

CHAPTER III

JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

Table of Contents

<u>Topic</u>	<u>Page</u>
Background	III-1
Functions of the Board	III-2
Coverage of the Act	III-4
Protected Rights of Employees	III-8
Types of Representation Elections	III-9
Appropriate Bargaining Units	III-10
Statutory Jurisdictions/Dollar Volumes	III-12
Jurisdiction Involving Foreign Countries	III-24
Jurisdiction Over Political Subdivisions	III-25

CHAPTER III

JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board derives its authority from Congress as a result of the enactment of the Labor Management Relations Act. The power of Congress to regulate labor relations is limited by the commerce clause of the United States Constitution. Congress can regulate enterprises whose operations “affect commerce” and can regulate labor disputes that “affect commerce.” Since the Board’s power is derived from Congress, it is similarly limited. Therefore, the Board can direct elections and certify the results only where the employer’s operations affect commerce. In addition, the Board can only act to prevent unfair labor practices where the labor dispute affects, or would affect, commerce.

Background

The policy as set forth in the original Act (the Wagner Act) is a simple but sweeping declaration of purpose, stated in terms of eliminating the causes of obstructions to the free flow of commerce

arising out of industrial strife and mitigating and eliminating such obstructions when they have occurred. Two methods of accomplishing the desired result were adopted--the encouragement of collective bargaining and the protection of the exercise by workers of full freedom of association, self-organization, and designation of representatives. Both the purpose and the methods remain unchanged.

The Board

- **Functions of the Board**

The Board has two primary and three secondary functions. The primary functions are: (1) conducting secret-ballot elections among employees in appropriate bargaining units to determine whether they wish to be represented by a labor organization, and (2) preventing and remedying unfair labor practices committed by employers, labor organizations, or their agents. Secondary functions include conducting union deauthorization elections to determine whether employees wish to rescind an outstanding union-shop clause, resolving jurisdictional disputes by determining which of the competing groups of employees is entitled to perform the work in dispute, and polling employees on their employer's last offer in "national emergency" situations.

- **Structure of the Board and the Decision-Making Process**

The Board consists of five public members who are appointed for five-year terms by the President with Senate approval. One member is designated by the President to serve as chairman. Each Board member has a chief counsel, a deputy chief counsel, and a staff of approximately 20 attorneys who serve that particular member.

While all five Board members may participate in a decision, and frequently do in cases that establish or change policy, decision-making authority in most cases is delegated to three-member panels. Each Board member is the head of one panel and a member of two others. Typically, a case will be assigned by the Executive Secretary to a particular Board member, and thus becomes a case of that member's panel. The case is referred to one of that member's staff counsel. The entire record, including all of the pleadings, briefs, the administrative law judge's or regional director's decision, and the transcript, is analyzed by the counsel. The case then is considered and discussed by a "subpanel"--i.e., senior staff members representing the three Board members who constitute the panel for that case. The subpanel recommends a disposition and the counsel drafts a legal memorandum

for Board consideration or a proposed Board Decision and Order in accordance with the subpanel recommendations. Draft opinions are reviewed by the Board members and, if approved, are issued by the Executive Secretary. Cases that are novel or that establish or modify policy often are considered at meetings of the full Board.

Coverage of the Act

- **Businesses**

Not everyone is subject to the provisions of the Act. The Board has broad jurisdiction over all businesses where materials, products, or services cross state lines or where the operations of other companies engaged in such activity are affected. However, the Board in its discretion may decline to assert jurisdiction provided that the standards it uses are not more restrictive than those prevailing on August 1, 1959. Businesses not covered by the Act generally are governed by state and local laws.

The statute empowers the Board to grant states and territories jurisdiction over cases involving industries that are engaged in or affect interstate commerce. However, the Board has never exercised this power and ceded its jurisdiction because of the prerequisite that the

state law and its interpretation by the appropriate state tribunal must be consistent with the federal law. Thus far, no state has qualified.

• **Employers and Employees**

The statute provides that the term "employer" includes any person acting directly or indirectly as an employer except:

- * The United States government;
- * States or their political subdivisions;
- * Federal Reserve banks;
- * Wholly-owned government corporations;
- * Any employer who is subject to the terms of the Railway Labor Act; and
- * Labor organizations and their officers and agents except when acting as employers.

