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## ESTABLISHMENT OF BARGAINING RIGHTS WITHOUT AN NLRB ELECTION

Howard Lesnick\*

THOSE who have become accustomed to keep one ear cocked for the five-part harmony relentlessly ground out by the mimeograph machines at NLRB headquarters on Pennsylvania Avenue—those whom one may call professional Board-watchers—have doubtless noticed how fashions come and go in the subjects of NLRB litigation. It is as if the interest of litigants as easily wanes as does that of the reader of opinions, for there is a fairly regular succession of themes, each to be developed for a time until, as though by common consent, attention swings toward a different problem entirely. The wave of the present, I believe most would agree, is the question of establishment of bargaining rights without an election. The Board has entertained a strikingly increasing number of cases involving union attempts to secure representative status other than through success in a Labor Board election,<sup>1</sup> and Congressmen,<sup>2</sup> judges,<sup>3</sup> commentators<sup>4</sup> and practitioners<sup>5</sup> have each contributed to the medley of the “card check.” Because the subject is currently so fashionable, I would like to forego the historical narrative ordinarily expected of professors and introduce the relevant legal issues with an overview of the current Board position, which in my view has changed perceptibly during the past year.

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1. There were, if my count is correct, about a dozen such cases in 1964, twice that many the following year, and approximately 117 in 1966.

2. See *To Repeal Section 14(b) of the National Labor Relations Act, Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 89th Cong., 1st Sess. 16-26, 181-98 (1965); 111 CONG. REC. 19308 (daily ed. Aug. 4, 1965) (remarks of Senator Javits); *id.* at 15124 (daily ed. June 29, 1965) (remarks of Senator Fannin).

3. The volume of litigation has been substantial. The most vigorous attack on the Board's use of authorization cards is probably Judge Timbers', in his separate opinion in *NLRB v. Gotham Shoe Mfg. Co.*, 359 F.2d 684 (2d Cir. 1966).

4. For a diatribe against reliance on authorization cards, see Comment, *Union Authorization Cards*, 75 YALE L.J. 805 (1966); a more restrained criticism is Comment, *Refusal-to-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387 (1966).

5. See, e.g., Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434 (1965); Loomis, *Determination of Union Majority Status*, 47 CHI. BAR RECORD 113 (1965); Sandler, *Another Worry for Employers*, U.S. News & World Report, March 15, 1965, p. 86; Shuman, *Requiring a Union to Demonstrate Its Majority Status by Means of an Election Becomes Riskier*, 16 LAB. L.J. 426 (1965).

## I. THE PRESENT STATE OF BOARD LAW

The central question is this: May an employer, presented with a demand to recognize a union which claims to have obtained signed authorization cards from a majority of his employees in an appropriate unit, decline to extend recognition and insist instead on a Labor Board election to determine the question of representation? Put another way, may a union denied recognition claimed on the basis of a showing of cards seek bargaining rights through either an election or an unfair labor practice charge, as it prefers, or may the employer confine it to the election route? I would have given a somewhat different answer a year ago, but today it seems clear (although perhaps for today only) that an employer ordinarily may insist on an election, that the initial option is his rather than the union's. The 1961 decision in *Snow & Sons*<sup>6</sup> seemed to suggest a far narrower employer privilege. The Board there specifically rejected the notion that an employer could insist on an election "because the employees might change their minds," and came close to holding that a refusal to recognize can be justified only by a doubt of present majority which has some objective warrant. It said:

The Board has held that the right of an employer to insist upon a Board-directed election is not absolute. Where, as here, the Employer entertains no reasonable doubt either with respect to the appropriateness of the proposed unit or the Union's representative status, and seeks a Board-directed election without a valid ground therefor, he has failed to fulfill the bargaining requirements under the Act.<sup>7</sup>

Today, *Snow* has been confined to its particular facts (the employer reneged on his agreement after verifying the cards), continued reliance on it has been explicitly disapproved by the Board,<sup>8</sup> and its principles have in effect been largely overruled. While continuing to talk the language of good-faith doubt, the Board has given that term a meaning substantially different from its earlier one of an actual particularized skepticism regarding the Union's present majority. This recent withdrawal is most clearly manifested, and its dimensions clarified, in the *Strydel*,<sup>9</sup> *Aaron Brothers*<sup>10</sup> and *H. & W.*

6. 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

7. *Id.* at 710-11. In enforcing the Board order in *Snow*, the court of appeals seemed to agree that the test is an objective one: "The manner in which an employer receives reliable information of union representation . . . is of no consequence. Once he has received such information from a reliable source, insistence upon a Board election can no longer be defended on the ground of a genuine doubt as to majority representation." 308 F.2d 687, 692 (9th Cir. 1962).

8. See *Strydel, Inc.*, 156 N.L.R.B. No. 114, 61 L.R.R.M. 1230 (Feb. 1, 1966); *Furr's, Inc.*, 157 N.L.R.B. No. 38, 61 L.R.R.M. 1388 (Mar. 7, 1966).

9. *Supra* note 8.

10. *Aaron Bros.*, 158 N.L.R.B. No. 108, 62 L.R.R.M. 1160 (May 25, 1966).

