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THE APPROPRIATENESS OF THE ISSUANCE OF BARGAINING ORDERS IN THE ABSENCE OF THE COMMISSION OF UNFAIR LABOR PRACTICES: THE DEBATE GOES ON

Anthony R. Fasano*

The most common and clearly preferred method by which a union secures recognition as the bargaining agent of an appropriately designated bargaining unit is by compliance with the procedure set down in section 9(c) of the Labor-Management Relations Act of 1947 ("LMRA").[1] This procedure anticipates the holding of an election by the National Labor Relations Board in response to a petition having been filed by the employees or any individual or labor organization acting on their behalf, or by an employer who has been confronted with a claim of representation from an individual or labor organization.[2] It had long been established, however, that majority status could be estab-

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1. 29 U.S.C. § 159 (1970).

2. The Board has delegated to its regional directors its powers to determine the appropriate bargaining unit, direct an election, and certify the results. Authority to take such action is provided in section 153 of Title 29. In petitioning for an election, a labor organization or individual seeking representation rights must show that at least thirty percent of the employees in the bargaining unit have indicated their support of such representation. (*See* NLRB: STATEMENTS OF PROCEDURE, RULES AND REGULATIONS § 101.18.) An employer, however, need only show that some labor organization has made a claim to represent his employees in order to obtain a representation election.

lished by means other than a secret ballot election. Section 9 of the Wagner Act[3] permitted the Board to resolve a question of representation by "a secret ballot of employees, or . . . any other suitable method" of determining such status. Section 8(5) of the Wagner Act established the employer's obligation to bargain "with the representatives of his employees."[4] An early court construction of the interrelationship of these sections required the employer to bargain with the union "as soon as the union presents convincing evidence of majority support."[5] Although there was early acceptance of the principle of alternative methods of establishing majority status, the Board and the courts have strained to determine acceptable means by which such status might be ascertained, and to devise remedies which permit the reconciliation of a number of competing interests—the promotion of collective bargaining, the exercise of an informed and uncoerced choice by the employee, and employer free speech. The Supreme Court in *Linden Lumber Division, Summer & Co. v. NLRB*[6] (*"Linden Lumber"*) had occasion to examine the circumstances under which a union's representative status may be predicated on anything other than the results of an election. Its conclusion significantly enhances the right of an employer to refuse to accept evidence of majority status other than the results of an election, and substantially narrows the utilization of the bargaining order to initiate the collective bargaining relationship. It is the objective of this paper to examine the considerations which prompted the Board's reevaluation of the threshold which initiates a bargaining obligation.

An examination of the language and legislative history of section 9(c) of the Wagner Act and sections 8(a)(5), 9(a), 9(c), 10(c) of the LMRA provides insight into the preference of Congress for a secret ballot election while recognizing the power of the Board to devise remedies which effectuate the polices of the Act[7] even though such remedies are contrary to the preference for an election.

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3. Wagner Act § 9(c), ch. 376, § 9(c), 49 Stat. 453 (1935), *as amended* 29 U.S.C. § 159(c) (1970); *see* note 13 *infra.*

4. 29 U.S.C. § 158(a)(5) (1970); *see* note 14 *infra.*

5. NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757; 6 L.R.R.M. 746, 747 (2d Cir. 1940).

6. — U.S. —, 95 S. Ct. 429, 87 L.R.R.M. 3236 (1974).

7. 29 U.S.C. § 141(b) (1970) provides:

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations. . . .

Section 9(c) of the Wagner Act provided:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. . . . In such an investigation, the Board . . . may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.[8]

The phrase, "utilize any other suitable method" was interpreted by the Board to endow it with authority to certify a union as the collective bargaining representative when its majority status could be established by a method other than an election,[9] most often by the use of authorization cards.[10] The Board not only designated a given individual as bargaining agent, but it certified the union, thus giving it additional protection.[11]

The deletion of the phrase "or utilize any other suitable method" from 9(c) in the Taft-Hartley amendments[12] was intended to prohibit the Board from issuing a certification in the absence of an election.[13] It cannot be persuasively argued that the congressional intent in deleting the phrase was to require that a union be certified before a refusal

8. Wagner Act § 9(c), ch. 372, § 9(c), 49 Stat. 449 (1935).

9. Gates Rubber Co., 13 N.L.R.B. 158, 4 L.R.R.M. 279 (1939); Santa Fe Trails Transportation Co., 2 N.L.R.B. 767, 1 L.R.R.M. 97 (1937); Armour & Co., 12 N.L.R.B. 49, 4 L.R.R.M. 123 (1939).

10. An authorization card states on its face that the signer authorizes the union to act as its collective bargaining representative. Cumberland Shoe Corp., 144 N.L.R.B. 1268, 54 L.R.R.M. 1233 (1964). If, on consideration of the totality of circumstances surrounding the card solicitation, the signer is led to believe that he has merely authorized an election rather than designated a bargaining representative, the card will not be counted. If the signer is told that the card will bring about both of these ends, or that it will be used solely to demonstrate that the solicitor is seeking status as the collective bargaining representative, it will be counted in ascertaining majority support. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 606-09, 71 L.R.R.M. 2481, 2493 (1969).

11. A Board certification establishes conclusive evidence of majority status for at least one year from the date of certification. Although the one year insulation period was established by statute in 1947 [29 U.S.C. § 159(c)(3)] and is currently extended only following a Board-conducted election, the Board, during the pre-Taft-Hartley period, adopted informally a reasonable period rule following certification, usually one year, during which the union was protected from raids from rival unions. Section 159 (c)(3) provides that "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held . . . ." This rule, following the 1947 amendments, would deny this protection to a bargaining agent designated by the Board in a bargaining order rather than selected by the employees in an election. Squirrel Brand Co., 104 N.L.R.B. 289, 32 L.R.R.M. 1022 (1953).

12. 29 U.S.C. § 159(c)(1) (1970).

13. If the Board finds . . . that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. *Id.*

to bargain by an employer is regarded as a violation of 8(a)(5).[14] An attempt by the House of Representatives to amend 8(a)(5) to produce this very result was ultimately rejected.[15] The House version would have permitted an employer to refuse to recognize a union clearly possessing majority support, but lacking certification by the Board.[16] Congress ultimately accepted the Senate version of the bill, which retained the language of the original Wagner Act.[17] Furthermore, section 9(a) which limits the employer's 8(a)(5) obligation to bargain to "representatives designated or selected for the purposes of collective bargaining by a majority of the employees" in an appropriate unit gives no indication of the method to be used in selecting the representative. Since Congress was aware of the Board practice of utilizing authorization cards to trigger the employer's bargaining obligation,[18] one may wonder why they did not terminate the practice. One might argue that the Congress retained the practice so as to give the Board a valuable weapon which it might use to effectuate its section 10(c) mandate to devise remedies to deal effectively with employer violations of the rights of employees.[19]

14. Section 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 9(a), 29 U.S.C. § 159(a) (1970) provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .

15. The House amendment of section 8(a)(5) reads as follows: "to refuse to bargain collectively with the representatives of his employees currently recognized by the employer or certified as such under section 9." H.R. 3020, 80th Cong., 1st Sess. (1947); 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 178 (1947).

16. "The present section 8(5) requires an employer to bargain 'subject to the provisions of section 9(a),' which provides that a representative chosen by the majority of the employees in a bargaining unit is the exclusive representative of all the employees in the unit. The bill imposes the obligation to bargain upon the employer if the union is 'currently recognized by the employer or certified as such (exclusive representative) under section 9.' Under this language, if an employer is satisfied that a union represents the majority and wishes to recognize it without its being certified under section 9, he is free to do so as long as he wishes, but as long as he recognizes it, or when it has been certified, he must bargain with it. If he wishes not to recognize an uncertified union, or, having recognized it, stops doing so, the union may ask the Board to certify it under section 9." H.R. REP. No. 245, 80th Cong., 1st Sess. 30 (1947); 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 321 (1947).

17. *See* note 14 *supra.*

18. *See* note 9 *supra.*

19. Section 10(c), 29 U.S.C. § 160(c) (1970) provides:

> If upon the preponderance of the testimony taken 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 . . . as will effectuate the policies of this subchapter . . . .

