Union Mergers and the Amendment Certification Procedure

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Recent years have witnessed an increasing number of union mergers. International labor organizations are consolidating their local affiliates with greater frequency and independent locals are actively seeking affiliations with international unions.

In view of the steady decline in the percentage of union membership in the total workforce, these mergers represent an important tool for consolidating bargaining power. Union mergers, whether resulting from the consolidation of two or more locals of an international union or the affiliation of an independent union with an international union, raise difficult legal questions under the Labor-Management Relations (Taft-Hartley) Act. Traditionally, when a union currently certified as the exclusive bargaining representative of a unit of employees covered by the Taft-Hartley Act effects a merger, the certified union has been required only to amend its certification to reflect its changed status. Under the National Labor

1. In 1977, 65 amendment certification petitions were filed with the NLRB. See [1978] 97 LAB. REL. REP. (BNA) 284; note 6 and accompanying text infra. This figure represents more than a 50% increase over the number (41) filed in 1976. BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS YEARBOOK 1977 at 306.
2. International unions such as the International Brotherhood of Teamsters, are parent labor organizations with local affiliates in the United States and Canada.
3. See Kistler, Trends in Union Growth, 28 LAB. L.J. 539, 539-40 (1977). In 1956, approximately 42% of the nation's work force were union members. By 1974, however, the number of unionized employees had dropped to between 32% and 36%. Kistler views this drop as a natural consequence of increasingly intense employer opposition to union organization. Id.
4. Mergers and affiliations enable the unions to consolidate this bargaining power so as to bring maximum economic strength to bear in the collective bargaining process. Mergers, therefore, represent the ultimate in coordinated bargaining. See generally Cohen, Union Rationale and Objectives of Coordinated Bargaining, 27 LAB. L.J. 75, 78-79 (1976).
6. The basic criteria for amendment is as follows:
If there is a unit covered by a certification and there is no question concerning representation, any party may file a petition for amendment [AC petition] to reflect changed circumstances, such as changes in the name or affiliation of the labor organization involved or in the name or location of the employer involved.
Relations Board's (NLRB) amendment certification (AC) procedure, a union's certification will be amended if the merger has not "raised a question concerning representation" and if the merger was approved by a majority of the members in a union-conducted election.\(^7\) Thus, the Board will make an initial substantive inquiry: whether continuity of representation is maintained after the merger. Then, it will make a procedural inquiry to ascertain whether the results obtained from the approval vote reflect majority opinion. If the merged union satisfies both of these criteria, the Board will amend the certification.\(^8\)

Recently, however, Board members as well as federal courts of appeal have disagreed in their evaluations of both the continuity of representation and procedural criteria. The dispute over the continuity criterion concerns the degree of change that the bargaining agent's status may undergo before the Board must find a lack of continuity in representation. On the other hand, the main issue in the procedural dispute is whether the union must allow all bargaining unit employees, rather than exclusively union members, to vote in the merger approval election.

In *Jasper Seating Co.*,\(^9\) the Board addressed both of these disputes. In that case, a majority of the full Board denied an AC petition from an independent local that had affiliated with an international union. The three member majority, although agreeing that the petition should be denied, disagreed as to the rationale.\(^10\) Members Jenkins and Walther did not question the continuity of representation, but dismissed the petition because the union had allowed only union members to vote in the merger.

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\(^7\) See *North Elec. Co.*, 165 N.L.R.B. 942, 942 (1967). The Board stated as a "general rule" that amendment certifications would not be granted when "they [either] raise a question concerning representation that can only be resolved by an election . . . [or] where the possibility of a question concerning representation remains open because the change of affiliation took place under circumstances that do not indicate that the change reflected a majority view." *Id.* at 942. See also *Safway Steel Scaffolds Co.*, 173 N.L.R.B. 311 (1968); *Emery Indus.*, Inc., 148 N.L.R.B. 51 (1964).

An amendment certification petition may also be filed by a local union to reflect the merger of its international affiliate with another international. *See, e.g.*, NLRB v. *Pearl Bookfinding Co.*, 89 L.R.R.M. 2614 (1st Cir. 1975); NLRB v. *Commercial Letter, Inc.*, 496 F.2d 35 (8th Cir. 1974); *Carpinteria Lemon Ass'n v. NLRB*, 240 F.2d 554 (9th Cir.), *cert. denied*, 354 U.S. 909 (1957); *Dickey v. NLRB*, 217 F.2d 652 (6th Cir. 1954). This note, however, will deal exclusively with the more commonplace mergers involving local-local union consolidations and independent-international union affiliations.

\(^8\) See, *e.g.*, *Hamilton Tool Co.*, 190 N.L.R.B. 571, 573-75 (1971).


\(^10\) *Id.* at 1026. Members Jenkins and Walther were joined in the majority by Member Penello who concurred.
In their view, an essential aspect of the procedural requirement was that all unit employees be permitted to vote. In their view, an essential aspect of the procedural requirement was that all unit employees be permitted to vote. Member Penello, concurring with the denial of the AC petition, never reached the procedural issue of non-member voting. Rather, he concluded that the merger of a small, independent local with a large international created a discontinuity of representation, thus raising a clear "question concerning representation." Only Chairman Fanning and Member Murphy, espousing the Board's previous reasoning, found that the union had satisfied both criteria necessary for an amendment certification.

