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Faced with an array of union organizational campaign tactics ranging from awarding door prize turkeys[1] to paying witness fees,[2] the National Labor Relations Board (NLRB) has often been called upon to determine the propriety of electioneering practices. In rendering its decisions, the Board has relied heavily on assumptions about employee voting behavior. For the most part these assumptions have remained unarticulated; each case seems to turn on its facts. The courts, in reviewing the Board's decisions, have done little better in clarifying the bases for their holdings. Usually, the courts either accept Board conclusions with little new analysis or reject them on the basis of contrary assumptions.[3]

The Board's treatment of union offers to waive initiation fees has provided somewhat of an exception. Following a period of uncertainty,[4] the Board, in *DIT-MCO, Inc.*,[5] examined the initiation fee waiver issue in depth. After reviewing the union's purposes in waiving the fee, the Board weighed the effects of the waiver and decided that a union waiver of initiation fees has no coercive effect on the voting behavior of employees, and is, therefore, a permissible campaign tactic. But even in *DIT-MCO* the Board indulged in an assumption about employee voting behavior. It credited employees with sufficient sophisti-

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[1] Jacqueline Cochran, Inc., 177 N.L.R.B. 837 (1969).

[2] NLRB v. Commercial Letter, Inc., 455 F.2d 109 (8th Cir. 1972).

[3] *See generally* Getman, Goldberg & Herman, *The National Labor Relations Board Voting Study: A Preliminary Report*, 1 J. Legal Studies 233 (1972); Samoff, *N.L.R.B. Elections: Uncertainty and Certainty*, 117 U. Pa. L. Rev. 228 (1968); Note, *Behavioral and Nonbehavioral Approaches to NLRB Representation Cases*, 45 Ind. L.J. 276 (1970).

[4] *Compare* Lobue Bros., 109 N.L.R.B. 1182 (1954) *with* A.R.F. Prod., Inc., 118 N.L.R.B. 1456 (1957) *and* General Elec. Co., 120 N.L.R.B. 1035 (1958).

[5] 163 N.L.R.B. 1019 (1967), *enforced*, 428 F.2d 775 (8th Cir. 1970).

cation to consider carefully the implications of the union's offer.

Primarily because it disagreed with this assumption, the Supreme Court, in *NLRB v. Savair Manufacturing Co.*,[6] overturned the Board's initiation fee waiver rule. The decision may go far beyond the issue of union initiation fee practices due to the assumptions about employee voting behavior articulated by the Court and the broad language used to support them. This article explores the meaning of the *Savair* case and its implications for union practices during the organizational campaign.

I. UNION INDUCEMENTS DURING THE ORGANIZATIONAL CAMPAIGN PRIOR TO SAVAIR: AN OVERVIEW

A. *The Statutory Framework and the Board's Authority to Regulate Election Conduct*

The right of employees to choose their bargaining representatives is basic to the Labor-Management Relations Act (L.M.R.A.).[7] Section 1 states that one of the Act's broad objectives is to protect "the exercise by workers of full freedom of . . . designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . . ."[8] To accomplish this objective, § 7 ensures the employees' right "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . . ."[9] This right is protected against abridgement by employer or union under the unfair labor practice provisions of §§ 8(a)(1),[10] 8(a)(3)[11] and 8(b)(1).[12] Moreover, conduct which does not reach the level of an unfair labor practice may be grounds for the Board to order a new election.[13] Section 9(c)(1)[14] which provides for Board cer-

[6] 414 U.S. 270 (1973), *aff'g* 470 F.2d 305 (1972).
[7] 29 U.S.C. § 141 *et seq.* (1973).
[8] *Id.* § 151.
[9] *Id.* § 157.
[10] *Id.* § 158(a)(1).
[11] *Id.* § 158(a)(3).
[12] *Id.* § 158(b)(1).
[13] *See, e.g.*, General Shoe Corp., 77 N.L.R.B. 124 (1948).
[14] 29 U.S.C. § 159(c)(1).

tification of unions as bargaining agents for employees, authorizes the Board to "direct an election by secret ballot and . . . certify the results . . . ." This provision was interpreted by the Supreme Court in *NLRB v. Waterman Steamship Corp.*[15] as granting the Board power to determine the procedures and safeguards necessary to protect employee freedom of choice in selecting a bargaining representative.

The Board has viewed its § 9[16] responsibilities as the duty to ensure "a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible,"[17] where an "atmosphere conducive to the sober and informed exercise of the franchise"[18] exists, and where "[c]onduct that . . . renders improbable a free choice"[19] is avoided. Of course, the aspiration of a sterilized union election is unattainable, as even the Board has acknowledged.[20] Its treatment of benefits offered by the union during the election campaign evidences the distance between the ideal laboratory environment and the reality of a heated representation contest.

B. *Union Promises and Tangible Benefits*

In contrast to the rules restricting inducements offered by employers during an organizational campaign,[21] both the Board and the courts have long recognized that unions must be permitted wider latitude than employers to promise potential members that future economic benefits will result from collective bargaining. *Wilson Athletic Goods Manufacturing Co. v. NLRB*[22] provides an example of this attitude. There, the Seventh Circuit refused to order a new election after the union had circulated a leaflet stating that it was negotiating a 30 cent per

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[15] 309 U.S. 206, 226 (1940).

[16] 29 U.S.C. § 159 (1973).

[17] General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

[18] Sewell Mfg. Co., 138 N.L.R.B. 66, 70 (1962).

[19] General Shoe Corp., 77 N.L.R.B. 124, 126 (1948).

[20] *See* Liberal Mkt., Inc., 108 N.L.R.B. 1481, 1482 (1954): "We seek to establish ideal conditions insofar as possible, but we appraise the actual facts in the light of realistic standards of human conduct."

[21] *See, e.g.*, NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

[22] 164 F.2d 637 (7th Cir. 1947). *See also* Regency Electronics, Inc., 198 N.L.R.B. 87 (1972); Tunica Mfg. Co., 182 N.L.R.B. 729 (1970).

hour increase at another plant and would do the same for the employees in question. Premising its decision on the notion that a union promise to obtain economic benefits is not per se unlawful, the court went on to say that "[i]t was a mild and temperate promise when contrasted with the promises to which the public is accustomed, over the radio, from the platform and in the public press by candidates and others in every political campaign."[23] Similarly, in *NLRB v. Muscogee Lumber Co.*,[24] the Fifth Circuit discounted a union's promise to create a fund to pay future strike benefits as merely an offer of "benefits routinely associated with unionization."[25] The court distinguished such promises from actual "tangible economic benefits to employees which enhance their economic position and induce them to vote for the donor."[26]

The rationale of such cases is apparent. The union's success is contingent upon its convincing employees that they will benefit economically from unionization. Since one purpose of the Act is to encourage industrial peace and stability, which the Act assumes will be promoted by equalizing employee-employer bargaining power, to deny the union its major economic argument would defeat this statutory purpose by placing the union at a disadvantage. However, if the benefit offered by the union is not contingent upon its becoming the bargaining representative, but instead is of immediate economic value to the employee, the Board may find an impermissible inducement. When confronting such situations, the Board has been forced to distinguish between mere "electioneering" and naked attempts to buy votes. In ruling on the permissibility of unions offering tangible benefits to employees, the Board has taken several factors into account: the size of the benefit, the services rendered by the employee in return for the benefit, the extent to which the benefit was negotiated between the union and the employees, and the union's purpose in offering the benefit. Although these factors obviously overlap, an analysis of the cases is helpful in understanding the Board's approach to elec-

[23] 164 F.2d at 639-40.
[24] 473 F.2d 1364 (5th Cir. 1973).
[25] *Id.* at 1367.
[26] *Id.*

tion regulation.

