

Michigan Law Review

Volume 54 | Issue 1

1955

Labor Law - Certified Union's Loss of Majority Status During Certification Year and Without Fault of Employer as Justification for Refusal to Bargain

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Recommended Citation

Eugene Alkema S.Ed., *Labor Law - Certified Union's Loss of Majority Status During Certification Year and Without Fault of Employer as Justification for Refusal to Bargain*, 54 MICH. L. REV. 111 (1955).

Available at: <https://repository.law.umich.edu/mlr/vol54/iss1/5>

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LABOR LAW — CERTIFIED UNION'S LOSS OF MAJORITY STATUS DURING CERTIFICATION YEAR AND WITHOUT FAULT OF EMPLOYER AS JUSTIFICATION FOR REFUSAL TO BARGAIN — The "one year certification rule" was originated in the early years of the National Labor Relations Board and has been consistently applied by it.¹ Essentially it provides that after certification an employer is required to bargain with the certified union for a reasonable time, which is usually one year² in the absence of "unusual circumstances." The certified union is conclusively presumed to represent a majority of employees in the unit for that period, the presumption afterward becoming rebuttable.³ This system of successive conclusive and rebuttable presumptions represents a compromise between the competing policies of giving a union time to establish a workable bargaining relation with the employer free from outside pressures and allowing a majority of employees to be represented by the bargaining agent of their own choice.

It is well established that if the employer causes the union to lose its majority standing by the commission of unfair labor practices, such as intimidating or interrogating employees or assisting the organizational efforts of an outside union, the loss of majority status by the inside union is no defense to an unfair labor practice charge of refusal to bargain.⁴ This same principle holds true where the only sin of the employer is his refusal to bargain and the loss of

¹ Whittier Mills Co., 15 N.L.R.B. 457 (1939); Appalachian Electric Power Co., 47 N.L.R.B. 821 (1943); Anderson Mfg. Co., 58 N.L.R.B. 1511 (1944); Mengel Co., 80 N.L.R.B. 705 (1948); Sexton Welding Co., 100 N.L.R.B. 344 (1952); Ray Brooks, 98 N.L.R.B. 976 (1952); Henry Heide, 107 N.L.R.B. 1160 (1954).

² While stated in terms of a "reasonable period," one year is almost automatically found "reasonable." But in *Globe Automatic Sprinkler Corp.*, 95 N.L.R.B. 253 (1951), eleven months and one week was found to be a "reasonable time," the Board saying that what is reasonable will depend upon the facts of the particular case.

³ *Toolcraft Corp.*, 92 N.L.R.B. 655 (1950).

⁴ *NLRB v. Bradford Dyeing Assn.*, 310 U.S. 318, 60 S.Ct. 918 (1940); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 64 S.Ct. 830 (1944); *Dallas Concrete Co.*, 102 N.L.R.B. 1292 (1953).

majority status occurs, subsequent to that refusal.⁵ This is simply because the loss of majority status subsequent to the commission of the admitted unfair refusal to bargain is irrelevant to the question of whether an order against the unfair practice should be issued or enforced, as the case may be.

The one year certification rule is used to find that a refusal to bargain is itself an unfair labor practice. In the two situations just noted, however, the rule is not needed, for the existence of the unfair practice can be established independently of it. The only instance in which the rule is applied is when the employer refuses to bargain with a certified union after a majority of employees in the bargaining unit have repudiated it of their own free will and without the intervention of the employer. The Board has consistently applied the rule to find such a refusal an unfair labor practice,⁶ and this has generally,⁷ though not uniformly,⁸ been upheld by the courts. The Supreme Court has recently approved the rule in this context.⁹ It is the writer's opinion that this application of the rule is questionable.

