and early 40's was, indeed, imposing, and the employer who attempted to see how close he could come to the line of legality without overstepping it generally failed to avoid Board action against him. See Crager, *Company Unions Under the National Labor Relations Act*, 40 MICH. L. REV. 831, 854 (1942).

31. 1942 (283); 1943 (205); 1944 (101); 1945 (54); 1946 (51); 1947 (36) 1948 (23); 1949 (15); 1950 (20); 1951 (11); 1952 (6). See 12 NLRB ANN. REP. 88 (1947); 13 NLRB ANN. REP. 106 (1948); 14 NLRB ANN. REP. 166 (1949); 15 NLRB ANN. REP. 229 (1950); 16 NLRB ANN. REP. 295 (1951); 17 NLRB ANN. REP. 282 (1952).

32. In addition, probably fewer dominated-union cases were filed with the Board.

33. *Detroit Edison Co.*, 74 N.L.R.B. 267 (1947).

34. The Club was determined by the Board to be a labor organization within the terms of the Act because the representatives of the Club had discussed with the employer problems concerning working conditions and wages as well as social affairs. *Id.* at 269.

tion. Thus, there was no "line of fracture or break in continuity" between the two organizations. Although the Board found that because the Association was the successor to the Club, it, too, was dominated by the employer,³⁵ it only ordered that the employer withhold recognition from the dominated Association until it was certified:

"... [T]he effects of this respondent's unfair labor practices have to a large extent been dissipated. . . . The disestablishment of a labor organization is a drastic remedy which . . . has been employed with insufficient discrimination in recent years. We ought, hereafter, to manifest fuller appreciation of the factual differences between cases. Whatever reasons may once have existed for directing disestablishment in every case in which a violation of Section 8(2) was found, [it is doubted] whether that remedy is invariably necessary today in order to effectuate the policies of the Act. This is 1947, not 1935; in the interim employees have learned much about protecting their own rights and making their own choices with the full facts before them. There are situations in which, because of the passage of time, or the intervening attitude of an employer, or both, it would appear unrealistic to assume that employees' free choice is inhibited solely because an unaffiliated organization to which many belong had an illicit beginning. . . . [T]he Board, in fixing the appropriate remedy, has tended to apply the 'fracture theory' too rigidly to all situations. Under Section 10(c) of the Act, remedy lies within our reasonable *discretion*. . . . The leading Court cases upholding Board orders of disestablishment do not require that the Board employ that extreme remedy in every situation in which an organization formed in violation of Section 8(2) remains, in ghostly aspect, on the scene. They merely hold that the Board has the *power* to take that step if it believes that that 'may be the only way of wiping the slate clean.'"³⁶

The Board's language again indicates that its major concern was the protection of employee freedom in choosing an organization to represent them. This rather puzzling attitude can best be explained by the context of rival unionism in which disestablishment cases arose. The overwhelming majority of such cases has originated by petitions filed by "outside" affiliated unions who hoped to represent employees in the particular plant. In an effort to encourage selection of the company

35. There was also a finding that the employer interfered with the formation and administration of the Club and gave the Club financial and other support in violation of Section 8(2) of the Act. *Id.* at 273.

36. *Id.* at 278-9. Board member Houston joined in the order but contended that it should also provide for complete disestablishment of the dominated organization as the sole method by which the Board could dispel the effect of the employer's domination and make available to the employees their rights under the Act. *Id.* at 281.

union and assure defeat of intruding unions, the employer almost invariably coerced employee freedom to choose a bargaining representative. On the other hand, determination of the adequacy with which an organization is representing employee interests requires a comparatively long period of observation. Many company unions had their source in employer opposition to the Wagner Act, but few of them had bargaining histories over an extended period because their affiliated rivals naturally filed unfair labor practice complaints almost as soon as they met with employer opposition.

