

A HOUSE DIVIDED—THE SCHISM DOCTRINE

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Serenity and harmony are hardly the hallmark of parent-local union relationship. Material differences at times overflow the channels of intraunion bounds and affect existing representative status and contract rights. When dissension cuts sufficiently deep to bring about a parting of the ways with resultant confusion in the identity of the organizations claiming to represent employees under a collective bargaining agreement, there exists the legal situation which the National Labor Relations Board [hereafter, the Board] calls a schism.¹

The schism doctrine is a by-product of the Board's struggle to resolve the conflict, inherent in the National Labor Relations Act,² between the desirability of stability in labor-management relations and securing to employees their free choice of representatives. Aside from the provision of having no more than one election a year,³ the statute does not by specific provision attempt to resolve this conflict. The Board has done so by the case-by-case method.⁴

Early in the history of the act, the Board barred an election petition if a contract for the duration of one year existed between the employer and the incumbent union.⁵ The Board then moved to a more flexible position, saying that a contract for a "reasonable period of time" will bar an election.⁶ What was "reasonable" depended upon the duration of contracts in "a substantial part of the industry" involved.⁷

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¹ Naumoff, "Evolution of the NLRB Contract Bar Doctrine," 10 CCH Lab. L. J. 687, 691 (Oct. 1959).

² National Labor Relations Act, as amended, 61 Stat. 136 (1947), 29 U.S.C. §§ 151-168 (1958).

³ National Labor Relations Act, 49 Stat. 453 (1935), 29 U.S.C. § 159(c)(3) (1958).

⁴ See Millis and Brown, *From The Wagner Act to Taft-Hartley* 155 (1950). In *Trailer Co. of America*, 51 N.L.R.B. 1106, 1109-10 (1943), the Board said:

"The Board has always held to the view, we think correctly, that its discretion with respect to the effect to be given to a collective bargaining contract in a representation case is limited by the necessity of balancing two separate interests of employees and society which the Act was clearly designed to foster and protect: namely, the interest in such stability as is essential to encourage 'the practice and procedure of collective bargaining' and the sometimes conflicting interest in the freedom of employees to select and change their representatives at will. In weighing these conflicting interests, the Board has developed its doctrine that a contract will bar an investigation to determine representatives for a definite and reasonable period, but no longer."

⁵ *National Sugar Ref. Co.*, 10 N.L.R.B. 1410 (1939).

⁶ See 6 N.L.R.B. Ann. Rep. 55 (1941); *Eaton Mfg. Co.*, 29 N.L.R.B. 53 (1941).

⁷ See 10 N.L.R.B. Ann. Rep. 19 (1945); *Uxbridge Worsted Co.*, 60 N.L.R.B. 1395 (1945); *United States Finishing Co.*, 63 N.L.R.B. 575 (1945).

In more recent times, the Board has enunciated a more rigid rule:

We have decided that henceforth a valid contract having a fixed term or duration shall constitute a bar for as much of its term as does not exceed 2 years and that any contract having a fixed term in excess of 2 years shall be treated, for the purposes of contract bar, as a contract for a fixed term of 2 years, notwithstanding the fact that a substantial part of the industry of which the contract employer is a part may be covered by contracts for a longer term.⁸

During the evolution of the contract bar principle, the Board, which started by giving weight to stability of labor relations, began to think in terms of the "status" of the incumbent union and of protecting that status.⁹ Of course, if a situation existed where "status" was lost and where the contract could not serve to stabilize labor relations, the Board realized that more weight ought to be given to the freedom of choice of representatives. In such situations, the existing contract was held not to bar an election.¹⁰

It is clear that if the union, which signed a contract with the employer, was no longer in existence or was no longer functioning, it had no status to be protected and there was no longer any stability of labor relations to preserve. The contract, therefore, lost its purpose as a bar.¹¹

A "schism" in the ranks of the union, leading to a doubt as to who represented the employees, also prevented an existing contract from being a bar to an election petition.¹² In a very early case, *United Stove Co.*, the Board said:

