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in line with the cases decided under other workmen's compensation acts.

"[E]very respectable loss-adjusting mechanism must look in two directions: it must make the injured person whole, and it must also seek out the true wrongdoer whenever possible."[38] The court in *Murray* is concentrating on the latter goal. Yet the result which is reached does not satisfactorily meet either goal. When this is the case, the emphasis should be placed on compensation to the injured employee in accord with the basic principle of recovery in tort. The resulting loss may fall heavily upon the third party. Nevertheless, courts should favor the injured plaintiff rather than the negligent tortfeasor.

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COALITION BARGAINING: THE EXPANSION OF THE BARGAINING UNIT

According to labor, one of its major deficiencies is not being able to negotiate with equal bargaining strength vis-à-vis multi-plant employers.[1] Therefore, in recent years, labor has considered coalition bargaining as one of its major goals.[2] Coalition bargaining involves different unions representing different bargaining units[3] of the same

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[38]A. LARSON, 2 WORKMEN'S COMPENSATION § 71.10, at 165 (1968).

[1]When the American Federation of Labor (AFL) merged with the Congress of Industrial Organization (CIO) in 1955, Walter Reuther, head of the CIO, insisted on the establishment of the Industrial Union Department (IUD) to formulate broad labor goals. How to deal with the large multi-plant employer has always been one of the primary concerns of the IUD. Engle, *Coordinated Bargaining: A Snare—And A Delusion*, 19 LAB. L.J. 518 (1968).

[2]Unions feel that coalition gives them a strengthened bargaining position since an employer no longer runs the risk of having only one of his plants shut down by strike, but virtually his entire operation. To an employer of size this is a weighty factor which the unions hope will tip the scales toward more employer concessions. Hildebrand, *Coordinated Bargaining: An Economist's Point of View*, 19 LAB. L.J. 524 (1968).

[3]As a matter of clarification, a *bargaining unit* is a group of employees with the same needs and interests that has been accepted by the Board as "appropriate" to be represented by some labor organization for the purposes of collective bargaining. Generally, the union will set out in their 9(c) petition what group of employees they wish to represent. The Board will then determine if that group of employees is an appropriate unit. If they are, the Board holds an election whereby the employees

employer negotiating in unison for one common contract for all units or in the alternative for individual unit contracts, each with identical terms.[4] Its purpose is "to bring multi-plant companies with several unions into national bargaining on economic items which are national in scope . . . ."[5] There is little doubt that any form of coaltion bargaining is permissible when there is a mutual desire to use it.[6] However, when either labor or management tries to force the other to accept coalition bargaining, its legality is drawn into question.

In a recent case, *General Electric Company*,[7] this issue was raised when the Company refused to bargain with the bargaining committee of the International Union of Electrical Workers (IUE)[8] when the

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in this unit are able to designate whether or not they desire the petitioning union to represent them. If the union receives a majority of the votes cast, they become the "exclusive bargaining agent" for the bargaining unit. *See* L. SILVERBERG, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD 19, 41, 47, 166 (3d ed. K. McGuiness 1967).

[4]This type of bargaining technique knows several names, including "pattern" bagaining, "cooperative" bargaining and "coordinated" bargaining. When the technique is used by management, it is called "multi-employer" bargaining. *See* Engle, *Coordinated Bargaining: A Snare—and A Delusion*, 19 LAB. L.J. 518 (1968); Comment, *The Status of Multiemployer Bargaining Under the National Labor Relations Act*, 1967 DUKE L.J. 558; Anker, *Pattern Bargaining, Antitrust Laws and the National Labor Relations Act*, NEW YORK UNIVERSITY NINETEENTH ANNUAL CONFERENCE ON LABOR 81 (1967).

[5]W. REUTHER, AGENDA FOR TOMORROW 51 (1965), *as quoted in* Petitioner's Brief on Review From Decision and Order of the National Labor Relation's Board at 46, General Elec. Co. v. NLRB, *appeal docketed*, No. 32867, 2d Cir., Feb. 28, 1969.

