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Bargaining Orders Without An Election: The National Labor Relations Board's "Final Solution"

By ROBERT J. AFFELDT*

I. INTRODUCTION

It is the intent of the National Labor Relations Act to protect the right of workers in freely choosing whether they wish to participate in an industrial form of government—unionism and collective bargaining.¹ The orthodox and historical method by which employees usually have expressed their preference either for or against unions has been the secret ballot election.² These "representation elections" are held by the National Labor Relations Board [hereinafter referred to as NLRB, or the Board] when at least thirty percent of the employees in a bargaining unit support a union.³ In order for the union to be certified, a majority within the unit must vote for the union. The Board closely supervises these elections, jealously guarding the election booth with all the safeguards at its command.⁴ If the Board feels that any irregularities or unfair election practices have influenced the election re-

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¹ National Labor Relations Act [hereinafter cited as NLRA] § 7, 61 Stat. 140 (1947), *as amended*, 29 U.S.C. § 157 (1964) provides:

Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and *shall also have the right to refrain from any or all such activities. . . .* (Emphasis added.)

² NLRA § 9(c), 49 Stat. 453 (1938), *as amended*, 29 U.S.C. § 159(c) (1964).

³ The Board in its discretion decided upon 30% as a substantial number. *West Virginia Pulp & Paper Co.*, 66 N.L.R.B. 309, 312 (1946).

⁴ In *General Shoe Corp.*, 77 N.L.R.B. 124 (1948), the Board defined its highest test of "laboratory conditions," saying that "[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *Id.* at 126.

sults, it may, upon request of a party, invalidate the election and order another one.⁵

However, during the last four years, the NLRB has favored a new method—open voting in the form of authorization cards. In those instances when the union obtains a majority of the authorization cards within a bargaining unit, on or off the employer's premises, and makes a demand upon the employer to bargain, the Board permits the union to short-circuit the secret ballot election process and establish itself as the bargaining representative at the time of the demand. This departure from past policy has succeeded in giving rise to the most controversial issue in Labor Law today—the authenticity of the card authorization process.

The Board's power to issue bargaining orders without an election, or despite an election, when the union possesses a majority of the authorization cards is derived from section 10 (c) of the National Labor Relations Act.⁶ Section 10 (c) grants the Board power to remedy the effects of unfair labor practices. Under Section 9 (c) the Board's power is limited; it can only order a new election. Under Section 10 (c) the Board's power is expansive—it may take affirmative action such as issuing bargaining orders to cure the effects of unfair labor practices. The power to draw upon this section to issue bargaining orders, at least in cases of intense employer coercion, was upheld by the courts at an early stage, although the Board has rarely exercised this power.

In *Frank Bros. v. NLRB*,⁷ the employer waged an intensely coercive campaign against the union after the union, having 45 out of 80 authorization cards, had requested him to bargain. The union withdrew its election petition, alleging that the holding of an election was futile. The United States Supreme Court upheld the Board's compulsory bargaining order without an election

⁵ *Claussen Baking Co.*, 134 N.L.R.B. 111 (1961); *Myrna Mills, Inc.*, 133 N.L.R.B. 767 (1961).

⁶ 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(c) (1964) provides:

If . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees, with or without back pay, as will effectuate the policies of this subchapter.

⁷ 321 U.S. 702 (1944).

saying that the authorization cards were a better indicia of employee desires than a fruitless election.⁸ The Court's approach was completely functional—cause and effect—looking to the effect of the employer's unfair campaign upon the employees. Its bargaining order was a remedial order issued under Section 10 (c) of the Act.

In *Joy Silk Mill, Inc. v. NLRB*,⁹ the District of Columbia Court of Appeals found that the employer's rejection of the union's request to check the signatures of 38 of 52 employees against the company's records and his commission of serious unfair labor practices prejudiced the results of the election which the union lost. The court found a Section 8 (a) (5)¹⁰ violation and said:

An employer may refuse recognition to a union when motivated by a good faith doubt as to that union's majority status. When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a)(5) of the Act.¹¹

The Board thus had two legal weapons to use against employers who frustrated its election process through unfair labor practices: the 8 (a) (1),¹² 8 (a) (2)¹³ or 8 (a) (3)¹⁴ bargaining order, emphasizing the futility of an election because of the *effect* of the employer's coercive conduct upon the employees, and the *Joy Silk Mill* 8 (a) (5) bargaining order, emphasizing the employer's culpability in terms of his state of mind—his *intent* to interfere with the Board's election process by refusing to bargain with the majority union.

The highly conceptual and subjective nature of the Section 8 (a) (5) "duty to bargain in good faith" vested the Board as the decision-maker with broad power to guess at the employer's state of mind and to find bad faith. The Board took a narrow view of "good faith," viewing it as a *factual* doubt not as a *reasonable* doubt.¹⁵ Commentators accused the Board of not being so much

⁸ *Id.*

⁹ 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

¹⁰ 61 Stat. 141 (1947), *as amended*, 29 U.S.C. § 158(a)(5) (1964).

¹¹ 185 F.2d at 741.

¹² 61 Stat. 141 (1947), *as amended*, 29 U.S.C. § 158(a)(1) (1964).

¹³ 61 Stat. 141 (1947), *as amended*, 29 U.S.C. § 158(a)(2) (1964).

¹⁴ 61 Stat. 141 (1947), *as amended*, 29 U.S.C. § 158(a)(3) (1964).

¹⁵ See *Piggly Wiggly El Dorado Co.*, 154 N.L.R.B. 445 (1965), where the

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interested in discovering and remedying the effect of employer unfair labor practices as in punishing the employers for interfering with its election process, notwithstanding the fact that the unfair labor practices had no effect upon the employees.¹⁶ The *Joy Silk Mill* doctrine as interpreted by the Board eventually crystallized into a per se rule. If the employer gave no supportable reason for refusing recognition, the Board indulged in the irrebuttable presumption that the refusal was motivated only by the employer's desire to gain time in order to dissipate the union's majority.¹⁷ It found employers who had committed no unfair labor practices, but who had refused recognition at the time of the union's presentation of cards, guilty of bad faith because the employer had given the wrong reasons for refusal.¹⁸ Also, if the employer had given reasons for refusal, his subsequent unfair labor practices, however slight, reflected, the Board said, his earlier bad faith at the time of refusal.¹⁹

In 1966, in *Aaron Brothers*,²⁰ the Board, probably in response to the flurry of criticisms directed at it,²¹ modified its punitive, "state of mind," *Joy Silk Mill* doctrine. In the future, the Board

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Board adopted the trial examiner's statement: "a reasonable doubt is not equivalent to a good faith doubt." *Id.* at 453. At first the courts agreed with the Board. In *NLRB v. Glasgow Co.*, 356 F.2d 476 (7th Cir. 1966), the court said:

[T]he testimony of Glasgow and Leone as to their 'doubt' reveals nothing with respect to a basis for the doubt. To be 'fair' or in 'good faith,' doubt must have a rational basis in fact. . . . Here there is no evidence of probative value to justify good faith doubt. In addition to its failure to reveal any reason for their 'belief,' the record discloses no action upon the part of Glasgow, Leone, or any other representative of the company, to attempt to verify the union's claim, either through inquiry addressed to the union or to the employees. *Id.* at 479.

¹⁶ Note, *Union Authorization Cards*, 75 YALE L.J. 805 (1966), where it is further noted that:

The good faith test assumes that the need to deter employer misconduct outweighs other important policies of the Act. . . . The *Joy Silk* rationale in effect authorizes a sanction almost penal in nature, not otherwise available to the Board. *Id.* at 819.

¹⁷ *Snow & Sons*, 134 N.L.R.B. 709 (1961), *enforced*, *Snow v. NLRB*, 308 F.2d 687 (9th Cir. 1962).

¹⁸ *H. & W. Constr. Co.*, 161 N.L.R.B. 852 (1966).

¹⁹ The cases here are too numerous to cite, but as an illustration see *Copeland Oil Co.*, 157 N.L.R.B. 126 (1966); *Tony R. Santangelo*, 154 N.L.R.B. 1649 (1965).

²⁰ 158 N.L.R.B. 1077 (1966).

²¹ Note, *Refusal to Recognize Charges under Section 8(a)(5) of the LMRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387, 397-401 (1966). See also *Lewis, The Use and Abuse of Authorization Cards in Determining the Union's Majority*, 16 LAB. L.J. 434 (1965).

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said, in determining good or bad faith, it would look to the nature and effect of the employer's unfair labor practice upon the employees, not to the employer's state of mind. No longer, the Board said, would it apply a per se rule regarding all subsequent unfair labor practices as proof positive of bad faith, but would consider the effect on the employees — whether the unfair practices were substantial or unsubstantial. The employer, the Board said, has an absolute right to an election by remaining neutral or silent—giving no supportable reasons for refusing recognition—but he also has a duty if he remains silent not to commit any substantial unfair labor practices, for if he does, he risks a bargaining order, with the Board imputing bad faith to him.

The Board said:

An election by secret ballot is normally a more satisfactory means of determining employees' wishes, although authorization cards signed by a majority may also evidence their desires. Absent an affirmative showing of bad faith, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority.²²

Not completely rejecting the intent test, the Board de-emphasized it by asserting that the employer had no duty to give any supportable or unsupported reasons for refusing recognition, the presumption being that his silence indicated good faith with supportable reasons. Member Jenkins in his concurring opinion said: "A mere absence of a good faith doubt of majority, an unsupported expression of doubt, or a 'no opinion' attitude toward its existence does not require the employer to accept the cards as proof of [the majority]."²³ He sounded a caveat, however, hinting that *Joy Silk Mills* was not dead by saying that a refusal to bargain

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It has been noted that:

Under this presumption that unfair labor practices later in time conclusively demonstrate prior intent, the *Joy Silk* test operated for many years as a per se rule. Virtually any unfair labor practice precluded the employer from proving good faith doubt when the cards were presented and triggered the order to bargain. Note, 75 YALE L.J., *supra* note 16, at 813-14.

²² 158 N.L.R.B. at 1078.

²³ *Id.* at 1080-81 (concurring opinion).

charge may still be proved "by independent knowledge of the employer that a union has a majority."²⁴

The promise of the functional or effect approach enunciated in *Aaron Brothers* never materialized. The "independent knowledge" test swallowed up the functional aspects of the decision.²⁵ Except for a few scattered cases,²⁶ which the Board dismissed for unsubstantial unfair labor practices, the Board retained its subjective good faith doctrine, finding employer bad faith unless he gave supportable reasons.²⁷ Thus, contrary to the Board's statement in *Aaron Brothers*, that it would not regard an unsubstantial unfair labor practice as evidence of bad faith, the employer, if he commits any unfair labor practice after union demand, must possess or give supportable reasons. If he gives no reasons,²⁸ the wrong reasons,²⁹ or unsupported reasons,³⁰ the Board will find him in bad faith and order him to bargain.

²⁴ *Id.* at 1081 (concurring opinion).

²⁵ In *Heck's Inc.*, 166 N.L.R.B. No. 2 (1967), the Board, unable or unwilling to issue an 8(a)(5) bargaining order on such a slight infraction as an employer poll of his employees, managed to issue the order on the ground that the employer knew of the union's majority, imputing the knowledge of his supervisor to him.

If the employer communicates no supportable reasons and commits minor unfair labor practices, the Board will find them to be major unfair labor practices committed with the purpose of dissipating the majority. In *Cohen Bros. Fruit Co.*, 166 N.L.R.B. No. 2 (1967), the trial examiner applied the *Acron Bros.* functional approach and dismissed the 8(a)(5) charge because the minor unfair labor practices had no effect on the employees or the election. The union contended that because of its majority status, in fact, and the appropriateness of its unit, it was entitled to recognition regardless of the nature of the employer's doubt as to its majority, making the employer's failure to bargain a violation of Section 8(a)(5). But as the trial examiner held, and as the union itself conceded, it is not the fact of majority status that is important, but rather the employer's state of mind. Continuing, the examiner pointed out that:

The question of how to ascertain an employer's state of mind in this area is a most vexatious one. In a series of recent cases, including *Aaron Brothers*, *Harmond and Irving*, and *Cameo Lingerie*, the Board has indicated that the determinative factor is the nature and gravity of the employer's unfair labor practices; e.g., whether they are 'substantial' (*Aaron Brother's*), 'extensive' (*Harmond and Irving*), or 'serious' (*Clermont's Inc.*), 154 N.L.R.B. No. 11.

The Board, in reversing the trial examiner, found that independent evidence revealed that the employer had knowledge of the union's majority and that he "never questioned . . . the union's majority status."

²⁶ *Union Carbide*, 166 N.L.R.B. No. 39 (1967); *20th Century Glove Co.*, 165 N.L.R.B. No. 122 (1967).

²⁷ *Dayton Food Fair Stores*, 165 N.L.R.B. No. 12 (1967); *Heck's, Inc.*, 166 N.L.R.B. 760 (1967).

²⁸ *Hecks, Inc.*, 166 N.L.R.B. 760 (1967).

²⁹ *Steel City Transp. Inc.*, 166 N.L.R.B. No. 54 (1967).

³⁰ *Shoppers Fair (Superior Sales, Inc.)*, 151 N.L.R.B. 1604 (1965). In this case the Board stated:

Although respondent indicated its doubt of the union's majority

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The Board possesses inherent power to establish and to administer its own rules over its election process.³¹ In 1954, it established the *Aiello Dairy Farms*³² procedural rule. This rule gave the union the choice of two alternatives when the employer refused to recognize a union who claimed to represent a majority of the employees in the bargaining unit. It could either proceed to an election or file an 8 (a) (5) unfair labor practice charge. If it proceeded to an election and lost, it was estopped from challenging the results of the election by filing an 8 (a) (5) charge. If it chose the unfair labor practice route instead of the election alternative and won, the Board would issue a bargaining order without an election. If it failed to prove the charge, of course, the matter was concluded.

In 1964, without warning, the Kennedy Board changed all this. In the classic case of *Bernel Foam*,³³ the Board gave the union "two bites at the apple."³⁴ No longer would the union be compelled to select one of two alternatives, but instead would have two non-exclusive alternatives—it could go to an election and subsequently file an unfair labor practice charge under 8 (a) (5). If an employer has knowledge of a union's majority or commits an unfair labor practice after the union's demand, and the union files for an election and loses, the union may still file a Section 8 (a) (5) unfair labor practice against the employer. If the union in its charge prevails, the Board will order the employer to bargain with the union despite the fact that the union lost the election. Losing the election, the Board said, is not a waiver of the right to follow the unfair labor practice route.

Until 1964, the date of the *Bernel Foam* decision, the election process, not the bargaining order, was the Board's favorite device

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representation, there is nothing the record which would support an inference that a reasonable basis existed for a good faith doubt. *Id.* at 1609.

³¹ In *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953), the Board said: We institute this rule pursuant to our statutory authority and obligation to conduct elections in circumstances and under conditions which will insure employees a free and untrammelled choice. *Id.* at 429.

³² 110 N.L.R.B. 1365 (1954).

³³ *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277 (1964).

³⁴ *Id.* at 1291 (dissenting opinion). The Board has limited the rule in that an election must be set aside by timely and meritorious union objections. *Irving Air Chute Co.*, 149 N.L.R.B. 627 (1965); *Koplin Bros. Co.*, 149 N.L.R.B. 1373 (1964) (where the union failed to file objections to the election.)

for testing employee preference. Also labor unions usually chose the secret ballot election, and thereby automatically waived any right to a bargaining order through an 8 (a) (5) charge. When the Board, however, in *Bernel Foam* expanded the opportunity of unions to acquire bargaining orders, unions for the most part seized upon authorization cards as their favorite organizational tool, de-emphasizing organizational picketing, principally because acquisition of cards was much more rapid, more certain and less expensive. Perhaps at no other time in the Board's history, at least in the organizational arena, has a procedural doctrine so swiftly revolutionized techniques and counter-techniques.

In *Irving Air Chute*,³⁵ the Board limited the reach of *Bernel Foam* by saying that a union, by going to an election, waives petition unfair labor practices no matter how flagrant or how impossible they have made an election.³⁶ The Board will only act on an 8 (a) (5) charge filed by a union which has lost an election when that election has been set aside on the basis of meritorious objections filed in the representation proceeding. This means that any unfair conduct must have occurred between the date the petition for election was filed and the date of the election.³⁷

The present state of Board law on the duty of the employer to recognize a union on the basis of authorization cards is as follows. When a union makes a demand for recognition upon the employer based upon the claim that it possesses a majority of the authorization cards, a prima facie case of the duty to recognize is established. The employer has three alternatives. One, he can recognize the union. Two, he can remain silent, refusing to give any reasons for refusing to recognize it. If he remains neutral, that is, commits no unfair labor practices, he will obtain an election. This position, however, involves a high risk, for if he does commit an unfair labor practice, substantial or unsubstantial, the Board is inclined to interpret his previous silence (no supportable reasons) as masking bad faith and thus order him to bargain. Three, he can refuse to recognize the union by giving supportable reasons—proving his good faith. In this way, if his reasons are supportable, he can

³⁵ 149 N.L.R.B. 627 (1964).

³⁶ *Id.* at 629-30.