In contrast, a unanimous three member panel composed of Chairman Fanning and Members Jenkins and Murphy displayed a much less stringent approach to the two criteria in McKesson Wine & Spirits Co. McKesson, however, involved an AC petition filed by a local union recently consolidated with another local of the same international union. Although the merger was accomplished without an approval vote of any kind, the panel found the procedural criterion satisfied and granted the petition because the union had subsequently conducted a ratification vote among all bargaining unit employees. Furthermore, none of the panel members questioned the existence of continuity of representation in the

11. Id.
13. 231 N.L.R.B. 1026-27 (Member Penello, concurring). Member Penello adopted the position of the United States Court of Appeals for the Third Circuit on independent-international mergers. See United States Steel Corp. v. NLRB, 457 F.2d 660 (3d Cir. 1972). In United States Steel, the Third Circuit concluded that representational continuity was lacking in a merged independent-international union because of the change in the union members' rights resulting from the imposition of the international's constitution on the merged local. Id. at 664. See notes 32-38 and accompanying text infra.
14. 231 N.L.R.B. 1028-29 (Chairman Fanning and Member Murphy, dissenting). Chairman Fanning and Member Murphy found the procedural criterion satisfied because they viewed the approval election as an internal union matter not requiring non-member participation. Id. Additionally, they found continuity of representation because the merger had involved no change in union leadership or contractual commitments. Id. See Hamilton Tool Co., 190 NLRB 571 (1971). For a discussion of Board precedent on the procedural criterion, see notes 59-68 and accompanying text infra. Board precedent on the continuity of representation criterion is discussed at notes 19-28 and accompanying text infra.
16. Id.
17. Id. at 1496. The Board has held previously that the subsequent ratification of a local-local merger by a majority of the bargaining unit satisfies the procedural requirement. See Ocean Systems, Inc. 223 N.L.R.B. 857 (1976); Kentucky Power Co., 213 N.L.R.B. 730 (1974); Safway Steel Scaffolds Co., 173 N.L.R.B. 311 (1968).
merged local.\textsuperscript{18}

\textit{Jasper} and \textit{McKesson} are representative of recent Board rulings on AC petitions. Since the composition of the Board panels and the facts in each case differ, direct comparisons between the decisions are difficult. Nevertheless, when viewed in light of the prior law in this area, \textit{Jasper} and \textit{McKesson} indicate that both the continuity of representation and the procedural criteria may be easier to satisfy in cases of local-local consolidations than in instances of independent-international affiliations. Furthermore, should the Board adopt Member Penello's view, as stated in \textit{Jasper} that independent-international mergers raise a question concerning representation, the AC procedure might no longer be viable in this type of merger. Thus, it is important to explore the procedural and continuity criteria set forth in existing AC decisions in order to determine the applicable standards imposed in union merger cases.

I. WHEN DOES A MERGED UNION EXHIBIT CONTINUITY OF REPRESENTATION?

The AC procedure is designed to effect a technical change in the identity of the union representative without the necessity of a full-scale election.\textsuperscript{19} More profound changes in the status of a bargaining representative raise a representation question requiring a Board-sponsored certification election.\textsuperscript{20} Therefore, in acting on an AC petition, the Board will evaluate the degree of representational continuity afforded by the proposed merger in order to determine whether the change in "status" raises a question concerning representation.\textsuperscript{21}

Traditionally, the Board has utilized lenient standards in making this evaluation. This attitude is illustrated in \textit{United States Gypsum Co.},\textsuperscript{22} in which two local units of the same international union voted to consolidate and filed an AC petition with the Board. In granting the petition, the Board found that the merged union had adequately demonstrated continuity of representation by producing evidence that the "day-to-day rela-
A "relationship" between the unit employees and the employer would remain unchanged, the existing contract would be honored, and the same local-international affiliation would continue. Likewise, in Woolworth Co., the Board granted the AC petition sought by a local which had consolidated with another local of the same international. The merged local in Woolworth demonstrated continuity by showing that it had maintained the same functional leaders and the same procedures for contract proposals, negotiations, ratifications and grievance processing.

Although the standards in United States Gypsum and Woolworth were applied to the merger of two local affiliates of the same international, the Board has used similar standards to evaluate the degree of representational continuity when an independent union has sought to affiliate with an international. In Emery Industries, Inc., for example, an independent union filed an AC petition after merging with a large international. Since the international union assured the independent in writing that the resultant unit would remain autonomous, honor all contract commitments, and retain its leaders and officers, the Board had no trouble finding representational continuity and granted the petition. Similarly, in East Dayton Tool & Die Co., the Board granted an AC petition to a newly merged independent-international local when evidence showed that the officers would be maintained and the existing contract honored. It is apparent that when determining whether an AC petition should be given to a merged local, the Board has used identical standards to evaluate continuity in both independent-international union affiliations and local-local consolidations of the same international union.

