the date of the discrimination against them, to the date of the offer of reinstatement, less net earnings, shall be computed on a quarterly basis in the manner established by the Board in *F W Woolworth Company*, 90 NLRB 289, *N L R B* v *Seven-Up Bottling Company of Miami, Inc*, 344 U S 344

Although the Respondent's unlawful conduct tends to thwart the fulfillment by employees of their basic rights guaranteed by the Act to form labor organizations and to engage in protected concerted activity, I am convinced that the Respondent's conduct was spontaneous and unpremeditated and was not the result of hostility towards the general purposes of the Act, particularly as the record is barren of evidence of union animus or any conduct violative of the Act prior to the events in question I do not anticipate, because of the unlawful conduct committed herein, a danger that the Respondent will in the future commit other similar acts or other conduct proscribed by the Act I shall, therefore, recommend the issuance only of a narrow order limited to curing the effects of the conduct found unlawful herein

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following

CONCLUSIONS OF LAW

1 By discriminating with respect to the hire and tenure of employment of Hector Figueroa, Adrian Gomez, Ramiro Gomez, Francisco Rivera, Ana Lydia Gomez, Celestino Olmeda, Francisco Garcia, Praxedes C Gonzalez, Ana Noboa, Gilberto Torres, and Herman Gomez, thereby discouraging membership in a labor organization of its employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act

2 By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act

3 The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act

[Recommendations omitted from publication]

Hershey Chocolate Corporation, Petitioner *and* Local 464, American Bakery and Confectionery Workers International Union, AFL-CIO [1] and Bakery and Confectionery Workers International Union of America. [2] *Case No 4-RM-265 September 18, 1958*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Bernard Samoff, hearing officer The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed

Following the close of the hearing the Board, on March 28, 1958, issued a notice and invitation to submit briefs or comment, advising the parties hereto and all other interested organizations and persons that it was considering possible revisions in certain of its contract bar policies and inviting briefs or comment with respect to certain enumerated policy considerations bearing on or related to the contract bar issues in the instant case [3] Responses to the notice and invitation have

[1] Herein called respectively ABC Local 464, and ABC.

[2] Herein called BCW

[3] At the same time, similar notices were issued in several other cases inviting briefs and comment with respect to enumerated policy considerations bearing on or related to the contract bar issues in such cases

been received from ABC Local 464, ABC, and BCW, and, as *amicus curiae*, from American Bakers Association, American Federation of Labor and Congress of Industrial Organizations, Automobile Transporters Labor Division (Employers Division) and Eastern Conference Transporters Joint Committee (Employers Division), Chamber of Commerce of the United States, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, AFL–CIO, and United Electrical, Radio & Machine Workers of America (UE). Thereafter, on June 16, 1958, the Board [4] heard oral argument at Washington, D. C., at which the Employer-Petitioner, ABC Local 464, ABC, BCW, American Federation of Labor and Congress of Industrial Organizations, Automobile Transporters Labor Division (Employers Division) and Eastern Conference Transporters Joint Committee (Employers Division), International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, AFL–CIO, and United Electrical, Radio & Machine Workers of America (UE), appeared and participated.

Upon the entire record in this case, including the briefs of the parties, the responses to the notice of March 28, 1958, and the oral argument, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. The question concerning representation:

Bakery and Confectionery Workers International Union of America, Local No. 464,[5] initially as an affiliate of the American Federation of Labor, and subsequently as an affiliate of the American Federation of Labor and Congress of Industrial Organizations,[6] has been the certified and contractual bargaining representative of the Employer's production and maintenance employees since 1939. The most recent contract was executed on March 26, 1957, for the period from April 1, 1957, through December 31, 1958. This contract and apparently all prior contracts, were negotiated and executed on behalf of the Union by local officers only. Apparently only local officials have participated in the administration of this and prior contracts.

Beginning in March 1957, a split developed in BCW, sparked by charges of corruption against International President Cross and cer-

[4] Chairman Leedom, who was not present during the oral argument with respect to this case, and Member Bean, who was present during only part of such argument, have read the complete transcript of the oral argument herein.

[5] Herein called BCW Local 464.

[6] Herein called AFL–CIO.

tain other BCW officers, and resulting in the formation of a so-called Integrity Committee which had as its purpose the replacement of the allegedly corrupt officers. During the spring and summer of 1957, hearings before the Select Committee on Improper Activities in the Labor or Management Field of the United States Senate, and an investigation and report by the AFL–CIO Ethical Practices Committee, dealt with the substance of the charges.[7] On the basis of the report of the Ethical Practices Committee and the failure of the officers of BCW to comply with its recommendations, BCW was suspended from the AFL–CIO pending action by the forthcoming AFL–CIO convention.