Gifts of negligible value from either the union or the employer generally escape Board disapproval under the label of "normal electioneering." For example, the Board has permitted union beer parties on election eve,[27] and even full dinner parties given by the employer on the theory that such conduct is "legitimate campaign media."[28] Indeed, in *Movsovitz & Son, Inc.*[29] the Board went so far as to permit the union's promise of beer and whiskey after the election if the union won. Although it found the contingency "troublesome," the Board stated that "this type of minimal gratuity is not such an emolument as can reasonably be expected to influence the employees' free choice in the election."[30]

The Board is likely to view larger financial benefits with a more jaundiced eye. New elections have been ordered following an extension of life insurance and funeral benefits to employees who had signed union authorization cards during the campaign but who had paid no union dues.[31] Similarly, the payment of seven times the normal hourly wage to election observers has been found to "transcend the bounds of propriety."[32] Further, a competition between two unions which resulted in payments to employees at 2.7 times the regular hourly wage for attendance at union meetings has been viewed by the Board as creating "the atmosphere of an auction room."[33]

Where an apparent quid pro quo other than the promise to vote for the union can be found, however, the union's offer of tangible economic benefits is usually permitted on the theory that the benefit is compensation. The Board has permitted both payment to employee drivers in exchange for a promise to carry voters to the polling place[34] and payment of parking

[27] *See, e.g.*, Lloyd A. Fry Roofing Co., 123 N.L.R.B. 86 (1959); Ohmite Mfg. Co., 111 N.L.R.B. 888 (1955). *But see* Coca Cola Bottling Co., 132 N.L.R.B. 481, 483 (1961) (employer not allowed to give money to one employee "with instructions to buy beer for the [other] employees and urge them to vote against the [union].").

[28] Zeller Corp., 115 N.L.R.B. 762 (1956).

[29] 194 N.L.R.B. 444 (1971).

[30] *Id.* at 445.

[31] Wagner Elec. Corp., 167 N.L.R.B. 532 (1967).

[32] Collins & Aikman Corp. v. NLRB, 383 F.2d 722, 729 (4th Cir. 1967).

[33] Teletype Corp., 122 N.L.R.B. 1594, 1595 (1959).

[34] Federal Silk Mills, 107 N.L.R.B. 876 (1954).

fees.[35] Similarly, the Board has allowed the awarding of lunch money[36] and door prizes[37] in exchange for attendance at meetings. But where these types of prizes are also given to those who did not attend the meetings, the Board has ordered a new election.[38]

Finally, the Board has permitted economic benefits to be given members of an existing union when that union was being challenged by a rival. In such cases, the Board does not seem to scrutinize the transaction closely. It has said: "The vice inherent in an employer's grant of benefit . . . cannot properly be found to be present where a union takes action . . . to improve its agency relationship with employees."[39] Thus, it distinguishes between offers used to obtain or discourage union support initially and those used to make the existing union more attractive.

In summary, the decisions by the Board concerning offers of immediate economic benefits and promises of future economic benefits reflect a relatively straightforward analysis. While mere promises of future economic profit are permitted, tangible benefits of any magnitude offered to employees prior to a representative election are considered as bribes, unless the benefit is clearly conferred in exchange for services other than an affirmative vote. This analysis makes several assumptions. First, it assumes that employees will sell their votes, *i.e.*, that every man has his price. Second, given the relatively small size of the offered benefit when compared to the certain, and larger, financial obligations of union membership, the analysis assumes that employees are, for the most part, incapable of undertaking a rudimentary cost/benefit calculation prior to deciding whether to "sell" their votes. Finally, the analysis dismisses conferrals of small benefits as insignificant, even though they may create a climate of opinion favorable to the union. This is not to say that the decisions are without justification.

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[35] Lawrence Security, Inc., 210 N.L.R.B. No. 156 (May 29, 1974).

[36] Jat Transp. Corp., 131 N.L.R.B. 122 (1961).

[37] Jacqueline Cochran, Inc., 177 N.L.R.B. 837 (1969); Bordo Prod. Co., 119 N.L.R.B. 79 (1957).

[38] General Cable Corp., 170 N.L.R.B. 1682 (1968).

[39] Primco Casting Corp., 174 N.L.R.B. 244, 245 (1969).

The conferral of a tangible benefit may mislead employees into thinking that union membership carries no costs. The proffer of benefit may thus be seen as symbolic of the good times which lie ahead. Moreover, the granting of tangible benefits during the campaign creates an atmosphere of unrestrained conduct which may in itself carry a coercive effect. Unfortunately, none of these arguments are presented in the opinions. No consistent effort has been made to analyze the overall effect of any particular inducement on interests of the union, the employer, or the employee. One exception has been the analysis devoted by the Board to union offers to waive initiation fees.

C. *Union Waiver of Initiation Fees: The Law Prior to Savair*

Prior to the *Savair* decision, both the Board and the courts permitted the union to waive initiation fees so long as the waiver remained open to all employees until some time after the election.[40] The *Root Dry Goods Co.*[41] and the *Gruen Watch Co.*[42] cases are early expressions of Board policy on the issue, such offers being characterized as traditional campaign tech-

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[40] *See* NLRB v. Crest Leather Mfg. Corp., 414 F.2d 421 (5th Cir. 1969); NLRB v. Gafner Automotive and Mach., Inc., 400 F.2d 10 (6th Cir. 1968); Macomb Pottery Co. v. NLRB, 376 F.2d 450 (7th Cir. 1967); Amalgamated Clothing Workers v. NLRB, 345 F.2d 264 (2d Cir. 1965). Since *Savair*, the Board has continued to permit the waiver of fees in this situation. *See* Peabody Solid Waste Inc., 214 N.L.R.B. No. 126 (Nov. 8, 1974); F.W. Woolworth Inc., 214 N.L.R.B. No. 99 (Nov. 8, 1974); Jefferson Food Mart, Inc., 214 N.L.R.B. No. 30 (Oct. 23, 1974); Gerbes Super Market, 213 N.L.R.B. No. 112 (Oct. 3, 1974); Albert's Inc., 213 N.L.R.B. No. 94 (Sept. 27, 1974); Lawrence Security, Inc., 210 N.L.R.B. No. 156 (May 29, 1974); Wabash Transformer Corp., 210 N.L.R.B. No. 68 (April 30, 1974); First Health Care Corp., 210 N.L.R.B. No. 44 (April 25, 1974); Phillips Indus., Inc., 210 N.L.R.B. No. 42 (April 24, 1974); Endless Mold, Inc., 210 N.L.R.B. No. 34 (April 19, 1974). All of these cases decided subsequent to *Savair* have relied for the most part on the reasoning found in B.F. Goodrich Tire Co., 209 N.L.R.B. No. 182 (April 8, 1974):

> The Board finds nothing in the union's conduct which is objectionable. The practice of offering special reduced rates during an organization campaign has long been a traditional union method of enhancing its appeal to employees. The Board has never found such conduct to be objectionable where . . . it was an unconditional offer not dependent on how the employee voted . . . . [A] waiver of initiation fees for all employees in the unit who join at any time during the organizational stage of representation, prior or subsequent to the election, is legitimate.

[41] 88 N.L.R.B. 289 (1950).

