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## BANKS AND THE NATIONAL LABOR POLICY

by Arthur S. Leonard

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Banks lie on the new frontier of union organization -- the organization of white collar workers. Although unions have generally been unsuccessful in winning bank certification elections, they continue to exhibit interest in what could be a lucrative field of organization. As a token of this interest, the AFL-CIO recently granted jurisdiction for bank organization to the Office and Professional Workers International Union. Non-AFL-CIO organizations such as the Teamsters and the Auto Workers have also demonstrated interest in bank organization.

In the following paper, Arthur Leonard summarizes the history of union organization in banks and considers the status of banks under the national labor policy in two dimensions: (1) NLRB jurisdiction over banks under the National Labor Relations Act, and (2) unit determination (the branch v. the whole-bank unit).

The author traces the history of the inclusion of banks under the labor policy through a series of cases illuminating the meanings of "employer," "commerce," and "affecting commerce" in Section 2 of the Labor Management Relations Act. Then he considers the situation in regard to appropriate bargaining units. As noted in many sectors of the economy, unions aim their organizing campaigns at the large, multi-plant operators, eschewing small operations which are uneconomical to organize. So too in banks, where unions have tried to make inroads in multi-branch banks through a divide and conquer "Splinter Approach." The NLRB has considered branch units to be appropriate for most of its history, but a recent Circuit Court ruling against the branch unit concept places the Board's approach in question. The Supreme Court has not yet dealt with this division of opinion.

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## Table of Cases

- Banco Credito y Ahorro Ponceno v. NLRB, 67 LRRM 2718 (1st Cir., 1968)
- Banco Popular de Puerto Rico (Santurce Branch) and Union de Empleados de Bancos de Puerto Rico (CGT), 61 NLRB 676 (1945).
- Bank of America National Trust and Savings Association and Local 17-L, Lithographers and Photoengravers International Union, 70 LRRM 1179, 174 NLRB No. 51 (1969).
- Bank of America National Trust and Savings Association and Union of Bank Employees, 80 LRRM 1081, 196 NLRB No. 76 (1972).
- Bank of America National Trust and Savings Association and United Office and Professional Workers of America, 14 NLRB 207 (1939).
- Bank of California, Unpublished Decision of the National Labor Relations Board (1960), cited and quoted in Bank of America, 80 LRRM 1086 (Kennedy dissent).
- NLRB v. Bank of America National Trust and Savings Association, 11 LRRM 546 (9th Cir., 1942).
- NLRB v. Northern Trust Company et al., 14 LRRM 830 (No. Dist. Ct. Ill., 1944).
- NLRB v. Polish National Alliance of the United States of North America, 322 U.S. 643 (1944).
- Reilly et al. v. Millis et al., 13 LRRM 554 (D.C. Dist. Ct., 1943).
- Wayne Oakland Bank v. NLRB, 80 LRRM 3042 (6th Cir., 1972).
- Wells Fargo Bank and Office and Professional Employees Local 3, 72 LRRM 1356, 179 NLRB No. 79 (1969).

## Introduction

The status of banks under the national labor policy, as interpreted and applied by the National Labor Relations Board (NLRB) and the federal courts, has acquired renewed importance in the 1970's due to the current surge of white collar organization. Prior to the late 1960's, bank organization by labor unions was sporadic and small scale; unions were usually unsuccessful in the few representation elections that were held.<sup>1</sup> Until the Banco Credito decision of 1968 (discussed in Part II, below) opened the door to the splinter approach (i.e., single branch bargaining units), only a dozen banks in the entire country had entered into collective bargaining relationships with labor unions, and several of these were banks controlled in whole or part by unions.<sup>2</sup>

Quincy McPherson, in a 1969 study of bank unionization, attributes the unions' lack of success in past efforts to the strategic approach taken by them before 1960: "Their goal was to strive for a contract that would encompass the entire corporate organization below the management and supervisory levels."<sup>3</sup> Factors contributing to this policy's lack of success include the character of sub-supervisory personnel in most banks,<sup>4</sup> the fringe benefits and employee welfare programs instituted by many banks,<sup>5</sup> and the opposition of bank owners and managers to organization.<sup>6</sup> McPherson suggests that the most fruitful ground for union organization may be the middle supervisory level, in view of the new organizational militance of white collar workers.<sup>7</sup>