The majority of appellate courts reviewing Board decisions to grant AC petitions have accepted the Board standards for the continuity of repre-

23. Id.
25. Id. at 1208-09. Compare Quemetco, Inc., 226 N.L.R.B. 1398, 1399 (1976)(the Board held that the retention of union officers was not of "paramount importance," but only one of many factors to be considered in determining continuity of representation).
27. Id. at 52-53. The Board also noted that fact that only the employer opposed the merger. Id.
28. 190 N.L.R.B. 577 (1971). In East Dayton the Board noted that the predecessor local did not oppose the AC petition. Id. at 580.
29. The appellate courts are required to accept Board findings of fact if, on the record as a whole, substantial evidence supports the finding. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-91 (1951).

Although the courts cannot pass directly on the propriety of an AC petition, the employer can invoke their jurisdiction and indirectly obtain review of the petition by refusing to bargain with the merged local after the AC petition is granted. This maneuver forces the union to file a § 8(a)(5) unfair labor practice charge with the Board against the employer to obtain
sentation criterion, regardless of whether the merger involves a local-local consolidation\textsuperscript{30} or an independent-international affiliation.\textsuperscript{31} One court of appeals, however, has rejected the Board’s lenient application of these criteria in cases involving mergers of independents with large internationals. In \textit{United States Steel Corp. v. NLRB},\textsuperscript{32} the employer refused to bargain after the formerly independent union representative became affiliated with the United Steelworkers of America. The Board found a section 8(a)(5) violation, but the Third Circuit refused to enforce the Board’s bargaining order.\textsuperscript{33} Since the employer’s defense to the unfair labor practice charge

an order requiring the employer to recognize and bargain with the merged union. \textit{See} 29 U.S.C. § 158(a)(5) (1976). The employer may raise as a defense, however, that it is no longer under a duty to bargain with the union, because the merger has destroyed the continuity of representation, thus presenting a question concerning representation that can be resolved only through a Board-supervised certification election. \textit{See, e.g.}, NLRB v. Gissel Packing Co., 395 U.S. 575 (1968). \textit{See generally} F. BARTOSIC & R. HARTLEY, \textit{LABOR RELATIONS LAW IN THE PRIVATE SECTOR} 89-90 (1977). The employer can further defend by arguing that it would be committing an unfair labor practice by continuing to bargain with a union that was no longer the certified representative of its unit employees. \textit{See} Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945) (the employer commits a violation of § 8(a)(2) of the Taft-Hartley Act if it fails to withdraw when another union has raised a question concerning representation).

The Board is unlikely, however, to reverse its finding of representational continuity in the earlier AC proceeding. It is probable that the Board will find the employer guilty of the § 8(a)(5) unfair labor practice charge, and will issue a bargaining order accordingly. Assuming the employer persists in its refusal to recognize the union, the Board will seek enforcement of its order in the appropriate court of appeals. In the court of appeals, the employer may reassert the same defenses in support of its refusal to bargain, and thereby effectively invoke appellate review of the Board’s finding of representational continuity. If the court finds the Board’s determination sound, it will enforce the order requiring the employer to bargain with the merged local. But, if the court disagrees with the Board’s evaluation, the bargaining order will be denied enforcement. \textit{Compare} Sun Oil Co. v. NLRB, 98 L.R.R.M. 2467 (3d Cir. 1978)(the employer successfully asserted that the merger raised a question concerning representation) with Retail Clerks, Local 428 (Independent Drug Store Owners) v. NLRB, 528 F.2d 1225 (9th Cir. 1975)(same defense unsuccessful; court enforced bargaining order).

30. \textit{See, e.g.}, Retail Clerks Intl Ass’n v. NLRB (Montgomery Ward & Co), 373 F.2d 655, 657 (D.C. Cir. 1967). The court enforced the Board’s finding that the employer had committed an unfair labor practice by refusing to bargain with a local-local merged union. Agreeing with Board’s finding of representational continuity, the court held that the merger did not invade the employees’ right to select a bargaining representative and, therefore, did not defeat the local’s presumption of continuing majority status. \textit{Id.}

31. \textit{See, e.g.}, Retail Clerks, Local 428 (Independent Drug Store Owners) v. NLRB, 528 F.2d 1225 (9th Cir. 1975)(representational continuity after an independent-international merger depends on factual determinations which the Board makes initially and the court follows if supported by substantial evidence; the bargaining order was enforced); NLRB v. Bear Archery, 95 L.R.R.M. 3094 (6th Cir. 1977)(the Board’s bargaining order was denied on procedural grounds; representational continuity was not questioned).

32. 457 F.2d 660 (3d Cir. 1972).

33. \textit{Id.} at 666.
was that the merger had destroyed representational continuity, thereby terminating its duty to bargain, the court reviewed the Board's application of the continuity criterion. Although it found that the terms of the existing contract would be honored and that the local leaders would remain unchanged, the court concluded that the dilution in "the rights of the parties" to the contract resulting from the affiliation between an independent with a membership of 300 and an international having 1,120,000 members precluded a finding of representational continuity. Critical to the court's conclusion was the merged local's subjugation to the international union's constitution. Since the new constitution required the international president's approval before a strike could be called and remission to the international of dues acquired by the employer pursuant to a check-off provision, the court concluded that the rights of unit members were changed significantly. Most importantly, however, the court saw the transfer of the power to negotiate the contract, handle grievances, and fix dues as a clear indication of a "change in the fulcrum of union control and representation."