Finally, and perhaps most important, the entire question of the effectiveness of company unions as bargaining agents, dominated or not, was and is not easily answered. The labor movement has always considered the restriction of a union to one plant or one company an unsustainable handicap in the bargaining process, and several observers have agreed.³⁷ There is ground to believe that the authors of the Wagner Act had a general antipathy toward company unions, but they clearly did not intend to prohibit them.³⁸ The Board may have preferred to avoid this more delicate, if more basic, phase of the problem and to concentrate upon employer coercion of the choice of bargaining agent. Even though it has eschewed overt discussion of the more fundamental issue, its treatment of nationally affiliated unions which are charged with being company dominated affords substantial evidence that it has not been unaware that company domination raises issues beyond that of employee free choice of an agent.

While administering the Wagner Act, the Board never issued a disestablishment order against an affiliated local. In its eyes, this was not because it was discriminating to the disadvantage of independent unions and to the advantage of affiliated unions but rather because it felt that ". . . assistance to a local union chartered by and subject to the constitution and by-laws of the national organization cannot, in practice, extend to the point of constituting domination by the employer. From the very character of the affiliation, the local group draws strength and direction from sources outside the employer's control; it accordingly cannot, at least for any extended period of time, be used as a mere utensil of an employer to deprive employees of the free exercise of the rights guaranteed by the Act."³⁹

37. See *Characteristics of Company Unions* 17-18; Crager, *supra* note 30, at 832-833; Note, 40 *Col. L. Rev.* 278, 308-309 (1940). It is possible that the Board's differential treatment of nationally affiliated locals indicated an acceptance of this view.

38. Crager, *supra* note 30, at 833 *et seq.*

39. Statement of former Chairman Herzog on pending labor legislation, *Hearings, supra* note 28, at 1912.

Therefore, under the Wagner Act, when the evidence presented was sufficient for the Board to have found domination or interference within the meaning of Section 8(2) if the organization involved had been an independent union, the Board instead would hold that in the case of an affiliated union, the employer only had restrained, coerced, or interfered with the employees' rights in violation of Section 8(1).⁴⁰ The resultant remedy issued was the standard order for violations of Section 8(1)—“withhold recognition from the coerced organization until certified by the Board.”⁴¹

If the NLRB was merely concerned with employee free choice of a bargaining agent, its attempts to draw a distinction between independent and affiliated unions were clearly wrong. Surely an affiliated local, in the mind of the employee, could, as against its rivals, become so identified as a favorite of the employer that its continued presence would have a coercive effect upon employee free choice. The Board's argument goes to the question of whether such a union can long remain subject to complete employer control. International unions undoubtedly have had a general policy against allowing any of their locals to be so dominated,⁴² but there is no reason to expect them to have a similar policy opposing an employer's favoring them over rival organizations.

The Eightieth Congress, at any rate, believed that the Board had discriminated against independent unions, consequently, the Taft-Hartley Act proscribed this practice.⁴³ It has been noted that this amendment could be interpreted as an abolition of the disestablishment order itself (since this would be one method of attaining equality of treatment) or as a direction to employ the remedy against affiliated unions with the fervor characterizing its use against independents.⁴⁴ In either case the equality of treatment required was more than a balanced dispensation of the remedy; the Board could no longer continue its practice of finding a violation of Section 8(2) in cases involving company unions where

40. See Note, 40 COL. L. REV. 278, 304-306 (1940), and the cases cited.

41. 13 NLRB ANN. REP. 50 (1948). The Board, however, would scrutinize the character of the international to determine its efficacy as a bar to domination. See *Atlas Underwear Co.*, 18 N.L.R.B. 338 (1939), discussed in Note, 40 COL. L. REV. 278, 305 n.228 (1940).

42. *Id.* at 305.

43. “[I]n determining whether a complaint shall issue alleging a violation of Section 8(a)(1) or Section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope.” 61 STAT. 147 (1947), 29 U.S.C. § 160(c) (Supp. 1951).

44. MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 427 (1950). The same writers suggest that Congress may have intended the first alternative. *Ibid.* Adoption of the second might hamper the use of the disestablishment remedy, rather than increase the frequency with which it was issued.

it would only find a violation of Section 8(1) if the union in question were affiliated with an international organization.⁴⁵

Whether the intent of Congress was to abolish the disestablishment remedy or to hamper somewhat its application to company unions by forcing the Board to be as circumspect with them as it had been with affiliated unions, fundamental changes in American labor relations had already reduced that problem to minor significance.⁴⁶ Correspondingly, one could not say that this portion of the Taft-Hartley Amendment burdened the NLRB's attempts to cope with the problem which company domination had historically presented. But if the day of the company-dominated independent was past, the era of rival unionism certainly was not. As long as an employer's aid and influence may be enlisted by any one organization in such struggles, the Board must face the problem of devising, or choosing from among already existing remedies, the means to preserve the rights protected by the Act.⁴⁷

It is in dealing with affiliated unions that the Taft-Hartley change in Section 10(c) presents more pressing problems. Although from the point of view of the employee right to choose freely a bargaining agent one may agree with Congress that differential treatment of affiliated unions would be discriminatory, the Board's argument that the local of a strong international cannot long be dominated carries considerable weight. Nevertheless, if it wished to retain the use of the disestablishment order to deal with those few cases of traditional domination which might arise, the Board would have to make findings of Section 8(2) violations by affiliated unions coextensive with those found with respect to independents; the influence which the international could have in preventing total employer control could not be considered.⁴⁸

The Board chose to retain the disestablishment remedy and established the basis for continued differentiation of affiliated union problems from the traditional domination situation in the *Carpenter Steel* case,⁴⁹ decided in 1948. The opinion states:

45. See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 23-24 (1947), and the evidence cited.

46. Note the language of the Board in the *Detroit Edison* case, quoted p. 226 *supra*.

47. National Labor Relations Act, as amended, 29 U.S.C. §§ 141 *et seq.* (Supp. 1951).

48. Setting aside the question of the strength which an affiliated union might draw from the parent body, such union might still, as a matter of fact, never be involved in situations requiring a finding of 8(2) violations. In light of the Congressional order to change its practices and the Board's previous policy of finding 8(1) violations against affiliated unions, it would have been, practically speaking, impossible for it to continue to do so.

49. 76 N.L.R.B. 670 (1948).

"Upon similar facts, the Board will hereafter apply the same remedy to both affiliated and unaffiliated labor organizations. . . . In all cases in which we find that an employer has dominated, or interfered with, or contributed support to a labor organization, or has committed any of these proscribed acts, we will find such conduct a violation of Section 8(a)(2) of the Act, as amended in 1947, regardless of whether the organization involved is affiliated. Where we find that an employer's unfair labor practices have been so extensive as to constitute domination of the organization, we shall order its disestablishment, whether or not it be affiliated. The Board believes that disestablishment is still necessary as a remedy, in order effectively to remove the consequences of an employer's unfair labor practices and to make possible a free choice of representatives, in those cases, perhaps few in number, in which an employer's control of *any* labor organization has extended to the point of actual domination. But when the Board finds that an employer's unfair labor practices were limited to interference and support and never reached the point of domination, we shall only order that recognition be withheld until certification. . . ."50

It is significant that the union involved here was an independent. By announcing a new criterion, support, which would not result in a disestablishment order against an unaffiliated union contravening Section 8(2), the Board retained the prerogative to refrain from disestablishing affiliated unions upon similar findings of 8(2) violations while still complying with the Congressional injunction against discrimination.⁵¹

The case has a further effect upon the Board's use of the disestablishment remedy which is of extreme importance. By introducing the concept of support as something less than domination, the NLRB for the first time made applicable to situations involving all unions the dis-