Any person who works for an employer is considered to be an "employee" unless specifically exempted from the Act. Individuals not presently working can also be employees if their non-working status is due to a labor dispute or an unfair labor practice and they have not obtained other substantially equivalent employment. Unless the statute otherwise provides, its guarantees apply to employees generally and

are not restricted to the employees of any particular employer. The statute specifically exempts the following individuals from its coverage:

- * Agricultural laborers;
 - * Domestic servants;
 - * Any individual employed by his or her parent or spouse;
 - * Any individual employed by an employer who is subject to the Railway Labor Act;
 - * Independent contractors;
 - * Supervisors; and
 - * Any individual employed by an employer exempt from the Act (e.g., government employees, employees of wholly-owned government corporations, or Federal Reserve banks).
- **Supervisors, Independent Contractors, and Agricultural Laborers**

The exemption of supervisors and independent contractors, and to a lesser extent agricultural laborers, has been most troublesome to the Board. The statute specifically states that it is not illegal for supervisors to organize; they are not, however, accorded the protections of the Act or the use of its election procedures. While a

comprehensive definition of the term "supervisor" is found in the Act, the Board and the courts also have developed certain secondary tests of supervisory status.

Neither independent contractors nor agricultural employees are defined by the Act, and the Board has therefore been forced to evolve its own concepts. In determining whether or not an individual is an independent contractor, the Board has consistently applied the common law "right of control" test. If the recipient of the services in question has a right to control not only the result to be achieved but also the manner in which the work is to be performed, an employer-employee relationship exists as a matter of law; otherwise, there exists an independent contractor relationship. The Board has turned to interpretations of Section 3(f) of the Fair Labor Standards Act as its principal guideline in defining agricultural laborers. When dealing with employees in any of the foregoing categories, particular care must be exercised to determine whether the exemptions apply.

- **Labor Organizations and Representatives**

The Act defines a labor organization as any organization, agency, employee representation committee, or plan in which

employees participate and which exists for the purpose of dealing with employers concerning grievances, wages, labor disputes, rates of pay, hours of employment, or conditions of work. Employee "representatives" include both individuals and labor organizations. An organization need not engage in collective bargaining to be qualified as a labor organization. When an employee association or organization is dominated by supervisors, however, it will not be recognized as a qualified representative of employees because of the possibility of a conflict of interest. The labor organization need not be a union; a committee will suffice.

- **Protected Rights of Employees**

The basic rights of employees that the statute seeks to guarantee are stated in Section 7. This provision declares:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and (employees) shall also have the right to refrain from any or all such activities.

Employees thus have a statutory right to select and bargain with their employer through representatives of their own choosing, to engage in other concerted activities for their mutual benefit, or to refrain from such conduct. In order to fall within the guarantees of Section 7, an individual's conduct must be both "concerted" and "protected." Activities by a single individual undertaken on his or her own behalf that are determined to be purely personal in nature are not deemed to be concerted.

Representation Elections

- **Types of Elections**

- * The *collective* bargaining election to determine the majority status of a labor organization. A petition for such an election may be filed by a labor organization, a group of employees, an individual, or an employer;
- * The *decertification* election to determine whether a certified or currently recognized labor organization still represents a majority of the employees. A petition for such an election may be filed by a labor organization, a group of employees, or an individual;

- * The *deauthorization* election to determine whether the employees wish to remove the labor organization's authority to have a union-shop agreement. A petition for such an election may be filed by a group of employees representing at least 30 percent of those covered by the agreement; and
- * The *national emergency* election to determine whether employees wish to accept the final offer of settlement made by their employer. This election must be conducted between 60-75 days after a federal district court has issued an injunction against a strike or lockout that imperils or threatens to imperil the national safety.

- **Determination of the Unit**

The Act provides that "the Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Beyond this provision, the statute carries specific prescriptions concerning craft units, guards, and professional employees.

(a) **Craft Units.** The Board cannot decide that any craft unit is inappropriate for bargaining purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation.

(b) **Guards.** The Board may not include guards in the same unit with other employees. Furthermore, a union cannot be certified as exclusive bargaining representative for guards if it admits to membership employees other than guards, or if it is affiliated "directly or indirectly" with a labor organization that admits to membership employees other than guards.

