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The Excessive Use of Presumptions and the Role of Subjective Employee Intent in Effectuating the Purposes of the National Labor Relations Act

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THE EXCESSIVE USE OF PRESUMPTIONS AND THE ROLE OF SUBJECTIVE EMPLOYEE INTENT IN EFFECTUATING THE PURPOSES OF THE NATIONAL LABOR RELATIONS ACT

by

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I. INTRODUCTION

WHEN ORIGINALLY ENACTED in 1935, the National Labor Relations Act ("NLRA" or "the Act") had as its stated purpose the promotion and protection of collective bargaining.[1] At the heart of the Act was Section 7, which provided that employees were protected in their rights 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 . . . ."[2] In 1947 the NLRA was amended by the passage of the Taft-Hartley Act to expressly provide that employees shall be protected in the exercise of the right to refrain from self-organizational activities. In important respects, the inclusion of the express right *not* to be represented by a labor organization conflicts with the Act's stated purpose of promoting the process of collective bargaining.

This conflict is well illustrated by the manner in which the National Labor Relations Board,[3] in its judicial role as enforcer of the Act, utilizes a plethora of legal presumptions to maintain the stability of the collective bargaining relationship. This extensive use of presumptions, however, impacts negatively on the actual exercise of free choice by employees covered under the Act.

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[1]The NLRA, as it currently exists, is an amalgam of three major legislative enactments: the Wagner Act of 1935, the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959. Section 101.1 of the Wagner Act provided, in relevant part:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employement . . . .

29 U.S.C. § 151 (Supp. 1982).

[2]29 U.S.C. § 157 (1973).

[3]The National Labor Relations Act is the primary body of federal law controlling labor-management relations in the private sector. The Act is administered by the National Labor Relations Board, which is composed of five presidentially appointed members who serve for staggered five-year terms. In unfair labor practice cases the investigative and prosecutorial functions of the Board are assigned by statute to the General Counsel. The tasks of investigating and prosecuting unfair labor practice cases and of investigating and supervising election cases are delegated on a day-to-day basis by the General Counsel and the Board, respectively, to the regional directors of the regional offices located in major cities throughout the United States.

This article will first examine the origin and development of significant presumptions and second, suggest a method by which the Board could better protect the Section 7 rights of employees without risking destabilization of the collective-bargaining process.

II. THE ORIGIN AND DEVELOPMENT OF BOARD PRESUMPTIONS PROTECTIVE OF THE COLLECTIVE-BARGAINING PROCESS

A. *Presumption of Majority Status*

In *Celanese Corporation of America,*[4] the Board explained the presumptions that it would apply when questions regarding the majority status of an incumbent union were placed in issue. The Board stated that absent unusual circumstances there is an irrebuttable presumption that the union's majority status continues for one year from the date of certification. Thereafter, this presumption of majority status becomes a rebuttable one which can be overcome by affirmatively establishing either (1) that at the time of the withdrawal of recognition the union in fact no longer enjoyed majority status; or (2) that the employer's withdrawal of recognition was based on a good faith doubt as to the union's continued majority status.[5] To establish the presumption of majority status the General Counsel need only prove the union's certification or voluntary recognition and, where applicable, its collective bargaining agreement.[6] The burden of rebutting the presumption rests on the party claiming lack of majority status. In most cases, this party will be the employer.[7]

In order to rebut the presumption based on "good faith doubt," two prerequisites must be met. First, the asserted doubt must be based on objective considerations. Second, it must not have been advanced for the purpose of gaining time in which to undermine the union's position.[8]

The objective considerations relied upon by an employer in support of a decision to withdraw recognition are subjected to strict scrutiny by the Board. Moreover, in assessing the sufficiency of the objective considerations asserted the Board has expressly rejected any defense based on the employer's subjective state of mind.[9]

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[4]95 N.L.R.B. 664 (1951).

[5]*Id.* at 671-672. *Celanese* has been cited approvingly by the Supreme Court in Ray Brooks v. NLRB, 348 U.S. 96, 104, n.18 (1954).

[6]Automated Business Systems, 205 N.L.R.B. 532 (1973).

[7]Stratford Visiting Nurses Assn., 264 N.L.R.B. 136 (1982); Pennco, Inc., 242 N.L.R.B. 467 (1979); United Supermarkets, Inc., 214 N.L.R.B. 958, 959 (1974). Bargaining-unit employees may, however, challenge of the union's majority status through the filing of a decertificaiton petition. *See infra* note 35.

[8]Terrell Machine Co., 173 N.L.R.B. 1480 (1969).

[9]Laystrom Manufacturing Co., 151 N.L.R.B. 1482 (1965) ("showing of doubt requires more than employer's mere assertion of it . . . more than proof of employer's subjective frame of mind"). For a general discussion of the presumption of majority status and employer defenses thereto, *see* Krupman, *Withdrawal of Recognition Based On Objective Considerations — Reckoning by Starlight,* I DELAWARE J. CORP. LAW. 288 (1976), Seger, *The Majority Status of Incumbent Bargaining Representatives,* 47 TUL L. REV. 961 (1973).