McPherson's hypotheses are supported by the new strategic approach of splintering adopted by labor unions contemplating bank organization. Early in 1971, the AFL-CIO granted official jurisdiction for banks to the Office and Professional Employees International Union, a white collar organization, rather than to one of the several industrial unions which have shown some interest in banking, such as the Retail Clerks, the Communications Workers, and the Boilermakers.<sup>8</sup> It should be noted that two non-AFL-CIO unions, the Teamsters<sup>9</sup> and the Auto Workers,<sup>10</sup> have shown interest in bank organization.

As an indication of the increased pace of attempted organization, there were only thirteen certification elections (and, incidentally, four successful decertification elections) from 1950 to 1963 (down from twenty-six during the 1940's);<sup>11</sup> by contrast, the Office and Professional Employees alone participated in fifteen such elections during the first quarter of 1971.<sup>12</sup>

In light of this renewed interest in bank organization, we will explore two areas of the status of banks under the national labor policy.

In Part I, the question of jurisdiction will be discussed, tracing the inclusion of banks under the labor policy from the first decision of the NLRB through the last word in this area, *NLRB v. Northern Trust Company* (1944). The subject is most interesting from a legal viewpoint in terms of the novel arguments advanced by banks to demonstrate that they are not engaged in "commerce" or are not "employers" within the meaning of the National Labor Relations Act, as amended.

In Part II, the vital strategic issue of appropriate bargaining units, still not conclusively settled by the Supreme Court, will be discussed. This is particularly timely due to the different positions currently held by the First and Sixth Circuit Courts of Appeals; if organizing efforts intensify to any considerable degree in the near future, it is likely that the Supreme Court will have to resolve the conflict between the Circuit Courts regarding the legality and appropriateness of the branch unit as against the bank-wide unit.

#### Part I: The Status of Banks

The first labor unions in banks date from 1923, when union-owned banks in Chicago and New York entered into collective agreements with employee organizations.<sup>13</sup> McPherson, in his survey of bank union history, found no further mention of bank unions until 1937, by which time the Wagner Act (NLRB) had been in effect for two years.<sup>14</sup>

The NLRB was first called upon to decide the status of banks in 1939, when the Board heard *In the Matter of Bank of America...and United Office and Professional Workers of America*.<sup>15</sup> The case arose out of a UOPWA organizing campaign in California's Bank of America, a federally chartered bank and trust company. In the course of organizing, the bank discharged an employee who had joined the union and was known to have taken part in union work. The union filed charges under Sections 8(1) and 8(3) of the old Wagner Act.

The bank responded by filing a "special appearance" requesting dismissal of the charges on the grounds that the bank was not subject to the national labor policy; Bank of America maintained that it was not an "employer" within the meaning of Section 2(2) of the Act, and further that it was not engaged in "commerce" or activities "affecting commerce" within the statute's definitions contained in Sections 2(6) and 2(7), respectively.<sup>16</sup>

As these two arguments of the bank persist throughout the cases, the

lines of reasoning of banks and courts will be followed through separately to their apparent conclusions.<sup>17</sup>

#### A. The Bank as "Employer"

An "employer" under the labor law is any person acting (as an agent) of an employer, directly or indirectly, but shall not include the United States (or any wholly owned Government corporation, or any Federal Reserve Bank), or any State or political subdivision thereof...<sup>18</sup> (Phrases in parentheses were added in 1947.)

On its face, this language includes all employers who are subject to Congressional regulation under the Commerce Clause of the United States Constitution (an issue to be discussed below) with the exception of the government, government-owned corporations, Federal Reserve Banks, and some other exceptions not relevant to this issue at hand. When the NLRB was faced with Bank of America in 1939, the exceptions of Federal Reserve Banks and wholly owned government corporations were not spelled out, but might be inferred from the language of the unamended statute.