³⁷ *Independent, Inc. The Daily Advertiser*, 165 N.L.R.B. No. 53 (1967); *Goodyear Tire & Rubber Co.*, 138 N.L.R.B. 453 (1962); *Green Bay Aviation*, 165 N.L.R.B. No. 137 (1967).

escape an 8 (a) (5) bargaining order. A good faith doubt, however, is not a reasonable doubt—it is something more. A well-founded suspicion that a majority does not exist is insufficient. If he gives the wrong reasons, or unsupported reasons, and commits minor unfair labor practices, the Board will find him in bad faith and order him to bargain. An employer must not only entertain a doubt, but must demonstrate to the Board's satisfaction that it is a "factual doubt" which proves the union had no majority.³⁸ If, for instance, upon union demand he refused recognition because he questioned the appropriateness of the unions bargaining unit and later the Regional Director, through inclusions or exclusions, agrees with him, but the final number in the bargaining unit does not change the union's majority status, he will be held to have been in bad faith at the time of the union's original demand.³⁹

The employer who offers supportable reasons for refusing recognition reduces immeasurably the risk of an 8 (a) (5) charge being leveled against him. It might even be said that he possesses a license to commit subsequent unfair labor practices against his employees because his grounded reasons prove that his intent is not to dissipate the majority. He is in good faith as far as section 8 (a) (5) is concerned.⁴⁰ He is, however, vulnerable to an 8 (a) (1), 8 (a) (2) or 8 (a) (3) bargaining order, for the test of a bargaining order under those sections is not good or bad faith but one of cause and effect—the restoration of the status quo before the employer's unfair labor practices.

The Board's expanded policy of issuing bargaining orders on the basis of authorization cards instead of a secret ballot election, and its new policy of permitting unions to obtain a bargaining order after losing an election, has ignited a flurry of criticism from Congress, commentators, and the courts. Senators Javits and Fannin have introduced bills in the Senate attempting to curtail

³⁸ See note 15 *supra*.

³⁹ *Dixie Color Printing Corp.*, 156 N.L.R.B. 1431 (1966).

⁴⁰ In *NLRB v. River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967), the Second Circuit, referring to the Board's *Aaron Bros.* decision, said:

This comes close to saying that when the evidence shows that an employer has a good faith doubt of the union's majority, unfair labor practices directed at undermining the union will be given effect not so much as evidence effectively contradicting existence of the doubt, as to which their probative force is often slight, but rather as a violation of § 8(a)(1) so serious as to make a bargaining order an appropriate remedy. *Id.* at 208.

the power of authorization cards.⁴¹ Commentators feel that present Board policy perverts both the purpose and policy of the National Labor Relations Act.⁴² Before Taft Hartley, they say, the Wagner Act authorized the Board to "take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."⁴³ (Emphasis added). However, it is pointed out that Section 9 (c) was amended by the Taft Hartley Congress, requiring the Board to use only the secret ballot procedure in deciding questions of representation. Hence, the argument runs, the

⁴¹ Senator Javits introduced two bills, S. 2133 on June 14, 1965, 111 CONG. REC. 12989, 12994 (1965), and a revised one, S. 2395 on Aug. 11, 1965, 111 CONG. REC. 19308 (1965). Senator Fannin introduced S. 2226 on June 29, 1965, 111 CONG. REC. 14584 (1965). Legislation would not be necessary if the courts would adopt Justice Friendly's view that the duty to clarify should rest with the union. In *NLRB v. S. E. Nichols Co.*, 380 F.2d 438 (2d Cir. 1967) he said:

But while clarity should constitute the beginning of any effort to show a majority on the basis of authorization cards, it is not the end; the clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the 'witty diversities' of labor law. It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality. The very argument by which the Board has upheld unions even when the cards were deceptively worded, namely, of placing 'more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards,' *NLRB v. Winn-Dixie Stores, Inc.*, *supra*, 341 F.2d at 754, works against it here. In our view the evidence demands a conclusion that at least three of the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election.

* * * *

The testimony is clear enough to us; housewives working as salesladies in discount stores are not to be charged with the learning of the Labor Board's trial examiners. *Id.* at 442-43.

⁴² Browne, *The Labor Board Unsettles the Scales*, 42 NOTRE DAME L. REV. 145 (1967) where the author states:

In the Taft-Hartley amendments of 1947, Congress withdrew the Board's authority to 'utilize any other suitable method.' Yet the Board, under a patent distortion of the doctrine of *Joy Silk Mills, Inc.* had held that where an employer commits alleged unfair labor practices, even though they be insubstantial, he demonstrates a lack of good faith doubt in a union's claim for recognition and can be ordered to bargain with the union without an election. *Id.* at 154.

See 75 YALE L.J., *supra* note 16, at 809, where it is noted that: "Designation by cards rests upon a strained reading of the National Labor Relations Act. . . . The theory authorizing this card procedure involves the use of section 8(a)(5) (an unfair labor practice provision) as a detour around section 9(c) (the secret ballot election provision)." See also *Id.* at 820-23.

⁴³ Wagner Act, ch. 312, § 9(c), 49 Stat. 453 (1935).

legislative history is quite clear that the purpose of the revision was to grant the employer an absolute right to an election.⁴⁴

It is asserted that not only history but statutory policy militates against present Board practices. The fundamental value which Congress intended to protect during the organizational stage was not the institutional power of either the union or the company, but that of the employee—his freedom of choice in voting for or against unionism. Accordingly, critics accuse the Board of changing the policy of the Act from that of protecting employee freedom of choice to promoting “the spread of unionism,”⁴⁵ foisting upon employees “a bargaining agent not necessarily of their own choosing,”⁴⁶ and subordinating “a consideration of employee free choice to concern with policing employer conduct.”⁴⁷ By permitting unions to organize through the back instead of the front door, they feel that the Board is promoting instant unionism. It is said that the effect of this policy is to place an employer in an impossible situation—a legal dilemma—when the union makes a demand upon him to bargain. If he refuses to recognize the union, he risks an unfair labor practice charge—an 8(a)(5) or 8(a)(1) bargaining order; if he recognizes the union and it is later determined that the union did not have the majority of the valid authorization cards, he is guilty of an 8(a)(2) unfair labor practice—bargaining with a minority union. This latter offense is a Labor Law capital crime, for as Justice Douglas said:

There can be no greater abridgment of section 7 of the Act, assuring employees the right to bargain collectively through representation of their choosing, or to refrain from such activity, than to grant exclusive bargaining status to an

⁴⁴ Outside of the 4th Circuit this argument has not been accepted by the circuits. It seems clear that an employer has the duty to bargain with a union when he is aware that it represents a majority of his employees. Under these circumstances he has no right to a 9(c) election. This means of course that the union will not be certified. *United Mine Workers v. Arkansas Oak Flooring*, 351 U.S. 62 (1956). Justice Sobeloff dissenting in *NLRB v. Sehon Stevenson & Co.*, 386 F.2d 551 (1967), said:

While it is true that section 9(c) now specifies that the only method the Board can employ for *certification* is a secret ballot election, the statute nowhere limits employees to this procedure and it does not make compliance with section 9(c) a prerequisite to an 8(a)(5) violation. *Id.* at 555.

⁴⁵ Note, *Refusal to Recognize Charges under Section 8(a)(5) of the LMRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387 (1965).

⁴⁶ Browne, *The Labor Board Unsettles the Scales*, 42 NOTRE DAME L. REV. 145 (1966).

⁴⁷ Note, *Union Authorization Cards*, 75 YALE L.J. 805, 828 (1966).

agency selected by a minority of employees, thereby impressing that agency on the nonconsenting majority.⁴⁸

The Board itself on occasions has spoken out against authorization cards, calling them "a notoriously unreliable method of determining majority status of a union. . . ."⁴⁹ "It is well known that membership cards obtained during the heat of rival organizing campaigns . . . do not necessarily reflect the ultimate choice of a bargaining representative."⁵⁰ Also, the AFL-CIO has said that "NLRB pledge cards are at best a signifying of intention at a given moment."⁵¹

The courts for the most part are highly suspicious not only of the authenticity of authorization cards—how the union obtained them—but also of what constitutes good faith upon the employer's part. The Circuit Courts have restrained the Board on both fronts. They are inclined, unlike the Board, to hold the union solicitor of cards to a much higher standard in determining misrepresentation.⁵² They are broadening the concept of employer good faith along two lines; first, by defining good faith in terms of an honest and reasonable doubt⁵³ and, second, by not regarding a subsequent unfair labor practice as conclusive evidence of his earlier state of mind when the employer has given reasonable reasons for refusal.⁵⁴ As the court stated in *NLRB v. River Togs, Inc.*:⁵⁵

⁴⁸ *International Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961).

⁴⁹ *Sunbeam Corp.*, 99 N.L.R.B. 546, 550-51 (1952).

⁵⁰ *Midwest Piping Co.*, 63 N.L.R.B. 1060, 1070 n.13 (1945).

⁵¹ AFL-CIO *GUIDEBOOK FOR UNION ORGANIZERS* (1961), quoted in *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 89th Cong., 1st Sess. 190 (1965).

⁵² *NLRB v. Peterson Bros., Inc.*, 342 F.2d 221 (5th Cir. 1965).

⁵³ In *Peoples Serv. Drug Stores, Inc. v. NLRB*, 375 F.2d 551 (6th Cir. 1967), the court said:

The mere fact that Peoples was guilty of unfair labor practices in connection with the union organizational campaign is not sufficient in and of itself to negative a doubt on the part of management. . . . An employer need not require a card check where he has a reasonable basis for believing that the cards do not reflect the uncoerced choice of his employees or that the employees signed the cards under a mistaken notion as to their full import. . . . The Board's retrospective determination that the authorization cards of a majority of the employees were valid does not necessarily negative an employer's good faith doubt at the time he refused recognition. . . . An honest doubt is all that is required. *Id.* at 556-57.

This last statement is at odds with the Board's prevailing policy that an honest or a reasonable doubt is not effective. There must be a *good faith doubt*. See *Piggly Wiggly El Dorado Co.*, 154 N.L.R.B. 445 (1965) where the Board said: "a reasonable doubt is not the equivalent to a good faith doubt." *Id.* at 453.

⁵⁴ *Peoples Serv. Drug Stores, Inc. v. NLRB*, 375 F.2d 551 (6th Cir. 1967); *NLRB v. River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967).

⁵⁵ 382 F.2d 198 (2d Cir. 1967).

[W]e see no logical basis for the view that substantial evidence of good faith is negated solely by an employer's desire to thwart unionization whether by proper or even by improper means. . . . His efforts to counter the union, almost all of them prior to the March 17 meeting, [the date of the union's demand and the company's refusal] were as consistent with a desire to prevent the acquisition of majority status as with a purpose to destroy an existing majority.⁵⁶

The National Labor Relations Board, the courts and the commentators agree that under normal circumstances the secret ballot election is by far the best index of employee free choice. They also agree that at times, because of intense employer coercion which makes a free election impossible, authorization cards are an adequate substitute for an election. It is recognized by most that if the administrative process is to prove workable, it must be armed with sanctions which are not only negative, but also *affirmative*. Today, negative sanctions—cease and desist orders—are not enough, since the regulated groups are not helpless individuals, but are instead powerful groups and combinations of groups which are little influenced by agency “slaps on the wrist.”

The detection of unfair labor practices means little if the only sanction is social embarrassment. The NLRB's challenge is not the detection and proof of unfair labor practices, but also the next step in the process, formation of specific yet flexible orders that give coordinated effect to the Act.⁵⁷

Over the years it became increasingly evident to the Board that employers and their attorneys were perverting the policy of the Act. In instance after instance it was revealed that attorneys were advising their clients to commit unfair labor practices. For example, if a company thought that a union had a good chance of winning a forthcoming election, it would discharge the union organizer. If the union went to election, its chances of winning were slim because the momentum was usually taken out of its organizing drive. If it filed an 8 (a) (3) charge against the company, the delay of six months to a year usually dampened enthusiasm. An 8 (a) (3) cease and desist order, and possible reinstatement with

⁵⁶ *Id.* at 206-07.

⁵⁷ Flannery, *The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 U. PA. L. REV. 69, 94 (1963).

back pay were considered good investments by the company in comparison with the expense of dealing with a union.⁵⁸

The Board and its critics, however, are in deep disagreement over when the Board should issue bargaining orders based on a card majority, and over the presumption that authorization cards are valid votes for the union. It is the thesis of this article that the Board has gone too far on both fronts. Issuing 8 (a) (1) bargaining orders without an election, or in spite of an election, is "strong medicine"⁵⁹ and there is overwhelming evidence that the Board is issuing these orders without considering any coercive effect upon the employees. To issue an 8 (a) (1) bargaining order for a slight infraction—a misdemeanor—which has no effect on an election, is to issue a punitive bargaining order, not a remedial one.⁶⁰ Section 8 (a) (1) bargaining orders should not be viewed as an ordinary remedy, but as an extraordinary remedy, issued only when an employer's anti-union campaign makes the holding of a free election impossible.

In order for the card authorization process to supplant the election process as a superior index of employee opinion, it is necessary that the card process of open voting approach as nearly as possible the certitude and reliability of the secret voting of the election booth. The union should be held to a high standard of presenting convincing evidence of majority support. To succeed in obtaining an 8 (a) (5) bargaining order this means that affirmative duties should be cast upon the union to: (1) prove its majority; (2) in an appropriate unit; (3) by making a clear demand; and (4) proving that the employer lacked a good faith doubt (Section 8 (a) (5)) or proving that his unfair labor practices made a fair election impossible (Sections 8 (a) (1), (2) or (3)).

II. THE AFFIRMATIVE DUTY OF THE UNION TO OBTAIN A MAJORITY — THE CARD AUTHORIZATION PROCESS UNDER SECTION 8 (a) (5)

In theory, to qualify as a bargaining representative, the union must fulfill certain affirmative duties. It must obtain a majority

⁵⁸ *Id.*

⁵⁹ NLRB v. Flomatic Corp., 347 F.2d 74 (2d Cir. 1965).

⁶⁰ The courts have viewed the purpose of bargaining orders as performing a restorative rather than a penal or deterrent function. See *Town and Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

of the authorization cards, possess an appropriate unit, make a clear and unequivocal demand for recognition upon the employer, and be able to demonstrate through the General Counsel that the employer refused to recognize the union because of his "bad faith," generally indicated through an unfair labor practice.⁶¹ This is the black letter law; this is the facade behind which the Board takes shelter when Congress, the courts, or commentators fire criticism at its bargaining orders. It is difficult to oppose the argument because everyone is opposed to unfair labor practices.

At the base of the facade, however, things are not what they seem on the surface, clear and simple, but, in fact, are quite multiplex. The Board has so relaxed these union affirmative duties through legal fictions that in a practical sense they no longer exist. The irrefutable fact is that once a union obtains a majority of the authorization cards, the Board will twist the rubber words of the common law into an affirmative duty on the part of the company to recognize the union. The substantive law may place the affirmative duties upon the union, but the Board's procedural law, in the form of legal presumptions, places the affirmative duty upon the company.

A. The Union's Affirmative Duty to Clarify the Purpose of a Dual Authorization Card

1. *Solicitation by the Union*—The typical authorization card serves two purposes: one, giving the union the power to call an election; and two, immediately empowering the union to act as the signer's bargaining agent without an election. In signing a dual purpose card the employee is really performing two acts, petitioning for an election and voting. Many doubt that he is aware of this.

Despite the ambiguity of the cards,⁶² the Board early in its history was inclined to count all cards regardless of the solicitor's

⁶¹ It is, of course, possible for an employer to be guilty of "bad faith" without committing an unfair labor practice. *H & W Constr. Co.*, 161 N.L.R.B. 852 (1966) (However, Member Zogoria dissented, arguing that in the absence of independent unfair labor practices the General Counsel failed to prove lack of good faith. *Id.* at 866).

⁶² One commentator, Robert Lewis, notes that authorization cards are ambiguous. He feels that the union should be obligated to use two cards, one for the election and another for a vote. Lewis, *The Use and Abuse of Authorization Cards in Determining the Union's Majority*, 16 *LAB. L. J.* 434 (1965).

statements to the employees.⁶³ Later, however, in *Englewood Lumber Company*,⁶⁴ the Board reversed its position, taking a more restricted view of cards, and held that any union misrepresentation as to the purpose of the card invalidated it. If employees were told that the cards were necessary for the Board to hold "an" election by secret ballot, the Board discarded such cards. Today, however, the Board has reverted to the policy of its early days. In the *Cumberland Shoe* case,⁶⁵ the Board stated it will vitiate a card only when the solicitor expressly says that its "only" purpose is the obtaining of an election. No inquiry into the employee's state of mind is permitted. The federal courts with the exception of the Fifth Circuit initially endorsed this doctrine;⁶⁶ that Circuit applied the *Peterson* doctrine which permitted inquiry into why the employee signed the card.⁶⁷

⁶³ T.M.T. Trailer Ferry, Inc., 152 N.L.R.B. 1495 (1965). Trial examiner Seagle said:

In any event, these cases date from the period when the Board seemed to subscribe to the doctrine that virtually nothing that a union solicitor told an employee could affect the validity of his act in signing an authorization card. *Id.* at 1507.

⁶⁴ 130 N.L.R.B. 394 (1961).

⁶⁵ 144 N.L.R.B. 1268 (1963), *enforced*, NLRB v. Cumberland Shoe Corp., 351 F.2d 117 (6th Cir. 1965). The Board distinguished *Cumberland* from *Englewood* but I feel they are indistinguishable. In *Cumberland*, the employees were told that the purpose of the cards was for an election; those cards were counted. While in *Englewood*, the employees were told that the purpose of the cards was for an election; those cards were not counted.

⁶⁶ *Amalgamated Clothing Workers v. NLRB*, 365 F.2d 898, 906 (D. C. Cir. 1966); *NLRB v. Gotham Shoe Mfg. Co.*, 359 F.2d 684 (2d Cir. 1966); *Happach v. NLRB*, 353 F.2d 629 (7th Cir. 1965); *NLRB v. Delight Bakery, Inc.*, 353 F.2d 344 (6th Cir. 1965); *NLRB v. Cumberland Shoe Corp.*, 351 F.2d 117 (6th Cir. 1965).

⁶⁷ *NLRB v. Peterson Bros., Inc.* 342 F.2d 221 (5th Cir. 1965). The Board defended its *Cumberland* rule by saying:

the cards on their face clearly and explicitly declare their purpose. If the cards are to be voided on the ground that the employees were misled into believing the cards would be used for a different or more limited purpose, this must be done on the basis of what the employees were told, not on the basis of their subjective state of mind when they signed the cards. *NLRB v. Peterson Bros., Inc.*, 144 N.L.R.B. 679, 682 (1963).