The Act defines a guard as "any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." Individuals with both guard and nonguard responsibilities will be deemed guards only if their guard functions constitute an essential part of their duties.

(c) **Professional Employees.** The Board may not include professional employees in the same unit with other employees unless a

majority of the professionals first vote separately in favor of such inclusion.

Statutory Jurisdiction

The Board's jurisdiction over both representation proceeds and unfair labor practices extends to all enterprises with operations that "affect" interstate or foreign commerce. The courts have construed this to mean that the Board's jurisdiction encompasses "the fullest jurisdictional breadth constitutionally permissible under the commerce clause," and is precluded only in situations where an employer's activities have a "*de minimis*" effect on interstate commerce.

Before accepting either an election petition or an unfair labor practice charge, it is incumbent upon the Board to establish that it has statutory jurisdiction to proceed. Thus, the Board must determine (1) whether a "labor dispute" exists, (2) whether "employers," "employees," and "labor organizations" are involved, and (3) whether the employer's operations "affect interstate or foreign commerce." Once established, the Board's jurisdiction is exclusive and is not subject to other means of dispute adjustment that may be established by law, by private agreement or otherwise. Neither the courts nor state

agencies have concurrent jurisdiction to identify and remedy unfair labor practices.

Discretionary Jurisdiction

Despite its extensive statutory grant of jurisdiction, the Board has never exercised its full authority. Instead, it has considered only those cases that, in its opinion, have a substantial effect on commerce. In approving this practice, the U.S. Supreme Court has noted that Congress left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce, and it has recognized that, even when the effect on interstate commerce is adequate, the Board sometimes properly declines to assert jurisdiction when, in the Board's judgment, the policies of the Act would not be served.

The Board has, over the years, developed a series of jurisdictional standards, expressed in terms of minimum annual dollar volume, to aid in determining whether it will effectuate the policies of the Act to assert jurisdiction. This practice was given statutory recognition by the Labor-Management Reporting and Disclosure Act of 1959. Congress there stated that the Board might continue to decline

jurisdiction over any labor dispute within its statutory jurisdiction, provided that it does not decline to assert jurisdiction over any labor standards prevailing on August 1, 1959. The Board's jurisdictional standards may be established either through a Board decision or through a formal rule-making proceeding pursuant to the Administrative Procedure Act.

The Board thus may expand but not contract its jurisdiction. In the 1959 amendments, Congress also resolved the troublesome problem of conflicting federal and state jurisdiction by providing that the states may assert jurisdiction over labor disputes that the Board declines to accept.

- **General Jurisdictional Standards**

The Board's current jurisdictional standards are:

- * *Nonretail Enterprises.* Sales of goods to consumers in other states, directly or indirectly (outflow), or purchases of goods from suppliers in other states, directly or indirectly (inflow), of at least \$50,000 per year.

Direct Outflow is defined as goods shipped or services furnished by the employer outside the state.

Indirect Outflow is defined as the sale of goods or services within the state to users meeting any of the Board's jurisdictional standards, with the exception of the indirect outflow or indirect inflow standard.

Direct Inflow is defined as goods or services furnished the employer directly from outside the state.

Indirect Inflow is defined as goods or services that originated outside the state, but that the employer purchased from a seller or supplier within the state.

In applying this standard, the Board will add direct and indirect outflow, or direct and indirect inflow; it will not add outflow and inflow.

- * *Retail Enterprises.* An annual volume of business of at least \$500,000, including sales and excise taxes.
- * *Retail and Manufacturing Enterprises Combined.* Either the retail or the nonretail standard, when a single, integrated enterprise manufactures a product as well as sells it directly to the public.

- * *Retail and Wholesale Enterprises Combined.* The nonretail standard, when a company is involved in both retail and wholesale operations.
- * *Instrumentalities, Links, and Channels of Interstate Commerce.* An annual income of at least \$50,000 from furnishing interstate passenger and freight transportation services or performing services valued at \$50,000 or more for enterprises that meet any of the standards except indirect outflow or indirect inflow established for nonretail enterprises.
- * *National Defense.* The enterprise has a substantial impact on national defense, whether or not it satisfies any other jurisdictional standard.
- * *Territories and the District of Columbia.* The normal standards as applied in the states are applicable to the territories. Plenary jurisdiction is exercised in the District of Columbia.
- * *Multiemployer Bargaining Associations.* Regarded as a single employer in that the annual business of all members is totaled to determine whether any of the standards apply.

