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THE REASONABLE DURATION OF COLLECTIVE BARGAINING AGREEMENTS AND THE CONTRACT-BAR RULE

I. INTRODUCTION

The National Labor Relations Act gives employees the right to organize and to bargain collectively through representatives of their own choosing on wages, hours, and other terms and conditions of employment. The Act further provides that the employer must bargain with this chosen representative. The usual result of these requirements is the formulation of a collective bargaining agreement in the form of a written contract. This is intended to stabilize the employer-employee relationship and thus minimize industrial strife and unrest. To further stabilize relations the National Labor Relations Board has developed what is commonly called the "contract-bar rule," which provides that a representation election will not be ordered among employees who are already covered by a valid, existing, collective bargaining contract of reasonable duration. This rule has been enunciated to mitigate any conflict which may arise as a result of the provision in the Act which gives employees the right to change their bargaining representative.

The purpose of this comment is to discuss the "reasonable duration" aspect of the "contract-bar rule" with the thought of furnishing employers and unions with a relatively precise yardstick for determining when a contract will bar a representation election.

II. ANALYSIS

The policy of the National Labor Relations Board, in this area, has varied somewhat through the years. For a clear understanding of the Board's position today, it is helpful to trace the development of the "reasonable duration" test and determine what, if anything, remains for a present day employer or union to consider when confronted by a contract duration problem. Initially there was no contract-bar rule and representation elections were allowed at any time. The existing agreement, however, continued and any newly elected representative was required to comply with it. These early principles were considered

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3 Ibid.
8 Ibid.: Also see American Seating Co., 106 N.L.R.B. 250, 32 L.R.R.M. 1439 (1953), which was the first case to decide that a contract need not be as-
the basis of "the whole process of collective bargaining and unrestricted choice of representatives." A new representative, while required to function under the existing agreement, could bargain concerning any changes, or follow any procedure therein, allowing for the termination of the contract.

The contract-bar rule began to appear less than two years after this initial pronouncement. The Board refused to order an election when they found that a one year contract, when negotiated and executed, was favored by a majority of the employees the petitioning union then claimed to represent. In commenting on the duration of the contract, the Board merely stated that it was "not for such a long period as to be contrary to the policies or purposes of the Act." A short time later this stand was reemphasized when an election was not ordered during the term of an eleven month contract although the contracting union had been certified one and one-half years before. In addition to the fact that the union represented a majority of the employees in an appropriate unit when the contract was executed, emphasis was given to the fact that the majority was not gained by any unfair labor practices as defined by the Act. While the Board, however, was holding that one-year contracts were a bar to representative elections, contracts of a longer term were not a bar if they had been in existence for one year, and the evidence raised a substantial question as to whether the employees wished the incumbent union to continue to represent them.

Once the one-year contract-bar policy had been developed, it was an easy step, in order to "attain stabilized relations in the industry," and when certain conditions were present, to extend the period. Thus, despite a substantial change in affiliation from the representing union to the challenging union, a two year contract that had been in existence for more than one year was held a bar to an election because the contract was consummated by a newly certified union. In all other cases, the Board did not decide one way or another.

9 See note 7 supra.
12 Ibid.
13 National Sugar Refining Co. of N.J., 10 N.L.R.B. 1410, 3 L.R.R.M. 544 (1938). Board member Edwin S. Smith dissents on basis of New England Transportation Corp., see note 7 supra. Also see, George L. Madden, 42 N.L.R.B. 885, 10 L.R.R.M. 207 (1942)
14 Ibid.
15 Los Angeles Shipbuilding and Drydock Co., 40 N.L.R.B. 1150, 10 L.R.R.M. 93 (1942), national emergency and/or two year contract; Kahn v. Feldman, Inc., 30 N.L.R.B. 294, 8 L.R.R.M. 49 (1941), two year contract; Lewis Steel Products Corp., 23 N.L.R.B. 793, 6 L.R.R.M. 338 (1940), two year contract; Riverside and Fort Lee Ferry Co., 12 N.L.R.B. 493, 6 L.R.R.M. 319 (1940), three year contract.
tract contained a closed shop provision and not all of the members of the representing union had shifted allegiance.\textsuperscript{18} The Board also had held that a contract for more than a one year period barred an election when the parties to the contract had a previous contract of the same duration during a five year bargaining history.\textsuperscript{19} More definitely the Board had stated that a contract was of reasonable duration and thus a bar to an election when the parties had a history of bargaining for a two year contract and that such contract duration was the prevailing practice of firms in that industry.\textsuperscript{20}

Subsequent to the above type exceptions to the rule that contracts of over one year duration were unreasonable and therefore not a bar to representative elections, the Board had occasion to review their previous decisions, and again, "in the interest of industrial stability," set forth a new rule.\textsuperscript{21} This time a contract of two years' duration was presumed to be reasonable and only when it could be shown, by the challenging union, that contracts shorter than two years in duration were the well established custom in the industry, or that under the circumstances of the particular case the contract term was unreasonable, would an investigation of representatives be undertaken.\textsuperscript{22} A contract of more than two years' duration, however, continued not to be a bar to a representative election after being in effect for more than one year,\textsuperscript{23} unless the party relying on the contract definitely established that it was of reasonable duration by showing that it was in accord

\textsuperscript{18} Ibid. Also see, Douglas and Lomason Co., 34 N.L.R.B. 69, 8 L.R.R.M. 328 (1941). But see, Chicago Hair Curled Co., 56 N.L.R.B. 1674, 14 L.R.R.M. 201 (1944) where a three year contract was not a bar to an election. The Board relied on the rule, "well recognized in the law of collective bargaining" that a contract was not a bar at the end of the first contract year. This case was distinguished from Owens-Illinois Pacific Coast Co., supra, where there was a "custom . . . apparently national in scope," that justified an exception for two year contracts. The distinction is hard to see.