Following the suspension of BCW from the AFL–CIO, BCW Local 464, at executive board and membership meetings held, respectively, on November 26 and December 5, 1957, which meetings were addressed by representatives of both the BCW officers and the Integrity Committee, adopted a resolution condemning the actions of the BCW officers which resulted in the suspension, calling upon the International to comply with the AFL–CIO recommendations, and authorizing any action necessary to continue affiliation with the AFL–CIO; these meetings also voted to send delegates to the AFL–CIO convention site to participate in any action necessary to implement the resolution. The vote at the executive board meeting was 42 to 1 in favor of the resolution; at the membership meeting the resolution was adopted by the approximately 250 members present by a voice vote, with only scattered dissent.

On December 9, 1957, the AFL–CIO convention determined that "the Bakery and Confectionery Workers International Union is dominated or substantially influenced by corrupt influences" and voted to expel it unless it in good faith took immediate steps to eliminate the corrupt influences, to correct abuses found to exist, and to bar from office those responsible for the abuses. The expulsion was made effective within a day or two thereafter and, on December 12, ABC was chartered as an AFL–CIO affiliate with substantially the same jurisdiction as BCW, the nucleus of ABC being substantially the same individuals who had constituted the BCW Integrity Committee.

On December 17, 1957, the BCW Local 464 executive board voted, with one dissent, to call a special membership meeting to consider and adopt a resolution to disaffiliate from BCW and affiliate with ABC. On December 18, a notice was mailed to the members of BCW Local 464 announcing a special meeting to be held on December 28 to consider questions of disaffiliation, reaffiliation, disposition of assets,

[7] Based on factual matters adduced at such hearings and contained in such report, ABC Local 464 has moved that BCW be denied the benefits of the Act and the processes of the Board. As BCW is concededly a labor organization within the meaning of the Act, we find no merit in the motion and it is accordingly denied. Cf. *Precision Scientific Company*, 117 NLRB 476, 478.

and the status of collective-bargaining agreements. On December 20, BCW advised the Employer that it was obligated to recognize only a local of BCW and to continue to check off dues in favor of that organization.

At the meeting on December 28, a vice president of ABC, formerly a member of the BCW Integrity Committee, reviewed the events leading up to the expulsion of BCW and the chartering of ABC, including the evidence of corruption and the failure of the BCW officers to accept the AFL–CIO directives, and urged the membership to vote for affiliation with ABC. After a discussion period, the membership, by a vote of 829 to 1, adopted a resolution to disaffiliate from BCW, to affiliate with ABC, to transfer all property and contract rights from BCW Local 464 to ABC Local 464, to continue all present officers as officers of ABC Local 464, and otherwise to continue to function as before with only such changes as were necessitated by the change in affiliation. As stated in the resolution, the reasons for such action were the expulsion of BCW from the AFL–CIO and "the notoriety and stigmas of dishonesty and unethical dealings which have attached to certain officials of the present International and to the International itself, as an organization." On December 30, the Local was advised that its request for a charter from ABC had been granted, and on the same day it advised the Employer of the change in affiliation, that it intended to maintain the preexisting contractual relationship, and that it expected the Employer to do the same.

At the time of the disaffiliation action, there were about 2,800 employees in the unit, of whom about 2,000 were members of BCW Local 464; of these 2,000, about 1,700 had executed checkoff authorizations. The Local officialdom consisted of 12 officers, about 50 executive board members, and about 92 departmental representatives. Following the disaffiliation action, all the officials except 1 officer and 2 or 3 departmental representatives continued in office as officials of ABC Local 464, and about 1,350 employees executed new checkoff authorizations in favor of ABC Local 464. ABC Local 464 has assumed administration of the contract and, except with respect to checked-off dues, which are involved in State court litigation and are being held in escrow by the Employer, the change in affiliation has apparently produced no change in the bargaining relationship with the Employer.

In the meantime, on December 30, BCW appointed a trustee to administer the affairs of BCW Local 464. On January 24, 1958, after the petition had been filed herein on January 9, the trustee advised the Employer that he was ready and willing to administer the contract and requested a meeting; there is no evidence of any reply to this communication. On January 26, BCW Local 464 held a meeting which was attended by about 35 employees in the unit. There appear

to be about 50 employees in the unit who have expressed continued allegiance to BCW Local 464.

