View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Villanova University School of Law: Digital Repository

Volume 13 | Issue 3 Article 4

1968

The Authorization Card Dilemma

Michael F. Rosenblum

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Administrative Law Commons, Election Law Commons, Evidence Commons, and the Labor and Employment Law Commons

Recommended Citation

Michael F. Rosenblum, *The Authorization Card Dilemma*, 13 Vill. L. Rev. 564 (1968).
Available at: https://digitalcommons.law.villanova.edu/vlr/vol13/iss3/4

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

Rosenblum: The Authorization Card Dilemma

THE AUTHORIZATION CARD DILEMMA

I. INTRODUCTION

There is probably no problem in the field of labor relations which is more uncertain and controversial, at this point in time, than that of the employer's obligation to bargain with a union when the employer is presented with authorization cards signed by a majority of his workers. The amount of litigation concerning the several facets of this problem is staggering, and there is no sign of abatement in sight. While it is always perilous to arbitrarily select a point in time at which to evaluate the artificially arrested course of a turbulent and unrelenting stream of conflicting administrative and judicial activity, the need for some kind of clarification in this area justifies such an effort.

The broad dimensions of the problem are relatively clear. The focal point is section 8(a)(5) of the National Labor Relations Act which provides that "[i]t shall be an unfair labor practice for an employer — (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."[1] Section 9(a) provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .[2]

There are two methods by which a union may attain the status required under section 9(a). The first is through a secret ballot election pursuant to section 9(c).[3] Under this provision, a petition for such an election may be filed by the union, the employees, or the employer. If after hearing and investigation, the Board finds that a question of representation exists,[4] it will proceed to hold the election and certify the results.

The other way the union may become the exclusive representative is through designation. The most common form of such designation is through the use of cards authorizing the union to assume such a representative status. The general rule, which received its classical

1. 29 U.S.C. § 158(a)(5) (1964).

2. 29 U.S.C. § 159(a) (1964).

3. 29 U.S.C. § 159(c) (1964).

4. The general rule is that a question of representation exists when the union involved has been designated by an initial showing of interest by at least 30% of the employees. 29 C.F.R. § 101.18 (1967). This designation must be kept distinct from the designation involved when the demand is made upon the employer directly. If the majority status of the union is clear, then the question shifts to the possibility of an 8(a)(5) violation. This is the primary focus of this study.

Published by Villanova University Charles Widger School of Law Digital Repository, 1968

expression in the *Joy Silk*[5] case, is that if a majority of employees designates a particular union as its bargaining representative, the employer is under an immediate duty to bargain with such union, and unless he entertains a good faith doubt of its majority status, his refusal to do so raises the possibility of charges under section 8(a)(5). Even if the union's majority is later lost as a result of other employer unfair labor practices, an order to bargain with the union may be imposed as the remedy for the original 8(a)(5) violation.[6] If the union has a claim under 8(a)(5), it does not waive this claim by waiting to file the charges until after an election has been held.[7]

The basic problem with which this study is concerned is under what circumstances the duty to bargain without an election will arise. This problem can be broken down into two separate questions: (1) what a union must do to establish the fact that it has been designated by a majority of the employees in the appropriate unit[8] and, (2) what an employer must do when faced with such a showing. After these two questions have been treated separately, various approaches to the solution of the base problem will be examined in an effort to evaluate and predict the future dimensions of the area.

II. THE PRESENTATION OF A VALID CARD MAJORITY

In the absence of an election, the obligation of an employer to recognize a union arises only when there is a demand for recognition[9] that is based on a validly obtained card majority. If a valid majority of signed cards is not presented, the employer has an effective defense to an 8(a)(5) charge. The greatest area of controversy concerning the employer's obligation in this respect concerns the criterion for determining what is a validly obtained card majority. The basic question that is presented is whether the union has misrepresented the purpose of the cards[10] to the

5. Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), *aff'd,* 185 F.2d 732 (D.C. Cir.), *cert. denied,* 341 U.S. 914 (1950). It must be noted that if the employer recognizes a union which does not in fact represent a majority of its employees he may be held to have impressed that agent upon a nonconsenting minority and thereby be guilty of an 8(a)(1) violation. I.L.G.W.U. v. NLRB, 366 U.S. 731 (1961). In this connection, *see also* Wall Street Journal, Mar. 12, 1968, at 18, col. 1.

6. *See, e.g.,* Franks Bros. v. NLRB, 321 U.S. 702 (1944).

7. Bernel Foam Prod. Co., 146 N.L.R.B. 1277 (1964), *overruling* Aiello Dairy Farms, 110 N.L.R.B. 1365 (1954). It is important to note that the *Bernel Foam* doctrine applies only when the election is set aside because of meritorious objections. If no such objections to the election can be raised, the results will stand undisturbed and the union's 8(a)(5) claim will be waived. Koplin Bros. Co., 149 N.L.R.B. 1378 (1964), *enforced,* 379 F.2d 488 (1967).

8. The question of the appropriateness of the bargaining unit will not be considered. *See, e.g.,* Southland Paint Co., 156 N.L.R.B. 22 (1965).

9. The filing of a representation petition has been held not to be a demand for recognition. L.B. Foster Co., 66 L.R.R.M. 1280 (NLRB 1967). Generally, however, there are few specific requirements concerning the form in which the demand is made. *See, e.g.,* NLRB v. Rural Elec. Co., 296 F.2d 523 (10th Cir. 1961); NLRB v. Barney's Supercenter, Inc., 296 F.2d 91 (3d Cir. 1961); Lincoln Mfg. Co., 160 N.L.R.B. 1866 (1966), *enforced,* 382 F.2d 411 (7th Cir. 1967).

10. Of course, other forms of misrepresentation in connection with the solicitation of cards have given rise to litigation. The Board, in general, allows the union wide

signing employees. Specifically, the problem is whether the employees have been misled into believing that the actual purpose of the cards was to request an election rather than to designate the union as the immediate bargaining agent.

This misrepresentation may take place in two separate ways: on the face of the cards themselves or through oral representations made during solicitation of the employee's signature. While these two areas might be thought of as interdependent parts of the total circumstances surrounding the employee's designation, they generally have been treated separately by the Board.[11] Further, the Board has held that where the employee's subjective impression was that the cards were to be used solely for an election instead of for immediate authorization, this is irrelevant in itself to negate the overt act of signing the cards which indicate that representation is desired.[12] The standards surrounding the definition of the validly obtained card majority consist rather of objective tests focusing on the nature of the cards and the methods of their solicitation.