[6]McLeod v. General Elec. Co., 257 F. Supp. 690, 705 (S.D.N.Y.) *rev'd*, 366 F.2d 847 (2d Cir. 1966), *rev'd per curiam*, 385 U.S. 533 (1967); Radio Corp. of America, 121 N.L.R.B. 633 (1958); *see* General Motors Corp., 120 N.L.R.B. 1215 (1958).

[7]173 N.L.R.B. No. 46, 69 L.R.R.M. 1305 (1968).

[8]For some time the several independent unions representing the Company employees had been increasingly concerned about what they considered a weakness in bargaining separately with the Company. This led to the formation in 1965 of the Committee on Collective Bargaining (CCB) composed of representatives of AFL-CIO unions that bargain with GE. Early in 1966, the IUE and the other seven cooperating unions framed joint bargaining demands to be presented to GE. By letter the CCB informed GE of their intention to bargain in a coalition. GE refused to meet with them on the grounds that it represented an illegal attempt to bargain on a company-wide basis. Thereafter the IUE notified the Company that it was withdrawing its request to bargain jointly and proposed a meeting date to which the Company agreed. However, in preparation for that meeting the union added to its negotiation committee as "nonvoting" members, one representative from each of the other seven unions, which, with the IUE, had comprised the coalition. The Company had no knowledge that the IUE had augmented its bargaining committee with the "outsiders" until the actual day of the meeting. On that day when the GE negotiators noted the presence of the representatives from the other seven unions, they refused to meet with the committee. The union then filed a refusal-to-bargain charge with the Board and the Board's General Counsel issued a complaint. See note 11 *infra*.

bargaining unit of the IUE included not only members of the IUE but also representatives from the bargaining units of seven other unions.[9] The Company argued that the "outsiders" at the meeting represented an indirect attempt by the union to bargain in a coalition. This, said GE, was illegal because such a coalition would have the effect of unilaterally expanding the bargaining unit without the proper National Labor Relations Board approval.[10] The Board found that the Company had violated Section 8(a)(5)[11] of the Labor Management Relations Act (LMRA) which provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. The Board reasoned that the unions had merely utilized their right under section 7 of the LMRA to select their own bargaining representatives.[12] To hold otherwise, said the

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[9]The other seven unions were the American Flint and Glass Workers, the Allied Industrial Workers, the Sheet Metal Workers International Alliance, the American Federation of Technical Employees, the International Association of Machinists, the United Automobile, Aerospace, and Agricultural Implement Workers, and the International Brotherhood of Electrical Workers.

[10]General Electric Co., TXR-316-67 (1967).

[11]Section 8(a)(5) of the Labor Management Relations Act provides: "(a) It shall be an unfair labor practice for an employer— . . . (5) to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5) (1964). The Board's procedure in processing a refusal-to-bargain charge is precisely set out in the Act. When the charge is received from the complainant, a Board agent is sent to investigate the merits. He reports his finding to the General Counsel and if the latter feels that the charge contains sufficient grounds for a complaint, one is issued. A hearing is then scheduled before a trial examiner where both parties have the opportunity to present evidence, cross-examine witnesses and generally present their respective cases. An appeal may then be taken to the five-member National Labor Relations Board. From there an appeal may be taken to the appropriate United States Circuit Court of Appeals. *See* Labor Management Relations Act § 10, 29 U.S.C. § 160 (1964).

Under section 10(j) of the Act if there is appropriate need, the General Counsel may seek an injunction from a United States District Court to enjoin the objectionable conduct until the complaint is heard. The principal case has a long history as a result of this provision. The General Counsel issued his complaint and then asked the United States District Court for the Southern District of New York to issue an injunction to compel GE to bargain with the IUE committee. The District Court issued the injunction. McLeod v. General Electric Co., 257 F. Supp. 690 (S.D.N.Y. 1966). However its decision was reversed by the United States Court of Appeals for the Second Circuit: McLeod v. General Electric Co., 366 F.2d 847 (2d Cir. 1966). Mr. Justice Harlan stayed the Second Circuit's order pending action on a writ of certiorari. 87 S.Ct. 5 (1966). The writ was granted, but subsequently a contract was executed by GE and the IUE. The Supreme Court then remanded the case for a determination of whether the issue had been mooted by the execution of the contract. 385 U.S. 533 (1967).