I. Analysis of Arguments in Support of the Rule

Basically, four arguments are urged on behalf of the rule. (1) When Congress amended the National Labor Relations Act in 1947 to allow employees to petition for decertification, it limited such elections to one per year. This formal method for revocation of a union's bargaining authority became the only way for employees to withdraw the union's power to represent them.¹⁰ It is argued

⁵ *Franks Brothers Co. v. NLRB*, 321 U.S. 702, 64 S.Ct. 817 (1944); *NLRB v. P. Lorillard Co.*, 314 U.S. 512, 62 S.Ct. 397 (1942); *International Assn. of Machinists v. NLRB*, 311 U.S. 72, 61 S.Ct. 83 (1940); *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 73 S.Ct. 826 (1950). The Board recognizes that there may be factors other than the refusal to bargain contributing to defection from the union, but it will not try to "disentangle" them. *NLRB v. Andrew Jergens Co.*, (9th Cir. 1949) 175 F. (2d) 130.

⁶ *Botany Worsted Mills*, 41 N.L.R.B. 218 (1942); *Vulcan Forging Co.*, 85 N.L.R.B. 621 (1949); cases cited in note 1 *supra*.

⁷ *NLRB v. Botany Worsted Mills*, (3d Cir. 1943) 133 F. (2d) 876; *NLRB v. Brooks*, (9th Cir. 1953) 204 F. (2d) 899; *NLRB v. Appalachian Power Co.*, (4th Cir. 1944) 140 F. (2d) 217; *NLRB v. Sanson Hosiery Mills*, (5th Cir. 1952) 195 F. (2d) 350; *NLRB v. Henry Heide*, (2d Cir. 1955) 219 F. (2d) 46.

⁸ *NLRB v. Vulcan Forging Co.*, (6th Cir. 1951) 188 F. (2d) 927; *Mid-Continent Petroleum Corp. v. NLRB*, (6th Cir. 1953) 204 F. (2d) 613; *NLRB v. Inter-City Advertising Co.*, (4th Cir. 1946) 154 F. (2d) 244. See also *NLRB v. Poultry Enterprises, Inc.*, (5th Cir. 1953) 207 F. (2d) 522; *NLRB v. Prudential Ins. Co.*, (6th Cir. 1946) 154 F. (2d) 385.

⁹ *Brooks v. NLRB*, 348 U.S. 96, 75 S.Ct. 176 (1954).

¹⁰ *NLRB v. Sanson Hosiery Mills*, (5th Cir. 1952) 195 F. (2d) 350; *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 70 S.Ct. 826 (1950); *Bishop, McCormick and Bishop*, 102 N.L.R.B. 1101 (1953); *United States Gypsum Co.*, 90 N.L.R.B. 964 (1950); *Brooks v. NLRB*, 348 U.S. 96, 75 S.Ct. 176 (1954).

that if an informal repudiation, as by a petition signed by a majority of employees, could have the same effect as a decertification election, the limitation on the use of the decertification procedure would become meaningless. But this argument proves too much. Employees can petition for a decertification election if a union is "certified or is currently recognized by their employer."¹¹ It has been held that if the members of a recognized but non-certified union informally revoke the union's bargaining authority, an employer does not violate section 8 (a) (5) by refusing to bargain with it thereafter.¹² Thus in a case where Congress expressly allowed the use of a decertification proceeding, it is not the only method of withdrawing a union's authority. Also, the Board, can, on request or on its own motion, revoke its prior certification without conducting a decertification election.¹³ Further, the one year certification rule itself provides that an employer can lawfully refuse to bargain with a certified union within the certification year if there are "unusual circumstances" present.¹⁴ It is, therefore, apparent that Congress, the NLRB, or the courts do not require the formal decertification proceeding to revoke a union's authority in every case where it might be used. The logical inference is that other valid ways of withdrawing representative authority from a union, even a certified union, are available to the employees.

(2) A Board-supervised secret ballot best indicates the free choice of the employees, and, it is argued, a non-supervised, public, and informal petition should not be allowed to nullify it.¹⁵ But in

¹¹ Labor-Management Relations Act, 1947, 61 Stat. L. 144, 29 U.S.C. (1952) §159 (c) (1) (A) (ii) (italics supplied).