The Board notes that this case does not involve a contest between rival labor organizations competing for majority representation during the existence of a valid outstanding exclusive bargaining contract, but that substantially the entire membership of Local 630, A.F.L.-U.A.W., acting upon their own initiative, disbanded the local, surrendered its charter, and transferred their affiliation to the C.I.O.-U.A.W. Under all the circumstances of this case, we find that the contract does not constitute a bar to this proceeding.¹³

In that case, the incumbent local was a part of the AFL United Automobile Workers. While its contract with the employer was in effect, the local's executive board appointed a committee to submit to the local membership a resolution to change affiliation to the CIO Automobile Workers Union. At a membership meeting, called for that pur-

⁸ Pacific Coast Ass'n of Pulp and Paper Mfrs., 121 N.L.R.B. 990, 992 (1958).

⁹ See *Millis & Brown*, *op. cit. supra* note 4, at 157.

¹⁰ *Container Corp.*, 61 N.L.R.B. 823 (1945); *Trailer Co. of America*, *supra* note 4.

¹¹ *Aladdin Indus.*, 63 N.L.R.B. 76 (1945).

¹² *United Stove Co.*, 30 N.L.R.B. 305 (1941).

¹³ *Supra* note 12, at 308.

pose, the members who attended voted unanimously to assign the interests of the AFL local to a new CIO local. They disbanded the AFL local. They reconvened immediately as a meeting of the CIO local and elected the same officers they had when they were the AFL local. The company refused to recognize the new local. The CIO local petitioned for an election. The company and the AFL local set up their contract as a bar. The Board ordered an election. The AFL local evinced no desire to be on the ballot. "No union" appeared on the ballot.

In the *United Stove* case, there was no confusion as to which union represented the employees. A direction of election, however, was the method by which the employer could ultimately be forced to bargain with the CIO local.

A mere change in affiliation is not enough to create a schism and to remove a contract as a bar. This was stressed by the Board in *Michigan Bell Telephone Co.*¹⁴ There, the Communications Workers of America, a parent organization, was unaffiliated. The union had subordinate groups, known as divisions. Divisions 43 and 44 had agreements with the employer. During the period of these agreements, the parent union affiliated with the CIO. The employer filed an election petition, claiming that the affiliation had so changed the character of the contracting divisions as to create a doubt that they remained the chosen representatives of the employees.

The Board dismissed the employer's petition. It noted that, as an exception to its contract bar principle, it had directed elections "in cases in which a change in the structure or affiliation of the contracting union so modified the character of that union that a real doubt arose as to whether it remained the labor organization which the employees desired to represent them."¹⁵ The Board then went on to say that the exception did not apply in that case:

In all of the cases relied upon by the Employer something considerably more substantial than a mere change in the affiliation of the contracting union's *parent organization*, such as is present here, had occurred. Thus, in many of these cases, the facts disclosed a schism in the contracting union, resulting in the establishment of a new union which challenged the representative status of the existing local. In others of these cases, the old contracting union abandoned its representative status or was voted out of existence by its members. It is true that in some instances the schism in, or demise of, the contracting union was provoked by a change in the affiliation of that union or of its parent organization. But we are aware of no case in which the Board applied the rule here

¹⁴ 85 N.L.R.B. 303 (1949).

¹⁵ *Id.* at 304.

urged by the Employer where a change in affiliation of the parent union, without more, was all that occurred.¹⁶

There were, of course, no conflicting claims to representation rights in the *Michigan Bell* case. There was merely an attempt by an employer to repudiate a relationship because it preferred not to deal with a union which abandoned its independent status to become part of the CIO. The stability of labor relations, in a legal sense, represented by the collective bargaining agreement and an unopposed union to administer it, continued to exist. The basic reason for maintaining the agreement as a bar to an election was present. Thus, in *Louisville Ry. Co.*¹⁷ and *Prudential Ins. Co.*,¹⁸ where locals disaffiliated from one parent, affiliated with another, kept their identity and assigned their agreements with the employers to the locals as newly affiliated, there was held to be no schism and the employers' petitions for elections were dismissed.

