Sierra Vista Hospital, Inc. and California Nurses' Association, affiliated with the American Nurses' Association. Cases 31-CA-5760 and 31-RC-3166[1]

March 30, 1979

SUPPLEMENTAL DECISION AND ORDER

On August 8, 1975, the Regional Director for Region 31 of the National Labor Relations Board issued a Decision and Direction of Election in Case 31-RC-3166 in which he found, *inter alia,* that, contrary to the contentions of Sierra Vista Hospital, Inc. (herein the Respondent or the Hospital), California Nurses' Association (herein CNA), affiliated with the American Nurses' Association, was not subject to the influence, domination, and control of supervisors and was a bona fide labor organization. Subsequently, the Employer filed a timely request for review, which the Board denied by telegraphic order dated September 9, 1975, with the caveat that, if CNA were certified and did not delegate its bargaining authority to a local autonomous chapter controlled by nonsupervisory employees, a motion to revoke certification would be entertained. An election was held on September 4, 1975, in which a majority of the votes was cast for CNA. On September 12, 1975, CNA was certified as the exclusive bargaining representative for Respondent's registered nurses. CNA thereafter requested bargaining. On October 29, 1975, Respondent filed with the Board a motion to revoke certification, alleging that CNA had failed to delegate its bargaining authority. On January 30, 1976, the Board remanded the case to the Regional Director to adduce further evidence on the issues raised by the motion, particularly with respect to CNA's negotiating procedure and the degree of participation of supervisory nurses in the bargaining process.[2] After the hearing, the case was transferred to the Board for decision.

On August 31, 1976, the Board issued a Decision and Order[3] in which it denied Respondent's motion to revoke certification, finding that CNA had "effectively delegated its collective-bargaining authority, which it acquired by virtue of the Board's certification here, to an autonomous local unit of nonsupervisory registered nurses, and that said local is properly exercising this authority on its own behalf."[4]

Respondent refused to bargain with CNA, and the latter consequently filed a charge in Case 31-CA-5760, upon which the Regional Director issued a complaint alleging that Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by its refusal to bargain. Thereafter, the General Counsel filed a Motion for Summary Judgment, which was granted by the Board on April 22. 1977.[5]

Following issuance of the Board's Decision and Order in *Sierra Vista II,* Respondent filed a petition for review and the General Counsel filed a cross-petition for enforcement in the United States Court of Appeals for the Ninth Circuit. While this action was pending, the United States Court of Appeals for the Fourth Circuit, on August 31, 1977, issued its decision in N.L.R.B. v. *Annapolis Emergency Hospital Association, Inc.*[6] (herein *Anne Arundel*), denying enforcement of the Board's Order in *Annapolis Emergency Hospital Association, Inc., d/b/a Anne Arundel General Hospital,*[7] on which the Board relied in its prior decision in the instant case. In *Anne Arundel,* the court found that "delegation of the bargaining function to [the local chapter] was the *sine qua non* to certification of MNA," and speculated that by conditional certification the Board was seeking to avoid "the difficult problem of whether an employer can be forced to bargain with a labor organization which allows the employer's supervisors to be members."[8] The court read Section 9 and Section 2(4) and (5) of the Act as requiring "that the certified labor organization be willing and able to bargain" and as prohibiting "the Board from certifying MNA to bargain on condition that it not bargain,"[9] and found that the Board effectively certified a "different labor organization than that petitioning."[10] Accordingly, the court concluded that the Board had exceeded its authority, inasmuch as "under the Act the Board may not certify a bargaining agent on condition that it not bargain."[11]

The Board did not seek certiorari in *Anne Arundel*

[1] As fully discussed in this Decision, the Board has decided to reopen the proceedings in Case 31-RC-3166. Accordingly. in order to effectuate the purposes of the Act and to avoid unnecessary costs or delay. Cases 31-CA-5760 and 31-RC-3166 are hereby consolidated.

[2] Member Jenkins, dissenting, would have denied the motion.

[3] 225 NLRB 1086, herein *Sierra Vista I.*

[4] 225 NLRB at 1088.

[5] 229 NLRB 232, herein *Sierra Vista II.* The bound volume of Board Decisions incorrectly lists former Member Walther, instead of Member Murphy. as participating in this Decision.

[6] 561 F.2d 524.

[7] 221 NLRB 305 (1975). herein *Anne Arundel II.* In the underlying representation proceeding reported at 217 NLRB 848 (1975), herein *Anne Arundel I,* the Board directed an election, finding no merit to the employer's contention that the Maryland Nurses' Association was not a bona fide labor organization because it was subject to the influence, domination, or control of supervisors.

[8] 561 F.2d at 534-536.

[9] *Id* at 537.