A. The Nature of the Cards

Where the purpose of the authorization card is completely misrepresented on its face, such cards are held to be invalid if the existence of a majority is at issue.[13] On the other hand, where alternative purposes are stated, one being authorization to act as immediate bargaining agent, the Board has generally permitted the cards to be used.[14] The circuit courts, however, are not in complete agreement on this question of dual purpose cards. The Fifth Circuit has reversed an 8(a)(5) finding where the union majority was based on cards stating a dual purpose.[15] The court held that the language of such cards was ambiguous and had the effect of placing on the Board the burden of proving that the signer was

---

latitude in this respect. *See, e.g.*, G & A Truck Line, Inc., 2 LAB. REL. REP. (67 L.R.R.M.) 1084 (NLRB Dec. 12, 1967); I.T.T. Semi-Conductors, Inc., 65 L.R.R.M. 1374 (NLRB 1967); John Kinkel & Son, 157 N.L.R.B. 744 (1966).

11. While this is generally true, the Board sometimes argues on appeal that the fairness of representations made during the solicitation should compensate for ambiguities in the wording of the cards or that clarity in the cards should compensate for misleading representations. *See* NLRB v. S.E. Nichols Co., 380 F.2d 438 (2d Cir. 1967); NLRB v. Winn-Dixie Stores, Inc., 341 F.2d 750 (6th Cir.), *cert. denied*, 382 U.S. 830 (1965).

12. Henry I. Siegel, Inc., 65 L.R.R.M. 1505 (NLRB 1967). The Board does not carry this position to its logical conclusion. Where the signers knew that the purpose of the cards was immediate authorization, in spite of representations made to them that the purpose was to obtain an election, the subjective state of mind was held to validate the card majority. Yazoo Valley Elec. Power Ass'n, 65 L.R.R.M. 1030 (NLRB 1967).

13. NLRB v. Freeport Marble & Tile Co., 367 F.2d 371 (1st Cir. 1966); Bannon Mills, Inc., 146 N.L.R.B. 611 (1964).

14. Lenz Co., 153 N.L.R.B. 1399 (1965); S.N.C. Mfg. Co., 147 N.L.R.B. 809 (1964), *aff'd*, 352 F.2d 361 (D.C. Cir.), *cert. denied*, 382 U.S. 902 (1965); Winn-Dixie Stores, 143 N.L.R.B. 848 (1963), *enforced*, 341 F.2d 750 (6th Cir.), *cert. denied*, 382 U.S. 830 (1965).

15. NLRB v. Peterson, 342 F.2d 221 (5th Cir. 1965).

actually aware of the card's purpose.[16] The First Circuit has expressed the view that:

> [S]o long as the use of cards is countenanced as an alternative to an election, there is the corresponding obligation on the part of the Board and the unions, to make the cards as clear and straightforward and as little susceptible to misinterpretation as possible.[17]

Moreover, the Sixth Circuit has recently held that when a dual purpose card is used, there is a greater obligation on the part of the union to make sure that the employees are fully aware of the significance of their act in signing.[18]

On the other hand, the criticism of the dual purpose card has been expressly rejected by some circuits. The Seventh Circuit, discussing this problem, maintained:

> The card expressly confers the requisite authority. The recital of alternative methods by which the card might be used to make the authority granted operative with respect to the employer in our opinion neither negates the grant nor beclouds it with ambiguity.[19]

The District of Columbia Circuit, faced with the same type of cards, agreed that the cards were valid on their face, and that, absent a showing of misrepresentation, the employer would not be able to inquire into the subjective state of mind of those who signed.[20]

The problems created by this judicial and administrative inconsistency and the resultant uncertainty affect counsel representing both union and management. The problem of the union's attorney is in drafting the cards, and the employer's problem is to ascertain their reliability. Both of these difficulties are magnified by the fact that the circuits cannot agree on a precise standard. Since what is involved is the written form rather than the subtlety of the spoken word, there seems to be little reason for not clarifying this area.

B. Union Representations During Solicitation

The state of the law concerning the nature of the cards themselves is relatively placid compared with that surrounding representations made

16. *Id.* at 224. *See also* Judge Burger's concurring opinion in IUE v. NLRB, 352 F.2d 361, 363 (D.C. Cir.), *cert. denied,* 382 U.S. 902 (1965).
17. NLRB v. Southbridge Sheet Metal Workers, 380 F.2d 851, 855 (1st Cir. 1967).
18. Dayco Corp. v. NLRB, 382 F.2d 577 (6th Cir. 1967).
19. NLRB v. C.J. Glasgow Co., 356 F.2d 476, 478 (7th Cir. 1966).
20. UAW v. NLRB, 363 F.2d 702 (D.C. Cir.), *cert. denied,* 385 U.S. 973 (1966). It must be noted that the cards involved in the *Glasgow* and *UAW* cases were much less misleading in terms of the basic purpose than those which the Board has approved in the past. *See* Lenz Co., 153 N.L.R.B. 1399 (1965); S.N.C. Mfg. Co., 147 N.L.R.B. 809 (1964), *aff'd,* 352 F.2d 361 (D.C. Cir.), *cert. denied,* 382 U.S. 902 (1965); Winn-Dixie Stores, 143 N.L.R.B. 848 (1963), *enforced,* 341 F.2d 750 (6th Cir.), *cert. denied,* 382 U.S. 830 (1965). The *Glasgow* and *UAW* cases involved cards which indicated that their main purpose was authorization, while the Board cases involved cards which indicated primarily election.

during their solicitation. The basic doctrine that has created the turmoil in this area is found in the *Cumberland Shoe* case.[21] In that case, the Board upheld the validity of solicitation in which the union represented that *one* of the purposes of the cards was to obtain an election. By distinguishing an earlier decision[22] which invalidated cards when they were solicited *solely* on this basis, the Board established the doctrine that a card majority will be invalid only if, during the solicitation, the only purpose represented was that of obtaining an election.[23] As mentioned above, it is not relevant that the individual signers thought that the cards were for the purpose of an election so long as the cards were not solicited solely on that basis.[24]

While the *Cumberland Shoe* doctrine is essentially parallel to the rule adopted by the Board concerning the face of the authorization cards, the reaction from the circuit courts toward the former has been much more violent. In a series of decisions within the past year directed at this question, considerable uncertainty concerning the status of *Cumberland Shoe* has been created.

