LABOR LAW—RECOGNITION PROCESS—ONUS UPON UNION SEEKING RECOGNITION

The Supreme Court of the United States in *Linden Lumber Division, Summer & Co. v. NLRB*,[1] held that an employer who has neither committed contemporaneous unfair labor practices which would impair the electoral process,[2] nor agreed to permit majority status to be determined by means other than Board[3] election,[4] will not be found to have violated section 8(a)(5) of the National Labor Relations Act[5] merely because he has refused to recognize a union despite the latter's showing of an authorization card majority or other evidence that it represents a majority of the appropriate unit.[6] Thus, the onus of going forward with the recognitional process[7] must be borne by the union seeking recognition.

Linden Lumber is a consolidation of two cases.[8] However, the essential facts are similar and can be summarized as follows:[9] The union presented the employer with signed authorization cards from a majority of the employees of the appropriate unit.[10] One employer refused to recognize the union and refused to enter into a consent election,[11] while the other made no response whatsoever to the union.[12] Thereupon a majority of the employees of the appropriate unit began recognition picketing. There was no evidence of contemporaneous unfair labor practices sufficient to raise the possibility of a bargaining order as in *NLRB v. Gissel Packing Co.*[13] Sub-

1. ___ U.S. ___, 95 S. Ct. 429 (1974) (5-4 decision) [hereinafter cited as *Linden Lumber*].

2. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

3. The term "Board" will be used throughout to refer to the National Labor Relations Board.

4. *See* Snow & Sons, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962). This question, *i.e.*, whether an employer's breach of an agreement to have majority status determined by means other than Board election, was not raised by the facts of *Linden Lumber* and was expressly reserved by the Court. ___ U.S. ___ at ___ n.9, 95 St. Ct. at 434 n.9.

5. 29 U.S.C. §§151 *et seq* (1947) [hereinafter cited as the Act].

6. For example, strike vote or recognitional picketing by a majority of employees of the appropriate unit.

7. *I.e.*, petition for Board election under section 9(c)(1)(A) of the Act.

8. The second case was NLRB v. Truck Drivers Local 413 (Wilder Mfg. Co.) [hereinafter referred to as *Wilder*].

9. For a complete statement of the facts, see Arthur F. Derse, Sr. (Wilder Mfg. Co.), 173 N.L.R.B. 214-23 (1968) and Linden Lumber, 190 N.L.R.B. 718 (1971).

10. There was some dispute in *Wilder* over the appropriateness of the unit selected by the union but this was subsequently resolved by consent of the parties and approved by the Board. Truck Drivers Local 413 v. NLRB (Wilder Mfg. Co.), 487 F.2d 1099, 1101 n.3 (D.C. Cir. 1973).

11. Linden Lumber, 190 N.L.R.B. 718 (1971).

12. Arthur F. Derse, Sr. (Wilder Mfg. Co.), 173 N.L.R.B. 214 (1968).

13. 395 U.S. 575 (1969) [hereinafter cited as *Gissel*]. There were no contemporaneous unfair labor practices in *Wilder*. *Id.* Although in *Linden Lumber* a subsequent section 8(a)(3)

sequently, upon petition by the union, the Board's general counsel filed complaints charging the employers with violations under sections 8(a)(1)[14] and 8(a)(5) of the Act. Although from this point the two cases differed greatly in the procedural complexity surrounding their separate routes to the court of appeals[15] and thence to the Supreme Court, the bases on which they were finally decided by these courts were identical. The Board held that an employer could not be found to have violated section 8(a)(5) of the Act "solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election."[16] On review the two cases were consolidated and each was reversed.[17] Writ of certiorari was issued by the Supreme Court and the decision of the court of appeals was reversed[18] with the Court thereby affirming the Board decisions.[19]

In both the Wagner Act[20] and section 9(a) of the present Act, a "[r]epresentative designated or selected for the purpose of collective bargaining *by a majority of the employees* in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit for purposes of collective bargaining . . . . " (emphasis added). Section 8(5) of the Wagner Act and section 8(a)(5) of the present Act put teeth into this provision by making it an unfair labor practice for an employer "to refuse to bargain with the representative of his employees, subject to the provisions of section 9(a)." The difficulty arises out of the failure of the Act to prescribe the method by which the choice, "by a majority of the employees," is to be manifested. An obvious method is the Board election and certification procedure promulgated in section 9(c). This method has never been questioned and is not only the most common method of obtaining recognition,[21] but is universally conceded to be the most satisfactory.[22] However, it was recognized early by both the courts[23] and the Board[24] that

violation was found, it was held that traditional remedies would be sufficient to erase any impact and that a fair election could be conducted. 190 N.L.R.B. No. 116. This issue was not tendered to either the court of appeals or the Supreme Court. ___ U.S. at ___ n.1, 95 S. Ct. at 430-31 n.1.

