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Memorandum on The Use of Struksnes Polls to Test Majority Status, 1979

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Abstract

Memo to all consultants, presenting the ways an employer is able to determine a union's majority status.
May 21, 1979

MEMO TO: ALL CONSULTANTS

FROM: Warren Ogden

DATE: MAY 21, 1979

RE: THE USE OF STRUKSNES POLLS TO TEST MAJORITY STATUS

INTRODUCTION

The basis of a union's claim to speak for the employees of an employer is its alleged status as majority representative of the employees of that employer. Since employee support is the fulcrum on which all union power rests, it is natural that an employer should wish to test the strength of that fulcrum. Normally, the employer has only three ways of accurately determining the union's majority status. The first is through the conduct of an NLRB sponsored and directed election. The second is what is called a Bourne interrogation of one of the employers sociometric stars. The third is through the use of the so-called Struksnes poll.

N.L.R.B. ELECTION

We are all aware of the problems involved in obtaining and controlling the outcome of an NLRB election. The principal difficulty with beating a union in an organizational campaign is, of course, the fact that the union has surprise on its side. The union, in an initial organizational campaign, is customarily the party who controls the time frame, within rough limits, during which majority status will be tested. Accordingly, it is necessary that a union obtain and retain majority status for a period from one day to six or eight weeks. After the conduct of an NLRB election, the union's majority status becomes basically irrelevant for at least a period of one full calendar year. Once the bargaining relationship has extended beyond a full calendar year, in theory the union's majority status is again subject to question. In fact, it is extremely difficult to obtain the services of the NLRB to conduct a test of majority status. In addition, an employer may be fearful of placing all his chips on the outcome. In other words, the employer may wish to "shade" his chances.

INTERROGATION OF CUE GIVERS

The second means by which an employer can test the majority status is probably as accurate as either the first or third, but it is subject to intense scrutiny by the Labor Board. The Board has customarily regarded any attempt by an employer to inquire of an employee as to union activity as a per se violation. The Board generally states its objection to such an interrogation on the grounds that there is a "natural tendency to instill in the minds of the employees fear of discrimination on the basis of the information the employer has obtained." NLRB v. West Coast Gasket Co., 205 F.2d 902,904, 332 LRRM 2343 (C.A. 9, 1953). The Board, it seems to me, continues to adhere to its per se interpretation despite its professed willingness to consider "the time, place, personnel involved, information sought, and...the employer's known preference..." Blue Flash Express, Inc., 109 NLRB 591, 34 LRRM 1384 (1954). The courts, on the other hand, have taken into account the fact that modern-day employees are not nearly so susceptible to

subtle threats as were their predecessors,the fact that the Supreme Court has read the first amendment rights to free speech quite broadly, and other factors in subjecting Board determinations concerning employee interrogations to strict scrutiny. The standard estabilised by the Second Circuit Court of Appeals in Bourne vs. NLRB, 332 F.2d. 47, 56 LRRM 2141 (1964), has been widely adopted by other circuits and is the customary test used by the courts. In cases of interrogations of peer group leaders by an employer in order to determine majority status, the Board will almost certainly find the interrogation violative but the Court will find that there is no unfair labor practice "unless it meets fairly severe standards." These include:

> "(1) The background, i.e., Is there a history of employer hostility and discrimination?
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> "(2) The nature of the information sought, e.g., Did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> "(3) The identity of the questioner, i.e., How high was he in the company hierarchy?
>
> "(4) Place and method of interrogation, e.g. Was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
>
> "(5) Truthfulness of the reply."

Agreeably, if an employer interrogates one of the employee cue givers solely for the purpose of testing majority and not to discriminate against individual employees, the courts would find this permissible. Of course, the Board would not.[1]

POLLING OF EMPLOYEES

The Board has made great efforts to treat systematic polling of employees as merely another form of interrogation. Although there are obvious differences, the Board originally took the position that any polling of employees was a per se violation. Once they were pushed off of this position by the courts of appeals who viewed polling much more sympathetically, than direct interrogation, the Board resorted to its Blue Flash criteria and continued to treat polling as something very close to a per se violation. The Board ran into continued resistance by the courts of appeals which at once point came very close to distinguishing between individual employee interrogations and systematic pollings. In view of the continued resistance by the appellate courts, the Board dropped back to a defensive posture and adopted its so-called Struksnes