The Employer has filed the instant petition seeking a Board determination as to which of the two claiming labor organizations it is obligated to recognize, contending in substance that a schism exists warranting an election; the Employer further asserts that the union winning such an election should be required to assume the administration of the existing contract for the balance of its term. Both Unions, however, assert that the existing contract, which does not expire until December 31, 1958, is a bar and have moved to dismiss the petition. For the reasons set forth hereinafter, these motions are denied. In support of its motion, ABC Local 464 contends in substance that it is the same organization as the former BCW Local 464, the only change being one of affiliation; that it therefore continues to be the contractual representative and is recognized as such by the Employer; and that accordingly no question concerning representation exists. It further asserts that BCW Local 464 is defunct. On the other hand BCW, in support of its motion, contends that if the contractual representative is not defunct, the Board has no authority under the Act to direct an election on the basis of an alleged schism; and that in any event an election should not be directed in this case because of certain alleged irregularities in the disaffiliation action. BCW denies that BCW Local 464 is defunct and further denies that there is any continuing identity between BCW Local 464 and ABC Local 464.

As indicated hereinabove, the Board has, in connection with this case, considered possible revisions in certain of its contract bar policies bearing on or related to the issues of schism and defunctness raised herein, including such matters as the factors necessary to warrant a finding that a schism exists; the type of election to be conducted when such a finding is made, and the effect of conducting such an election on the existing contract; the consequences of the assignment of a contract from one union to another in a schismatic situation; and the factors bearing on the issue of defunctness. Our conclusions with respect to these matters are set forth hereinafter. We have also considered the contention of BCW and certain of the participants *amicus*, that the Board has no statutory authority to conduct an election on the basis of a schism when the contractual representative is not defunct, and hold in accord with established Board and court precedent[8] that the Board's contract bar policies are compelled neither by the Act nor by judicial decision, but are rather discretionary rules which may be applied or waived as the facts in a given case may require in the interests of effectuating the policies of the Act. We therefore conclude that the Board has authority to direct an election on the basis of a

[8] E. g., *Ford Motor Company*, 95 NLRB 932, 934; *N. L. R. B.* v. *Libby-Owens-Ford Glass Company*, 241 F. 2d 831 (C. A. 4).

schism, whether or not the contracting representative is defunct, and accordingly turn to the policy considerations bearing on or related to the issues of schism and defunctness.

a. *The elements of a schism*

The initial consideration is a determination of the factors necessary to a finding that a schism exists warranting an election. Relevant to that determination is the fact that the schism issue arises in the context of an existing contract which would otherwise achieve the statutory objective of promoting industrial stability and therefore under normal Board practice would remain a bar for the balance of its reasonable term. The direction of an election on the basis of a schism therefore constitutes an exception to the general principle that in the interest of promoting industrial stability, the existence of a contract meeting the required standards warrants postponement of the employees' statutory right freely to select their representative. Accordingly, before directing an election on the basis of an alleged schism, the Board must be satisfied that the existing contract can no longer serve to promote industrial stability, and that the direction of an election would be in the interests of achieving industrial stability as well as in the interests of the employees' rights in the selection of their representative.

There have been numerous types of situations in which the Board has been called upon to determine whether the alleged schism has so disrupted the existing bargaining relationship that an election is warranted to resolve the resulting confusion and reestablish bargaining stability. These have included cases in which a local union, or a group within a local union, has sought to change its affiliation in the context of a basic intraunion conflict over fundamental policy considerations, involving an entire international union or a federation of unions; they have also included cases in which such a change in affiliation is sought in the absence of any basic intraunion conflict. In the cases arising out of a basic intraunion conflict, that conflict has usually resulted in the disaffiliation or expulsion of a union from the federation with which it had been affiliated and the creation of a new rival union within the federation, or the transfer of affiliation of a part of the official hierarchy of one union to an existing rival union, and in consequence in the creation of a new union rivalry or the aggravation of an existing rivalry based on the policy conflict. Such a conflict and realignment has in turn been followed by intensive campaigning to secure the allegiance of the local union members on the basis of the policy differences which were initially responsible for the basic conflict.

In considering the cases in which these varying situations have been presented, the Board has generally found a schism to exist, war-

ranting an election, when the disaffiliation action at the local level has occurred in the context of a basic intraunion conflict.[9] It has, however, also on occasion found a schism to exist on the basis of local action unrelated to a basic intraunion conflict.[10] Although there are obvious superficial similarities between these two types of cases with respect to the situation at the local level, we nevertheless believe that an election is warranted only when the local action occurs in the context of a basic intraunion conflict, and not otherwise.