The bank's claim to exemption from national labor policy was based on the argument that the bank "is an instrumentality and agency of the United States government and, therefore, is not an employer" within the statutory definition.<sup>19</sup> Supporting this contention, the bank cited its membership in the Federal Reserve System and the Federal Deposit Insurance Corporation, its subjection to federal laws, rules, and regulations, and its status as depository for United States funds and agent for the government in certain financial transactions and policies.<sup>20</sup>

The rejoinder of the NLRB to this argument was four-pronged: (1) the bank is privately owned; (2) the bank's personnel policies, which are most relevant to labor relations, are not decided or regulated by the government; (3) the bank was not created by the government for its own use; and (4) actions taken by the bank as an agent of the government are "purely incidental to its business, such as it might perform for any other person dealing with it."<sup>21</sup> The NLRB concluded that the Bank of America was not the United States within the meaning of the Act, and was thus an "employer" under Section 2(2).

The bank appealed this ruling to the 9th Circuit Court of Appeals. In

affirming the NLRB's holding, Circuit Judge Healy reiterated in summary form the NLRB reasoning, adding:

...It is true, also, that national banks may at times be called upon as aids in carrying out the fiscal policies of the government, but their activities in these respects are occasional and incidental to the private purpose of the individuals who organize them.<sup>22</sup>

The bank attempted further appeal, but the Supreme Court denied certiorari in 1943, giving this NLRB policy decision the imprimatur of the high court.<sup>23</sup>

Bank of America is a "national bank," operating under federal regulation and charter. In *NLRB v. Northern Trust Company*, decided in the Northern District Court of Illinois, District Judge Holly asserted the jurisdiction of the NLRB over a state-chartered bank.<sup>24</sup> Surprisingly, the Northern Trust Company did not directly advance its state charter as a justification for exemption from national labor policy; instead, the bank relied on a two-fold argument involving banking law and participation in the national banking system.

First, the bank maintained that participation in the Federal Reserve System and the Federal Deposit Insurance Corporation exempted it from regulation as an arm of the government -- virtually the same argument unsuccessfully made by Bank of America. The bank's second contention was more original; Northern Trust claimed that "the National Banking Act provides that no bank subject to the Act shall be subject to any visitatorial powers other than such as are authorized by law..."<sup>25</sup> Since the NLRB has, under Section 9 of the Act, the power to investigate organizations under its jurisdiction for various purposes specified by Congress, the bank was arguing that the anti-visitatorial provisions of the banking laws shielded it from NLRB jurisdiction. In this case, the shield was intended to defend the bank from a subpoena requested by the NLRB to examine the bank's records and thus to ascertain whether the bank was involved in interstate commerce.

Judge Holly bluntly struck down this new defensive strategy:

The argument does not impress me. Congress had made the Act applicable to all employers...engaged in interstate commerce and has not excepted banks; ...bargain-(ing) collectively with their employees does not interfere with the conduct of the business of the bank any more than would a voluntary agreement as to wages and hours..<sup>26</sup>

Judge Holly went on to specifically bring up the state charter v. federal charter issue on his own, but he promptly demolished it by pointing out that numerous corporations with state charters were subject to national labor policy due to the interstate nature of their businesses.<sup>27</sup> The major focus of this case is Judge Holly's ruling on the "commerce" issue, which will be elaborated below.

Northern Trust did not appeal the District Court ruling, and further research did not reveal any later cases dealing with this question, so current standing of banks (both state and federal) would seem to be constant since Northern Trust was decided in 1944.

Before leaving this issue, it would do well to note the Taft-Hartley amendments to Section 2(2) in combination with developments in banking since 1947.

Most banks today are more deeply involved as agents of the government (a category specifically exempted by Taft-Hartley) than they were in 1947. For example, banks aid in the enforcement of fair housing laws through their mortgage policies; they sell food stamps in many parts of the country; they frequently serve as distribution centers for Internal Revenue forms; they send reports of savings account interest and other transactions to the Internal Revenue Service; and they recently have been required to report all large cash transactions to the Treasury Department.<sup>28</sup>

On the other hand, the amendments of 1947 specifically add Federal Reserve Banks to the list of exceptions. This addition tends to support the position of the NLRB; if Congress meant to exclude all banks, it would have done so explicitly in 1947, rather than narrowly excluding just the Federal Reserve Banks (central banks) themselves.