Since United States Steel, the Third Circuit has refused to enforce Board bargaining orders in two similar cases, NLRB v. Bernard Gloekler North East Co. and Sun Oil Co. v. NLRB. Both of these cases involved employer refusals to bargain after certified independent unions merged with international unions and were granted amendment certifications. In Bernard Gloekler, the court found that the Board's application of the continuity criterion in cases involving independent-international mergers allowed "powerful international unions to be substituted for independent locals while contracts are in force," in direct contravention of the Board's own contract bar rule. Furthermore, in Sun Oil, the court specifically held that since it imposes a new constitution on the unit members, the merger of an independent with an international union changes the bargaining agent of the employees. Under the Third Circuit's view, then, an

34. Id. at 663-64.
35. Id. at 664.
36. Id.
37. Id.
38. Id. This transfer of power from officials whose primary interests were those of the 300 independent members to officers representing the overall interests of the many members of the international was a clear indication of a major change in the independent's status. Id.
40. 576 F.2d 553 (3d Cir. 1978).
41. 540 F.2d at 203. See note 51 infra.
42. 576 F.2d at 558. The court concluded: We hold that when a local independent labor union affiliates with and becomes a local unit of an international union and transfers control over the rights of its
independent-international merger per se terminates the employer’s duty to continue recognition of a previously certified union. As of this writing, no other circuit court of appeals has adopted this reasoning, but it was recently embraced by Board Member Penello in *Jasper Seating Co.* In *Jasper*, Member Penello was the only member of the full Board who voted to dismiss the AC petition because the merged union failed to show representational continuity. Following the Third Circuit’s rationale, Member Penello concluded that the merger had resulted in a substantial change in the identity of the bargaining representative because a new constitution had been imposed on the local. Since the union offered proof that the officers would remain unchanged and contractual commitments would be honored, evidence which has traditionally satisfied the Board’s continuity inquiry; no other member questioned the representational continuity of the merged local. Nevertheless, Member Penello’s stance in *Jasper* is significant because it demonstrates that the Third Circuit’s position henceforth will be advocated in AC proceedings before the Board. Accordingly, employer opposition to AC petitions may be more frequently advanced on this ground.

members to the international whose constitution and by laws make substantial changes in the rights of employees to the contract, affects their obligations to management and links their concerns with thousands of other members of the international throughout the county, a change is effected in the bargaining agent of such employees.

See, e.g., NLRB v. Bear Archery, 95 L.R.R.M. 3094 (6th Cir. 1977) (the Board’s bargaining order was denied enforcement because the court found the procedures used to ascertain majority approval were inadequate; representational continuity was not questioned; the issues raised in *Bernard Gloeker* were not addressed). See also notes 30 & 31 supra. 231 N.L.R.B. 1025, 1027 (1977) (Member Penello, concurring).

Id. at 1027-28. Despite “surface similarities” between the merged local and the independent, Member Penello found that the affiliation resulted in a “clear change in the identity of the employees’ bargaining representative.” Id. at 1028. The plurality opinion of Members Walther and Jenkins concluded: “[T]here has been no essential change in the identity of bargaining representative (at least within the meaning of past Board precedents).” Id. (parenthetical in original). The plurality did not cite the precedents to which it referred. Chairman Fanning and Member Murphy, in dissent, concluded that the purpose of the affiliation vote is to determine if the independent members want assistance from the international in conducting their affairs with the employer, not to select a new bargaining agent. Id. at 1028. (Chairman Fanning and Member Murphy, dissenting).

Section 10(e) of the Taft-Hartley Act states in pertinent part that “no objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, [i.e., the appropriate court of appeals] unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(c) (1976).
Should Member Penello's view of the continuity criterion be adopted by a Board majority, the ramifications undoubtedly will be great. The primary benefit of the AC procedure is to effect nominal changes in the status of the bargaining agent without the necessity of a new Board-sponsored election. Accordingly, the AC procedure is available at any time during the union-employer relationship, and it is unaffected by any of the bars to certification elections imposed by either the Taft-Hartley Act or Board rules. But if, as under the Penello-Third Circuit view, the merger of a certified independent union with an international were automatically to raise a question concerning representation, the AC procedure would become an inappropriate method to certify such a change in status. Instead, the change in status could be effected only through a Board-conducted certification election, which can take place only when none of the bars to a certification election are in force. Furthermore, since the merger would

49. See note 6 supra.

50. 29 U.S.C. § 159(c)(3) (1976). This section bars a certification election in any bargaining unit within the 12 month period after a valid election has been held. This prohibition is referred to as the statutory election bar.