\textsuperscript{19} American Finishing Co., 50 N.L.R.B. 313, 12 L.R.R.M. 237 (1943), twenty-two month contract; also see West Virginia Coal and Coke Corp., 58 N.L.R.B. 1, 15 L.R.R.M. 13 (1944), a two year contract was a bar. All contracts between the parties since 1935 had been for a two year period.

\textsuperscript{20} Celluplastic Corp., 60 N.L.R.B. 172, 15 L.R.R.M. 226 (1945). The contracting union (A.F. of L.) had, since 1939, entered into a two-year contracts exclusively with plastic fabricating firms. At this time they had two-year contracts with a manufacturing Association, representing forty-nine firms, as well as with twenty individual companies. The petitioning union (CIO), at this time, had no contracts in the metropolitan (Newark, N.J.) area.

\textsuperscript{21} Uxbridge Worsted Co., Inc., 60 N.L.R.B. 1395, 16 L.R.R.M. 55 (1945). A two year contract in the woolen and worsted industry was held not to be unreasonable under the rule on the basis of the practices of the three leading unions in this field. Two preferred one-year contracts; the other, two-year contracts, both on occasion deviating from their respective policies. Compiled data of the Bureau of Labor Statistics of the Department of Labor in regard to collective bargaining agreements in this industry was also considered.

\textsuperscript{22} Ibid.

with the general practice in the industry involved,\textsuperscript{24} or as more frequently stated, was in accord with the custom in the industry.\textsuperscript{25}

Another significant modification in Board policy occurred when it was decided that a contract of two years' duration was a bar to an election even when it had been in effect for more than one year and despite a proven custom of only one-year contracts in the industry involved.\textsuperscript{26} In cases where the contracts were of more than two years' duration evidence of "custom in the industry" remained the test of a contract's reasonableness.\textsuperscript{27} Regardless, however, of the finding of unreasonable duration, the contract was a bar for its initial two year period.\textsuperscript{28}

At present, the basic rule remains that contracts of two or more years' duration are per se a bar to representative elections during the initial two year period.\textsuperscript{29} This rule presents little or no problem for

\textsuperscript{24} Omar, Inc., 69 N.L.R.B. 1126, 18 L.R.R.M. 1281 (1946), three year contract.


\textsuperscript{26} Reed Roller Bit Co., 72 N.L.R.B. 927, 19 L.R.R.M. 1227 (1947). There are three reasons for the new rule: 1) In applying the rule that two-year contracts are presumably reasonable, nothing was discovered indicating that such contracts unduly limited the rights of employees to change their representatives; 2) added security in the position of the parties who have entered into a two year contract as opposed to a one year contract; 3) The passing of the experimental and transitional period of collective bargaining and the, then, necessity of allowing a frequent change in representatives. But see, United Parcel Service of New York, Inc., 74 N.L.R.B. 888, 20 L.R.R.M. 1226 (1947) where it was held that a two year contract in effect for only one year was not a bar to a determination of representatives because at the time the contract was signed the employer had completed plans for expansion, which expansion was imminent, and therefore to bar an election would deny the employees, in the expanded unit the right to select their own bargaining representative for an unreasonable period of time. The unit was expanded from nine to twenty employees shortly before a retroactive contract was executed.


\textsuperscript{28} Union Starch and Refining Co.; American Seating Co.; Cushman's Sons, Inc.; see note 27 supra. Sanson Hosiery Mills, Inc., 84 N.L.R.B. 654, 23 L.R.R.M. 1114 (1949), the contract was a bar for the initial two year period even though the employer attempted to unilaterally terminate it; Puritan Ice Co., see note 27 supra; and Fitrol Corp., 74 N.L.R.B. 1307, 20 L.R.R.M. 1272 (1947).

\textsuperscript{29} Ames, Harris, & Neville, 118 N.L.R.B. No. 43, 40 L.R.R.M. 1186 (1957); Central San Vicente, Inc., 117 N.L.R.B. No. 50, 39 L.R.R.M. 1243 (1957); Pazan Motor Freight, Inc., 116 N.L.R.B. No. 224, 39 L.R.R.M. 1043 (1956); and Stewart-Warner Corp., 111 N.L.R.B. 1222, 36 L.R.R.M. 1176 (1955). But see Kearney and Trecker Corp., 116 N.L.R.B. No. 275, 39 L.R.R.M. 1118 (1956) for an exception to the normal contract bar rule when there was a schism in the contracting union, a seizure of its assets by the dissident group, the use
employers or unions. The problems lies with the contract term that exceeds two years. “In place of the former test predicted on ‘custom in the industry,’ the test to be applied” today to determine the “reasonableness of contract duration for contract-bar purposes” is “whether a substantial part of the industry is covered by contracts of a similar term.”