In conclusion, it would seem that banks are still "employers" within the meaning of Section 2(2), even though they are deeply involved in quasi-governmental functions as enforcers, distributors, and information reporters.

#### B. Banks and the Commerce Clause

"Commerce" is defined in Section 2(6) of the Act as "trade, traffic, commerce, transportation, or communication among the several states."<sup>29</sup> This definition is unaltered in the amended form of the statute. The Act further says (in Section 2(7)), "The term 'affecting commerce' means in

commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."<sup>30</sup>

On their faces, Sections 2(6) and 2(7) would seem to include bank activities within their ambit as a matter of course. However, the contention that banks are not engaged in commerce within the meaning of the Act has been recurrent throughout the cases.

Bank of America advanced this contention in the first case discussed above.<sup>31</sup> Unfortunately, the published opinion of the NLRB does not disclose the full detail of the bank's argument. Reconstructing the bank's reasoning from the NLRB's response, one might assume that it contended that it did not deal in goods (a dictionary definition of commerce), and certainly did not transport goods across state lines. The Board is explicit and comprehensive, however, in explaining its rationale for classifying Bank of America as both "in commerce" and "affecting commerce" by its activities. The following list contains some of the main bank activities cited by the Board in support of its holding:

- (1) transmits money from one part of the country to another by drawing drafts on correspondent banks in other states;
- (2) finances current business operations of customers engaged in commerce;
- (3) issues letters of credit and drafts which are instruments of commerce;
- (4) finances travel through issuance of traveller's checks and letters of credit;
- (5) trades in foreign exchange, etc.<sup>32</sup>

The Board summarized its argument as follows:

It is a matter of common knowledge that the commercial bank...is the primary medium in the commercial system...for the transfer of money credits from one portion of the country to another...whereby payment is effected for goods...sold and transported...

Commerce without payment for the goods moved in commerce would immediately fail.<sup>33</sup>

The NLRB concluded that strikes or labor unrest of the type Congress sought to reduce through the adoption of the Act would "obstruct commerce" if they occurred in the bank, thus providing a clear indication that banks participate in "commerce" in the way Congress defined

"commerce" in the Act.<sup>34</sup>

Upholding the Board on appeal, Circuit Judge Healy drew an analogy between the credit services of a bank and the power services of a public utility:

The dependence of commerce upon the continuity of credit furnished by these great banking institutions is as marked as was its dependence upon the electric energy furnished by the intra-state utilities involved in *Consolidated Edison v. NLRB*, 305 U.S. 197. While credit services, considered as aids to commerce, may be less tangible than is electric current, for present purposes the differences would appear to be immaterial.<sup>35</sup>

Judge Healy further demonstrated that the bank's regular dealings with its out-of-state correspondent banks and customers involved it directly in communication between the states, an activity specifically included in the definition of "commerce" provided in Section 2(6).<sup>36</sup>

The 9th Circuit decision was affirmed through Supreme Court denial of certiorari, and was cited as precedent by the District Court of the District of Columbia in *Reilly v. Millis*, 13 LRRM 554, in its decision that the City National Bank and Trust Company of Chicago was subject to national labor policy.

The jurisdictional reach of the NLRB under the Commerce Clause of the United States Constitution is further extended with regard to banks in *NLRB v. Northern Trust*. In this case, discussed above, the District Court of the Northern District of Illinois granted a subpoena requested by the NLRB under its Section 9(c) investigatory powers to examine the records of Northern Trust to determine whether this state-chartered bank met the definition of an employer "in commerce." The court went further than granting the request; holding that virtually every bank is involved in activities affecting interstate commerce, the Court rendered its subpoena superfluous even as it was issued.<sup>37</sup> As authority for this sweeping holding, Judge Holly cited the opinion of Justice Frankfurter for the Supreme Court in *Polish National Alliance v. NLRB*, which had been issued just one month prior to the decision in *Northern Trust*.<sup>38</sup> Frankfurter's crucial argument says:

...Congress(,) in order to protect interstate commerce from adverse effects of labor disputes(,) has undertaken to regulate all conduct having such consequences that constitutionally it can regulate.<sup>39</sup>

Commenting on the wording of Sections 2(6) and 2(7) and its implications, Frankfurter said:

...half a dozen enactments...are sufficient to illustrate that when (Congress) wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only "commerce," but also matters which "affect," "interrupt," or "promote" interstate commerce.<sup>40</sup>

Rejecting just the sort of hair-splitting arguments that had been advanced by the banks, Frankfurter commented:

When the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions.<sup>41</sup>

Applying Frankfurter's reasoning (which had involved a fraternal society's insurance fund) to the situation of Northern Trust, Holly said, "The reasoning of the court...brings the ordinary business of a bank, other perhaps than a very small local bank, within the meaning of the term interstate commerce."<sup>42</sup>

Northern Trust seems to be the last word on the status of banks in regard to the Commerce Clause and the labor policy. One might add, as a final comment, that Judge Holly's exception of "very small local" banks is probably no longer valid, due to the wider construction afforded the Commerce Clause in more recent cases (particularly in the Civil Rights area), the increased mobility of the American lifestyle, and the interstate character of most corporations doing business with banks, all of which combine to make interstate transactions an integral part of the operations of the bank, no matter how large or small.

The first part of this paper has examined the case history of NLRB jurisdiction over banks. Typical bank defenses against being included within the jurisdiction of national labor policy have been examined, and the reasoning of the Courts in striking down these defenses has been presented. Now that we have established the liability of banks to being organized by labor unions, we move on to examine the crucial strategic issue of how that organization is to be attempted by unions -- the issue of unit determination.

## Part II: The Appropriate Unit for Bargaining

During the 1960's, unions interested in bank organization adopted a strategy called the 'splinter approach.' Convinced by their experiences of the 1950's that elections in bank-wide units were exercises in futility, unions concentrated their efforts on organizing in branch banks or specific departments in central offices.

The first case to deal with this new strategy is referred to in Board Member Kennedy's dissent in *Bank of America and Union*;<sup>43</sup> Kennedy cites the Board's unpublished ruling in *Bank of California*, decided in 1960.<sup>44</sup> In that case, the NLRB turned down the union's application for a branch unit; the Board found centralized administrative and personnel functions, including personnel transfer, hiring, wage determination, retirement, and welfare plans to be controlling factors.<sup>45</sup>

However, with the emergence of the new "Kennedy Board" in the early 1960's, a drastic change took place in the Board's policy. The NLRB, in deciding unit questions, returned to the policies expressed in the earliest case in this area, *Banco Popular de Puerto Rico* (1945).<sup>46</sup> In *Banco Popular*, a branch unit was found appropriate based on history of organization (the union had only organized in one branch) and the geographical isolation of the branch. A key point in the decision is the Board's statement that a bank-wide unit is always appropriate, but is not necessarily the only appropriate unit. This reasoning was to recur in the 1960's, when the Board would even acknowledge the dual "appropriateness" of larger and smaller units within the same large bank.<sup>47</sup>

The NLRB reversed the *Bank of California* holding in *Banco Credito y Ahorro Ponceno*.<sup>48</sup> This decision, affirmed by the First Circuit Court of Appeals in 1968, expands on the limited statement in *Banco Popular*, offering a specific list of reasons for acknowledging the appropriateness of a branch unit:

- (1) Branch managers ... supervise employees on a day-to-day basis, recommend ... pay increases, promotions, transfers, discipline, and discharge;
- (2) Branch managers...explain...new policies to employees;
- (3) ...assign overtime work;
- (4) ...establish vacation schedules;
- (5) ...resolve minor employee grievances. (Also,)
- (6) ... (note the) relative remoteness of branch...;
- (7) ... (and) almost complete absence of interchange

of personnel between (branch) and other parts of the system.<sup>49</sup>

This list of personnel functions and characteristics was adjudged by both the NLRB and the Court to be more important in making the unit determination than the acknowledged centralized administration, "uniform policies and standards, and corresponding lack of authority in local branch managers."<sup>50</sup>