It is, of course, a question of fact in each case whether or not a "change in the structure or affiliation of the contracting union so modified the character of that union"¹⁹ that confusion arises as to the identity of the union. The Board has endeavored during the years to establish criteria by which to measure whether a true schism exists, whether to conclude that there is no longer any stability of relations to maintain and, therefore, to resolve opposing representation claims by an election despite the existence of a collective bargaining agreement.

In 1958, the Board endeavored to standardize its criteria in *Hershey Chocolate Corp.*²⁰ While the earlier schism cases arose out of the transfer of allegiance from the AFL to the CIO and then out of expulsion of parent unions from the CIO on ideological grounds, the *Hershey* case arose out of the expulsion of a parent union from the AFL-CIO as a result of disclosures by the McClellan Committee.

In *Hershey*, the employer filed the election petition. Local 464 of the Bakery & Confectionary Workers International Union of America (BCW) had represented the employer's employees since 1939. The BCW was originally an AFL affiliate. It later was an affiliate of the merged AFL-CIO. Its most recent contract with Hershey ran from April 1, 1957, to December 31, 1958. The local negotiated, executed and administered the contract. While the contract was in effect, BCW was first suspended and then expelled from the AFL-CIO as a result

¹⁶ *Id.* at 304-05.

¹⁷ 90 N.L.R.B. 678 (1950).

¹⁸ 106 N.L.R.B. 237 (1953).

¹⁹ *Supra* note 15.

²⁰ 121 N.L.R.B. 901 (1958).

of corrupt practices brought to light by the McClellan Committee. The suspension caused a rift in the ranks of BCW. Local 464 held a membership meeting, called for the purpose of voting on a resolution condemning the BCW officers and calling upon BCW to meet the conditions imposed by the AFL-CIO.

When BCW was expelled, the AFL-CIO chartered a new union, the American Bakery & Confectionary Workers of America (ABC). Then Local 464, by a majority executive board vote, called a special membership meeting to consider disaffiliating from BCW, and affiliating with ABC by transferring assets and the status of the collective bargaining agreement with Hershey to the latter. The membership, by a vote of 829 to 1, agreed to disaffiliate from BCW, to affiliate with ABC as Local 464, to transfer property and contract rights from Local 464 BCW to Local 464 ABC and to retain the same officers as the officers of the new local. ABC then chartered the new local. After the new affiliation, about 1,350 employees out of 1,700, who formerly had dues deduction cards with BCW, executed new dues deduction cards in favor of Local 464 ABC. The Board, after reviewing these facts, stated that "the change in affiliation has apparently produced no change in the bargaining relationship with the employer."²¹

The employer filed a petition because it did not know which of the two organizations it was obligated to recognize. Both unions claimed the contract as a bar. No more than 50 employees expressed any continued allegiance to the old BCW.

It would seem, at this point, that the Board could have dismissed the petition on the basis of the *Louisville Ry.*²² and *Prudential Ins.* cases.²³ There seems to be little doubt that here there was a transfer of affiliation with complete maintenance of identity and substantial employee participation and acquiescence in the transfer. The Board itself recognized that there was "apparently . . . no change in the bargaining relationship with the Employer."²⁴

However, the Board took the occasion offered by this case to consider "possible revisions in certain of its contract bar policies bearing on or related to the issues of schism. . . ."²⁵ The Board decided to wrestle with the many problems flowing out of schism situations. It considered, not only what would constitute a schism, but: the type of election to hold where a schism exists, the effect of such an election on

²¹ *Id.* at 904.

²² *Supra* note 17.

²³ *Supra* note 18.

²⁴ Hershey Chocolate Corp., *supra* note 20, at 904.

²⁵ *Id.* at 905.

the existing contract and the consequences of assigning the contract from one union to another.