Some consideration must be given to section 9(c)(1)b) which provides that an employer may petition for an election whenever one or more unions present demands for recognition. It can be argued that this section is inconsistent with the issuance of bargaining orders in that it extends to the employer the right to petition for an election whenever a question concerning representation exists. Such an argument ignores the congressional purpose in enacting the provision. Under the Wagner Act the employer could petition for an election only when confronted with petitions from two unions. Section 9(c)(1)(8) was intended to deal with this injustice and to prevent an employer petition for an election during the initial stages of an organizational campaign before the union has had an adequate opportunity to secure majority support.[20]

A reading of the legislative history shows that while Congress recognized the preferred status of the election process for the purpose of initiating the obligation to bargain, it recognized the existence of alternative methods, and indicated no desire to abolish them. Having so concluded, one still knows little either of the desirability of issuing bargaining orders or the circumstances under which such orders have

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Although the authority of the Board to determine the manner in which inappropriate employer or union action may be remedied is considerable, it is not without limit. "The power to command affirmative action is remedial, not punitive." Republic Steel Corp. v. NLRB, 311 U.S. 7, 12, 7 L.R.R.M. 287, 290 (1940). The bargaining order, that is, an order directed to the employer to bargain with the union in the absence of an election, can be justified as remedial even though its primary purpose is to serve as a deterrent. The order is remedial in that a union's majority support, as manifested by authorization cards, has been dissipated by unlawful employer conduct, and the order brings about an end that would have come about had it not been for the employer. If there is a flaw in this reasoning, the employer must tolerate it since his illegal action was responsible for the atmosphere that made "an unfettered free choice" by the employees improbable.

20. "The present Board rules also discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent their employees are really not the choice of the majority. It is true that where an employer is confronted with conflicting claims by two or more labor organizations, he may file a petition. But where only one union is in the picture, the Board denies him this right. Consequently, even though a union which has the right to petition and be certified as the majority representative, if it is really such, may strike for recognition, an employer has no recourse to the Board for settlement of such disputes by the peaceful procedures provided for by the Act. The one-sided character of the Board's rules has been defended on the ground that if an employer would petition at any time, he could effectively frustrate the desire of his employees to organize by asking for an election on the first day that a union organizer distributed leaflets at his plant. It should be noted that this may be a valid argument for placing some limitation upon an employer's right to petition, but it is no justification for denying it entirely. The committee has recognized this argument insofar as it has point, by giving employers a right to file a petition but not until a union has actually claimed a majority or demanded exclusive recognition." S. REP. No. 105 on S. 1126, 80th Cong., 1st Sess. 10-11 (1947).

been issued and ought to be issued in the future. It is necessary to examine the legal background of the bargaining order prior to the *Linden Lumber* case so that one can more completely understand the Court's motive in departing, if it did so depart, from its earlier approach.

Soon after the passage of the Wagner Act, in recognition of the damaging impact of an employer refusal to bargain on an employee's right to organize, the Board implemented section 9(c) of the Act[21] by issuing bargaining orders to deter an employer from engaging in conduct that undermined the union's majority status without any injury as to the existence of less severe remedies which possessed the same deterrent effect but minimized the potential for abuse that authorization cards have on employee free choice.[22] That the deterrent effect was the predominate motive in issuing the bargaining order is clearly demonstrated in *Franks Bros. v. NLRB*[23] where the Supreme Court affirmed the issuance of a bargaining order commenting that:

> Out of its wide experience, the Board many times has expressed the view that an unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters organizational activities, and discourages their membership in unions. The Board's study of this problem has led it to conclude that, for these reasons, a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain.[24]

The Court went on to note:

> The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation.[25]

Thus, prior to the adoption of the Taft-Hartley amendments in 1947, it was a well established principle that a union's status as a bar-

21. *See* note 8 *supra.*

22. *See* Armour and Co., 12 N.L.R.B. 49, 4 L.R.R.M. 123 (1939); Gates Rubber Co., 13 N.L.R.B. 158, 4 L.R.R.M. 279 (1939); Inland Steel Co., 9 N.L.R.B. 783, 3 L.R.R.M. 331 (1938); N.L.R.B. v. P. Lorillard Co., 314 U.S. 512, 9 L.R.R.M. 410 (1942).

23. 321 U.S. 702, 14 L.R.R.M. 591 (1944).

24. *Id.* at 592-93, 704.

25. *Id.* at 593, 705.

gaining representative might be established by a means other than an election even though the union's majority at the time of the issuance of the bargaining order had been dissipated by unlawful employer conduct. Secondly, the cases make clear that the unlawful conduct complained of may consist solely of a refusal to bargain by an employer with no requirement of his having taken any other affirmative action.[26] The Taft-Hartley amendments in 1947, as noted earlier, merely indicated a preference for the election process as a means of determining majority status, but did not elevate the election process to a position of sole determinant of majority status. Thereafter, certification by the Board would follow only a section 9(c) election, but certification was not a condition of recognition.

The Board in *Joy Silk Mills, Inc. v. NLRB ("Joy Silk")*[27] expanded its earlier approach in fashioning a "good faith doubt" test focusing on the employer's state of mind in determining the appropriateness of a bargaining order following an employer refusal to bargain. In finding an 8(a)(5) violation, the Court stated that:

> [A]n employer may refuse recognition of 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.[28]

The difficulty created by the decision, apart from the obvious problem of probing into the mind of the employer to determine the existence of the doubt, was whether the Board would require the employer to

26. *See* Armour and Co., 12 N.L.R.B. 49, 4 L.R.R.M. 123 (1939); Vanadium Corp. of America, 13 N.L.R.B. 836, 4 L.R.R.M. 361 (1939).

In the overwhelming majority of decisions, the courts have regarded it as essential that the union possessed a majority at some point prior to the issuance of the bargaining order. There are few decisions which have held that a bargaining order may be issued in the absence of the union ever establishing majority support where the "employer's unfair labor practices are so outrageous and pervasive and 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." NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 570, 66 L.R.R.M. 2596, 2603 (4th Cir. 1967); *see also* J.P. Stevens & Co. v. NLRB, 441 F.2d 514, 76 L.R.R.M. 2817 (5th Cir. 1971). The Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575, 71 L.R.R.M. 2481 (1969), indicated its awareness of this practice, but did not indicate its acceptance of it. The Court limited its holding to permitting the issuance of a bargaining order only where the employer has committed unfair labor practices which have undermined the majority support held at some point by the union, and where the likelihood of a fair election is slight.

27. 185 F.2d 732 (D.C. Cir. 1950), *enforcing* 85 N.L.R.B. 1263, 24 L.R.R.M. 1548 (1949).

28. 185 F.2d 732, 741, 27 L.R.R.M. 2012, 2018 (D.C. Cir. 1950) (citations omitted).

take any affirmative action in order to assert a "good faith doubt." This becomes especially relevant when the employer has engaged in no conduct undermining the union's majority.

Although the decision contained language which would permit the Board to determine good faith by focusing on the existence of a doubt when the employer is presented with a request for recognition as well as on employer conduct subsequent to the request to bargain designed to undermine union support,[29] the case was largely disposed of on the basis of the commission of unfair labor practices. Subsequent courts which later adopted the *Joy Silk* rationale[30] converted subsequent employee conduct into an almost conclusive presumption of bad faith. It is unfortunate that the courts established, in so casual a manner, a connection between the commission of unfair labor practices by an employer, and the lack of good faith as to the union's majority,[31] since the unfair labor practices were as consistent with a desire to prevent the union from securing a majority as with a desire to destroy a majority already attained.[32] Attention is more appropriately directed to the likelihood of a fair election as a result of the unfair labor practice. This is in keeping with the avoidance of drastic remedies, which may deter employers from engaging in unlawful activity, but which generate potentially adverse effects on employees' section 7 rights.[33] Conceding that an employer's unfair labor practices might reduce a union's majority as evidenced in authorization cards does not insure that the cards

29. "In cases of this type the question of whether the 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." 185 F.2d at 742, 27 L.R.R.M. at 2019.

30. The decision was adopted by every circuit. NLRB v. Whitelight Prods. Div., 298 F.2d 12, 49 L.R.R.M. 2402 (1st Cir. 1962); NLRB v. Pyne Molding Corp., 226 F.2d 818, 37 L.R.R.M. 2007 (2d Cir. 1955); NLRB v. Epstein, 203 F.2d 482, 43 L.R.R.M. 1426 (3d Cir. 1953); Bilton Insulation Inc., v. NLRB, 297 F.2d 141, 49 L.R.R.M. 2267 (4th Cir. 1961); NLRB v. Stewart Oil Co., 207 F.2d 8, 32 L.R.R.M. 2651 (5th Cir. 1953); NLRB v. Armco Drainage & Metal Prods., Inc., 220 F.2d 573, 35 L.R.R.M. 2536 (6th Cir. 1955); NLRB v. Jackson Press, Inc., 201 F.2d 541, 31 L.R.R.M. 2315 (7th Cir. 1953); NLRB v. Decker, 296 F.2d 338, 49 L.R.R.M. 2107 (8th Cir. 1961); NLRB v. Trimfit of California, Inc., 211 F.2d 206, 33 L.R.R.M. 2705 (9th Cir. 1954); NLRB v. Hamilton Co., 220 F.2d 492, 35 L.R.R.M. 2658 (10th Cir. 1955).