51. In an effort to accommodate the goals of industrial stability and employee free choice, the Board has devised, in addition to the statutory election bar, three other bars prohibiting certification elections. The certification bar prevents the filing of certification petitions within one year from the date of a union's certification by the Board. See Centr-O-Cast & Eng'r Co., 100 N.L.R.B. 1507, 1508 (1952). Similarly, the Board has developed a lawful voluntary recognition bar which affords a reasonable period of time for the employer and union to reach a contract following voluntary recognition and bars any other unions from filing a petition during this period. See Keller Plastics E., Inc., 157 N.L.R.B. 583, 587 (1966). Also, a collective bargaining contract between the certified union and the employer generally bars an election in the bargaining unit covered by the contract for a period of three years, or the term of the contract, whichever is shorter. See General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962). The contract will qualify as a bar if it: (1) has a definite duration; (2) is in writing and has been executed by all parties; (3) applies to the employees cited in the election petition; (4) covers an appropriate unit; (5) contains substantial terms and conditions of employment; (6) does not contain a union security clause which is facially invalid or has been found by the Board to be invalid; and (7) does not racially discriminate among employees. See Jonathan H. Swisher & Son, Inc., 209 N.L.R.B. 68, 69 (1974); Appalachian Shale Prod. Co., 121 N.L.R.B. 1160, 1161-64 (1958). See also F. Bartosic & R. Hartley, supra note 29, at 79.

52. See F. Bartosic & R. Hartley, supra note 29, at 78-80; notes 50 & 51 supra. A 30-day "open period" exists during which certification petitions may be filed during the term of an existing contract, beginning 90 days and ending 60 days before the expiration date of the contract. See Leonard Wholesale Meats, Inc., 136 N.L.R.B. 1000, 1001 (1962). Another "open period" occurs after the contract has been in effect for three years or after it has expired and no other contract has been executed. See General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962). Similarly, a certification petition filed within the 60 days prior to the expiration of the statutory election bar will be processed, but the election will not occur until the 12 month period has passed. See Vickers, Inc., 124 N.L.R.B. 1051, 1052 (1959). In contrast, petitions filed at any time within the 12 month period following Board certification of a union will not be processed; such filings may occur only after the 12 month period has
relieve the employer of its duty to bargain with the merged-incumbent union, a merged union's only recourse to regain recognitional status during periods when certification elections are barred would be immediate disaffiliation with the international. Therefore, should the Third Circuit's view be adopted by the Board majority, the usefulness of the AC procedure to effect an independent-international union merger will be eliminated and the mergers themselves will be restricted to open periods when Board-supervised certification elections are permitted.

It is not clear whether the Third Circuit would, if given the occasion, extend its reasoning to cases of local-local consolidations. Although merged locals retain the same constitution, substantial changes in collective bargaining procedures and grievance processing, which are not unlike the changes imposed by international constitutions on independent unions, do occur. Arguably, the Penello-Third Circuit view, eventually could serve as a basis for finding a lack of representational continuity in mergers involving consolidated locals.

The position of the Board majority on the continuity of representation criterion with its emphasis on retention of leadership and contract commitment is, however, the better view for two reasons. First, by requiring maintenance of existing contractual duties and rights, the position assures continued industrial stability even when the merger occurs in the middle of a contract term. By making the maintenance of an existing contract a prerequisite to granting an AC petition, the Board ensures that a change in union status will not affect the existing employer-union contract relation-

53. See notes 32-41 and accompanying text supra.
54. See, e.g., Newspapers, Inc., 210 N.L.R.B. 8 (1974), enforced, 515 F.2d 334 (5th Cir. 1975)(merger sanctioned between two locals located over 200 miles apart); F. W. Woolworth Co., 194 N.L.R.B. 1208 (1972) (AC petition granted after consolidation of local having 162 members with local having 2100 members). Although AC petitions were granted in both of these cases, the consolidation did alter member rights. The distance union members must travel to attend meetings in Newspapers limited member participation in the decision-making of union leaders. Likewise, the smaller proportionate voice the union members in Woolworth had after the merger substantially reduced individual input in collective bargaining proposals and shifted the forces of power to leaders concerned with the interests of a great many as opposed to a few. See note 38 and accompanying text supra.
55. See notes 26-28 and accompanying text supra.
56. This policy of promoting stability during contracts is the principal reason for the Board's contract bar rule prohibiting certification during the term of a contract. See General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962); note 51 supra. See also Brooks v. NLRB, 348 U.S. 96, 103 (1954) (underlying purpose of the Taft-Hartley Act is industrial peace).
ship. Secondly, retaining a union's leadership after the merger will maintain the day to day channels of communication between the employer and the union as they existed before the merger. Since the merger of a certified bargaining representative with another union has the potential to upset the stability in labor relations between a union and employer promoted by an existing contract, the retention of established labor-management channels of communication will minimize any disruption.\textsuperscript{57}

Neither of these factors predominate. Rather, both are used as methods of protecting industrial stability from the potentially disruptive effect of a merger. Therefore, if the Board majority continues to find the continuity criterion satisfied when the merged union filing the AC petition can show retention of the local leadership and a commitment to honor the existing contract, the occurrence of union mergers will, in all likelihood, continue to increase.\textsuperscript{58} International unions will continue to evaluate the structural necessity of reorganization whenever the need arises, rather than waiting until periods when certification elections can be held. Likewise, independent unions can attain the benefits of affiliation with an international without fear of the loss of certified status. In sum, the majority's view allows a union to change its status through a merger during periods when certification elections cannot be held and simultaneously assures industrial stability by requiring proof that the union-employer relationship is maintained.