Before analyzing the present test of “reasonableness” for contracts of more than two years’ duration it is useful to understand the Board’s attitude toward “custom in the industry.” The decisions establish that the Board was always impressed by the fact that a high percentage of firms, in similar industry, had contracts of the duration in controversy. The cases, decided, reveal that over a 50% coverage was always necessary to establish a “custom.”

Of particular significance when the “custom test” was the rule, is the fact that “recent innovations” in the length of collective bargaining agreements were not considered a part of a “well established custom.”

of the assets by them, and a court decision setting aside a Board election between the two groups.

30 General Motors Corp., Detroit Transmission Division, 102 N.L.R.B. 1140, 31 L.R.R.M. 1344 (1953).

31 Sutherland Paper Co., 64 N.L.R.B. 719, 17 L.R.R.M. 143 (1945). 126 contracts of one year duration were shown as against only three contracts of two year’s duration; Kennebec Copper Corp., 63 N.L.R.B. 466, 17 L.R.R.M. 3 (1945). General evidence of a custom was not sufficient when evidence of other length contracts was also introduced. The Board also placed reliance on the fact that, in any event, the contract involved had only sixteen more months to run and therefore was not unreasonable duration when coupled with exceptions to a one year contract practice; U.S. Finishing Co., 63 N.L.R.B. 575, 17 L.R.R.M. 12 (1945), where it was shown that 250 plants in an area where 90% of the industry was located and seventeen more, of twenty-nine, where the party employer and 5% of the industry was located were covered by three-year contracts; Omar, Inc., see note 24 supra. Ten of nineteen agreements were for three year’s duration. The industry involved was the baking industry of the City of Indianapolis, Indiana, where there only were six major bakeries, two exclusive chain store bakeries and several of the neighborhood type. Also see note 71 infra: California Walnut Grower’s Association, see note 27 supra. The record did not show that the employer’s operations of packing and marketing walnuts dominated the industry, but the Board was satisfied that the operations were not an “inconsiderable” portion of all walnut growers when 9,300 independent growers were covered by three-year contracts; Also see note 71 infra. But see, Boulevard Transit Lines, Inc., note 25 supra, where a three year custom was not established when twenty contracts of one year length, the majority with interstate bus lines, were shown as against only six contracts of three year’s duration, which for the most part were with intrastate lines; American Powder Works, Inc., 69 N.L.R.B. 1367, 18 L.R.R.M. 1322 (1946). Two contracts of three years’ duration did not establish a custom when a “number of one year contracts” were also in evidence. A contract for two years’ duration with an automatic renewal provision for a one year period is not a three year contract; Cushman’s Sons, Inc., see note 27 supra. A three year custom was not established when the intervenor showed that of the four contracts in the New York City area in the baking industry, the petitioner had one three year contract with a retail chain. There was no evidence of the number of stores or employees covered, however. The other three contracts were of one year’s duration. As is later shown in this article, a problem often arose as to what constituted an industry.

Therefore, the Board found that three-year contracts were of unreasonable duration, despite a “substantial number” of them, when they began to appear just one year prior to the challenging union’s petition. Likewise, the “present negotiation” of numerous five-year contracts and a new union policy of longer-duration contracts were not evidence of a custom in the industry.

In contrast to the above “custom in the industry” test of reasonableness, the present rule is based on a “substantial part of the industry” test. The General Motors decision in 1953 emphatically indicates the change without explaining the difference or significance. The only lead to the difference is gleaned from the Board’s reasoning for the change. The test, said the Board, “is more practical, is in keeping with present day economic developments and will better effectuate the policies of the act.” On its face this means nothing, but when coupled with the Board’s concept of what is “substantial,” a fairly accurate standard can be set up despite the interchange of the terms “custom” and “substantial” in subsequent decisions.

Before proceeding with a discussion of what is “substantial,” it seems best at this point to break down the present test of “reasonableness of contract duration for contract-bar purposes” and analyze it in the light of the manner an employer or union would have to proceed when confronted with the problem. To reiterate, the test of reasonableness is presently determined “on the basis of whether a substantial part of the industry is covered by contracts of a similar term.” Obviously, the first problem is to determine, what “industry” is involved. This must be done before the “substantial” test can be applied. At first this does not seem to pose much of a problem. But reflection suggests a number of questions: To what industry do you belong if you are engaged in dual or multiple operations? To what industry do you belong if you manufacture parts for another industry or industries? To what industry do you belong if part of your employees, or one of your plants, is engaged exclusively in one industry, the remainder in another? Is the industry, to which the substantial test is applied, the entire industry or merely the organized segment? Is it the nationwide

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33 Ibid. Also see California Walnut Grower’s Association, note 27 supra.
34 Puritan Ice Co., see note 27 supra.
35 Reed Roller Bit Co., see note 26 supra.
36 See note 30 supra.
38 See note 30 supra.
industry or the industry determined on a local, or immediate area, basis? These are some of the "industry" questions, that must be answered.