A number of circuits have expressly rejected the *Cumberland Shoe* doctrine. The Fourth Circuit has recently held in *Crawford Mfg. Co. v. NLRB*[25] that, regardless of the fact that the cards may have been unambiguous on their face, the central question in determining their validity is whether the signers were free of any misapprehension with respect to their purpose, and on this issue the Board has the burden of proof. The Second Circuit also rejected *Cumberland Shoe* by holding that the decisive question is whether the employees actually meant to make the union their representative or merely intended to request an election.[26] The Fifth and Eighth Circuits, in earlier decisions, evidence a similar dislike of the *Cumberland Shoe* approach.[27]

Another tack that has been taken by some circuits is more subtle. Rather than completely rejecting the Board's position, they have drastically restated the contours of the doctrine. The Sixth Circuit, which had affirmed the *Cumberland Shoe* case originally, stated:

> We think it right now to say that we do not consider that we have announced a rule that only where the solicitor of a card actually employs the specified words "this card is for the *sole* and *only* purpose of having an election", will a card be invalidated. We did not intend such a narrow and mechanical rule. We believe that whatever the

---

21. 144 N.L.R.B. 1268 (1963), *enforced,* 351 F.2d 917 (6th Cir. 1965).
22. Englewood Lumber Co., 130 N.L.R.B. 394 (1961).
23. 144 N.L.R.B. at 1269. The *Cumberland Shoe* doctrine has been consistently followed by the Board. *See* Brandenburg Telephone Co., 65 L.R.R.M. 1183 (NLRB 1967); Montgomery Ward & Co., 160 N.L.R.B. 1729 (1966); Gordon Mfg. Co., 158 N.L.R.B. 1303 (1966); Conren, Inc., 156 N.L.R.B. 592 (1966); Gotham Shoe Mfg. Co., 149 N.L.R.B. 862 (1964), *enforced,* 359 F.2d 684 (2d Cir. 1966).
24. *See, e.g.,* Henry I. Siegel, Inc., 65 L.R.R.M. 1505 (NLRB 1967).
25. 386 F.2d 367 (4th Cir. 1967).
26. NLRB v. S.E. Nichols Co., 380 F.2d 438 (2d Cir. 1967).
27. Engineers & Fabricators, Inc. v. NLRB, 376 F.2d 482 (5th Cir. 1967); Bauer Welding & Metal Fabricators v. NLRB, 358 F.2d 766 (8th Cir. 1966).

Published by Villanova University Charles Widger School of Law Digital Repository, 1968

> style or actual words of the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the cards is to obtain an election,* an invalidation of such card does not offend our *Cumberland* rule.[28]

The court stated further that the subjective intent of the signer is a relevant consideration in determining whether the representation was "clearly calculated" to create a false impression.[29]

This restatement of the *Cumberland Shoe* test was specifically followed by the Seventh Circuit.[30] The court there indicated that it preferred to reinterpret and then follow the doctrine, rather than to adhere to the original meaning and reject it as some of the other circuits had done.[31]

Other circuits have followed the original *Cumberland Shoe* doctrine, but with some reservations. The First Circuit recently stated: "Without going so far as to say that a misrepresentation cannot ever vitiate a card when it is not proffered as a sole reason for signing, we have no hesitation in saying that here the representation that there would be an election does not invalidate . . . [the] card."[32] Further, the court uses the term "hard sell" to characterize the type of solicitation necessary to vitiate an employee's card, thus indicating a slight retreat from the mechanical approach.[33] The District of Columbia Circuit, while specifically adhering to *Cumberland Shoe,* as originally interpreted, maintained that the doctrine was merely a rule of thumb and would not be applied in cases of "gross misstatement."[34]

At the present time it is uncertain to what degree the validity of an authorization card majority will be determined by the objective, mechanical tests adopted by the Board or by the more subjective, total impression test advocated by many of the circuits.[35] The great amount of uncertainty concerning this question demands clarification. Recently, a petition to grant certiorari was filed in the *Crawford* case,[36] and it can well be hoped that a solution to the problem will be forthcoming from the Supreme Court.

---

28. NLRB v. Swan Super Cleaners, Inc., 384 F.2d 609, 618 (6th Cir. 1967).
29. *Id.* at 617.
30. NLRB v. Dan Howard Mfg. Co., 2 LAB. REL. REP. (67 L.R.R.M.) 2278 (7th Cir. Jan. 12, 1968).
31. The reason for the approach taken by the court was probably to avoid overruling the controlling precedent of Happach v. NLRB, 353 F.2d 629 (7th Cir. 1965).
32. NLRB v. Southbridge Sheet Metal Workers, 380 F.2d 851, 855–56 (1st Cir. 1967).
33. *Id.* at 855.
34. UAW v. NLRB, 66 L.R.R.M. 2548, 2552 (D.C. Cir. 1967).
35. A separate problem which has recently received some attention is the effect misrepresentation with respect to one card will have on the entire showing. While it has been the general rule that the effect will extend only to the particular card involved, proof of a pattern of misrepresentation may result in placing the burden on the Board to show that the other signers were unaffected. *See* Bryant Chucking Grinder Co. v. NLRB, 2 LAB. REL. REP. (67 L.R.R.M.) 2017, 2021 (concurring opinion) (2d Cir. Dec. 12, 1967); NLRB v. Golub Corp., 66 L.R.R.M. 2769 (2d Cir. 1967). For a discussion favoring this approach see Lesnick, *Establishment of Bargaining Rights Without an NLRB Election,* 65 MICH. L. REV. 851, 857–58 (1967).
36. 386 F.2d 367 (4th Cir. 1967), *petition for cert. filed,* 36 U.S.L.W. 3309 (U.S. Jan. 25, 1968) (No. 1051). For a proposed solution *see* p. 581 *infra*.

III. THE EMPLOYER'S DOUBT

Once the union confronts the employer with a validly obtained card majority and demands recognition, the employer is obligated to recognize and bargain with that union unless he entertains a good faith doubt of the union's majority status.[37] The question that obviously arises pertains to the application and explication of this test. A precise definition of the good faith doubt standard is impossible since the existence of the good faith doubt is determined in light of all of the relevant factors in the case.[38] In addition to the presence of numerous factors bearing on the question in each case, there is great variation among the courts, and even in some Board decisions, concerning which factors are to be accepted as relevant. The approach that will be taken, therefore, is to separately analyze those factors which are generally considered relevant and to attempt to arrive at a workable definition through the structuring of the process of proof involved.

The most important factor in the decisional process of determining whether or not recognition was mandated is that the burden is on the Board to prove lack of good faith.[39] In a sense, therefore, the standard is defined by what the Board must prove to sustain its burden. For the purpose of analysis, the types of evidence which are generally used may be broken down into three categories. The first concerns the direct assertions made by the employer indicating his attitude toward the union's demand. The second concerns the implication of lack of good faith which may arise from the employer's attitude toward investigation of the union's alleged majority. The final category involves the controversial question of the use of employer unfair labor practices to demonstrate lack of good faith.

A. *The Employer's Assertion*

The assertion of a doubt by the employer is, of course, essential to a successful defense to an 8(a)(5) charge,[40] and a delay in the assertion of the doubt may be considered evidence of lack of any doubt at all.[41] Where the employer recognizes and begins bargaining with the union before asserting a doubt, this generally will be held to be affirmative evidence of an actual lack of a good faith doubt.[42] Moreover, where the employer

37. Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), *aff'd,* 185 F.2d 732 (D.C. Cir.), *cert. denied,* 341 U.S. 914 (1950).