[42] 108 N.L.R.B. 610 (1954).

niques. The Board found that although the offer represented a potential benefit, the benefit was not conditioned on the outcome of the election. The central premise of these cases seemed to be that union membership carried its own rewards, *i.e.*, that union membership involved benefits which would continue after the election, regardless of the outcome. Although the waiver might have encouraged employees to become union "adherents,"[43] the Board was unwilling to admit that the practice could influence the election. It distinguished the waiver of fees from the tangible benefit cases on the ground that waiver of initiation fees was a traditional means of attracting new members.[44]

The courts likewise concluded that waiver of initiation fees was permissible and offered additional rationales for this result. In *Amalgamated Clothing Workers v. NLRB*[45] the Second Circuit confronted an offer to waive the initiation fee which was available until a collective bargaining agreement was executed by the union. In upholding the Board's decision that the offer did not interfere with the fairness of the election, the court first reasoned that because the waiver was open to all employees until some time after the election, there was no coercion to join early in the campaign. Employees could vote against the union and still take advantage of the offer after the election. However, this theory implies that the employee will receive a benefit and, therefore, appears contrary to the tangible benefit cases, which had held that the fact that benefits are available to all is insufficient to justify the gift. For instance, gift certificates given to all employees, whether or not they attended organizational meetings, had consistently been found to be unfair election interference.[46] Therefore, this first rationale, standing alone, would seem insufficient support for the decision.

But the court had an additional basis for its decision to allow the waiver. It noted:

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[43] *Id.* at 612.

[44] *Id.*

[45] 345 F.2d 264 (2d Cir. 1965). *See also* NLRB v. Crest Leather Mfg. Corp., 414 F.2d 421 (5th Cir. 1969).

[46] *See* cases cited note 37 *supra*.

> Amalgamated had a constructive reason to waive its initiation fees prior to the time when it signed a contract . . . . Employees otherwise sympathetic to the union might well have been reluctant to pay out money before the union had done anything for them. Waiver of the payments would remove this artificial obstacle to their endorsement of the union.[47]

Thus, the court concluded that waiver represented only the removal of an "artificial obstacle" to union support. Moreover, it would seem that the removal of this obstacle did not result in a tangible economic benefit. Unlike an outright gift, the waiver did not place the employee in a better economic position than he had been prior to the campaign. Rather, it insured that the employee was no worse off in terms of his immediate economic situation for having supported the union.

After these early decisions, the Board began to permit unions to waive fees only for those who signed cards prior to the election, the standard initiation fee remaining in effect for those who joined after the election. In *Otis Elevator*,[48] *Bronze Alloys Co.*,[49] and *A.R.F. Products, Inc.*,[50] the Board allowed waiver, again relying on the argument that the waiver or partial reduction of fees was a tactic "traditionally used by Unions."[51] The Board distinguished the offer from the purchase of votes on the basis that the waiver was not made expressly contingent upon the election result. The Board did not, however, directly confront the question of why such waivers, available only prior to the election, did not unfairly influence the election by eliciting union support from voters in exchange for the waiver of fees.

In *DIT-MCO, Inc.*[52] the Board did go further and explained why a waiver of fees for those signing authorization cards prior to the election was permissible. There, the union had not only waived fees for those signing cards prior to the election, but had

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[47] 345 F.2d at 268.
[48] 114 N.L.R.B. 1490 (1955).
[49] 120 N.L.R.B. 682 (1958).
[50] 118 N.L.R.B. 1456 (1957).
[51] Otis Elevator, 114 N.L.R.B. 1490, 1493 (1955).
[52] 163 N.L.R.B. 1019 (1967).

also expressly conditioned the waiver on a union victory. In its earlier cases, the Board had stated that a union offer to waive initiation fees contingent on winning the election was an interference with freedom of employee choice in selecting a bargaining representative. It had held in *Lobue Brothers*[53] that such a waiver, which was open only to those signing cards prior to the election, was impermissible. Similarly, the Sixth Circuit, in *NLRB v. Gilmore Industries, Inc.*,[54] had relied on the concept that a waiver conditioned on the outcome of the election necessarily influenced the employees' voting: "There can be no question but that freedom of choice may be seriously interfered with by economic inducements."[55] But soon after it had rendered the *Lobue Brothers* decision, the Board began seeking ways to distinguish it. In *General Electric Co.*[56] it permitted a waiver contingent on the election outcome on two grounds: first, that because the election had been held in a right-to-work state, no employee would be compelled to join the union and pay the fee even if the union won; and second, that the offer was designed to counteract employer rumors about the size of initiation fees. Likewise in *A.R.F. Products, Inc.*,[57] the Board concluded that the apparently conditional nature of a waiver offer was only a "prediction" by the union of the consequences of a union victory coupled with a union-security provision in the contract.

These post-*Lobue* decisions seemed to recognize that as a practical matter the contingency of union victory is always implied in an offer to waive initiation fees. Absent the union's attainment of representative status, union membership is of little worth.[58] The difference in fringe benefits obtained from the nonunion employer and those additional benefits obtained from union membership would hardly seem to justify the payment of dues, even though the initiation fee has been waived.

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[53] 109 N.L.R.B. 1182 (1954).

[54] 341 F.2d 240 (6th Cir. 1965).

[55] 341 F.2d at 241. *See also* NLRB v. Gorbea, Perez & Morell, 328 F.2d 679 (1st Cir. 1964), where a new election was ordered after the union imposed a fee solely for the purpose of waiving it.

[56] 120 N.L.R.B. 1035 (1958).

[57] 118 N.L.R.B. 1456 (1957).

[58] For example, a union may not give a member preference over nonmembers in hiring hall systems. *See* Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961).

Moreover, there is no obligation to join the union until a valid union security agreement is signed, and then the obligation is only to pay dues. Thus, the Board's early distinction in *Lobue* between waivers conditioned on union victory and unconditional waivers appears to have been wrongheaded. Whether or not expressed by the union, employees know that the waiver is of little value absent collective bargaining with their employer.

A recognition of these factors seems in part to have led to the *DIT-MCO* decision. In overruling *Lobue Brothers* the Board stated:

> We are now of the opinion that no real distinction exists between a situation where the union offers to waive or reduce the initiation fees, but nothing is said about the election results, and one where, as in *Lobue*, the waiver is expressly conditioned on the outcome of the election. For, whether expressly told so or not, an employee must recognize that as a practical matter the waived or reduced initiation fee can become of value to him only if the union wins the election.[59]

Having acknowledged the meaninglessness of distinctions based on the contingency of union victory, the Board then confronted the more significant question of employee voting sophistication: If the benefit had value only if the union won the election, did not the offer of the benefit induce employees to vote for the union?

To resolve this question, the Board made two basic assumptions about voting behavior, both of which were different from those relied on in the tangible benefit cases. First, the Board assumed that employees were capable of weighing carefully the benefits of signing authorization cards against the financial obligations which signing carried if the union won. The Board theorized that employees opposed to the union would sign authorization cards simply to avoid future initiation fees if the union won and that such employees would still vote against the union even though they had signed the cards. In short, the Board assumed that employees were sophisticated enough to "hedge their bets" by signing authorization cards and thus avoiding liability regardless of the election outcome.

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[59] 163 N.L.R.B. at 1021.