50. *Id.* at 672-3. In this case, the employer had participated and assisted in instituting an independent labor organization comprised of a joint employee-management committee. The employee representatives of the Committee were elected from different departments, but none could be representatives with less than one year's service with the company; a representative's status could be severed by terminating his employment or by transferring him to another department; minutes of meetings had to be approved by management prior to posting; no dues were required, and the company financed the expenses of the organization by donating proceeds of candy and milk machines installed on company property. No bargaining contract was ever negotiated; rather, bargaining was confined to grievances only. Throughout the existence of the Committee the employer continued to recognize it as the exclusive bargaining representative for the employees, except for a five-month period, at the employer's request, when a rival CIO union filed a representation petition. The Committee began functioning again without the employer questioning its majority status after the CIO was defeated in a consent election which did not involve the Committee. The Board found that the Committee was dominated and ordered it disestablished.

51. The *Detroit Edison* decision accomplished the same thing for the Board, but it was a "successor-union" case. The *Carpenter Steel* dictum simply does on a broader basis what *Detroit Edison* does with regard to successor unions.

tion which had been inherent in its preferential treatment of affiliated unions prior to the Taft-Hartley Act. The basis upon which the NLRB had then refused to utilize the disestablishment order was that affiliated unions could not long remain subject to employer control. It has already been suggested that employer control of a labor organization is the true rationale upon which the disestablishment order should rest and that the theory of the *Wheeling Steel Corporation* case merges the problem of domination with the problem of employer coercion of employee free choice. The two issues are distinct, though, as a matter of fact, both often appear together. The *Carpenter Steel* decision, then, designates employer control as domination and distinguishes it from coercion, which was henceforth to be controlled by findings of support and the withhold-recognition remedy.⁵²

This is borne out by decisions subsequent to *Carpenter Steel*. Where disestablishment has been used, there has been clear evidence that the organization in question was actually subject to employer control,⁵³ often it was not an active bargaining representative.⁵⁴ In two cases, although the employer exercised no coercion over employee choice between the company union and any other organization, disestablishment was ordered.⁵⁵

52. The *Wheeling Steel Corporation* case rationale, under modern conditions, is too weak to justify the severity of the disestablishment order. The language of the *Detroit Edison* case is persuasive in this respect. See p. 226 *supra*.

53. See, e.g., Crosby Chemicals, Inc., 85 N.L.R.B. 791, 820 (1949), which states: "Because of the Respondent's illegal conduct with regard to it, [the Independent] is incapable of serving the Respondent's employees as a genuine collective bargaining agency." Generally speaking, these are cases of overt control, i.e., control through the by-laws or constitution of the organization or more directly, through employer representatives. [Cf. Note, 27 VA. L. REV. 359, 366-367 (1941).] See H. N. Thayer Co., 99 N.L.R.B. 1122 (1952); Delores, Inc., 98 N.L.R.B. 550 (1952); Coal Creek Coal Co., 97 N.L.R.B. 14 (1951); Bryan Mfg. Co., 94 N.L.R.B. 1331 (1951); Sun Oil Co., 89 N.L.R.B. 833 (1950); C. Ray Randall Mfg. Co., 88 N.L.R.B. 140 (1950); Florida Telephone Corp., 88 N.L.R.B. 1429 (1950); Madix Asphalt Roofing Corp., 85 N.L.R.B. 26 (1949); Superior Engraving Co., 83 N.L.R.B. 215 (1949); Duro Test Corp., 81 N.L.R.B. 976 (1949); Raybestos-Manhattan, Inc., 80 N.L.R.B. 1208 (1948); Clark Phonograph Record Co., 78 N.L.R.B. 34 (1948); Red Arrow Freight Lines, Inc., 77 N.L.R.B. 859 (1948); Rathbun Molding Corp., 76 N.L.R.B. 1019 (1948); Vogue-Wright Studios, Inc., 76 N.L.R.B. 773 (1948). In a few cases there are lesser indicia of that control, but the inference of its existence is quite strong; see Galyan's Super Market, Inc., 92 N.L.R.B. 298 (1950); Sebastian S. Kresge, 80 N.L.R.B. 329 (1948) *modifying* 77 N.L.R.B. 212 (1948).