[10] *Ibid*

[11] 561 F.2d at 528. Judge Hall (adopting the unpublished panel opinion of the late Judge Craven) dissented. He argued, *inter alia,* that Congress made employer (e.g., supervisory) domination of unions an unfair labor practice because it was unions and not employers who feared such domination and that the employer was attempting "to turn the statutory offense of 'employer domination' into an excuse f a refusing to bargain." He suggested further that a holding that the presence of other employers' supervisors "somehow flaws the integrity of the bargaining representative" could only be based on some conflict of interest (561 F.2d at 530) and that the employer failed to show that a real a potential conflict of interest existed.

and requested the Court of Appeals for the Ninth Circuit to remand the instant case to the Board, in order that the Board might reconsider its decision in light of the issues raised by the Fourth Circuit's decision in *Anne Arundel.* On March 7, 1978, the Ninth Circuit remanded the case to the Board. Respondent and CNA have submitted timely statements of position.

The Board has reconsidered its earlier decisions in this case in light of the court's decision in *Anne Arundel,* the parties' statements of position. and the entire record in these proceedings. For the reasons fully set forth below. we have concluded that we will not condition certification of nurses' associations on the delegation of their bargaining authority to autonomous chapters or locals.

Prior to the enactment of the 1974 amendments to the Act, the Board has had occasion to address the issue of whether labor organizations are disqualified from acting as bargaining representatives because of the active participation of supervisors in the labor organizations' internal affairs. However, this issue has been raised in numerous state nurses' association cases since 1974, and our experience in the area has led us to the conclusion expressed in this case. that conditioning certification of a state nurses' association on its delegation of bargaining authority to a local autonomous chapter or unit is neither necessary nor useful in resolving this issue.

The conditional certification approach is ineffective as a means for resolving the problems created by the participation of supervisors in labor organizations. Indeed, it raises more problems than it solves. Thus, in attempting to resolve issues concerning the qualification of nurses' associations via a requirement that bargaining authority be delegated, the Board has been confronted, *inter alia,* with the question of whether it has the authority to certify a labor organization conditionally, as well as with factual questions in each case as to whether the nurses' association has taken sufficient measures to insure local control of bargaining. Indeed, both of these issues were discussed by the court in *Anne Arundel.*

The court decision in *Anne Arundel* pinpoints another difficulty caused by conditioning certification of a nurses' association on delegation of bargaining authority: the conditional certification approach has obfuscated the distinction between nurses' associations as statutory labor organizations and the issue of whether the participation of supervisors in the internal affairs of the association disqualifies it as a bargaining representative.

In cases in which state nurses' associations have sought bargaining rights, employers repeatedly have raised the issue whether the presence and active participation of supervisors in the hierarchy of the associations precludes the associations from serving as bargaining representatives. Although we have consistently found state nurses' associations, in such instances. to be labor organizations within the meaning of Section 2(5) of the Act, it is apparent that several of our decisions with respect to that issue have generated some confusion. Thus, some Board decisions have pointed to local control of bargaining as a factor in determining 2(5) status.[12] In others, the Board has found the associations to be statutory labor organizations but has indicated, in making the determination, that a failure to establish local control of bargaining could be grounds for a revocation of certification.[13]

The question of statutory labor organization status is, however, distinct from the question of a statutory labor organization's qualification to act as a bargaining representative in all instances and without regard to the circumstances under which bargaining takes place or will take place. And, to the extent that distinction has not emerged from or been maintained by our treatment of the labor organization status of state nurses' associations, the point is to be emphasized: the mere presence of supervisors in a labor organization is virtually irrelevant to determining status under Section 2(5) of the Act. Indeed, we have, with court approval, uniformly construed Section 2(5) to reach all associations which exist for the purpose, in whole or in part, of collective bargaining and which admit employees to membership, despite the fact that supervisors, in addition to employees and even in substantial numbers. may likewise be admitted.[14]

At the outset, therefore, we stress that "labor organization" status under the Act bears no relation to a delegation and/or local control of bargaining,[15] and we disavow any implication to the contrary in prior Board decisions involving nurses' associations. As long as nurse-employees participate in the association and one of its purposes is representing employees in collective bargaining, a nurses' association, like any other, meets the definition of "labor organization" in Section 2(5) of the Act.

But, while the presence of supervisors in an association does not bear upon its "labor organization" status, the identity and role of those supervisors in the labor organization may operate, nonetheless, to disqualify it from bargaining in certain instances. This potential for disqualification stems from an inherent statutory concern that "[e]mployees have the right to

[12] See, e.g., *Anne Arundel I. supra.*

[13] See. in addition to *Sierra Vista* I, *supra. Sisters of Charity of Providence. St. Ignatius Province. d/b/a St. Patrick Hospital.* 225 NLRB 799 (1976).