¹² NLRB v. Mayer, (5th Cir. 1952) 196 F. (2d) 286; NLRB v. Bradley Washfountain Co., (7th Cir. 1951) 192 F. (2d) 144.

¹³ Telegraph Publishing Co., 102 N.L.R.B. 1173 (1953); TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING §398.109 (Supp. 1950).

¹⁴ "Unusual circumstances" have been found only infrequently, and none since 1947. NLRB v. Henry Heide, (2d Cir. 1955) 219 F. (2d) 46. Unusual circumstances were found when the certified union had been dissolved within the certification year [Public Service Electric and Gas Co., 59 N.L.R.B. 325 (1944)] and where by a "collective, formal effort" on the part of employees there was affiliation with another union after a local schism. Carson, Pirie Scott and Co., 69 N.L.R.B. 935 (1946); Jasper Wood Products, Inc., 72 N.L.R.B. 1306 (1947). Extreme reduction of personnel is not of itself an unusual circumstance. Bethlehem Steel Co., 73 N.L.R.B. 277 (1947). Nor is the filing of a certification or decertification petition. NLRB v. Henry Heide, supra. In view of the infrequency of the finding of unusual circumstances, the exception may now be academic. But see Member Murdock's concurring opinion in Henry Heide, 107 N.L.R.B. 1160 (1954), in which it is suggested that the exception should not be so narrowly confined as it has been in the past.

¹⁵ Lift Trucks, 75 N.L.R.B. 998 (1948); NLRB v. Botany Worsted Mills, (3d Cir. 1943) 133 F. (2d) 876; Anderson Mfg. Co., 58 N.L.R.B. 1511 (1944); Ray Brooks, 98 N.L.R.B. 976 (1952). Bishop, McCormick and Bishop, 102 N.L.R.B. 1101 (1953), although an extreme

the cases where the one year certification rule is necessary to find an unlawful refusal to bargain, it is assumed that the repudiation is not the result of pressure on the employees, but that it is in fact the free choice of a majority of the employees. If the employer instigates the defection, such activity itself can be found to be an unfair labor practice without resort to the one year rule,¹⁶ and the remedial order to bargain can be enforced whether or not the union represents a majority of employees when the order is issued or enforced.¹⁷ The Board has been alert to detect subtle pressures in other contexts, and its *expertise* should be adequate to determine whether the informal repudiation represents the free choice of the employees.

(3) It is said that doing away with the rule would encourage employers to delay bargaining in the hope that the union would lose its majority status, thereby relieving the employer of the obligation to bargain.¹⁸ However, the employer is required "to bargain in good faith,"¹⁹ and this elastic concept can be easily stretched to cover a multitude of sins, including dilatory and insincere tactics. If the union does in fact represent a majority of employees in the bargaining unit when the employer engages in stalling tactics, such stalling then is an unfair labor practice.²⁰ In such a case, the one year certification rule is not needed; the violation of section 8 (a) (5) exists independently of it and an order to bargain can be enforced even though the union has lost the support of a majority of employees after the employer's commission of the unfair labor practice.²¹

It may be conceded that abandoning the rule will encourage some employers to drag their feet in bargaining. But machinery for remedying and discouraging this is available in the "good faith bargaining" requirement. Admittedly this would require litigation of each case to determine the bona fides of the employer. It is arguable, however, that this burden of increased litigation

case, exemplifies what is feared. Within one year's time a union was certified, repudiated, the repudiation repudiated, and the repudiation of the repudiation repudiated.

¹⁶ Southern Block and Pipe Co., 90 N.L.R.B. 590 (1950); Gottlieb and Co., 102 N.L.R.B. 1708 (1953); Century Oxford Mfg. Co., 47 N.L.R.B. 835 (1943).

¹⁷ Cases cited in note 5 supra.