[12]The text of section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of

Board, would hinder collaboration, cooperation and communication among unions. Dissenting, Board member Howard Jenkins maintained that "to allow representatives of other units to attend and participate in negotiations for a unit which they do not represent may have the effect of broadening or narrowing, at the pleasure of the unions concerned, the numbers, types and locations of the employees covered or affected by the bargaining. This in turn would conflict with the responsibility of the Board to determine the scope of the appropriate unit...."[13]

Analytically, *General Electric* raises some interesting questions relative to the concept of coalition bargaining. The first falls within the realm of what is commonly known as *true coalition bargaining.* In true coalition bargaining two or more unions join together and bargain for a common "master agreement."[14] The object of the unions is to group together as one so as to be in a position to employ massive economic force against the employer in order to gain their economic demands.[15] The question that is presented is whether this technique can be upheld under current Board regulations. A related question is whether a true coalition could ever be considered by the Board to be an appropriate bargaining unit where there is a lack of mutual consent.[16]

A second area of concern deals with what unions commonly call "coordinated" bargaining.[17] Coordinated bargaining is a variation

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their own choosing and to engage in other concerted activities for the purpose of collective bargaining....

29 U.S.C. § 157 (1964).

[13]General Elec. Co., 173 N.L.R.B. No. 46, 69 L.R.R.M. 1305, 1312 (1968).

[14]A master agreement is a common contract covering all employees represented by the various unions making up the coalition. The master agreement is the device through which the coalition acquires its added economic strength. By having a master agreement all employees are legally able to go on strike at the same time. *See* note 2 *supra.*

[15]When unions speak of their "economic power" they refer to their effective ability to apply economic pressure on the employer to the point that the employer concedes the unions' bargaining demands. Such economic pressure is effected through the basic device of striking. Obviously, with more employees on strike at the same time causing a larger percentage of the employer's productive capacity to shut down, greater economic pressure may be applied by the union. Thus, the idea underlying *true coalition bargaining* is to control as many employees as possible in order to gain added bargaining power at the negotiating table. *See* Hildebrand, *Coordinated Bargaining: An Economist's Point of View,* 19 LAB. L.J. 524 (1968).

[16]The writer has found no cases precisely on this point.

[17]Unions apparenty use this term because to them it indicates a cooperative endeavor. Also, unions are aware of the legal problems that surround *true coalition bargaining* and thus tend to emphasize a distinction through terminology. *See* Lasser, *Coordinated Bargaining: A Union Point of View,* 19 LAB. L.J. 512 (1968).

from true coalition bargaining in that two or more unions representing separate bargaining units negotiate jointly for *individual unit contracts containing common terms.* This was the technique used in *General Electric.* The question is whether this technique should be permitted by the Board if true coalition bargaining is not.

I

The inherent defect in true coalition bargaining is that the coalition attempts to negotiate for an expanded bargaining unit which has not been approved by the Board. One of the most important functions of the Board, under section 9 of the LMRA, is to delineate collective bargaining units and to certify exclusive bargaining agents[18] to represent those units. This arises from the basic policy underlying the LMRA, which is the promotion of industrial peace through the maintenance of stable bargaining relationships.[19] In order to preserve such stability at the bargaining table, the parties must know with whom and for whom they are negotiating. For this reason the LMRA designated the Board to decide the appropriate unit and agent, preliminary to the actual bargaining, so as to eliminate any disruptive

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[18]Section 9 sets out the procedure to be followed in determining proper representation for employees and for proper certification of bargaining units. It provides:

> SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment....
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> (b) The Board 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....
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> (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board... the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing.... If the Board finds upon the record of such hearing that such a question or representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159 (1964).