54. See Saxe-Glassman Shoe Corp., 97 N.L.R.B. 332 (1951); E. A. Laboratories, Inc., 86 N.L.R.B. 711 (1949) *modifying* 80 N.L.R.B. 625 (1948); Russell Mfg. Co., 82 N.L.R.B. 1081 (1949); Wrought Iron Range Co., 77 N.L.R.B. 487 (1948); Pacific Moulded Products Co., 76 N.L.R.B. 1140 (1948).

55. Farrington Mfg. Co., 93 N.L.R.B. 1416 (1951); Axelson Mfg. Co., 88 N.L.R.B. 761 (1950). In the latter case, the board adopted, *in toto*, a trial examiner's report which states at one point: "To be sure, the record discloses a friendly attitude on the part of the Respondent toward its employees; it establishes no hostility toward outside unions; it is devoid of evidence of any *design* to coerce employees in the selection of their repre-

Since 1947 there have been but two cases in which disestablishment orders have been rendered against affiliated unions. In *Jack Smith Beverages*,⁵⁶ the company had solicited its employees in one branch plant to sign a statement repudiating a CIO organizational effort. Immediately thereafter the company's president and branch plant manager helped a representative of an AFL Teamsters' local induce employees to sign union membership cards and checkoff authorizations. Without bargaining, the company immediately granted the local's request for checkoff privileges. It also paid dues to the local for the benefit of employees but made no deductions from their wages. At the same time, the company gave written recognition to the AFL local knowing that the CIO local had petitioned for a representative election. Thereafter, the AFL local made no effort to negotiate a collective bargaining agreement with the company and held no meetings for nearly a year.⁵⁷

Obviously, the Teamsters' local was not an effective agency for collective bargaining but was purely a subterfuge to foreclose organization of the plant to the rival CIO union. The analogy to the disestablishment cases involving independent unions is apparent. The *Polynesian Arts* case,⁵⁸ decided in 1952, presents a less obvious instance of domination.

Here, employer activities, coercing employees into an AFL union and manifesting pronounced hostility to a CIO union, were similar to those of the employer in *Jack Smith Beverages*.⁵⁹ However, a collective bargaining agreement was negotiated and signed. The factor which deprived this bargaining relationship of its effectiveness was the manner in

sentatives." *Id.* at 777. And elsewhere, it is said: "The employees' only choice is therefore between the Plan and the selection of some other labor organization as their bargaining representative; neither of which alternatives they may regard as wholly acceptable. The right of organization is not so circumscribed. This assurance of control by the Respondent over the structure of the Plan seriously impairs its capacity to act as an employee representative." *Id.* at 772.

56. 94 N.L.R.B. 1401 (1951).

57. The Board stated: "In view of our agreement with the Trial Examiner's finding that Respondent *dominated* as well as interfered with and supported Teamsters Local 164, we have no alternative under the present statute but to order the Respondent to disestablish that labor organization." *Id.* at 1405. On appeal, the order was modified such as to restrict the disestablishment order to the one branch plant since there was no evidence of domination at any of the Company's other plants. *NLRB v. Jack Smith Beverages, Inc.*, 202 F.2d 100 (6th Cir. 1953).

58. 100 N.L.R.B. 542 (1952).