The Board remarked:

> We shall assume, *arguendo*, that employees who sign cards when offered a waiver of initiation fees do so solely because no cost is thus involved; that they in fact do not at that point really want the union to be their bargaining representative. The error of the *Lobue* premise can be readily seen upon a review of the consequences of such employees casting votes for or against union representation. Initially, it is obvious that employees who have received or been promised free memberships will not be required to pay an initiation fee, *whatever the outcome of the vote*. If the union wins the election, there is by postulate no obligation; and if the union loses, *there is still no obligation*, because compulsion to pay an initiation fee arises under the Act only when a union becomes the employees' representative and negotiates a valid union-security agreement. Thus . . . it is completely illogical to characterize as improper inducement or coercion to vote "Yes" a waiver of something that can be avoided simply by voting "No."[60]

Second, the Board assumed that employees would not feel obligated to vote for the union in order to realize the benefit of the waiver. The Board felt that since a "No" vote would avoid entirely the obligations of union membership, employees were unlikely to see the waiver of the relatively small initiation fee as a "benefit." Instead, the Board believed that the employee would distinguish between the waiver of the initiation fee and an outright gift that would place him in a better financial position. On the assumption that he would view the waiver as merely the avoidance of a future, involuntary liability which would not be incurred absent a union victory, the Board reasoned that "an employee who did not want the union to represent him would hardly be likely to vote for the union just because there would be no initial cost involved in obtaining membership."[61] Thus, the waiver of fees would not, standing alone, induce a "Yes" vote from an employee opposed to the union. Instead, the persuasive value of the waiver of fees would be no greater than any other permissible union tactic. In the

[60] *Id.* at 1021-22.

[61] *Id.* at 1022.

secrecy of the balloting booth, the waiver would carry no more effect than statements concerning the benefits or costs of union membership.

The *DIT-MCO* decision was upheld on appeal.[62] Citing the traditional use of initiation fee waivers in representational campaigns, and the false barriers which such fees create, the Eighth Circuit found the inference of coercion in fee waivers to be "artificial."[63] More significantly, the court relied on the Board's wide discretion to regulate elections. The court recognized that although the Board had indulged in assumptions about voting behavior, so too had the *Lobue* decision been based on assumptions. Therefore, the court seemed to be saying that, since neither set of assumptions could be tested, the decision in *DIT-MCO* was not "inappropriate," given the Board's power to regulate elections.[64]

Nevertheless, there was evidence that the Board's theories concerning employee voting sophistication were not accepted in all the circuits. In *Amalgamated Clothing Workers v. NLRB*[65] for example, Judge Friendly, in a concurring opinion, questioned the majority view that a waiver left open until the signing of a contract is permissible in that the employee can wait until after the election to take advantage of the offer:

> It is true that in this case the stated deadline was not the achievement of majority status . . . but the signature of a contract, which presumably would come somewhat later. A lawyer scrutinizing the card might consider himself thus protected against the need of hasty action, although even he would feel much better if he were assured some advance notice of the fall of the boom. But it is unrealistic to suppose that Puerto Rican glovemakers being solicited by union organizers would draw so nice a distinction.[66]

Despite this reservation, however, Judge Friendly declined to dissent because the union majority was so great.

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[62] NLRB v. DIT-MCO, Inc., 428 F.2d 775 (8th Cir. 1970).

[63] *Id.* at 779.

[64] *Id.* In a later case, the Ninth Circuit agreed that the Board should be accorded wide discretion to supervise elections. *See* NLRB v. G.K. Turner Associates, 457 F.2d 484 (9th Cir. 1972).

[65] 345 F.2d 264 (2d Cir. 1965).

[66] *Id.* at 268.

Similarly, in *NLRB v. Gafner Automotive and Machinery, Inc.*,[67] Judge Phillips, of the Sixth Circuit, while concurring in permitting the waiver of fees where the offer was available after the election, doubted the ability of employees to rationally assess the meaning of a union waiver:

> If the Union's substantial reduction of its initiation fee had been limited to a period of only two weeks, this of necessity in my opinion would constitute an inducement for a wavering employee to hedge his bet on the outcome of the election at a bargain rate, choosing to accept the discounted membership fee while available. Such an economic inducement clearly would interfere with the employees' freedom of reasoned choice.[68]

Thus, at the time of *Savair*, the issue was squarely posed. It was whether an offer by a union to waive initiation fees constitutes an economic benefit which should be condemned. The issue had been created because of conflicting assumptions about employee voting behavior. At least some circuit judges doubted the ability of employees to differentiate between a waiver of fees and an outright gift of money. They condemned both as coercive interferences with employee freedom of choice. The Board, on the other hand, assumed that employees were sufficiently sophisticated to balance the costs and benefits of the union's offer of waiver, even though the Board had made no attempt to harmonize this assumption of sophistication with the assumptions relied upon when the union's offer was of immediate tangible benefit.

II. THE SAVAIR DECISION

In 1970, the Mechanics Educational Society of America, AFL-CIO, began organizing the production and maintenance employees of Savair Manufacturing Co., a Michigan producer of machine parts. Prior to the filing of the representation petition, an employee-organizer discussed the issue of union initiation fees with Savair's employees. He told them that unless they signed union authorization cards, they would be subject

[67] 400 F.2d 10 (6th Cir. 1968).

[68] *Id.* at 13.

to a fee if the union won the election. Testimony of two employees left in doubt whether the organizer referred to the payment as an "initiation fee" or as a "fine."[69] At this stage of the organizing process, 28 employees signed union cards.[70]

After the filing of the representation petition, the issue of fees again arose in a meeting between Savair employees and Alfred Smith, Secretary-Treasurer of the union.[71] It is unclear whether Smith stated that the "small fee" would be waived only for those signing cards before the election, or whether he stated that the waiver would also apply to those who joined the union any time prior to the successful negotiation of a contract with the employer.[72] In any event, the union organizer subsequently told employees that the waiver would only be available to those signing authorization cards prior to the election.[73] Seven or eight additional employees signed cards after the filing of the petition but prior to the representation election. Although the initiation fee involved amounted to only ten dollars, the employees apparently did not know the amount of the payment.[74] The union won the representation election by a vote of 22 to 20, with one ballot challenged and one ballot declared void.[75]

Savair objected to the election results on the ground that the waiver offer interfered with the employees' free choice. After an evidentiary hearing, the hearing officer dismissed the objection, relying on the Board's decision in *DIT-MCO* that such a waiver was not impermissibly coercive. The Board sustained the hearing officer and certified the union as the exclusive bargaining representative.[76] The company then refused to bargain and an unfair labor practice complaint was issued. The Board sought enforcement of its order in the Sixth Circuit.

The Sixth Circuit refused to enforce the order.[77] After re-

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[69] NLRB v. Savair Mfg. Co., 414 U.S. 270, 272-73 n.4 (1973).
[70] *Id.* at 274.
[71] *Id.* at 281-82.
[72] *Id.* at 272-73 n.4.
[73] *Id.*
[74] *Id.* at 274.
[75] 470 F.2d at 305.
[76] Savair Mfg. Co., 194 N.L.R.B. 298 (1971).
[77] 470 F.2d 305 (6th Cir. 1972).

viewing its earlier decision in *NLRB v. Gilmore Industries, Inc.*,[78] and noting that the controversy as to what was actually said "indicate[s] the confusion concerning initiation fees . . . that can be generated in the minds of those involved in a Union election,"[79] the court reaffirmed *Gilmore* and held that a waiver of an initiation fee which is contingent on the election outcome and available only to employees who join prior to the election violates §§ 7 and 9(a) of the L.M.R.A. The court's conclusion was succinct: "We simply refuse to believe that the waiver of initiation fees, contingent upon the outcome of an election, whether it is referred to as a fine, an assessment, or a waiver of initiation fees, is not coercive in the context of a union election."[80]