¹⁸ Brooks v. NLRB, 348 U.S. 96, 75 S.Ct. 176 (1954); Cuffman Lumber Co., 82 N.L.R.B. 296 (1949); NLRB v. Appalachian Power Co., (4th Cir. 1944) 140 F. (2d) 217; NLRB v. Andrew Jergens Co., (9th Cir. 1949) 175 F. (2d) 130.

¹⁹ Labor-Management Relations Act, 1947, 61 Stat. L. 142, 29 U.S.C. (1952) §158 (d).

²⁰ Cuffman Lumber Co., 82 N.L.R.B. 296 (1949); Marshall and Bruce Co., 75 N.L.R.B. 90 (1947).

²¹ Cases cited in note 5 supra.

will not outweigh the advantages of assuring employees complete freedom to choose their bargaining representative. It is true that the "good faith" bargaining test is already uncertain and difficult of application in specific cases. However, in the past the Board has not hesitated to apply that standard simply because it is indefinite and often inexact. Cases in which the employer's good faith was examined are legion, and there is no reason to anticipate that the Board's experience in this area is inadequate.

(4) It is urged that, as a practical matter, the rule is needed to promote stability and peace in industrial relations,²² and to minimize strife resulting from raiding by outside unions.²³ But it is doubtful whether lasting and peaceful industrial relationships are actually encouraged in a plant by preventing the employees from choosing freely their bargaining representative or by forcing them to accept as their bargaining agent a union which a majority of the employees do not desire to have represent them. As for the raiding argument, what would be the result of abandoning the rule? The rule can apply only if the employer bargains with the outside union after a majority of employees have chosen it, for an employer violates section 8 (a) (5) if he refuses to bargain with the certified union while it still has a majority,²⁴ and he violates section 8 (a) (1) if he encourages the outside union in its organizational campaign or interferes with the certified union's attempt to retain its membership. Section 8 (b) (4) (C) prohibits the outside union from resorting to the pressures of collective action to gain bargaining rights while the inside union is certified. In such a case, the word "raiding" is hardly the term to describe what has actually happened. The employees have not been subjected to any unlawful pressure. After weighing the pros and cons of shifting their affiliation, they have exercised the right expressly given them in sections 7 and 9 (a) to choose their own bargaining representative. By hypothesis, the employer is neutralized, and the employees have freely expressed their desires after having heard and considered the merits of the change. Use of the one year certification rule freezes their bargaining status for a year, and in these circumstances would seem likely to incite just as much if not more unrest, discontent and instability than it quiets.

²² *NLRB v. Brooks*, (9th Cir. 1953) 204 F. (2d) 899; *Mengel Co.*, 80 N.L.R.B. 705 (1948); *Henry Heide, Inc.*, 107 N.L.R.B. 1160 (1954); *NLRB v. Appalachian Power Co.*, (4th Cir. 1944) 140 F. (2d) 217.

²³ *Brooks v. NLRB*, 348 U.S. 96, 75 S.Ct. 176 (1954).

²⁴ *Franks Brothers Co. v. NLRB*, 321 U.S. 702, 64 S.Ct. 817 (1944); *NLRB v. P. Lorillard Co.*, 314 U.S. 512, 62 S.Ct. 397 (1942).

II. *Conclusions*

Abandoning the rule might conceivably relieve an employer of a duty to bargain with any union in some cases. This could happen as follows: one month after a certification election a majority of employees by petition repudiate certified union *A*. Outside union *B* then claims to represent a majority of employees in the bargaining unit. The employer states that he doubts whether either *A* or *B* actually represents a majority, and declines to bargain with either until one or the other is certified. Some cases have held that the employer can impose this condition precedent to bargaining when he has good faith doubts as to a union's claim of majority status.²⁵ As section 9 (c) (3) limits elections to one per year, no election could be held for eleven months, and the employer would then have no duty to bargain with either union *A* or *B*.