38. Aaron Bros., 158 N.L.R.B. 1077 (1966); Hammond & Irving, Inc., 154 N.L.R.B. 1071 (1965).

39. NLRB v. River Togs, Inc., 382 F.2d 198 (2d Cir. 1967); NLRB v. Great Atl. & Pac. Tea Co., 346 F.2d 936 (5th Cir. 1965).

40. *See, e.g.,* NLRB v. Idaho Elec. Co., 384 F.2d 697 (9th Cir. 1967); NLRB v. Ralph Printing & Lithographing Co., 379 F.2d 687 (8th Cir. 1967); Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), *aff'd,* 185 F.2d 732 (D.C. Cir.), *cert. denied,* 341 U.S. 914 (1950).

41. Local 1179, Retail Clerks v. NLRB, 376 F.2d 186 (9th Cir. 1967); Lifetime Door Co., 158 N.L.R.B. 13, 15 (1966), *enforced,* 2 LAB. REL. REP. (67 L.R.R.M.) 2704 (4th Cir. Feb. 1, 1968).

42. NLRB v. Mutual Indus., Inc., 382 F.2d 988 (9th Cir. 1967). It appears that a union bargaining relationship shifts the ultimate burden of proof to the employer.

substantiates his asserted good faith doubt by reasons other than the lack of an existing union majority, for example, doubts as to the NLRB's jurisdiction,[43] the appropriateness of the proposed unit,[44] and even where the employer considers the signers to be independent contractors,[45] the general rule seems to be that no defense to the 8(a)(5) charge can be mustered, and that, with respect to such doubts, the employer acts at his peril in refusing to recognize the union.[46]

The really significant question, however, is whether the mere assertion of a good faith doubt is sufficient to fulfill the employer's initial obligation or whether it is necessary for him to demonstrate a reasonable basis for such doubt as well. This ultimately is a question of burden of proof because such evidence is often used by the employer in the presentation of his case.[47] Evidence indicating the basis for the employer's doubt may include a past history of election losses by the union involved[48] and information gained by the employer concerning the sentiments of particular employees.[49] However, it must be remembered that such evidence will not be considered if the election losses were the result of, or the information gathering resulted in, unfair labor practices by the employer.[50]

It would seem reasonably clear that since the Board has the ultimate burden of proof on the issue of good faith doubt,[51] the employer is initially required merely to assert such doubt;[52] however, there has been some language to the contrary. The Seventh Circuit is clear on this point: "To be 'fair' or in 'good faith' doubt must have a rational basis in fact."[53]

See H & W Constr. Co., 63 L.R.R.M. 1346 (NLRB 1966). One commentator has suggested that the only time a bargaining order based on a card majority should be issued, absent other unfair labor practices, is when the employer's doubt is asserted after substantive bargaining has commenced. *See* Comment, *Labor Law — Employer's Good Faith Doubt of Union's Majority,* 27 LA. L. REV. 564 (1967).

43. H & W Constr. Co., 63 L.R.R.M. 1346 (NLRB 1966).

44. Southland Paint Co., 156 N.L.R.B. 22 (1965).

45. Steel City Transp. v. NLRB, 2 LAB. REL. REP. (67 L.R.R.M.) 2589 (3d Cir. Feb. 21, 1968).

46. Where the employer's doubt concerning his duty to bargain results from the fact that a valid election had been held within the preceding year, his position is not clear. The issue seemed to have been settled contrary to the employer's position by Conren, Inc., 156 N.L.R.B. 59, *enforced,* 368 F.2d 173 (7th Cir.), *cert. denied,* 386 U.S. 974 (1966). However, a later Board decision, Strydel, Inc., 156 N.L.R.B. 1185 (1966), seemingly allowed the prior election to serve as a defense to the 8(a)(5) charges.

47. *See, e.g.,* NLRB v. Quality Mkts., Inc., 387 F.2d 20 (3d Cir. 1967); Peoples Serv. Drug Stores v. NLRB, 375 F.2d 551 (6th Cir. 1967); NLRB v. Great Atl. & Pac. Tea Co., 346 F.2d 936 (5th Cir. 1965).

48. Wausau Steel Corp. v. NLRB, 377 F.2d 369 (7th Cir. 1967); NLRB v. Johnnie's Poultry Co., 344 F.2d 617 (8th Cir. 1965).

49. NLRB v. Great Atl. & Pac. Tea Co., 346 F.2d 936 (5th Cir. 1965); Cedar Hills Theatre, Inc., 67 L.R.R.M. 1076 (NLRB 1967). *But see* NLRB v. Economy Food Center, 333 F.2d 468 (7th Cir. 1964).

50. NLRB v. Quality Mkts., Inc., 387 F.2d 20 (3d Cir. 1967); Cedar Hills Theatre, Inc., 67 L.R.R.M. 1076 (NLRB 1967).

51. Cases cited note 39 *supra.*

52. The consistently expressed viewpoint that authorization cards are inherently unreliable would indicate that no further substantiation of the employer's good faith doubt is required, at least initially. *See* NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 566 (4th Cir. 1967); Pizza Prod. Corp. v. NLRB, 369 F.2d 431 (6th Cir. 1966); NLRB v. Flomatic Corp., 347 F.2d 74 (2d Cir. 1965).

53. NLRB v. C.J. Glasgow Co., 356 F.2d 476, 479 (7th Cir. 1966).

The Second Circuit is less explicit: "If we should assume, which we do without deciding, that an employer relying on good faith doubt of a union's majority, while not bearing the ultimate burden of proof, must come forward with some evidence of a reason, that was done here."[54]

Nevertheless, the general rule would seem to be that the employer's mere assertion would be enough to satisfy any initial burden, and that evidence supporting the employer's doubt is essential only after the Board has presented a prima facie case.

B. Investigation of the Union's Claim

Diverse problems arise concerning the question of investigation into the union's claim of a majority, and the way that an employer's reaction to that problem may be used as evidence to determine the existence or lack of a good faith doubt. Two forms of investigation must be kept distinct. The card check involves the mechanical process of checking the signatures on the cards against those of the employees while the general investigation entails the polling of employees with respect to their signatures.

In the area of card checks, it has been held that the refusal of an employer to abide by the results of a card check performed by a neutral third party is enough to demonstrate a lack of good faith doubt.[55] However, the Board has recently held that a repudiation of an agreement to submit to a card check was not enough, standing by itself, to demonstrate such an attitude.[56] Moreover, a refusal to accept an offer of proof at the time a demand for recognition is made is generally considered as some evidence of a lack of a good faith doubt.[57] But again, it is very questionable whether, standing alone, such evidence will justify a finding to that effect.[58] Language in a recent Second Circuit decision, *TWU v. NLRB*,[59] raises a question concerning the propriety of using a refusal to accept an offer of proof as evidence at all. The Court pointed out that it is perfectly consistent to concede the technical validity of the cards while still maintaining a doubt that the cards are reliable indicators of employee sentiment.[60]

54. TWU v. NLRB, 386 F.2d 790, 793 (2d Cir. 1967).

55. Fred Snow & Sons, 134 N.L.R.B. 709 (1961), *aff'd*, 308 F.2d 687 (9th Cir. 1962).

56. United Buckingham Freight Lines, 66 L.R.R.M. 1357 (NLRB 1967). In addition to the absence of any other indications of lack of good faith doubt, the Board pointed out the employer's willingness to deal with the same union as the representative of other employees. Therefore, this decision may be distinguished in the future on this particular fact.