The court said:

. . . In view of the language on the face of the card that 'this is not an application for membership' and the language that in the alternative it is 'for an NLRB election', we think there was a burden of the General Counsel to establish by a preponderance of the evidence that the signer of the card did, in effect, what he would have done by voting for the union in a Board election. We think that in refusing to consider the subjective intent of the signer of the card, in light of the ambiguity on the face of the card, the Board erred. *NLRB v. Peterson Bros., Inc.*, 342 F.2d 221, 224 (5th Cir. 1965).

Present Board policy on the signing of authorization cards is that if a solicitor says that the purpose of the card is "an" election, expressly refraining from saying the "only" purpose, then the card is valid. There is a strong, almost irrebuttable presumption that signed cards are votes for the union, reflecting the true and uncoerced intentions of the signers. The Board is not interested in the subjective intentions of the signers; it looks to the intent of the solicitor and the intent of the card language, not to the intent of the signers.

The validity of such affirmation can be overcome only by establishing that the union obtained the signatures through coercion . . . that the union obtained the signatures by representing to the employees that the cards would be used only for a different, more limited purpose. This must be done on the basis of what the employees were told, not on the basis of their subjective state of mind when they signed the cards.⁶⁸

There are two principal forms of misrepresentation which the Board refuses to police: "bandwagoning," *i.e.*, informing the employee that the majority of all of the other employees have signed up; and informing the employee through vague language that the union is primarily interested in an election, not a vote.

The Board has taken an inconsistent approach on bandwagoning but lately it has been justifying these misrepresentations on the basis that the solicitor's remarks were the truth or, if not the truth, then mere puffing, or that the remark was not the true cause of the employee signing the card.

Social scientists have testified that the most intense coercion which can be directed at most people in our conformist society is the threat of social ostracism by their peer groups. Even though the threat of this social sanction is regarded as the supreme punishment, the Board feels that when an employee solicitor backs a seventeen year old high school student into a corner and tells him that everyone in the plant except him has signed up, the employee is not coerced. In 1965, Trial Examiner William Siegel did not see it that way. In *TMT Trailer Ferry, Inc.*,⁶⁹ Hunter, a union solicitor, told two employees that everyone had signed cards

⁶⁸ Aero Corp., 149 N.L.R.B. 1282, 1283, 1290 (1964).

⁶⁹ T.M.T. Trailer Ferry, Inc. and Associated Maritime Workers, Local No. 8, 152 N.L.R.B. 1495 (1965).

and that if they would sign it would be a hundred per cent. The Trial Examiner said:

Considering that less than a majority of the employees in the bargaining unit had signed authorization cards, what Hunter told Peacock and Sharpe, in order to induce them to sign such cards, seems to me to have constituted a gross misrepresentation. Bandwagon psychology is always an important factor in inducing hesitant employees to sign authorization cards. By falsely creating this bandwagon psychology Hunter was engaged in deceiving the two employees.⁷⁰

Since establishing the *Cumberland* doctrine, the Board no longer follows this policy. It has held that a solicitor's remarks "that ninety percent of the west end signed," was "mere puffing" and that it was "not a factor in card signing."⁷¹ The Board places the affirmative duty to clarify on the employee, not the union. When an employee testified that a solicitor told her that: "I was one of the last ones to sign up or the last one to sign up and that I'd better hurry and sign if I wanted to be in on it," the Board said that it was the duty of the employee to get the facts before she signed.⁷² Also, when an employee was told that he was one of the last ones to sign up, the Trial Examiner said, "He thus had the opportunity to verify the truthfulness of the stranger's representations to him that 'he was one of the last ones to sign'."⁷³

Present Board policy on bandwagoning seems to be that if the solicitor makes no express threats of group social sanctions the card will count. "Such puffing does not vitiate the cards unless the comments were means of coercing employees to sign cards out of fear of majority reprisal."⁷⁴

⁷⁰ *Id.* at 1508.

⁷¹ *Wausau Steel Corp.*, 160 N.L.R.B. 635, 642 (1966).

⁷² *Henry Colder Co.*, 163 N.L.R.B. No. 13 (1967). The trial examiner said: The examiner finds and concludes that Dieffenback freely designated the union on his card to represent him in collective bargaining with the company. This is based on the fact that Christopher's representation to Dieffenback that he 'was one of the last ones or the last one to sign up' was ambiguous; that Dieffenback had ample time and opportunity to verify the representation whatever it meant; that there is no overt evidence of record that Dieffenback relied upon the representation; and that the representation coming from one salesman to another, it being in the nature of commission salesmen to engage in a good deal of puffing and touting, was a harmless representation. *Id.*

⁷³ *Id.*

⁷⁴ *Clothing Workers v. NLRB (Sagamore Shirt Co.)* 365 F.2d 898, 908 (D.C. Cir. 1966).

The Board continues to parse the sentences of union solicitors looking for the adverb "only." If it feels that the card is unambiguous and the agent conveys the impression that an election will probably be held, without committing himself to an election as the only means of recognition, the Board will honor the card. The following statements were not considered material misrepresentations: "if they get enough people they would have a vote and the union in";⁷⁵ "just to get a vote to see if there was enough to have a vote for a union";⁷⁶ "It didn't mean a thing—it was just to see how many men they could get to join the union and it didn't mean nothing if we signed it."⁷⁷

Many of these cards have the word *election* in bold letters scattered over their face; others explain that it represents a vote in small letters; all are confusing, even to the lawyer. Yet the Board imposes the duty to clarify, not on the solicitor, but on the employee.

In a Board election it is possible for part-time high school students working a few hours, to restructure the government of a plant. In one recent case, a Trial Examiner included such a part-timer in the voting unit, saying that he had a sufficient community of interest because he had worked two hours each Wednesday morning unloading trucks. In a period of six months, this employee had accumulated 69 hours of working time.⁷⁸

Everyone is being pushed into the open or closed voting booth, including employees without temporary or permanent interest in the election: employees who have resigned, upon the possibility that they might return;⁷⁹ and employees who have submitted resignations which do not take effect until after the date of the union's demand.⁸⁰ It is very difficult to see how these employees have any community of interest in the working conditions of the company, but it is very easy to see how their votes can interfere with the Section 7 rights of permanent employees and the future of the company.

The Board's *Cumberland* rule has been bitterly attacked by

⁷⁵ Golub Corp., 159 N.L.R.B. 503 (1966).

⁷⁶ Wausau Steel Corp., 160 N.L.R.B. 635, 642n.67 (1966).

⁷⁷ *Id.*

⁷⁸ Quality Mkts., 160 N.L.R.B. 44 (1966).

⁷⁹ S & M Mfg. Co., 65 L.R.R.M. 1350 (1967).

⁸⁰ Quality Mkts., 160 N.L.R.B. 44 (1966).

commentators and courts.⁸¹ Recently, the Board found occasion to defend its rule. In *Levi Strauss & Company*,⁸² it said that unions soliciting employees through the medium of dual purpose authorization cards—requesting representation or an election—were not guilty of misrepresentation when they emphasized an election because it is usually the *intent* of that union at that time to seek an election. It is only later, when the employer through the commission of unfair labor practices makes an election impossible that the union is compelled to abandon its original intent and seek representation via the unfair labor practice route.

This attempt by the Board to justify its rule fails to answer the objections of the critics. They feel that the Board is applying an incorrect standard, and this latest defense, emphasizing the *intent* of the union solicitor, not the intent of the card signer, only confirms their belief. It is the effect of the solicitor's words upon the signer, they assert—whether he is led to think he is simply registering for an election or voting for the union, or both—that is important, not the union's secret intent or state of mind.⁸³ The Board, entangled in the power politics of both groups, has lost sight of the fact that the central figure here is the employee. "The

⁸¹ "It exalts one word in the English language. It places too much reliance on testimony, often hazy, as to what was said months previously." Lewis, *supra* note 62 at 440.

An employee can be deemed to have signed a valid authorization card even though he had no intention of authorizing a union to act as his exclusive bargaining representative and the employer can be compelled to recognize and bargain with a union on the basis of evidence that does not indicate what it is said to indicate . . . 33 U. CH. L. REV., *supra*, note 21, at 396.

Permitting "cards signed for one purpose (an election) to be used for another, . . . countenances misrepresentation and fosters deceit. It adds fuel to the argument for legislative overriding of *Joy Silk*. . . ." Lewis, *supra*, note 62, at 617.

⁸² *Levi Strauss & Co v. Southwest Regional Joint Bd., Clothing Workers*, 172 N.L.R.B. No. 57 (1968).

⁸³ The Sixth Circuit, the original endorser of the Board's *Cumberland* rule, recently abandoned it. In *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1968), it said:

We at once make clear that we do not consider testimony of a subjective intention not to join the union as of controlling importance. . . . But it is relevant in assessing the effect of the solicitor's words, for it casts a telling reflection on the actual communication conveyed to the signer. The testimony of the signer as to his *expressed* state of mind is also relevant in determining whether his misapprehension over the purpose of the card was *knowingly induced* by the solicitor. Such inducement of an employee who openly expresses an intention not to join the union suggests that representations concerning an election were intended to lead to a belief that the only purpose of the card was to hold an election. (Emphasis added). *Id.* at 617.

struggle is between the employer and the union, but the right to select is the employees'."84

Initially the courts, with the exception of the Fifth Circuit,⁸⁵ adopted the *Cumberland* rule. Recently, however, it appears that except for the District of Columbia Circuit Court, little is left of the rule in the Circuits.⁸⁶ Over the years the courts have tended to view the unsupervised solicitation of dual and single purpose cards with suspicion. The standard now, if the validity of a card is in issue, is for the courts to cast the "burden on the General Counsel to establish by a preponderance of the evidence that the signer of the card did, in effect, what he would have done by voting for the union in a Board election."⁸⁷ In effect this means that the courts will assume that disputed dual purpose authorization cards solicited by the union, though they are clear and unambiguous on their face, are invalid. They can only be validated when the union demonstrates that it has fulfilled its affirmative duty of explaining to the signer that if the union obtains majority status, it would or could claim representation status without an election. The courts seem to engage in a presumption that single purpose authorization cards—calling only for representation—are valid, but these cards too can be invalidated if the employer can demonstrate that the employees signed because of oral representations by the solicitor that an election would be forthcoming.⁸⁸ A few months ago, the Second Circuit suggested to the Board that it draw up a model authorization card.⁸⁹ If the Board fails to heed this advice, little will be left of the Board's power to issue bargaining orders based upon authorization cards.

2. *Solicitation by Supervisors*—The supervisor has largely been a forgotten figure since the Taft-Hartley amendments of 1947 eliminated him from the protection of the Act. Since 1964, how-

⁸⁴ NLRB v. Southland Paint Co., 394 F.2d 717, 727 (5th Cir. 1968).

⁸⁵ NLRB v. Peterson Bros. Inc., 342 F.2d 221 (5th Cir. 1965).

⁸⁶ See NLRB v. Southland Paint Co., 394 F.2d 717 (5th Cir. 1968), for evidence that the courts have abandoned the *Cumberland* rule.

⁸⁷ NLRB v. Peterson Bros., Inc., 342 F.2d 221, 224 (5th Cir. 1965).

⁸⁸ Engineers & Fabricators, Inc. v. NLRB, 376 F.2d 482 (5th Cir. 1967).

⁸⁹ In *Bryant Chucking Grinder Co. v. NLRB*, 389 F.2d 565 (2d Cir. 1967), Justice Friendly said:

What would truly ease the administration problem both for the Board and for the courts would be for the Board to use its long neglected rule-making power, and specify what a union authorization card should say and how. *Id.* at 570 (concurring opinion).

ever, the date of the *Bernel Foam* doctrine, he is once again beginning to assume importance. In many organizational campaigns the unions are using sympathetic supervisors as key men in either actively or passively soliciting authorization cards. This practice has raised novel questions with the Board. Does supervisory participation in a union campaign invalidate all the cards or simply some of them; those he directly solicited or simply those signed in his presence but actually solicited by others? Does supervisory solicitation constitute coercion and, if it does, is it coercion per se or simply a presumption of coercion which may be rebutted by the General Counsel? These questions and a host of others have cropped up as a result of the new technique of union organizing via authorization cards.

Since *Bernel Foam*, the Board has been inclined to define the term "supervisor" rather narrowly in card authorization cases, probably because an affirmative finding tends to invalidate the cards. As a result, the trial examiners, the courts, and the Board are fighting a running battle among themselves as to what constitutes a supervisor. It is not possible to give a specific answer here, but only to outline the general characteristics of a supervisor, for as the decision-makers have said, it is ultimately a "question of fact."⁹⁰

Section 2 (11) of the Act states that "the term supervisor" means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or, to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.⁹¹

This section has been interpreted disjunctively, not conjunctively—an employee may be found to be a supervisor if he

⁹⁰ See *Northern Va. Steel Corp. v. NLRB*, 300 F.2d 168 (4th Cir. 1962), where the court quotes from Justice Soper:

It is a question of fact in every case as to whether the individual is merely a superior workman or leadman who exercises the control of a skilled worker over less capable employees or a supervisor who shares the power of management. *Id.* at 171.

⁹¹ 61 Stat. 140 (1947), as amended, 28 U.S.C. § 152(11) (1954).

possesses one of these characteristics.⁹² Unlike the Wagner Act, he need not possess sanctions, the right to hire or fire; it is sufficient that he simply possess the power "responsibly to direct" other employees.⁹³ The key term in defining a supervisor is the use of independent judgment, the ability to exercise discretion and responsibility without necessarily consulting with others. The cases divide themselves into three categories: (1) clear cases of independent judgment, no closeness of supervision by higher management; (2) middle cases, some closeness of supervision by higher management but a dispute whether it is intimate or remote; (3) clear cases of no independent judgment, a very high degree of control by management, making the employee a leadman rather than a supervisor.

The NLRB has held that very close supervision by a supervisor over another employee is a conclusive sign that the employee is not a supervisor but at most a leadman serving as a conduit of information. In these cases, however, certain unmistakable indicia are always present. The employee never possesses the authority to hire, fire, suspend, etc. He conveys orders from his superior who usually works in close contact with him.⁹⁴ He spends ninety to ninety-five percent of his time performing non-supervisory functions with five to ten percent of his time devoted to the exercise of discretion, but even here it is principally of a clerical, routine nature with emphasis upon skill, not management of people. He usually follows "detailed written instructions" or a blueprint,⁹⁵ assisting rather than directing. He is a conduit of information rather than a participant in the company power process. This

⁹² *NLRB v. Edward G. Budd Mfg. Co.*, 162 F.2d 461 (6th Cir. 1947), cert. denied 335 U.S. 908 (1948); *NLRB v. Elliott Williams Co.*, 345 F.2d 460 (7th Cir. 1965).

⁹³ In *Florence Printing Co.*, 145 N.L.R.B. 141 (1963) the Board said: While the record is clear that Holland does not have the right to hire and fire employees, the possession of any one of the powers enumerated in section 2(11) of the Act is sufficient to establish supervisory status since the section is interpreted disjunctively. *Id.* at 144.

⁹⁴ In *Plastics Workers Union v. NLRB (Sinko)*, 369 F.2d 226 (7th Cir. 1966), the Seventh Circuit found that an employee was not a supervisor because he could not criticize but only assisted other employees, attended no foreman meetings, carried out instructions and was too closely supervised by another supervisor.

⁹⁵ *North Va. Steel Corp. v. NLRB*, 300 F.2d 168 (4th Cir. 1962). The court rejected the company's contention that the union solicitor of cards was a supervisor. It held that Combs, the employee, possessed no power to responsibly direct other employees because his independent judgment was limited to following the instructions of blueprints.

relationship is one of a more skilled to less skilled workers, not that of a supervisor to the rank and file workers. Privileges, such as attending management meetings, usually are not available to him. Also, the proportion of supervisors to employees in these situations is very high.

In difficult "middle" cases where the decision-maker cannot determine whether the employee is a supervisor from the primary characteristics of Section 2 (11), he will usually resort to secondary characteristics, the most important of which is the proportionality test, the percentage of supervisors to the number of employees. In *Super-Swan Cleaners*,⁹⁶ a good case was made that two employees were not supervisors but leadmen since they could not hire or fire and could not "formulate, determine, or effectuate" company policy.⁹⁷ They were found to be supervisors in spite of the fact that they only directed employees in the laundry room in a rather routine fashion largely because the proportion of supervisors to employees was very low, one to sixty-five.

Usually, in the clear cases of the first classification, little trouble is experienced by the decision makers. In *Donald Skillings, Yankee Distributors*,⁹⁸ the Board found an employee to be a supervisor who: (1) opened the plant in the morning; (2) closed it every evening; (3) attended management meetings; (4) handled complaints; (5) was held out to be a supervisor; and (6) was regarded by employees to be a supervisor.⁹⁹

In the matter of supervisory solicitation of union authorization cards, the Board is applying a double standard. When a supervisor acting in behalf of the company, threatens a union supporter, the Board considers the threat inherently coercive under its doctrine that it "was reasonably calculated to coerce."¹⁰⁰ Evidence as to the effect of the remarks on the employee is considered im-

⁹⁶ 152 N.L.R.B. 163 (1965).

⁹⁷ *Id.* at 169. In *Welsh Farms Ice Cream*, 161 N.L.R.B. No. 67 (1966), the employees seemed to possess all the attributes of a supervisor especially in responsibly directing other employees but the Board refused to find them to be supervisors because "if two were found to be supervisors, there would be five supervisors for eleven employees." *Id.*

⁹⁸ 152 N.L.R.B. 1018 (1965).