31. *See* Swan Super Cleaners, 152 N.L.R.B. 163, 59 L.R.R.M. 1054 (1965); Frantz and Co., 153 N.L.R.B. 1322, 59 L.R.R.M. 1645 (1965); Comfort, Inc., 152 N.L.R.B. 1074, 59 L.R.R.M. 1260 (1965).

32. NLRB v. River Togs, Inc., 382 F.2d 198, 65 L.R.R.M. 2987 (2d Cir. 1967).

33. "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 shall also have the right to refrain from any or all of such activities. . . ." Labor-Management Relations Act § 7, 29 U.S.C. § 157 (1970).

reflect the desire of the employees to select the union as its collective bargaining representative.

The opportunity for coercion by union organizers is enhanced when an authorization card is used rather than an election. So, too, is the likelihood that employees will misunderstand the significance of the authorization.[34] It may be argued that, even in the absence of unlawful employer conduct, a union which has authorization cards signed by a majority of the employees in a bargaining unit may lose the election.[35] Congress having indicated that the election process is the preferred method of initiating a bargaining obligation since it is most likely to balance a variety of interests that need to be encouraged,[36] it would seem desirable to utilize a less severe remedy, if one exists, which promotes those same interests but minimizes the potential for abuse.

The Board in *Hammond & Irving Inc.* ("*Hammond*")[37] stated the *Joy Silk* rule ought not to operate as a per se rule, conclusively establishing the bad faith of the employer. More significant is the Board statement that "not every act of misconduct necessarily vitiates the respondent's good faith."[38] The Board recognized that some unfair labor practices are not inconsistent with a good faith doubt that a union represents the majority of the employees. The Board, the following year, handed down its decision in *Aaron Brothers Co. ("Aaron").*[39] Here the burden of proving the employer's bad faith was shifted to the Board. The Board reiterated its statement in *Hammond* that the commission of an unfair labor practice did not per se establish bad faith, and indicated that what was required was the commission of "substantial unfair labor practices calculated to dissipate union support."[40] The *Ham-*

34. Increased sensitivity to this problem ought to be stimulated by the Supreme Court's decision in the *Gissel* case noting that "employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature." 395 U.S. at 606, 71 L.R.R.M. at 2493.

35. In an address to the American Bar Association, former NLRB chairman McCullock stated:

> In 58 elections, the unions presented authorization cards from 30 to 50 percent of the employees; and they won 11 or 19 percent of them. In 87 elections, the unions presented authorization cards from 50 to 70 percent of the employees; and they won 42 to 52 percent of them. In 57 elections, the unions presented authorization cards from over 70 percent of the employees; and they won 43 or 74 percent of them.

1962 PROCEEDINGS, ABA LABOR RELATIONS LAW SECTION, cited in NLRB v. Johnnie's Poultry Co., 344 F.2d 617, 620, 59 L.R.R.M. 2117, 2120 (8th Cir. 1965).

36. Those interests are: the promotion of collective bargaining, employer free speech, an uncoerced and informed choice of a bargaining representative.

37. 154 N.L.R.B. 1071, 60 L.R.R.M. 1073 (1965).

38. 154 N.L.R.B. at 1073, 60 L.R.R.M. at 1074.

39. 158 N.L.R.B. 1077, 62 L.R.R.M. 1160 (1966).

40. 158 N.L.R.B. at 1079, 62 L.R.R.M. at 1161.

The Board in *Aaron Brothers* argued that the *Joy Silk* rule conformed to the utiliz-

mond and *Aaron* cases moved the Board closer to its ultimate rejection of the good faith test. The employer no longer had to state his desire for an election or show any ground for doubt when asked for recognition. He could simply indicate that he desired an election, and in the absence of the commission of substantial unfair labor practices which undermined the support of the union, a showing that he possessed independent knowledge of the union's majority status, or a refusal to bargain on grounds other than a doubt as to the union's majority status, there would be no finding of bad faith. The discussion of the last two concepts will enable us to deal with the first category of decisions which *Joy Silk* permitted the Board to reach, those cases where the employer is held to have acted inappropriately at the time a request to bargain is made. If an employer either possesses independent knowledge or if his refusal is based on something other than doubt about the union's majority status, there is a presumption of bad faith resulting in a violation of 8(a)(5). Thus far, we have been dealing with the commission of unfair labor practices, violations of 8(a)(1), 8(a)(2), 8(a)(3), 8(a)(4), from which the Board has concluded the absence of good faith. The Board noted in the *Aaron* decision that the employer's bad faith could be established by conduct which did not constitute an unfair labor practice.[41]

The independent knowledge doctrine was developed in *Snow & Sons v. NLRB* ("*Snow & Sons*")[42] and provides that an employer may be ordered to bargain with a union on the basis of authorization cards, even though he has committed no unfair labor practices independent of 8(a)(5), if he has independent knowledge of a union's majority status. In *Snow & Sons,* the employer agreed to submit the authorization cards to an impartial third party for authentication. The employer,

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ing of the most reliable means available to determine the desires of the employees.

> Where an employer has engaged in unfair labor practices, the results of a Board-conducted election are a less reliable indication of the true desires of employees than authorization cards, whereas, in a situation free of such unlawful interference, the converse is true.

158 N.L.R.B. at 1079 n.10, 62 L.R.R.M. at 1161 n.10. Thus the Board established as a primary objective the implementation of the will of the majority of the employees, and the avoidance of remedies whose sole purpose is deterrence where more "reliable means" are available. The Board is, in this manner, able to utilize the bargaining order when necessary while avoiding the charge that the order is penal in nature, rather than remedial, and thus in excess of the Board's authority. The remedial nature of the order is established by arguing that it is the best method of determining the majority will since the employer's coercive conduct has made any other method unreliable.

41. 158 N.L.R.B. at 1079, 62 L.R.R.M. at 1161.

42. 308 F.2d 687, 51 L.R.R.M. 2199 (9th Cir. 1962), *enforcing* 134 N.L.R.B. 709, 49 L.R.R.M. 1228 (1961).

however, reneged on his agreement and refused to recognize the union after the third party indicated that the cards reflected the desire of the majority of the employees to designate the union as their collective bargaining representative. The Board held if an employer agrees to submit authorization cards to an impartial third party for verification and the cards have been so authenticated, the employer will be held to an 8(a)(5) violation in the event he refuses to bargain.[43] The *Snow & Sons* decision appears to have been limited to its facts[44] prior to the decision of the Board in *Pacific Abrasive Supply Co.*[45] In *Strydel, Inc.*, the Board indicated that it was unwilling to infer that:

> [R]espondent was guilty of bad faith merely because it denied recognition while rejecting the Union's proposal for submission of the cards to impartial determination. This does not, standing alone, provide an independent basis for concluding that the instant denial of recognition was unlawful.[46]

The Supreme Court indicated its awareness of the Board's independent knowledge doctrine in *Gissel Packing Co. ("Gissel")*[47] but chose to avoid any extensive consideration of it since it was not necessary to the disposition of the case, there being present the commission of "pervasive" employer unfair labor practices which made a fair

43. Kellog Mills, Inc., 147 N.L.R.B. 342, 56 L.R.R.M. 1223 (1964); *enforced*, 347 F.2d 219 (9th Cir. 1965); Dixon Ford Shoe Co., 150 N.L.R.B. 861, 58 L.R.R.M. 1160 (1955).

44. *See* Strydel, Inc., 156 N.L.R.B. 1185, 61 L.R.R.M. 1230 (1966); Furr's, Inc., 157 N.L.R.B. 387, 61 L.R.R.M. 1388 (1966); *enforced*, 381 F.2d 562 (10th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

45. 182 N.L.R.B. 329, 74 L.R.R.M. 1113 (1970).

46. 61 L.R.R.M. at 1230 (1966) .

47. 395 U.S. 575, 71 L.R.R.M. 2481 (1969).

> When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, unless he has knowledge independently of the cards that the union has a majority, decline the union's request and insist on an election.

395 U.S. at 591, 71 L.R.R.M. at 2487. The Court, however, indicated that it need not deal with the question in the case before it since the Court in *Gissel* had the advantage of employer unfair labor practices which made a fair election improbable.