57. NLRB v. Luisi Truck Lines, 384 F.2d 842 (9th Cir. 1967); NLRB v. Witbeck, 382 F.2d 574 (6th Cir. 1967); NLRB v. Ralph Printing & Lithographing Co., 379 F.2d 687 (8th Cir. 1967).

58. Strydel, Inc., 156 N.L.R.B. 1185, 1187 (1966).

59. 386 F.2d 790 (2d Cir. 1967).

60. *Id.* at 793. The court's opinion suggests the importance of distinguishing the card check and a general investigation. Although the question has not arisen, presumably refusal of a union's request to have the employees interrogated would be stronger evidence of a lack of good faith.

A coincident problem arises when the employer has made a general investigation himself and has discovered that the union in fact did have a majority. A showing of this nature has been held to support a contention of a lack of good faith doubt.[61] The Board, apparently, is not inclined to take this position to its logical conclusion. It has recently been held by the Board that if the results of an employer poll were favorable to his position, these would not be considered sufficient to justify the employer's contention of good faith doubt.[62]

Finally, there is some indication that a failure on the part of the employer to make an investigation on his own initiative may be some evidence of lack of doubt. In a recent Fourth Circuit decision it was stated:

> If, upon receipt of a union's claim of a majority and a demand for recognition, an employer does nothing, his inaction may be some indication that he has no doubt of the union's majority status. . . . The natural response of an employer entertaining real doubt of the union's claim is an affirmative, investigatory one.[63]

As pointed out by that decision, however, such investigatory conduct may result in an 8(a)(1) violation, and, therefore, the employer's inaction may be caused by fear of such a charge.[64] Where the employer does engage in investigatory conduct which does not amount to an unfair labor practice, such conduct is not only not considered evidence of a lack of good faith doubt, but may actually be used to support a finding that the employer's doubts are in good faith.[65]

The above discussion is intended only to catalogue some of the questions which may arise during the consideration of the problem of good faith doubt. The subheadings of "Employer Assertion" and "Investigation" are but convenient devices to organize some of the factors involved.

C. The Use of Unfair Labor Practices as Evidence

The controversy surrounding the use of subsequent unfair labor practices as evidence of lack of good faith goes to the fundamental approach utilized in determining the appropriateness of a bargaining order. The Board's position is that the commission of independent unfair labor practices by the employer should be used as evidence of lack of good faith doubt.[66] While the finding of such unfair labor practices had in

61. NLRB v. Sehon Stevenson & Co., 386 F.2d 551, 557 (4th Cir. 1967); NLRB v. Tom's Supermarket, Inc., 385 F.2d 198 (7th Cir. 1967); Jem Mfg., Inc., 156 N.L.R.B. 643, 645 (1966).

62. Oleson's Food Stores, 66 L.R.R.M. 1108 (NLRB 1967).

63. NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 567 (4th Cir. 1967). For the Board's position to the contrary, see John P. Serpa, Inc., 155 N.L.R.B. 99 (1965), *rev'd and remanded sub. nom.*, Local 1179, Retail Clerks, 376 F.2d 186 (9th Cir. 1967).

64. NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 567 (4th Cir. 1967).

65. Don the Beachcomber v. NLRB, 2 LAB. REL. REP. (67 L.R.R.M.) 2551 (9th Cir. Feb. 7, 1968).

66. Copeland Oil Co., 157 N.L.R.B. 126 (1966); Samual B. Gass, 154 N.L.R.B. 728 (1965); Frantz & Co., 153 N.L.R.B. 1322 (1965).

the past operated as a per se determination of lack of good faith,[67] the Board presently looks to all of the facts involved before making any such determination.[68] Further, not all unfair labor practices are used as evidence. The rule is that, to be considered in connection with the lack of good faith doubt, the unlawful activity must be substantial and calculated to dissipate the union's majority.[69]

The Board's approach has been adopted by the majority of the circuit courts which have considered the question.[70] However, two recent circuit court decisions have raised interesting questions concerning the interpretation and the propriety of the Board's position. In *NLRB v. River Togs, Inc.*,[71] the Second Circuit refused to enforce a bargaining order based on an 8(a)(5) violation on the grounds that a lack of good faith had not been established. In addition to disputing the Board's findings with respect to certain unfair labor practice charges, the court maintained that evidence of unfair labor practices consisting of an "extensive antiunion campaign" and discriminatory layoffs was irrelevant: "But apart from that [the invalidation of certain Board findings] we see no logical basis for the view that substantial evidence of good faith doubt is negated solely by an employer's desire to thwart unionization whether by proper or even by improper means."[72] While the court based this statement on evidence affirmatively substantiating the employer's good faith doubt,[73] the court's approach, as indicated by other language in the opinion, is much broader. For example, the court quotes the following statement made by Judge Learned Hand concerning the use of unfair labor practices to demonstrate lack of good faith: "As a penalty it might be proper, but as a link in reasoning it seems to be immaterial."[74]

The court then interpreted the Board's basic approach in this area as an attempt to find the most reliable method for ascertaining employee sentiment. It characterized the Board's examination of unfair labor practices more in terms of an effort to discern the appropriateness of a bargaining order as a remedy for such practices, rather than as evidence of lack of good faith doubt. Therefore, if a bargaining order is to be imposed, the court concludes, it must be because the 8(a)(1) violations are

---

67. *See* Comment, *Union Authorization Cards,* 75 YALE L.J. 805, 814 (1966).

68. Hammond & Irving, Inc., 154 N.L.R.B. 1071 (1965). *But see* Comment, *supra* note 67, at 815, for the view that the Board still uses the per se approach.

69. *E.g.*, Aaron Bros., 158 N.L.R.B. 1077 (1966).

70. NLRB v. Quality Mkts., Inc., 387 F.2d 20 (3d Cir. 1967); UAW v. NLRB, 66 L.R.R.M. 2552 (D.C. Cir. 1967); NLRB v. Luisi Truck Lines, 384 F.2d 842 (9th Cir. 1967); American Sanitary Prod. Co. v. NLRB, 382 F.2d 53 (10th Cir. 1967); NLRB v. Ralph Printing & Lithographing Co., 379 F.2d 637 (8th Cir. 1967).

71. 382 F.2d 198 (2d Cir. 1967).