The Board seems to rely heavily, for industrial classifications, on their prior decisions, analyses by the United States Bureau of Labor Statistics and more recently on the Standard Industrial Classification Manual. In general it can be said that there are certain well-established industries. The automotive, the aircraft, and steel are examples. With these there is usually no quarrel unless a finer industry breakdown or even a more inclusive one is attempted. The Board holds that an independent manufacturer of component parts for the automotive industry is part of that industry. Great stress is placed on the fact that the parts manufacturer's chief competitors, as well as customers, are automobile manufacturers. A similar policy probably exists in the aviation and aviation parts industry, although an independent status seems to be given to the aviation parts industry. In

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39 Republic Aviation Corp., 109 N.L.R.B. 569, 34 L.R.R.M. 1406 (1954). See dissent for the posing of some of these questions and the urging of a straight two year contract duration rule so that no problem would arise in determining whether a particular long term contract is a bar or not.


43 See note 30 supra.

44 Republic Aviation Corp., see note 39 supra.


46 Bendix Products Division, Bendix Aviation Corp., see note 41 supra. This division does not manufacture complete automobiles, nor is it a subsidiary of an automobile manufacturer. Aircraft parts were manufactured as well as automobile parts. No production statistics are given.

47 Consideration was also given to the U.S. Bureau of Labor Statistics analysis placing automobile parts under automobile and to the fact that "other Machinery and Fabricated Metal Products" industry has the same length contract. Also see, The Carborundum Co., 105 N.L.R.B. 192, 32 L.R.R.M. 1235 (1953), where consideration was given to the fact that a manufacturer of abrasives' chief customers (automotive and farm equipment manufacturers) were covered by five-year contracts. But see, Bendix Aviation Corp., note 48 infra, where the Board gave no consideration to the "chief customer" contention when they found that the particular plant involved was engaged in the aviation parts industry and Budd Co., note 40 supra where no consideration was given to the contention that the sales and manpower figures pertaining to jet engine parts that were supplied to a company primarily engaged in automobile manufacturing should be given weight as evidence of belonging to the automotive industry.

an attempt to subdivide the aviation parts industry, an aviation engine industry was not recognized.\textsuperscript{49} In similar fashion, an effort to establish a Douglas fir plywood industry, rather than the more inclusive lumber or plywood industries, met with failure.\textsuperscript{50} On the other hand, an attempt to set up an all inclusive transportation equipment manufacturing industry, in lieu of the already established automotive and aviation industries, was also denied.\textsuperscript{51}

Specifically, the industry problem takes shape when the employer is engaged in a multiplant, diversified operation. When a contract-bar issue is raised at one of these plants, the plant involved seems to fall within one of the following categories: First, the plant produces items ready for sale to the public or parts for another manufacturer, or both. It is not an integral part of a company-wide system and is not governed by a national agreement.\textsuperscript{52} Second, the plant manufactures parts for the employer's other plants\textsuperscript{52} and is an integral part of the employer's main operation.\textsuperscript{54} A national agreement is not involved.\textsuperscript{55} Third, the plant manufactures items ready for sale to the public, does not manufacture any items for use in the employer's main industrial operation and in no way can be said to belong to that industry. The contract involved is part of a national agreement.\textsuperscript{56}

The determination of industry, when the plant falls within the first category, is on the same basis as any one-plant, diversified operation.\textsuperscript{57} The decision would hinge on the question of what is the primary industry in that individual plant.\textsuperscript{58} Thus, a plant was found to be involved in the aviation engine parts industry when 75% of the dollar value and 90% of the labor of that plant were concerned with that industry.\textsuperscript{59} A plant was not a part of the aircraft industry when 60% of its current, total production, based on dollar value, and 60% of

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\item some indication that had sufficient evidence been submitted, a finer breakdown might have resulted.
\item \textsuperscript{49} \textit{Ibid.}
\item \textsuperscript{50} Diamond Lumber Co., see note 42 \textit{supra.}
\item \textsuperscript{51} Budd Co., see note 40 \textit{supra.}
\item \textsuperscript{52} Bendix Aviation Corp. and Budd Co., see note 47 \textit{supra.} But see, Allis-Chalmers Mfg. Co., note 41 \textit{supra.} where the plant with the contract problem manufactured agricultural, heavy type industrial and electrical equipment and consideration was given to the fact that of the other ten Allis-Chalmers' plants, five mainly produced agricultural equipment.
\item \textsuperscript{53} International Harvester Co., Milwaukee Works, see note 40 \textit{supra.}
\item \textsuperscript{54} Allis-Chalmers Mfg. Co., see note 40 \textit{supra.} The plant concerned manufactured electric motors, centrifugal pumps and textile sheaves and therefore could not be said to be chiefly engaged in the manufacture of farm equipment.
\item \textsuperscript{55} See notes 53 and 54 \textit{supra.}
\item \textsuperscript{56} General Motors Corp. (Milwaukee Plant), A.C. Spark Plug Division, 102 N.L.R.B. 1139, 31 L.R.R.M. 1345 (1953).
\item \textsuperscript{57} Heintz Mfg. Co., see note 41 \textit{supra} and Royal Jet, Inc., 113 N.L.R.B. 1064, 36 L.R.R.M. 1477 (1955). It is not certain from the reports of these decisions that the companies involved are one-plant operations, but the principle stands, regardless.
\item \textsuperscript{58} See notes 52 and 57 \textit{supra.}
\item \textsuperscript{59} Bendix Aviation Corp., see note 48 \textit{supra.} Also see Budd Co., note 40 \textit{supra.}
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the employees were concerned with the manufacture of heating equipment. Similarly, a plant was not in the aircraft or automobile industry when 50 to 60% of the total sales and employee complement during the contract period fell into the metal stamping and miscellaneous fabrication industry.