*Construction*<sup>11</sup> decisions. In *Strydel*, the Board expressly declared its unwillingness to infer "that Respondent 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."<sup>12</sup> *Aaron Brothers* provided a somewhat more illuminating explanation:

An election by secret ballot is normally a more satisfactory means of determining employees' wishes, although authorization cards signed by a majority may also evidence their desires. Absent an affirmative showing of bad faith, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority.<sup>13</sup>

Although these views seem to suggest—as Member Jenkins aptly put it in his concurring opinion in *Aaron Brothers*—"that the mere absence of a good-faith doubt of the majority, an unsupported expression of doubt, or a 'no opinion' attitude toward its existence, does not require the employer to accept the cards as proof of [the majority],"<sup>14</sup> the Board has stopped short of acknowledging a general employer right (assuming no accompanying unlawful acts) to refuse recognition demanded on the basis of cards. In *H. & W. Construction Co.*, the employer withheld recognition on the ground, later held erroneous, that the NLRB lacked jurisdiction over it. Because the employer did not insist that the union test its majority through an election and did not (except *post litem motam*) question the union's representative status, a majority of the Board found an unlawful refusal to recognize. The opinion explicitly recognized an employer privilege to rely on an asserted doubt of majority, "though his doubt is founded on no more than a distrust of cards." Contrary implications of *Snow* notwithstanding, he "will not be subject to an 8(a) (5) violation simply because he is unable to substantiate a reasonable basis for his doubt."<sup>15</sup> However, the Board adhered to the view that an employer who in fact lacks—that is, is proven to lack—an actual doubt of present majority may not lawfully refuse recognition sought on the basis of a proffer of cards. In effect, then, an employer presently has the right to insist on an election, but only if he does so on

11. *H. & W. Constr. Co.*, 161 N.L.R.B. No. 77, 2 LAB. REL. REP. (63 L.R.R.M.) 1346 (Nov. 10, 1966).

12. 61 L.R.R.M. at 1231.

13. 62 L.R.R.M. at 1161.

14. *Id.* at 1162.

15. 63 L.R.R.M. at 1348-49.

the ground that he disbelieves the union's card showing and his assertion of disbelief is not itself belied by his other acts or statements. The need to resolve any latent inconsistency between the acknowledgment of a privilege to rely on a generalized "distrust of cards" and the denial of an opportunity to see if the employees "might change their minds" has not yet been given recognition in NLRB opinions.

It is not the typical case, however, when the employer simply declines recognition. In most of the litigated cases, the employer has undertaken to campaign actively against the union. A union which has filed or is planning to file an election petition and which is faced with acts of employer coercion, discrimination, or interference during the pre-election period may abandon the election campaign and file charges challenging the lawfulness of the initial refusal to recognize (as well as the employer's pre-election conduct). The union may prefer, however, to continue to an election in the hope of prevailing despite employer coercion, and to attack (should that hope prove unfounded) the validity of the election and the lawfulness of the original refusal to recognize in consolidated post-election proceedings.<sup>16</sup> Whether arising after an election loss or following a campaign aborted by unfair labor practices charges, the employer violations have served, in the overwhelming majority of cases, as the foundation for a finding of bad faith, rendering the initial refusal to recognize unlawful and calling forth a bargaining order as the standard remedy for a refusal to bargain. As the Board summarized its practice in *Aaron Brothers*:

Where a company has engaged in substantial unfair labor practices calculated to dissipate union support, the Board, with the Courts' approval, has concluded that employer insistence on an election was not motivated by a good-faith doubt of the union's majority, but rather by a rejection of the collective-bargaining principle or by a desire to gain time within which to undermine the union.<sup>17</sup>

Here too it seems that there has been a recent change in rationale. While the Board, as the preceding quotation acknowledges, has regularly used employer acts of coercion to infer a lack of earlier

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16. This option arises from the overruling of the *Aiello Dairy Farms* doctrine, (requiring election of remedies), 110 N.L.R.B. 1365 (1954), by the well-known decision in *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277 (1964). The § 8(a)(5) charge may go forward only if a motion to set aside the election is properly made and is found meritorious. *Irving Air Chute Co.*, 149 N.L.R.B. 627, 630 (1964); *Kolpin Bros.*, 149 N.L.R.B. 1378 (1964).

17. 62 L.R.R.M. at 1161; cf. *Jem Mfg., Inc.*, 156 N.L.R.B. No. 62, 61 L.R.R.M. 1074 (1966): "Ordinarily the General Counsel sustains this burden of proof [of bad faith] by demonstrating that an employer has engaged in other unfair labor practices which are designed to dissipate a union's majority status."

doubt regarding the union's majority, it seems fairly clear that such a circumstantial inference cannot logically be made as confidently or routinely as it has been. The fact of employer coercion may be as consistent with a desire to prevent the acquisition of majority status as with a purpose to destroy an existing majority. Judge Learned Hand aptly put the thought: "As a penalty it might be proper, but as a link in reasoning it seems to us immaterial."<sup>18</sup> Indeed, critics, noting the weakness of the link in reasoning, have concluded that what is involved in fact is a penalty and that it is *not* proper as such.<sup>19</sup> Recent decisions seem to me to have emphasized (perhaps in partial recognition of such views) a significantly different rationale. In *Aaron Brothers*, as a footnote to the passage quoted above, the Board referred to its

objective of utilizing the most reliable means available to ascertain the true desires of employees with respect to the selection of a collective-bargaining representative. 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.<sup>20</sup>

The Board comes very close here to acknowledging that the significance of unfair labor practices lies less in their retroactive impact on the substantive lawfulness of the insistence on an election than in their effect on the appropriate remedy when an election has been set aside or aborted. Indeed, there have been several cases in which a union proving prior majority status has won a bargaining order although there was no finding of a refusal to bargain (because, for example, no demand for recognition had been made). Here it is plain that the bargaining requirement is a remedy for employer coercion. But more of these problems in a moment.

Finally, there is the question of proof of actual majority status in the unfair labor practice proceeding. Here perhaps the greatest heat has been generated. The Board has shown a consistent reluctance to entertain broad attacks on the validity of authorization cards and has permitted challenges only to individual cards under rules which make it difficult for these challenges to succeed. The most litigated illustration of this position is the so-called dual purpose card, which both designates the union as representative and states the signatory's desire for an election. The controversy has been particularly acute with respect to the solicitation of signatures on

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18. *NLRB v. James Thompson & Co.*, 208 F.2d 743, 746 (2d Cir. 1953).