In making this decision, the Court explicitly articulated the implicit logic of *Banco Popular*:

The Bank...cannot succeed only by demonstrating that a system-wide unit would be appropriate but must also show that a branch unit is clearly not appropriate.<sup>51</sup>

The Court cited the "broad discretion... (of) the Board, the limited scope of review, (and) the Act's policy of assuring freedom to employees...to organize" as reasons for upholding the Board's original ruling.<sup>52</sup>

McPherson; discussing the legal situation in his 1969 study, claims the refusal of the Supreme Court to grant certiorari "established the splintering approach as a workable method for union organizers seeking to establish a significant foothold in the nation's banks."<sup>53</sup> The NLRB seemed to take the First Circuit decision and the Supreme Court silence as expressing approval in principle for the branch unit concept, and the Board has continued in four major cases to apply and broaden the concept of splintering.

In *Bank of America and Lithographers Union* (1969), the Board sanctioned a unit of lithographic and other graphic employees in one department of the bank's centralized service facility.<sup>54</sup> The community of interest of the employees was considered more important than the functional integration of the bank; moreover, since the unit in question was housed in the same building as other bank departments, the Board had reduced its list of criteria by one ("relative remoteness" of unit).

In *Wells Fargo and UPEIU* (1969), the Board narrowed the *Bank of America* holding slightly by refusing to establish a unit in a service department which had considerable interchange and contact with other departments in the same building. However, in the same decision the Board recognized a branch unit even though it acknowledged the "appropriateness" of regional and divisional units which would be of an intermediate size between that of the branch and a bank-wide unit.<sup>55</sup> Once again, the basic thrust of the Board's

reasoning was that where there were several appropriate units, the one requested by the employees or their organization would be favored over the one sought by the bank.

In Wayne Oakland Bank (1971), the NLRB routinely applied similar criteria and recognized several branches, a drive-in facility, a loan department, and a main office as distinct and appropriate units.<sup>56</sup> This was certainly an expansion of the previous decisions, as the loan office, main office, and drive-in facility were geographically connected.

In Bank of America and Union of Employees (1972), the Board once more recognized a branch unit, severing out trust department employees who were present in the branch.<sup>57</sup> There was a crucial difference in this case, however. For the first time, a member of the Board submitted a vigorous dissent showing remarkable prescience, for just a month later Wayne Oakland was overturned by the Sixth Circuit on appeal by the bank.<sup>58</sup>

Kennedy's dissent in Bank of America recalls the unpublished Bank of California decision of 1960.<sup>59</sup> In that decision, the Board found centralized administration and functional integration of the bank's personnel policies to be overriding factors in denying a union's branch unit request.

Kennedy argued for a re-establishment of the Bank of California holding by citing an early "Kennedy Board" decision (1962) in which the Board had defined a "two-fold objective" in determining units:

- (1) ...giving employees freedom of choice and
- (2) in a group which has a 'direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.'<sup>60</sup>

Kennedy focuses his attention on the second 'fold,' pointing out that the branch manager does not have authority to negotiate many of the "mandatory" subjects of bargaining. Arguing for a regional unit (regions of Bank of America consist of several districts, each containing several branches), Kennedy points out:

It is the district branch administrators who work under the regional vice president who ensure that the Employer's operational and personnel policies are enforced. They are the persons vested with

authority to vary policies.<sup>61</sup>

In arguing for a unit of intermediate size in this large bank, Kennedy sought to strike a compromise between the branch unit (which would meet the first objective of the Board) and the bank-wide unit (which would meet the second). In reversing Wayne Oakland, the Sixth Circuit Court went a step further by implicitly asserting that a maximization of the second objective would result in a maximization of the first. By establishing a unit most effective for the 'factual situation,' implied the Court, the Section 7 rights of employees to be represented collectively would be most fully realized.

In this connection, Circuit Judge Kent focused on centralized control of labor policy in his decision for the Court.<sup>62</sup> He quoted liberally from the report of the NLRB's regional director to provide evidence that a bank-wide unit in Wayne Oakland would comport best with the 'factual situation.'