[14] *International Organization of* Masters. *Mates and Pilots of America, Inc., AFL-CIO (Chicago Calumet Stevedoring Co., Inc.),* 144 NLRB 1172, 1177 (1963). In that case. the union was held to be a labor organization where a minimum of 170 of the approximately 11,000 members were statutory employees.

[15] See. e.g., *Oak Ridge Hospital of the United Methodist Chruch,* 220 NLRB 49 (1975): *Valley Hospital, Ltd.*, 220 NLRB 1339 (1975).

be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests,"[16] and the identity and role of supervisors admitted to membership in a labor organization can, in certain circumstances, compromise that statutory interest. Thus, active participation in the affairs of a labor organization by supervisors employed by the employer with whom that labor organization seeks to bargain can give rise to question about the labor organization's ability to deal with the employer at arm's length. Central factors involved in considering this issue are the employees' right to a collective-bargaining representative whose undivided concern is for their interests and the employer's right to expect loyalty from its own supervisors. Active participation" by the employer's own supervisors may, in a given case, contravene either or both of these legitimate interests. Indeed, we have held that an employer has a duty to refuse to bargain where the presence of that employer's supervisors on the opposite side of the bargaining table poses a conflict between those interests."

The active, internal union participation of supervisors of a third-party employer (i.e., an employer other than the one with whom the labor organization seeks to bargain) does not present the danger that an employer may be "bargaining with itself." But it may operate, nonetheless, to disqualify a labor organization from acting as a bargaining representative for particular employees. Although, in such cases, the legitimate interest of an employer in the loyalty of its supervisors is not in issue (the active supervisors are not its own), the presence of supervisors of third-party employers may impinge upon the employees' right to a bargaining representative whose undivided concern is for their interests. Not because, as has been argued during the course of the debate on this issue,[19] there is an inherent conflict between all supervisors and all employees, but because of the possible relation between the employer with whom bargaining is sought and the employer or employers of the supervisor participating in the bargaining process. Thus, we have held that an employer may lawfully refuse to bargain with a bargaining representative which itself was in a competing business." We have also held that an employer may refuse to bargain where the union's bargaining team included an agent of a union representing employees of a principal competitor; since trade secrets might be revealed, that agent's presence as a negotiator raised a clear and present danger to meaningful bargaining.[21]

Under the foregoing analysis, it is conceivable that the presence of even one supevisor on CNA's board of directors, if employed by Respondent, could present a danger that unit employees' interests might not be single-mindedly represented. That would depend on the role, if any, of that supervisor in CNA's internal affairs. It is also conceivable that the active involvement in CNA of supervisory nurses employed by other employers may, in some circumstances, present a conflict of interest requiring that CNA be disqualified from representing a particular unit for which it was certified. That would depend on a demonstrated connection between the employer of those unit employees and the employer or employers of those supervisors, and, with respect to this possibility, we stress that the participation of supervisors (of third-party employers), even if constituting a majority of a nurses' association's board of directors, would not in and of itself necessarily require disqualification, absent some other demonstrated conflict of interest, for we do not assume an "inherent" conflict between supervisors and employees in the bargaining process.

An employer who establishes a disqualifying conflict of interest may, as we have indicated lawfully refuse to bargain. But it is clear that the burden on the employer to show such conflict is a heavy one:

> There is a strong public policy favoring the free choice of a bargaining agent by employees. The choice is not lightly to be frustrated. There is a considerable burden on a nonconsenting employer, in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present."

With respect to the procedural aspects pertaining to the consideration of these issues, CNA contends in its statement of position that the Board generally does not permit litigation in representation cases of unfair labor practice issues such as employer domination of

[16] *Nassau and Suffolk Contractors' Association, Inc., et al.*, 118 NLRB 174, 187 (1957).

"We emphasize that we are here concerned with supervisors who have an active role in and some authority with respect to directing the affairs of a labor organization. Cf. *International Organization of Masters, Mates and Pilots, supra; Allen B. Dumont Laboratories, Inc.*, 88 NLRB 12% (1950).

[18] *Nassau and Suffolk Contractors' Association, supra; Banner Yarn Dyeing Corporation*, 139 NLRB 1018 (1962); *Welsbach Electric Corporation*, 236 NLRB 503 (1978).

[19] In *Anne Arundel*, the employer asserted "a potential conflict of interest in the fact that supervisors generally, by whomsoever employed, share a proprietary perspective which favors the moderation of wages and fringe benefits." 561 F.2d at 531. That is, the employer contended MNA should be disqualified from acting as the bargaining representative for its rank-and-file nurses because they might not receive wages and benefits as great as if they were represented by a labor organization composed exclusively of nonsupervisory employees. Largesse aside, we believe that view of the matter turns the statutory scheme of thing upside down.