19. *E.g.*, Comment, 75 *YALE L.J.* 805, 828-31 (1966).

20. 62 *L.R.R.M.* at 1161 n.10.

dual purpose cards with the representation that a purpose is to obtain an election; the Board has refused to invalidate such a card in the absence of a showing of a representation that an election was the *only* purpose sought to be achieved.<sup>21</sup>

The foregoing, if I have apprehended it accurately and it has not been changed during its recounting, is the current state of Board law. Of the several issues raised by these doctrines, I would like to focus on three which seem to me central and controversial: proof of majority status through authorization cards, the relation of independent unfair labor practices to the decision to issue a bargaining order, and the asserted right of an employer to insist on an election in the first place.<sup>22</sup>

## II. THE NEED TO POLICE USE OF AUTHORIZATION CARDS

The Board has been needlessly rigid in its extreme reluctance to police union practices involving the collection of authorization cards. Whatever one concludes as to the broader issues discussed below, it must be recognized that the process of gathering and submitting cards is so unregulated, varying, and difficult to regularize that it presents serious possibilities of abuse. I sympathize strongly with the Board's apparent skepticism toward subsequent withdrawals and repudiations, witness-stand impeachment, and the like—although I wish the Board would spell out a little more the nature and basis of its skepticism. However, it is another matter entirely for it to fail so completely even to attempt to regulate the content of cards and the conduct of union solicitors. The Board has upheld cards which on their face seem calculated to mislead. In *S.N.C. Mfg. Co.*,<sup>23</sup> the second line of the card—the only line of full capitals—carried the statement, "I want an NLRB election now." There seems to me very little justification for failing to say squarely that, to es-

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21. See the discussion in *Shelby Mfg. Co.*, 155 N.L.R.B. No. 39, 2 LAB. REL. REP. (60 L.R.R.M.) 1346 (Nov. 1, 1965). For a decision in which cards were invalidated by the Board, see *Family Bargain Centers, Inc.*, 160 N.L.R.B. No. 66, 2 LAB. REL. REP. (63 L.R.R.M.) 1063 (Aug. 31, 1966).

22. This catalogue excludes the much-disputed *Bernel Foam* doctrine. One good discussion may be found in Comment, 113 U. PA. L. REV. 456 (1965). *Bernel Foam* has been uniformly upheld by the courts of appeals, see *NLRB v. Frank C. Varney Co.*, 359 F.2d 774 (3d Cir. 1966), and cases there cited, and in my judgment there is no substantial basis for dispute regarding its validity. Objections about giving the union "two bites at the apple" hardly seem to prove much; after all, when the other fellow has put a worm in the apple, it is hardly going very far to allow a second bite. (This is not to say that there is not a problem raised by the issuance of an order requiring an employer to recognize a union that has lost an election; see the last paragraph of note 64, *infra*).

23. 147 N.L.R.B. 809 (1964), *enforced sub nom.* *IUE v. NLRB*, 350 F.2d 791 (D.C. Cir. 1965).

tablish majority status, such a card may not be used at all; the loss to the union is minimal, and the safeguard against misunderstanding and misrepresentation is substantial.

Where the language of the cards is unambiguous, the Board, under its well-known *Cumberland Shoe*<sup>24</sup> doctrine, will apparently not entertain any claim of misunderstanding on the employees' part and will find misrepresentation sufficient to vitiate a card only when the solicitor has said in so many words that its only purpose is the securing of an election. Here the ground is slippery indeed, for we are dealing with statements made in litigation occurring months after the events. For example, the Sixth Circuit upheld the validity of the cards challenged in the *Cumberland* case, relying (quite properly in my view) on the fact that the employees' testimony was given in response "to leading questions propounded by [employer] counsel, upon cross-examination, as to whether they were told that the purpose of the cards was to secure an election."<sup>25</sup> Obviously, an affirmative answer to such a question does not establish real misrepresentation. Contrast, however, the practice upheld by the Board—and by a majority of the Second Circuit over Judge Timbers' strong dissent—in *Gotham Shoe*,<sup>26</sup> where several employees testified to being told such things as "they wanted to get enough signatures on the cards so that if they got a majority of signatures, they could have an election," "they needed a certain per cent of the employees to sign cards in order to get a vote," and "signing of the card was for the purpose of getting an election and was not itself a vote." Here, there is more than a suspicion that the employees in question were misled, whether deliberately or not. Yet the Board was content to note that the statements could be parsed consistently with the idea that one purpose of the cards was to secure bargaining rights.<sup>27</sup> Moreover, the Board seems almost never to go beyond invalidating a particular card, once it finds misrepresentation or coercion.<sup>28</sup> As a general matter, this may be unobjectionable, but there are certainly some circumstances which call for a broader reaction. On some occasions, invalidation of all cards obtained by a particular solicitor, or obtained on a particular form of card, or secured following a particular letter found to misrepresent the impact of the cards,

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24. *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963), *enforced*, 351 F.2d 917 (6th Cir. 1965).

25. *Id.* at 919, quoting from the Board opinion.

26. *NLRB v. Gotham Shoe Mfg. Co.*, 359 F.2d 684 (2d Cir. 1966).

27. See also *Mutual Indus., Inc.*, 159 N.L.R.B. No. 73, 62 L.R.R.M. 1477 (June 21, 1966) (organizer told employee that he needed a signed card in order to enter the plant to solicit other employees).

28. See *Snow & Sons*, 134 N.L.R.B. 709, 710 (1961).



is warranted.<sup>29</sup> More broadly, the Board should be less intent on a card-by-card adjudication of union guilt or innocence and more concerned with an overall evaluation of the atmosphere in which employees were asked to register their choice. The Board's function here is not unlike that which it discharges in ruling on challenges to an election, and its present stubbornness in dealing with cards only encourages broader disapproval and controversy. Surely methods are available to accommodate the Board's just concerns regarding the problems of litigating employees' understanding and intent with its obligation to discourage abuses of the system.