The Supreme Court affirmed the Sixth Circuit in a six to three decision.[81] Writing for the majority, Justice Douglas based the decision on three principal arguments. First, he asserted that the "realities" of the waiver permitted the union to "buy endorsements and paint a false portrait of employee support during its election campaign."[82] Not only would some employees who had signed authorization cards feel bound to vote for the union, he reasoned, but those who signed cards and voted against the union would, by the mere fact of signing, mislead their fellow employees into thinking the union had greater support than in fact existed. Second, Justice Douglas analogized the union's conduct to an employer's promise to increase fringe benefits. Since such conduct by employers was forbidden under the Court's *NLRB v. Exchange Parts Co.*[83] decision, similar conduct by the union should be grounds for setting aside representation elections.[84] Finally, Justice Douglas argued that because authorization cards may in some cases be used by a union to obtain bargaining privileges without an election, the Court should exercise special care to ensure that the collection of authorization cards be held to the "same kind

[78] 341 F.2d 240. See discussion in text accompanying note 52 *supra*.
[79] 470 F.2d at 306.
[80] *Id.* at 307.
[81] NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973).
[82] *Id.* at 277.
[83] 375 U.S. 405 (1964).
[84] 414 U.S. at 278-79.

of moral standard" which governs an actual secret ballot election.[85]

Justice White, writing also for Justices Brennan and Blackmun, dissented from the majority's conclusions,[86] arguing that the economic inducement represented by the waived initiation fee entered only marginally into the employee's decision on whether or not to support the union.[87] He distinguished *Exchange Parts* on the grounds that the waiver of fees represented only a small, contingent benefit and that, further, the union was powerless to penalize employees by removing the benefit if it lost the election.[88] He also found the majority's concern for the wrongful use of authorization cards unnecessary in a case where an election had been held.[89] Finally, Justice White questioned the wisdom of the Court's substituting its own assumptions about voting behavior for those of the Board.[90]

III. SAVAIR: A CRITICAL EXAMINATION

A. *Voting Behavior and the Waiver of Initiation Fees*

No one knows why employees vote as they do in representation elections. An early study of a representation election suggests that employees are influenced by three factors: a desire for better economic conditions, *i.e.*, higher wages, shorter hours and an end to wage inequalities; a desire for protection from management favoritism; and a desire to gain or retain the fellowship and respect of those who are already union members.[91] Another early study stresses family background, prior work history, and experience working with the employer as factors which influence the resolve with which employees support unions.[92] The preliminary research of Getman and Gold-

[85] *Id.* at 380.
[86] *Id.* at 281.
[87] *Id.* at 284.
[88] *Id.* at 284-85.
[89] *Id.* at 287-88.
[90] *Id.* at 290.
[91] J. BARBASH, THE PRACTICE OF UNIONISM 9-14 (1956).
[92] Serdinan, London & Karsh, *Why Workers Join Unions*, ANNALS, March, 1951, at 75.

berg suggests that "[e]mployees display a fairly low degree of familiarity with the campaigns of the parties. We have been generally successful in predicting voting behavior, including vote switching, on the basis of data collected prior to the election campaign—that is, without regard to the election campaign."[93] Their studies also suggest that only those who vote for the union are aware of the issues in the campaign, and that the impact of employer unfair labor practices is to induce employees to vote for the union.[94] Yet another study suggests that employee voting is affected by pragmatic rather than ideological factors. Issues such as the size of union dues and the likelihood that economic gain would result from unionization are found to predominate.[95] The reason for the varied theories about employee voting behavior has been well stated by Professor Bok:

> The lack of consensus concerning the role of law in regulating elections appears to result not so much from political considerations as from a deeper uncertainty regarding the nature of the election process itself. To quote one of the most careful studies in the field: "Despite the universal interest in what has influenced our elections, interpretation has scarcely risen above the simplest impressionism. The explanations offered for an electoral result are astonishingly varied; they depend typically on the slenderest evidence, and disagreements are commonplace even among knowledgeable observers."[96]

It is not surprising then, that the Board as well as the courts have relied on assumptions about voting behavior for the basis of their decisions on how to regulate union representation elections. To the extent that there is any agreement among the commentators about these assumptions, it is that the Board apparently assumes a very low level of employee voting sophis-

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[93] Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972).

[94] Goldberg & Getman, *Voting Behavior in NLRB Elections*, N.Y.U. 23d CONF. ON LAB. 115, 128 (1971).

[95] Brotslaw, *Attitude of Retail Workers Toward Union Organization*, 18 LAB. L.J. 149 (1967).

[96] Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 40 (1964), quoting CAMPBELL, CONVERSE, MILLER & STOKES, THE AMERICAN VOTER 523 (1960).

tication. Getman, Goldberg, and Herman state that the Board assumes that employees are easily influenced by the campaigns of both the union and employer, and are especially susceptible to employer threats of retaliation if they vote for the union and to promises of benefit if they do not.[97] Likewise, according to Samoff:

> The Board, employers, and unions assume that workers are generally like amoebas—unthinking, unfeeling, passive, and reactive—easily swayed, unable to evaluate, and susceptible to propaganda, promises, and blandishments. The Board, employers, and unions seem to reject the view that workers are generally reasonable, capable of acting in their own interests, and open to change.[98]

Although this recognized assumption seems to have characterized the reasoning of the tangible benefit cases, it does not seem to have underlain the *DIT-MCO* decision which the Board applied in *Savair*.[99] Its rejection by the Board was short-lived, however, as it was quickly revived by the Sixth Circuit in its *Savair* opinion. The court states that it "simply refuse[s] to believe that the waiver of initiation fees, contingent upon the outcome of the election . . . is not coercive in the context of a union election."[100] Relying primarily on *Lobue* and its earlier *Gilmore* decision, the Sixth Circuit appears to believe that an offer to waive an initiation fee represents both a tangible benefit to those who sign cards and a threat to those

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[97] Getman, Goldberg & Herman, *supra* note 3, at 234.

[98] Samoff, *supra* note 3, at 235.

[99] *See* discussion in text accompanying notes 59-60 *supra*. The Board's assumptions in *DIT-MCO* and *Savair* seem to echo the suggestions of Samoff about the ideal Board approach:

> One significant aspect of NLRB elections is that ninety per cent or more of the eligible voters consistently vote. Workers with such strong interest in election results are more likely to know the issues and less likely to be susceptible to propaganda than apathetic voters. Unlike political parties, which are interested only in getting *their* supporters to the polls, both unions and employers strive for maximum turnout in the belief that the result should be legitimized by the largest number of voters. Direct involvement, familiarity with the issues, appraisal of the propaganda, and maximum turnout could be the system's corrective for electioneering, exaggerations, and misrepresentations.

Samoff, *supra* note 3, at 246.

[100] NLRB v. Savair Mfg. Co., 470 F.2d 305, 307 (6th Cir. 1972).

who do not. Its analysis further assumes that such a "gift," coupled with the threat of loss if it is refused, will necessarily influence the decision of employee voters who are unable to separate the impact of the waiver from the vote itself.

Unlike the Sixth Circuit, however, the majority opinion of the Supreme Court in *Savair* does not take issue with the Board's theories about the effect of a waiver on voting behavior. Rather, Justice Douglas argues that the Board's analysis "ignores the realities of the situation" because it fails to consider the effect of the waiver on the appearance of union support:

> Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union. His outward manifestation of support must often serve as a useful campaign tool in the union's hands to convince other employees to vote for the union, if only because many employees respect their coworkers' views on the unionization issue. By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign.[101]

Thus, Justice Douglas focuses primarily on the "bandwagon" effect of the waiver. The waiver offer encourages even those opposed to the union to sign authorization cards, giving the union an appearance of support which will persuade uncommitted voters to support the union. Because this appearance of support is achieved by waiving the initiation fee, it is seen as "buying" endorsements. To support this argument, Justice Douglas cites the fact that more employees signed authorization cards than voted for the union. In his view, this indicates that the waiver of the fee was crucial in "buying" endorsements from those who opposed the union.