We reach this conclusion because we are convinced that the fundamental differences in causation between local action related to a basic intraunion conflict and one not so related necessarily have different effects on the stability of the bargaining relationship at the local level. For, as the Board has pointed out,[11] when "the split in the organization was created by a basic intraunion conflict . . . no salutary stabilizing purpose could have been served by applying the contract bar rule . . . [and] an immediate direction of election was the only means by which the Board could hope to assist the employer, the employees, and a bargaining representative to continue to live together with some semblance of stability." On the other hand, if the schism doctrine could be invoked in the absence of a basic intraunion conflict, it could be utilized to facilitate a raid or to permit a dissident group to repudiate the bargain made by the existing representative, thus providing a means for circumventing the normal contract bar rules when stability could be maintained on the basis of the contract without an election.

In concluding as we have that a basic intraunion conflict is a necessary prerequisite to a finding that a schism exists warranting an election, we deem a basic intraunion conflict to be any conflict over policy at the highest level of an international union, whether or not it is affiliated with a federation, or within a federation, which results in a disruption of existing intraunion relationships. As illustrated by the cases cited in footnote 9, this would include the disaffiliation or expulsion of an international union from the federation with which it was affiliated, combined with the creation by the federation of a new organization with similar jurisdiction or the assignment of such jurisdiction to an existing organization; it would also include a split within an international union in which some of its officials transferred their affiliation to an existing rival union or established a new organization claiming similar jurisdiction. However, the citation of the foregoing as illustrations does not mean that a finding as to the ex-

[9] E. g., *Brewster Aeronautical Corporation*, 14 NLRB 1024; *Harbison-Walker Refractories Company*, 44 NLRB 816; *Boston Machine Works Company*, 89 NLRB 59; *Wade Manufacturing Corporation*, 100 NLRB 1135; *A. C. Lawrence Leather Company*, 108 NLRB 546; *The Great Atlantic and Pacific Tea Company*, 120 NLRB 656.

[10] E. g., *Brightwater Paper Company*, 54 NLRB 1102; *Sun Shipbuilding and Dry Dock Company*, 86 NLRB 20; *New York Shipbuilding Corporation*, 89 NLRB 915.

[11] See *Saginaw Furniture Shops, Inc.*, 97 NLRB 1488, 1491–1492.

istence of a basic intraunion conflict necessarily depends on its taking the same form as the illustrative cases; rather, it may include any realignment affecting an international union or federation of unions, resulting from a policy conflict, which has substantially the same effect on the stability of bargaining relationships as the above illustrations.

As indicated above, the existence of a schism warranting an election depends not only on the existence of a basic intraunion conflict, but also upon action by the employees in the unit arising out of the basic conflict and creating such confusion in the bargaining relationship that stability can be restored only by an election. In determining whether the action taken by the employees has been sufficient to warrant a schism finding, the Board has at times adverted to the observance or nonobservance of certain formalities,[12] and also to the question of whether or not the existing representative was defunct.[13] In our opinion, the consideration of defunctness is largely irrelevant to the basic principles underlying the schism doctrine. While a schism may result in defunctness, its absence does not eliminate the confusion in the bargaining relationship in situations of this type; on the contrary, in a context of basic intraunion conflict and the creation of a "new" local, the continued existence of the "old" local may tend to heighten rather than lessen the confusion. As to the requirement of formalized action by the bargaining representative, we believe that in some situations where a schism finding has not been made because of the failure to observe certain formalities, form has been permitted to override substance. However, before concluding, even in the presence of a basic intraunion conflict, that a sufficient state of confusion exists in the bargaining relationship to warrant an election in the face of an outstanding contract, we must be convinced that the employees involved have had an opportunity to exercise their judgment on the merits of the conflict. We believe that this condition can best be satisfied at an *open meeting* called, without regard to any constitutional restrictions but with *due notice* to the members in the unit, for the purpose of taking disaffiliation action for reasons relating to the basic intraunion conflict.