For example, in *Thomas Industries, Inc.*,[10] the employer relied on the following factors as objective grounds for doubting the union's majority status: 1) forty-two of 124 unit employees expressed dissatisfaction with the union; 2) the percentage of union dues had declined from sixty-three percent in January, 1979 to thirty-one percent in October, 1979; and, 3) twenty-four members including officers, committeemen and stewards had resigned from the union.

In rejecting these factors, the administrative law judge, with Board approval, determined that a union need not have majority support in terms of membership or dues-checkoff to enjoy the presumption of continuing majority status.[11] Likewise, expressions of dissatisfaction from a minority of employees cannot be relied upon as an objective consideration.[12] In the Board's view the evidence presented showed only that some of the bargaining-unit employees were dissatisfied with the union as an institution. The Board concluded, however, that this did not necessarily establish that the employees had rejected the union as its bargaining representative.[13]

Believing that it did have an objective basis for doubting the union's majority status, the employer in *Thomas Industries* proceeded to conduct a secret ballot poll of its employees to determine whether a majority in fact desired continued representation by the union. The results of the poll showed forty-eight votes for the union, sixty-four votes against. Thereafter, the employer withdrew recognition. The union filed an unfair labor practice under Section 8(a)(5) of the Act,[14] alleging that the employer was unlawfully refusing to bargain.

As previously stated, the Board did not agree with the employer's assessment of its objective grounds for doubting the union's majority status. Consequently, the Board found that the employer's conducting of the employee poll in the absence of sufficient objective evidence of a loss of majority support was, itself, a violation of Section 8(a)(1) of the Act;[15] it therefore could not be relied upon to defend against the refusal-to-bargain charge.[16]

[10]255 N.L.R.B. 646 (1981).

[11]*See, e.g.,* Dalewood Rehabilitation Hospital, Inc. d/b/a Golden State Habilitation Convalescent Center, 224 N.L.R.B. 1618 (1976); Gulfmont Hotel Company, 147 N.L.R.B. 997 (1964), *enforced,* 362 F.2d 588 (5th Cir. 1966).

[12]Retired Persons Pharmacy, 210 N.L.R.B. 443, 446 (1974); United Supermarkets, Inc., 214 N.L.R.B. 958, 966 (1974); Daisy's Original, Inc. of Miami, 187 N.L.R.B. 251 (1970).

[13]255 N.L.R.B. at 647.

[14]Section 8(a)(5) provides in relevant part: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees . . . ." 29 U.S.C. § 158(a)(5) (1976).

[15]Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1) (1976).

[16]The Board has recognized the validity of employer polls to determine majority status, provided that the employer's reason for conducting the poll is supported by objective considerations for doubting the union's majority status. *See* Montgomery Ward Company, 210 N.L.R.B. 717 (1974); Mid-Continent Refrigerated Services Co., 228 N.L.R.B. 917 (1977). However, to be lawful the poll must be conducted in accordance with the guidelines established in Strukness Construction Co., Inc., 165 N.L.R.B. 1062 (1967). To comply with *Strukness,* the following safeguards must be observed: (1) the purpose of the poll

On appeal to the United States Court of Appeals for the Sixth Circuit, the court reversed the Board's finding that the polling of employees by secret ballot violated the Act.[17] In the court's view the key inquiry was whether the company had substantial, objective evidence of *loss* of support for the union. Thus, the court would allow polling of employees on a lesser showing of objective evidence of good faith doubt than that required to justify an initial withdrawal of recognition.[18]

Likewise, in *NLRB v. A. W. Thompson, Inc.*[19] the Fifth Circuit rejected the Board's premise that an employer may only conduct a poll of its employees when it already has sufficient grounds for withdrawing recognition. The court reasoned that to impose such a limitation would result in the anomalous situation of allowing an employee poll only when there was no need to do so, i.e., when there was already sufficient objective evidence to justify withdrawal of recognition.[20]

The Board's rejection of employer-sponsored polls to determine an incumbent union's majority status derives from what appears to be a general distrust of reliance on employees' subjective state of mind.[21] This distrust has led the Board to reject proffered employer evidence regarding lack of majority support for the union in situations where it is clear that in so ruling the employees have been deprived of their right to reject union representation.

In *Fertilizer Company of Texas, Inc.*,[22] a successor employer voluntarily extended recognition to the union which had represented the predecessor's employees, based on the mistaken belief that a majority of its employees desired representation by the union. Within a few days of the employer's act of recognition, it began to receive inquiries from employees as to whether recognition had been extended as well as, significant expressions of opposition to the union.

is to determine the truth of the union's claim of majority; (2) this purpose is communicated to the employees; (3) assurances against reprisals are given; (4) the employees are polled by secret ballot; and, (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. Very rarely, if ever, has an employer poll passed the Board's critical review.

[17]Thomas Industries, Inc. v. NLRB, 687 F.2d 863 (6th Cir. 1982).

[18]*Id.* at 867.

[19]651 F.2d 1141 (5th Cir. 1981).