⁹⁹ *Id.* at 1029. In *Florence Printing Co.*, 145 N.L.R.B. 141 (1963), the Board found an employee to be a supervisor who (1) granted time off, (2) assigned work, (3) changed job assignments, (4) made more money, (5) authorized overtime, (6) was regarded by employees as a supervisor, even though the employee had no right to hire or fire. *Id.* at 143-44.

¹⁰⁰ *NLRB v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir. 1954); *International Ass'n of Machinists v. NLRB*, 311 U.S. 72 (1940).

material; instead the Board applies a conceptual approach, looking only to the moral state of mind of the supervisor. When a supervisor acts on behalf of the union in soliciting cards, however, the Board abandons the conceptual test for a scientific cause and effect test, insisting that supervisory solicitation is not inherently coercive but only coercive if the employee signed because of the solicitor's supervisory status. It is still unclear who must bear the burden of proof when it is demonstrated that a supervisor solicited a card. Must the employer go further and show cause and effect, or does there exist a presumption of coercion thereby compelling the General Counsel to show the employee signed for reasons other than the supervisor's influence?

The Board has taken a very narrow view of coercion in respect to supervisory solicitation of cards. It has held that cards signed in the presence of a supervisor are valid cards because of the supervisor's "passive participation."¹⁰¹ It invalidates only those cards which he personally solicited—the products of his "active solicitation."¹⁰² Even when supervisors have been generally active on the union's behalf during an organizational campaign, the Board proceeds on a card to card basis, refusing to invalidate all the cards, but only those he personally tainted.¹⁰³

It seems obvious that supervisory solicitation of cards should be held to be inherently coercive. One can hardly imagine more intense coercion on an employee than when his supervisor asks him to sign a card. The Board's approach in asking the conceptual question of whether the supervisor is working for the company's interest or in his own and the employee's interest is

¹⁰¹ *Southland Paint Co.*, 156 N.L.R.B. 22 (1965). *NLRB v. Great Atl. & Pac. Tea Co.*, 346 F.2d 936 (5th Cir. 1965). The court said:

The Board concluded that the mere presence of Mr. LaFleur at the time his wife signed her card did not constitute substantial evidence of improper influence. We cannot say that either of those conclusions by the Board was unwarranted. *Id.* at 940 n.4.

¹⁰² 156 N.L.R.B. 22 (1965). See also *Heck's, Inc.*, 156 N.L.R.B. 760 (1966); *J. C. Penney, Inc.*, 160 N.L.R.B. 279 (1966).

¹⁰³ *Heck's Inc.*, 156 N.L.R.B. 760 (1966). The company contended that the "union's entire card showing should be rejected because it has been 'tainted' by the participation of the department heads in the union's organizational campaign." *Id.* at 767. The Board rejected the company's argument by stating,

While it is true that as Respondents assert, that the five regular or acting department heads, just mentioned, participated in varying degrees in the Union's campaign to organize Respondents' store, we do not believe in the circumstances of this case that their involvement was sufficient to 'taint' the union's entire card showing. *Id.* at 768.

completely unrealistic.¹⁰⁴ The employee usually signs because he is only too aware that if the union gets into he plant, the combined power of the supervisor and the union will be directed toward his job security if he refuses to sign. This functional approach of inherent coercion is being resisted by the Board but it is supported at least in part by some trial examiners. As yet the Board has not adopted this realistic approach, looking to the effect of the solicitation on the minds of the employees and invalidating a card if the employees regarded the solicitor as a supervisor whether he was one in fact or not. *Purity Food Stores, Inc.*¹⁰⁵ indicates at least that the Board has not rejected this approach.

In that case, Silva, a non-supervisory employee, solicited 18 cards, including some from seventeen-year old high school students. The company contended that he was a supervisor but the Board, despite the fact that he wore an "assistant grocery manager" badge, held that his routine work was more indicative of a leadman than a supervisor. The Trial Examiner found that the cards were tainted because even though Silva was not a supervisor, the fact that he was so regarded by the employees invalidated the cards because they were induced to sign by coercion:

In determining whether or not the card majority adduced by General Counsel was tainted by the inherent coercion of a supervisory solicitation, it is necessary to consider the employees themselves since it is their right of free choice which the Act was designed to protect. As noted, a great many of the employees in this store were and are teenagers, going to school and working part-time. What is a 17 year-old school boy likely to do when the individual wearing a badge "Assistant Grocery Manager" and whose orders he has been instructed to follow, comes to him and asks him to sign a card. It appears reasonable to believe that he yields to the request, particularly if he sees that others are doing as the supervisor requests.¹⁰⁶

The Board did not explicitly reject the Trial Examiner's reasoning that the cards would be invalidated if the employees believed that Silva was a supervisor, but reversed him on a point of evidence, disagreeing that the employees regarded Silva as a supervisor. The Board said:

¹⁰⁴ See *J. C. Penney Co.*, 160 N.L.R.B. 279 (1966).

¹⁰⁵ 150 N.L.R.B. 1523 (1965).

¹⁰⁶ *Id.* at 1532.

Nor do we find anything in the record to support the Trial Examiner's finding that 'employees generally had reason to consider Silva as a supervisor and company agent.' Many employees testified at the hearing but none of them testified that he considered Silva to be a supervisor, or that he had been instructed to follow Silva's direction. . . . In the light of these facts, we do not believe that that evidence on the record will support an inference that the employees looked upon Silva as a supervisor whose 'instructions they must follow.'¹⁰⁷

The Board has also indicated in other cases that the element of coercion is present when employees think a person is a supervisor regardless of whether in fact he is one.¹⁰⁸ The test is how the employees regard him even if he is not in fact a supervisor.

It is as yet unclear what test the Board will adopt in supervisory solicitation of cards, the conceptual or the functional one.¹⁰⁹

¹⁰⁷ *Id.* at 1525.

¹⁰⁸ *American Cable Systems*, 161 N.L.R.B. 332 (1966); *Bauer Welding & Metal Fabricators, Inc.*, 154 N.L.R.B. 954 (1965). *American Cable Systems* is confusing. The Board held that cards, solicited by an employee who in fact was not a supervisor but whom the company maintained was regarded by the employees as a supervisor should be counted toward a majority because "neither two was coerced into signing because he felt Cook was a supervisor." 161 N.L.R.B. at 339. Is the Board saying that it intends to apply a cause and effect test, that the company must prove that the employees signed from fear of supervisor status, or is it saying that employee cards would be invalid if they regarded Cook to be a supervisor?

¹⁰⁹ Recent cases indicate some hope, though the point is still vague. In *J. C. Penney Co.*, 160 N.L.R.B. 279 (1966) a supervisor, Cox, participated in the union's organizational campaign although technically he did not personally solicit any cards. The Board held that his general participation was sufficient to taint all the cards. The trial examiner said:

On the record as a whole I cannot agree that Cox's activities were minimal or that they can be regarded as having had no coercive effect upon the employees. His participation in the discussion with the union representatives at the Old South Restaurant at noon on December 18, when French and Lamke signed union authorization cards; and his further participation that day at the Blue Bonnet Cafe, when five of the employees signed authorization cards in his presence after they had been advised to do so by him; his advice and statements to employees Santone, Crank, Ickes and Samples, concerning such cards when they asked him what they should do; and his action in openly permitting Lamke to call in the employees individually during the afternoon of December 18 for the purpose of signing such authorization cards lead to the conclusion that the union's majority was secured with his direct and open assistance. Accordingly, I find that the union's designation cards signed by the warehouse employees on December 18 did not constitute a valid showing that a majority of such employees had designated the union to represent them at that time. *Id.* at 286.

See also the recent case of *Lamar Elec. Membership Corp.*, 164 N.L.R.B. No. 12 (1967) where the employer refused to bargain with a newly certified union because his supervisor substantially aided the union's organizational campaign. When the employer became aware of the supervisor's activities, on the

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It is to be hoped, however, in the interest of industrial realities that it will hold that supervisory solicitation of union cards is inherently coercive, constituting a per se invalidation of the cards.

3. *Authorization Cards and the Trial*—If an employer is to prevail in a *Bernel Foam* case and escape from an 8 (a) (5) or an 8 (a) (1) bargaining order, he must conclusively demonstrate to the Board that the union never had a majority of the uncoerced employees. The key phrase is *majority of uncoerced employees*, and the employer must attack the entire shaky foundation of the authorization card process. The Board, however, through built-in procedures, prevents these cards from being substantially attacked. Anyone who attempts to do so will run into the “card protectors”—the *Jencks*¹¹⁰ and *Taitel*¹¹¹ rules. These rules are designed to prevent the employer from attacking the authenticity of the cards.

The NLRB is an agency which combines both the fact-finding and prosecution functions. In investigating a charge, the field attorney takes affidavits and statements from witnesses for both parties, the company and the union. If the Board decides to issue a charge against the company, the government enjoys a tremendous advantage because the field attorney who previously functioned in the role of a fact-finder now functions in the role of a prosecuting attorney with intimate knowledge of the company's case while the company is relatively unfamiliar with the union's case. The employer has no right to the benefits of discovery. He

(Footnote continued from preceding page)

day before the election, he notified the Regional Director that he would refuse to participate in the election. The Regional Director overruled the employer's objections to the election without a hearing. The Board held the employer guilty of an unfair labor practice when he refused to bargain. *NLRB v. Lamar Elec. Membership Corp.*, 148 N.L.R.B. 582 (1964), but the Fifth Circuit refused to enforce the Board's order and remanded the case to the Board, which proceeded to dismiss the complaint and set the election aside. *NLRB v. Lamar Elec. Membership Corp.*, 362 F.2d 505 (5th Cir. 1966).

In *A.T.I. Warehouse, Inc.*, 169 N.L.R.B. No. 75 (1968), a case in which this writer participated, the Board said: “. . . the cards solicited by him [the supervisor] could not be counted toward the Union's majority when it requested recognition. . . . It is well settled that cards obtained with the direct and open assistance of a supervisor are invalid for such purposes.” This statement by the Board, however, in the writer's opinion does not settle the issue, for in this case the supervisor directly solicited cards from high school boys thereby creating a presumption of coercion. The General Counsel made no attempt to rebut this presumption.

¹¹⁰ *Jencks v. United States*, 353 U.S. 657 (1957). In this connection, see also *Ra-Rich Mfg. Corp.*, 121 N.L.R.B. 700 (1958).

¹¹¹ *I. Taitel and Son.*, 119 N.L.R.B. 910 (1951), *enforced*, 261 F.2d 1 (7th Cir. 1958), *cert. denied*, 359 U.S. 944 (1959).

has no legal right to view any pre-hearing affidavit or statement before trial or before the General Counsel's direct examination. The first and only time, according to the rule, when he may request to see the pre-trial statement of General Counsel's witnesses is after direct examination and prior to his cross-examination.

Even this privilege of enlightenment under the *Jencks* rule is not very meaningful, for it only applies to a witness who has personally appeared to authenticate his card. In the matter of authorization cards, the Board had held that "the best evidence rule" does not require signatories to testify in connection with the signing of their cards.¹¹² This has been interpreted to mean that anyone, usually the union solicitor, may testify who saw the employee sign in his presence. In such a situation, when a union organizer authenticates the cards of absent signers, the employer cannot invoke his privilege under the *Jencks* rule because he is entitled only to the statements of testifying witnesses.

The ghostly nature of these cards becomes even more apparent under the *Taitel* rule. The Board has stretched its rules of authentication to validate cards signed in the presence of no one but which are simply in the possession of the union. It has held that cards will be admitted into evidence, even though they are not authenticated by the signer or by anyone who saw him sign, simply on the testimony of a union agent that they have been received by him in the regular course of union business from keymen in the unit. The burden of proof is upon the employer to invalidate the signatures; no opportunity is given him to prove coercion from the nature of the solicitor's remarks, yet a Trial Examiner has said, "the *Taitel* rule contains all the reasonably necessary safeguards to employers for due process. . . . Common experience indicates that signature forgery is the exception rather than the rule."¹¹³

The Board tolerates a very loose procedure not only in the acquisition and admission of cards but also in their completion. It is common practice for union organizers to obtain only the signatures of the employee leaving the rest of the card incomplete, including the most important item—the date. It is a curious

¹¹² *Lifetime Door Co.*, 158 N.L.R.B. 13, 21 (1966).

¹¹³ *Henry Colder Co.*, 163 N.L.R.B. No. 13 (1967) (Statement by Trial Examiner Maurice S. Bush in his supplementary decision to the NLRB defending the *Taitel* rule.)

anomaly of Board procedure that while undated cards are discarded in support of a showing in representative cases, they are considered valid in an unfair labor practice proceeding if the date can be established through evidence. The presumption concerning undated cards is that they are valid, signed before the union made its demand or the employer refused the demand. In *Midwestern Mfg. Co.*,¹¹⁴ the General Counsel argued that an employee's card should count toward the majority, even though the employee could not remember the date on which he signed it—"It was hot during the summertime."¹¹⁵ The Trial Examiner rejected the card for the lack of sufficient evidence showing that the card was signed before October, when the union made its demand. The Board curtly reversed him by saying, "It is common knowledge that it is far more likely to be hot in Oklahoma before October than after that date."¹¹⁶

The Board's loose procedures on incomplete cards encourage forgery on a highly important item which can spell the difference between victory and defeat—the date. It is a very simple matter for a union, having undated cards within its possession, acquired from employees after union demand and hence invalid, to insert prior demand and refusal dates and hence validate the cards. It is inexcusable for the Board to honor these cards. To insure the validity of the election process, an administrative ruling should require that all cards in the union's possession before demand bear the NLRB stamp.

In those rare instances when the Board finds coercion or misrepresentation in the solicitation of cards, it confines itself to the invalidation of single cards, refusing to find a pattern of coercion concerning the rest of the cards. This may result in a situation where the signatures of present coerced signatories do not count but the signatures of absent signatories in the same environment do count. In *Golub Corporation*,¹¹⁷ many employees testified that the solicitor violated the *Cumberland* rule by stating that the cards were to be used "solely" for an election, yet the Board said the "cards of employees who did not appear to testify are counted since there is no showing that the union engaged in an invariable pat-

¹¹⁴ 158 N.L.R.B. 1968 (1966).

¹¹⁵ *Id.* at 1699.

¹¹⁶ *Id.* at 1700.

¹¹⁷ 159 N.L.R.B. 355 (1966).

tern of misrepresentation in obtaining signatures."¹¹⁸ A commentator has also criticized this practice by the Board.

On some occasions, invalidation of all cards obtained by a particular solicitor or obtained on a particular form of card, or secured following a particular letter found to misrepresent the impact of the cards, is warranted. More broadly, the Board should be less intent on a card-by-card adjudication of union guilt or innocence and more concerned with an overall evaluation of the atmosphere in which employees were asked to register their choice.¹¹⁹

4. *Revocation of Authorization Cards*—In theory, the Board permits an employee to revoke his card at any time before the employer's refusal to recognize the union. After the refusal data, however, an employee has no power to revoke the card. In *Southland Paint Company*,¹²⁰ the Board said:

Nor is it of any consequence that some of the employees sought to revoke their authorization cards on April 17. The fact as to whether an employer entertains a genuine doubt that a union represents a majority of the employees is to be determined as of the time the employer refused to recognize the union. Once it is shown that the employer entertained no genuine doubt of the kind at the time it refused to bargain, an unfair labor practice has been established. The fact that it later developed there were grounds that might have created doubt at the time is immaterial.¹²¹

The actual revocation of the card even before refusal, however, is another matter. Even though the courts have said that a card may be informally revoked,¹²² the Board has insisted upon imposing heavy, formal, affirmative duties upon any employee seeking to revoke his card, sacrificing substance and intent, to empty form. For instance, it appears to be present Board law that an em-

¹¹⁸ *Id.* at 366.

¹¹⁹ Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851, 857-58 (1967).

¹²⁰ *Southland Paint Co.*, 156 N.L.R.B. 22 (1965).

¹²¹ *Id.* at 45.

¹²² *NLRB v. Reeder Motor Co.*, 202 F.2d 802 (6th Cir. 1953). The Sixth Circuit said:

The Board thought it reasonable to require that the withdrawal of authority be evidenced with the degree of formality required to establish the original designation. We are unable to agree. This would exalt form over substance and make the interest of the agent of paramount importance rather than that of his principals. *Id.* at 804.

ployee seeking to revoke his card before union demand or company refusal, must orally inform a union agent or preferably send a registered letter of revocation to union headquarters.¹²³ Communication of his disavowal to the employer has no legal effect. This doctrine, contrary to the principles of common law agency which allow a principal to revoke the power of his agent by informing the third party, obviously originated from dictum by the Eighth Circuit Court of Appeals in *Jas. W. Matthews v. NLRB*,¹²⁴ where the court said: "I am unable to see how the letter of withdrawal can possibly be relevant to the question of the union's majority status on . . . the date the union requested recognition, as a principal's revocation of his agent's authority is ineffective until communicated to the agent."¹²⁵

Although trial examiners are holding that communication of card revocation to the employer is an ineffective act of revocation, citing *Tinley Parlor Dairy*,¹²⁶ the Board itself has dodged passing upon the question although it is adopting the examiners' conclusions.

It seems to be an exercise in technicalities for the Board to say that employees had failed to revoke their cards by formally informing the union when all the employees including the union solicitors knew that these employees were agents of the company.¹²⁷ It is even more absurd when the Board itself, after finding them to be company agents, attributing their unfair labor practices to the company, at the same time finds that the union is their agent and that their cards count toward the union majority. This certainly seems to be a case of revocation through employee conduct, the knowledge of the revocation coming to the attention of the union.

In 1941, Justice Goodrich of the Third Circuit warned the

¹²³ *Arkansas Grain Corp.*, 163 N.L.R.B. No. 97 (1967), where the Board stated:

There was no testimony establishing that copies of the two joint letters purporting to withdraw the authorization of the seven employees were mailed to the union or its agent, and there was no testimony or admission that the union or its agent received either letter. In these circumstances I cannot presume that the union was notified or on notice of these attempts to withdraw the previously given seven authorizations at the time of the attempt. *Id.* at 16.