[19]The policy as set forth in the LMRA is a simple but sweeping declaration of purpose; namely, to eliminate the causes of obstructions to the free flow of commerce arising out of industrial strife. 29 U.S.C. § 141(b) (1964). One method of accomplishing this result is to encourage collective bargaining. Thus stable and effective bargaining, which is the underlying policy of the LMRA, is achieved. Retail Associates, Inc., 120 N.L.R.B. 388, 393 (1958); *In re* Engineering Metal Prods. Corp., 92 N.L.R.B. 823, 824 (1950).

effect that might otherwise result if the question were left unresolved or to the decision of the parties.[20] The Board has jealously guarded this statutory right and has steadfastly stated that it will not abdicate this responsibility to the parties.[21] Thus an employer is under no obligation to bargain with representatives of employees unless the unit being represented has been found appropriate under established Board procedure.[22]

Therefore, the question is whether the pooling together of several independent bargaining units for the purpose of true coalition bargaining represents an unauthorized expansion of the already existing bargaining units so that the employer might lawfully refuse to bargain. The answer to this question would appear to be yes.

When the coalition begins bargaining as a group, it will soon become obvious that the coalition is not bargaining for each individually certified unit, but for the combined units as a whole. Since these combined units have not been certified as an appropriate unit under section 9(b) and since the coalition has not been certified as the exclusive bargaining agent for the combined units, it is highly questionable whether the Board would require the employer to bargain with the coalition.[23]

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[20]*See In re* Waterfront Employers Ass'n, 71 N.L.R.B. 80, 109-11 (1946).

[21]*Id.*

[22]*See, e.g.*, Typographical Union, 123 N.L.R.B. 806 (1959), *modified on other grounds*, 278 F.2d 6 (1st Cir. 1960), *aff'd*, 365 U.S. 705 (1961); *cf.* Electrical Workers Union, 119 N.L.R.B. 1792 (1958), *enforced per curiam*, 266 F.2d 349 (5th Cir. 1959).

[23]Coalition bargaining finds another legal barrier when during negotiations the union insists to the point of impasse that the company bargain with the coalition rather than with each union individually. At that stage the employer may refuse to bargain or may be compelled to bargain, depending on whether the size of the bargaining unit is a mandatory or non-mandatory subject of bargaining. 29 U.S.C. § 158(d) (1964). Ever since NLRB v. Borg-Warner Corp, 356 U.S. 342 (1958), it has been well settled that a party commits an unfair labor practice when it bargains to impasse on a non-mandatory subject of bargaining. In *Borg-Warner* the company was insisting upon a "recognition" clause in the contract which would have the effect of eliminating the international union as the exclusive bargaining agent for the employees. The international had been certified by the Board as the exculsive bargaining agent. In holding that the Company was guilty of refusing to bargain, the Court said that the subject herein involved was a non-mandatory subject of bargaining and since the parties have a duty to bargain on all mandatory subjects under section 8(d), insistence on agreement upon non-mandatory subjects was a barrier to the performances of the parties' section 8(d) duties. And this constituted, indirectly to be sure, a refusal to bargain. *See* 29 U.S.C. § 158(a)(5) (1964).

In International Longshoremen's Ass'n v. NLRB, 277 F.2d 681 (D.C. Cir. 1960), the *Borg-Warner* principle was applied directly to a union's attempt to unilaterally expand a certified bargaining unit. There the union had been certified to represent employees in the Port of Greater New York and vicinity. During negotiations the union insisted that the bargaining unit be extended to include almost all

If the coalition of unions were able to convince the Board to consider whether the coalition was an appropriate bargaining unit, there would still be formidable barriers.[24] First, the coalition would have to overcome established precedent that a previous determination of the appropriate bargaining unit in a Board representation proceeding is binding in a subsequent proceeding charging an employer with an unlawful refusal to bargain.[25] Moreover, the coalition would have to overcome the rule that individual local units are presumptively appropriate unless there is affirmative evidence to the contrary.[26] Thus, for the coalition to prevail, it would have to show that a coalition made up of several units is conclusively appropriate over an individual unit. This could be a difficult undertaking. When the Board is determining whether a single unit or a coalition of units is more appropriate, the bargaining history of the parties is an important factor.[27] In simplest terms this means that the Board will look to see if the employer has in the past bargained with the units in question on a single-unit or multi-unit basis. If, for example, the parties in the past have mutually consented to coalition bargaining or if the actions of the parties, as manifested by their previous bargaining history, indicate a consent to coalition bargaining, the Board is greatly influenced to find the multi-unit appropriate.[28] However, if the employer has always bargain-