[20]*Id.* at 1144-1145. *See also,* Pioneer Inn Assoc. v. NLRB, 578 F.2d 835, 840 & n.3 (9th Cir. 1978); NLRB v. North American Mfg Co., 563 F.2d 894, 896 (8th Cir. 1977).

[21]The Board has drawn support for its position that evidence of an employee's subjective state of mind is generally irrelevant, and therefore inadmissible, from dictum in the Supreme Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). There, the Supreme Court stated that it would "reject any rule that requires a probe of an employee's subjective motivation (in signing a union authorization card) as involving an endless and unreliable inquiry." 395 U.S. at 608. This statement was made in response to the Fourth Circuit's decision requiring the Board to probe the subjective intent of each card signer before validating the card as the basis for determining majority union support. Rejecting this approach, the Supreme Court endorsed the Board's treatment of union authorization cards as described in Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963) and reaffirmed in Levi Strauss & Co., 172 N.L.R.B. 732 (1968). Under *Cumberland Shoe,* if the card itself is unambiguous (i.e., states on its face that the signer authorizes the union to represent the employee for collective bargaining purposes), it will be counted unless it is proved that the employee was told that the card would be used *solely* for the purpose of obtaining an election.

[22]254 N.L.R.B. 1382 (1982).

The employer thereafter obtained affidavits from twenty-two of its twenty-nine employees that they had in no way designated the union as their representative between their date of hire by the successor employer and the date the affidavit was given. This evidence of substantial employee dissatisfaction prompted the employer to conduct a poll of the employees to determine whether they wanted to be represented by the union. Of the twenty-nine employees working, twenty-seven voted in the poll; twenty-four voted against representation and three voted in favor. Based on the results of this poll the employer withdrew the recognition that it had voluntarily extended three weeks earlier. The union filed an unfair labor practice charge based on the withdrawal of recognition.

At the hearing, the administrative law judge found that when the employer had assumed operation of the plant, it had hired twenty-five employees previously employed by the predecessor employer. Seventeen of these individuals were union members on "out of work" status. In an ironic twist, the administrative law judge concluded that based on the employees' union membership it had to be presumed that the employees had intended to designate the union as their bargaining representative even though many of the employees had joined the union well before assumption of the operations by the new employer.[23] To overcome the presumption that union membership evidenced an intent to designate the union as their representative, the employer sought to introduce employee testimony regarding whether they had intended to have the union's representation continue under the new employer. The administrative law judge refused to allow this testimony on the grounds that the Board precludes examination of an employee's subjective motivations for continuing or discontinuing union membership.[24]

It is difficult to envision what type of proof could be more relevant in such a situation. In refusing to allow the employer to rely upon the employee affidavits, the law judge concluded that the employer was without objective grounds for conducting the poll, hence the poll was unlawful. The employer's withdrawal of recognition, based as it was on an unlawful poll, constituted a violation of Section 8(a)(5) of the Act.

The result reached by the Board in *Fertilizer Company of Texas* cannot be reconciled with the Act's prohibition against employer recognition of a

[23]The contradiction created by this presumption was not addressed by the judge. If it can be presumed that union membership evidences support for union representation, then resignation from the union should evidence non-support. The Board has refused to accept the latter presumption. *See, e.g.,* Dalewood Rehabilitation Hospital, 224 N.L.R.B. 1618 (1976); Gulfmont Hotel, 147 N.L.R.B. 997 (1964), *enforced,* 362 F.2d 588 (5th Cir. 1966).

[24]254 N.L.R.B. at 1386. The administrative law judge stated:

> This facet of the employer's argument is premised upon the subjective intent of the employees' retaining union membership. But the same policy that precludes "a probe of an employee's subjective motivations for having signed a union authorization card . . . would serve to preclude examination of an employee's subjective motivations for continuing his or her membership in a labor organization." *Id., Cf., Stratford Visiting Nurses Association,* 264 NLRB No. 136 (1982) (employer cannot establish lack of majority support by asking at unfair labor practice hearing whether, at time employer refused to bargain, he or she wanted the union to represent them).

minority union.[25] Despite substantial probative evidence that the majority of the bargaining-unit members did not desire union representation, the employer was required to recognize and bargain with the union. Moreover, the employees were forced to accept a representative they did not want.

Clearly, *Fertilizer Company of Texas* illustrates how the Board has massaged a significant presumption, that of continuing majority status, to the point where the situation as viewed by the Board did not comport with reality. Far from promoting bargaining stability, the use of the presumption in this case worked to the utter frustration of employee free choice.

A similar result was reached in *Petroleum Contractors, Inc.*[26] There, bargaining unit employee Paul Ziegler, on his own initiative, asked each bargaining unit employee to signify in writing whether he or she "wanted" the union. Mr. Ziegler had each employee write "yes" or "no" upon a sheet of paper which bore the caption "Union"; a left-hand column captioned, "Yes"; and a right-hand column captioned, "No." Below the "Yes" column, Mr. Ziegler wrote the digits 1 through 10 and below the "No" column, the digits 1 through 14. After completing his poll, Mr. Ziegler's paper contained one "yes" and fourteen "no's."[27]

Mr. Ziegler delivered the written straw vote to the company's Executive Vice-President, Warren Fenstermaker. Mr. Ziegler told Mr. Fenstermaker that the employees were not "happy" with the union. A second employee who had participated in the taking of the poll, Ernest Kulp, confirmed to Mr. Fenstermaker the manner in which the vote had been conducted. Mr. Kulp also told Mr. Fenstermaker that he was dissatisfied with the union.