The Director also found with respect to personnel policies:  
 "...substantially all...employees work common hours...  
 Wage levels and fringe benefits are centrally determined  
 and administered. All hiring...is done by the central Per-  
 sonnel Department... Newly hired personnel are not hired  
 for a specific location, but are assigned to the main office  
 during...training..."<sup>63</sup>

Judge Kent left some hope for the splinter strategy when he distinguished the Wayne Oakland situation from Banco Credito by pointing to the geographic closeness of Wayne Oakland's branches and the significantly higher degree of interchange among branch personnel in the Wayne Oakland Bank.<sup>64</sup> In a brief dissent, Circuit Judge Edwards noted the wide discretion allowed the NLRB under the Act and added that he was convinced by the factual evidence presented by the Board that its decision was supported by the evidence.<sup>65</sup>

What is the current law regarding appropriate units in banks? The Wayne Oakland and Banco Credito decisions by two different Circuit Courts of Appeals have not yet been resolved or collated through dual affirmation (and differentiation) by the Supreme Court as of this writing. Banco Credito was denied certiorari, however, thus retaining some stamp of higher approval than Wayne Oakland, at least within the confines of the First Circuit.

Reporting Wayne Oakland, the American Bankers Association's publi-

cation, Banking, saw the decision as evidence of a new trend toward "multiunits." Quoting from a speech by NLRB Chairman Edward B. Miller to a banker gathering, Banking set forth the following criteria for unit determination:

...We look to see whether there is regular and frequent interchange of employees as among the several branch banks; ...how much autonomy and authority is afforded to the local manager; ...the geographical spread... If we find very little authority, very extensive interchange and not too great a geographical spread..., we are more likely to insist upon a grouping of branches.<sup>66</sup>

One might view the different rulings of the Circuit Courts in two different ways. First, one might assert that there is no conflict between the two, because of the reasons set forth by Judge Kent and because of the difference in size and scope of Bank of America and Wayne Oakland Bank. On the other hand, one could see an essential conflict between a maximization of employee freedom to determine the unit they want to be organized in and the discretion of the Board or Courts in deciding which of several seemingly appropriate units is subjectively more efficient for collective bargaining.

If the Supreme Court were to take the latter view, it might decide with Judge Kennedy that an intermediate unit is the answer to the problem of balancing employee freedom against unit functionalism. In the case of a large operation like Bank of America or Wells Fargo, such a unit might be a region or district composed of several branches. In the case of a smaller bank, such as Wayne Oakland (with eleven branches and two other clearly distinct facilities), there might be one or more units consisting of several branches, such as a unit of suburban branches, a unit of urban branches, and a unit of the main office and drive-in facility. The Court might even decide that banks with less than some given number of branches would be granted bank-wide units for reasons of practicality or convenience. This is, however, mere speculation; the Supreme Court might be persuaded to go to one extreme or the other, recognizing branch units where they are most practical and bank-wide units where they seem more efficient in an affirmation of Judge Kent's reasoning in his differentiation of Wayne Oakland from Banco Credito. The Supreme Court may even decide to leave the unit decision completely to the discretion of the NLRB, thus tacitly reaffirming the Banco Credito policy currently pursued by the Board.

If the NLRB modifies its approach to conform to ruling in future cases, there will be no higher court test unless unions decide to pursue a test case (as the banks did in Wayne Oakland.) If the NLRB continues on its present course (the Banco Credito Approach), bank appeals may bring an eventual Supreme Court test. At this writing, the Board has not denied a branch unit request since Bank of California in 1960.