### III. THE EFFECT OF EMPLOYER UNFAIR LABOR PRACTICES ON THE ISSUANCE OF A BARGAINING ORDER

#### A. *Employer Coercion as Proof of Bad Faith*

The Board has been most successful in the courts of appeals in winning approval of its fairly uniform practice of basing a finding of lack of good faith doubt on employer unfair labor practices committed during the organizational campaign. The finding is said to be one of fact—did the employer doubt the union's majority?—and once the finding is made and upheld, the bargaining order can be routinely imposed and sustained as the obvious remedy for an unlawful refusal to bargain. While it may be wishful thinking to hope for the abandonment of a winning formula, it seems clear to me that the Board's rationale for its reliance on employer unfair labor practices should be discarded. The question is characteristically put as whether the employer had a good faith doubt of the union's majority, or whether he rejected the collective bargaining principle and withheld recognition in order to gain time within which to undermine the union's majority.<sup>30</sup> I must confess to a total inability to understand in what sense relevant here an employer is obliged to accept the collective bargaining principle. Of course he is enjoined to bargain in good faith (when he is obliged to bargain at all), and he must refrain from discrimination or coercion affecting employee attitudes toward collective bargaining. But what has that got to do with his state of mind or motivation when it comes to his response to an initial demand for recognition? It certainly cannot be unlawful for him to want to defeat the union at the polls and thereby obtain a lawful ground for rejecting collective bargaining. If an employer is to be permitted, first, to insist on an

29. *E.g.*, *Bauer Welding & Metal Fabricators, Inc. v. NLRB*, 358 F.2d 766 (8th Cir. 1966).

30. See, *e.g.*, the quotation from *Aaron Bros.* in the text accompanying note 17 *supra*.

election, and then to campaign against the union in that election, it is perfectly clear that he is being permitted to reject the collective bargaining principle so long as his employees do not, by voting for the union, oblige him to accept it. It simply encourages hypocrisy to permit an employer to acknowledge his doubts, but not his hopes.

Similarly, the notion that an employer may not deny recognition "in order to gain time during which to undermine the union's majority" is an unfortunate one. If taken seriously, it would result in deeming it irrelevant whether the employer's opposition to unionization took lawful or unlawful form, and regarding as critical the question whether the employer was seeking to dissipate an existing majority or to prevent the union from obtaining one. Yet precisely the reverse situation seems to prevail. The Board has explicitly declined to rely on lawful anti-union conduct as a ground for inferring that an initial refusal to recognize was unlawful.<sup>31</sup> But the taking of this step, unless no more than an obeisance to the language of section 8(c),<sup>32</sup> implies that a legitimate purpose of the election is not simply to ascertain the validity of the union's initial claim to represent a majority, but also to test the durability of that majority in the crucible of a pre-election campaign. Once that fact is acknowledged, it seems obvious that it is entirely irrelevant to the legitimacy of the employer's conduct whether the union initially commanded a majority, which it hoped to hold through a campaign, or began with something less than fifty per cent support, which it hoped to augment.

#### B. *The Bargaining Order as a Remedy*

As suggested above,<sup>33</sup> I believe that the Board has recently begun to acknowledge that the rationale—and perhaps the scope as well—of its reliance on unfair labor practices may be misplaced. First, recent decisions have emphasized the function of the bargaining order as one of remedy where employer interference has vitiated the reliability of the election as an indication of the uncoerced wishes of the employees.<sup>34</sup> Second, in a few cases—the *Hammond & Irving* decision<sup>35</sup> is the best-known—the Board has declined, de-

31. *Becker County Sand & Gravel Co.*, 157 N.L.R.B. No. 49, 61 L.R.R.M. 1407 (March 10, 1966).

32. Section 8(c) of the NLRA provides:

The expressing of any views, . . . or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.

61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1964).

33. See text accompanying note 20 *supra*.

34. See the passage quoted from *Aaron Bros.* in the text accompanying note 17 *supra*.

35. *Hammond & Irving, Inc.*, 154 N.L.R.B. 1071 (1965) (interrogation of six of the 110 employees in unit). See also *Clermont's, Inc.*, 154 N.L.R.B. 1397 (1965).

spite the presence of unfair labor practices, to infer an unlawful motive for the original refusal to recognize. It has recently emphasized the flexibility of its application of the "good faith" test,<sup>36</sup> a flexibility which would be entirely appropriate (and would seem less capricious) were the question deemed to be the remedial adequacy of a rerun election as distinguished from a bargaining order. The agency has been given wide discretion over choice of remedy, but on such a shift in rationale it would need to persuade the courts of appeals that the stronger remedy was not chosen routinely or simply as a deterrent,<sup>37</sup> but was appropriate in light of the specific setting of the particular acts of illegality involved. This would be all to the good, in my view, for just such considerations ought to determine the result now. A parallel should be recognized to those cases in which a bargaining order is sought as a remedy for section 8(a)(1) or 8(a)(3) violations alone; indeed, it should be acknowledged that, where an election has been held, the question whether there was an earlier improper refusal to recognize is a totally abstract one and should be irrelevant to the result.<sup>38</sup> The Second Circuit's influential *Flomatic* decision illustrates how attention would be shifted from the meaningless issue of employer motivation and good faith to the central one of the nature and extent of his violations, and their impact on the employees.<sup>39</sup>

In addition, both Board and courts would, one would hope, be encouraged to focus more fully on the problem of the rerun election and the importance of searching for imaginative means

36. *Aaron Bros.*, 158 N.L.R.B. No. 108, 62 L.R.R.M. 1160 (May 25, 1966).