The employee poll was conducted at a time when the company and union were in the midst of negotiating a collective-bargaining agreement. During these negotiations Fenstermaker repeatedly asked the union to prove that a majority of employees were members. The union never did so.

Shortly after the "Ziegler" poll, the parties held another bargaining session. The employer again requested that the union demonstrate majority membership. At the same session the parties completed their discussions concerning the terms for an agreement. A few days later the union submitted the proposed agreement to the unit employees for a secret ballot ratification. The results of the ratification vote were nine to six in favor of accepting the agreement.

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[25]Section 8(a)(2) provides in relevant part: "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization . . . ." 29 U.S.C. 2158(a)(2).

A labor organization may be recognized as bargaining representative only when it has been designated by a majority of employees in a unit appropriate for such purposes. When an employer deals with a union as exclusive representative that has authorization from a minority of employees, the employer violates Section 8(a)(1) and 8(a)(2) of the Act. ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961).

[26]250 N.L.R.B. 604 (1980).

[27]*Id.* at 606.

The company then refused to sign the agreement without proof that a majority of the employees were desirous of being members of the union. The union then filed a refusal-to-bargain charge against the company. The employer defended against the charge on two grounds. First, it maintained that no new agreement was reached because the negotiations had been conducted subject to the condition precedent that the union demonstrate its majority status. Second, the company asserted that it had a good-faith doubt as to the union's representation status by virtue of the expressions of employee dissatisfaction and receipt of Mr. Ziegler's employee poll.

The administrative law judge, with approval by the Board, rejected both defenses. With respect to the union's failure to establish membership by a majority of employees, the administrative law judge concluded that union membership was not a relevant factor in determining majority status.[28] He also rejected the company's reliance upon the reports of employee dissatisfaction by employees Ziegler and Kulp, together with the written employee poll. The administrative law judge's reasons for rejecting this evidence are spurious at best. As he stated:

> I consider their [Ziegler and Kulp] various expressions of dissatisfaction with the union representation amount only to emotional outbursts of union antipathy. To attribute a more significant interpretation to the gripes of Ziegler and Kulp is tantamount to substitution of subjective states of mind.
>
> In a like vein, I conclude Ziegler's employee poll has little probative value in support of [the company's] position.[29]

Rejection of the "poll" evidence and the statements by Messrs. Ziegler and Kulp because it reflected the employees' subjective state of mind was wrong. Whether or not an employee deisres union representation is essentially a subjective question: does the employee want to be represented by that union or not? Likewise, evidence of union membership, while not conclusive, should be accorded greater significance than is currently the case. As the remainder of this article will show, the Board has erected for the employer a virtually impassable roadblock to overcoming the Board's presumptions by persistently rejecting evidence of the subjective intent of an employee regarding his or her support of union representation, or in a related context, evidence of whether employer conduct has had an impact on that support. This approval by the Board consistently defeats the primary objective of the NLRA — employee free choice.

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[28]The administrative law judge observed:

> The Board has frequently held that showing of membership in a union or financial support of a union is not the equivalent of establishing the number of employees who desire to be represented by the union. Citing, *Dalewood Rehabilitation Hospital, Inc. d/b/a Golden State Habilitation Convalescent Center,* 224 NLRB 1618 (1976); *Olin Corporation,* 210 NLRB 633 (1974); *Terrell Machine Company,* 173 NLRB 1480 (1969).

250 N.L.R.B. at 607.

[29]*Id.* at 608.

B. *Presumption That New Employees Support The Union In The Same Ratio As Those They Replace*

Employers often attempt to rely upon employee turnover and/or the hiring of permanent replacements in a strike situation as the objective basis upon which to doubt the union's continuing majority status. Employer reliance upon these highly significant factors as bases for withdrawing recognition have been largely dissipated by the Board's utilization of a presumption that new employees support the union in the same ratio as those they replace.[30] This presumption has absolutely no basis in fact. To the contrary, the truth is almost the exact opposite. Moreover, it is a presumption that is essentially irrebuttable by the employer since the employer may not, without violating Section 8(a)(1), question the new employees as to their union preference. Thus, the newly hired employee and/or permanent strike replacement, through the operation of this presumption, is essentially denied the right to freely decide the question of union representation.

C. *Presumption That Employee Dissatisfaction Is Causes By Employer's Failure To Remedy Past Unfair Labor Practices*

The Board regularly takes the position that any unremedied unfair labor practices which precede the employer's receipt of objective evidence that the union has lost its majority position preclude an employer from questioning that status. The Board's rule is founded on a presumption that any unlawful conduct by the employer, no matter how distant or unrelated to the actual cause of the employees' discontent, caused the employee disaffection.[31] While the Board has stated that the nature of the unremedied violation is a factor to be considered in deciding whether an employer may question the union's majority status,[32] too often this examination is perfunctory at best.[33] This is particularly true in instances where the Board has refused to consider proffered evidence that there was no causal relationship between the unremedied unfair labor practices and the employees' dissatisfaction with the union.