The industry of a plant in the second category is based on the employer's primary industry, determined by reference to the company-wide, combined plant operations. Thus a plant was a part of the farm equipment manufacturing industry when it manufactured parts for the employer's other plants which were determined to be primarily engaged in that industry. It is clear, however, that the plant's entire output need not be utilized by the employer's other plants. A 20% consumption, with the remainder sold to customers, has been found to be sufficient when the plant involved was an "integral part" of the employer's, previously determined, primary industry.

A plant in the third category, similarly, belongs to the primary industry of the employer, determined on company-wide, combined operations basis. Thus, a plant engaged exclusively in the manufacture of navigational computers and bombsights was governed by the Board's decision for the automobile industry, the employer's main industry. The Board held that since the "national agreement" was already held to be a bar for the main industry, "... it similarly precludes an election for any group of employees subject to its terms, regardless of their specific work assignments." The theory of this ruling is based on an analysis of the collective bargaining history between the employer and the union, and the "salutary and stabilizing effect of that relationship."

After it has been determined to what industry classification the contract in question belongs, it is necessary to ascertain the "whole" from which "substantial" is to be derived. Generally it can be

60 Royal Jet, Inc., see note 57 supra. It is interesting to note that sometime after the execution of the contract involved the employer added aviation fuel tanks to its products and in the year prior to this decision, that production exceeded the heating equipment. This is most likely the reason for the emphasis on "current" statistics as distinguished from the Heintz case, see note 61 infra, where the contract period was used.

61 Heintz Mfg. Co., see note 41 supra.

62 See notes 53 and 54 supra.

63 See note 54 supra.

64 Ibid.

65 Ibid. Also see Allis-Chalmers Mfg. Co., note 41 supra.

66 See note 56 supra.

67 Ibid.

68 Ibid.

69 See note 56 supra. For rationale see note 30 supra.

70 The only portion of the "reasonableness test" that was changed by the General Motors case, see note 36 supra, was "customary in the industry" to "substantial part of the industry"; therefore, for all practical purposes, any reference to "industry" that took place before the General Motors case (1953) should be applicable to the present test.
assumed that the entire industry\textsuperscript{71} is the “whole.” This, of course, is the safe assumption as usually a determination of “substantial” on any other basis will necessarily be included therein. If, however, “substantial” cannot be shown on an entire industry basis it may be advantageous to do so on a local, or immediate area basis or by use of only the organized segment of the industry. This suggestion is worthy of consideration because an absolute interpretation of “a substantial part of the industry” has not been made by the Board and there is some indication that determination could be made on the local\textsuperscript{72} or organized segment\textsuperscript{73} basis. The contract practice in the baking industry has been determined on the basis of the particular locality involved.\textsuperscript{74}

There is some question as to whether this ruling would be applicable today,\textsuperscript{75} but the fact that such a decision has been made, always leaves open the possibility for similar pronouncements.

Assuming that the industry questions have been settled, the next and final step of the employer or union is to show that a “substantial” part of the industry is covered by contracts of similar term and therefore that the contract in question is not of an unreasonable duration. The burden of proving this is always on the party asserting, as a bar, the contract of more than two years’ duration.\textsuperscript{76} “Substantial” was established, for the first time in the automobile industry\textsuperscript{77} when General