[20] *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954).

[21] *CBS Inc.*, 226 NLRB 537 (1976).

[22] *N.L.R.B.* v. *David Buttrick Company*, 399 F.2d 505, 507 (1st Cir. 1968). There can be no question with regard to a conflict-of-interest defense that the Board agrees with the Court of Appeals for the First Circuit's formulation of a respondent's burden of shoving a "clear and present danger" and that the Board will strike that defense when a respondent fails to carry its burden.

or interference with a labor organization in violation of Section 8(a)(2) of the Act and that as a matter of policy the Board should not permit litigation of issues concerning supervisory involvement in CNA in a representation proceeding.[23] Our dissenting colleague apparently agrees with this view.

lssues concerning the qualification of a labor organization to bargain on behalf of particular employees have traditionally been considered in representation proceedings, wherein they are viewed from a conflict-of-interest perspective rather than as the litigation of unfair labor practice issues in a representation proceeding." While "conflict of interest" does embrace a variety of matters, some of which may be considered in unfair labor practice proceedings, e.g., whether an organization is "dominated" by supervisors within the meaning of Section 8(a)(2) of the Act, it likewise encompasses matters outside the ambit of unfair labor practice issues.[25] Characterizing the issue as a "conflict-of-interest" one is more than "convenient." As indicated earlier, cases involving the active participation of supervisors of third-party employers. by definition, do not concern themselves with an employer's interest in the loyalty of its supervisory corps and primarily involve employees' rights to a bargain-., ing representative whose undivided concern is for their interests. But that does not mean an employer is necessarily a neutral party to the union-employee conflict which may be present in such cases. As a general rule, an employer has a right to engage in collective bargaining which is not influenced by interests the bargaining representative may have outside its employee representative capacity. However, the extent of an employer's interest in such cases cannot be determined in a vacuum, can only be considered on the facts of a given case, and is a question on which we need not now pass.

Once "conflict of interest" is viewed as concerned with two different forms of conflict—one involving the conflict between an employer's interest in the loyalty of its own supervisors and that of employees in a single-minded representative, the other involving a conflict between that employee interest and an interest a union may have outside its representative responsibilities—it becomes evident, we think, that "conflict of interest" is broader in scope than Member Truesdale suggests.

With respect to the dissent's contention that consideration of supervisory participatian in nurses' associations will unduly delay the Board's representation proceeding, we have already emphasized the heavy burden imposed on an employer who seeks to establish a disqualifying conflict of interest. In these circumstances, we cannot agree with the dissent that our decision herein will have the effect of delaying the speedy resolution of representation cases or that we are permitting Respondent "to embark on a fishing expedition in a pond which [we] virtually concede is dry." For it should be clear that we are not by this decision countenancing any fishing expeditions in representation hearings, and if Respondent (or any other employer who raises a similar issue) is unable to adduce probative evidence substantiating a claim that supervisory participation in the affairs of the union presents a clear and present danger of interference with the bargaining process, its contention will be summarily found lacking in merit. If, on the other hand, an employer is able to establish that because of a conflict of interest the union is unable to approach the bargaining table

> . . . with the single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent, and there must be no ulterior purpose. . . .[26]

then it cannot be argued that the "pond is dry."

Our dissenting colleague further argues, *inter alia,* that it is unnecessary to consider alleged supervisory domination at the preelection stage because any employer confronted with such a problem also has self-help remedies readily available to it.[27] However, as the dissent at least implicitly concedes, such remedies are available only where the employer's own supervisors are alleged to dominate or interfere with the association, and not all conflicts of interest involving supervisory participation which would disqualify a labor organization from representing an employer's em-

[23] To support this wntenrion, CNA and our dissenting colleague cite *Paragon Products Corporation,* 134 NLRB 662. 665 (1961). In our view. CNA's reliance on *Paragon Products* is misplaced. That case did not involve supervisory participation or other possible conflict of interest. Rather, in *Paragon* (which was itself a representation proceeding), the Board decided to consider as bars to elections in representation proceedings contracts wntaining union-security clauses. absent a prior determination that a clause was unlawful. And, in that context, the Board stated: "No testimony and no evidence will be admissible in a representation proceeding where the testimony or evidence is *only* relevant to the question of the practice under a contract urged as a bar [emphasis supplied]. . . ," 134 NLRB at 667. The issues and reasons for admitting evidence in the instant case are, of course, entirely different.