> We thus need not decide whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing that there is a representation dispute.

395 U.S. at 601 n.18, 71 L.R.R.M. 2491 n.18. It did, however, cite with approval its earlier decision in United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62, 72 n.8, 37 L.R.R.M. 2828, 2831 n.8 (1956) which noted that a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status." 395 U.S. at 597, 71 L.R.R.M. at 2489.

election improbable. The Court, however, did note the permissible issuance of a bargaining order where no unfair labor practices, independent of a violation of 8(a)(5), had been committed. It indicated the continuing validity of its earlier comment in *United Mine Workers v. Arkansas Oak Flooring Co. ("Arkansas Oak Flooring")* that "in the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated section 8(a)(5) of the Act."[48]

The Supreme Court in *Gissel* noted that the Board, in it oral argument, had abandoned the *Joy Silk* doctirine.[49] Both the Court and the Board, however, seem to have left unclear the extent of the abandonment.

The *Joy Silk* approach permitted the Board to focus on conduct taking place both before and after the employer refusal to bargain. An employer's refusal to bargain could be found to constitute bad faith if it could be established either that at the time the employer refused to bargain he could have had no good faith doubt about the union's majority, or that unfair labor practices committed following this refusal to bargain dissipated the support of the employees for the union.[50] In abandoning *Joy Silk*, the Board clearly was not repudiating the second half of the test. The Board indicated in *Gissel* that "the commission of serious unfair labor practices that interferes with the election processes and tends to preclude the holding of a fair election" shall continue to merit the issuance of a bargaining order.[51] As to the first half of the *Joy Silk* test relating to the appropriateness of a refusal to bargain, the Board retained the "independent knowledge" doctrine, and acknowledged its expansion to reach the employer whose polling[52] of his employees established the union's majority support.[53] The Board

48. 351 U.S. 62, 72 n.8, 37 L.R.R.M. 2828, 2831 n.8 (1956).
49. 395 U.S. at 594, 71 L.R.R.M. at 2488.
50. 185 F.2d 732, 742, 27 L.R.R.M. 2012, 2019 (D.C. Cir. 1950).
51. 395 U.S. at 594, 71 L.R.R.M. at 2488.
52. 395 U.S. at 594-95, 71 L.R.R.M. at 2488. In Strucksnes Construction Co. Inc., 165 N.L.R.B. 1062, 1063, 65 L.R.R.M. 1385, 1386 (1967), the Board listed the safeguards which must be followed by an employer who takes a poll of his employees: (1) the purpose of the poll must be to determine the truth of the union's claim of majority support, (2) this purpose must be communicated to the employees, (3) the employer must provide assurances against any reprisal in the future, (4) there must be a poll by secret ballot, (5) the employer must not have engaged in unfair labor practices or otherwise created a coercive atmosphere.
53. In NLRB v. Sehon Stevenson & Co., 386 F.2d 551, 66 L.R.R.M. 2603 (4th Cir. 1967), the court held that in the event that the results of an employer's poll of the employees confirms the union's claim of majority support, the employer may not assert the lack of good faith doubt regarding such status unless he can assert some specific basis

also noted that refusals of recognition premised on arguments not relevant to the union's majority would result in an 8(a)(5) violation.[54] Therefore the Board had narrowed *Joy Silk* by permitting the employer to refuse to bargain so long as he avoided engaging in unlawful activity making a fair election improbable, and so long as he possessed no independent information as to the union's majority. The degree of the Board's limitation of *Joy Silk* would depend on its subsequent construction of the breadth of "independent knowledge."

The opinion of the Supreme Court in *Gissel* generated considerable uncertainty as to the limitations it was placing on *Joy Silk*. Because of the commission of extensive unfair labor practices designed to undermine the union's majority, the Court indicated: "[W]e need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes."[55] The Court noted without comment the Board's carving out of exceptions from its "abandonment" of *Joy Silk*.[56] The Court clearly accepted the appropriateness of the issuance of a bargaining order when the employer engaged in unfair labor practices designed to erode the union's majority when "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight."[57] The intent underlying the order

for doing so. This admittedly places the employer in an awkward position in that, if he seeks to inform himself as to the validity of the cards, he is bound by the confirmation. This would appear to encourage his taking no action, and simply requesting the union to go to an election. In that event, unless the Board can establish independent knowledge of the union's majority, the commission of unfair labor practices which make a fair election improbable, or an assertion by the employer of doubt as to the union's majority based on factors unrelated to its majority, the action is likely to be sustained.

A brief comment concerning the assertion of doubt by the employer on the basis of some factor unrelated to the union's majority is in order. In Florence Printing Co. v. NLRB, 145 N.L.R.B. 141, 54 L.R.R.M. 1325 (1963), the Board held that a good faith but erroneous belief that the unit requested by a union is inappropriate may not be asserted as a defense to an 8(a)(5) charge. An employer who relies on a doubt of appropriateness of a unit in refusing to bargain does so at his peril. The *Florence* decision also indicates that such a doubt, where permitted, must be relied upon at the time of the request for and refusal to bargain. The Board will also not tolerate the following as defenses to an 8(a)(5) charge: (1) an erroneous view of the law, Old King Cole, Inc. v. NLRB, 260 F.2d 530, 43 L.R.R.M. 2059 (1958); (2) lack of Board jurisdiction on the basis of a belief that the employer was not engaged in commerce as defined under the Act, H & W Construction Co., 161 N.L.R.B. 852, 63 L.R.R.M. 1346 (1966); (3) belief that its employees were independent contractors, NLRB v. Keystone Floors, Inc., 306 F.2d 560, 50 L.R.R.M. 2699 (3d Cir. 1962).

54. 395 U.S. at 595, 71 L.R.R.M. at 2488.

55. *Id.*

56. 395 U.S. at 594-95, 71 L.R.R.M. at 2488.

57. 395 U.S. at 614, 71 L.R.R.M. at 2496.

is not simply to penalize the employer for having engaged in unlawful activity, and to prevent him from benefitting from his illegal conduct. The order is an acknowledgement that a fair election is no longer likely and that the "most reliable means" of determining the desire of the employees is by examination of the authorization cards.[58] The cards, while admittedly an imperfect reflection of the will of the majority, are the best method available to effectuate the section 7 rights of the employees.

Considerably more difficult is a determination of the Court's view concerning the parameters of Board authority where the only unfair labor practice committed by the employer is the refusal to bargain itself. The Court recognized that a Board-conducted election is not the sole method of initiating a bargaining obligation.[59] Since the Court limited its discussion to activity involving employer unfair labor practices other than the mere refusal to bargain, it must have impliedly conceded some other method of bringing into being the bargaining obligation. The Court cited approvingly its earlier decision in *Arkansas Oak Flooring* where the Court stated that once authorization cards signed by the majority of employees in a bargaining unit were submitted, "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated section 8(a)(5) of the Act."[60] Consequently, it may be argued that, despite the Court's failure to comment on the exceptions to *Joy Silk* carved out by the Board in *Gissel,* it regarded the exceptions, at least in so far as they were stated, as permissible.

The Board extended the scope of the "independent knowledge doctrine" in *Pacific Abrasive Supply Co.* ("*Pacific Abrasive*")[61] Union organizers presented the employer with authorization cards signed by four employees in a warehouse unit.[62] The employer, upon presentation of the cards, acknowledged their authenticity. The employer was told the next day by four employees of their support of the union. When the employer refused to bargain with the union, the four employees decided to strike and commenced picketing soon thereafter.

58. *Id.*
59. 395 U.S. at 597, 71 L.R.R.M. at 2489.
60. 395 U.S. at 597-98, 71 L.R.R.M. at 2489.
61. 182 N.L.R.B. 329, 74 L.R.R.M. 1113 (1970).
62. The Trial Examiner found the bargaining unit to be an appropriate one.

Concluding that these facts "established independent knowledge",[63] the Board found that the employer violated 8(a)(5), and a bargaining order was issued. The opinion does not imply that the mere presentation of cards signed by a majority of the employees triggers a bargaining obligation. But the presentation and verification of their authenticity by the employer established the "absence of a dispute concerning representation" at the time of the refusal to bargain.