37. *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651, 658 (1961) (Harlan, J., concurring); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940).

38. See *Priced-Less Discount Foods, Inc.*, 157 N.L.R.B. No. 95, 61 L.R.R.M. 1505 (Mar. 28, 1966), and *77 Operating Co.*, 160 N.L.R.B. No. 68, 2 LAB. REL. REP. (63 L.R.R.M.) 1057 (Sept. 7, 1966), where the Board found it unnecessary to determine the substantive § 8(a)(5) issue; *Dayco Corp.*, 157 N.L.R.B. No. 117, 61 L.R.R.M. 1550 (April 5, 1966), where the trial examiner, whose conclusions were adopted by the Board, treated interchangeably cases basing a bargaining order on a finding of a refusal to bargain and those ordering bargaining without such a finding; and *Bishop & Malco, Inc.*, 159 N.L.R.B. No. 106, 62 L.R.R.M. 1498 (June 24, 1966), where the Board, having found a violation of § 8(a)(5), went on to hold alternatively that a bargaining order would be warranted as a remedy even if it were determined that the employer had a bona fide doubt of the union's majority status.

39. *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965), where the court reversed a post-election bargaining order to remedy a § 8(a)(1) violation:

[C]ard majorities must by necessity be deemed evidence of the status quo ante where the employer's conduct has been so flagrantly hostile to the organizing efforts of a union that a secret election has undoubtedly been corrupted as a result of the employer's militant opposition.

Where, as here, there was no such sustained broad-gauged campaign but only the instance of a somewhat overstated reply to the union's charge, a bargaining order based on authorization cards in lieu of a secret election is less easily justified.

But cf. the same court's decision in *Irving Air Chute Co. v. NLRB*, 350 F.2d 176 (2d Cir. 1965), distinguishing *Flomatic* largely on the ground of lack of a § 8(a)(5) violation.

to ensure that the impact of employer violations is dissipated. The Board has taken a few steps in this direction, as in the well-known *J. P. Stevens* case,<sup>40</sup> where the employer was required to mail copies of the Board notice to each of its employees in two states, to give the union reasonable access to company bulletin boards for the posting of its own notices, and to convene meetings of employees during working time, at which the Board notice would be read. Similarly, in *H. W. Elson*,<sup>41</sup> the company was ordered to give union representatives the opportunity to address the employees on company time and property. By explicitly facing up to the question of the adequacy of a rerun election, and the possible development of means of enhancing its adequacy, the justification for a bargaining order in particular types of cases can be more soundly established, while in those cases where it is found not justified, the obligation to provide other means might perhaps be recognized and more fully met.<sup>42</sup>

In speaking as I have, I have assumed that, in at least some cases, a bargaining order could be upheld as a remedy. That notion has been attacked, on the ground that it penalizes the employees as well as the employer and sacrifices the statutory rights of the former because of the other's disregard of the law.<sup>43</sup> Such views seem to me to be the product of an obsession with the infirmities of authorization cards, and a romanticizing of the validity of an election. Cards have been used under the act for thirty years; the Supreme Court has repeatedly held that certification is not the only route to representative status;<sup>44</sup> and the 1947 attempt in the House-passed Hartley Bill to amend section 8(a)(5) to require employer recognition of certified unions only was rejected by the conference committee that produced the Taft-Hartley Act.<sup>45</sup> No amount of drum-beating should be permitted to overcome, without legislation, this

40. *J. P. Stevens & Co.*, 157 N.L.R.B. No. 90, 61 L.R.R.M. 1437 (March 22, 1966).

41. *H. W. Elson Bottling Co.*, 155 N.L.R.B. No. 63, 60 L.R.R.M. 1381 (April 10, 1965).

42. It is probably not coincidental that *Stevens* and *Elson* were cases in which the Board thought itself precluded from issuing an order to bargain because the union had never achieved majority status. See also *Scotts Inc.*, 159 N.L.R.B. No. 146, 62 L.R.R.M. 1543 (June 30, 1966); *Crystal Lake Broom Works*, 159 N.L.R.B. No. 30, 62 L.R.R.M. 1407 (June 15, 1966). For an argument suggesting that a bargaining order may be appropriate in such a situation, see Bok, *The Regulation of Campaign Tactics in Representation Elections Under the NLRA*, 78 HARV. L. REV. 38, 134-39 (1964); cf. Note, 112 U. PA. L. REV. 69, 83 (1963).

43. See, e.g., Comment, 75 YALE L.J. 805, 839-44 (1966).

44. *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956); *Brooks v. NLRB*, 348 U.S. 96 (1954); *Franks Bros. v. NLRB*, 321 U.S. 702 (1944).

45. See H.R. 3020, 80th Cong., 1st Sess. 21, 81, § 8(a)(5) (May 13, 1947) [1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 51 (1948)] (the Hartley Bill); cf. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 41 (June 3, 1947) [1 NLRB LEGIS. HIST. 545].

history. As for the validity of elections, obviously the consistent affirmance of the appropriateness of compelling bargaining with an uncertified union bespeaks an awareness that elections too have some relevant infirmities. The problem is even more acute in the case of a rerun election made necessary by employer coercion or discrimination. It is important to bear in mind that an election is a far better cure for union than for employer misdeeds.<sup>46</sup> And the fact remains that, in a regime where there has been just concern over the adequacy of the remedial scheme,<sup>47</sup> the simple notion of doing over again what has worked badly once is hardly a reassuring method of undoing the effects of the abortive attempt.