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[1] As a practical matter, the Courts do not go through a full scale Bourne examination in every case. Where the Board has alleged and found an unalwful interrogation, and this is merely one small portion of the activity which the Board finds violative, and it is clear that even without that violation the same result would obtain, the Courts tend to "defer" to Board expertise. However, where the

standards. The Board in that case stated that:

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8 (a)(1) of the Act unless the following safeguards are observed: (1) The purpose of the polling is to determine the truth of the union's claim of majority, (2) This purpose is communicated to the employees, (3) Assurances against reprisal 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.

On the surface, Struksnes presents an inviting alternative for employers. In fact, the Board has done everything in its power to make Struksnes the basis on which it has reenacted its per se rule. In the first place, the Board will demand of an employer who undertakes to poll his employees an exceedingly specialized knowledge of the law. An employer who undertakes a polling by means which fall short, on any account, of the Struksnes standards will have committed a per se violation. In the second place, even if the employer meets all of the standards set out in Struksnes, the Board has reserved for itself the right to examine whether "the employer has engaged in unfair labor practices or otherwise created a coercive atmosphere" -- whatever the hell that means. To date, Struksnes has turned out to be a snare and delusion for most employers.

Quite obviously, the Board has an institutional stake in finding polling of employees to be per se violative. This is so since a polling undermines the Board's principal institutional perogative -- the authoritative determination of majority status. While I have never seen this point argued to a court of appeals as a grounds for liberalizing the Board's Struksnes standards or upholding an employee poll, this is, in my estimation, the principal problem with conducting an employee poll. The Board has an institutional stake in attempting to disqualify the poll and accordingly prevent the employer from relying on the results.

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interrogation alleged and found by the Board is crucial to the Board's underlying order, as were this is the only violation alleged or is the crucial violation underlying a Gissell bargaining order, the Courts will drag out Bourne and examine the Board's determination critically.

EVALUATION OF THE USE OF THE STRUKSNES POLL

DISADVANTAGES

There are, as I see it, three principal disadvantages to using the Struksnes polls. The first is that they will be subjected to intense Board scrutiny for the reasons outlined above. The second is that the employer, if he meets the rigid standards of Struksnes, substantially restricts his ability to control the outcome. The third is that the employer substantially restricts his alternatives for future action by committing himself to polling of employee sentiment.

1. Intense Board Scrutiny. If one follows the theory that polling is a substitute for a Board conducted election, albeit without the one year bar, it follows that the Board has a substantial institutional stake in preventing polling. Accordingly, when the courts of appeals consistently reversed the Board on polling, the Board fell back to what it regarded as a standby position. It essentially attempted to establish a standard for polling which was very nearly consistent with its own election standards. It announced, in its own minds, that any poll which did not meet its relatively severe standards would be regarded as per se unlawful. However, in the Board's view, it made an enormous concession in allowing even the possibility that an employer-conducted poll could be relied upon by the employer as an adequate representation of employer sentiment.[2] In practice of course, the text books are replete with hundreds of examples of employer polls which did not live up to the Board's standards and accordingly were viewed by the Board as per se unlawful.

The Courts are not fully satisfied with the Board's attitude toward Struksnes. Many of them continue to require something more. As the 8th Circuit stated in General Mercantile & Hardware Co. v. NLRB, 80 LRRM 2622, 2623 (1972), "Although this Court has adopted Struksnes, the decisions in this Circuit on interrogation of employees continue to embody a necessity of anti-union animus." This additional requirement is found in most of the circuit courts in one form or another. For instance, in NLRB v. Roberts Bros., 36 LRRM 2424 (1955), the 9th Circuit found no violation when an employer conducted a secret poll of employee sentiment immediately after a privileged anti-union speech by its manager. The Court stated, "The per se idea announced early by the Board was later laid to rest..by a direct overruling...and a direct repudiation of the doctrine that interrogation is per se