In *Pittsburgh & New England Trucking Co.*[34] the Board held that certain unfair labor practices committed by the employer in 1976 precluded the processing of an employee decertification petition and made unlawful the employer's withdrawal of recognition based on that petition a year later.[35] These unfair

[30]John S. Swift, Co., 133 N.L.R.B. 185, *enforced,* 302 F.2d 342 (7th Cir. 1962); King Radio Corp., 208 N.L.R.B. 578 (1974); Pioneer Inn Association, 228 N.L.R.B. 1263, 1267 (1977); Libbie Convalescent Center, 251 N..L.R.B. 817 (1980).

[31]C & C Plywood Corporation, 163 N.L.R.B. 1022, 1028 (1967).

[32]King Radio Corporatin, 208 N.L.R.B. 578 (1974); Coca-Cola Bottling Works, 186 N.L.R.B. 1050 (1970); Deblin Manufacturing Corp., 208 N.L.R.B. 392 (1974).

[33]*See, e.g.,* Guerdon Industries, Inc., 218 N.L.R.B. 658 (1975); Providence Medical Center, 243 N.L.R.B. 714, 748 (1979); National Cash Register Co. v. NLRB, 85 L.R.R.M. 2657, 2659 (8th Cir. 1974).

[34]249 N.L.R.B. 833 (1980).

[35]Employees may test an incumbent union's majority status by filing of decertification petition. The petition recites that "a substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative." N.L.R.B. Form 502. The petition must be supported by a thirty percent showing of interest.

labor practices, found by the Board in a prior decision,[36] were embodied in two letters sent to employess by the employer during a 1976 strike. These letters contained unlawful threats of superseniority for employees who abandoned the strike or were hired as permanent replacements. The Board's decision did not issue until September 29, 1978 and was enforced by the United States Court of Appeals for the Fourth Circuit on December 4, 1979.[37]

Meanwhile, the strike which had commenced on July 30, 1976 ended on November 29, 1976 when the union requested reinstatement of all strikers. The company refused to immediately reinstate the strikers due to the hiring of permanent replacements but did state that strikers would be recalled as work became available.

On May 9, 1977, employee Claire Sadler presented the company with a petition signed by seventeen employees stating in substance that the union no longer represented the employees.[38] Ms. Sadler then filed two decertification petitions with the Labor Board. Both petitions were dismissed by the Regional Director in accordance with its practice of refusing to process election petitions where there are pending unfair labor practice charges.[39]

On May 17, 1977 the company and union met for negotiations. At this meeting the employer withdrew recognition based on the decertification petition that had been filed. During this same meeting the union's representative attempted to accept the company's last proposal for an agreement. This request was repeated by the union on May 18, 1977. On May 24, 1977 the company rejected the union's request, stating that it had withdrawn recognition based on its belief that the union did not represent a majority of the employees.

The union filed unfair labor practice charges alleging a violation of Section 8(a)(5) based on both the company's rejection of the union's offer to accept the company's last contract proposal and its withdrawal of recognition. A complaint was issued based on this charge and, as stated above, the employees' decertification petitions were dismissed because of the pending unfair labor practice charge.

During trial of the matter, the Board's General Counsel argued that the company could not rely upon the employees' petition because of the existence of the unremedied unfair labor practices of 1976. The administrative law judge found that the company's threat to striking employees that their seniority rights would be affected if they did not return to work was a serious threat and one

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[36] 238 N.L.R.B. 227 (1978).

[37] Pittsburgh & New England Trucking Co. v. NLRB, 612 F.2d 1309 (4th Cir. 1979).

[38] 249 N.L.R.B. 833, 835 (1980).

[39] United States Coal Co., 3 N.L.R.B. 398 (1937); Edward J. Schlacter Meat Co., Inc., 100 N.L.R.B. 1172 (1952). *See,* N.L.R.B. Casehandling Manual § 11730 ("It is the general policy to hold in abeyance any representation case where pending unfair labor practice charges are based on conduct of a nature which would have tendency to interefere with the free choice of employees in an election.").

that had not been retracted at the time of the filing of the decertification petition.[40] Accordingly, the administrative law judge concluded that this unremedied unfair labor practice had necessarily produced the employee disaffections with the union and thus removed as a lawful basis the employer's withdrawal of recognition.[41]

A review of the administrative law judge's decision reveals that there was no factual basis for reaching this conclusion. Instead, the administrative law judge, without any examination whatsoever into any cause and effect relationship between the unremedied unfair labor practice and the decertification petition, simply presumed that the former had caused the latter. In fact, the judge refused to even permit in the record the most probative evidence on this issue: the proffered testimony of employee Sadler that the 1976 unfair labor practices had not affected nor in any way caused her or any other signatories to execute the decertification petition. The proffered testimony was refused on the grounds that "subjective" evidence should not be admitted.[42]