- * *Multistate Establishments.* The annual business of all establishments is totaled to determine whether any of the standards apply.
- * *Nonprofit Organizations.* The same standards as if the organization were operated for profit.
- * *Union Employers.* The appropriate nonretail standard.

- **Standards for Specific Industries**

The Board's current jurisdictional standards for specific industries are as follows:

- * *Accounting Firms.* The Board has asserted jurisdiction over certified public accounting firms without specifying a precise jurisdictional standard. In the leading case, the firm received gross annual revenues in excess of \$10 million.
- * *Arbitration Associations.* The Board has asserted jurisdiction over the American Arbitration Association, but has failed to establish a jurisdictional standard.
- * *Architects.* The Board has applied its nonretail business standards to architectural firms.

- * *Art Museums.* Gross annual revenues in excess of \$1 million.
- * *Automobile Dealers.* Treated as retail operations, even if the dealer has a franchise from a national manufacturer.
- * *Building and Construction.* The appropriate jurisdictional standard in cases involving a single building trades employer, or the multiemployer standard if the employer is part of a multiemployer bargaining association.
- * *Colleges, Universities, and Secondary Schools.* At least \$1 million total annual income from all sources except those designated by the grantor as not available for operating costs. This applies to both profit and nonprofit institutions.
- * *Country Clubs.* Treated as retail concerns.
- * *Courier and Escort Services.* The Board has asserted jurisdiction over a company providing escort guard services, applying its nonretail discretionary standard.
- * *Day Care Centers.* Gross annual revenues of at least \$250,000.
- * *Entertainment and Amusement.* Treated as retail concerns. The Board will not assert jurisdiction over horse and dog racing tracks.

- * *Federal Credit Unions.* At least \$500,000 annual gross income from loans, deposits, investments, etc.
- * *Gambling Casinos.* At least \$500,000 gross annual revenue.
- * *Guard Services.* Companies furnishing plant guards to employers involved in interstate commerce are themselves subject to Board jurisdiction if the value of the services meets one of the Board's basic jurisdictional standards. The Board also has asserted jurisdiction over a company providing escort guard services where the nonretail standard was met.
- * *Health Care Institutions.* The Board's jurisdiction extends to "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons." Federal, state and municipal hospitals are exempt, as are administrative employers in the health field. The Board will assert jurisdiction over nursing homes, visiting nurse associations, and related facilities with gross revenues over \$100,000 per year and over proprietary and nonprofit hospitals and other types of health care institutions with gross revenues over \$250,000 per year.

- * *Horse and Dog Racing.* The Board has declined to assert jurisdiction over the horse-racing and dog-racing industries, primarily because local control over these industries is extensive.
- * *Hotels, Motels, Apartments, and Condominiums.* At least \$500,000 total annual volume of business, whether an establishment is residential or nonresidential.
- * *Law Firms and Legal Aid Programs.* Gross annual revenues of at least \$250,000.
- * *Museums.* The Board has asserted jurisdiction over art museums with gross annual revenues in excess of \$1 million.
- * *Nonprofit, Private Educational, and Religious Institutions.* When the Board eliminated the distinction between profit and nonprofit institutions for jurisdictional purposes, it decided that a separate jurisdictional category encompassing all charitable, nonprofit, non-health-care institutions was unnecessary. Hence, these institutions are classified according to their substantive purpose, and jurisdiction over each institution is asserted on the basis of the same

jurisdictional standard that applies to the corresponding proprietary organization.

- * *Office Buildings, Shopping Centers, and Parking Lots.* At least \$100,000 total annual income, of which \$25,000 or more is paid by other organizations that meet any of the standards, except the indirect outflow and indirect inflow nonretail standards.
- * *Postal Service.* Full jurisdiction as provided in the Postal Reorganization Act of 1970.
- * *Printing, Publishing, and Newspapers.* At least \$200,000 total annual volume of business, and the employer must hold membership in or subscribe to interstate news services, publish nationally syndicated features, or advertise nationally sold products.
- * *Professional Sports.* Though the Board has refused to apply the \$500,000 retail jurisdictional standard, or any other specific discretionary jurisdictional standard, to professional sports employers, it has asserted jurisdiction over several professional sports employers.