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[2]It is interesting juxtapose the Board's position on employer polls with its position on union-obtained authorization cards which it consistently regarded as second only to the Board election in authenticity. It is obviously difficult to tell what an employee intends to communicate to the world by signing a union card. In fact, the employee may intend to say something more than "thanks for the duck dinner." But the Board presumes that the employee read what was on the card and will order an employer to bargain on the basis of the cards. On the other hand, the Board will not presume any validity exists in an employer's poll of employees. In fact, it will presume that the employer could not rely on the outcome of the poll until the employer proves he lived up to Struksnes standards in conducting the poll.

unlawful." In other words, while the Courts continue to confuse interrogation and polling and apply similar standards, there is at least an argument based on circuit decisions that "it is well-settled that an employer interrogation of its employees in not unlawful per se unless conducted with such anti-union animus as to be coercive." NLRB v. Little Rock Downtowner, Inc., 414 F.2d 1084, 72 LRRM 2444 (8th Cir. 1969).

Even if an employer commits himself to meet the severe standards of Struksnes and is willing to abide by the results of the poll, there is always the possibility that the Board, in its fervent attempt to prevent the employer from usurping its function of determining majority status, will find that the employer has "engaged in unfair labor practices or otherwise created a coercive atmosphere." This is an understandable reaction of the Board which, if aligned with pro-union employees ability to imagine, may well result in a Board attempt to attack the poll via other unfair labor practices rather than attempting the traditional frontal assult which has been so consistently successful for it. NLRB v. Super Toys, Inc., 79 LRRM 3026 (9th Cr. 1972); NLRB v. Tom Woods Pontiac, Inc., 77 LRRM 2968 (C.A. 5 1971); Chicago Mattress Co., 196 NLRB 579 (1972); Ben Hur Produce, 211 NLRB 70 (1974).

2. Controlling the Circumstances. The second principal disadvantage with the use of the Struksnes poll is that it limits the employers ability to control the circumstances in which the poll is taken. With one exception, the employer is not limited as to time frame. The Board continues to find that an employer poll conducted during the pendency of a certification election will be regarded as per se unlawful on the grounds that it serves no useful purpose. Central Merchandise Co., 194 NLRB 804 (1972). Although the circuit courts have not yet ruled on this, it is quite possible that they will buy the Board's logic. Accordingly, the employer is deprived of the opportunity of using a Struksnes poll during the pendency of a Board certification election.[3]

Even given this relatively modest limitation in terms of time frame, there are other significant limitations on an employer's ability to conduct a poll. It is obvious, that in order for the poll to be relied upon, an employer must conduct a poll which comes very close to meeting Board election standards. The poll must be done by secret ballot. The poll must be done for the purpose of testing majority status. The employees must be gauranteed freedom from punishment based on the vote. And the poll must be done in an atmosphere free of unfair labor practices.

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[3]It has not yet been determined whether this same rule applies in the pendency of a decertification election. However, arguably, a different rule should apply since the decertification election should eliminate the obligation to bargain as of the time of filing and accordingly, the poll could have no adverse effect. Of course, if the employer took any affirmative action to discriminate against employees who voted for continued representation, that would give rise to additional charges. But if the employer conducts a poll during the pendency of a decertification election and withdraws recognition on the basis of that poll arguably no violation occurs.

This last is a significant problem if for instance the employer is engaged in a lengthy period of "good faith" bargaining which has ultimately culminated in convincing the employees that it is futile to continue to bargain through the union since the union can get no more than the company is willing to give. The entire period of time during which the bargaining was underway will be subject to scrutiny by the NLRB to determine whether any alleged unfair labor practices, even very technical ones, have somehow created a coercive atmosphere. Presumably a regional office which is willing to block an NLRB election on the basis of a "technical" violation is also willing to find that a similar violation created an atmosphere so coercive that the employers poll could not be relied upon.[4]

In theory, an employer is not prevented from doing extensive stage setting for the conduct of the poll. However, it is reasonable to assume that the Board will use every method at its disposal to determine that the stage setting was somehow violative of the Act. As indicated above, the Board has a substantial institutional stake in so doing. Accordingly, an employer must be very circumspect in preparing the employees for the coming poll. Ironically, a union has to meet a heavier burden of proof to challenge an employer poll than it does to overturn a Board election. This is so because the Board has consistently held that one of its elections may be set aside because of employer mis-conduct which does not amount to an unfair labor practice. In other words, while a union may not have to allege, and the Board prove, that a particular piece of employer propoganda amounted to an unfair labor practice in order to set aside a Board election; in order to set aside an employer poll, the union must contend and the Board prove that the employer's activity amounted to an unfair labor practice. Accordingly, it is reasonable to anticipate that the Board will give every leniency to a union claim that the employer committed some extraneous unfair labor practice which tainted the atmosphere in which the poll was taken. The Board could be expected to bend over backwards to find a ULP charge has merit when the effect of such a finding would be to prevent the employer from relying on the poll.