It is interesting to note that, at the very outset, the Board reiterated its earlier position that its contract bar policies are discretionary rules "which may be applied or waived as the facts in a given case may require in the interests of effectuating the policies of the Act."²⁶ It would seem, therefore, that although the Board may develop principles regarding a schism (as it did in *Hershey*), one may never be certain that these principles will always be applied in the same way.

The Board, in discussing the elements of a schism, pointed out that in the past it had held a schism existed in (a) cases where a basic intraunion conflict resulted from disaffiliation or expulsion of a union from a federation and the creation of a new rival union within the federation or the transfer of affiliation of part of one union to an existing rival union,²⁷ and (b) cases where local change of affiliation was unrelated to any basic intraunion conflict.²⁸ The Board concluded that it would continue to find a schism in the first type of case, that is, where local action occurs in the context of a basic intraunion conflict, but that it would no longer hold that a schism existed in the second type of case.

Thus, the Board would no longer hold a schism existed, as it held in *Brightwater*²⁹ (where the independent contracting union purported to affiliate with District 50 UMW, leaving a group of employees who were still loyal to the independent union and kept its identity alive), or in *Sun Shipbuilding*³⁰ (where 150 out of 2500 members of the contracting union met and voted to disaffiliate from the parent union and remain as an unaffiliated union and both the old and new unions claimed representation rights), or in *New York Shipbuilding*³¹ (where 700 out of 3000 members of the contracting union met and voted to disaffiliate from one parent union and to affiliate with a rival parent union).

The Board, in *Hershey*, stated that local union change resulting

²⁶ *Ibid.*

²⁷ Here, the Board cited *The Great A.&P. Tea Co.*, 120 N.L.R.B. 656 (1958); *A.C. Lawrence Leather Co.*, 108 N.L.R.B. 546 (1954); *Wade Mfg. Corp.*, 100 N.L.R.B. 1135 (1952); *Boston Machine Works Co.*, 89 N.L.R.B. 59 (1950); *Harbison-Walker Refractories Co.*, 44 N.L.R.B. 816 (1942); *Brewster Aeronautical Corp.*, 14 N.L.R.B. 1024 (1939).

²⁸ Here, the Board cited *N.Y. Shipbuilding Corp.*, 89 N.L.R.B. 915 (1950); *Sun Shipbuilding & Dry Dock Co.*, 86 NLRB 20 (1949); *Brightwater Paper Co.*, 54 N.L.R.B. 1102 (1944).

²⁹ *Brightwater Paper Co.*, *supra* note 28.

³⁰ *Sun Shipbuilding & Dry Dock Co.*, *supra* note 28.

³¹ *N.Y. Shipbuilding Corp.*, *supra* note 28.

from a basic intraunion conflict affected stability of labor relations while a local union change unrelated to such a basic intraunion conflict did not affect stability of labor relations. The Board went on to define "a basic intraunion conflict" as "any conflict over policy at the highest level of an international union, whether or not it is affiliated with a federation, or within a federation, which results in a disruption of existing intraunion relationships."³²

Moving from definition to example, the Board described a basic intraunion conflict as—

(a) disaffiliation or expulsion of an international union from the federation with which it was affiliated, combined with the creation by the federation of a new organization with similar jurisdiction or the assignment of such jurisdiction to an existing organization;

(b) a split within an international union in which some of its officials transferred their affiliation to an existing rival union or established a new organization claiming similar jurisdiction.³³

The Board then moved from the specific to the general in its description and concluded that it would find the existence of a basic intraunion conflict in "any realignment affecting an international union or federation of unions, resulting from a policy conflict, which has substantially the same effect on the stability of bargaining relationships as the above illustrations."³⁴

The basic intraunion conflict, however, is not enough in itself to constitute a schism. It must work its way down to the employees in the bargaining unit. They must be stirred into action as a result of it and such action must give rise to such confusion in the bargaining relationship that only an election can restore the pre-existing stability.