II. THE PROCEDURAL INQUIRY — WHEN DOES THE RESULT OF A MERGER APPROVAL ELECTION REFLECT MAJORITY OPINION?

The second inquiry made by the Board after an AC petition is filed centers on whether the results obtained in the merger approval election mirror the majority opinion. In this determination, the employees' freedom of choice in selecting the bargaining representative, rather than industrial stability, is the underlying policy consideration.\textsuperscript{59}

A. The "Formal Steps" Necessary for an Approval Election

The Board requires the approval election to reflect certain procedures before considering an AC petition submitted in connection with either an independent-international affiliation or a local-local consolidation. Although the Board has never clearly indicated what it perceives to be the minimum safeguards required, it has, however, frequently noted with ap-

\textsuperscript{58} See notes 1 & 3 and accompanying text supra.
approval a number of procedures. In *North Electric Co.* and *Emery Industries, Inc.*, the Board indicated that a secret ballot to approve independent-international mergers, accompanied by proof that all employees eligible to vote had ample notice of the time and place of the election were necessary procedural standards. Similarly, in *Hamilton Tool Co.*, the Board granted the petition when the union used secret ballots, provided ample notice of the vote to the employees, and afforded those voting in the election the opportunity to discuss and ask questions about the proposed merger.

There is some evidence, however, that less stringent procedural standards are imposed in elections approving consolidations of locals of the same international union. For example, in *Kentucky Power Co.*, the Board granted an AC petition even though the approval vote, taken after the actual consolidation, was not conducted with secret ballots. Additionally, the grant of the AC petitions in *Kentucky Power* and *Safway Steel Scaffolds Co.* indicates that the Board does not require that employees voting to approve local-local consolidations be given the opportunity to discuss and question the merger before it occurs. Arguably, the differences in minimum procedural standards required in the two types of union mergers reflect the amount of actual change involved in each of the two situations. Seemingly in evaluating the adequacy of the approval vote in a particular AC proceeding, the Board has placed the facts of the case on a mythical spectrum reflecting the degree of change in the certified representative. At one end of the spectrum, the degree of change is minimal. This end is characterized by mergers involving the consolidation of locals of the same international, when officers, constitutional rights and employer-

60. *Id.* at 942.
63. 190 N.L.R.B. 571 (1971).
64. *Id.* at 574.
65. *See* Viking Metal Indus., NLRB Advice Mem., 93 L.R.R.M. 1333, 1334 (1976)(lower standard applied in evaluating the procedural criterion in local-local merger elections than in those held by independent unions seeking to affiliate with international unions). *See also* Kentucky Power Co., 213 N.L.R.B. 730, 732 (1974)(show of hands vote rather than a secret ballot is not so irregular as to negate the validity of the members' expression). *But see* Underwriters Adjusting Co., 227 N.L.R.B. 453, 454 (1976)(AC petition denied because the members of one of the locals were not given the opportunity to vote in the approval election.)
68. In both cases, an after-the-fact merger ratification vote was sufficient to show membership approval. Kentucky Power Co., 213 N.L.R.B. at 732; Safway Steel Scaffolds Co., 173 N.L.R.B. at 312.
union relations remain unchanged. Because little change is involved, the need to protect employee free choice is less acute; consequently, relatively few procedural requirements are imposed. At the other end of the spectrum, the change in bargaining agent is more severe, and the status of the merged union borders on the threshold of presenting a question concerning representation. Such a situation arises when independent and international unions merge necessitating procedural requirements similar to those imposed in Board-supervised elections. By employing this spectrum analysis, the Board allows the AC procedure to be "a quite reasonable accommodation between the statute's sometimes inconsistent purposes of industrial stability and freedom of choice."  

Such an abstract analysis, however, is an inadequate guide for the union contemplating a merger. Since the Board has not explicitly defined procedural standards for the two types of union mergers, it must make an ad hoc procedural inquiry in each AC determination. It may be prudent for a union contemplating a merger to invoke the full panoply of Board-approved formal steps.  

This approach was taken by the union in *Jasper Seating Co.*, but the AC was nevertheless denied. Two members of the majority found the procedures used in the approval election insufficient and imposed a further requirement: all unit employees, not just union members, must be given an opportunity to state their views and vote on the proposed merger.

B. Must All Unit Employees Be Permitted to Vote in Merger Approval Elections?

In *North Electric Co.*, Member Jenkins first tried to persuade the Board majority that approval by all unit employees was a prerequisite to granting an AC petition. Finding the selection of the bargaining agent basic to the collective bargaining process, he, together with Member Zagoria, rea-

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70. A synthesis of past Board decisions indicates that the following list of formal steps has traditionally satisfied minimum procedural requirements: (1) at least one meeting is held to answer questions and openly discuss the pros and cons of the proposed merger, see Hamilton Tool Co., 190 N.L.R.B. 571, 574 (1971); (2) advance notice of the meeting is given to all unit employees, see North Elec. Co., 165 N.L.R.B. 942-43 (1967); (3) notice of the time and place of the approval election is given to all unit employees, see Emery Indus., Inc., 148 N.L.R.B. 51, 51-52 (1964); and (4) the election, by secret ballot, is held before the affiliation or consolidation occurs, see Hamilton Tool Co., 190 N.L.R.B. 571, 574-75 (1971).
72. *Id.* at 1026.
73. *Id.* at 1025-26 (opinion of Members Jenkins and Walther).
74. 165 N.L.R.B. 942 (1967).
75. *Id.* at 943 (Members Jenkins and Zagoria, dissenting).
soned that any change in the agent's designation required the approval of all unit members. The majority, however, found that limiting voting to only union members satisfied the procedural inquiry, and proceeded to grant the AC petition.