The Board extended the doctrine still further in *Wilder Manufacturing Co., Inc. ("Wilder I").*[64] In that case, the employer was presented with eleven signed authorization cards and two unsigned cards[65] along with a request to recognize the union as bargaining representative of the eighteen employees in the production and maintenance unit. Unable to get an immediate answer on the request to bargain, the eleven employees left the plant and set up a picket line. They were joined the following day by the two employees who had submitted unsigned cards. The Board indicated that the mere presentation of cards signed by a majority of the employees was insufficient to establish a bargaining obligation. The Board concluded that an employer's refusal to bargain violated section 8(a)(5) and that a bargaining order was an appropriate remedy when the record contains:

> (1) evidence in addition to mere cards sufficient to communicate to the employer convincing knowledge of majority status, and (2) insufficient evidence that the employer's refusal to grant recognition was based upon a genuine willingness to resolve any doubts concerning majority status through the Board's election processes.[66]

The Board concluded that the combination of the cards, the strike in which all who signed cards participated, and the fact that an officer of the employer conceded that he told his fellow officers that the union had the support of "ten or eleven" of the employees, was sufficient to support a finding that the employer had independent knowledge of the union's majority.[67] The Board noted that there was no evidence in the record of any employer attempt to resolve "any lingering doubts" concerning the majority status of the union by petitioning for an election, or suggesting that the union so petition. The opinion merits some

63. 182 N.L.R.B. at 330, 74 L.R.R.M. at 1115.
64. 185 N.L.R.B. 176, 75 L.R.R.M. 1023 (1970).
65. Two blank cards were included because two employees indicated their desire to sign, but the union had not as yet obtained the signature.
66. 185 N.L.R.B. at 176, 75 L.R.R.M. at 1024.
67. *Id.*

examination because of its casual acceptance of some questionable assumptions.

The weaknesses inherent in authorization cards as a valid barometer of employee wishes have already been noted.[68] The Board's conclusion that refusal to cross a picket line is strongly indicative of support fails to consider the impact of fear and peer pressure as motivating influences.[69] It seems unfair that the Board would find persuasive an inadvertent remark as to the degree of union support made by one officer of the employer to another officer, particularly in the absence of any demonstration that the comment was based on anything other than hearsay. Finally, the Board seems to require that the employer take some affirmative action to establish the reasonableness of his doubt of the union's majority. It had long been established that an employer need take no action whatever when confronted with a request to bargain.[70] The burden is on the Board to establish the commission of unfair labor practices or the possession of independent knowledge of the union's majority.[71] That burden becomes proportionately easier to bear as the degree of employer action increases.[72]

In *Redmond Plastics, Inc.*,[73] the employer was presented with authorization cards from sixteen of the twenty-one employees in a bargaining unit together with a request to bargain. The union, in order to maximize the impact of the authorization cards, informed the employer that twelve employees did not go to work but remained outside the plant, and that additional employees would join them in the event the employer required further proof of support. The employer indicated his belief that the union did, indeed, possess such a majority, that he would recognize the union, and that negotiations would begin toward the drafting of a contract in three days.[74] The employer committed to writing the substance of what had taken place along with his recognition of the union, but refused to sign it until he talked with counsel. Later on that day, the employer informed the union that he would agree only to a consent election. The Board issued an order

68. *See* note 34 *supra.*

69. *See* NLRB v. Union Carbide Corp., 440 F.2d 54, 56, 76 L.R.R.M. 2181, 2183 (4th Cir. 1971); Truck Drivers Local 413 v. NLRB, 487 F.2d 1099, 1110 n.44, 84 L.R.R.M. 2177, 2185 n.44 (D.C. Cir. 1973).

70. *See* notes 47 and 53 *supra.*

71. John P. Serpa, Inc., 155 N.L.R.B. 79 (1965); Aaron Bros. Co., 158 N.L.R.B. 1077 (1966).

72. *See* note 53 *supra.*

73. 187 N.L.R.B. 487, 76 L.R.R.M. 1035 (1970).

74. 187 N.L.R.B. at 487-88, 76 L.R.R.M. at 1035-36.

to bargain finding that the employer's subsequent assertion of doubt of the union's majority was "clearly contrived and wholly specious."[75] The Board concluded that the employer's insistence on the utilization of the election process was motivated by a desire to delay the implementation of his bargaining obligation.

The Board began its retreat from the positions taken in *Pacific Abrasive* and *Wilder I* when it decided *Linden Lumber Division, Summer & Co. ("Summer & Co.")*[76] The employer, when presented with cards signed by twelve employees in a twelve-man unit, refused to bargain on the ground that since two of the members of the unit were supervisors,[77] employer recognition would constitute a violation of section 8(a)(2).[78] The employer rejected the union's submission of a new petition containing a "fresh" showing of interest by thirty percent of the employees[79] despite his having previously informed them that he would agree to a consent election if they took such action.[80] The Board held that a bargaining order was an extraordinary remedy, that a Board-conducted election was the preferred method of initiating a bargaining obligation, and that a bargaining order was appropriately issued only when it was the most effective method of effectuating employee sentiment.[81] The Board conceded the commission by the employer of 8(a)(3) violations in refusing to reinstate strikers, but concluded that he was motivated by a belief that Mr. Marsh was a supervisor[82] and had quit and that Mr. Alexander had engaged in unprotected activity while on the picket line which permitted a discharge

75. 187 N.L.R.B. at 488, 76 L.R.R.M. at 1037.

76. 190 N.L.R.B. 718, 77 L.R.R.M. 1305 (1971).

77. The Trial Examiner later determined that one of the men, Mr. Shafer, was a supervisor, but there is no evidence that he solicited the support of employees for the union. The second man, Mr. Marsh, was found not to be a supervisor.

78. 29 U.S.C. § 158 (1970) states:

> It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .

79. NLRB STATEMENT OF RULES AND REGULATIONS § 101.18.

80. 190 N.L.R.B. 718, 719, 77 L.R.R.M. 1305, 1307 (1971).

81. 190 N.L.R.B. at 719, 77 L.R.R.M. at 1307. The Board cited *Gissel Packing* in support of its view that a bargaining order was appropriate where "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." 190 N.L.R.B. at 719, 77 L.R.R.M. at 1307.

82. Although officers of the employer introduced Mr. Marsh to customers as superintendent of the employer's trust department, it does not appear that anyone in management ever advised Mr. Marsh that he possessed any supervisory authority, or that he ever exercised such authority.

for cause.[83] Furthermore, the Board concluded that the impact of the unfair labor practices might be substantially neutralized by resort to remedies less severe than a bargaining order, namely, reinstatement, backpay, and the posting of notices.[84]

The Board made an impressive attempt to distinguish its decision from the *Wilder I* case[85] by arguing that *Wilder I* involved not simply the possession of independent knowledge, clearly present in the instant decision because of the submission of cards by all of the employees in the bargaining unit as well as the participation in a strike by nine of the eleven individuals in the unit.[86] *Wilder I* also involved an unwillingness to resolve any lingering doubts of majority status through election procedures. The Board then went on to note that the employer and the union in the present case never entered any agreement to permit majority status to be determined by means other than a Board election.[87]

The illogic of the distinction is apparent. If an employer will not be found to have violated 8(a)(5) by reneging on an agreement to permit majority status to be determined within the Board's election process, the Board appears to be overruling *Wilder I* since the employer there made no agreement of any kind. Clearly the existence of a strike supported by a majority cannot be controlling since this element exists in both cases. The only other basis for distinction is the communication in *Wilder I* by one officer of the corporation to other officers that the union had majority support. Surely such a comment, particularly in view of the absence of anything in the record as to the evidentiary basis of the remark, ought to be insufficient to justify the issuance of a bargaining order in *Wilder I.* Comparatively, the argument for the issuance of a bargaining order in *Summer & Co.* is stronger than that in *Wilder I* since in the former case the presentation of authorization cards, petitions signed by the majority of the employees on two separate occasions, and a strike in which nine of the eleven employees in the bargaining unit participated would appear to establish independent knowledge under the *Wilder I* test. Furthermore, the Board's somewhat dubious reliance in *Summer & Co.* on an erroneous belief that

83. 29 U.S.C. § 160(c) (1970) permits an employer to discharge an employee for cause.

84. 190 N.L.R.B. 718, 719, 77 L.R.R.M. at 1307.

85. 185 N.L.R.B. 175, 75 L.R.R.M. 1023 (1970).

86. At the time the strike took place, Mr. Shafer had quit his job thus reducing the size of the unit to eleven.

87. 190 N.L.R.B. at 721, 77 L.R.R.M. at 1309.

supervisory personnel had influenced the employees would seem to be a basis for an 8(a)(5) violation using the logic of *H & W Construction Co., Inc.*[88] which held that an employer could not assert, as a defense to an 8(a)(5) charge, a contention that is unrelated to the majority status of the union.