Nor can one responsibly invoke here the principle that inadequacies in one area of the law should be treated directly, rather than by warping others—that two wrongs do not make a right. We are talking about a single concern: remedies when the election process has been corrupted through coercion or discrimination. 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 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. Perhaps, if the time comes when the Board has developed practical and workable rules regulating rerun elections, and they have been upheld by the courts, and are applied in more than the exceptional case, it will be appropriate to say that

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46. Since the union's continued influence over the job and fate of the employees is largely contingent on its prevailing at the polls, an employee can ordinarily shake free of its power by voting “no.” (He will usually find the isolation and anonymity of the polling booth sufficient to insulate him from union-generated prior pressures). A “yes” vote, however, does not act as a similar insulator against employer pressures; the employee is not voting for or against continuing his association with the employer, and the latter's displeasure at the outcome of the vote will be a matter of continuing concern to the employee.

47. See, e.g., SUBCOMMITTEE ON NLRB, HOUSE COMMITTEE ON EDUCATION AND LABOR 87th Cong., 1st Sess., *Administration of the Labor-Management Relations Act by the NLRB* 20-24 (1961) (The Pucinski report); Bok, *supra* note 42, at 64-65, 124-25; Note, *The Need for Creative Orders Under Section 10(c) of the NLRA*, 112 U. PA. L. REV. 69 (1963).

bargaining orders should not be used as a remedy. It seems plain that that time is not the present. Indeed, it would not be surprising if it were the use of the bargaining order which prompted the development of other remedies. It is not uncommon in legal regulation for those who have been unwilling to take even a single substantial step to agree to do so once others begin to insist on taking two.

#### IV. THE ASSERTED EMPLOYER RIGHT TO AN ELECTION

It is appropriate to face last the problem which raises the most fundamental and controversial questions of underlying policy, although—because of the prevalence of employer unfair labor practices during an organizing campaign—its practical importance may be substantially less. I refer of course to the right of an employer faced with a demand for recognition to insist on an election in the first place. I have suggested earlier that the Labor Board, after giving some indication of a rejection of any such general right, has recently taken the view (or one which is in practice its near equivalent) that an employer may insist on an election.<sup>48</sup> This position is favored by nearly everyone who has spoken to the question,<sup>49</sup> and it can only be some deep-seated perversity that impels me to swim against so strong a current. Since I am about to do so, however, I should be careful not to over-state my position. I am not so much convinced that an employer should *not* be permitted to insist on an election as I am wholly unconvinced by the arguments that I have seen or read in support of such a right. Do I fairly summarize the case for an employer's right to an election in these terms? What-

48. The cases discussed above (see notes 9-15 *supra* and accompanying text) suggest that an employer who meets a union demand for recognition with a laconic expression of scorn for authorization cards will not be held to have lacked a good-faith doubt. Hence, I say that he may insist on an election. *H. & W. Constr. Co.*, 161 N.L.R.B. No. 77, 2 LAB. REL. REP. (63 L.R.R.M.) 1346 (Nov. 13, 1966) the most recent decision, warns the garrulous and the unwary that it is only the assertion of a doubt regarding present majority, protected as it is by the lack of any requirement of objective substantiation, that confers this immunity. Apparently, an employer may not "waive" this doubt, and rely instead on a faith or hope that employees conceded to be presently in favor of unionization will (through lawful means) come to vote against it. See Member Zagoria's dissent in *H. & W.*, 2 LAB. REL. REP. (63 L.R.R.M.) at 1349-50. (Perhaps the Board will construe *H. & W.* more narrowly, and hold that an employer may rely as well on this latter variety of doubt, provided he voices it in response to the union demand. Such a proviso would have little appeal, but it seems more troublesome yet to draw a line permitting an employer to obtain a future secret vote if he thinks a present secret vote would contradict a present card-check but not if he thinks that only a future secret vote would have that effect.)

49. See 111 CONG. REC. 19308 (daily ed. Aug. 4, 1965) (Senator Javits); 111 CONG. REC. 15124 (daily ed. June 29, 1965) (Senator Fannin); SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 260 (1965) (Prof. Bok). If I read the views of Secretary of Labor Wirtz correctly, perhaps I can claim him as partial support for what follows. See *Hearings*, *supra* note 2, at 19-26 (especially p. 25).

ever the situation earlier, since 1947 it has not been the policy of the National Labor Relations Act to foster and promote union organization, and the Labor Board goes beyond its authority when it seeks, as it has been accused of doing, to "force people into unions." Even if one were to acknowledge that authorization cards were "validly" obtained, in the sense that an election held on the very day of a demand for recognition would produce a union majority—an acknowledgement that would not be routinely warranted—there is an interest in withholding the polling of employees until there has been a campaign. First of all, the choice of a bargaining representative is a sufficiently weighty decision that it should be made with some ceremony.<sup>50</sup> Cards can be collected one at a time, in small groups, or at a meeting, as best suits the tactics of the organizer. There is no assurance that an employee, even if he freely believes at the moment that he wishes to have the union represent him, "really" has made a measured decision. The trappings of the secret ballot election—government personnel, ballot boxes, and so forth—serve in part to impress upon the employee that he is not simply picking Miss Rheingold of 1967. Beyond that, the employees, solicited in whatever manner best suits the union, do not ordinarily have the opportunity to consider, or even be informed about, possible disadvantages to them of collective bargaining or of representation by the particular union involved. The employer, because of financial and other interests in opposing unionization, serves a public function in bringing relevant considerations to the employees' ears. Thus, employee sentiment registered after a campaign more truly reflects their free choice than does an affirmative response to what has been called "instant unionism" through the solicitation of cards.<sup>51</sup>

I must confess that the foregoing reasoning—or any alternative formulation I have seen—leaves me largely unpersuaded.<sup>52</sup> It seems

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50. See Mr. Justice Frankfurter's excellent discussion of the rationale of the "certification bar" in *Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954).

51. Compare the somewhat similar argument in favor of permitting a minority union to picket prior to an election: "Insistence upon an election [prior to enjoining picketing] is a matter of jurisdictional propriety in the sense that . . . an election is much the most reliable test of employee sentiment, but it also goes to the meaning of freedom of choice." Cox, *Some Current Problems in Labor Law: An Appraisal*, 35 L.R.R.M. 48, 56 (1954).