The Court's analysis on this point is subject to criticism on several grounds. First, the bandwagon argument indulges in assumptions about employee voting behavior which seem highly questionable. Under § 9(a) of the L.M.R.A., election of bargaining representatives must take place "in a unit appropri-

[101] 414 U.S. at 277.

ate for such purposes . . . ."[102] The overriding standard for determining whether a unit is appropriate is whether it assures to employees "the fullest freedom in exercising the rights guaranteed by this Act."[103] The Board looks to such factors as the community of interest of the employees, their physical proximity, the employer's business organization, the bargaining history of the parties, and the union's preference and reasons for that preference.[104] Thus, the voters are not strangers to each other. Their unit has been selected as an appropriate unit for election primarily because they share a community of interest, because common issues predominate, and because the chance for communication among them is high. The employees are likely to know each other personally, to have worked closely together, and to have discussed among themselves the pros and cons of collective bargaining. Given this composition of the unit, it would seem likely that the feelings of an individual employee concerning unionization would be well-known to all. Thus, any employee is likely to perceive the motives of his fellow employees in signing authorization cards, whether that motive is based on true support of the union or mere desire to avoid initiation fees should the union prevail. This would seem even more probable in a small unit, such as the one involved in the *Savair* election.

Significantly, Justice Douglas does not quarrel with the Board's assumption that the waiver of initiation fees will not, by itself, coerce employees into favoring the union. It is not the actual vote which is "bought and sold," but rather the endorsement. Thus, unlike the Sixth Circuit, he assumes that the employees do have sufficient sophistication to "hedge their bets"—to sign authorization cards even though they are opposed to the union. Implicitly, Justice Douglas recognizes this by citing the statistics which indicate that more employees signed authorization cards than voted for the union. If, as he

[102] Labor-Management Relations Act § 9(a), 29 U.S.C. § 159(a) (1973). A "bargaining unit" is "[a] group of employees who may be a craft unit, a plant unit or subdivision thereof, banded together for the purpose of bargaining wages and/or benefits with the employer." Arnone v. Chrysler Corp., 148 N.W.2d 902, 904 n.1 (Mich. 1969).

[103] Labor-Management Relations Act § 9(a)(b), 29 U.S.C. §§ 159(a)(b) (1973).

[104] *See* Mallinckrodt Chem. Works, 162 N.L.R.B. 387 (1966).

assumes, employees would endorse the union even though opposed to it, it seems unlikely that this fact would escape the notice of other employees in the unit. It also seems unlikely that voters who are sophisticated enough to "hedge their bets" would be misled by a false showing of authorization card support. Indeed, the figures cited by Justice Douglas appear to cut against his argument. He notes that while 35 or 36 employees had signed authorization cards, only 22 voted for the union.[105] If more employees signed authorization cards than supported the union, the bet-hedging process must have gone on. Apparently, the endorsements did not increase union support, since any bandwagon effect created during the campaign had apparently dissipated by the time of the election. Consequently, the validity of the argument that "buying" endorsements is unduly influential in generating union support is questionable.

The majority opinion in *Savair* also asserts that the mere signing of the cards will induce some employees to support the union in order to remain true to their "stated intention."[106] This argument goes to the issue of whether the signing of cards misleads employees into believing that they are obligated to support the union in the upcoming election. While he does not say so, Justice Douglas may feel that the signing of the card in return for the waiver gives some employees the impression that they have entered into a binding agreement to vote for the union. The premise for this argument is that an employee who signs the card is unsophisticated and will not be aware that he is "not legally bound to vote for the union and has not promised to do so in any formal sense . . . ."[107] This assumption, however, is contrary to the reasoning behind the Board's *Cumberland Shoe*[108] rule which was upheld by the Supreme Court

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[105] 414 U.S. at 277-78.

[106] 414 U.S. at 278. The argument of Justice Douglas reflects that argued by Savair:

> The person who puts his signature on a written document, albeit under economic duress, which says in effect that he wants to be a union man . . . is likely to feel some moral obligation to carry through on his written declaration and vote for the union.

Brief for Respondent at 6.

[107] 414 U.S. at 277-78.

[108] Cumberland Shoe Corp., 114 N.L.R.B. 1268 (1964).

in *NLRB v. Gissel Packing Co.*[109] This rule allows authorization cards to be used to support the issuance of a bargaining order in lieu of an election if the cards unambiguously authorize the union to represent the signing employee. The Court's basis in upholding the rule was that, if the language is "clear," the employees "should be bound by . . . what they sign . . . ."[110] Thus, the Court in *Gissel* reasoned that an employee can analyze the language of the card and can determine independently the consequences of his signature. But while in *Gissel* the Court assumed that employees have sufficient sophistication to realize that they should be bound by an unambiguous card, in *Savair* Justice Douglas feared that employees are so unsophisticated that they will fail to realize that they are not bound. Absent misrepresentation by the union, it would seem no more difficult for an employee to determine the consequences of his signature on a recognition slip of the type used in *Savair*[111] than to realize the consequences of his signature on an authorization card of the type used in *Cumberland Shoe.*[112]

B. *The Waiver of Initiation Fees and Promises of Benefit*

The majority opinion in *Savair* also contends that union offers to waive initiation fees should be treated analogously to fringe benefits offered by the employer during the election campaign. *NLRB v. Exchange Parts Co.*[113] held that employer offers of benefits during an election campaign are unfair labor practices in violation of § 8 (a)(1) of the Act.[114] Justice Harlan, speaking for the Court in that case, reasoned that such offers were but a reminder of the "fist inside the velvet glove,"[115] and as such coerced employees into opposing the union. In *Savair*, Justice Douglas states that "[a]n employer who promises to increase the fringe benefits by $10 for each employee who votes

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[109] 395 U.S. 575 (1969).

[110] *Id.* at 606.

[111] 414 U.S. at 277.

[112] Where the union has misrepresented the purpose of the cards, a different rule can be devised. Such cases can be treated analagously to those in which the union misrepresented either the size or existence of the initiation fee which it offered to waive. *See, e.g.*, Gorbea, Perez & Morrel 328 F.2d 679 (1st Cir. 1964).

[113] 375 U.S. 405 (1964).

[114] 29 U.S.C. § 158(a)(1).

[115] 375 U.S. at 409.

against the union, if the union loses the election, would cross the forbidden line under our decisions,"[116] and deduces that the union's offer to waive initiation fees has a similar coercive effect on employees.[117]

As the dissent points out, the analogy between the employer's "fist inside the velvet glove" and the offer of the union to waive an initiation fee is far from exact.[118] In the first place, because the offer in *Savair* was to waive only a ten dollar initiation fee, which was additionally contingent on a union victory, it was "not very velvet."[119] Moreover, since a losing union may not remove previously conferred benefits, it lacked an effective "fist." The weakness in the majority's argument is that the influence of the employer over the employees will continue despite the election, while a losing union will be in no position to reward or penalize the employees.