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  \item Diamond Lumber Co., see note 42 supra; Heintz Mfg. Co., see note 41 supra; and Joseph Aromauer, Inc., 106 N.L.R.B. 1382, 33 L.R.R.M. 1025 (1953). Proof of the total number of employees in the industry and the percent of the entire industry covered by similar contracts is required.
  \item Boulevard Transit Lines, Inc., see note 31 supra. No comment was necessary concerning the entire industry, even though only evidence of the immediate area was submitted, as the burden of proof was not sustained even on the local area basis. California Walnut Growers Association, see note 31 supra; Rheinstein Construction Co., see note 27 supra, the burden of proof of the custom in the “building maintenance work in the New York area” was not sustained; see note 44 supra, the burden of proof was sustained “whether viewed on a national or Eastern segment basis;” Home Curtain Corp., 111 N.L.R.B. 336, 35 L.R.R.M. 1472 (1955), reconsideration denied, 111 N.L.R.B. 1233, 35 L.R.R.M. 1683 (1955), the burden of proof was sustained on a nationwide as well as New York Metropolitan basis.
  \item Home Curtain Corp., see note 72 supra; Republic Aviation Corp., see note 39 supra; and The Carborundum Co., see note 47 supra.
  \item See Omar, Inc. and Cushman’s Sons, Inc., note 31 supra. The Board confined itself to the contract practice in the particular locality involved because bakeries are located in relation to population and because of the perishability of the products.
  \item Union Starch and Refining Co., see note 27 supra. The Board states that the custom of the contract duration in the particular industry, rather than special circumstances relating to individual employers, is the test for determining reasonableness. These cases setting forth a definite exception are strong evidence that the entire industry must be looked to, generally, in determining what is substantial.
  \item Heintz Mfg. Co., see note 41 supra. A challenging union will attempt to show a contract to be of reasonable duration when it wants to show a “premature extension.” The doctrine only applies when the earlier agreement was itself a bar at the time the new contract is executed.
  \item General Motors Corp., Detroit Transmission Division, see note 30 supra. The contracts ranged from three years, eleven months to five years, ten months. The Board, however, did not pass on whether contracts of more than five years'
Motors showed that their long term contract (five years) was followed by every major manufacturer in the industry and that of the 537,500 employees in the industry, they had 265,000. On the same day, the Board found that five-year contracts were also of reasonable duration in the farm equipment manufacturing industry because three of the four major producers of this type equipment had agreements of five years' duration covering 38,000 employees which was a "considerable portion of the industry." Five-year contracts covered a "clear substantial portion" of the abrasive products industry when 4,370 employees, or 65%, of the 6,740 organized employees in the industry in the United States were governed by such agreements. In the aviation industry a three year contract was found to be reasonable. The industry had forty-three manufacturers, and of this number, twenty-six of them employed 136,200 people, or 90% of the total number in the industry. Of these twenty-six, ten had contracts of longer than two years' duration. The number of employees covered by the ten contracts is not indicated, but the Board felt that the facts given were sufficient to find substantial, especially since two years later 42.4% of the organized industry had contracts for three or more years' duration. The Home Curtain Corporation decision gives, perhaps, the best indication of what the Board is likely to find as the minimum requirement to satisfy the "substantial part of the industry" test. There, only 30% of all the employees in the industry were covered by three-year contracts and the test was met. Generally, when the "substantial" test is not met, no evidence of the industry practice has been submitted, or if it has, the Board merely comments that the evidence was not sufficient. As a result, it is difficult to tell what has been found to be not a "substantial part of the industry" and the requirements to satisfy the test must be obtained from decisions where "substantial" has been established. Some help is obtained, however, in the negative approach, in that it has been clearly stated a number of times that it is not sufficient for the party urging the contract as a duration could be, under any circumstances, of reasonable duration for contract-bar purposes.

78 Allis-Chalmers Mfg. Co., see note 41 supra.
79 The Carborundum Co., see note 47 supra.
80 The Republic Aviation Corp., see note 39 supra.
81 111 N.L.R.B. 336, 35 L.R.R.M. 1472 (1955). Evidence that 40% of all the organized employees in the industry were covered by three-year contracts, as well as the immediate area statistics (80% of the organized and almost 50% of all) was submitted. From the decision it is impossible to tell how much weight the Board afforded each, and what, if anything, standing alone would have been sufficient.
83 Diamond Lumber Co., see note 42 supra, 95% of its contracts were for five
bar to merely show the duration and number of *its* contracts in the industry, or in an employer association, or the number of employees covered by these contracts. The party must go further and relate the percent of the long term contracts to the entire industry or the employees covered by long term contracts to the total number of employees in the industry.84

Of particular significance is the recent decision in the *Thompson Wire Company* case85 involving a three year contract in the steel industry. The petition and hearing on the representative question came about after two years had run on the contract and while two-year contracts were the standard length in the industry. Subsequent to these events, but prior to the Board decision, the basic steel industry established a new pattern of three-year contracts for its members. The Board took "official notice" of this new industrial pattern and relying on the test of the *General Motors* case,86 held that in using a "realistic approach," by giving "appropriate recognition to the circumstances now in existence," by according "full weight to the current contractual period prevalent in the steel industry," rather than to "circumstances that no longer exist," the three year contract would bar an election.87

This decision opens up a whole new area of uncertainty for employers and unions. It is now absolutely impossible to predict, at the years' duration, but this represented only half of the employees in the contested for industry. Also, no other union in the industry had five-year contracts; Heintz Mfg. Co., see note 41 *supra*, eighty of its contracts (eighty-nine two years later) were of three years' duration and 50% of the employees were covered by these contracts. The opposing union showed a list of twenty-six agreements in the industry (obtained from the Bureau of Labor Statistics) and only 15% of the employees were covered by three-year contracts; Joseph Aronauer, Inc., see note 71 *supra*, 80% of its contracts were for three years and 500 of the 3,000 employees it represented.