[24] See, e.g., *Brunswick Pulp & Paper Company,* 152 NLRB 973 (1965): New *York City Omnibus Corporation.* 104 NLRB 579. 584 (1953); *Columbia Pictures Corporation, et al., 94* NLRB 466 (1951), and cares cited therein at fn. 7. Indeed. in various cases involving nurses' associations. the Board has considered. in reprexntation proceedings. supervisory involvement in the associations. For example. in *Carle Clinic Association,* 192 NLRB 512 (1971). and *International Paper Company. Southern Kraft Division,* 172 NLRB 933 (1968). the Board found the associations qualified where the supervisors in positions of authority in the associations were not employed by the employer at issue: and see *St. Rose de Limo Hospital, Inc.,* 223 NLRB 1511 (1976).

[25] See. e.g., *Hurlem River Consumers Cooperative. Inc.,* 191 NLRB 314 (1971).

[26] *Bausch & Lomb Optical Company, supra* at 1559.

[27] Thus, Sec. 14(a) of the Act provides:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law. either national or local, relating to collective bargaining.

ployees necessarily involve conduct by that employer's supervisors. Additionally, utilization of a self-help remedy may well promote more litigation than it avoids, including disputes over alleged employee or supervisory status. A proliferation of litigation is hardly in the best interest of any of the parties.

The dissent also makes much of the fact that no employee has complained of supervisory domination of CNA. While this may be the case, the failure of employees to complain to the Board about a conflict of interest between them and their bargaining representative is not dispositive of the issue of whether such a conflict exists.[28]

Finally, if there were evidence indicating that the litigation of such questions measurably "protracted" our representation proceedings, our dissenting colleague's departure from our traditional approach would be more attractive. But, given the burden an employer has to establish the clear and present danger of conflict, there is little to suggest that our representation proceedings, particularly our preelection proceedings, where the need for speedy resolution is greatest at the same time that the employer's burden is heaviest,[29] are an improper forum in which to adduce evidence of conflict of interest.

From all of the foregoing, it is clear that we find state nurses' associations which meet the criteria set forth in Section 2(5) of the Act to be labor organizations and that we will treat claims that the associations are dominated or controlled by supervisors, or have some other conflict of interest which disqualifies them from representing employees, in the same manner that we will treat such allegations against other labor organizations. Thus, we will not require nurses' associations to delegate bargaining authority to any other entity as a condition of certification, and we will consider contentions of disqualifying conflicts of interest in representation proceedings where the association seeks certification as bargaining representative. Applying these principles to the instant case, it is clear that CNA is a labor organization within the meaning of the Act.

Respondent has not explicitly urged a "conflict-of-interest" defense and has, therefore, offered no evidence or explanation of how the presence of supervisors on the CNA board of directors who are employed by other employers raises a conflict of interest. However, as neither the underlying representation proceeding nor the instant unfair labor practice case was litigated on the basis of whether the presence of supervisory nurses employed by other employers on CNA's board of directors or in other positions of authority conflicted with the interest of unit employees employed by Respondent, we will rescind our previous Decisions and Orders granting the General Counsel's Motion for Summary Judgment and denying Respondent's motion to revoke certification. Thus, in order that the parties may have the opportunity to litigate these issues, we shall remand Case 31-RC-3166 to the Regional Director for Region 31 to schedule a hearing on Respondent's motion.[30] As set forth above, we do not view active participation in CNA by supervisors employed by other employers as presenting any inherent conflict of interest that would warrant granting Respondent's motion. Accordingly, unless Respondent can sustain its burden of demonstrating that there is a clear and present danger of a conflict of interest which compromises CNA's bargaining integrity, we shall deny Respondent's motion to revoke certification.

ORDER

It is hereby ordered that the Board's Decision and Order in Case 31-CA-5760 (229 NLRB 232) and prior Decision and Order in Case 31-RC-3166 (225 NLRB 1086) be, and they hereby are, rescinded.

IT IS FURTHER ORDERED that a hearing be held before a duly designated Hearing Officer for the purpose of receiving evidence to resolve issues raised by Respondent's motion to revoke certification in Case 31-RC-3166, namely, whether or not the presence of supervisors as officers in, on the board of directors of, or in other positions of authority to speak for or bargain on behalf of CNA disqualifies that association as the collective-bargaining representative of Respondent's nonsupervisory nurses.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting such hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said motion. Within

[28] The Board has previously stated:

> [A]s a matter of policy, the Board has held that a supervisor cannot act as representative of employees to decertify a union, nor can a supervisor represent employees of an employer for purposes of collective bargaining regardless of whether the employees desire such a bargainingagent and despite the employees' right in Section 7 to bargain collectively through representativesof their own choosing. In so holding the Board indicated that one purpose of the Act was to draw a clear line of demarcation between supervisory representativesof management and employees because of the possible conflicts in allegiance if supervisors were permitted to participate in union activities with employees. [*Bausch & Lomb Optical Company,* 108 NLRB at 1557.1

[29] Givm the strong public policy favoring free selection of a bargaining agent, it is obvious that the qualification question can only be resolved without resorting to speculation about a labor organization's possible subsequent course of conduct.