On appeal the Fourth Circuit Court of Appeals held that rejection of the evidence of employee subjective intent was reversible error.[43] In denying enforcement of the Board's order, the court made the following cogent observation:

> The NLRB adduced no evidence to show an actual cause and effect relationship between a) the 1976 threats . . . and b) the disaffection from the union. Rather the NLRB conclusion rested solely on the supposed inherent tendency the proscribed activities might be presumed to have to induce a lessened esteem for the union among employees in the bargaining unit.
>
> It is not necessary for us to determine whether such an assumption standing alone would suffice for the purposes to which it was put by the NLRB if there had been absolutely no additional offer of evidence one way or the other.. . . . Here the Company sought to make just such a showing by calling as a witness an employee in the bargaining unit instrumental in preparation of the petition . . . . She would have testified that the 1976 unfair labor practices did not affect her or other signers . . . .
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> . . . To bar evidence as to the state of mind of a witness when the issue itself is whether her state of mind towards the union had been influenced was to deny the company the most direct proof available on the controverted issue . . . .[44]

[40]The litigation involving this charge was still in process in May, 1977. The Board decision did not issue until September, 1978 and the affirmance by the Fourth Circuit did not issue until December, 1979. *See supra* note 37.

[41]249 N.L.R.B. at 836. As authority, the law judge relied upon prior Board decisions in Ponn Distributing, Inc., 232 N.L.R.B. 312, 315 (1977); King Radio Corporation, 208 N.L.R.B. 578, 579 (1974), *enforced,* 510 F.2d 1154 (10th Cir. 1975); Olson Bodies, Inc., 206 N.L.R.B. 779, 780 (1973).

[42]*See* discussion of rejection of this evidence in the Fourth Circuit's decision at 643 F.2d at 177-178.

[43]Pittsburgh & New England Trucking v. NLRB, 643 F.2d 175 (4th Cir. 1981).

[44]643 F.2d at 177-178.

The Board's rationale for rejecting subjective evidence of an employee's state of mind derives from a statement from the United States Supreme Court's landmark decision in *NLRB v. Gissel Packing Co., Inc.*[45] The Supreme Court, in determining whether union authorization cards could be used by the Board as a basis for establishing a union's majority status, opined:

> We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of Section 8(a)(1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.[46]

The Board, however, in subsequent decisions has adopted a *per se* mechanical approach of rejecting all evidence based on employee subjective motivation. That rejection of all such evidence goes far beyond the intent of the Supreme Court in *Gissel Packing Co.*

In *Gissel,* the Supreme Court desired to avoid a situation that would require the Board to prove, with respect to each card signer, that the authorization card had not been signed under the "impression" that an election was assured. Thus, the Court rejected a rule requiring that the Board affirmatively inquire into the reasons behind an employee signing a union authorization card. However, the fact that the Board need not probe into an employee's state of mind does not mean that such evidence is either irrelevant or immaterial, particularly in cases such as *Pittsburgh & New England Trucking* and all other cases that turn on the very issue of the impact of employer conduct on employee actions.

Unless the employer has the opportunity to prove through employee testimony that the unremedied unfair labor practice or other employer conduct did not cause or create employee decisions to reject union representation, the employer will be deprived of its most persuasive evidence on this issue. As a result, the employer in most cases will be unable to rebut the Board's resumption that the unlawful conduct caused the employee disaffection and the employees concerned will be deprived of their right to reject union representation.

That this is the natural consequence of rejection of evidence of this nature is illustrated by the Board's decision in *Automated Business Systesm.*[47] In this case, the Board initially found that the union was entitled to the usual presumption of majority status based on its certification and subsequent collective

[45] 395 U.S. 575 (1969).

[46] 395 U.S. at 608.

[47] 205 N.L.R.B. 532 (1973), *enforcement denied and remanded* in Automated Business Systems v. NLRB, 497 F.2d 262 (6th Cir. 1974).

bargaining agreements with the employer. To rebut this presumption, Automated Business Systems sought to introduce into evidence cards from a majority of unit employees that had been used to support a decertification petition. The Board rejected this proffered evidence. Without this evidence, the employer was unable to rebut the union's presumption of its majority status. After the filing of the decertification petition, the employer committed some unfair labor practices. The Board, after examining the nature of the employer's unfair labor practices, concluded that they were serious enough to warrant imposition of a remedial bargaining order.

On appeal to the United States Court of Appeals for the Sixth Circuit the Board's refusal to permit the company to introduce into evidence the number of cards filed in support of the decertification petition was held to be reversible error. In the court's view the Board had impermissibly placed the burden of establishing the union's lack of majority status upon the employer, and then denied the employer the means of meeting its burden.

In this case the majority status of the incumbent union was challenged by the filing of a decertification petition. The employer then withdrew recognition. The union filed charges, and in settlement of the refusal-to-bargain charge agreed to a Board election to determine the union's majority status. No unfair labor practices were committed prior to or concurrent with the filing of the decertification petition.