¹²⁴ 354 F.2d 432 (8th Cir. 1965).

¹²⁵ *Id.* at 438.

¹²⁶ *Tinley Park Dairy Co.*, 142 N.L.R.B. 683 (1963).

¹²⁷ *Atlas Engine Works*, 163 N.L.R.B. No. 61 (1967).

Board about the danger of indulging in per se rules—in the irrebuttable presumption that any employer unfair labor practice caused the employees to revoke their cards. In *Ougton v. NLRB*¹²⁸ he said:

There is no competent evidence that the loss in union membership was influenced by the employer unfair labor practices. Even if the Board may make the assumption that there is a causal relationship between unfair labor practices on the part of the employer and loss in union membership when the unfair labor practices are contemporaneously present, certainly there is no irrebuttable legal presumption of a cause and effect. We do not see how the testimony of those who perhaps would testify to the contrary may fairly be rejected.¹²⁹

The Board, however, throughout the years, has completely rejected this rebuttable presumption test and has adopted a per se mechanical approach, invalidating all card revocations occurring after the employer's unfair labor practice, completely disregarding the fact whether it was at all related to the revocation. The road for the Board has not been easy, however, for the Trial Examiners, present at the scene and in a much better position to judge whether the employer's misconduct caused the revocation, have fought the Board all the way.

In *Sullivan Surplus Sales*,¹³⁰ an employee before union demand and after a slight employer unfair labor practice, told the union agent that she wanted him to return her card because "her husband was having a fit."¹³¹ The Trial Examiner found that her revocation was unrelated to the unfair practice. The Board reversed him, saying her card should be counted because of "a direct causal relationship between respondent's conduct and Kuttner's request."¹³² In *Quality Markets, Inc.*¹³³ the Trial Examiner found that an employee, Vera Vergith, revoked her card before the union demand "strictly on her own initiative."¹³⁴ The evidence, he pointed out, showed that the employer never interrogated Vergith. Not so, said the Board: "In the light of the small size of the unit which comprises 21 employees and the respondent's unlaw-

¹²⁸ 118 F.2d 486 (3d Cir. 1940).

¹²⁹ *Id.* at 499-500 (dissenting opinion).

¹³⁰ 152 N.L.R.B. 132 (1965).

¹³¹ *Id.* at 158.

¹³² *Id.* at 135.

¹³³ 160 N.L.R.B. 44 (1966).

¹³⁴ *Id.* at 46.

ful conduct designed to coerce employees to withdraw from the union, we must presume that Vergith's attempted revocation of her card was the result of the respondent's unlawful conduct."¹³⁵

The Board's skeptical attitude toward card revocation can best be summed up in the *Tinley Park Dairy*¹³⁶ and *Idaho Egg Producers*¹³⁷ decisions. In *Tinley Park Dairy*, an employee, Betty Villa, after signing a union card, told her husband the next day that she regretted it, and on the following day, before any union demand upon the company, told the store manager about the union meeting and about signing the card. Several months later she sent a letter of revocation to the union. The Trial Examiner found that Villa's "action in notifying Suhs of her signing with the union together with her announced decision to her husband to stay out of the union, constituted a revocation of her designation which dissipated the union's majority."¹³⁸

The Board, holding that communication of revocation to her husband was legally ineffective dodged the question of whether communication to the employer was effective by concluding that she had no intent to revoke because she did not use the word "regret" to the employer. "As Villa did not tell Suhs that she regretted having signed a card, but only told him that she had signed one, there is nothing in this aspect of her conduct that warrants the Trial Examiner's conclusion as to revocation."¹³⁹ This is indeed very technical language which exalts ritual over intent, especially in view of the fact that as the employer com-

¹³⁵ *Id.* See also *Werstein Uniform Shirt Co.*, 157 N.L.R.B. 856 (1966), where again the Board reversed the Trial Examiner stating:

. . . although the Trial Examiner found that the illegal interrogations by Leah Werstein involved 'perhaps no more than 3 or 4 employees and that there was no evidence indicating that Anna Kempf was directly affected by the illegal conduct,' we are persuaded on the basis of the entire record, that during the period in question to Anna Kempf revoking her authorization card, Leah Werstein primarily and Emil Dohen asked many of the employees including almost all of the females whether they signed authorization cards. . . . Thus we conclude in view of the relatively small size of the unit which is composed of 23 employees and the evidence of this extensive coercive conduct by the respondent, that the revocation must be presumed to be the result of respondent's unlawful conduct and that but for such conduct the union would have maintained the majority status which the parties agree the union had originally achieved. *Id.* at 859-60.

¹³⁶ 142 N.L.R.B. 683 (1963).

¹³⁷ 111 N.L.R.B. 93 (1955).

¹³⁸ 142 N.L.R.B. 683, 686 n.116.

¹³⁹ *Id.* at 686 n.124.

mitted some unfair labor practices after Villa's confession to her supervisor, the Board concluded that her letter of revocation to the union was ineffective because it had been caused by the unfair labor practices.

In *Idaho Egg Producers*,¹⁴⁰ employee Panter, after signing a card told her employer the next day before any union demand that she regretted her act. She did not inform the union, however, until about a week later, after the employer committed some unfair labor practices. The Board, while not saying that revocation to the company was ineffective, said that she had no intention to leave the union because she had not acted immediately in informing it.

Her conduct is more impressive and is of more substance than her statement to Slayden on September 23, that she was sorry that she had signed a card because despite his reply that she could withdraw or stay in, as she chose, she patently preferred to keep the status quo, namely to stay in. I find that Panter's card should properly be counted as evidence of the union majority.¹⁴¹

It must be obvious, even to the Board, that employees uninitiated in the legal complexities of labor law are completely unaware of the fact that they can even revoke a card, much less of the technical formal requirements for revocation. It is quite obvious in both of these cases that the employees intended to revoke their cards for personal reasons, not because of the employer's unfair labor practices. The "but for" rule, that the employee would not have revoked his card but for the employer's unfair labor practice, should be re-examined in the light of industrial realities and in the name of common sense. It is apparent from these illustrations that the Board is employing a double standard in applying common law rules of agency—using agency as a tool of immunity for unions and as a tool of liability for employers. An employer is responsible for the misconduct of his supervisors even though they disobey his express instructions unless he disavows their acts by applying sanctions. A union is not responsible for the acts of card solicitors because they have no "actual" authority and when a union member disobeys the in-

¹⁴⁰ 111 N.L.R.B. 93 (1955).

¹⁴¹ *Id.* at 106-07.

structions of his union, a simple act of disavowal is sufficient—the application of sanctions is not required.¹⁴² An employee, as principal, cannot revoke his card through any of the common law principles of agency. At the present time the Board is developing the alarming doctrine based on agency that an employee may conditionally revoke his card and later ratify it by his conduct. These recent doctrines stretching the rules of agency to their furthest extent to validate cards—trust, bailment, etc.—serve to make the entire card process rather ludicrous and only encourage congressional legislation.¹⁴³ Also, if an employer in any way assists in the formulation of a letter of withdrawal to the union, even though requested to do so by the employee, the Board is inclined to hold the letter of revocation ineffective, regarding the employer as the principal and the employee as the agent.

B. The Affirmative Duty Of The Union To Give A Clear and Unequivocal Demand

The second affirmative duty on the part of the union is to make a clear and unequivocal demand to bargain collectively with the company. The United States Supreme Court has said that a

¹⁴² See Affeldt, *The Independent Labor Union and The Good Life*, 35 GEO. WASH. L. REV. 869 (1967).

¹⁴³ A recent case, *A.T.I. Warehouse, Inc., v. Teamsters Local 20*, 169 N.L.R.B. No. 75 (1968), litigated before Trial Examiner Frederick U. Reel, is a good illustration in point. This was a *Bernal Foam* case in which the writer appeared as counsel for the respondent company. The Eighth Region, after informing me by telephone that no 8(a)(5) complaint would issue because the union never obtained the majority of the authorization cards, issued a complaint about a week later on the tenuous ground that an employee never effectively revoked his card. This employee, after signing an authorization card and prior to any union demand upon the company, asked the union agent to "return his card or destroy it." The union solicitor, or so it was alleged, asked the employee if he could keep the card until "the employee heard the union's side of the story." He said the employee agreed to this. At the first union meeting, a month after the union demand, it was alleged that the employee said "he was for the union." The Regional Director, although there was no legal precedent for this type of transaction, obviously viewing it as a bailment, a trust, or a ratification of an agency relationship, issued an 8(a)(5) complaint.

This is dangerous business, applying common law doctrines, designed for interactions of citizens, to employees within a statutorily defined arena. The statutory policy here should be the Section 7 right of freedom of choice, favoring employee revocation. The presumption, especially after the union has possession of a card, should be against the union. Under no circumstances after an employee has asked for the return of his card, should the union be in a position to impose conditions upon its return. Under this new Board "freeze" doctrine, it would be almost impossible to invalidate a card. Also, the Board is applying a double standard refusing to permit evidence to vitiate a card when an employee signs it but permitting evidence of intent when he attempts to revoke it. If the union feels that the employee has changed his mind about the union, the duty at least

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demand is a condition precedent to any finding of a refusal to bargain: "An employer cannot be found to have refused to bargain collectively with a representative of an appropriate unit until the representative has first sought or indicated a desire to bargain for that unit."¹⁴⁴

"No special formulas or form of words need be employed,"¹⁴⁵ but it is necessary for an 8 (a) (5) violation that there "be an express request to bargain by the union and a refusal by the employer."¹⁴⁶ This is no mere technicality, as the Supreme Court and early Board decisions have pointed out, but an affirmative duty of the highest policy dimensions because it provides the employer with knowledge of the majority's desires without which recognition would involve a violation of the employee's Section 7 rights—the heart of the Act.

Unfortunately, over the past few years, the Board, by whittling away at this doctrine through legal fictions—such as constructive demand, implied demand, continuing demand, futility, informal demand, clarifying demand—has reduced it to a meaningless technicality which is not even necessary under 8 (a) (1) bargaining orders.

It is black letter law that a union must have a majority of the authorization cards when it makes its demand to bargain upon the employer—for if it does not have a majority of the cards on the date of demand, the employer is under no duty to bargain. Under the continuing demand doctrine, however, if the union, not having a majority on the date of its demand, eventually picks up a majority before company refusal to recognize it, no new and separate demand is necessary since the unit is not frozen until the date of the employer's refusal to bargain.¹⁴⁷ For instance, if a

(Footnote continued from preceding page)

should be placed upon the union of securing another card.

The Board in *A.T.I. Warehouse, Inc.*, 169 N.L.R.B. No. 75 (1968) refused to face this issue. It stated that even if the employee ratified his card thereby giving the union a bare majority, an 8(a)(5) bargaining order would not be appropriate because the union failed to make a subsequent demand upon the employer.

¹⁴⁴ *NLRB v. Columbian Enameling Co.*, 306 U.S. 292, 297 (1939).

¹⁴⁵ *Joy Silk Mills v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

¹⁴⁶ *NLRB v. Burton Dixie Corp.*, 210 F.2d 199 (10th Cir. 1954).

¹⁴⁷ In *Henry Colder Co.*, 163 NLRB No. 13 (1967), the Board said:

General Counsel's position is reiterated in his brief as follows: 'with respect to Starks' card, while it was executed on Oct. 14 one day subse-

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union made its request to bargain with a company on June 1, having only 13 out of 29 cards, less than a majority, and the employer immediately refused recognition, then the union, when it picks up its majority in the future, would be obligated to make a new and separate demand in order to acquire an 8 (a) (5) bargaining order. But in this case, if the employer did not immediately refuse to bargain but instead waited until June 3 to refuse, and between June 1 and June 3 the union picked up three extra cards giving it a majority, the employer would be obligated to bargain under the continuing demand theory. Of course, if the union loses any cards through revocation, the same principles apply—these cards would not count toward its majority.¹⁴⁸

It is difficult to quarrel with the logic of the continuing demand doctrine but the Board has gone much further. Under its "futility" doctrine, it now holds that an ineffective demand made by a minority union continues beyond the date of the employer's refusal to bargain, extending to the date the union eventually acquires its majority. A new and separate demand is excused on the basis that the employer's attitude and disposition toward collective bargaining—his bad faith—has made it obvious that a new

(Footnote continued from preceding page)

quent to the second demand for recognition and bargaining by the union it should be counted. The last date for determining the union's majority status should be the date of the company's refusal to bargain *viz.*, Oct. 19. Thus as Starks' card was executed prior to the company's refusal her card is countable.

* * * *

General Counsel cites *Cuffman Lumber Co., Inc.*, 82 N.L.R.B. at 319 in support of his position. In that matter the union demanded recognition on July 19, 1946 and the employer refused recognition some 14 days later on Aug. 3. The decision determined the union's majority question on the basis of the number of cards in the possession of the union as of Aug. 3 and not July 19 when the demand for recognition was made. It can be deduced in that case that the demand therein was deemed a continuing demand subject to a card count as of the date of the employer's response to the demand. *Cf. Local No. 152 v. NLRB*, 343 F.2d 307, 310 (D.C. Cir. 1965). On the authority of the *Cuffman* case and the rationale of *Local 152*, the Trial Examiner finds and concludes that Elizabeth Starks' card of Oct. 14 is countable in determining the union's majority status. *Id.*

After the date of the employer's refusal, a new and separate demand must be made. In *NLRB v. Scott & Scott*, 245 F.2d 925 (9th Cir. 1957), the Ninth Circuit said: "At the time of the demand therefore there was no legal necessity for the employer to bargain. The union did not represent a majority of the non-supervisory employees." *Id.* at 928. The court said that a new and separate demand was necessary.

¹⁴⁸ *Henry Colder Co.*, 163 N.L.R.B. No. 13 (1967).

demand would be useless and vain. At the time the union acquires its secret majority, an automatic duty to bargain arises upon the employer's part regardless of his awareness of knowledge of the majority.¹⁴⁹

The Board's new futility doctrine renders the necessity of a majority union to make a clear and unequivocal demand to bargain a historic relic. Instead of the union at the time of its initial demand having the affirmative duty to inform the company that it has a majority of the employees in the appropriate unit and that it desires to bargain, the affirmative duty is cast upon the employer to inform the union that it has supportable reasons for doubting its majority status. If the company fails to convey supportable reasons, even though the union at the time of its demand had only a minority, the Board will excuse a new and separate demand on the union's part because of the futility of making a new demand. This is a dangerous doctrine, in fact, a trap for the employer in view of the *Aaron Bros.* and *John Serpa* decisions. These cases seem to say that an employer need not convey his reasons for refusal but if he does not, the Board will seize upon his silence as a conclusive indicia of continuing bad faith.

This futility doctrine had its origin in *Wafford Cabinet Co.*,¹⁵⁰ where the Board said: "It is now well established that, absent special circumstances not present here, a prerequisite to a finding of a refusal to bargain by an employer is a clear and unequivocal demand for bargaining by the union."¹⁵¹ In *Burton-Dixie*,¹⁵² the case that triggered the futility doctrine, the Tenth Circuit defined as one of the "special circumstances," an employer's intractable intention not to bargain when he ordered the union agent off the premises.

There was, however, no express request to bargain, but it was clearly implied that such a request would follow recognition of the union, and we think the statements made by Sevic to Bailey fairly construed, amounted in substance and effect to an affirmative statement that respondent would not bargain

¹⁴⁹ *Arkansas Grain Corp.*, 163 N.L.R.B. No. 92 (1967); *J. C. Penney Co.*, 160 N.L.R.B. 279 (1966); *Wausau Steel Corp.*, 160 N.L.R.B. 635 (1966), *enforced*, 377 F.2d 369 (7th Cir. 1966); *American Compressed Steel Corp.*, 146 N.L.R.B. 1463 (1964); *NLRB v. Burton Dixie Corp.*, 210 F.2d 199 (10th Cir. 1954).

¹⁵⁰ 95 N.L.R.B. 1407 (1951).

¹⁵¹ *Id.* at 1408.

¹⁵² *NLRB v. Burton Dixie Corp.*, 210 F.2d 199 (10th Cir. 1954).

or otherwise deal with the union as the representative of its employees. Clearly, from statements to Bailey, a request by Bailey that respondent bargain with the union as the representative of the employees, would have been utterly vain and useless and a mere formality.¹⁵³

The Board, however, in its recent rash of futility cases does not rely upon what the employer *says* but upon what he does *not say* in formulating its definition of futility. In *American Compressed Steel Corporation*,¹⁵⁴ the union, without a majority, made its demand on April 18. It picked up a majority on April 25, but made no further demand for bargaining. At the time of the initial demand, the employer failed to inform the union that he refused recognition because it had not obtained a majority. The Board said —

The company's refusal to bargain, however, was not based on the fact that the union held only 26 cards on April 18, but rather on an outright rejection of the union's request without regard to the number of cards held. In the light of this refusal, it would have been futile for the union formally to renew its request after April 25.¹⁵⁵

A union demand to bargain need not be direct or express; it may be indirect and implied. Such conduct as a strike vote and picketing constitutes a sufficient demand.¹⁵⁶ Also, demand may take place anywhere, in the employer's office or at lunch.¹⁵⁷

The Board early in its history, held firmly to the proposition that a demand must be clear and unconditional, and that any ambiguity would be resolved against the union.

¹⁵³ *Id.* at 201.

¹⁵⁴ 146 N.L.R.B. 1463 (1964).

¹⁵⁵ *Id.* at 1470.

¹⁵⁶ *Scobell Chemical Co. v. NLRB*, 267 F.2d 922 (2d Cir. 1959). The court said:

Even assuming that the union did not represent a majority of the employees in the unit at the moment of the express request to bargain, there can be no doubt that it represented a majority the next day, at the time of the strike and picketing. The strike and the picket line in the circumstances here presented cannot be considered to be anything less than a continuing demand for recognition and bargaining. *Id.* at 925.