3. Reduction of Alternatives. The third principal problem with the use of a Struksnes poll is that the employer may limit his alternatives. In short, the employer, whether required to by the

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[4] Pete and Fred, you may see in the above the basis of attacking the Board's blocking charge policy in an unfair labor practice proceeding despite the Board's consistent refusal to allow an employer to litigate a representation matter in an unfair labor practice proceeding. If the Board blocks your decertification election, you conduct a poll. Presuming the poll lives up to Struksnes standards, the union must allege that the ULP that "blocked" the charge created an atmosphere which was so coercive that the poll could not be relied upon. The employer then gets his day in court on the issue of whether there is connection between the ULP and the election.

Act or not, will be obliged to live with the results of the poll. True, if the poll does not show that the union has lost its majority status, the employer is under no obligation to divulge the results. True, even if the employer loses, he obtains some estimate of the intensity of the union support which may bear on such matters as the likelihood of a strike. But basically, an employer who conducts a poll and determines that the employees do in fact support the union must live with the results.

Quite obviously, an employer who polls the employees and determines that the employees support the union has no basis for refusing to bargain. While the poll may give him needed information as to what particular groups of employees constitute the bulk of union strength, the employer is still left with a union majority and must limit his future behavior on the basis of that understanding. Further, if the results of the poll do become public, an employer will be bound to live by them since the union could use the results of the poll to its own advantage. That is a serious disadvantage, but those are the risks that the employer assumes.

ADVANTAGES

There are, in my view, four principal advantages in using a Struksnes poll. The first is, obviously, that the employer can rely on the results of the poll and refuse to bargain. The second is that the employer has exclusive control over major, and perhaps determinative, aspects of the polling. Third, the poll is not nearly so susceptible to second guessing on the basis of propoganda, Milchelm violations, and other peripherals as are regular board elections. Finally, when the employer conducts the poll he, in effect, commits a deliberate, intentional act which will be alleged to be an unfair labor practice and accordingly is in a much better position to defend his action.

1. Withdrawal of Recognition. The first advantage of this poll is obvious and overriding. The employer may rely on the results of the poll as the basis on which to refuse to bargain. If the poll turns out as the employer hopes it will, he may, as of the moment of certification of results, refuse to bargain. In other words, the results of the poll can have the absolute effect of blocking any further negotiation with the union.

As a spin off of this, if the employer handles himself correctly in relation to the employees, the results of that poll are effectively unchallegnable by the union. Even if the union resorts to the NLRB, as it almost surely must, the employer may take its case to the employees immediately after the results are made known. The employer tells the employees that it conducted a fair, free poll. They were against the union. It intends to honor the employees wishes. But the union wants to prevent them from having a say. If handled successfully, even if the employer is found to have committed one or more unfair labor practices in the conduct of the poll, the employer may very well solidify

support on his side to such a point that no strike will be possible and accordingly the union's position substantially weakened.

2. The Employer Determines When, Where & How The Poll is Conducted. With the exception of a relatively brief period during the pendency of a certification petition, the employer is basically free to establish the time at which the poll will be taken. This it seems to me, is a matter of very great importance, and may well justify taking the chance which a Struksnes poll involves.

The principal advantage that a union has in establishing itself in an employer's business is surprise. Over the long continum of years involved in an employer/employee relationship, it is necessary that the union obtain and retain a majority status only from date of demand to the date an NLRB election can be finally resolved. Once that critical period has past, the majority status of the union becomes largely irrelevant. In addition, the union obtains a powerful ally in the National Labor Relations Board which, as noted above, has a stake in assuring that no further questions concerning majority status are raised.