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ports from Maine to Texas. The employers filed a refusal-to-bargain charge. The court held that the union had refused to bargain under the *Borg-Warner* theory. Negotiating over the size of the bargaining unit is not a mandatory subject of bargaining and insistence upon such discussion constitutes a refusal to bargain on the mandatory subjects.

Thus, under *Borg-Warner,* negotiation on mandatory subjects of bargaining would effectively be foreclosed if the unions insisted as a prerequisite to bargaining on some non-mandatory item. And since, in view of *Longshoremen's Ass'n,* it would be unlikely that a court would consider coalition bargaining a mandatory subject for bargaining under section 8(d), it would appear that an unfair labor practice would be committed by insistence upon it.

[24]The coalition, in order to get the Board to consider this question, would normally have to file a petition under section 9(c) designating that they wish to represent all employees who heretofore were being represented by the individual unions in separate bargaining units. The Board would then, preliminary to an actual election, have to determine whether this combination of heretofore separate bargaining units could be appropriate as a single bargaining unit. See note 17 *supra.*

[25]*See* NLRB v. Puritan Sportswear Corp., 385 F.2d 142 (3d Cir. 1967); Metropolitan Life Ins. Co., 150 N.L.R.B. 1298 (1965); Wagner, *Multi-Union Bargaining: A Legal Analysis,* 19 LAB. L.J. 733 (1968).

[26]Parsons Inv. Co., 152 N.L.R.B. 192 (1965); Fredrickson Motor Express Corp., 121 N.L.R.B. 32 (1958); Shaver, 119 N.L.R.B. 939 (1957).

[27]*See, e.g.,* Firestone Tire & Rubber Co., 103 N.L.R.B. 1749 (1953); American Suppliers, Inc., 98 N.L.R.B. 692 (1952).

[28]Cases cited note 27 *supra.*

ed on a single-unit basis, a strong presumption arises that a workable bargaining relationship exists, and the Board will be reluctant to order any change.[29] Since the establishment of a multi-unit bargaining history would initially depend upon the mutual consent of the parties, it is unlikely that the factor of bargaining history would ever operate in favor of unions which are trying to force a coalition upon the employer.

There are other factors which the Board considers in determining what is an appropriate bargaining unit.[30] However, the bargaining history of the parties seems to have special influence with the Board and there is little doubt that when all other factors are either equal, ambiguous, or otherwise non-decisive, the bagaining history of the parties will be determinative.[31]

Perhaps there is a more basic reason, grounded upon policy considerations as to why the Board might not find a coalition an appropriate bargaining unit. Either in its true form or in the GE-IUE form, legal coalition bargaining would have profound economic consequences. "The ultimate goal of coordinated bargaining is to force companies to negotiate major economic items on a national level."[32] If labor succeeds in its latest effort, one centralized bargaining committee could, through the use of strikes, control the stability of large segments of the economy. As such, strikes would take on new proportions in that they could have a critical impact on the national economy to the extent that government would be compelled to intervene as a protector of the public interest.[33] When this happens, the give and take of true collective bargaining breaks down and is replaced by the pressurized need for immediate settlement. Moreover, since unions are not subject to the anti-trust laws,[34] their concentration of power would be virtually unchecked and would be conducive to great abuse.

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[29]The reason for this probably reverts back to the underlying policy of the LMRA—to maintain stable bargaining relationships. So, unless there has been a complete breakdown, the Board will generally go with that arrangement which has proven itself to be workable and thus stable. *See* note 19 *supra.*

[30]Included among these are geographic considerations, interchange of employees, integration of work and general community of interest among employees. *See* Hall, *The Appropriate Bargaining Unit,* 18 W. RES. L. REV. 479, 485 (1967).