But see *Grain Millers v. NLRB*, 197 F.2d 451 (5th Cir. 1952), where the court rejected the union's theory of a continuing request: "the union's theory of a continuing obligation to bargain, which, without request, renewed itself each day after the first refusal, that, in short, the first refusal created and set in motion a continuing tort, therefore, will not do." *Id.* at 454.

¹⁵⁷ *NLRB v. Scott & Scott*, 113 N.L.R.B. 911 (1955), *appealed*, 245 F.2d 926 (9th Cir. 1957).

Such a requirement imposes on the union representative only the obligation to say what he means. Failing to do so, he cannot be considered as having made the sort of request to bargain which imposes upon an employer a legal obligation to comply.¹⁵⁸

* * * *

We require no words of art or words without which a request to bargain is not proper, but only as we have already emphasized that a labor organization in words of its own choice clearly communicate to the employer the extent of the unit employees for which it wishes to bargain. It is not incumbent upon him [the employer] to resolve an ambiguity in a request to bargain.¹⁵⁹

There is language in recent decisions indicating that the duty to resolve ambiguities in a union demand now rests upon the employer.¹⁶⁰ Also, the Board has spawned a new doctrine, comparable to the continuing demand, in viewing a petition for an election as a clarifier of the original demand.¹⁶¹ In this matter of ambiguity, however, the courts have refused to permit the Board to stray very far by insisting that the union communicate its demand in clear language. In *Valley Broadcasting Company*,¹⁶² the Board attempted to dispense with all the formal requirements of a demand by stretching agency ratification doctrines out of shape to reach a policy result, but the Sixth Circuit reversed the Board. The union in that case made a conditional demand upon the company, offering it the choice of immediate recognition or an

¹⁵⁸ C. L. Bailey Grocery Co., 100 N.L.R.B. 576, 579 (1952).

¹⁵⁹ *Id.* at 580.

¹⁶⁰ NLRB v. Scott & Scott, 113 N.L.R.B. 911 (1955). The Board said the employer raised no question as to the group for which Stansbury presumed to speak.

¹⁶¹ Thurston Motor Lines, Inc., 159 N.L.R.B. 1265 (1966).

Although Reed's March 17 letter mentioned only the drivers, by the time of Thurston's March 29 letter, the petition made it clear that the union was not seeking a limited unit but claimed to represent all Nashville terminal employees engaged in driving and dock work. While Thurston's letter of Oct. 29 challenged the appropriateness of the unit set forth in the letter, its failure to mention the unit described in the petition makes it clear that its challenge was technical and did not reflect candid concern over the scope of the unit the Teamsters claimed to represent. I find that the request for recognition set forth in the Teamsters March 17 letter, as clarified by its petition, was sufficient in form as a request for bargaining and constituted a valid request for bargaining in the appropriate unit. *Id.* at 1309.

See also *Waukesha Lime and Stone Co., Inc.*, 145 N.L.R.B. 973 (1964).

¹⁶² 87 N.L.R.B. 1144 (1949), *enforced in part*, 189 F.2d 582 (6th Cir. 1951).

election. Realizing that this demand was ineffective, it seized upon a conversation between the plant manager and an employee in which the employee advised the manager to talk to the union, not the employer. The Board held that the union, by filing an 8(a)(5) unfair labor practice charge, ratified and adopted the employee's request as its own. The court dismissed the 8(a)(5) charge, holding that the union never made any demand upon the employer.¹⁶³

Lately, the Board has placed two restrictions upon a demand. An election petition may act as a clarifier of a previous demand but it cannot serve as an original demand since it constitutes a demand to recognize and not a demand to bargain.¹⁶⁴ Also, it has held that a demand made by a union agent during a meeting held for the purpose of arranging for an election was not a legal demand.

It is clear that the parties were meeting on that day solely for the purpose of discussing details for an election, the course of which they already decided as a means for fully resolving the union's representation claim. We hold that there was no justification for the Examiner's conclusion of an 8(a)(5) violation.¹⁶⁵

*C. The Affirmative Duty of the Union to have an
Appropriate Bargaining Unit*

Perhaps, with an exception of the Board's authorization card policy, there is no other field of labor law in which the Board has

¹⁶³ *Id.*

¹⁶⁴ See *Western Aluminum of Oregon*, 144 N.L.R.B. 1191 (1963), where the Board said:

In the instant case the only steps taken by the union looking toward bargaining was the filing of a petition. Can it be said without any further action on the part of the union to bargain, a request and refusal will be inferred from the filing of a petition and subsequent unfair labor practices by the respondent in violation of 8(a)(1) and 8(a)(3) of the Act designed to defeat the union's majority representation. In my opinion the answer is no. There was nothing in these circumstances to indicate that the union was prepared to negotiate a contract and desired to do so at the time the respondents committed their unlawful acts. Certainly the union should have exhibited this much interest before the legal duty to bargain would attach to the respondent. . . . Although the filing of a petition for certification may suffice as a request for recognition in order to raise a question concerning representation, it does not suffice as a request to bargain, an essential element to an unfair labor practice. *Id.* at 1202.

¹⁶⁵ *J. J. Newberry Co.*, 153 N.L.R.B. 1526, 1529 (1965).

been so bitterly criticized for its lack of policy and its ad hoc decisions as in its determination of appropriate bargaining units.¹⁶⁶ In a real sense, however, these are not separate problems but two aspects of the same problem. The Board has been accused by the courts and commentators of lacking objective criteria, of ignoring employee Section 7 rights, and of furthering the organizational activities of unions.

The unit decisions consistently encourage the growth of unionism as such, rather than protect the rights of employees.¹⁶⁷

* * * *

[T]he Board's increasing reliance on this factor [the extent of union organization] manifests a policy that whatever is good for the growth of organized labor is good for the country.¹⁶⁸

In any event, it seems that the Board has revolutionized its concept of what constitutes an appropriate unit. No longer does the union possess the affirmative duty of making a demand based upon its majority with "the" appropriate unit. Today it can carve out "an" appropriate unit from the optimum or "most" appropriate unit.¹⁶⁹ This policy, of course, works hand in hand with the card authorization process, for it is a much simpler matter for the union to obtain cards from a majority within a small unit and then work outward to organize the entire plant than to obtain cards from the majority of the entire unit and then work inward. Once again through its change of procedural requirements, the Board has relaxed the affirmative duties of the union in obtaining a majority with an appropriate unit.

¹⁶⁶ See Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employees Free Choice*, 18 W. RES. L. REV. 479 (1967).

¹⁶⁷ K. MCGINNESS, THE NEW FRONTIER NLRB 97 (1963).

¹⁶⁸ Rains, *Determination of the Appropriate Bargaining Unit by the NLRB: A Lack of Objectivity Perceived*, 8 B.C. IND. & COM. L. REV. 175 (1967). Mr. Rains also makes the point that "in making this important determination, the Board has frequently allowed one factor to become controlling; that factor is the extent to which the members of the unit requested and other potential units have been organized." *Id.* at 176.

¹⁶⁹ Black and Decker Mfg. Co., 147 N.L.R.B. 825 (1964). The Board said: It has been our declared policy to consider only whether the requested unit is an appropriate one even though it may not be the optimum or most appropriate unit for collective bargaining. We are convinced that such a policy is compatible with the objectives of the Act which seeks to encourage rather than impede the collective bargaining process. *Id.* at 828.

The policy of the Act demands a strong affirmative duty upon the union to define accurately the scope of the bargaining unit in which it claims a majority and for which it demands bargaining rights. If the bargaining unit is defined vaguely or incorrectly, the employer risks an 8 (a) (2) unfair labor practice charge by recognizing a minority union. Also, and more importantly, employee Section 7 rights are violated. No employer should be placed in such jeopardy that one part of the Act pulls him in one direction—recognition, while the other part of the Act pulls him in the other direction—refusal. The duty of adequately defining the appropriate unit should be placed where it belongs—on the union.

The Board, at least until recently, followed the policy of compelling the union to define, at least substantially, the bargaining unit. "Once having defined the unit it claims to represent and having made a bargaining demand on that basis, the union thereby established the frame of reference for measuring the validity of its demand."¹⁷⁰

In holding the union to a high standard of properly defining the unit, the Board held that when a union made a demand to bargain for "all your employees," meaning only his mix and truck drivers, the demand was ineffectual.¹⁷¹ It held that the standard was employer confusion, not union intent,¹⁷² and that intentional exclusion of fringe groups even though they might be part of the appropriate unit, constituted a substantial variance because of the confusion it created in the employer's mind.¹⁷³

In the past few years, however, the trend has swung in the opposite direction. No longer will an employer be considered as acting in good faith if he honestly doubts the union's bargaining

¹⁷⁰ Sportwear Indus., Inc., 147 N.L.R.B. 758, 760-61 (1964).

¹⁷¹ Parker Bros. & Co., 101 N.L.R.B. 872, 876 (1952).

¹⁷² Mike Persia Chevrolet Co., 107 N.L.R.B. 377 (1953). The Board said: The Respondent was justifiably confused as to the scope of the unit requested by the Union and that, in such a situation, it was not incumbent upon the Respondent to seek clarification from the Union in the matter. *Id.* at 380.

¹⁷³ E. R. Goddard & Co., 105 N.L.R.B. 849 (1953). The Board found that:

. . . the unit requested by the union, excluding as it does, mechanics employed in the service department is inappropriate and that only a unit including the service department mechanics is appropriate for the purposes of collective bargaining. As the union never requested the respondent to recognize it in the unit which we find to be appropriate and at no time represented a majority of employees. . . . *Id.* at 857.

unit, even though the Regional Director confirms his doubts by certain inclusions or exclusions. These additions or subtractions will not be regarded as a "substantial variance" from the union's original claim unless it destroys the union's majority, for the Board has said that a reasonable, though mistaken doubt, is not the equivalent of a good faith doubt.¹⁷⁴ The Board has held that any variance between the union's proposed request and that unit ultimately found appropriate by the Regional Director, be resolved in the union's favor under a doctrine of implied intent—that the union intended to include all fringe categories falling under its claim to jurisdiction. When the union claims too little, the Board's inclusions usually do not change "the essential nature of the unit"; when the union claims too much, the Board's exclusions usually do not affect the legality of its demand. When the union intentionally excludes certain categories, making impossible the application of the implied intent rule, the Board finds that "the variance between the unit requested and the appropriate unit is not so substantial as to vitiate the bargaining demand or to excuse the duty to bargain."¹⁷⁵

It is obvious here that the Board has abandoned a functional approach, looking to the effect of the demand by the incorrect bargaining unit upon the employer to determine whether he was confused by the demand. Instead, it looks to the intent of the union and expands the express intent to the implied intent. The important policy values of the employer duty not to recognize a minority union—which is a very real possibility when a union imprecisely defines the bargaining unit—and the strong tendency to interfere with employee rights to refrain from union activities, are completely ignored. The Board has forgotten what the Supreme Court said some years ago. "It is difficult to see how the refusal of the request can be unlawful when granting the same

¹⁷⁴ *NLRB v. Fosdal*, 367 F.2d 784 (7th Cir. 1966). The court said: We agree with the Board that adding three employees to the previous seven was an insubstantial variance. The essential nature of the unit was not changed. All ten performed substantially similar work and the majority status of the work was unaffected by changing the unit from seven to ten, inasmuch as seven employees had validly signed the dual purpose cards. In these circumstances the company was not excused from its statutory obligation to bargain with the union. *Id.* at 787.

See also *Dixie Color Printing Co.*, 156 N.L.R.B. 1431 (1966); *Heck's, Inc.*, 156 N.L.R.B. 760 (1966); *Primrose Supermarket*, 148 N.L.R.B. 610 (1964).

¹⁷⁵ *Priced Less Discount Foods, Inc.*, 157 N.L.R.B. 1143, 1145n.11 (1961).

request might ultimately result in an unfair labor practice proceeding."¹⁷⁶

III. SECTION 8 (a) (1), 8 (a) (2) AND 8 (a) (3) BARGAINING ORDERS

An 8 (a) (5) bargaining order, as we have seen, will not be issued by the Board until a majority union in an appropriate unit has made a demand to bargain upon the employer. If no demand is made, the Board, however, may still issue a bargaining order, not a Section 8(a)(5) but a Section 8(a)(1), 8(a)(2) or 8 (a) (3) bargaining order.

Two conditions can trigger the issuance of such a bargaining order: one, the acquisition of a majority by the union; and two, an unfair labor practice by the employer. Knowledge of the union's majority through a union demand is not necessary; the employer who commits an unfair labor practice assumes the risk that a majority might exist. It is not a matter of knowledge but a matter of strict liability—cause and effect. The Board's rationale is that since the union claimed a majority of the employees within the unit before the employer's unfair labor practice, the bargaining order simply restores the status quo prior to the employer's violation.

The Board defends its policy of issuing section 8 (a) (1), 8 (a) (2) and 8 (a) (3) bargaining orders by proclaiming that it has the sole power to determine the effect of the employer's unfair labor practices upon the minds of the employees, whether the unfair labor practices were substantial or unsubstantial. There appears to be some authority for the Board's position. In *International Association of Machinists v. NLRB*,¹⁷⁷ Justice Douglas, speaking for the Supreme Court, said: "It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged."¹⁷⁸ Also, Justice Learned Hand, a vocal exponent of judicial restraint, said. "The Board is the tribunal to determine the effect of what was done upon the minds of the employees who were present at those meetings. This was authoritatively settled in *Frank Bros.*"¹⁷⁹

¹⁷⁶ *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731, 734 (1961).

¹⁷⁷ 311 U.S. 72 (1940).

¹⁷⁸ *Id.* at 82.

¹⁷⁹ *NLRB v. Stow Mfg. Co.*, 217 F.2d 900, 905 (2d Cir. 1954).

It is difficult to accept the Board's rationale. In *Frank Bros.*¹⁸⁰ and the early cases of the thirties and forties, when labor law was in a relatively unsophisticated stage, the courts endorsed the rare bargaining orders. However, those were cases of serious and flagrant 8(a) (2) (company domination of the union) and 8(a) (3) (discriminatory discharges) unfair labor practices committed by employers. They were not cases of "isolated" or "technical" violations.

Today, the Board is relying upon these early cases of employer capital economic crimes to justify issuing bargaining orders in economic misdemeanor cases. It is not at all clear in most Section 8(a) (1) bargaining order cases whether the unfair labor practice had any coercive effect upon the employees. The circuit courts, as will be pointed out, do not feel that the Board should be the sole arbiter which judges the effect of employer unfair labor practices upon the employees. Section 10(c) only gives the Board power to adopt remedies which effectuate the purpose of the Act. Many circuit courts feel that issuing bargaining orders based upon slight or technical unfair labor practices does not effectuate, but instead militates against the purpose of the Act, because it interferes with the Act's principal purpose—the protection of employees' Section 7 rights of freedom of choice.¹⁸¹

It seemed, at least until 1963, the date of the *Western Aluminum*¹⁸² decision, that the Board considered Section 8(a) (1) bargaining orders an extraordinary remedy. Only a few 8(a) (3) bargaining orders had been issued. In *Western Aluminum*, the Board found that the union had represented a majority of employees but that, by discriminatorily discharging an employee, the employer had dissipated that majority. The Trial Examiner, finding that he was unable to issue an 8(a) (5) bargaining order because the union had not made any demand for recognition upon the employer, recommended an 8(a) (3) bargaining order based upon section 10(c) of the Act. The Board adopted his recommendation in an opinion which hinted that henceforth it would look with favor upon Section 8(a) (1), (2) and (3) bargaining orders:

¹⁸⁰ 321 U.S. 702 (1944).

¹⁸¹ See, e.g., *NLRB v. Flomatic Corp.*, 347 F.2d 74, 76 (2d Cir. 1965).

¹⁸² 144 N.L.R.B. 1191 (1963).

Where as here the union has clearly established its majority status prior to respondent's unfair labor practice and respondents have engaged in unfair labor practices aimed at destroying the union's majority and disclosed a disposition to evade their obligation under the Act, we would require respondents to bargain upon request whether or not the union lost its majority by a turnover. . . . Indeed, under the circumstances, it must be presumed that, but for the respondents unfair labor practices, the union would have retained its majority. . . . Not to order the respondents to bargain with the union upon request would in effect enable the respondents to profit by their unfair labor practices.¹⁸³

Delight Bakery, Inc.,¹⁸⁴ is the classic case which the Board continues to cite as precedent for issuing 8 (a) (1) bargaining orders. It is only the second case in the Board's history in which the Board issued an 8 (a) (1) bargaining order. It is the first case in the Board's history in which it issued a bargaining order where it is not all clear whether the employer committed an unfair labor practice. Even assuming *arguendo*, that the employer was guilty of an unfair labor practice, it was at most a slight, technical unfair labor practice.

In this case the employer, the owner of a small bakery, was in serious financial trouble and his employees' morale was at a low ebb. After the union obtained a majority, he sought a solution to his financial troubles by hiring a firm of professional consultants. These consultants made a survey and as a result advised him to hold frequent meetings with his employees. At these meetings he kept within the law, discussing problems but promising no benefits to the employees. A committee was formed for closer communication, whether at the suggestion of the employer or the employees it is difficult to say from the record. Also, in accordance with state law, he supplied uniforms to the employees. The Board found that the company was guilty of unfair labor practices in promising benefits, forming the committee and providing the uniforms. It is a very close borderline case in respect to even the existence of unfair labor practices; it could have gone either way, depending upon the view of the decision-maker.

¹⁸³ *Id.* at 1192.

¹⁸⁴ 145 N.L.R.B. 893 (1964).