[30] As is indicated by the discussion above, we shall henceforth consider in a representation proceeding issues raised by supervisory participation. However, since CNA has in the instant case been certified, we see no point in setting aside the election at this time but rather shall simply consider Respondent's contention and evidence in light of its motion to revoke certification.

10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C.. eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party and shall file a copy with the Regional Director. If no exceptions are filed thereto. the Board will adopt the recommendations of the Hearing Officer.

IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 31 for the purpose of conducting such hearing and that the Regional Director be. and he hereby is. authorized to issue notice thereof.

MEMBER TRUESDALE, dissenting in part:

I agree with that portion of my colleagues' decision which abandons the "conditional certification" test of *Anne Arundel, supra.* It would seem evident. as the court stated. that "under the Act the Board may not certify a bargaining agent on condition that it not bargain."[31] I readily join the majority in laying that particular *non sequitur* to rest.

However, I fear that my colleagues are heading down another wrong path in their present decision. In my view. the Petitioner should be certified on the basis of the present record.

It should be noted at the outset that the Board, as a matter of policy, generally precludes "litigation of allegations of unfair labor practices in preelection phases of representation proceedings." As stated in *Paragon Products Corporation,*

> [S]uch proceedings are investigatory in character and do not afford a satisfactory means for determining matters which are more properly the subject of adversary proceedings with their accompanying safeguards.[32]

Since it is also well recognized that all parties have an interest in speedy resolution of representation matters, we ill serve the parties by allowing. unless absolutely necessary, protracted litigation of matters better left for another forum. In fact, the Board has held that the issue of whether a union is "company-dominated" is "not litigable in a representation proceeding."[34] Yet. by conveniently characterizing the issue herein as involving a potential "conflict of interest," the majority sees fit to ignore these basic Board policies. rejecting the Union's argument that the issue of supervisory participation may not be litigated except in an unfair labor praciice proceeding. Regrettably, it has done so on the basis of precedent which is not only outmoded but also inapposite and, in this case, despite the absence of any evidence of conflict, either real or potential.

It is true, as the majority notes. that in several early cases the Board, in a representation proceeding. held a purported labor organization disqualified from representing employees on the basis of obvious evidence of employer or supervisory domination. Thus, in ***Brunswick Pulp & Paper Co., supra,*** one of the cases cited. the petitioning organization accepted as journeymen members only "producers," and only producers were eligible to become members of the board of governors; yet a number of the producers were named as joint employers in the petition, and the Board found these producer-member-employers were either independent contractors or supervisors. To allow an organization of named employers a place on the ballot as a labor organization seemed, on its face, contrary to the spirit of the Act. In the ***New York City Omnibus Corp.*** and ***Columbia Pictures Corp.*** cases, ***supra,*** the petitioners were predominantly composed of, and controlled by, the respective employer's own supervisors. In ***New York City Omnibus,*** for example, 93 of the 113 individuals sought by the petitioner, including its president, were the employer's own supervisors. Similarly, in ***Columbia Pictures,*** individuals found to be the employer's supervisors comprised and materially participated in the organization of the petitioner.

The present case, and others involving nurses' associations, are a far cry from these early cases.[35] Nurses' associations have existed for many years, as both professional associations and collective-bargaining agents.[36] It is natural that the more senior nurses hold official positions in many of the associations. There is not even a suggestion or a hint that these associations are employer-formed or supervisor-dominated in the sense of the organizations involved in the cited cases. Moreover, the precedential value of ***New York City Omnibus*** and ***Columbia Pictures*** is diminished by the fact that they were decided only shortly after supervisory personnel were divested of full rights under the

[31] 561 F.2d at 528.

[32] 134 NLRB 662. 665.

[33] See. e.g., *Amalgamated Clothing Workers of America, AFL-CIO [Sagamore Shirt Company, d/b/a Spruce Pine Manufacturing Co.)* v. *N.L.R.B.*. 365 F.2d 898 (D.C. Cir. 1966). See also the opinion of the Board majority in *Handy Andy, Inc.*, 228 NLRB 447. 454-456 (1977), reemphasizing the necessity for the avoidance of delay in representation proceedings. In that case. the Board decided that questions of invidious discrimination by a labor organization, which some hold are of constitutional dimension, should best be left for adversary proceedings under the unfair labor practice provisions of the Act. See also *Bell & Howell Co. v. N.L.R.B.*, 598 F.2d 136 (D.C.Cir. 1979).