72. *Id.* at 206–07.

73. The evidence consisted of an antiunion petition, indications of gifts received by the signers, and the fact that some of the signers were Polish-speaking. *Id.* at 204–07.

74. *Id.* at 207, *quoting* NLRB v. James Thompson & Co., 208 F.2d 743, 746 (1953). *See also* Lesnick, *supra* note 35, at 858.

Villanova Law Review, Vol. 13, Iss. 3 [1968], Art. 4

so serious as to make a bargaining order an appropriate remedy.[75] Although this court has made it clear, in a later opinion, that unfair labor practices may be used as some evidence of a lack of good faith doubt,[76] the Second Circuit appears committed to the policy of looking to unfair labor practices primarily in terms of the appropriateness of the remedy to be imposed.

The Fourth Circuit also takes a position against the use of independent unfair labor practices as evidence of lack of good faith doubt. In *NLRB v. S.S. Logan Packing Co.*,[77] the court held that investigatory conduct violative of 8(a)(1) would not negate the employer's claim of good faith doubt because such conduct was not of any probative value on that issue. While the court recognized that extreme conduct may support an inference of lack of good faith,[78] it contended that in most situations the opposite is true.

> A finding of a § 8(a)(1) violation out of such investigatory conduct of an employer tends to confirm his claim of a good faith doubt of the union's majority; it has no tendency to negate it. . . . [I]n typical cases, subsequent unfair labor practices have a tendency to prove only the employer's opposition to the union's organizational effort; they throw no light on his belief or disbelief of the union's claim of majority status.[79]

While it is possible that in the future the Board will adopt the approach outlined by the Second Circuit and view the commission of independent unfair labor practices primarily as grounds for the issuance of a bargaining order rather than as evidence of lack of good faith doubt, it is clear that such an approach is not reflected in current Board policy.[80] Further, it must be recognized that if the Second Circuit approach receives additional judicial acceptance, the Board will be more reluctant to issue a bargaining order, thereby greatly curtailing the use of the bargaining order as a remedy.

Although the approach of the Board at present is that to be used as evidence of lack of good faith doubt, independent unfair labor practices must be substantial,[81] as a practical matter, almost any such activity is

75. 382 F.2d at 207-08. In this case, the court held that a bargaining order would be inappropriate because the violations were too insignificant. *See also* NLRB v. Flomatic Corp., 347 F.2d 74 (2d Cir. 1965).

76. *See* NLRB v. United Mineral Corp., 2 LAB. REL. REP. (67 L.R.R.M.) 2343 (2d Cir. Jan. 16, 1968).

77. 386 F.2d 562 (4th Cir. 1967).

78. Such extreme conduct was found to be present in NLRB v. Lifetime Door Co., 2 LAB. REL. REP. (67 L.R.R.M.) 2704 (4th Cir. Feb. 1, 1968).

79. 386 F.2d at 568.

80. *See generally* Address by H. Stephan Gordon, Associate General Counsel of the NLRB, Federal Bar Association and the George Washington University National Law Center Labor Relations Institute, in Washington, D.C., Feb. 15, 1968 (Reprinted in 1 LAB. REL. REP., News and Background Information Section 165 (Feb. 19, 1968)). It must be remembered that the issuance of a bargaining order based on 8(a)(1) violations alone has always been available as a possible alternative open to the Board. *See* Oleson's Food Stores, 66 L.R.R.M. 1108 (NLRB 1967).

81. *E.g.*, Aaron Bros., 158 N.L.R.B. 1077 (1966).

used as strong, if not conclusive, evidence against the employer.[82] Once the finding of lack of good faith doubt is made, "the bargaining order can be routinely imposed and sustained as the obvious remedy for an unlawful refusal to bargain."[83]

A bargaining order based on the *River Togs* rationale is a different matter. Since the focus under this rationale is shifted to the question of the appropriate remedy, the Board "would need to persuade the courts of appeals that the stronger remedy was not chosen routinely or simply as a deterrent, but was appropriate in light of the specific setting of the particular acts of illegality involved."[84] The Board would, therefore, be more careful in ordering bargaining if the *River Togs* approach were adopted by the other circuits. Further, the risk of saddling a group of employees with a minority union is increased where, as in *River Togs,* the bargaining order, if issued, would be based on 8(a)(1) violations alone. Under the traditional approach, the risk involved was that the union did not enjoy a majority status at the time the bargaining order was issued; under the new approach a bargaining order may be imposed notwithstanding the fact that a majority never existed.[85]

IV. SOME APPROACHES TOWARDS SOLUTION

Having briefly reviewed the current state of the law in this area, it is appropriate to examine some of the possible approaches to solution of the problem. These approaches will be divided into three general categories: the "absolute right to an election," the "most appropriate remedy," and the "good faith doubt."

A. The Absolute Right to an Election

A strong suggestion that the employer has an absolute right to insist on an election as a means of resolving questions of representation is found in the *Logan Packing* case.[86] The court first argued that section 9(c), prior to 1947, had provided that the Board was empowered to decide questions of representation by a secret ballot election, or by "any other suitable means." Since the latter phrase has been omitted in the Taft-Hartley Amendments, the only means available to resolve questions of representation is the election.[87] To further buttress this argument the court referred to the majority and minority reports[88] and the 1947 addition

82. *See* Comment, *supra* note 67, at 814–15.
83. Lesnick, *supra* note 35, at 858.
84. *Id.* at 860.
85. *See* NLRB v. United Mineral Corp., 2 LAB. REL. REP. (67 L.R.R.M.) 2343, 2349 (2d Cir. Jan. 16, 1968).
86. 386 F.2d 562 (4th Cir. 1967).
87. *Id.* at 569.
88. The court pointed out that the Minority Report suggestion that the Board might have discretion to dismiss an employer's election petition if there were no doubt that the union did represent a majority of employees was completely rejected by

of section 9(c)(1)(B),[89] which permits the employer, as well as the union, to petition for an election; these references were offered as further indications of the legislative intent to allow the employer to insist on an election.[90]

As the court itself recognized, section 9(c) does not come into play unless a question of representation exists for the Board to resolve. But the court concluded: "A question concerning representation exists, however, when a determination of the union's status and the employer's doubt of it is dependent upon a choice of dubious or debatable inferences arising from disputable, or even undisputable, evidentiary facts."[91]

When this statement is added to the lengthy indictment of the reliability of authorization cards contained earlier in the court's opinion,[92] the position of the Fourth Circuit appears to be that a question of representation always exists whenever a demand is made on the basis of authorization cards.[93] This position is circuitous. The court is willing to allow the employer, by asserting a good faith doubt, to raise the question of representation — which in turn gives him the right to avoid litigation on the very issue of good faith doubt. By assuming the existence of a question of representation whenever the employer asserts one, the court is in effect vitiating the traditional position that properly obtained and drafted authorization cards constitute a proper basis for recognition and bargaining.[94]