In theory, the employer may use the methods involved with an RM election or the employees may use the technique of an RD election in order to test majority status if the petition is filed in "window" of a contract, or after a contract has lapsed and before another is signed. However, the difficulties involved with obtaining decertification elections are enormous since they are subject to the Board's blocking charge procedure. Further the use of the decertification petitions involves an advance tip off to the union that their majority status is again to be tested. This gives them the opportunity to begin to campaign again to defend themselves in a democratic election. Given the fact that the union has at its disposal a ready-made technique for delaying the election for a subtantial period of time, the union will almost surely obtain a delay by filing ULP charges, or refusing to conduct an election. Consequently, a decertification election has much less chance of turning out in the employer's favor than does a poll.

It should be obvious that where an employer attempts to attack the union's majority status, the union will use every weapon at its disposal to delay the election. After all, the possibility of losing an election is an enormous threat. This is particularly true when the unit involved is one of considerable size. Further, with many industries, the union has an exceptionally large stake in a particular unit because it may represent a toe hold in that industry. In other words, for practical purposes, the union will be under considerable pressure to use whatever methods it has at its disposal to delay testing its majority status and will use the time accorded it to regroup.

3. The Union Must Plead and Prove an Unfair Labor Practice. The third major advantage, besides surprise, is that an employer Struksnes poll is not subject to the same critical examination that the conduct of a Board certification or decertification election is. The results of a Board election can be over turned on the basis of any number of actions or statements which do not constitute direct violations of the National Labor Relations Act. For instance, electioneering at or around the polling place may be a violation of the Board's Milchelm rules, but is not a violation of Section 8(a)(1) of the Act. Additionally, all of the employer or union written statements are subject to scrutiny by the Board to determine the truthfulness thereof. While the employer or the union may not have committed an unfair labor practice in distributing the literature, the Board will essentially determine whether the material in the campaign propoganda is factually correct and will over turn the results of the election if the literature was untrue. With a poll, none of these problems exist. In order to overturn the results of a poll, it is necessary for the union to allege and the Board to prove that the employer violated Section 8(a)(1) of the Act.

4. An Employer has Advance Knowledge That The Union Will Citicize The Poll. A fourth major advantage of conducting a Struksnes poll is that the employer is in the position of effectively controlling all of the "proof" used to determine that his poll was inadequate or that other activities on his behalf created a coercive atmosphere. It is true that employees may not "remember" that all of the guarantees laid out in Struksnes were given to them. But the employer, knowing that he will conduct the poll and knowing with considerable assurance that the Board will test that poll in a ULP proceeding may take steps to assure himself that he has proof that the guarantees were given. Therefore, the employer may leave the union and the Board with relatively little ammunition with which to prove the alleged violations of Section 8(a)(1) or (5) of the Act.

All of the above may appear to be predicated on the assumption that the Board will attempt to challenge the poll in an unfair labor practice proceeding. However, given the validity of my assumption that the Board has an institutional stake in preventing such polls from taking place, I think its fair to assume that the Board will, in fact, challenge the poll even if it is necessary to solicit a charge to do so. If the union is seriously interested in maintaining its bargaining relationship, it surely will rely on the Board and do everything it can to help the Board prove its case.

PRACTICAL REQUIREMENTS

It is surprising that the cases show so little ingenuity in the use of polls by employers. However, some employers have made use of the poll with devastating effect. For instance, in the H.P. Wasson Company the employer polled a relatively small 51-person unit. The employer did so by employing a private research

company to go to the employees homes at night. The members of the survey crew had been thoroughly advised as to exactly what to say. In each case they were acocmpanied by a court reporter who copied down a verbatim record of what was said so that there could be no mistaking the fact that the appropriate cautions were given. The employer conducted the poll shortly before the termination of its contract with the Retail Clerks International Association and after the Retail Clerks had demanded the commencement of negotiations. The employer claimed that the poll was needed since it had noticed a significant decline in the number of check-off authorizations and the fact that there had been substantial employee turnover. The union, of course, filed charges. The Board pursued the charges. The case went all the way to the 7th Circuit. In NLRB v. H. P. Wasson & Co., 73 LRRM 2448 (1970), the 7th Circuit reversed the Board's decision and held that it was not warranted in finding violations of Section 8(a)(1) or (5) since all of the requiste requirements mere met.[1]

In order to safeguard himself, the employer must have some reasonable basis for conducting the poll. Presumably, if the employer intends to conduct the poll anyway, he should be able to engender some objective manifestation of employee dissatisfaction. If he cannot, he shouldn't conduct the poll in the first place since this is a logical give away that he would lose.