Some commentators, while not questioning the rule, have questioned the rationale of *Exchange Parts*. Professor Bok contends that employees do not need employer promises of increased fringe benefits to remind them of the power which the employer has over their futures. If the fact is not already obvious to them, employees will certainly be reminded by the union.[120] According to Professor Bok, a more persuasive justification for the *Exchange Parts* rule is not the "fist in the velvet glove" rationale but rather the fact that

> the employer who suddenly adopts this strategy just before the election may grow niggardly again when the threat of organization disappears. In such cases, the employees may be misled by the benefits into believing that conditions in the plant will be more favorable than they will in fact turn out to be.[121]

But neither the rationale of the Court nor that of Professor Bok applies to a union offer of benefits. Unlike the power of the employer, the union's influence on employees exists only if the

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[116] 414 U.S. at 278.
[117] *Id.* at 278-79.
[118] *Id.* at 285.
[119] *Id.*
[120] Bok, *supra* note 96, at 113.
[121] *Id.* at 114.

union wins the election, and even then it may not be permanent. After the contract bar period passes, the employees may vote out the union in favor of either a rival union or no collective bargaining agent at all. Furthermore, the waiver of the initiation fee will not mislead employees into believing that there are no costs attached to union membership. Clearly, employees know that they will be subject to dues payments and other obligations if the union wins. Beyond these payments, any changes in working conditions are largely determined by the results of collective bargaining with the employer. Unlike the employer, who can act unilaterally to remove benefits he bestowed during the election campaign, the union can only act through its membership in conjunction with the employer.

Given the weakness of the analogy between union waiver of fees and employer promises of benefits, the Court's reliance on the *Exchange Parts* rationale appears to be more of an attempt to equalize the conduct permitted employer and union than of protecting the § 7 rights of employees who do not wish to join a union.[122] Justice Douglas seems to accept the argument offered by Savair in its brief to the Court:

> Given that economic inducements are likely to have a great impact upon the minds of employees, the unions ought to be subject to the same restrictions as employers in this area. If employers cannot give or withhold economic benefits in order to influence the outcome of the election, the union ought to be likewise prohibited from doing so.[123]

While this argument possesses a surface appeal, it is unconvincing. It assumes either that employees will sell their votes in return for the waiver of initiation fees or that the union's offer will so predispose employees to support the union that the employer is unfairly precluded from arguing effectively against union membership. But the majority opinion does not suggest that the waiver of fees is a purchase of votes. Rather, the effect feared is the deception of apparent endorsement. Moreover, the argument that the employer is unfairly prejudiced by the union

[122] Section 7 of the L.M.R.A. states that employees not only have the right to "form, join, or assist" unions, but also the right "to refrain from any or all of such activities." Labor-Management Relations Act § 7, 29 U.S.C. § 157 (1973).

[123] Brief for Respondent at 8-9.

offer fails to recognize the significant differences between the campaign run by the union and that of the employer. The employer runs on his past record. Prior to the election campaign, he has opportunities to increase fringe benefits of his employees and to otherwise convince them, by his actions, that collective bargaining is unnecessary. In contrast, the union's campaign focuses on the future and on the benefits which the employees may gain from union representation. Unlike the employer, the union has no record of performance within the unit with which to persuade the employees. Its claims for the future will seem hollow if the only immediate tangible result of union membership appears to be the payment of fees. By refusing to permit the union to waive the initiation fee, bargaining power is not equalized. Instead, the union is placed at a disadvantage in that its potential members can receive no benefits until they have suffered an economic loss *and* the union has won the election.

Finally, it seems overly simplistic to characterize the waiver of initiation fees as the "purchase" of anything. In offering to waive initiation fees, the union expends no funds and offers the employee nothing of marketable value. The employee gains nothing immediate or tangible from the union's waiver. Nor is he forgiven a voluntary indebtedness. Rather, the union simply reduces the employee's future investment in union membership, while at the same time reducing the union's potential treasury. The inevitable result will be either a reduction in the services which the union can offer to its members or a compensating increase in dues payments or other costs of membership. So long as the offer is not made discriminatorily, but is open to all, no consideration is exchanged and no endorsement of the union has been "purchased."

In addition, it can be argued, as some courts did prior to *Savair*,[124] that initiation fees are purely the business of the union and its members (present and prospective), much like dues payments, strike funds and other membership costs. Such an argument impliedly recognizes that the initiation fees serve two purposes, both internal. First, they are a source of revenue

[124] *See* NLRB v. Crest Leather Mfg. Corp., 414 F.2d 421 (5th Cir. 1969); Amalgamated Clothing Workers v. NLRB, 345 F.2d 264 (2nd Cir. 1965).

for the union, and second, they serve as a kind of equity payment for the benefit of members of longer standing who have maintained the union's coffers. The waiver of such a fee is clearly not a cash outlay, but is instead the removal of an "artificial barrier" to membership which does not go to the merits of either collective bargaining or ongoing representation.

C. *Waiver of Initiation Fees and Card Majorities*

The *Savair* majority also expresses concern about the use of initiation fee waivers in the context of authorization cards. Justice Douglas perceives a special need for caution from the fact that under some circumstances, certification of a union as bargaining representative is permitted based solely on the percentage of authorization cards received.[125] He wrote:

> [P]rior to the election if the union receives overwhelming support, the pro-union group may decide to treat the union authorization cards as authorizing it to conduct collective bargaining without an election. The latent potential of that alternative use of authorization cards cautions us to treat the solicitation of authorization cards in exchange for consideration of fringe benefits granted by the union as a separate step protected by the same kind of moral standard that governs elections themselves.[126]

Justice Douglas is clearly correct that a card majority could conceivably result in the issuance of a bargaining order without an election. However, the situations where this is possible are very limited, and the requisite circumstances were not present in *Savair*. The Court, in *NLRB v. Gissel Packing Co.*,[127] recognized that if the employer commits "outrageous" unfair labor practices, such that a "fair and reliable election cannot be had," the Board may issue a bargaining order even if the union never possessed a card majority.[128] In addition, less severe misconduct by an employer, if "pervasive and substantial," may result in the issuance of a bargaining order if the union can

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[125] NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).
[126] 414 U.S. at 280.
[127] 395 U.S. 575 (1969).
[128] *Id.* at 613-14.

show that it had once held a card majority.[129] There is also a third category of employer labor practices which will not sustain a bargaining order "because of their minimal impact on the election machinery . . . ."[130]

These three situations involve employer misconduct, and the issuance of a bargaining order is appropriate where the employer has as his objectives "to delay or disrupt the election processes and to put off indefinitely his obligation to bargain . . . ."[131] Absent employer misconduct, the Board will not issue a bargaining order without an election unless the employer has actual knowledge of the union's majority status.[132] In these situations, the existence of a good faith doubt by the employer will be sufficient grounds to force an election.[133]

It is clear that the circumstances necessary to support the issuance of a bargaining order based on authorization cards alone was not existent in *Savair*. In the first place, no unfair labor practices by the employer were alleged by the union. Furthermore, the Court's basic argument defeats the application of the principle that an order may issue on a card majority alone if the employer has actual knowledge of the majority. Since the Court's contention is that the mere offer to waive initiation fees permits the union to acquire more cards than supporters, such a belief by the employer would clearly meet the good faith doubt exception and enable him to force an election. Finally, two additional factors indicate that Justice Douglas' concern was misguided. The dissent suggests, without elaboration, that the cards signed in *Savair* might not serve as

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[129] *Id.* at 614.

[130] *Id.* at 615.

[131] *Id.* at 610-11.

[132] *See, e.g.*, Summer & Co., 190 N.L.R.B. 718 (1971); Snow & Sons, 134 N.L.R.B. 709 (1961). *But see* Wilder Mfg. Co., 185 N.L.R.B. 175 (1970); Pacific Abrasive Supply Co., 182 N.L.R.B. 329 (1970).