It is apparent, then, that a dispute between a local and its parent, causing the local to disaffiliate or to align itself with another parent is not sufficient to bring about a schism situation. The conflict must be at the top—the split must appear at the parent union level; only when its reverberations have been felt and acted upon by the local at the bargaining unit level, mirroring the split at the top and creating confusion as to which entity represents the employees in the bargaining unit, is there a true schism, leading to an election despite the existence of a contract. The action at the local level must follow the split occurring at the parent union level "within a reasonable period of time."³⁵

The elements of a schism, said the Board, existed in *Hershey*: there was the "basic intraunion conflict" at the parent union level

³² *Hershey Chocolate Corp.*, *supra* note 20, at 907.

³³ *Ibid.*

³⁴ *Id.* at 908.

³⁵ *Ibid.*

brought about by the expulsion of the parent union from the AFL-CIO and the chartering of a new parent by the federation; the conflict at the top had its repercussions at the bargaining unit level; the local acted upon the conflict within a reasonable time after it occurred by disaffiliating from the old parent and joining the new; the employer was faced with conflicting claims of recognition status from the old and the new entities.

There is a "Toynbee-like" march of events which the *Hershey* case wove into the presently-operative schism principle: the "universal state" beset by a "time of troubles," followed by an interregnum during which there occurs a "volkerwanderung" marked by the opposing forces of an "internal proletariat" and an "external proletariat."

It would seem, in *Hershey*, that the substantial nature of the change at the local level removed any confusion. The substitution of the new local for the old was sufficiently complete to have justified a recognition by both the employer and the Board of the new local as the proper representative and as the continuing party to the agreement. This approach, however, was expressly rejected by the Board. Thus in so far as the election itself was concerned, the Board adhered to its established practice: intervenors could get on the ballot; "no union" would also appear on the ballot. Here, too, there is an internal inconsistency. If the only confusion is as to which local—the old or the new—is the continuing representative of the employees, why should the door be opened to a rival third union or to an obliteration of union representation altogether? With the wide latitude afforded employers to propagandize against any union representation at all, the schism situation makes employers unexpected and happy beneficiaries.

What about the contract? True, it is no longer a bar to an election. But, if a union won the election, would the employer be obligated to bargain a new contract or could it insist upon the winning union being forced, by law, to assume the existing agreement? The Board felt that stability of labor relations would be fostered if it would not require the winning union to assume the existing contract. Of course, it could do so voluntarily. But suppose the employer saw this as a good opportunity to negotiate more advantageous terms. Could it refuse to go along with the winning union's desire to assume the old contract? Presumably, the same principle of stability of labor relations would accord to the employer the same rights that are accorded to the winning union.

Suppose "no union" wins. A contract had been negotiated for a specified duration. May the employer disregard the wages and working conditions in that agreement because the status of the other party, the union, has been obliterated by law? After all, the contract is not only

a bipartite document. It concerns, covers and affects employees who, in many respects, are third party beneficiaries of the wages and working conditions set forth in the agreement for a specified period of time.³⁶ May such employees sue on the contract to enforce their rights thereunder in the absence of the union? Complex questions of this sort, as yet unanswered, are bound to arise from the type of tri-partite document represented by the collective bargaining agreement.

The *Hershey* case gives a rather doctrinaire and rigid definition of a schism. There may often arise situations where confusion as to representation status occurs at the bargaining unit level to a degree more marked than in *Hershey*, but where this confusion did not emanate from a "time of troubles" besetting the parent union. And, conversely, as in *Hershey* itself, the change at the local level may be so clear, definite and complete as to cause little confusion and yet be termed "schism," merely because it emanates from a basic intra-union conflict at the parent union level. A fundamental reason for the Board's approach seems to have been a desire to keep raiding, rival, unions from asserting "schism" because of some success in converting a number of local members or officers.

Hershey does serve the purpose of enunciating a principle and a procedure with sufficient clarity to avoid confusion in the application of the schism doctrine. It highlights the type of intraunion conflict that can jeopardize existing representation status and contract rights.

³⁶ See Cox, "Rights Under A Labor Agreement," 69 Harv. L. Rev. 601, 604 (1955).