Even if the assumption of the *Logan* court were correct, it is far from clear that section 9(c) applies exclusively to cases in which a question of representation exists. As Judge Sobeloff of the Fourth Circuit has pointed out, 9(c) is the exclusive method whereby certification may be obtained, but nowhere does the statute limit a union to that method for obtaining representative status, whether or not a question of representation exists.[95] In fact, an examination of the language of section 9(a) supports the opposite inference, since the section indicates that the representatives with whom the employer must bargain under 8(a)(5) are those who are "designated" or "selected." While selection of the representative is accom-

89. 29 U.S.C. § 159(c)(1)(B) (1964).
90. The addition of section 8(c), 29 U.S.C. § 158(c) (1964), in 1947, to insure the expression of employer's views might also be used to support the position of the Fourth Circuit in *Logan*.
91. 386 F.2d at 569.
92. *Id.* at 565-66.
93. A subsequent Fourth Circuit decision, NLRB v. Lifetime Door Co., 2 LAB. REL. REP. (67 L.R.R.M.) 2704 (4th Cir. Feb. 1, 1968), indicates a possible retreat from the position taken in *Logan*. In that decision, Judge Sobeloff, who had previously severely criticized the *Logan* rationale in NLRB v. Sehon Stevenson & Co., 386 F.2d 551, 555 (4th Cir. 1967) (concurring opinion), affirmed, without citing *Logan*, a Board finding that where the employer made no assertion of a good faith doubt and where the commission of serious unfair labor practices indicated a clear lack of such doubt, the employer had violated section 8(a)(5). The case is not necessarily inconsistent with *Logan*, since the employer in the former had not even filed an election petition; however, a movement from *Logan* may be precursed by *Lifetime Door*.
94. The Second Circuit has indicated that this is the effect of the *Logan* case. *See* NLRB v. United Mineral Corp., 2 LAB. REL. REP. (67 L.R.R.M.) 2343, 2347 n.10 (2d Cir. Jan. 16, 1968).
95. *See* NLRB v. Sehon Stevenson & Co., 386 F.2d 551, 555 (4th Cir. 1967) (concurring opinion).

Rosenblum: The Authorization Card Dilemma

plished through section 9(c)'s secret election, designation is accomplished through the authorization card procedure.[96]

Whatever the merits of the argument for establishing the employer's absolute right to an election, it seems reasonably clear that such a right will have to be created by new legislation rather than through interpretation of the existing Act. Such legislation has recently been proposed by Senator Fannin of Arizona.[97] The Fannin Bill would amend section 9(a) to provide that the only bargaining representative with whom the employer is required to bargain under 8(a)(5) shall be one who has been certified by the Board as a result of an election conducted in accordance with 9(c). In addition, section 10(c) would be amended to provide that no bargaining order shall be issued by the Board unless the union is so certified.[98]

There are several arguments to support the Fannin Bill. The first argument, which has already been considered, is that the courts have misconstrued the original legislative intent on this point, and, therefore, new legislation is necessary to correct the error.[99] Support for this approach can also be premised on an interpretation of the first amendment. As long as the employer is under a threat of a bargaining order, in the absence of or in spite of an election, he is not really free to express his views.[100] However, since a bargaining order would be issued only after either an improper refusal to bargain or acts of interference or coercion, all of which constitute the commission of unfair labor practices under the Act, the first amendment problem does not seem to be a serious one.[101]

Another obvious argument supporting the Fannin proposal is that authorization cards are inherently unreliable. There can be little question that the standards surrounding the proper nature of the cards and their solicitation are in severe need of renovation. However, even if the standards were radically changed to test the validity of the card majority more stringently, the reliability argument has a deeper and more persuasive aspect. The employee is not in a position to make a truly free and reasoned choice, as desired by the Act, unless he is afforded the opportunity of hearing the employer's views; if recognition is required upon presentation of the card majority, the employer has no opportunity to interact in the employee's decision. This argument has a great deal of merit. However, the Fannin proposal, by prohibiting the use of the bargaining order, does not adequately take cognizance of the possibility of the commission of

96. This contention has been answered by interpreting the term "designation" to apply to the single union election and confining "selected" to the multi-union situation. *See* Comment, *supra* note 67, at 821. There is, however, no indication that such an approach has or will be accepted.

97. S. 22, 90th Cong., 1st Sess. (1967).

98. There is no indication that any action has been taken on the bill to date.

99. *See* pp. 576-77 *supra*.

100. *See* Comment, *supra* note 67, at 840.

101. *But see id.* at 840. The position is taken that first amendment problems exist whenever a bargaining order is based on the use of authorization cards as a means of obtaining the status of bargaining representative.

Published by Villanova University Charles Widger School of Law Digital Repository, 1968

unfair labor practices by the employer during the campaign. This omission may actually allow the destruction of the "reasoned choice" it was designed to protect. When employer unfair labor practices have been committed during the campaign, the ability of the employee to make a reasoned choice is significantly open to doubt, and the Fannin proposal would leave no alternative but a re-run election.

B. *The Most Reliable Method Approach*

The approach which focuses on ascertaining what is the most reliable method of determining the employees' desires comes in two varieties. One is that exemplified by the *River Togs* case. In *River Togs,* unfair labor practices were considered not in terms of the traditional good faith doubt approach, but rather in terms of the appropriateness of the remedy to be applied. The second approach is that contained in a bill proposed by Senator Javits of New York.[102] The bill would amend section 9(c) to provide for an expedited election in those cases in which a demand for recognition is made, unless unfair labor practices are committed during the campaign. If unfair labor practices are committed, the employer may be subject to an 8(a)(5) violation.[103]

While the Javits Bill, like *River Togs,* views the problem of the propriety of the bargaining order more in terms of its appropriateness as a remedy than in terms of whether or not a good faith doubt ever existed, it is important to remember that the only time the question of appropriateness of remedies is raised is when unfair labor practices are committed. Otherwise, the two approaches are at opposite ends of the spectrum. The Javits Bill would provide for an election as the general rule and, therefore, can be seen as closer to the Fannin approach, with a remedy provided for the latter's most serious defect. *River Togs,* on the other hand, assumes the traditional *Joy Silk* test but makes one major exception to the traditional interpretation of that test in the case of unfair labor practices, and greatly limits the extent to which that test will be used.