Relying upon one case, the Board issued an 8 (a) (1) bargaining order.¹⁸⁵

On appeal, Justice Edwards of the Sixth Circuit admitted that it was a borderline case: "The record we have reviewed does not compel the findings and inferences we have recited. Nor are we certain that had we heard the witnesses, we would have reached the same results. Each of the company's acts could have been interpreted differently."¹⁸⁶ Despite his doubt that the employer committed any unfair labor practices, Justice Edwards affirmed the Board's order. To the company's contention that an 8 (a) (1) bargaining order was a "revolutionary" device, completely out of proportion to the doubtful unfair labor practice, Justice Edwards insisted that previous court decisions substantiated the order, citing *D. H. Holmes Co. v. NLRB*¹⁸⁷, *Summit Mining Corp. v. NLRB*,¹⁸⁸ and *NLRB v. Caldarera*.¹⁸⁹

There is little doubt that *Delight Bakery* is "a revolutionary decision".¹⁹⁰ The cases and the supporting Supreme Court dicta which the NLRB has been citing to the courts have absolutely no support for the issuance of 8 (a) (1) bargaining orders. *International Ass'n of Machinists v. NLRB*,¹⁹¹ *NLRB v. Colton*,¹⁹² *NLRB v. Lorillard*,¹⁹³ *NLRB v. Stow Mfg. Co.*,¹⁹⁴ and *NLRB v. Armco Drainage*¹⁹⁵ were serious 8 (a) (2) domination cases, not

¹⁸⁵ *D. H. Holmes Co. v. NLRB*, 179 F.2d 876 (5th Cir. 1950).

¹⁸⁶ *NLRB v. Delight Bakery, Inc.*, 353 F.2d 344, 345 (6th Cir. 1965).

¹⁸⁷ 179 F.2d 876 (5th Cir. 1950).

¹⁸⁸ 260 F.2d 894 (3d Cir. 1958).

¹⁸⁹ 209 F.2d 265 (8th Cir. 1959).

¹⁹⁰ 353 F.2d at 347.

¹⁹¹ 311 U.S. 72 (1940). In this case an unsophisticated employer refused to enter into a contract with the U.A.W. which clearly represented a majority of his employees. He instituted a campaign against the machinists union, discharging twenty toolroom employees who refused to join the machinists union.

¹⁹² 105 F.2d 179 (6th Cir. 1939). This is not strictly a first arena case but a decertification case. Here the employer attempted to disestablish the union through a campaign of coercion, polls, threats, etc.

¹⁹³ 117 F.2d 921 (6th Cir. 1941). Here the Sixth Circuit, admitting that the company was instrumental in dissipating the union's majority through domination, disagreed with the Board that it was the only cause. The U.S. Supreme Court reversed the Sixth Circuit saying that "this was for the Board to determine and the court below was in error in modifying the Board's order in this respect." *NLRB v. P. Lorillard Co.*, 314 U.S. 512, 513 (1942).

¹⁹⁴ 217 F.2d 900 (2d Cir. 1954). Justice Learned Hand found a pattern of employer attempts to dominate the union. "Between Oct. 11 and Oct. 25, it [the company] held 9 meetings of the separate 'departments' that we have described and it is certainly possible that it was these that lost the Union its majority." *Id.* at 905.

¹⁹⁵ 220 F.2d 573 (6th Cir. 1955). The employer recommended a company union.

8 (a) (1) cases. *Texarkana Bus Co. v. NLRB*,¹⁹⁶ *Hamilton G. Brown Shoe Co. v. NLRB*,¹⁹⁷ *Summit Mining Corp.*,¹⁹⁸ *NLRB v. Calderera*,¹⁹⁹ *Piasecki Aircraft Corp. v. NLRB*,²⁰⁰ and *Editorial "EL Imparcial" v. NLRB*²⁰¹ were serious 8 (a) (3) cases, not 8 (a) (1) cases.

There is only one decision before *Delight Bakery* that has any possible relevance to an 8 (a) (1) bargaining order and in that case, *D. H. Holmes*, the employer initiated a campaign against the union, committing flagrant unfair labor practices, threatening to close the bakery in the event the company lost the election, and granting wage increases and back pay on the day before the election.²⁰²

A few months after the *Delight Bakery* decision, Trial Examiner Frederick U. Reel rendered his decision in *American Compressed Steel*.²⁰³ In this case the union made its demand upon the company on April 18 without having a majority. The company refused to bargain. On April 25 the union obtained a majority, neglecting, however, to make a new demand upon the company.

¹⁹⁶ 119 F.2d 480 (8th Cir. 1941). Here, the employer committed flagrant 8(a)(1) and 8(a)(3) unfair labor practices. He asked employees to sign letters disavowing the union, questioned employees about their union affiliation, and indiscriminately discharged employees.

¹⁹⁷ 104 F.2d 49 (8th Cir. 1939). This case involved serious 8(a)(2) and 8(a)(3) violations of the Act. The Eighth Circuit refused to enforce a bargaining order but ordered a return of the status quo by ordering the Board "to determine the choice of the employees by requiring an election after the status quo shall have been restored by disestablishing the company union and by the reinstatement of the wrongfully discharged employees." *Id.* at 56.

¹⁹⁸ 260 F.2d 894 (3d Cir. 1958). This is an 8(a)(3) bargaining order case. The union made a conditional, invalid demand by giving the employer a choice of a card check or an NLRB election. The Third Circuit upheld the 8(a)(3) bargaining order, saying "this provision of the order does not depend upon a previous demand by the union or a refusal by petitioner. It looks to the future and only in event such request shall be made will petitioner be required to bargain collectively with the union." *Id.* at 900.

¹⁹⁹ 209 F.2d 265 (8th Cir. 1954). The union here made an ambiguous request to an uneducated employer by asking him—"care to do business with us?" The court found the demand legally ineffective but upheld the Board's 8(a)(3) bargaining order because of the campaign against the union especially the discharge.

²⁰⁰ 280 F.2d 575 (3d Cir. 1960). This case involved the duty of a successor corporation not to discriminate in its hiring practices against employees because of their union membership.

²⁰¹ 278 F.2d 184 (1st Cir. 1960). This is not technically a first arena case since the union here was already in existence. The company refused to bargain because the union failed to comply with the filing requirements of Sections (g), (f), and (h) of the Act and discriminatorily discharged union adherents. The court upheld the 8(a)(3) bargaining order.

²⁰² *D. H. Holmes Co. v. NLRB*, 179 F.2d 876 (5th Cir. 1950).

²⁰³ 146 N.L.R.B. 1463 (1964).

During the interval between April 18 and April 25, the company committed some slight unfair labor practices. Trial Examiner Reel initiated a double barreled remedy. He recommended an 8(a)(5) bargaining order based on the futility doctrine because the company did not give the correct or specific reason for refusing to bargain (the lack of a union majority), thereby implying that it would not bargain for any reason. He also recommended an alternative remedy—an 8(a)(1) bargaining order if the Board refused to accept his 8(a)(5) order. "Even if the absence of a formal request after April 25 were fatal to the claim of refusal to bargain, an affirmative bargaining order would be appropriate to remedy the violations found above and to restore the status quo ante."²⁰⁴ The Board upheld his 8(a)(1) bargaining order.

On appeal, the District of Columbia Circuit Court of Appeals also upheld the right of the Board to issue an 8(a)(1) bargaining order. It said,

[A]n order of the NLRB requiring an employer to bargain with the union upon request in the future is enforceable and does not depend upon prior violations of section 8(a)(5) of the Act since the union did not obtain majority status and such an order is appropriate to remedy section 8(a)(1) and (3) violations.²⁰⁵

The key word here is "majority." The method by which the union obtained the majority was not discussed and the court seemed to imply that the Board was the chief determiner of what constituted "interference." By placing no duty upon the Board to give any reason why slight unfair labor practices merited a bargaining order and effectuated the policies of the Act, the court rubber-stamped the Board's per se approach—an irrefutable presumption that any unfair labor practice dissipated the majority.

Many courts, however, are beginning to have second thoughts about the Board acting as a sole arbiter in determining the effect of employer unfair labor practices on the minds of the employees. In *NLRB v. Flomatic Corp.*,²⁰⁶ the court reversed the Board's holding that an employer who promised some minor benefits to his employees during an organizational campaign merited an

²⁰⁴ *Id.* at 1471.

²⁰⁵ *Teamsters Local 152 v. NLRB (American Compressed Steel Corp.)*, 343 F.2d 307, 309 (D.C. Cir. 1965).

²⁰⁶ 347 F.2d 74 (2d Cir. 1965).

8 (a) (1) bargaining order. The court found the promises to be technical violations, but too unsubstantial in nature to warrant an 8 (a) (1) bargaining order. Justice Hays, in dissent, felt that the court should not intrude upon the Board's domain in determining the effect of coercion upon employees and how to remedy it.

The circuits are presently in agreement that the Board has the power to issue 8 (a) (1), (2) and (3) bargaining orders, but are divided over the issue of whether the courts have the power to enforce these orders. Some courts follow Justice Hays' judicial restraint approach.²⁰⁷ Others follow Justice Anderson's judicial activist approach as expressed in the *Flomatic* majority opinion.²⁰⁸

The judicial restraint opinion is illustrated by the District of Columbia Circuit Court of Appeals decision in *Steelworkers v. NLRB*.²⁰⁹ In that case, the court, after admitting that the evidence of unfair labor practices was "hardly overwhelming,"²¹⁰ upheld the Board's 8 (a) (1) bargaining order, saying:

As we have stated, the choice of remedies is primarily within the province of the Board. The Board has the responsibility for deciding what relief is most 'appropriate' and in the absence of a clear abuse of discretion we will not interfere. Even where the particular remedy carved out by the Board has an impact on other values protected by the National Labor Relations Act, it is the Board that has the primary duty of reconciling sometime divergent interests.²¹¹

The judicial activist approach is illustrated by the Second Circuit decision in *NLRB v. Better Val-U Stores*.²¹² In that case the employer committed some unfair labor practices but since the union failed to make any demand upon the employer to bargain, the Board could not seek an 8 (a) (5) order. Instead the Board asked the court to enforce its 8 (a) (1) bargaining order. The court refused saying that it would only issue an 8 (a) (1) bargaining order when in its opinion the effect of the employer's unfair labor

²⁰⁷ *United Steelworkers v. NLRB*, 376 F.2d 770 (D. C. Cir. 1967); *Wausau Steel Corp. v. NLRB*, 377 F.2d 369 (7th Cir. 1967); *J. C. Penny Co. v. NLRB*, 384 F.2d 479 (10th Cir. 1967).

²⁰⁸ *NLRB v. Better Val-U Stores*, F.2d (2d Cir. 1968); *NLRB v. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967); *Pulley v. NLRB*, 395 F.2d 870 (6th Cir. 1968).

²⁰⁹ 376 F.2d 770 (D.C. Cir. 1967).

²¹⁰ *Id.* at 772.

²¹¹ *Id.* at 773.

²¹² 401 F. 2d. 491 (2d Cir. 1938).

practices was so grave that it made a free election impossible. It demanded substantial evidence not only of a "widespread campaign,"²¹³ but also of proof that the company dissipated the union's majority. The court stated that the issuing of an 8 (a) (1) bargaining order was an extraordinary remedy and should only be issued "where the employer's conduct has been so flagrantly hostile to the organizing efforts of a union that a secret election has undoubtedly been corrupted as a result of the employer's militant opposition."²¹⁴

The trend is definitely toward the activist approach. In *NLRB v. S. E. Nichols Company*,²¹⁵ the company initiated a campaign designed to keep the union out of its plant. After union demand, the Board found that the company gave the impression of union surveillance, promised economic benefits and threatened to eject from the store any employee who was found talking to a union organizer. These were all technical violations, but the court was not impressed with the intensity of the coercion. Chief Justice Friendly said:

We suppose the Board was warranted in finding that the provision of increased benefits violated 8(a) (1) under *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), although in contrast to the Examiner's portentous description the violation to our mind comes close to being *de minimus*. . . . The two incidents relied upon to prove that Nichols created an impression of unlawful surveillance shows little more than it as some source of information about union activities; there was nothing to indicate it had stimulated the naming of such reports. . . .²¹⁶

Finding technical violations of 8 (a) (1), the court proceeded to dismiss the 8 (a) (5) bargaining order by finding many of the cards invalid. Chief Justice Friendly also took time out to attack the Board on its policy of issuing 8 (a) (1) bargaining orders. "We do not read the Trial Examiner's report which the Board adopted, as basing the bargaining order on the 8 (a) (1) violations, and, with these of so low an order of magnitude, we would not uphold it if in fact it proceeded on that ground."²¹⁷

²¹³ *Id.* at 495.

²¹⁴ *Id.* at 494.

²¹⁵ 380 F.2d 438 (2d Cir. 1967).

²¹⁶ *Id.* at 440.

²¹⁷ *Id.* at 441.

IV. CONCLUSION

This tendency of the Board to impose a bargaining representative upon the employer and his employees when it is far from clear that an uncoerced majority exists, or that the majority has been influenced or coerced by the employer's unfair practices, strikes at the heart of the Act—section 7 right of employees to freedom of choice.²¹⁸

To obtain a bargaining order the union must possess an uncoerced majority in the bargaining unit. The possession of the majority of authorization cards does not mean that the union possesses an uncoerced majority.²¹⁹ To presume so, as does the Board, is simply unrealistic. The presumption, since cards lack the safeguards of the voting booth, should be that they are invalid and that it is incumbent upon the union to demonstrate their authenticity. There should be a presumption that cards solicited by a supervisor, either actively or passively, are invalid; that informal revocation is valid, when conveyed to an employer; that during the hearing, it is incumbent upon the signer of the card to testify or, if he cannot, to submit affidavits, that he voluntarily signed. The continuing demand and futility doctrines should be discarded. Also, the same strict rules regarding the acceptance and

²¹⁸ In *W. FRIEDMAN, LAW IN A CHANGING SOCIETY* (1959), the author states that:

[F]reedom of association must include the freedom not to associate. It is true, that increasingly agreements made between the major employers' and employees' associations are applied to the whole industry so that even non-members join in the benefits of such agreements. Graver, however, than this situation would be the recognition of a genuine principle of compulsory union membership as a condition of employment. This would transform democratic industrial society into that of the corporate state. The practical difference is small for the trend is towards powerful unions which hardly need coercion. The freedom of the occasional dissenter makes a difference of principle out of proportion to its economic significance. *Id.* at 501-02.

²¹⁹ *NLRB v. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967). The court here states that signed cards are at most an indication of employees' desires because the employer does not know how the union obtained them. In *Textile Workers Union v. NLRB (Hercules Packing Co.)*, 386 F.2d 790 (2d Cir. 1967), Justice Friendly said:

Examination of the cards goes only to one element necessary to the union's majority status. It shows nothing on the equally important factor of how the cards were obtained. For an employer to say in effect 'I will concede you may have a majority of signed cards, but I distrust their validity' is in no way inconsistent with good faith. *Id.* at 793.

In the recent case of *Wilder Mfg. Co.*, 69 L.R.R.M. 1322 (1968), the Board seems to have accepted Justice Friendly's thesis.

rejection of cards as applied by the Board in representation elections—the necessity of a date, etc.—should govern in counting cards toward a majority.

There is substance to the Board's argument that evidence of the card signer's state of mind when he signed the card should not be introduced into evidence contradicting the written language of the card itself. The period of time between the date of signing the card and the hearing is too long, thus providing the employer with ample time to change the minds of many card signers. The Board should, however, place a much higher duty upon the solicitor of the cards, compelling him to submit two cards, one calling for an election and another calling for a vote. A simple, brief explanation, preferably approved by the Board, should be attached to each, explaining the consequences of the act of signing—that it is possible, if the union acquires a majority, that no election will be held. The judicial standard is correct and the Board should take the court's suggestion to draw up such a model card.

The present mechanical approach of the Board, basing bargaining orders upon innocuous unfair labor practices is also alarming because it betrays an insensitivity to the realities of industrial life. By viewing any unfair labor practice after the union has obtained an alleged majority of the authorization cards as a capital economic crime against the employees, making necessary a bargaining order instead of an election, the Board has demonstrated that it has adopted a conceptual, punitive test. The Board is looking into the mind of the employer for fault as if such fault were a criminal offense, instead of looking to the effect of the unfair labor practice upon the mind of the employee, as it should do in finding a regulatory offense. *Per se* rules, except at the extremities of a process where they guard high values, have no place in dynamic group interactions.

The concept "unfair labor practice" is not a static term; it is employed to describe a process which may vary from the slightest to the most intense coercion. It is necessary for the decision-maker to take into consideration the degrees of coercion, and not to assume that all unfair labor practices have the same effect. Some unfair labor practices are inherently coercive, such as most 8 (a) (2) and 8 (a) (3) practices. If during an organization campaign, the

employer dissipates the majority by establishing a company union, he deserves a bargaining order. Also, if he discharges a union organizer or employee for union activity, it is obvious that he has intensely coerced the other employees and hence should be ordered to bargain.

This writer has no quarrel with the Board when it issues bargaining orders in these serious 8 (a) (2) and 8 (a) (3) cases. It is only too obvious that the union lost the election or its majority because of the employer's misconduct. However, this writer does quarrel with the Board when it mechanically issues bargaining orders in 8 (a) (1) cases. Most 8 (a) (1) unfair practices, except when they accumulate as part of an employer's anti-union campaign, are economic misdemeanors and as such the capital punishment of a bargaining order does not fit the crime or effectuate the purposes of the Act.

There is a tremendous difference between an 8 (a) (1) violation of forgetting to place a comma or correct word in a no-solicitation rule and an 8 (a) (3) violation of discharging a union organizer. If the Board feels that 8 (a) (1) unfair practices did have some effect, it could more adequately restore the status quo by the use of other sanctions more suited to the misconduct, such as permitting the union to neutralize the employer's conduct by speaking on the company's premises, fines, etc. More imaginative use of sanctions by the Board would convince many that it was more interested in remedial rather than in punitive orders. In brief, both the Board and the courts should bear in mind that the process of coercion encompasses a wide spectrum and that many unfair labor practices not only fall on deaf ears but off smiling lips.²²⁰ If the courts refuse to permit the Board to experiment with imaginative sanctions, and there is evidence that they are reluctant to do so, they should at least demand that the Board give supportable reasons for its bargaining order decisions.