Likewise, in *Hamilton Tool Co.*, the majority of the full Board again rejected Member Jenkins' view and granted an AC petition. The majority classified the independent union's affiliation with an international as an "internal union matter" and thus required only the approval of union members. Similarly, in *East Dayton Tool & Die Co.*, the Board majority adhered to the position that merger approval elections concerned internal union affairs and found a members-only voting procedure sufficient.

Member Jenkins persisted in his view that unanimous unit approval is necessary to grant the petition and gained additional support from Member Walther in *Jasper Seating Co.* Because Member Penello failed to find representational continuity in *Jasper*, the AC petition was dismissed. Since Member Penello never reached the voting issue and because Chairman Fanning and Member Murphy continued to regard that issue as an internal union affair, the Board in *Jasper* divided evenly over the issue of who must be allowed to vote. Given the recent change in the Board's composition, however, a return to the previously held majority position is possible. Member Walther has been replaced by Member Truesdale and, as of this writing, Truesdale has participated in only one AC decision.

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76. Id. at 944 (Members Jenkins and Zagaria, dissenting). They stated that "a cardinal prerequisite to any change in designation of the bargaining representative is that all employees in the bargaining unit be afforded the opportunity to participate in such selection." Id. at 944 (emphasis in the original).

77. Id. at 942-43. The majority noted that all non-union members had been notified of the proposed election and had been given ample time and the opportunity to become members before the vote occurred.

78. 190 N.L.R.B. 571 (1971).

79. Id. at 574.

80. 190 N.L.R.B. 577 (1971). In both *Hamilton Tool* and *Dayton Tool*, however, the majority was careful to note that the outcome of the election would not have been affected if all unit employees had been allowed to vote. Id. at 580. Hamilton Tool & Die Co., 190 N.L.R.B. at 574.


82. See *Good Hope Indus., Inc.*, 230 N.L.R.B. 1132, (1977) (Jenkins approved the AC petition noting that the record did not indicate any unit employee was denied the right to vote); *Hamilton Tool Co.*, 190 N.L.R.B. at 576 (Member Jenkins, dissenting); *East Dayton Tool & Die Co.*, 190 N.L.R.B. at 580 (Member Jenkins, dissenting).


84. Id. at 1027-28 (Member Penello, concurring). See notes 45-47 and accompanying text supra.

85. 231 N.L.R.B. at 1026.
Orleans Public Service, Inc. In that case, an AC petition was granted when an independent merged with an international, but the issue of non-union member voting was not raised. Although Member Jenkins was on the Board panel, the approval of the election met with no challenge since all unit employees had been given an opportunity to vote. Similarly, the continuity of representation inquiry met with no resistance, presumably because Member Penello was not on the Board panel. If Member Penello had participated, however, he would probably have found continuity lacking despite the inclusion of a successor clause in the existing contract between the independent union and employer. Although Member Penello's vote alone will not foreclose an AC petition, his vote, coupled with the votes of any two other members denying the petition on procedural grounds, can determine its fate. Therefore, if Member Penello should adopt the Jenkins view, AC petitions filed to reflect independent-international affiliations will likely meet the same fate as Jasper if the union excludes nonmember unit employees from voting in the approval election and if the case is reviewed by either the full Board or a panel containing any two of Members Truesdale, Penello and Jenkins. Additionally, since Member Penello has not indicated his position on the "all unit employee" vote requirement, there is a possibility that this standard could be imposed on future local-local consolidations should he agree with Member Jenkins' reasoning. A prudent union lawyer would be well advised to urge that a union contemplating a merger allow all unit employees the opportunity to vote in the approval election.

Although both the "all unit employee" vote and "internal union affair" rationales have merit, the ultimate resolution of the controversy depends upon the Board's statutory authority to impose procedural requirements on these union elections. Implicit in the Taft-Hartley Act and the Labor-Management Reporting and Disclosure (Landrum-Griffin) Acts is the

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87. Id. at 1033-34.
88. Id. at 1033 n.5.
89. The existing contract stated "This agreement and all of its terms and conditions shall insure to the benefit of and be binding upon the successor and assigns of the respective parties." Id. at 1033 n.8.
90. See notes 83-85 and accompanying text supra. The Board is empowered under section 3(b) of the Taft-Hartley Act to delegate decisionmaking to panels of three members. 29 U.S.C. § 153(b) (1976). While these three member panels decide routine cases, those cases deemed particularly important by Board members will be heard by the full Board. See F. Bartosic & R. Hartley, supra note 29, at 16. It is likely that any controversial merger cases, such as Jasper, will be heard by the full Board.
policy that a labor union should have the right to conduct its internal affairs without interference.\textsuperscript{93} Although the Supreme Court has indicated that the Board lacks statutory authority to interfere with internal union matters in most instances, it has recognized that the Board has a duty to intervene when union conduct threatens an overriding federal labor policy.\textsuperscript{94} Therefore, the Board's power to impose any procedural requirements on union-conducted merger approval elections must be based on the need to protect an overriding federal labor policy.