[34] *Sabine Towing Company, Inc*. 126 NLRB 61 (1960).

[35] The "various cases involving nurses' associations." cited by the majority, arc distinguishable. In *Carle Clinic, supra,* the Board did not consider the issue of supervisory involvement, since only the union filed a request for review, and the issue presented was whether Carle Clinic was a single employer with what was then an exempt hospital. In *International Paper, supra,* the Board merely held that the petitioner was a "labor organization." Finally. St. *Rose de Lima Hospital, supra,* is not precedent but rather one of the recent efforts by the Board to engage in the type of analysis now embraced wholeheartedly by the majority, an analysis with which I disagree.

[36] See, e.g., the discussion in *Mercy Hospitals oj' Sacramento, Inc.*, 217 NLRB 765. 767 (1975).

Act. Both cases relied on cases decided prior to the Taft-Hartley Act of 1947, at a time where supervisors were accorded the status of "employees." Thus, the question of supervisory domination was deemed susceptible to resolution at any stage, since the employer had no means of controlling its supervisors' union activities.

Today, however, "self-help" is clearly available. All the employer need do, if it is concerned that its supervisors are not, in the majority's words, "loyal," is to tell them to stop: to resign as officers, to remove themselves as members of the negotiating committee, etc. Indeed, the Supreme Court has recently suggested that very course of action in the context of union fines and Section 8(b)(1)(B):

> Congress' solution was essentially one of providing the employer with an option. On the one hand, he is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union. . . . Alternatively, an employer who wishes to do so can permit his supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through the traditional procedures of collective bargaining. But it is quite apparent, given the statutory language and the particular concerns that the legislative history shows were what motivated Congress to enact §8(b)(1)(B), that it did not intend to make that provision any part of the solution to the generalized problem of supervisory-member conflict of loyalties?'

The Court made it plain that the Act envisaged the employer's achieving "loyalty" by exercising discipline over its supervisors; the Court forbade this Board's imposing that loyalty by distorting the statute. Here, I fear, the majority is impeding and delaying the normally prompt representation case process by permitting litigation of this issue.

What is the special "conflict-of-interest" danger about which the majority is concerned? There are two concerns to which they refer; neither, I believe, constitutes a persuasive argument for delaying our normally prompt representation proceedings while this 8(a)(2)-type issue is litigated.

One concern raised by the majority, mentioned above, involves the supervisors of the employer whose employees are sought in the particular representation proceeding. None of this Employer's supervisors holds high office in CNA. The majority is apparently concerned that the presence of the involved employer's supervisors on the association's board of directors or their presence on negotiating committees could constitute a "conflict of interest," apparently depriving the employer of supervisors of unquestioned loyalty, or employees of bargaining representatives free of conflicting loyalties.

Stated baldly, my colleagues are permitting an employer in this situation to utilize its own possible misconduct—what in the proper forum constitutes a violation of Section 8(a)(2)—to its own advantage; i.e., to delay or even defeat certification. When an employer permits its supervisors to dominate a labor organization, it commits a clear and classic violation of Section 8(a)(2) of the Act.[38] How ironic it is that an employer may do this and benefit even further by disqualifying a longstanding association of professional nurses from achieving bargaining status. The fact that any employer may not bring an 8(a)(2) charge against itself is evidence of the peculiarly inappropriate nature of what the majority is doing.[39] A party in an unfair labor practice proceeding cannot be heard to complain of its own misconduct; so, here too, an employer should not be able to thwart the desires of the employees because of the acts of those who are by law his agents and under his control."[40] Any hurt that might be suffered would be by the employees themselves, who, as the majority would have it, might find their bargaining representative not totally responsive because it was wearing two hats; if that turns out to be so, an 8(a)(1) or (2) charge could be filed by any of the aggrieved employees. However, no employees are complaining in this proceeding.[41]

Relegating the issue of this Employer's supervisors' bargaining and union activities to a subsequent unfair labor practice proceeding has the further advantage that the issue will be addressed at a time when the critical facts have developed and are more likely to be ascertainable. The statute itself, at Section 14(a), makes it clear that supervisors may belong to labor organizations. Similarly, the holding of union office would, by itself, be unlikely to provide sufficient evidence of conflict, and the majority so recognizes. In the normal situation, it would seem premature for a labor organization to settle on its bargaining committee and tactics until it has achieved recognition or certification. Thus, the majority here suggests delaying representation proceedings for a determination of

[37] *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers. Local MI,* 417 U.S. 790, 812-813 (1974).

[38] *Employing Bricklayers' Association of Delaware Valley and Vicinity,* 134 NLRB 1535 (1961).