[31]General Motors Co., 120 N.L.R.B. 1215 (1958).

[32]W. REUTHER, AGENDA FOR TOMORROW 71 (1965) *as quoted in* Petitioner's Brief on Review From Decision and Order of the National Labor Relations Board at 47, General Elec. Co. v. NLRB, *appeal docketed,* No. 32867, 2d Cir., Feb. 28, 1969.

[33]*See, e.g.,* Fleming, *Emergency Strikes and National Policy,* 11 LAB. L.J. 267 (1960).

[34]*See* Timbers, *The Problems of Union Power and Antitrust Legislation,* 16 LAB. L.J. 545 (1965).

Although unions would be justified in seeking coalition bargaining as a new weapon in their constant struggle against management, nevertheless, it would seem apparent that coalition bargaining would operate against the public interest.

II

In order to avoid what seems to be inevitable legal pitfalls in unilaterally expanding their bargaining units or petitioning the Board for certification as the appropriate bargaining unit, unions have sought other techniques by which to achieve the same result.[35] Thus, in *Standard Oil Co. v. NLRB*[36] and *American Radiator and Standard Sanitary Corp.*[37] unions met with some measure of success with the technique of coordinated bargaining which was effected by having "outsiders" sit in on the negotiations as members of a single union's bargaining committee. In these cases the Board held that unions representing different units of the same employer have the right to agree on a common set of bargaining objectives and to exchange representatives to participate in each other's negotiations and otherwise cooperate in an effort to achieve those objectives. The *American Radiator* case is particularly relevant. In that case the union had previously requested from the company its consent to use company-wide bargaining in the upcoming negotiations. When the company refused, the union merely made the members of the coalition members of their own bargaining unit. At this point the unions, if they followed the procedure for coordinated bargaining outlined in *Agenda for Tomorrow*,[38] would have entered into an agreement whereby no union would

[35]The unions themselves have recognized that true coalition bargaining presents stubborn legal problems and thus have pursued the course of "coordinated bargaining." *See* Lasser, *Coordinated Bargaining: A Union Point of View*, 19 LAB. L.J. 512, 513 (1968).

[36]322 F.2d 40 (6th Cir. 1963), *enforcing* 137 N.L.R.B. 690 (1962). In this case local unions invited international representatives to sit in as members of their bargaining committees. The unions involved here were all locals of the same international. Coalition bargaining goes farther in that the "outsiders" are members of different unions of different internationals. However, the Board used the same reasoning in this case as it did in *American Radiator & Standard Sanitary Corp*, note 37 *infra*.

[37]155 N.L.R.B. 736 (1965), *rev'd on other grounds*, 381 F.2d 632 (6th Cir. 1967). In reversing the Board's decision the Sixth Circuit said in effect that bargaining under protest does not constitute a refusal to bargain under section 8(a)(5) and thus dismissed the complaint on that basis. The court did not address itself to the issue of whether the company was justified in initially refusing to meet with a bargaining committee composed of "outsiders."

[38]See Petitioner's Brief on Review From Decision and Order of the National Labor Relations Board at 46, General Elec. Co. v. NLRB, *appeal docketed*, No. 32867, 2d Cir., Feb. 28, 1969.

accept its contract until all sister unions in the coalition had been offered similar terms.[39] Charges were filed by the unions when the company refused to bargain under these circumstances. The Board held that a union had the right to select its own bargaining representatives as well as the right to communicate and cooperate with sister unions of the same employer. As such, the company could not refuse to bargain because of the presence of the outsiders.[40]

This case is significant because the union by merely selecting its own representatives to sit on its bargaining committee, was able to accomplish the same result as it would have under true coalition bargaining—without having to face the legal questions which enshroud that technique. Thus, in *American Radiator* the Board allowed the union to accomplish indirectly what it most likely could not have accomplished directly. The Board's reasoning in *American Radiator* was never tested by the courts, as the Sixth Circuit reversed on other grounds.[41] The *General Electric* case, which is not unlike *American Radiator,* provided the Board an opportunity to re-evaluate its decision in *American Radiator.* Unfortunately, the Board chose to confine itself only to the problems of whether the company could refuse to bargain