59. In the *Polynesian Arts* case, the company's president called a meeting of all employees on company property and introduced to them the AFL organizers stating that he desired the employees to cooperate with them. Later the company superintendent and assistant superintendent accompanied the AFL representatives throughout the plant distributing application cards for membership. The president and his wife, on separate occasions, interrogated employees as to whether they had joined and made remarks to coerce them into joining the AFL. Surveillance was taken of employee attendance at rival CIO organizational meetings, and one employee was discharged and another transferred to a less desirable job because of interest in CIO activities.

which negotiations took place.⁶⁰ The employer and AFL representatives drafted a contract which they jointly presented at an employee meeting. Upon the first vote the contract was rejected, and the employer stated that he “. . . was ‘quite displeased’ with the results of the vote and remarked that ‘he would like to see the sheep from the goats and the ones that was against him step out the door.’ ”⁶¹ After some revision, a second vote was taken, and the contract was accepted. Having been thus negotiated, the contract was found by the trial examiner to be “. . . a means whereby self-organization and genuine collective bargaining by the employees is frustrated.”⁶²

It would be difficult to maintain that the representatives of the AFL in *Polynesian Arts*, or for that matter, in *Jack Smith Beverages*, were subject to the control of the employer. To a degree, then, neither of these cases can be categorized as instances of traditional company domination. The Teamsters, at least, are a powerful and dynamic organization;⁶³ intense rivalry among AFL, CIO, and other international organizations is not novel.⁶⁴ Nevertheless, the evil of the tactics employed in

60. There is no indication that the wages, hours, or working conditions specified in the contract were anything but reasonable. The Board adopted the trial examiner's opinion which recommends that the employer not be required to vary the “. . . substantive features of its relations with the employees which Respondent has established in performance of the said contract or any revision, extension, renewal, or modification thereof.” *Id.* at 554.

61. *Id.* at 547. The AFL representatives warned him, however, that he could not do this, and so the employees were not separated.

62. *Id.* at 554. There was also a union-security clause in the contract which, at that time, was illegal. Compare p. 235 *infra*.

63. Miller, *Dave Beck Comes Out of the West*, *The Reporter*, Dec. 8, 1953, p. 20.

64. Rival unionism has persisted since the early days of union development. One view is that it results in a serious waste of time, money and effort to have strife among the ranks of the labor groups. The goal of labor forces is lost sight of when the fear of one group is that another is encroaching upon its own areas. See GALENSON, *RIVAL UNIONISM IN THE UNITED STATES 37-40* (1940). Yet, as one author points out, “Leadership rivalry is the life-blood of unionism in the United States. After all, the American trade union is pragmatic to the core, neutral in ideology, and weak in political purpose. In the absence of competition for the allegiance of workers, there would be little else to insure its militance and guarantee its role as an agency of protest. Moreover, rivalry has been the most effective stimulus to organize the unorganized. Let the reader ask himself if the labor movement would be as far along as it is today, in terms of total membership, had there not occurred the split between the AFL and the CIO in the 1930's.” ROSS, *TRADE UNION WAGE POLICY 63* (1948).

There have been recent attempts to avoid such conflicts between AFL and CIO unions. See *AFL, CIO Sign No-Raid Agreement*, *Business Week*, June 13, 1953, p. 162. But see Miller, *supra* note 63, at 22, col. 2.

One of the weapons sometimes used by unions is to offer employers drastic concessions on wages and hours in exchange for help against competing unions. See GALENSON, *loc. cit. supra*. It has been suggested that this is one of the methods by which United Electrical Workers have maintained their hold on some plants after being expelled from the CIO. See Scanlon, *The Communist-Dominated Union Problem*, 28 *NOTRE DAME LAW. 458, 465* (1953).

these two cases is similar enough to the traditional evil of domination to justify the use of disestablishment. In both, bargaining was removed from employee control, and, in *Jack Smith Beverages*, the representatives of the International manifested no concern for employee interests.⁶⁵

In this regard a new problem arises. Because the disestablishment order perpetually prohibits the union from being recognized by the employer as a bargaining representative and also prevents it from ever being certified by the Board, such an order might apply not only to the local organization but also could go so far as to obstruct any local which the international organization desires later to establish in the plant. If the order involved the latter interpretation, disestablishment, indeed, would be a powerful weapon in the hands of the Board to pit against competing international labor organizations.⁶⁶