52. I think it clear that the rationale underlying the Board's current view is *not* that summarized in the preceding paragraph of the text. The uncertain scope of *H. & W. Construction*, see note 48 *supra*, makes precision difficult, but the Board is apparently reluctant to accept the notion that a campaign is a desirable prelude to an expression of employee choice. It rather seems concerned with the purity of heart of the employer: Was he honestly uncertain where his duty lay? Considering the elusiveness of the many relevant factual issues and the controversiality of the concept of "uncoerced majority," that concern seems the least weighty. One is not branded

to me to rest on a serious misstatement of the attitude of the statute toward the spread of collective bargaining and on an inappropriate romanticizing about employee free choice and its relevance to what actually goes on when employees are asked to vote for or against unionization.

As to the first—a matter which is or ought to be of the deepest political controversy—it is simply not so that prior to 1947 the act sought to encourage collective bargaining but that it does so no more. All that happened in 1947 was that Congress gave recognition to two competing values: the interests of employees in rejecting collective bargaining, and of employers in opposing unionization through noncoercive speech. Surely no lawyer would suggest that a legislature must choose between supporting a principle, whatever the cost, and rejecting it entirely. Were any such notion to be taken seriously, Congress would never have passed a single piece of labor legislation. Even the Wagner Act contained an implicit limitation on the desire to foster collective bargaining, in the form of the principles of majority rule and elections.<sup>53</sup> In 1947, the interest in refraining from concerted activities was raised to the status of a legal right, as against certain forms of union restraint and coercion. In addition, recognition was given to the employer's interest in seeking, through speech, to influence the employees' choice. None of this can be used to gainsay the fact that the encouragement of collective bargaining remains one goal of this complex, multi-contradictory statute.<sup>54</sup> While Congress amended the statute's statement of findings and policies, it continues to be the declared national policy "to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . ."<sup>55</sup> Obviously, many people

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a criminal, nor apparently is he disgraced, by being adjudged a violator of § 8(a)(5), and the relief is prospective only (except in those cases in which replaced strikers who have unsuccessfully resorted to self-help in support of a recognition demand seek back-pay as unfair labor practice strikers, and there the employees have most convincingly demonstrated their adherence to unionization). It seems clear to me that the scope of permitted employer insistence on an election should be either broader or narrower than it now appears to be.

53. Cf. *Fur Workers Union (CIO) v. Fur Workers Union (AFL)*, 105 F.2d 1 (D.C. Cir. 1939), *aff'd per curiam*, 308 U.S. 522 (1930); COX, *LAW AND THE NATIONAL LABOR POLICY* 23 (1960).

54. The continued recognition given to the interest of unions in expanding organization is evidenced by the *Curtis Bros.* decision, *NLRB v. Drivers Local 639*, 362 U.S. 274 (1960), and, indeed, by the multiple ambivalences of the more-recently enacted § 8(b)(7).

55. NLRA § 1, as amended, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1964). Note that this aim is stated as an additional objective to that of "protecting the exercise by workers of full freedom of association . . . ." Note also the congressional espousal of the aim of "stabilization of competitive wage rates and working conditions . . . ."



today—perhaps a majority—do not believe that our national labor policy should encourage collective bargaining, to whatever degree. I am not seeking to argue that question here; I am asserting that such a policy was central to the statute as originally enacted, and that it remains in the act today, resting alongside competing principles.

In speaking of the election process as an enhancement of employee free choice, we must all recognize the danger of arguing from a model which cannot be universally valid and may not even be typical. For example, employees may not know that a particular union sets great store by area-wide uniformity of standards, and that in designating it as their representative they may be subordinating their own interests to those of employees in the industry as a whole. Or—to choose another example—employees may not know of unsavory practices carried on by leaders of the local or international union, or of particular political or other public aims espoused or financed by the union. In cases such as these, it may be appropriate to see in an election campaign a contribution to a better-informed free choice.<sup>56</sup> However, even if an election is a requisite to the disclosure of such information,<sup>57</sup> I wonder what percentage of the cases potentially coming before the Board can be said to fit this model. After all, the safeguarding of employee free choice (like the promotion of collective bargaining) has not always been a decisive factor in the definition of permissible campaign practices, and it seems to me dangerously misleading to equate what is lawful campaigning with what promotes employee free choice. The problem is only in part that of coping with delay, veiled threats, subtle coercion and the like, or of section 8(c) or its interpretation.<sup>58</sup> The more fundamental point is that employees do not make choices about unionization for the same reasons, or in the same con-

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56. *But cf.* Bok, *supra* note 42, at 88-89, suggesting grounds for doubting the influence of such factors on the employees.

57. This assumption is entirely true only where there is almost literally a case of "instant unionization." Where the employer has a pre-demand awareness of an organizing effort, his decision to delay announcement of information damaging to the union until a petition is filed is a tactical choice.