The failure of the Board in *Summer & Co.* to acknowledge that the effect of its decision was to overrule *Wilder I* was corrected when the Board later reconsidered *Wilder.*[89] The Board then lost little time in noting that *Wilder I* was overruled,[90] and that the independent knowledge doctrine would, henceforth, be significantly narrowed. The Board came to recognize that the doctrine possessed many of the weaknesses inherent in the "good faith doubt" test of *Joy Silk.* The Board was troubled by the difficulty, potential for abuse, and lack of predictability that was unavoidable when an attempt was made to "divine" the state of the employer's knowledge and intent at the time of his refusal to bargain.[91]

The Board focused on the subjective nature of the test devised in *Wilder I*:

> And if we are to let our decisions turn on an employer's "willingness" to have majority status determined by an election, how are we to judge "willingness" if the record is silent, as in *Wilder*, or doubtful, as here, as to just how "willing" the Respondent is in fact? We decline . . . to reenter the "good-faith" thicket of *Joy Silk*, which we announced to the Supreme Court in *Gissel* we had virtually abandoned . . . altogether.[92]

The Board, in an effort to limit the considerable discretion provided under the *Wilder I* test to determine whether the facts presented give rise to an inference that the employer had independent knowledge of the union's majority, substituted a new test, namely, that the employer is under no obligation to accept evidence of the union's majority status, other than the results of an election, unless he has attempted to make his own determination of the union's support by means other than a Board election.[93] It would appear, therefore, that the independent knowledge test can still be utilized to reach him if he agrees to submit

88. 161 N.L.R.B. 852, 854-55, 63 L.R.R.M. 1346, 1347 (1966).
89. 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972). The Board petitioned the Court of Appeals for the District of Columbia to remand *Wilder* for reconsideration in light of its decision in *Summer & Co.* The motion was granted.
90. 198 N.L.R.B. No. 123, 81 L.R.R.M. at 1040 (1972).
91. *Id.*
92. *Id.*; *see* text accompanying note 66 *supra.*
93. 198 N.L.R.B. No. 123, 81 L.R.R.M at 1040.

authorization cards to an impartial third party for verification, or if he unilaterally attempts to gauge union support by means of interrogation or polling of employees. The Board, thus, set down a test which it hopes will encourage the use of the election process since it most effectively balances the interests Congress desired to promote, namely implementation of an employee's section 7 rights, employer free speech, and a flexible formula endowing the Board with the power it needs to promote those interests while possessing sufficient specificity so as to place interested parties on notice as to what is likely to be proscribed conduct.[94]

The Supreme Court in *Gissel* provided little assistance in determining the permissibility of the Board's new approach. The Court, for the most part, limited its discussion to the appropriateness of the issuance of a bargaining order where there is substantial and irreparable interference with the election process.[95] The Court recognized that reliance on authorization cards is, at times, unavoidable, but only where unlawful employer conduct has disrupted the election process.[96] It avoided consideration of the appropriateness of any such reliance where no unfair labor practices have been committed. Its emphasis on the superiority of the election process would seem to support the assertion that the bargaining order is an extraordinary remedy, resorted to only when no other remedy may adequately protect employee section 7 rights. The endemic weakness of the cards is not, in itself, sufficient cause to ignore them, but rather ought to serve to stimulate the Board to exercise greater care in minimizing the abusive utilization of the cards. If the employer's conduct has frustrated the election process, the rights of employees will unavoidably be affected regardless of whether or not the bargaining order is issued.

> When the preferred method of determining employee wishes has been tampered with, it totally begs the question to say that employee rights are sacrificed by a bargaining order. Employee rights are affected whatever the result: If an inadequate rerun remedy is routinely applied, the rights of

94. "[T]he objectives of our statute are best served by encouraging the parties to utilize our orderly election procedures to establish a reliable majority support foundation for a bargaining relationship. In such cases, it seems far better not to enter the tangled thicket of frequently unreliable evidence as to the subjective desires of employees with respect to representation." *Id.*

95. 395 U.S. at 597-98, 71 L.R.R.M. at 2489 (1969). *See also* note 47 *supra.*

96. "The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered totally invalid, for where the employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice." 395 U.S. at 602, 71 L.R.R.M. at 2491.

> those employees who desire collective bargaining, and whose desires were met with violations of law, are not being protected; if a bargaining order is issued, the rights of those who oppose collective bargaining are being tramped on if—and I emphasize the "if"—a poll conducted after the effects of earlier coercion were satisfactorily dissipated would indicate a union loss. Thus it is impossible to defend a refusal to impose a bargaining order unless one is willing to defend the adequacy of the particular remedies in fact applied in connection with the decision to direct a second election.[97]

The Board has all too casually issued bargaining orders in the past without reference to whether less severe remedies might be devised to neutralize unlawful employer conduct.[98] Such an approach fails to accord to the election process the "preferred" status both Congress and the Supreme Court intended it to have.[99] It may be argued with considerable merit that there exists little or no empirical data that permits the Board to conclude that a specific employer unfair labor practice can be effectively neutralized by a given remedy. There exists even less information on the effect of the mere passage of time on union support.

Perhaps the best known study yet conducted is that of Professor Daniel Pollitt who examined 20,153 elections held between 1960 and 1962.[100] Professor Pollitt found that the individual responsible for the initial election being set aside won in more than two-thirds of the rerun elections.[101] The study also concluded that some unfair labor practices were more effective than others in establishing a coercive atmosphere in which a union victory was unlikely.[102] Finally, the study established

97. H. Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851, 862 (1967).

98. The variety of remedies is limited only by the scope of the Board's imagination and the requirement that the remedy be remedial rather than penal in nature. Since it is not difficult to establish a causal link between a Board devised remedy and the promotion of an employee's section 7 rights, this limitation is not one especially difficult to overcome. Illustrations of less severe remedies which may make unnecessary the issuance of a bargaining order include requiring that an employer post notices on company property denouncing its unfair labor practices, the issuance of cease and desist orders, granting the union the right to use company bulletin boards for a specific period of time, requiring the employer to mail notices to employees acknowledging his intent to avoid interfering in their organizational campaign, requiring the employer or a representative of the NLRB to read aloud to employees on company time a statement repudiating its unlawful conduct.

99. See text accompanying notes 7-20 *supra*; 395 U.S. at 599-604, 71 L.R.R.M. at 2490-91 (1969).

100. D. Pollitt, *NLRB Re-run Elections: A Study*, 41 N.C.L. REV. 309 (1963).

101. *Id.* at 212. During this period, 267 rerun elections were held and in only 31% of them did the individual whose unlawful conduct was responsible for negating the results of the first election lose the rerun election.

102. Where a threat to close the plant was made if the union were elected, the union

a connection between the impact of the lapse of time between the original election and the rerun election and the likelihood of change in the result.[103]

The Pollitt study, while admittedly useful, provides the Board with a basis for making only the most general conclusions concerning the most effective manner of dealing with a given unfair labor practice. Furthermore, the study does not address itself to the effect of the lapse of time on the results of an election in the absence of an unfair labor practice. Thus it is impossible to thoroughly evaluate one of the most frequently voiced arguments of the union, namely, that, even in the absence of unfair labor practices, a requirement that the union, rather than the employer, be expected to petition for a representation election will inevitably result in delays that are sufficient to undermine its majority.[104] Board member Fanning in his dissent in *Wilder II* observed that:

> [O]ur experience in conducting elections demonstrates that where employers are willing to go to an election, the election is held more expeditiously and with far less likelihood of interference in the conduct of the election than is the case where either party has to be forced to an election.[105]

The Court of Appeals in *Truck Drivers Local 413 v. NLRB*[106] resolved the problem by reinstating the "willingness to resolve lingering doubts" test of *Wilder I* and by requiring the employer to evidence such "will-

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lost in 71% of the rerun elections; a promise of a wage increase or other benefit if the union were defeated resulted in union defeat in 67% of reruns; surveillance resulted in loss in 67% of reruns; a threat to discharge employees if they voted for the union resulted in union loss in 63% of rerun elections; a threat to eliminate benefits or a refusal to bargain with a union if elected resulted in union loss in 25% of reruns; interrogation by supervisors resulted in loss of 50% of reruns; misrepresentation of material facts resulted in union loss in 40% of rerun elections. *See* Pollitt, *supra* note 100, at 215.

103. A rerun election held within one month of the initial election or longer than nine months afterward ended in a change in result in 21% and 22% respectively. An election held between one and two months after initial election generated the greatest change in result, 40%. Between two and three months, the figure drops to 32%, and between three and six months drops to 26%. Pollitt, *supra* note 100, at 221.