- * *Public Utilities.* At least \$250,000 total annual volume of business or \$50,000 outflow or inflow, direct or indirect. This standard applies to retail gas, power and water companies, as well as to electric cooperatives. Wholesale utilities are subject to the general nonretail standards.
- * *Radio, Television, Telegraph, and Telephone Companies.* At least \$200,000 total annual volume of business.
- * *Real Estate Firms and Associations.* The Board has declined to assert jurisdiction over the real estate brokerage business, holding that the services performed by brokers are "essentially local and have at best only a remote relationship to interstate commerce." However, the Board advised that it would assert jurisdiction over a nonprofit real estate industry association that supplied various services to the public and to thousands who owned rent-stabilized apartment buildings.
- * *Restaurants.* Treated as retail operations.
- * *Service Establishments.* Treated as retail operations.
- * *Social Welfare Organizations.* For social welfare organizations other than those for which there is a standard specifically applicable to the type of activity in which they

are engaged (e.g., a nonprofit corporation established to improve the general social and economic conditions of a particular group), the Board applies a jurisdictional standard of at least \$250,000 in annual revenues.

- * *Symphony Orchestras.* At least \$1 million total annual income, compiled from all sources except those designated by the donor as not available for operating costs.
- * *Taxicab Companies.* At least \$500,000 total annual volume of business.
- * *Transit Companies.* At least \$250,000 total annual volume of business.
- * *Union Employers.* The Supreme Court has held that the Board may not refuse to assert jurisdiction over unions as a class when they act in the capacity of employers. The Board generally asserts jurisdiction over local unions that are affiliated with national organizations and that remit to them dues or other fees across state lines.

- **Jurisdiction Over Labor Disputes Involving Foreign Countries**

The Board will assert jurisdiction over most labor disputes that arise in the territorial United States or its possessions, but not over those that arise in a location under the control of another country, even if U.S. employees are involved. Jurisdiction has been asserted over labor disputes in American Samoa and Puerto Rico, but denied in a dispute arising in the Danish possession of Greenland, even though the employees were hired in the United States, paid from the United States, and returned to the United States following completion of their assignment.

Conversely, the issue of Board jurisdiction over the labor disputes of foreign corporations doing business in the United States depends upon the nature of the foreign business. The Supreme Court has held that the Board does not have jurisdiction over foreign flag vessels operating in the United States, even though the vessels belong to a wholly-owned American corporation. The Court relied in part on "the well-established rule in international law that the law of the flag state ordinarily governs the internal affairs of a ship. In similar fashion, international organizations such as the World Bank, the Inter-American Development Bank, and the International Monetary Fund enjoy "the

privileges and immunities from the laws of the sovereignty” and are exempt from coverage under the Act.

In contrast, the Board will assert jurisdiction when foreign governments or their agents actually act as employers doing business in the territorial United States.

- **Jurisdiction Over Political Subdivisions**

The exclusion of “political subdivisions” of state governments from the statutory definition of “employer” has proven to be particularly difficult for the Board to apply in practice. The Board and the courts have held that an organization is an exempt political subdivision if it (1) was created directly by the state and operates as a department or administrative arm of the government, or (2) is administered by individuals who are responsible to public officials or to the general electorate. In addition, the Board for several years refused to assert jurisdiction in situations where there was an “intimate connection” between the purposes of the exempt institution and the services provided by the otherwise nonexempt employer.

The intimate connection standard was abandoned in 1979, and the Board now determines whether the employer itself meets the

statutory definition of employer and, if so, determines whether the employer retains sufficient control over the employment conditions of the employees to enable it to bargain with a labor organization as their representative.

- **Application of the Jurisdictional Standards**

In applying the dollar volume standards, the Board has developed the following rule of application:

There is no need for a separate showing of legal jurisdiction if the employer does enough interstate business to satisfy the indirect inflow or outflow tests. However, when the standards involved are exclusively in terms of gross dollar volume of business, proof of legal jurisdiction is necessary to ensure that not all of the employer's required volume of business has been done within the confines of a single state.