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[39]*Id.*

[40]However, the Board has carved out important exceptions to this holding. Where the presence of outsiders or any other member of the bargaining committee causes such disruption, confusion, or mistrust to be present at the bargaining table so that effective, good faith bargaining cannot be effected, then the Board will generally relieve the other party from its duty to bargain. Thus in NLRB v. Kentucky Util. Co. 182 F.2d 810 (6th Cir. 1950), the court held that where a union representative had shown such open hostility toward the company and its negotiating team that good faith bargaining was rendered impossible, the company could lawfully refuse to bargain. The negotiator involved had been fired by the company and subsequently became a union representative. Prior to negotiations he told how he would "get even with the company" and "hoped they might go broke." The court noted how such an attitude could only create mistrust in the minds of the company negotiators and where mistrust exists, only "lip service" bargaining can result. The policy underlying the LMRA did not contemplate that the negotiators would have to overcome such obstacles.

Another case where the right of the parties to select their bargaining representatives and the overriding policy underpinning collective bargaining came into conflict was NLRB v. International Ladies' Garment Workers, 274 F.2d 376 (3d Cir. 1960). There an ex-union negotiator "showed up" on the company's bargaining team to negotiate for the company against his old union. Obviously, the ex-union negotiator had a considerable amount of inside knowledge about the union and its bargaining tactics and the company made it clear that it had "put one over on the union." The court held that the union was under no duty to bargain with this company committee where it appeared obvious that no substantive bargaining progress could be made. Surface bargaining is not conducive to accomplishing the underlying goals of the LMRA, namely, good faith bargaining. *See* General Elec. Co., 173 N.L.R.B. No. 46, 69 L.R.R.M. 1305, 1307 (1968).

[41]*See* note 37 *supra.*

solely because of the "outsiders" on the union committee. Thus, the *General Electric* case will likely provide the first clear test by the courts of the Board's reasoning in these cases.

The distinction which the Board seemingly draws between coalition and coordinated bargaining is perhaps more one of form than of substance, for the addition of other union representatives to one union's bargaining committee still raises objections which are common to a direct attempt at coalition bargaining. When the employer takes note of the presence of the other union representatives in one union's bargaining session, he can never be sure who the union is truly representing—its own unit or an interlocking coalition. His suspicion is particularly magnified in view of the fact that he knows that the very unions who are now sitting as representatives of one union desired coalition bargaining and that they had been previously denied a request to bargain in a coalition relative to these negotiations. Though the union would contend that the outside unions are there bargaining only for the one union, it is virtually impossible for the outside unions to separate their ultimate goals and problems from those of the unit for whom they purport to be bargaining.[42] Irrespective of the union's true intent, an atmosphere of suspicion and mistrust may immediately arise. Such an atmosphere is conducive to "sham" or "surface" bargaining since the parties are likely to go only through the motions of bargaining while attempting to gather further evidence as to what their bargaining adversary is trying to accomplish. Under such circumstances bargaining stability would inevitably deteriorate, thus causing the very situation which the Board is charged to prevent.

Upon closer analysis the union's reasons for wanting other union representatives are not persuasive. The outsiders in both *General Electric* and *American Radiator* were secondary to the negotiations and could have been easily removed without serious effect upon the union's bargaining ability. Thus, if the very presence of the outsiders created bargaining unrest because management felt the unions were trying to come in through the back door in an effort to bargain in a coalition, the policy of the LMRA would best be fulfilled by removing the outsiders rather than ordering the company to bargain in an atmosphere of sham and mistrust caused by the outsiders' presence. Moreover, if the union's reasons for having the other unions sit in

[42] *See* General Elec. Co. 173 N.L.R.B. No. 46, 69 L.R.R.M. 1305, 1312 (1968) (dissenting opinion).