Notes

1. L. Quincy McPherson, "Why the Bank?" in McPherson and Seiler, *Your Bank Versus the Union - What to Do About It*, Boston: Financial Publishing Company and Stonier Graduate School of the American Bankers Association, 1972.
2. *Ibid.*, p. 8.
3. *Ibid.*, p. 12.
4. *Ibid.*, p. 17.
5. *Ibid.*, p. 11.
6. The whole tenor of the McPherson and Seiler study, as indicated by the title and the sponsorship of the publication, indicates the anti-union stance pervading the banking business, as does the jubilant tone of the article, *infra* note 66.
7. McPherson, *supra* note 1, pp. 7, 16-17.
8. AFL-CIO action reported in *Banking*, June 1971, p. 16. Other unions indicated in McPherson, *supra* note 1, p. 8.
9. McPherson, *supra* note 1, p. 8.
10. *Banking*, January 1973, p. 10.
11. McPherson, *supra* note 1, p. 10.
12. *Banking*, July 1971, p. 9.
13. McPherson, *supra* note 1, p. 7.
14. *Ibid.*
15. 14 NLRB No. 15 (Case No. C-903, 1939)(14 NLRB 207).
16. *Ibid.*, at 208.
17. It would do well to note that some relevant portions of the National Labor Relations Act were amended in 1947. However, these "Taft-Hartley" Amendments do not essentially change the argument of this section, and provide in one instance additional support for the position of the NLRB. Consequently, in discussing the definitions of "employer" and "commerce," the writer will use the Act as amended, although all the cases discussed in Part I took place before 1947.
18. Labor Management Relations Act, Public Law No. 101, 80th Congress, 1st Session (1947), 61 Stat. 136 (1947), as amended by Public Law No. 257, 86th Congress, 1st Session (1959), 73 Stat. 541 (1959); 29 U.S.C. Sections 141 et. seq.; Section 2(2).
19. *Bank of America*, 14 NLRB 207 (1939), at 209.
20. *Ibid.*, at 210.
21. *Ibid.*
22. *NLRB v. Bank of America*, 11 LRRM 546 (9th Cir., 1942), cert. denied, 19 April 1943; at 548.
23. *Ibid.*, at 546.

24. NLRB v. Northern Trust, 14 LRRM 830 (No. Dist. Ill., 1944).
25. Ibid., at 831.
26. Ibid., at 833.
27. Ibid., at 833-834.
28. The writer's knowledge of these functions stems from his employment by a national bank during the summer of 1972.
29. LMRA, *supra* note 18, Section 2(6).
30. Ibid., Section 2(7).
31. Bank of America, *supra* note 19.
32. Ibid., at 210-211.
33. Ibid., at 211.
34. Ibid., at 212.
35. NLRB v. Bank of America, *supra* note 22, at 547.
36. Ibid., at 548.
37. NLRB v. Northern Trust, *supra* note 24, at 831.
38. Polish National Alliance v. NLRB, 322 US 643 (S.C., 1944).
39. Ibid., at 647.
40. Ibid.
41. Ibid., at 650.
42. NLRB v. Northern Trust, *supra* note 24, at 831.
43. 196 NLRB No. 76, 80 LRRM 1081.
44. Bank of California, Case 20-RC-4084, unpublished decision quoted in 80 LRRM 1086.
45. Summarized in McPherson, *supra* note 1, p. 13.
46. 61 NLRB 676.
47. Banco Credito v. NLRB, 67 LRRM 2718 (1st Cir., 1968).
48. 167 NLRB No. 52.
49. Banco Credito, *supra* note 47, at 2719.
50. Ibid.
51. Ibid.
52. Ibid.
53. McPherson, *supra* note 1, pp. 15-16.
54. 174 NLRB No. 51, 70 LRRM 1179.
55. 179 NLRB No. 79, 72 LRRM 1356.
56. 192 NLRB No. 59, 78 LRRM 1062.
57. Bank of America, *supra* note 43.
58. Wayne Oakland Bank v. NLRB, 80 LRRM 3042 (6th Cir., 1972).
59. Bank of California, *supra* note 44.
60. Kalamazoo Paper Box Corporation, 136 NLRB 134, 137, as quoted in Kennedy dissent, *supra* note 44.
61. *Supra* note 44, at 80 LRRM 1087.
62. *Supra* note 58.
63. Ibid., at 3043.
64. Ibid., at 3044.

65. *Ibid.*, at 3045.

66. Speech by Edward B. Miller, Chairman of the NLRB, reported in, Alan E. Adams, "Banks Score in Bargaining Unit Fight," *Banking*, September 1972, p. 8.