[133] *See generally* Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard*, 39 U. CHI. L. REV. 314 (1973); Summer & Co., 190 N.L.R.B. 718 (1971); Snow & Sons, 134 N.L.R.B. 709 (1961). Since the *Savair* opinion, the Supreme Court has held in Linden Lumber Div. v. NLRB, 419 U.S. 301 (1974) that an employer does not commit an unfair labor practice simply by refusing to accept evidence of the union's majority status other than the results of a Board election. Whether the employer had good or poor reasons for refusing to accept evidence of majority status was not deemed relevant.

the basis for a bargaining order even with the existence of serious unfair labor practices.[134] This suggestion could be based on the fact that the cards in *Savair* were not unambiguous authorization cards, but were instead "recognition slips." The dissent was apparently not ready to decide whether such slips, alone or in conjunction with employer unfair labor practices, could support a bargaining order. An even greater indication that the majority's concern for the "latent potential" of authorization card use was erroneous lies in the fact that in *Savair* the cards were not used as the basis for the union's claim to representative status at all. There was an election in *Savair*, and both the Board and the Court agree that an election is superior to the use of authorization cards as a means of determining the union's majority status.[135] Because of this, it seems strange that the majority would even offer the use of authorization cards as an argument. Clearly, more appropriate cases will emerge in which the Court may delineate further regulations for the use of authorization cards to support the issuance of a bargaining order.

IV. CONCLUSIONS—THE REVERBERATIONS OF SAVAIR

Prior to *Savair*, the ability of a union to waive its initiation fee increased the flexibility of its campaign strategy. If the employees appeared clearly to support the union, the union could retain the fee and benefit from the revenue. If the employer exaggerated the size of the initiation fee, the union could close off the debate by waiving the payment. Obviously, as a result of *Savair*, much of this flexibility is lost. The union is left with more limited options. Apparently it may do away with the initiation fee altogether for all elections and accept the resulting loss of funds. It can also retain the initiation fee and attempt to rebut employer exaggerations about its size either verbally or by showing the union constitution and bylaws to prospective members. However, if the employer has been able to create unrealistic fears of union membership costs, this al-

[134] 414 U.S. at 287.

[135] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 602-03 (1969); Aaron Bros., 158 N.L.R.B. 1077 (1966); *cf.* General Shoe Corp., 77 N.L.R.B. 124 (1948).

ternative will be less successful than waiving the fee altogether. Finally, the union can waive the fee for all members of a particular unit, whether or not they sign cards in advance of the election.[136] This will not be seen as an illegal inducement since, by focusing analysis on the use of the waiver offer as a means of acquiring *endorsements*, the Supreme Court has discounted the notion that the waiver of fees is the purchase of votes.[137]

Yet the tone of the opinion suggests that unions may have lost more than their flexibility. The Court's analogy between union waiver of fees and employer offers of fringe benefits, if developed in later cases, will clearly have a significant impact on the union's ability to persuade employees of the advantages of collective bargaining. To extend the analogy beyond the context of bestowal of tangible benefits during the representational campaign would be to destroy the union's appeal as a vehicle whereby future benefits can be extracted from the employer. Similarly, the concern by the Court for the regulations surrounding the acquisition of authorization cards, if returned to in subsequent opinions, may carry great significance. *Savair* assumes that the union's collection of cards is nearly identical to its collection of votes and thus should be supervised and regulated in the same manner. While clearly dictum in *Savair*, the Court seems to suggest that any time or expense which the union once saved in gaining representative status through the collection of authorization cards from a majority of employees may soon be lost.

Finally, *Savair* serves notice that election regulation is no longer to be the sole province of the Board. Prior to *Savair*, the principle that the Board has primary responsibility for determining permissible election conduct had been longstanding. In *NLRB v. Waterman Steamship Co.*[138] the Supreme Court stated that "[t]he control of the election proceeding, and the determination of the steps necessary to conduct that election

[136] Cases decided by the Board subsequent to *Savair* expressly permit the waiver of dues if the offer remains open until the union signs a collective bargaining agreement with the employer. *See* cases cited note 40 *supra*.

[137] Indeed, in a footnote to its opinion, the majority recognized the legitimate union interest in waiving initiation fees and argued that this interest can be protected by keeping the offer open to those who join after the election. 414 U.S. at 272-74 n.4.

[138] 309 U.S. 206, 226 (1940).

fairly were matters which Congress entrusted to the Board alone." Similarly, in *NLRB v. A.J. Tower Co.*,[139] the Court stated that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." While the majority continues to pay lip service to these principles,[140] *Savair* seems to indicate that the Court is now willing to indulge in its own assumptions about voting conduct and to find that the Board has overestimated the extent of employee voting sophistication. Since neither the Board nor the Court possesses empirical data on the relationship between various campaign tactics and voter choice, the wisdom of the Court in arbitrarily substituting its judgments for those of the Board is questionable. As others have observed, limited judicial review of election regulations permits the Board to develop uniform rules which can be tested in the context of a large number of cases.[141] Occasional judicial forays into election regulation, as in *Savair*, cut against this uniformity and encourage circuit courts to substitute their own assumptions about election behavior for those of the Board. As different rules develop in different circuits, forum shopping and uncertainty about permissible conduct will replace what little finality now exists in the union certification process.[142]

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[139] 329 U.S. 324, 330 (1946).

[140] 414 U.S. at 276-77.

[141] Getman & Goldberg, *supra* note 93, at 683.

[142] Indeed, the Board has been called upon to decide a rash of initiation fee waiver cases in light of *Savair*. In a number of cases, the Board has held that a union offer kept open to all employees until the signing of a collective bargaining agreement or until the expiration of a predetermined time period is permissible. In reaching this result, the Board has relied on footnote 4 of the *Savair* opinion, which suggests that the union can preserve its legitimate interests by keeping the waiver offer open after the election. *See* cases cited in note 40 *supra*. In other cases the Board has held permissible offers to waive the initiation fee "during the campaign," where other statements in the offer indicates that "campaign" includes a post-election period. *See* Hobart Mfg. Co., 213 N.L.R.B. No. 40 (Sept. 6, 1974); Smith Co., 200 N.L.R.B. 772 (1972). The Board has also held permissible a union offer to waive the initiation fee if victorious in the election, on the theory that the statement is not a condition but only a recognition of practical reality. *See* Phillips Indus., Inc., 210 N.L.R.B. No. 42 (April 24, 1974).

In other situations, however, the Board has struck down the union's offer. The *Savair* rule has been extended to cover offers to waive initiation fees made prior to the

filing of the election petition. California State Auto. Ass'n., 214 N.L.R.B. No. 27 (Oct. 23, 1974); Scrivner v. Boogaart, Inc., 214 N.L.R.B. No. 22 (Oct. 23, 1974). The Board has also held impermissible offers to waive initiation fees for "charter members," on the theory that the term may be interpreted by employees to require joining the union prior to the election. California State Auto. Ass'n., 214 N.L.R.B. No. 27 (Oct. 23, 1974); Coleman Co., 212 N.L.R.B. No. 129 (Aug. 16, 1974); Inland Shoe Mfg. Co., 211 N.L.R.B. No. 73 (June 19, 1974).

Finally, the *Savair* decision has led at least one Court of Appeals to remand a case to the Board for further facts. *See* NLRB v. Stone & Thomas, 502 F.2d 957 (4th Cir. 1974).