58. For reliance on factors like these to oppose the right to insist on an election, see COX, *LAW AND THE NATIONAL LABOR POLICY* 41-42 (1960); SOUTHWESTERN LEGAL FOUNDATION, *LABOR LAW DEVELOPMENTS* 270-75 (1965). Recent improvements in the processing of representation proceedings, and more restrictive regulation of employer speech, see Bok, *supra* note 42, tend to alleviate these factors somewhat. Might the Board not consider, if an employer opportunity to campaign is thought desirable, acknowledging a right to insist on an election provided certain conditions were met, *e.g.*, an employer petition, agreement on a prompt election, consent to reasonable restrictions on the volume and content of campaign propaganda, prompt adjudication of challenges to disciplinary action? Our traditional hostility to Board law-making (whether by rule or decision) inhibits such developments, and makes more difficult a sensitive resolution of difficult issues.

text, that they join veterans' organizations, political parties, churches, or bowling leagues. If they are supporting collective bargaining in an attempt to exert increased economic pressure against their employer, he might influence their decision by arguing—this is called “pointing out the disadvantages” of organization—that such pressure will be ineffectual or self-defeating, or will be met by counter-presures which might leave the employees worse off than before. I am thinking, obviously, of the employer's right under the law to refuse to make concessions, to take a strike, to lock out, and to subject strikers to the risk of permanent loss of their jobs to replacements. The fact is that we have a dual regime in our labor law: We attempt to insulate employees from economic pressure affecting their decision whether or not to bargain collectively, but we build our scheme of collective bargaining on the foundation of economic power.<sup>59</sup> The governing principle, to adapt Professor Cox's happy aphorism to this context, is: “To the lion belongs the lion's share.”<sup>60</sup> We delude ourselves, however, when we begin to think of these compartments as watertight, and the election campaign is the spot at which the point of leakage is to be found. The lawful coercion of collective bargaining must affect the intended free choice of the voters in a Labor Board election.

Again, understand that I am not questioning our concept of collective bargaining as one of economic warfare, nor even denying the implications of that fact for the lawfulness of employer “predictions” in organizing campaigns. But a “free” choice connotes one protected from coercive pressures, not merely one fully informed of them, and it makes a mockery of the notion of free choice to invoke it as the interest which clamors for expression via an employer anti-union campaign. Perhaps our national labor policy should afford employers an opportunity to persuade their employees to abandon an earlier preference for collective bargaining.<sup>61</sup> But such a view must find its justification in the strength of the interests of the employer himself,<sup>62</sup> or in a felt need to protect employees from the

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59. See *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

60. Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 163 (1957).

61. When I speak of such an “earlier preference,” I assume that the rules regulating the gathering of authorization cards are the product (as they now are not, see text accompanying notes 23-29 *supra*) of a sustained and discriminating effort to keep abuses and inadequacies within acceptable limits. If this condition is met, employees are not being “forced into unions.”

62. Cf. Secretary Wirtz's views, in *Hearings*, *supra* note 2, at 25. The argument that § 8(c) guarantees an employer an opportunity to campaign prior to being compelled to bargain with a union is one contention which could be made within this framework. The argument that the NLRA is entirely indifferent to the spread of unioniza-

hazards of letting their militancy outrun their power.<sup>63</sup> It should not be permitted to wrap itself in the attractive mantle of our traditional desire to protect and nurture associational self-determination.<sup>64</sup>

tion, and that, therefore, in fairness each side should have its turn to play the game, is another.

63. Cf. Bok, *supra* note 42, at 74-82: "[T]he employer should be permitted to stress . . . disadvantages [of unionization] so long as the consequences he mentions are ones which may actually and lawfully take place if the union is voted in." *Id.* at 79, discussing rules regulating election propaganda.

64. I will do no more than sketch in a concluding footnote my present thoughts regarding the balance of advantage which the foregoing considerations seem to me to produce, for they are tentative and rest on assertions one does not often see or hear publicly debated. The interests suggested in note 62 seem to me unsupported by the statute as enacted. (On § 8(c), I rely on its language and the failure to amend §§ 8(a)(5) and 9(a), see note 45 *supra* and accompanying text; I think a constitutional objection cannot be seriously maintained, in part for reasons suggested by note 57 *supra*). As a matter of equity—and it must be conceded that political-economic preferences are a large ingredient of one's response to this issue—I am not persuaded that an employer is being treated unfairly if he is denied a general right to a post-demand election campaign. The consideration referred to in the text accompanying note 63 (protecting employees from improvident militancy) is more troublesome, and deserves the fullest exploration. My present inclination to discount it reflects in part the feeling that there may be an aspect of the self-fulfilling prophecy in rules motivated by a desire to be sure that employees realize their vulnerability; in part it reflects exasperation at a public policy that seems to have lost the capacity even to ask whether lessened vulnerability might be an alternative solution to heightened awareness.

These views, more fully spelled out, better supported, and not persuasively rebutted, would lead one to espouse a rule permitting an employer faced with a demand for recognition based on a proper showing, see note 61 *supra*, of cards to withhold recognition only on the basis of a specific and objectively reasonable basis for doubting the validity of the showing, much as in the case of an employer refusal to renegotiate an expiring contract, e.g., *Laystrom Mfg. Co.*, 151 N.L.R.B. 1482 (1965). (The General Counsel would of course have to prove union majority status, unsupported by any presumption). The Board explicitly rejected such a rule, reversing the trial examiner, in *H. & W. Constr. Co.*, 161 N.L.R.B. No. 77, 2 LAB. REL. REP. (63 L.R.R.M.) 1346 (Nov. 13, 1966). *But cf.* the court of appeals' formulation in *Snow & Sons*, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

I should add that such a view is not, in my judgment, inconsistent with a refusal to issue a post-election bargaining order except as a remedy, see note 38 *supra* and accompanying text. Whatever the initial availability of unfair labor practice proceedings, if a union has chosen to go through an election, and has lost it, the case is different. To say that the election was invalid is not to say that it never occurred, nor that the union should be deemed to have representative status. The question is whether a new poll is or is not a preferable way of now resolving the question. Even if one were to say that the election was tainted *ab initio*, as it were, by being made necessary only by an unlawful refusal to bargain, it is not, I think, a return to *Aiello*, see note 16 *supra*, to deem it of significance that a petition was filed, and that the employees were polled and voted to reject the union. The consequence is not to say that the § 8(a)(5) charge is "waived"; it is to say that it does not effectuate the policies of the act to issue a bargaining order unless, in light of all that happened, it is appropriate as a remedy.