It may be, however, that the Board will allow a different local, although affiliated with the same international labor organization, to be certified later in the same plant and will use the same reasoning as it presently employs with respect to independent unions which are successors to prior company-dominated independent unions; there must be public disavowal by the employer of the old organization and a change in the new one which results in a clear line of fracture between the two organizations before the new local may receive certification. This might be insufficient; for example, in the *Jack Smith Beverages* situation, the taint of employer domination might easily pervade this successor organization since it is still a Teamsters affiliate. This would be particularly true if the same district representative was responsible for the organizational drives of both locals.

The Board's reluctance to use disestablishment against affiliated locals is, thus, easily understandable. The withhold recognition order,

65. Disestablishment may be somewhat more difficult to justify in *Polynesian Arts* since a contract was negotiated. The manner in which it was forced on the employees is the strongest basis for concluding that it did not represent healthy collective bargaining. Of course, it may be argued that, as a general rule, the power of any international over its locals and its control over the union side of the bargaining process is nearly complete. See Neufeld, *State of the Unions* in *THE HOUSE OF LABOR*, 5, 14-20 (Hardman and Neufeld ed. 1951).

66. In *Jack Smith Beverages* the Board noted that "[t]he Teamster International is not a party to this proceeding, and the order herein issues only against the Local." *Jack Smith Beverages, Inc.*, 94 N.L.R.B. 1401, 1405 n.14 (1951). There is no indication that either notice or hearing was afforded the international whose local was dominated in the *Polynesian Arts* case. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938), held that the Board cannot abrogate a contract between an employer and a union unless the union is given notice and an opportunity to be heard. See SMITH, *LABOR LAW* 118 (2d ed. 1953); Notes, 40 *COL. L. REV.* 278, 306 (1940); 6 *U. OF CHI. L. REV.* 319 (1939). The Board conceivably could continue to proceed in the manner adopted in *Jack Smith Beverages* and thus deprive itself of the power to issue any order against the international.

with its flexibility and its tendency to resolve the rival unionism problem by the election process, seems more desirable. Where an employer clearly favors one organization, a rival union has three possible methods of attack: It can embark upon a membership drive in an attempt to raid the preferred union; thus, if it could gain majority status then employer recognition or a certification election, at least temporarily, would eliminate its adversary. However, in most cases, the employer and the rival union have entered into contracts with durations of one or more years; the Board has consistently held that such agreements bar redetermination of representatives until the expiration date is imminent.⁶⁷ It can encourage its adherents to petition for a decertification election to test the majority status of its rival,⁶⁸ but, again, the Board will apply the "contract bar" principles.⁶⁹ It can file unfair labor practice charges against the employer, and if there is a finding of interference or support, circumvent the various obstacles to elections by means of a withhold recognition order with its attendant abrogation of the offending contract.⁷⁰

It should be noted that former Board Chairman Herzog felt that the withhold recognition order was itself too severe in many cases of employer support. Where the support took the form of a union-security clause, he favored annulment of that clause of the contract and reliance upon election procedures, either certification or decertification, for the protection of Section 7 rights.⁷¹ A disestablishment order might give rival affiliated locals unhampered opportunity to organize a plant, particularly in view of the difficulties surrounding the question of whether the order would apply to internationals.

67. See 17 NLRB ANN. REP. 37 *et seq.* (1952). The Board has applied this rule to contracts as long as five years in duration. See, e.g., General Motors Corp., 102 N.L.R.B. No. 115 (Feb. 1953); 17 NLRB ANN. REP. 51 n.13a (1952).