104. *See* Brief for Respondents at 8-9, Linden Lumber, — U.S. —, 95 S. Ct. 429, 87 L.R.R.M. 3236 (1974).

The median time in a contested election, in which a party has moved for a preelection hearing, between the filing of the petition for representation and the election is 60 to 63 days. In a consent election, in which the preelection hearing is waived, the usual time between petition and election is twenty to twenty-three days.

105. 198 N.L.R.B. No. 123, 81 L.R.R.M. at 1043 (1972).

106. 487 F.2d 1099, 84 L.R.R.M. 2177 (D.C. Cir. 1973). *Wilder II* and *Summer & Co.* were consolidated on appeal under this name. The case was decided by the Supreme Court under the name Linden Lumber Division, Summer & Co. v. NLRB, — U.S. —, 95 S. Ct. 429, 87 L.R.R.M. 3236 (1974).

ingness" by either recognizing the union or petitioning for an election.[107] By requiring the employer to take this action, the election process would be expedited by dispensing with the need for an initial hearing, and thus would provide a substantial safeguard against the delaying tactics of the employer. The requirement would also serve to implant substantially greater predictability into the issuance of bargaining orders by eliminating those elements of the independent knowledge test that were subject to potential abuse. There would be no further need to probe into the employer's psyche for the purpose of determining whether there existed any genuine question of majority status, nor would it be necessary to examine events, the impact of which on the employer was equivocal at best, in order to create a fiction of certainty as to the union's support. The proposed formula was simplicity itself. In the absence of an unfair labor practice which made the holding of a fair election improbable regardless of the imaginativeness of the remedy devised to neutralize the unlawful conduct—in which case a bargaining order remained appropriate—the burden was placed on the employer, when confronted with cards signed by a majority of the employees in the bargaining unit, to either recognize and bargain with the union representative or resolve any doubts as to its majority support by petitioning for an election.

The new approach did not appear, at first glance, to conflict with the congressional intent as expressed in the Wagner Act and the Taft-Hartley amendments. The legislative history of the relevant statutes[108] expressed a preference for the election process, a preference strongly affirmed by the Supreme Court.[109] The legislative history, however, as has already been demonstrated, never intended the Board-conducted election to be the only method of generating a bargaining obligation. It might be argued that since the bargaining order may continue to be appropriately issued in *Gissel*-type situations, the election is not the exclusive method of initiating a bargaining relationship. But the legislative history of section 9(c)(1)(b),[110] which permits the employer to

107. "While we have indicated that cards alone, or recognitional strikes and ambiguous utterances of the employer, do not necessarily provide such 'convincing evidence of support,' so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid both any duty to bargain and any inquiry into the actuality of his doubt." 487 F.2d at 1111, 84 L.R.R.M. at 2186.

108. *See* text accompanying notes 1-20 *supra.*

109. Gissel Packing Co., 395 U.S. 575, 71 L.R.R.M. 2481 (1969).

110. *See* note 20 and accompanying text *supra.*

petition for an election when presented with a request to bargain, was never intended to require the employer to so petition. The section was aimed at remedying the discrimination which had existed against employers under the Wagner Act, permitting them to petition for an election only when confronted by demands for recognition from two or more unions, while preventing an employer from petitioning for an election during the early stages of the organizing campaign before a union possessed an adequate opportunity to secure majority support. The principle which the court of appeals advocated in *Truck Drivers* would substitute a new discriminatory treatment of the employer for the one removed by Congress in 1947.

It can be argued in support of the union's position that the *Truck Drivers* test more effectively promotes the objectives of the Labor-Management Relations Act than does the Board's approach in *Wilder II*. No significant burden is placed on the employer's right of free speech under section 8(c)[111] since the employer has a median time of twenty to twenty-three days to communicate his position to his employees. One might also argue that the employer had an opportunity to communicate his point of view, by deeds as well as words, long before the union came onto the scene. If he did so in a convincing fashion and addressed himself to the needs of his men, he has little to fear. Furthermore, section 8(c) was not intended to insure a right of rebuttal, but rather to prevent the Board from attributing an anti-union motive to an employer on the basis of his past statements. Under the Wagner Act, which contained section 8(a)(1) but not section 8(c), the Board condemned almost any anti-union expression by an employer, insisting upon strict neutrality by the employer. The Supreme Court in *NLRB v. Virginia Electric and Power Co.*[112] expressed its disapproval of the Board approach when it held that the employer possessed a constitutional right to express opinions that were noncoercive in nature. The Board's subsequent reluctance to fully implement the ruling of the Court[113] constituted the background for section 8(c) of

111. 29 U.S.C. § 158(c) (1970) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

See also Linn v. Plant Guards Local 114, 383 U.S. 53, 62 n.5, 61 L.R.R.M. 2345, 2348 n.5 (1966).

112. 314 U.S. 469 (1941).

113. *See* Clark Bros. Co., 70 N.L.R.B. 802, 18 L.R.R.M. 1360 (1946).

the Taft-Hartley Act.[114]

Secondly, the section 7 rights of the employees are more likely to be promoted by the adoption of the proposed test in that both sides have adequate opportunity to communicate to the employees the wisdom of adopting their respective positions while minimizing the potential for abuse that an unnecessary prolongation of the period required to determine the existence of a bargaining obligation is likely to generate. It is naive to expect an employer, who is unwilling to accept any alternative for ascertaining the union's majority status other than a union petition for an election, to make every effort to expedite a Board election.

The Board's approach in *Wilder II* continues to make possible the issuance of a bargaining order, admittedly under a narrowed construction of the independent knowledge doctrine, but nevertheless undermining the employer's right of free speech and maximizing reliance on the use of authorization cards, strikes,[115] polling, etc., for the purpose of concluding that no real question of the union's majority status exists. The approach proposed in *Truck Drivers* would appear to minimize

114. The Hartley bill as passed by the House provided that "[e]xpressing any views or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, if it does not by its own terms threaten force or economic reprisal," shall not constitute or be evidence of an unfair labor practice. H.R. 3020, 80th Cong., 1st Sess., § 8(d)(1) (1947). The Senate version was broader in scope reading:

> The Board shall not base any finding of unfair labor practice upon any statement of views or arguments, either written or oral, if such statement contains under all the circumstances no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit. *Provided*, That no language or provision of this section is intended to nor shall it be construed or administered so as to abridge or interfere with the right of either employers or employees to freedom of speech as guaranteed by the first amendment to the Constitution of the United States.

H.R. 3020, 80th Cong., 1st Sess., 8(c) as passed by the Senate p. 84.

Senator Taft commented on the intent of the Conference Committee.

> The conferees had in mind a number of Board decisions in which because of the fact that an employer has at some time committed an unfair labor practice a speech by him, innocuous in itself, has been held not to be privileged. The conferees did not believe that past misconduct should deprive either employers or labor organizations of the privilege of exercising constitutional rights. There have also been a number of decisions by the Board in which discharges of employees, even though there was no evidence in the surrounding circumstances of discrimination, have been deemed unfair labor practices because at one time or another the employer has expressed himself as not in favor of unionization of his employees. The object of this section, therefore, is to make it clear that decisions of this sort cannot be made under the conference bill.

90 CONG. REC. 7002 (1947).

115. The Supreme Court in *Gissel* acknowledged that a strike was a factor that might be considered in determining majority support. A strike alone, however, is insufficient to establish independent knowledge. The employer may reasonably regard individuals who strike to be motivated as much by fear of physical intimidation and social ostracism as by support for the union. *See* Linden Lumber, 95 S. Ct. 429, 432 (1974).

reliance on authorization cards, merely utilizing them as a mechanism to trigger the employer's obligation to petition for an election. The proposed test would minimize the issuance of the bargaining order, except in situations involving the commission of unfair labor practices which render a fair election improbable, thus recognizing the bargaining order as an extraordinary remedy with greater potential for frustrating the objectives of the Labor-Management Relations Act than any requirement that an employer petition for an election.

If an employer is compelled to go to an election against his wishes, it can be argued that the time saving advantage of the proposal is significantly reduced, since the employer, in the event of a union victory, may refuse to bargain thus necessitiating the filing of an 8(a)(5) charge against him.[116] If, however, an employer is adamant in his determination to avoid bargaining with a union, it will make little difference who files a representation petition, since in either case the employer always has available to him the alternative of refusing to file. It is this very factor that justifies the retention of the bargaining order, for there is no viable method of regulating an individual who demonstrates his willingness to ignore cease and desist orders and risks the contempt powers of the courts in order to destroy a union's support.[117] Furthermore, if an 8(a)(5) hearing must be held, the issues for consideration are considerably less complex than they would be using the independent knowledge test, since it is limited to a determination of the appropriateness of the bargaining unit and the existence of cards signed by a majority of the employees in the unit. The deterrent effect of the proposed rule is subject to question, since the employer may rely on the considerable time necessary to process an unfair labor practice charge to undermine union support even if he does not succeed in winning at the hearing. But this same problem exists under the current Board approach.