A union merger usually modifies, to varying degrees, the nature of the union-employer and union-employee relationship.\textsuperscript{95} Accordingly, before it grants an AC petition, the Board is justified in conducting a procedural inquiry to ensure that the employees' right to be represented by a bargaining agent of their choice is maintained. The statutory authority for this interference in internal union affairs is section 7 of the Taft-Hartley Act, which embodies the federal labor policy guaranteeing employees the right to bargain collectively "through representatives of their own choosing."\textsuperscript{96}

\textsuperscript{93} This policy was recognized and discussed by the Supreme Court in three decisions dealing with union discipline. See NLRB v. Boeing Co., 412 U.S. 67 (1973); Scofield v. NLRB, 394 U.S. 423 (1969); NLRB v. Allis-Chalmers, 338 U.S. 175 (1967); note 94 infra. In NLRB v. Allis-Chalmers, 338 U.S. 175 (1967), the Court found that a union had not violated section 8(b)(1)(A) of the Taft-Hartley Act (29 U.S.C. § 158(b)(1)(A) (1976)) when it fined its members for crossing an authorized lawful picket line. In the legislative history of the Act, the Court found numerous assurances by the sponsors of § 8(b)(1)(A) that the section was not meant to regulate union affairs, and the Court concluded that the Board's authority to regulate internal affairs under the Taft-Hartley Act was limited to barring the enforcement of an internal union regulation which used membership status to affect employment status. 388 U.S. at 195. See 29 U.S.C. § 158(b)(2) (1976).

One reason advanced for this policy of federal noninterference in union affairs at the time of enactment was that unions are voluntary associations, similar to religious and fraternal organizations, that have no easily definable standards or rules governing internal procedure that the courts can use in deciding disputes. See Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1051 (1951). In accord with this policy of federal noninterference, the legislative history of the Taft-Hartley Act reveals that the proponents of the closed shop prohibition provision, (29 U.S.C. § 158(b)(2) (1976)) stressed that the clause, if enacted, would be the only one in the Act where the union's status as an independent voluntary organization would be threatened. See Epstein, The Expanding Coverage of Section 301 of the Labor-Management Relation Act, 26 Lab. L.J. 439, 446 (1975).

\textsuperscript{94} In Scofield v. NLRB, 394 U.S. 423, (1969), the Court stated that the Board had no statutory authority to interfere in internal affairs unless it is clear that "the rule invades or frustrates an overriding policy of the labor laws." Id. at 429. Likewise, in NLRB v. Boeing Co., 412 U.S. 67 (1973), the Court found the Board's statutory power did not allow it to determine the "reasonableness" of union discipline unless the exercise of the discipline thwarts a policy of the Taft-Hartley Act. Id. at 74-75. These decisions imply that the Board's power to interfere in any internal union matter must be based on a need to protect another overriding labor policy.

\textsuperscript{95} See text accompanying notes 68-69 supra.

This right, however, is not limited to the protection of union member rights. Rather, the right to be represented by a freely chosen bargaining agent extends to all unit members. An argument can thus be made that Member Jenkins’ position requiring that all unit employees be given the opportunity to vote in approval elections is consonant with, and carefully tailored to protect, the unit employees’ section 7 rights. These are the very rights that provide the basis for the Board’s imposition upon internal union affairs.

III. Conclusion

Union mergers are becoming more and more prevalent as both international and independent unions attempt to reconcile their structural frameworks with membership needs. Although the AC procedure remains a viable tool for unions to retain certified bargaining representative status after merger, the varying Board members’ views of both the continuity of representation and procedural requirements has created some confusion. Until these criteria are more firmly established, the prudent union counsel must urge a client to utilize the strictest safeguards possible in connection with any merger. From the continuity standpoint, the merged union should be prepared to show that its local leaders have been retained, that the day to day relationship with the employer remains intact, and that all existing contract obligations will be honored. Such a showing should be sufficient to satisfy the continuity criterion, even in cases of independent-international affiliations, provided Member Penello’s view remains a minority position on the Board and the appropriate court of appeals accepts the Board’s continuity criterion. Similarly, the union should employ the full range of formal, Board-sanctioned procedural steps prior to the merger. These would include holding meetings for employees to discuss the proposed merger, taking the merger approval vote by secret ballot, and giving adequate notice to employees of all meetings. Furthermore, because the AC procedure must not abridge the right of all employees in the bargaining unit to choose their representative, all unit employees should be permitted to vote in the merger approval election.

Likewise, the prudent management counsel should advise the employer to withdraw recognition of the merged union if it has a reasonable doubt that the union has satisfied both the procedural and continuity of representation criteria. Such a refusal to bargain will force the union to file an unfair labor practice charge, thus enabling the employer to adjudicate the
propriety of the amendment certification in the appropriate court of appeals.

When properly utilized, the AC procedure enables unions to restructure without offending either the employees' right to choose their bargaining agent or the need for industrial stability during contract terms.

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