84 C. A. Olsen Mfg. Co., Ames, Harris, & Neville, see note 29 *supra*; Heintz Mfg. Co. and Joseph Aronauer, Inc., see notes 41 and 71 *supra*. Prior to the *Aronauer* decision it was the practice of some multi-plant and multi-contract employers to submit evidence of the number of long term contracts they had in their organization. See, Allis-Chalmers Mfg. Co., note 41 *supra*, nine of eleven plants were covered by five-year contracts; International Harvester Co., Milwaukee Works, see note 40 *supra*, over 100 five-year contracts with the UAW-CIO and four in the plant in question; The Carborundum Co., see note 47 *supra*, 90% of its employees were covered by five-year contracts.

It is difficult to determine the weight given to this evidence by the Board at that time, but it seems that today the only value would be in relation to the total number of contracts or the total number of employees in the industry. Perhaps this evidence was submitted because of a Board comment, see Bendix Aviation Corp., note 41 *supra* that "we do not require that all contracts of any individual employer . . . be for the same duration." This would indicate, if it has more than the one in question, at least some must be of the same term. The *Allis-Chalmers* case, *supra*, however, was decided on the same day as the *Bendix* case, *supra*, and the *General Motors* case, note 30 *supra*, and it is more likely that all possible persuasive material was presented to the Board in an effort to show "stability in the industry."


86 See note 30 *supra*.

87 See note 85 *supra*. For sharp disagreement see the dissenting opinion. It is very clear and to the point on the retroactive issue and the immateriality of other employer's contracts in relation to the one in question.
time of petition, whether any given contract of longer than two years’ duration will stand as a bar to a representative election. The test of “reasonableness” is applied on the date the Board hands down its decision. This case, however, does clear up one open question. The distinction between the former “customary in the industry” test and the present “substantial part of the industry” test is brought into sharp focus. “Recent innovations,” the present trends, and new policies are a major factor in determining reasonableness today, whereas under the old rule, no consideration was given to these circumstances. In addition to this case, a comparison of the two tests also reveals that, besides requiring a well established contract duration practice in the industry, the “custom” test required the party asserting the contract as a bar, to show a greater number of agreements of a similar duration. While 30% of the contracts in the industry has been sufficient to satisfy the “substantial” test, the “custom” test was never satisfied with less than 50%, and usually the figure ran much higher.

III. CONCLUSION

It is well established that whenever a contract is urged as a bar to a representative election, the National Labor Relations Board is faced with balancing two separate interests: the statutory objective of maintaining industrial stability by stabilizing industrial relations for the duration of a valid collective bargaining contract and the statutory right of employees to select and change their bargaining representatives. In balancing this conflict the Board has developed the rule that an existing, valid contract will bar a representative election for a reasonable period of time, or conversely, employees can change their bargaining representatives at reasonable intervals. This policy has evolved over the years so that today contracts of two years’ duration are per se reasonable. Similarly, contracts of over two years’ duration are reasonable, per se, for the initial two year period and for the entire period if a substantial part of the industry is currently.

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59 Puritan Ice Co., see note 27 supra.
60 Reed Roller Bit Co., see note 26 supra.
61 It is also significant that these rules have not been used since the General Motors test, see note 30 supra, was announced except in Supreme Sunrise Food Exchange, Inc., see note 45 supra, which case seems to be a bad ruling unless it was handed down on the basis, along with the other cases in note 45 supra, of the rules in operation prior to the General Motors case. If this is so, the Board does not so indicate in its decision.
62 The Home Curtain Corp., see note 81 supra.
63 See notes 4 and 5 supra. Also see Thompson Wire Co., note 45 supra, General Motors Corp., Detroit Transmission Division, note 30 supra, and Reed Roller Bit Co., note 26 supra.
64 Ibid.
65 See note 29 supra.
66 Ibid.
67 See note 85 supra.
covered by contracts of a similar term.\textsuperscript{98} Agreements up to five years in duration have been found to be reasonable.\textsuperscript{99} No little difficulty is presented in determining the industry\textsuperscript{100} involved, and what is a substantial part thereof.\textsuperscript{101} This results in uncertainty and unnecessary litigation, as well as in the possibility of arbitrary and discriminatory application.\textsuperscript{102} This situation aids no one, and certainly frustrates the purposes of the National Labor Relations Act.\textsuperscript{103}

There are a number of possible solutions which would allow employers and unions to operate with certainty and predictability in this area.\textsuperscript{104} The first, and most obvious, is for the Board to establish definite standards for its present test of reasonableness. This would necessitate the overruling of the recent Thompson Wire Company case\textsuperscript{105} which make it absolutely impossible for an employer or union to determine, at the time a petition is filed, whether the contract involved is of reasonable duration or not. Many things can happen; much time, effort and money can be spent and wasted between the petitioning date and a Board decision. Fixed rules for determining "industry" and "substantial" are essential. This could be accomplished by establishing unequivocal guides. The Standard Industrial Classification Manual, already used as a reference by the Board, is adequate for enumerating the various possible industries. The problem of setting up an unequivocal guide for what industry involved is no easy task, and the Board's problem is appreciated. One answer is to make the determination strictly on a plant-for-plant basis, as is sometimes now done. Another, is to set up a series of guides, similar to the categories utilized in this comment through an analysis of the various decisions.\textsuperscript{106} It seems that the number of employees concerned with a particular industry should be the criteria for establishing the primary industry. This seems more logical than the "dollar value" approach, because the Act deals with the employer-employee relationship. The "dollar value" approach would allow a majority of the employees, concerned with another industry, to have their contract classified in the industry returning the most money for the employer.