The Supreme Court in *Linden Lumber* argued that the time saving argument of the circuit court's proposal was illusory, since even if required to petition for an election, the employer might select a bargaining unit other than that sought by the union.[118] This does

116. The median time in a contested case involving an unfair labor practice charge is 388 days. *See* Linden Lumber, 95 S. Ct. 429, 432 (1974). Indeed, in *Linden Lumber*, the time differential between the filing of the charge and the Board's ruling was 4½ years, in *Wilder*, about 6½ years.

117. *See* J.P. Stevens & Co. v. NLRB, 76 L.R.R.M. 2817 (5th Cir. 1971).

118. NLRB: RULES & REGULATIONS § 102.62. When an employer petitions for an election, he is required to define the appropriate unit and therefore would not be entitled,

not necessarily mean he would be acting in bad faith in an attempt to delay further proceedings. There might be legitimate differences of opinion as to which unit is appropriate. The union could waive the hearing by not raising any objections at that point, but in doing so, it would have to accept the employer's determination of the bargaining unit. If the union refused to accept the employer's determination, a hearing would be held, with the subsequent loss of much of the time advantage the requirement of an employer petition was to provide. Admittedly the time lapse would not be as great as a union petition would entail, since in the former situation, the union could minimize its challenges, whereas in the latter case, the employer might attempt to make as many challenges and seek as many postponements as possible.

Furthermore, the employer must be provided with a reasonable period of time in which to file his petition. The opportunity to delay here can be remedied by the Board using its rule making authority to designate what constitutes a reasonable time. Nevertheless, another segment of the time advantage would be removed. Consequently, the time saving envisioned by the circuit court would occur only when the union would be willing to resolve in the employer's favor questions relating to whether given individuals or job classifications fall within a bargaining unit.[119] Thus, a requirement that an employer petition for an election still does not preclude delay if the employer is sophisticated enough to draft his petition so as to elicit objections from the union.[120]

The proposal in *Truck Drivers* clearly possesses considerable merit—simplicity, predictability, reduction of the opportunity for an abusive exercise of discretion by the Board, the promotion of an employee's section 7 rights, adequate opportunity for communications of

as an objecting party, to request a hearing or to object to a sufficient showing of majority support (30%).

119. 95 S. Ct. at 433-34. Section 9(c)(1)(B) of the LMRA, 29 U.S.C. § 159(c)(1)(B) (1970), states that an employer petition must allege that "one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a)." Since a question of representation is raised only by a claim by a labor organization that it represents a majority of employees in an appropriate unit, the Board will dismiss an employer's petition if there is a significant discrepancy between the unit designated by the employer and that posited by the union. This is likely to be a problem only where the employer designated unit is significantly larger than the union designated unit.

120. Even if a union petitions for an election, although it must demonstrate a 30% showing of interest from the employees, the sufficiency of the showing is not litigable by the parties. NLRB v. Savair Mfg. Co., 414 U.S. 270, 287 n.6, 94 S. Ct. 495, 504 n.6 (1973).

each party's position. The fact that the employer feels that he suffers inconvenience ought not, in itself, be controlling. Legislation inevitably places limitations upon an individual's freedom of action. Such a result is tolerated if greater interests are promoted.

There is considerable difficulty in ascertaining whether this test is superior to that adopted by the Board in *Wilder II* and affirmed by the Supreme Court in *Linder Lumber*. Both tests are premised on a recognition of the preferred status of an election to determine the degree of union support and the need to minimize any inquiry into an employer's subjective motivation to assess the propriety of a bargaining order. It was with this objective in mind that the Board in *Wilder II* limited the issuance of a bargaining order to those cases where either unlawful conduct had taken place making improbable the holding of a fair election or where the employer attempted to determine majority status by a means other than an election.

The *Wilder* test, however, despite its substantial narrowing of the independent knowledge doctrine still involves the Board in a determination of employer intent. Although the Board in *Wilder* referred only to cases dealing with reneging on an agreement to submit authorization cards to a third party[121] and a case involving the polling of employees by the employer,[122] the language of the opinion would permit the Board to go beyond those fact patterns to focus on whether the employer engaged in any activity designed to determine the degree of union support.[123]

The tests set down in both *Wilder II* and *Truck Drivers* are steps in the right direction. *Wilder II*, however, possesses the rather disconcerting potential for reversion into the more unfortunate aspects of the old independent knowledge doctrine. If an employer possesses any sincere doubts concerning the union's majority, he can resolve those doubts in an election, generally conceded to be the most accurate method of gauging employee support. This election will be preceded by a period of sufficient duration to permit the employer to communicate his case to his employees.[124] The opportunity to delay the election by utilizing Board procedures, while admittedly still present, is reduced.[125] The ultimate resort to a refusal to bargain in the event of

121. Snow & Sons, 134 N.L.R.B. 709, 49 L.R.R.M. 1228 (1961).
122. Nation-Wide Plastics Co., 197 N.L.R.B. 996, 81 L.R.R.M. 1036 (1972).
123. 198 N.L.R.B. No. 123, 81 L.R.R.M. at 1039-40.
124. *See* note 104 *supra*.
125. *See* text accompanying notes 118-119 *supra*.

a union victory is an ever present possibility regardless of the initiator of the representation petition. But at the 8(a)(5) hearing the issues will be relatively simple and easy to resolve, namely, the existence of a card majority and the justifiable nature of the delay. The employer retains the right to designate the bargaining unit,[126] and if the union is dissatisfied with his choice, any further delay will be its responsibility. As to any waiver of a right to challenge the union showing of interest (30%), this is not subject to questioning at this stage anyway.[127] The purpose of the rule is not to permit the union the right to an election when its bargaining position is strongest. It clearly possesses no such right any more than it has the right to communicate, during the organization campaign, so as to maximize the impact of its statement.[128] The rule is designed to promote the objectives of the act, and it permits the employer to adequately protect significant interests while maximizing the right of the employees to have their sentiments effectively determined.

It may be argued that the view of the lower court enhances the value of authorization cards as an accurate gauge of employee support for the union by requiring the employer to accept the cards and immediately agree to bargain or to regard the cards as sufficiently persuasive to require him to go to an election. Heretofore, the employer would simply refuse to acknowledge the validity of the cards, and in the absence of the commission of unfair labor practices rendering a fair election improbable, an agreement to permit a third party to resolve the question of authenticity, or a unilateral effort to verify personally, usually by polling, his refusal to bargain would not be subject to question. The approach currently adopted by the Board in *Wilder II* and approved by the Supreme Court in *Linden Lumber* continues to require the Board to determine whether an employer's unfair labor practices are so substantial that a fair election is impossible. Due to the lack of empirical data on the effect of the commission of various types of unfair labor practices on the employee, the difficulty in ascertaining the appropriate timing of a rerun election , and the effectiveness of remedies other than bargaining orders in dissipating employer conduct

126. If the employer's proposal for a unit is outrageous, the regional director could suggest a change without conducting a hearing, or the union could disclaim any interest in the unit.

127. *See* note 120 *supra.*

128. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Central Hardware Co. v. NLRB, 407 U.S. 539, 80 L.R.R.M. 2769 (1972); NLRB v. Babcock & Wilcox, 351 U.S. 105, 38 L.R.R.M. 2001 (1956).

which weakens a union majority, any system which minimizes reliance on the weaknesses of the current procedure and substitutes the authorization cards as a mechanism for triggering an obligation to petition for an election would appear to be desirable. Such an approach reduces much of the uncertainty concerning the desires of the employees and the effect of employer conduct. The election which would follow would provide the Board with a statistical base for evaluating the effect of employer conduct on the election. It is incumbent upon the Board, however, to conduct a systematic examination of the election process so that it may more effectively devise remedies other than the bargaining order wherever possible, thus reducing its reliance on a gut reaction as to the effect of employer conduct. In the absence of such a study, reliance upon what many regard to be the myth of Board expertise is likely to generate greater disillusionment with the entire process, and encourage the manipulation of the current procedures by both sides in a manner that frustrates the objectives of the Act.