The second practical requirement is that the employer do everything within his power proceeding the election to assure that the outcome will be correct without giving notice to the union of its intent to poll the employees. Essentially, this practical requirement is no different than that involved in a pre-election campaign except that no mention of an upcoming poll can be made.

The third practical requirement is that the employer choose the appropriate time and place for the conduct of the poll. Obviously, the day after payday, the day after a wage increase, the day after a long vacation or some other similarly auspicious moment would logically be chosen. Within limits, the employer may chose to meet the employees on or off company property, alone or in a group and at the place of the employer's chosing.

The fourth practical requirement is that the employer make every effort to insure that the employees are told that the purpose of the poll is to determine employee sentiment and to give the appropriate safeguard statements. While this may seem burdensome it really isn't. It is doubtful that the assurances have much effect and even if they do, the employer cannot discharge or discriminate against an employee based on union support anyway.

The fifth practical application is that the employer shade the question so as to produce the hoped-for results. There are, of course, literally thousands of books about polling and how it works. It would behoove an employer to study these carefully

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[1] There are certain decisions such as Shaeffer Pen Co., 459 F.2d 80 (C.A. 8, 1973) which go so far as to allow pre-hire interviews in which one question is whether potential new hires will cross a picket line. Naturally, guarantees against reprisals must be given in such cases. You have already been made aware of your rights to inquire about strike intentions in health care facilities. Preterm, Inc., 240 NLRB No. 81, 100 LRRM 1345 (1979).

and even perhaps to hire an independent agency. My wife informs me that in her study of marketing in a business context, it is possible by selecting the right question and asking it at the right time to prove almost anything.

A sixth practical condition should be pointed out. There is no back pay liability or other contractual obligation which could cloud taking the matter through the Board and to the circuit court of appeals. Even though the Board could be assumed to oppose the employer throughout the whole process, the employer would not have the meter ticking while he defended his actions. Further,during the three or so years until final resolution by the court of appeals, the employer could solidify his position by announcing clearly and unequivocally to the employees that henceforth he is acting on their behalf in refusing to bargain with the union. Insofar as obtaining employee support is concerned, this is a much better position to be in than merely refusing to bargain with the union or engaging in a long-term process to impasse. While the employees may get the message more forcefully if the employer goes the impasse route, the employer is still subject to the possibility that the employees will seek to rectify the problem by bringing in an even stronger union. However, if the employer is sophisticated, he will make use of the interim period after a polling to prove to the employees that he is acting in their best interest and that he can be depended upon to "do right naturally."

CONCLUSION

In the above, there has been an attempt to weigh a number of the advantages and disadvantages of using a Struksnes poll. It is quite frankly, a remarkably versatile tool if the employer uses it correctly. It is true that the emplcyer must agree in effect to abide by the results. But he gains an enormous amount as a result of this relatively small concession. He gains the right to control the timing. He obtains valuable information as to the intensity of the union support and the areas where that support is congregated. He gains considerable amounts of information as to the possibility of a strike being effectively carried off. He places himself in the publicly defensable position, if he wins the poll, of acting in the employees' best interest.

The use of this poll, particularly in the situation where long-term established bargaining relationship exists, could be a major addition to our repertoire of techniques. If the employer loses the poll, he may always go back to the bargaining table while settling the 8(a)(1) charge. In effect, he is no worse off than he was before but he has obtained significant insight into the likelihood of a successful strike being carried out. On the other hand, if he wins the poll, he may refuse to bargain and litigate the matter all th e way to the circuit court on behalf

of the employees with no back pay running and with the assurance that even if he ultimately loses at the circuit court, he will have convincingly demonstrated to the employees that he was right in refusing to bargain. In effect, he will have gained most of the advantages of the impasse route with relatively few of the problems associated with it.

Warren C. Ogden, Jr.