The determination of substantial should be fairly simple. A definite percentage is always an arbitrary figure, but the line must be drawn somewhere. Since the Board has already found 30% of the employees

\textsuperscript{98} See note 30 \textit{supra} and all subsequent cases.
\textsuperscript{99} See notes 77, 78 and 79 \textit{supra}.
\textsuperscript{100} See notes 39 through 69 and 79, 80, and 81 \textit{supra}.
\textsuperscript{101} See notes 85 through 95 \textit{supra}.
\textsuperscript{102} See note 39 \textit{supra}.
\textsuperscript{103} See note 4 \textit{supra}.
\textsuperscript{104} These solutions are based on the Board's reasoning for changing and modifying the various rules and tests in this area. See rationale of cases cited, notes 92 and 26 \textit{supra}.
\textsuperscript{105} See note 85 \textit{supra}.
\textsuperscript{106} See notes 52 through 69 \textit{supra}.
in the entire industry to be substantial,\textsuperscript{107} this percentage should suffice. This type of standard is not wholly satisfactory for an industry that fluctuates frequently with the number employed, but then, no matter what the industry, the figure will not be a constant. The average number employed for a set period prior to the petition seems to be a fair approach.

A second possibility is to establish a straight election bar rule for a definite number of years, like the present per se two year rule,\textsuperscript{108} but without the additional test of reasonableness. Whether two, or another number of years would be most satisfactory, is certainly a debatable point.\textsuperscript{109} It seems, however, that since contracts up to five years in duration have already been found reasonable "without unreasonably restricting employees in their right to change representatives,"\textsuperscript{110} five, as easily as two years, could be, per se, a bar to an election. A greater number of years is also feasible. After all, the Board concedes that collective bargaining has passed the "trial and error" period.\textsuperscript{111} Therefore, it must be assumed that employers and unions carefully consider their contract from all angles. With this approach, it can hardly be argued that the Board is in a better position than the contracting parties to determine reasonableness. The employees, however, must be saved the right to change representatives, if desired. Therefore, some limit on reasonableness is necessary. The major industries, previously adopting the five year contract, are now working under a three year plan. Perhaps this is the best figure, as it is not so short a span as to thwart industrial planning, and yet, not so long as to prevent periodic contract changes, when, and if, needed.

A third possibility would be for the Board to return to its original agency theory and allow elections at any time, but requiring the challenging union, if successful, to be bound by the terms of the existing labor contract until its expiration.\textsuperscript{112} This possibility is highly unlikely as the Board feels that it "hamstrings" a newly elected union.\textsuperscript{113} However, with the carefully worked out contracts of today, the chief cause of changing representatives is poor contract administration, rather than any particular contract provisions. A return to this rule, it seems, would of necessity improve union contract administration.

An acceptable compromise solution, utilizing parts of the second and third suggestions would seem realistic. It is based on the assumption that of the various contract terms, three years is reasonable.

\textsuperscript{107} See note 81 supra.
\textsuperscript{108} This suggestion was first made in the dissent, see note 39 supra.
\textsuperscript{109} See concurring opinion, Allis-Chalmers Mfg. Co., note 40 supra.
\textsuperscript{110} See note 99 supra.
\textsuperscript{111} See note 84 supra.
\textsuperscript{112} See notes 7, 8, 9 and 10 supra.
\textsuperscript{113} American Seating Co., see note 8 supra.
per se.114 All labor contracts, regardless of term, and regardless of
the industry involved, would be considered a bar to representative
elections for a period of three years, unless of course, the contract was
for a lesser period, which period would then govern. Agreements of
more than three years' duration would not bar a challenging union
from obtaining an election after the three year period. If successful,
however, the new union would be bound by the existing, valid agree-
ment for a period of one year, or until its termination by its own
terms, whichever event occurred first. Clearly, this would afford both
employers and unions definite industrial stability for at least a three
year period without unduly restricting employees from changing their
representative if they so desire. The "grace" period of one year would
allow the employer to plan for a new negotiation rather than require
him to proceed without sufficient preparation. This is especially nec-
essary in view of long range financing of fringe and special benefit
programs. It would also allow the new union preparation time under
immediate administrative conditions and time for the new local repre-
sentatives to better acquaint themselves with union policies and prob-
lems. Many differences undoubtedly would be better understood prior
to actual contract negotiation, thus increasing the possibility of a
more efficient contract and a sounder industrial relationship.

In all events, it seems that the problem is of sufficient importance,
and the time appropriate, for further study and consideration by the
Board. Clarification and workable rules are desirable. It has been
suggested that the Board entertain proposals from both labor and
management before instituting a permanent rule.115 The adoption of
this suggestion would undoubtedly improve the situation.

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114 The three year term fits the reasoning given for adopting the two year
term. See note 26 supra.