The Board has never had to face this problem because the one year certification rule requires the employer to bargain with certified union *A* for a year regardless of loss of support. Many cases, however, have held that an employer cannot require certification as a condition precedent to bargaining when a union offers other reasonable proof of its majority standing.²⁶ In such instances, the employer can have no "good faith doubt" of the union's status. If the one year certification rule were to be abandoned, this line of cases could be used to avoid the difficulty. The employer is required to bargain with the union representing a majority of the employees. Proof of majority status could be had without having an election by a Board comparison of authorization, membership, or check-off cards with the employer's payroll. If a union could not submit such proof to the Board to substantiate its claims, it would seem to be a reasonable inference that it does not represent a majority and therefore is not entitled to act as bargaining representative.

²⁵ *D. H. Holmes Co. v. NLRB*, (5th Cir. 1950) 179 F. (2d) 876; *Zall v. NLRB*, (9th Cir. 1953) 202 F. (2d) 499; *Cuffman Lumber Co.*, 82 N.L.R.B. 296 (1949); *NLRB v Stewart*, (5th Cir. 1953) 207 F. (2d) 8.

²⁶ *NLRB v. W. T. Grant Co.*, (9th Cir. 1952) 199 F. (2d) 711 (check of authorization cards "or any other quick procedure"); *Joy Silk Mills, Inc. v. NLRB*, (D.C. Cir. 1950) 185 F. (2d) 732 (membership cards); *NLRB v. Kobritz*, (5th Cir. 1951) 193 F. (2d) 8; *United States Gypsum Co.*, 90 N.L.R.B. 964 (1950) (membership ledger); *NLRB v. Geigy Co.*, (9th Cir. 1954) 211 F. (2d) 553 (authorization cards); *Hart Cotton Mills, Inc.*, 91 N.L.R.B. 728 (1950) (dues check-off cards); *National Gas Co.*, 99 N.L.R.B. 273 (1952) (participation in strike called by union). See generally the cases cited in 1 CCH LAB. L. REP., ¶3042.73 et seq.

Ultimately, the effect of the one year certification rule is to prevent temporarily an employee from withdrawing a union's authority to bargain for him. Its justification can only be that it furthers the collective bargaining process by giving a union once certified as the proper bargaining agent a chance to establish a working relation with the employer. Admittedly, in many cases, it may substantially encourage the formation of sound collective bargaining relationships. As indicated above, however, the rule is not needed to prevent the employer from encouraging defection from the certified union, or to require an employer to bargain in good faith with the union in fact representing a majority of employees in the bargaining unit. If this is the case, suspension of the power to change bargaining representatives during the certification year in order to promote collective bargaining runs squarely against the "section 7 right" of employees "to bargain collectively through agents of their own choosing." Section 9 (a) provides that "representatives designated or selected for the purposes of collective bargaining *by the majority of the employees . . .* shall be the exclusive representative of all the employees in such unit." The one year certification rule modifies this to read that "representatives *certified* for the purposes of collective bargaining *by the Board . . .* shall be the exclusive representative *for one year* of all employees in such unit."²⁷ Likewise section 8 (a) (5) obligates an employer "to bargain collectively with the representatives of his employees." But the effect of the one year rule is to require the employer "to bargain for one year with the certified union, whether representing a majority of his employees or not."

The one year certification rule is not expressly mentioned in the statute and is the result of Board practice. When a rule of such origin detracts from statutory rights and modifies duties expressly imposed by statute, it is difficult to justify. A labor organization exists for the benefit of the employees whom it represents, and its rights are designed to allow it to make that representation effective. These rights should accrue from the fact that it *represents* a majority of employees and not from the fact that it is *certified* as representing a majority of them when in fact this is no longer true. Yet the one year rule emphasizes the fact of certification and not the fact of actual representation of a majority of employees, to the derogation of the express statutory right of those employees to choose their bargaining representatives.

²⁷ Italics supplied.