As it is the effect on the bargaining relationship which is the primary consideration, we conclude that, in the context of a basic intraunion conflict, a finding that a schism exists warranting an election may appropriately be made on the basis of requisite action taken by employees in the unit seeking to change their representative for reasons related to the basic intraunion conflict, only if that action is taken within a reasonable period of time after the occurrence of the

[12] E g , *Standard Conveyor Company*, 114 NLRB 1447.
[13] E. g., *Muskin Manufacturing Co., Inc.*, 114 NLRB 1307.

conflict [14] and results in confusion unstabilizing the bargaining relationship. Although we cannot attempt to anticipate all the factual situations in which such unstabilizing confusion may or may not exist, we find that it clearly exists where the disaffiliation action is coextensive with the existing unit and results in the employer being confronted with two organizations each claiming with some show of right to be the organization previously chosen by the employees as their representative. On the other hand, it does not exist if the employees take no disaffiliation action or, if such disaffiliation action has been taken, the employer is not confronted with conflicting claims by the unions involved in the alleged schism.

With respect to the instant case, the facts set forth above show a policy conflict within the AFL–CIO resulting in the expulsion of BCW on grounds of alleged corruption and the chartering of ABC with substantially the same jurisdiction; these facts establish the existence of a basic intraunion conflict. The facts set forth above also show that at an open meeting called for the purpose and with due notice to the members in the unit, the employees in the unit sought to change their representative for reasons related to the basic intraunion conflict; [15] that such action was taken within a month after the expulsion of BCW from the AFL–CIO and the chartering of ABC; that the action was coextensive in scope with the existing unit; and that in consequence the Employer has been confronted with conflicting claims from ABC and BCW, each claiming to be the representative previously chosen by the employees. We find, accordingly, that a schism exists warranting an election, notwithstanding the existence of a contract.[16]

b. *The nature of the election; the effect on the contract*

In considering cases in which it has been alleged that a schism exists, and in directing elections on the basis of schism finding, it has been the practice of the Board to make no distinction as to the type of petition which it will entertain; to permit unlimited intervention; to permit a severance election in a segment of the contract unit, when otherwise appropriate; and to give the employees an opportunity to choose not to be represented. It has also been the practice of the Board not to consider in a representation proceeding the effect on the

[14] What is a reasonable period of time will depend on the circumstances of each individual basic intraunion conflict. However, we shall no longer follow *A. C. Lawrence Leather Company*, 108 NLRB 546, and cases relying thereon, to the extent that such cases imply that the time element is to be ignored in determining the schism issue.

[15] As set forth hereinabove, alleged irregularities in connection with this action are immaterial to the issues of this case.

[16] The contention of ABC Local 464 that no election is warranted because it was and continues to be the contractual representative is rejected for the reasons discussed hereinafter.

existing contract of the certification of a new bargaining representative. In connection with this case, we have considered whether these practices should be continued or modified, and particularly whether an election directed on the basis of a schism should be held for the limited purpose of determining which of the organizations directly involved in the schismatic situation should be entitled to administer the existing contract. Upon full consideration of these issues, we have concluded that no change is warranted in existing practice.[17]

As has been pointed out above, an election is directed in a schismatic situation because the contract, which would normally be a bar, is no longer a stabilizing force and there is therefore no warrant for denying to the employees the immediate exercise of their right to select their representative, and because it is only through the medium of an election that stability can be restored to the disrupted relationship. In these circumstances, no salutary purpose would be served by limiting the employees' freedom of choice. Instead, granting to the employees full freedom of choice would further serve the statutory objective of promoting stability in bargaining relationships by definitively resolving all proper questions of representation affecting the employees involved.[18] In view of this conclusion that the employees ought not be limited in their choice in the election and in accord with established practice, we also believe that, in a representation proceeding, it would be inappropriate to require the winning union, if any, to assume the existing contract. The Employer's contention that assumption of contract should be required is therefore rejected.[19]

c. *Transfer of affiliation and assignment of contract*

As set forth hereinabove, at the meeting of Local 464, held on December 28, the employees voted *inter alia* to transfer all contract rights from BCW Local 464 to ABC Local 464. On the basis of a bargaining history reflecting participation in negotiations primarily by local officials, and of the actions taken at that meeting, including the purported assignment of contract rights, ABC Local 464 contends that it was and continues to be the contractual representative recognized by the Employer, the only change being one of designation and affiliation, and that the contract therefore remains a bar. We find no merit to this contention.

The Board has long held [20] that the mere change in designation or affiliation of the contractual representative does not of itself warrant

[17] For the reasons set forth in his separate opinion, Member Jenkins does not agree with this conclusion

[18] See, e. g., *Pratt & Letchworth Co., Inc.*, 89 NLRB 124, 128–129

[19] This does not of course bar a voluntary assumption of the contract.