An indispensable requirement of due process in western countries is that the decision-maker give reasons, not only for his decisions, but for his orders. This the Board has failed to do. This the court should compel it to do—give reasons and evidence for all bargaining orders. The assumption indulged in by the courts

²²⁰ Affeldt, *Group Sanctions and Sections 8(b)(7) and 8(b)(4): An Integrated Approach to Labor Law*, 54 GEO. L.J. 55, 56 (1965).

should be that all serious 8 (a) (2) and 8 (a) (3) bargaining orders are valid, while all 8 (a) (1) bargaining orders are invalid. Only convincing evidence beyond a reasonable doubt should uphold even a serious and flagrant 8 (a) (1) bargaining order. Other sanctions exist to cope with this problem.

The chief reason for the Board's sudden change of policy, besides its desire to penalize employers who interfere with its election process, is "its insistent refusal to see any social or intellectual connection between one part of the NLRB and its satellite areas."²²¹ This balkanized approach has caused immeasurable harm, dislocating vital values which Congress meant to preserve. The inner logic of the Act demands a recognition of three related arenas—before, during, and after collective bargaining.

In the second and third arenas, during and after collective bargaining, where the participants are organized groups (the corporation and the union) the values are different. In the second arena—during collective bargaining, both groups have a mutual obligation to each other to exercise the most intensive effort to agree upon a contract. In essence, they have a duty to associate, to sit down and attempt to reach agreement. In the third arena, once they have signed a contract, both groups have a duty not to disassociate during the term of the contract because of the high value of community peace.

This duty to negotiate, to settle differences amicably in the interest of community peace, is not the policy of the first arena—the organizational stage—since the employee under Section 7 is given the privilege of refraining from collective bargaining. The social interest in community industrial peace is subordinated to the employee's right of freedom of choice. The participants here are the corporation, the labor union, and the unorganized individual; the existence of the bargaining group even though supported by the majority of authorization cards, is highly uncertain—it has not been certified. To impose the same duties upon an employer in dealing with a legitimate, certified group as in dealing with a highly doubtful majority is irrational until a majority within that group is conclusively and clearly demonstrated. Until that time the employer has no duty to recognize that group; in fact,

²²¹ *Id.*

he has the duty to refuse recognition until he is convinced that it is formed. The affirmative duty to give clear and supportable reasons for the group's existence should be cast upon the union, not the employer. Only in this way can the interest of the employer and the interest of the employees in freedom of association and freedom of choice be served. The present tendency of the Board to place the affirmative duties on the employer is simply an amendment of the Act through administrative decision.²²²

Board regulation of campaign tactics during an election, though well-intentioned, has been recognized by critics and acknowledged by the Board itself, as ending in failure.²²³ The Board feels that the chief cause for its failure is the lack of adequate sanctions or remedies. It accordingly has seized upon the remedy of the bargaining order as the final solution to its troubles. This writer feels, however, that the solution does not lie here, but rather in the institutional structure of the first arena. This writer would, therefore, propose a neutrality test, applicable to both the company and the labor union. Under this theory, the Board would prevent both groups from interacting with the employees and discussing any union activities. From the date of the beginning of the organizational drive, or from the time of the announcement of the election to the date of the election, a

²²² In the first arena the Board's principal function is to act as a "protector" of the individual's freedom of non-association as well as of association. Its principal function in the second arena is not to act as a "protector" but as an "arbitrator" bringing both groups together and, through legal coercion, attempt to strike a rough balance of power sharing. The collective bargaining process is a combination of status and contract; status, because both groups as a result of their social responsibilities have a duty of association; contract, because no governmental agency can compel them to agree to the terms of a contract.

In the third arena, after the collective bargaining agreement or treaty has been signed, the state and federal courts are the principal decision makers. The function of the courts is to act neither as a "protector" or "arbitrator," but rather as a "guardian" of the public interest. Representing the overriding interests of the state, the social interest in industrial peace, after the community has provided both parties an opportunity to reach agreement, the courts are enforcers of the contract, imposing upon each the duty to refrain from disassociation, at least during the term of the collective agreement.

The NLRB by equating the first and second arenas has confused its function as a "protector" with that of an "industrial manager" or "arbitrator." It has substituted its conception of the industrial public philosophy for that of Congress and that of the nation.

²²³ See *Hearings on H.R. 11725 Before the Special Subcomm. on Labor of the House Comm. on Education & Labor*, 90th Cong., 1st Sess. (1968); *Hearings on H.R. 667, H.R. 1134, H.R. 1548, H.R. 2038, H.R. 3355, H.R. 4278, & H.R. 6080 Before the Special Subcomm. on NLRB of the House Comm. on Education & Labor*, 89th Cong., 2d Sess. (1966); *Hearings on Administration of the Labor-Management Relations Act by the NLRB Before the Subcomm. on NLRB of the House Comm. on Education & Labor*, 87th Cong., 2d Sess. (1961).

Board employee would be present at the plant to enforce this neutrality theory. Slight infractions could result in fines, revocation of authorization cards, additional speeches by the harmed party, etc. In order for the employees to have access to enlightenment, the Board could permit a maximum of three debates between the parties in a public hall. A possible objection—that this theory would imperil free speech—has no standing because free speech does not apply to groups possessing sanctions over their audience.

The ability of both groups to communicate—to get their message across to the employees—would be more than adequately served through the three debates. This would eliminate encounter between the group and the single individual which has caused so much litigation. In adopting this test the Board would bring to a halt that silly semantic game of distinguishing between persuasion and coercion which it has played for the last thirty-plus years. This writer believes that if both parties, the employer and the labor union, are subscribing in good faith to our national labor policy which is that persuasion rather than coercion should prevail in the organizational stage, then this is a more democratic answer than the Board's final solution.

It is the thesis of this article that the card authorization process is a perfectly legitimate method of obtaining union recognition, but that the Board has abused this process by assuming that solicitor's cards are valid cards. It is recommended that the card process be regulated, not abandoned. There is alarming evidence, however, that the courts, disenchanted with the Board's administration of the process and unable to regulate it, are beginning to reject the entire process. Instead of finding cards presumptively unreliable, they are beginning to find cards inherently unreliable, regardless of the circumstances.²²⁴

²²⁴ NLRB v. Logan Packing Co., 386 F.2d 562 (4th Cir. 1967). The court said:

It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. . . . If he has no honest doubt of the union majority, it will be because of other evidence known to him, not because of the card check. *Id.* at 568.

See also *General Steel Prods., Inc. v. NLRB*, 398 F.2d 339 (4th Cir. 1968);

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Legal authority supports the proposition that under Section 8 (a) (5) the employer has the duty to bargain with his employees once he becomes aware of their majority status. An election is not a condition precedent to recognition.²²⁵ "The duty to bargain is not dependent upon a Board certification under section 9 (c)." ²²⁶ The fact that authorization cards are not "convincing" evidence of majority support does not militate against the fact that they are "strong" evidence of majority support. At the very least, a prima facie case for recognition should be made out when the union makes a recognition demand upon the employer.²²⁷ It should then be incumbent upon the employer after he has had time to make a proper investigation to rebut this prima facie case by demonstrating his good faith by giving at that time specific supportable reasons for his refusal.

This writer has no complaint with the Board's present policy of defining employer good faith in narrow objective terms—a material, substantial doubt grounded upon a factual basis.²²⁸ It must be remembered here that we are dealing with the duty of collective bargaining, which goes to the heart of the Act. Certainly, if, as the Supreme Court recently decided, the employer has the affirmative duty to give not only reasons, but substantial ones, to justify an 8 (a) (3) allegation,²²⁹ highly supportable reasons should be

(Footnote continued from preceding page)

NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968); NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968); Crawford Mfg. Co. v. NLRB, 386 F.2d 367 (4th Cir. 1967).

²²⁵ United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956).

²²⁶ NLRB v. Sehon Stevenson & Co., 386 F.2d 551, 554 (4th Cir. 1967) (Concurring opinion).

²²⁷ In *Pulley v. NLRB*, 395 F.2d 870 (6th Cir. 1968), the court said that a prima facie case was not made out.

An allegation on the part of an employer that he possesses a good faith doubt as to the majority status of a union is not in the nature of an *affirmative defense* upon which the employer has the burden of proof. Rather the burden of proof is on the General Counsel to establish the bad faith of the employer in refusing to bargain with a union claiming to represent a majority of his employees. . . . As the Board admits in its brief 'this burden is not met simply by showing that the employer has advanced no reason for his doubt.' Merely proving that an employer has rejected a card check in favor of a board supervised election is not sufficient to negative a good faith doubt. (Emphasis added.) *Id.* at 876.

²²⁸ See note 15, *supra*.

²²⁹ In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the court said:

And even if the employer does come forward with counter explanation for his conduct in this situation, the Board may nevertheless draw

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demanded on an 8(a)(5) allegation. Any doubt should not suffice, but only a substantial objective doubt which the employer entertained at the time of his refusal to recognize the union. An honest but mistaken doubt, one that does not affect the majority status of the union, should not be considered good faith.

There is a trend upon the part of the courts to subvert the entire structure of the card authorization process by expanding the "good faith" concept to such an extent that it is becoming meaningless. They have re-defined "good faith" in terms of an "honest doubt," not a material factual doubt.²³⁰ The result is that the entire card process is threatened with extinction since it taxes the imagination how even the most unsophisticated employer could not claim good faith under this definition. He would always entertain some doubt about some aspects of the card process. This judicial approach combined with its propensity to view 8(a)(1), (2) and (3) bargaining orders as extraordinary remedies signals the death of all bargaining orders under Section 10(c).

The Fourth Circuit has directly repudiated the authenticity of authorization cards.²³¹ Because of their inherently invalid nature, this Circuit holds that an employer has no duty to justify his good faith by giving any reason for rejecting them. The Second and Sixth Circuits reach the same conclusion indirectly by the expansion of the good faith concept.²³²

The good faith of the employer is usually determined by

(Footnote continued from preceding page)

an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in the light of the Act and its policy.

• • • •

Thus, in either situation once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him. (Emphasis added.) *Id.* at 33-34.

²³⁰ In *Pulley v. NLRB*, 395 F.2d 870 (6th Cir. 1968), the court said: The proof may ultimately indicate that there was no reasonable basis for the employer's asserted good faith doubt. But this is not dispositive of the case for all that is required is an honest doubt, whether or not such doubt is justified. *Id.* at 876.

See also *Peoples Serv. Drug Store v. NLRB*, 375 F.2d 551 (6th Cir. 1967).

²³¹ *NLRB v. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967).

²³² *Pulley v. NLRB*, 395 F.2d 870 (6th Cir. 1968). See also *NLRB v. Fashion Fair, Inc.*, 399 F.2d 764 (6th Cir. 1968); *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968); *Textile Workers Union v. NLRB*, 386 F.2d 790 (2d Cir. 1967); *NLRB v. River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967).

what he says, does, or what he refuses to do at the time of his refusal to recognize.²³³ If there is independent evidence that an employer, either through his words or conduct, is convinced of the union's majority support, the courts will order him to bargain.²³⁴ These types of cases, however, are very rare. In the more typical case, the employer, after refusal to recognize, commits substantial unfair labor practices. Initially, the courts viewed these unfair practices as indicia of bad faith. Today, however, the Second, Fourth and Sixth Circuits do not view his unlawful conduct as indicia of bad faith.²³⁵

Also, these circuits have stated that there is no duty upon the employer to give any supportable reasons for refusing to recognize the union.²³⁶ Since, however, the failure to give reasons may be some evidence of bad faith, the courts, if the employer fails to supply reasons, will supply them for him from the record. The courts have held the following to be good supportable

²³³ *Joy Silk Mills v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). Here the court said:

Neither the Board nor the courts can read the minds of men. As the Board has stated: 'In cases of this type of question of whether an employer is acting in good or bad faith at the time of the refusal is, of course, one which of necessity must be determined in the light of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct.' *Id.* at 742.

²³⁴ The Fourth Circuit, which has rejected the theory of authorization cards, will accept this evidence. In *NLRB v. Sehon Stevenson & Co.*, 386 F.2d 551 (4th Cir. 1967), the court stated that:

When the employer has conducted his own investigations, the results of which confirm the union's claim, we think it reliably establishes the union's majority and the employer's lack of any good faith doubt of it. Resurrection of that doubt after the investigation requires much more than a very general unspecific and unelaborated suggestion that some of the employees may have thought the union's authorization cards were applications for insurance which would cost them nothing. . . . If we had no more in this case than the cards and the findings of violations of 8(a) (1) and (3), the board's order to bargain would not be enforced. . . . *Id.* at 554.

²³⁵ *NLRB v. Fashion Fair, Inc.*, 399 F.2d 764 (6th Cir. 1968); *Pulley v. NLRB*, 395 F.2d 870 (6th Cir. 1968); *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968); *NLRB v. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967); *NLRB v. River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967); *Montgomery Ward & Co. v. NLRB*, 377 F.2d 452 (6th Cir. 1967).

²³⁶ In *NLRB v. Fashion Fair*, 399 F.2d 764 (6th Cir. 1968), the Court said: "An employer's good faith doubt is not demonstrated merely by showing that he did not immediately set forth a reason for his good faith doubt, or in advancing no reason at all." *Id.* at 768. In *NLRB v. Great Atl. & Pac. Tea Co.*, 346 F.2d 936 (5th Cir. 1965), the court said that an employer is not obligated to submit to a card check by a neutral third party in order to preserve his claim of good faith doubt.

reasons: (1) a rumor that the union threatened some employees while soliciting cards—in this case the trial examiner rejected this testimony, but the court considered it relevant as bearing upon the employer's state of mind;²³⁷ (2) the possibility that the union misrepresented dual authorization cards;²³⁸ (3) prior experience with the union which lost an election years ago;²³⁹ (4) the narrow majority of the cards;²⁴⁰ (5) the hurried procedure of the union;²⁴¹ (6) such an afterthought as the rejection of the union at the election booth;²⁴² and (7) the filing of an unfair labor practice charge against the union which was dismissed.²⁴³

If good faith is measured by what an employer says, does, and ought to say when the union asks him to recognize it, the courts by saying that his conduct (unfair labor practices) is irrelevant and that he has no duty to say anything, have stripped good faith of all meaning. To preserve the card authorization process and at the same time to preserve the rights of all parties under the Act, the following solution is suggested.

All authorization cards should be presumed to be invalid and it should be the affirmative duty of the union to prove by a preponderance of the evidence that they are valid, free from both misrepresentation and coercion. Any doubt concerning the card should be resolved against the union. When a union, however, asserting majority status from the cards, makes a demand upon the employer, a prima facie case for recognition should exist. The employer now has a choice of four alternatives. (1) He can recognize the union. (2) He can refuse to recognize the union and give no supportable reasons. If he commits no substantial unfair labor practices, he should be entitled to an election. (3) He can refuse recognition, decline to give supportable reasons, and commit substantial unfair labor practices. In this situation, the employer might be tempted, because of the legal presumption that the cards are invalid, to defy the Board's charge and take his chances at a trial. If the union meets its burden of proof and the

²³⁷ *Pulley v. NLRB*, 395 F.2d 870 (6th Cir. 1968).

²³⁸ *Crawford Mfg. Co. v. NLRB*, 386 F.2d 367 (4th Cir. 1967).

²³⁹ *NLRB v. Fashion Fair, Inc.*, 399 F.2d 764 (6th Cir. 1968); *NLRB v. Gissel Packing Co.*, 398 F.2d 336 (4th Cir. 1968).

²⁴⁰ *NLRB v. Fashion Fair, Inc.*, 399 F.2d 764 (6th Cir. 1968).

²⁴¹ *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968).

²⁴² *Id.*

²⁴³ *Pulley v. NLRB*, 395 F.2d 870 (6th Cir. 1968).

trial examiner finds the cards to be valid, the employer's unfair labor practices, unless they are extremely minor or technical violations, should conclusively reflect his bad faith. An 8 (a) (5) bargaining order should issue. As a deterrent, however, for employers who do not question the union's majority through supportable reasons but instead attempt to dissipate its majority through unfair practices and attempt to profit from the legal presumption favoring the invalidity of the cards, the Board should order that the benefits of the collective bargaining agreement should be retroactive to the date of the employer's refusal to recognize the union. The legality of this type of remedy is now before the Supreme Court and it is hoped that the Court will hold that the Board possesses this power under Section 10 (c) of the Act.²⁴⁴ (4) The employer can refuse recognition, give supportable reasons and commit substantial unfair labor practices. In this type of case, if the Board finds that the cards are valid, it should not issue an 8 (a) (5) bargaining order because the employer had supportable reasons which demonstrated his good faith. If, however, his unfair labor practices were of a serious 8 (a) (2) or 8 (a) (3) nature or consisted of an 8 (a) (1) widespread campaign, the Board should issue an 8 (a) (1), (2) or (3) bargaining order, also making the collective bargaining agreement retroactive to the time of the employer's refusal to recognize.

Only in this way, by casting the affirmative duty upon the union to validate its authorization cards, and by casting the affirmative duty upon the employer to demonstrate his good faith in refusing to recognize the union, can the policy of the National Labor Relations Act be effectuated. It is only proper that the Courts have rejected the Board's "final solution," yet it is felt that it would be highly improper for the courts to reject the entire card authorization process.

²⁴⁴NLRB v. Strong, 386 F.2d 929 (9th Cir. 1967), *cert. granted*, 36 U.S.L.W. 3452 (May 27, 1968).