The Javits Bill, by curing the most objectionable aspect of the Fannin Bill — the unavailability of the bargaining order as a remedy — presents the most acceptable statement of the right to an election approach, and perhaps the most appropriate solution to the problem itself. The arguments against this approach must be supported by a showing of the positive aspects of the traditional requirements of bargaining unless there is a good faith doubt. One such advantage, of course, is the saving of time and

102. S. 2395, 89th Cong., 1st Sess. (1965).

103. The bill would also amend section 8 to provide that a refusal to recognize a union presenting a card majority is an unfair labor practice if the employer has no good faith doubt of the majority status of the union *and* has not filed a petition for election under section 9(1)(B). Although this part of the bill would give the employer an absolute right to an election, it would be quite difficult to interpret this as being the exclusive statement of the employer's obligations in this area, and therefore it should be read in conjunction with the proposed amendment to section 9(c). *See* Comment, *supra* note 67, at 890.

administrative effort that results from the requirement of immediate bargaining. While the Javits Bill would provide for an expedited election, the bargaining order would unquestionably remain the most efficient method of handling the problem. Another argument is that the immediate bargaining approach fosters one of the basic policies of the Act, *i.e.*, the promotion of the right to self-organization; to bypass this approach is to run counter to this basic policy. It must be remembered, however, that underlying the right to self-organization is the right to freely select a bargaining representative, and to the extent that the new approach makes possible a more reasoned choice, it would seem that the overall policy of the Act would be furthered. Only if it can be said that the policy of spreading unionism was the *overriding* policy of the Act, can the approach suggested in the Javits Bill be considered basically conflicting, and, after the 1947 Amendments, this can hardly be said to be the case.[104]

If, however, legislation in this area is not forthcoming, a solution will have to be attempted by the courts. Adoption of the "most reliable method" approach by the Board and the courts would eliminate the problem of making a specific fact determination with respect to the presence or absence of a good faith doubt. There are indications that the Board may very well be moving towards this position;[105] however, before resort to this approach is taken, a re-evaluation of the more traditional process of analysis is in order.

C. *The Good Faith Doubt Approach*

Two requirements must be met before the immediate duty to bargain arises. These are that the union must present a validly obtained card majority and that the employer lack a good faith doubt regarding the union's majority status. With respect to the first, it has been seen that the Board's burden of meeting the standard of validity is relatively light. On the other hand, the difficulty of proving lack of good faith is quite substantial,[106] and if the use of independent unfair labor practices is limited, as suggested in *River Togs,* it will be even more difficult.[107] This situation is exactly the opposite of what it should be.

---

104. *See* Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 HARV. L. REV. 1, 44 (1947).

105. This seems to be the position taken in a recent address by the Associate General Counsel of the Board. *See* Address by H. Stephan Gordon, *supra* note 80, at 182. Mr. Gordon also pointed out that, at present, the imposition of a bargaining order is not at all a common occurrence. During fiscal year 1967, only 107 bargaining orders were issued compared with the 8183 elections which were conducted. *Id.* at 166. *See also* Frito-Lay, Inc., 2 LAB. REL. REP. (67 L.R.R.M.) 1313 (NLRB Feb. 16, 1968), in which the Board considered the case from the viewpoint of the "most appropriate remedy" as well as the traditional good faith doubt approach.

106. The difficulty of proving a negative is substantial in itself. In addition to this, the means whereby the Board is able to do so are severely limited. *See* pp. 570–73 *supra*.

107. It is interesting to note that 102 of the 107 bargaining orders issued in 1967 involved the commission of independent employer unfair labor practices. *See* Address by H. Stephan Gordon, *supra* note 80, at 166.

First of all, there is no reason at all not to require more stringent standards for the language of the cards and for the process of their solicitation. The Board could very easily prescribe a standard form for authorization cards, or, if this is thought to be excessive interference with the union's affairs, it might at least set forth more adequate minimum standards.[108] Considering the importance of the matter, it does not seem unreasonable to require the union to use separate cards for authorization and for election.[109] Further, the mechanical *Cumberland Shoe* test should be abandoned entirely in favor of an approach assessing all of the facts and circumstances surrounding the solicitation, including the form of the cards themselves, with a view toward determining the question of whether the signers were misled with respect to the significance of their authorization.

The stricter standards suggested would have the effect of enhancing the reliability of authorization cards and of making the existence of a good faith doubt on the part of the employer less likely. This fact, coupled with the great difficulty of proof, dictates that in the future, demonstration of certain objective factors should result in the creation of a presumption which will shift the burden to the employer to substantiate his good faith doubt.

The factors that should be considered in order to determine the existence of the presumption of validity may be open to debate, but two factors seem particularly relevant to this question. The first is the percentage showing of the union. A study has been made indicating that the greater the majority of authorization cards, the greater the likelihood of a union victory, and certainly this factor should be given more weight than it has been given in the past.[110] The second pertinent consideration is the ease with which the employer can investigate the union's claim of majority status. The major factor in this respect would be the number of employees involved, but, in addition, other factors concerning the question of feasibility of investigation may also be considered. This approach would have the effect of placing an affirmative duty to investigate on the employer under certain circumstances where he is in a position to make a determination of majority status himself.

This restructuring of the process of determining good faith doubt has two advantages. First, it relates the question of good faith doubt more directly to the question of reliability by requiring a more objective assess-

---

108. This could be done through the rule-making powers of the Board. For an excellent discussion of the failure of the Board to adequately use such powers, *see* Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961).

109. For a more specific proposal in this regard, see Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434, 440–41 (1966).

110. *See* 1962 ABA PROCEEDINGS, SECTION OF LABOR RELATIONS LAW 14–17.

ment of both.[111] Second, the emphasis on the concept of lack of good faith will shift from the notion that the employer is certain of the union's majority to the notion that he is completely unconcerned with the question as evidenced by his failure to substantiate his good faith doubt through investigation. To the extent that the concept of lack of good faith is altered to reflect an attitude of reckless disregard as well as of complete certainty, that concept will become more meaningful and workable.[112]

V. CONCLUSION

It is hoped that this exposition has demonstrated the need for reevaluation and clarification in this area. At present, unions have little to guide them in making a determination of what is necessary to impose an immediate duty to bargain upon the employer. Similarly, employers have few guidelines for determining their statutory obligations once a demand for recognition is made.

As suggested above, the most desirable solution may well be the establishment of the right to an election in all cases, with the safeguard of the bargaining order where necessary. If this is to be accomplished, it must be done by the legislators. If the problem is to be solved judicially, it is essential that the determination of the obligation to bargain without an election be as closely related to the question of the reliability of the cards as possible.

Michael F. Rosenblum

---

111. In a sense, this is the logical outcome of the *River Togs* approach. By deemphasizing subsequent employer activity in making a determination with respect to a lack of good faith, the focus is shifted to the factors surrounding the actual demand and the employer's attitude at that time.

112. One result of this approach is that the practice of imposing a bargaining order solely on the basis of unfair labor practices committed during a campaign would be almost eliminated. This would follow because the adjudication of the question of good faith doubt would be more closely related to that of reliability, and a showing of the former would leave the court with less of a basis to say that the union *ever did* represent the majority choice. As long as the remedies were available for exceptional circumstances, this limitation would be another advantage of the new approach.