[20] *The Louisville Railway Company*, 90 NLRB 678; *Chesapeake & Potomac Telephone Company of Baltimore*, 89 NLRB 231; *Michigan Bell Telephone Company*, 85 NLRB 303; cf. *Harris-Woodson Co., Inc.*, 85 NLRB 1215, enfd. 179 F. 2d 720 (C. A. 4).

a finding that an otherwise valid preexisting contract is no longer a bar; this is true whether or not there is a specific assignment of the contract. None of the cases establishing or applying this principle, however, involved a true schismatic situation as defined above and present in this case. They involved, rather, an agreement with respect to the transfer among all the interested unions or, at most, a disaffiliation based on a disagreement between an international and an individual local which did not result in the confusion and instability inherent in a true schismatic situation.[21] These cases are therefore not precedent for the result urged by ABC Local 464. Moreover, application of this principle to a true schism would tend to place resolution of the representation issue in the hands of the local officers who may or may not reflect the employees' wishes. We conclude, accordingly, that the assignment of a contract does not preserve it as a bar when the elements of schism are present.

d. *Defunctness*

The Board has consistently held, and no reason appears to reach a different conclusion now, that a representative is defunct, and its contract is not a bar, if it is unable or unwilling to represent the employees. However, mere temporary inability to function does not constitute defunctness; nor is the loss of all members in the unit the equivalent of defunctness if the representative otherwise continues in existence and is willing and able to represent the employees.

In considering whether the representative continues in existence, a question often arises, particularly in a pseudo-schismatic situation or, as here, in the context of a schism, as to the effect on the resolution of the defunctness issue of efforts by an international union or some intermediate body to assume the representative functions of a local which, because of loss of membership, is no longer capable of performing such functions. When as, here, the elements of schism are present, we believe it is unnecessary to reach the issue of defunctness, as resolution of that issue would add nothing to the ultimate conclusion that an election should be directed. Accordingly, we do not decide whether or not BCW Local 464 is defunct. When, however, it is necessary to reach the issue of defunctness because the elements of schism are not present, we believe that consideration should be given only to the actions of the entity or entities which are parties signatory to the contract and are consequently in a position to secure enforcement of its terms. Accordingly, actions by an international union or intermediate body evidencing its willingness and ability to assume the representative functions of a local which is no longer capable of performing such functions will be deemed relevant to the issue of defunct-

[21] E g, *The Prudential Insurance Company of America*, 106 NLRB 237.

ness only if such international union or intermediate body is a party signatory to the contract.

e. *Conclusions*

As we have found that the current contract with the Employer is not a bar because of a schism, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act, and we shall therefore direct an immediate election.[22]

4. The parties agree that the existing unit as described in the contract is appropriate. Accordingly, we find that all production and maintenance employees and teamsters at the Employer's Hershey, Pennsylvania, plant, the Lebanon Creamery, and branch milk-receiving stations, excluding office employees, executives, attorneys, traveling and outside salesmen, engineers, professional employees, watchmen, guards, superintendents, supervisors, foremen, assistant foremen, all other supervisors as defined in the Act, or any persons excluded by law, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

[Text of Direction of Election omitted from publication.]

MEMBER JENKINS, dissenting in part:

Since I believe the only issue raised in a "schism" conflict to be that of the identity of the true bargaining agent I would limit the choice on the ballot to the two contending factions. I would not confuse this issue by permitting the intervention of third parties or rejection of the bargaining agent.

[22] As there is no evidence that any of the assets of BCW Local 464 have been disbursed to the advantage of ABC Local 464, we find no merit in the contention of BCW that no election should be held until pending litigation involving such assets has been concluded. *The Great Atlantic and Pacific Tea Company,* 120 NLRB 656, footnote 10.

American-Marietta Company[1] *and* United Steelworkers of America, AFL–CIO, Petitioner[2]

American-Marietta Company, Petitioner *and* United Mine Workers of America, District 50, Region 16 and United Steelworkers of America, AFL–CIO.

Cases Nos. 6–RC–2142[3] *and 6–RM–157. September 18, 1958*

DECISION AND DIRECTION OF ELECTION

Upon separate petitions duly filed under Section 9 (c) of the National Labor Relations Act, a consolidated hearing was held before

[1] The name of the Employer appears as amended at the hearing.

[2] Herein called the Steelworkers

[3] United Mine Workers of America, District 50, Region 16, herein called the Mine Workers, intervened in Case No. 6–RC–2142 on the basis of a showing of interest.