However, during the period immediately preceding the representation election, which the union lost, the employer was found to have committed violations of Section 8(a)(1) of the Act by threatening plant relocation and/or closing in the event that the union won the election. The issue before the Board was whether it should issue a cease and desist order to remedy the unfair labor practices or whether the employer's conduct justified the issuance of a remedial bargaining order.[48]

The appropriateness of a bargaining order remedy turned on whether the union had maintained its majority status during the period preceding the election. The court held that in such a situation the Board erred in denying the company the opportunity to establish lack of majority status through the "best

[48]In NLRB v. Gissel Packing Co., the Supreme Court delineated three categories of unfair labor practices. With regard to the first of these categories the Court held that the Board could issue a bargaining order, without inquiry into majority status on the basis of authorization cards or otherwise, in " 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices." 395 U.S. at 613. The Court stated that such an order would be appropriate if the violations were of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *Id.* at 614. In the second category of unfair labor practices the Court held that the Board could issue a bargaining order in "less extraordinary cases marked by less pervasive practices which nonetheless have a tendency to undermine majority strength and impede the election process." *Id.* To issue a bargaining order in these circumstances it must be shown that the union had majority support at some time prior to the unfair labor practices. *Id.* Proof of majority status is most often established through union authorization cards. In the third category, minor or less extensive unfair labor practices, a bargaining order is not appropriate because of their minimal impact on the election process. *Id.* at 615.

evidence" available. Accordingly, the court remanded the case to the Board to permit introduciton of the number of employee signatures on the decertification petition.[49]

The court also examined the Board's conclusion that a remedial bargaining order was appropriate based on the employer's unfair labor practices. Again, the court criticized the Board for refusing to allow the employer to introduce employee testimony that the remarks found to be violative of the Act had not influenced the employees to whom they were directed. The Board had rejected this proffered testimony on the ground that it was irrelevant. The court disagreed. Referring to the Supreme Court's *Gissel* decision, the court observed that *Gissel* requires the Board, in deciding whether to issue a bargaining order, to determine whether there is a causal connection between the unfair labor practices and the conclusion that the election process is undermined.[50] Employee testimony as to the effects of the unfair labor practices on their vote was highly relevant to this determination.

Moreover, the relevance of employee testimony regarding the causal connection between employer unfair labor practices and employee decisions to file decertification petitions, revoke union authorization cards, or vote against union representation is all the more clear when it is considered that the Board applies yet another presumption — that employer unfair labor practices are widely disseminated to bargaining unit employees and necessarily impact adversely on the employees.[51]

D. *Presumption That Card Revocations Made Subsequent To Employer Unfair Labor Practices Are A Result Of The Employer Misconduct.*

As with its presumption in withdrawal of recognition cases, the Board also presumes that employer unfair labor practices committed prior to an employee's attempt to revoke his or her union authorization card are the cause of the

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[49]497 F.2d at 271, 275-76.

[50]*Id.* Factors relied upon by the Board in determining the impact on an election are whether the employees were likely to have been influenced by the employer midconduct; whether they had a timely opportunity to spread the harmful influence among other employees; that effect, other than turnover, the time span between the employer misconduct and the bargaining order might have upon elimination of the impact and whether the company's conduct might probably recur if a rerun election were held. New Alaska Development Corp. v. NLRB, 441 F.2d 491, 494 (7th Cir. 1971).

[51]*See, e.g.*, National Cash Register Co. v. NLRB, 85 L.R.R.M. 2657 (8th Cir. 1974) (court refused to enforce bargaining order based on Board's presumption, unsupported by any evidence, that employer unfair labor practice had caused employees to file decertification petition); Devon Gables Lodge and Apartments, 237 N.L.R.B. 775 (1978) (Board presumed unlawful statements were widely disseminated in an employee unit, burden was on employer to prove unfair labor practices were not widely known); Miami Coca-Cola Bottling Co., 150 N.L.R.B. 892 (1965) (presumption applied that unfair labor practices caused dissipation of union majority); Piggly Wiggly Tuscaloosa Division, 258 N.L.R.B. 1081 (1981) (burden on employer to show unfair labor practices not widely known to employees). Super Thrift Markets, Inc., 233 N.L.R.B. 409 (1977) (Board found unfair labor practices had impact on election where unfair labor practices were presumed to be widely disseminated).

attempted revocation and, hence, render any such effort ineffective.[52] The consequences of this presumption are far-reaching since in many close cases whether a *Gissel* bargaining order will issue turns on whether or not the union attained majority status. The validity of a single card revocation can determine whether union representation will be imposed upon a group of employees by Board order rather than through the election process.

Although the presumption that card revocations are the result of employer misconduct is rebuttable, an examination of Board decisions on the issue reveals that the presumption is actually treated as conclusive. The Board has repeatedly applied a *per se* mechanical approach invalidating all card revocations occurring after commission of an unfair labor practice by an employer, regardless of whether the employer's conduct was in any way causally related to the revocation.