[39] *Shop-Rite Foods, Inc. d/b/a Jif-E-Mart,* 205 NLRB 1076 (1973).

[40] Whatever protection employers may need is, in fact, offered through the "taint" theory relating to the showing of interest. If, in fact, the employees' interest, as measured by the showing of interest, has been procured through supervisory involvement, that defect is readily curable during the ancillary investigation of the showing of interest.

[41] The employees hardly need the employer to make this complaint on their behalf: as CNA points out in its brief on review, there are, in reality, few employers who would resent bargaining with an employer-oriented labor organization.

facts not only within the employer's control. but which have in all likelihood not become sufficiently well formulated to lend themselves to judicial scrutiny or determination.

The other concern of the majority in this type of case—and the only one conceivably present here—is that a number of supervisors of *other* employers may be active participants in the association.[42] The majority opinion rejects the argument that, even if over half of the directors of the association were other employers' supervisors, this fact would present an inherent conflict of interest. That conclusion may stem in part from the rationale of *Inrernarional Organizarion of Masrers, Mares and Pilots of America, Inc., AFL-CIO, et al. (Chicago Calumet Stevedoring Co., Inc.),* 144 NLRB 1172 (1963), 146 NLRB 116 (1964). enfd. 351 F.2d 771 (D.C. Cir. 1965), in which an organization having as members only 1-1/2 to 2-1/2 percent "employees" (170-291 out of 11.000) was found to be a labor organization. So, too. here. the majority concedes that the Union is a labor organization. Thus, they would require a showing that the presence of any such supervisor conflicted with the interest of the unit employees. conceding that the burden on the employer to make such a showing is "heavy." However, the Employer has not alleged any economic conflict; indeed, the Employer has alleged no particularized conflict of any sort.

What. then, does the majority expect to be adduced at the further hearing it has ordered? My colleagues are remanding this proceeding for more evidence even though (a) no supervisors of the Employer are officers of the petitioning labor organization; (b) they concede that there is not an inherent conflict for other employers' supervisors to so serve, and in any event less than 50 percent do so serve: and (c) no economic or other type of conflict is alleged.[43] One would presume that employees would be better able to judge than their employer whether a particular labor organization can serve them with sufficient loyalty to be an adequate bargaining representative. The majority is permitting the Employer to embark on a fishing expedition in a pond which it virtually concedes is dry—purportedly for the employees' benefit, but actually at their expense.[44]

In cases such as this, in which it is alleged that an entity found to be a labor organization is dominated by supervisors, I would apply the normal rule of not permitting litigation of unfair labor practice issues in a representation proceeding. Nor would I allow this matter to be litigated in any 8(a)(5) case testing the certification, since I view that as merely an outgrowth of the representation proceeding. I do not feel the least bit uncomfortable relegating the Employer to self-help, if it is truly concerned about its own supervisors' participation in the union. I would similarly direct the employees to the 8(a)(2) forum if they are concerned about the loyalty of their bargaining representative (which, of course, they have not been in this case to date). In truth. the employees have a more direct remedy: they may select a more "loyal" representative initially, if that is their concern. Lastly, if it is the supervisors of other employers who pose the concern, the employees, the aggrieved parties, have the remedies set forth above, and the employer may, as indicated, interpose a *Bausch & Lomb* type defense under existing precedent, if it is truly an economic conflict of interest about which it is complaining.

I believe the majority's decision further to delay resolution of *this* representation case, upon the Employer's urging, to ascertain facts which probably have not been developed sufficiently to be ascertainable, which are within the control of the complaining party, and. lastly, the significance of which the majority has discounted in advance is, to say the least, incongruous.

I would affirm the certification of the Union forthwith.

[42] The Board has found at an earlier stage of this proceeding that this Employer has no supervisors presently sewing as officers or board members of the petitioning labor organization. See 225 NLRB at 1086.

[43] Where it is alleged that the union or its agents have financial or other business interests which compete with those of the employer whose employees the union represents. presenting a "clear and present danger" to meaningful bargaining. I would readily join in any decision holding such issue litigable and. if the allegations were proved. find the union disqualified from acting as collective-bargaming representative. This is the classic economic conflict of interest as expressed in *Bausch & Lomb Optical Company, supra.* cited in the majority opinion. However. it appears that any allegations of such conflict in this case could be no more than pure speculation and insufficient to override the statutory right of employees to select the representative of their choice.

[44] I am in basic agreement with the views expressed in *Anne Arundel, supra.* by the late Judge Craven, whose original panel opinion was adopted by Judge Hall in dissent. (See secs. II and III of Judge Craven's opinion. 561 F.2d at 529-532.)