68. This is a new type of election introduced by the Taft-Hartley Amendment. Any employee or union can request that an election be held to determine if the union which is acting as the bargaining agent of the employees has majority representation, either as a result of a previous election or the employer's voluntary recognition. 61 STAT. 144 (1947), 29 U.S.C. § 159(c) (1) (A) (ii) (Supp. 1951). If, as a result of the election, the union is found to have lost its majority representation, it will lose its rights to bargain with the employer. See 13 NLRB ANN. REP. 19 *et seq.* (1948).

69. See Snow & Nealley Co., 76 N.L.R.B. 390 (1948).

70. See Knickerbocker Plastic Co., 104 N.L.R.B. No. 71 (1953); Sunbeam Corp., 99 N.L.R.B. 546 (1952); Mundet Cork Corp., 96 N.L.R.B. 1142 (1951); Monolith Portland Cement Co., 94 N.L.R.B. 1358 (1951); Stewart-Warner Corp., 94 N.L.R.B. 607 (1951); Harrison Sheet Steel Co., 94 N.L.R.B. 81 (1951); Hollywood Ranch Market, 93 N.L.R.B. 1147 (1951); Ronney & Sons Furniture Mfg. Co., 93 N.L.R.B. 1049 (1951); United Hoisting Co., 92 N.L.R.B. 1642 (1951); Peerless Quarries, Inc., 92 N.L.R.B. 1194 (1951); Meyer & Welch, Inc., 91 N.L.R.B. 1102 (1950); Spiegel, Inc., 91 N.L.R.B. 647 (1950); Von's Grocery Co., 91 N.L.R.B. 504 (1950); Salant & Salant, Inc., 87 N.L.R.B. 215 (1949); Sioux City Brewing Co., 82 N.L.R.B. 1061 (1949). It should be noted that contracts conflicting with the policies of the Act do not bar elections. See 17 NLRB ANN. REP. 39 (1952).

71. Strauss Stores Corp., 94 N.L.R.B. 440 (1951).

From the *Wheeling Steel Corporation* point of view, of course, there is considerable justification for barring an international which has behaved in the manner of the Operative Potters Brotherhood in *Polynesian Arts* and the Teamsters in *Jack Smith Beverages*. Psychologically, the effects of employer domination may be felt for sometime to come, even after the employer has ceased his illegal activities. The employee's present livelihood and, more particularly, his future with the company regarding advancements and other related factors depend, to some extent, upon his being viewed with favor by the employer. If the employer had favored Teamsters' Local 164 to the point of interference, support, and domination, would the employees not feel the effects of this when Teamsters' Local 165 starts organizational activities in the same plant?⁷²

It has been suggested, however, that the *Wheeling Steel Corporation* rationale is, at least, not the most important basis for the disestablishment order. Further, there is little danger that any employer will ever control the Teamsters. Perhaps a modified policy can be adopted; the Board could order disestablishment of the company dominated local and, in addition, direct the employer to withhold recognition from any other local of the same international which might thereafter wish to organize in the plant until it is certified. With the employer's influence removed from the picture by a cease and desist order, the remaining problem would be one which the Board has long faced—control of pre-recognition or preelection activities.⁷³

THE NEW PRIMA FACIE TEST FOR PROOF OF RECEIPT OF PRICE DISCRIMINATIONS UNDER THE ROBINSON-PATMAN ACT

For almost seventeen years, Section 2(f) of the Robinson-Patman Act seemed to be the one provision of that Statute which posed no significant problems.¹ In some thirty words this Section apparently had effec-

72. Note that in the *Polynesian Arts* case, the hostility of the employer was directed at the CIO International and not at any particular local thereof. *Polynesian Arts, Inc.*, 100 N.L.R.B. 542, 546 (1952).

73. See note 26 *supra*. Surely it would be better to face the problem squarely in this manner than to continue along the lines suggested by the *Jack Smith Beverages* case and refrain from giving notice and hearing to the international.

1. 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1946). The Robinson-Patman Act is directed primarily against the practice of granting discriminatory prices by sellers, but Subsection (f) provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."