In *Warehouse Groceries Management, Inc.*[53] the issue of whether a remedial bargaining order would be imposed turned on the validity of several card revocations. The bulk of employer misconduct found to be unlawful occurred during the first week of February of 1979. Subsequently, employees continued to sign union authorization cards. With respect to the disputed card revocations, the record showed that each such employee-signer had signed his or her card *after* the employer misconduct and then, a day or so later, attempted to revoke the authorization. The administrative law judge found that the revocations were effective and therefore concluded that the union had not achieved majority status. The Board disagreed.[54]

The Board noted that the employer had been found by the administrative law judge to have engaged in coercive conduct "designed to undermine union support."[55] Without analyzing whether the employer misconduct bore a causal relationahip to the card revocations of the employees, the Board simply presumed that the revocations had been the result of the unlawful conduct.

The same result was reached in *Quality Markets, Inc.*[56] There, an employee told the union agent who had solicited her card that she was sorry she had signed the card and that she wanted the card back. The employee made the request the day after she signed the card and before the union made a demand for recognition. The employer unfair labor practices occurred on the same day as the employee's attempted revocation.[57] The Board acknowledged that no representative of the employer spoke directly to the employee about her card,

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[52]Sullivan Surplus Sales, Inc., 152 N.L.R.B. 132, 135 (1965); Werstein's Uniform Shirt Co., 157 N.L.R.B. 856, 860 (1966).

[53]254 N.L.R.B. 252 (1981).

[54]254 N.L.R.B. at 254.

[55]*Id.*

[56]160 N.L.R.B. 44 (1966).

[57]*Id.* at 52.

nor was there any evidence that the employee herself was aware of the employer misconduct. Nonetheless, the Board concluded that the unfair labor practices rendered the card revocation ineffective, stating it "must presume that [the employee's] attempted revocation of her card was the result of [the employer's] unlawful conduct."[58]

In both *Warehouse Groceries* and *Quality Markets* the question of whether a remedial bargaining order would be imposed turned on the validity of the authorization cards signed by employees who had later attempted to revoke their authorizations. The Board's application of a conclusive presumption that employer unfair labor practices occurring prior to an employee's card revocation render the revocation ineffective does not comport with the Board's ultimate responsibility to protect the rights of employees to freely decide whether to designate a union as their bargaining representative. The rights of employees who do not want to unionize or who are undecided are ignored by this presumption.

Moreover, it has never been demonstrated what impact, if any, unfair labor practices have on either an employee's decision to revoke an authorization card or the employee's choice in a Board election.

As noted by Derek C. Bok in his article *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*[59]:

> The fact is that an enormous number of Board doctrines are based on untested suppositions. We have had twenty-five years and more of litigation about organizing activities on and off company property but little data on how employees react to various devices. We simply do not know what makes an employee feel fear in an election situation.[60]

Notwithstanding the absence of empirical proof to support the Board's presumption that employer unfair labor practices cause the employee's card revocation, the Board has continued to invalidate revocations on this ground.

III. PROPOSAL FOR UTILIZING EVIDENCE OF EMPLOYEE SUBJECTIVE INTENT

Each of the conclusive or almost-conclusive presumptions previously discussed are in fact nothing more than convenient legal fictions utilized by the Board to (1) insure the stability of the collective bargaining relationship, i.e., maintain the labor relations status quo by preventing what it considers improper challenges to an incumbent union's majority status and (2) discourage employer interference with employees' organizational rights by imposing a heavy burdne of proof upon the employer to establish that its conduct did not impact adversely on those rights. By utilizing presumptions so freely, however, the

[58] *Id.* at 46.

[59] 78 HARV. L. REV. 38 (1964).

[60] *Id.* at 40.

Board has converted the employer's burden from heavy to back-breaking.

The Board has an equal responsibility to protect the rights of employees who do not wish to be represented by a union or who are undecided on this question. Employee testimony regarding whether an employer's misconduct has had an impact upon the decision to revoke a union authorization card or file a decertification petition is clearly relevant in determining whether a bargaining relationship should be imposed in the first instance or continued in the latter situation. By rejecting such testimony regularly because it is viewed as "inherently unreliable" is to insult the intelligence and honesty of the American worker. In 1983, the more realistic view is that the average employee is intelligent and is capable of articulating his or her reasons for any action he or she has taken.

In *Gissel* the Supreme Court, in deciding that authorization cards could be used by the Board to determine a union's majority status, did so because in the Court's view employees were sophisticated enough to understand the import of what they were signing.[61] If employees can be presumed to be sophisticated enough to understand the significance of signing a union authorization card, then they should be equally presumed to be capable of testifying honestly and articulately with respect to the impact of employer conduct on their actions.

The authors submit that evidence of employee subjective intent is highly relevant and is, as often as any other testimony, reliable. Therefore, it should be admitted and utilized by the trier of fact. The weight this testimony is given should depend on the facts of the particular case. To wholly exclude such evidence unfairly prejudices the employer by depriving the employer of the most direct evidence available on the controverted issue. To the extent that the reliability of such evidence is questioned the full force of cross-examination should provide the answer.

[61] 395 U.S. at 607.