14. The section 8(a)(1) charges had no independent basis, but were merely adjuncts to the section 8(a)(5) charge. 487 F.2d at 1101 n.7.

15. The reader interested in the rather fascinating travels of the *Wilder* case is referred to Arthur F. Derse, Sr., 173 N.L.R.B. 214 (1968); Textile Workers Union v. NLRB, 420 F.2d 635 (D.C. Cir. 1969); Arthur F. Derse, Sr., 185 N.L.R.B. No. 175 (1970); NLRB v. Wilder Mfg. Co., 454 F.2d 995 (D.C. Cir. 1971 *as amended* 1972) (per curiam with all three judges writing separate opinions); Arthur F. Derse, Sr. 198 N.L.R.B. (1972); Truck Drivers Local 413 v. NLRB (Wilder Mfg. Co.), 487 F.2d 1099 (D.C. Cir. 1973). *Or see* summary in 487 F.2d at 1100-03.

16. 190 NLRB at 721; 198 N.L.R.B. at ___.

17. Truck Drivers Local 413 v. NLRB (Wilder Mfg. Co.), 487 F.2d 1099 (D.C. Cir. 1973).

18. 43 U.S.L.W. 3305 (1974).

19. Linden Lumber Co. v. NLRB, ___ U.S. ___, 95 St. Ct. 429 (1974).

20. 49 Stat. 449 (1935).

21. 395 U.S. 575, 596 n.7 (1969).

22. *Id.* at 602.

23. NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940); NLRB v. Remington Rand Inc., 94 F.2d 862, 868 (2d Cir. 1938).

24. Denver Automobile Dealers Assn., 10 N.L.R.B. 1173 (1939); Century Mills, Inc., 5 N.L.R.B. 807 (1938).

a Board election was not the only means of showing majority status and other methods of involving the bargaining obligation were approved. Still remaining was the question of when a recalcitratnt employer, in the absence of a Board election and certification, would be required to bargain with a union which claimed to be the representative of a majority of his employees. A generally applicable test was difficult to formulate. In seeking to devise a workable test, the Board and courts had to be constantly mindful of section 8(2) of the Wagner Act which made it 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 . . . ."[25] An employer is held to be in violation of this provision, without regard to scienter, if he recognizes a uniom representing only a minority of his employees.[26] Therefore, the test could not be so stringent as to face the good faith employer with the task of divining the legitimacy of a union's claim of majority support, at the risk of being guilty of a violation of section 8(a)(2) if he guessed wrong.[27] On the other hand, the Board and courts were unwilling to require the unions to petition for an election in all cases in which the employer had refused to bargain, though this position was repeatedly urged by employers[28] and, curiously enough, on occasion by a union.[29]

The first widely accepted test was formulated in *Joy Silk Mills v. NLRB*.[30] The "good faith doubt" test, as promulgated in *Joy Silk*, provided that an employer may refuse recognition to a union which has based its recognitional request on an authorization card majority, when the refusal is motivated by a "good faith doubt as to that union's majority status."[31] Where subjective "good faith doubt" was lacking in the employer's refusal to bargain, and the union at one time had majority status, then a bargaining order, without an election or in spite of an election, unfavorable to the union, would be proper.[32]

25. Section 8(a)(2) of the present Act.

26. *E.g.*, Garment Workers v. NLRB, 366 U.S. 731 (1961). Such was held to be an abridgement of an employees section 7 rights "to bargain collectively through representatives of their own choosing" or "to refrain from such activity." However, to be noted is the exception found at section 8(f) of the Act.

27. At this early date the employer could petition for a representation election only in cases where there were two unions seeking recognition. It was not until the Taft-Hartly Act of 1947 (61 Stat. 136) that the employer was allowed to petition for an election in other types of cases.

28. *E.g.*, NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir. 1938).

29. *E.g.*, IOB v. Los Angeles Brewing Co., 183 F.2d 398, 404 (9th Cir. 1950) (Appellant union was seeking to dislodge another union as exclusive representative in respondent's business).

30. 185 F.2d 732 (D.C. Cir. 1950), *enforcing* 85 N.L.R.B. 1263 (1949).

31. *Id.* at 741.

32. *Id.* at 744.

Joy Silk was quickly accepted by the Board and eventually became the test utilized by all eleven circuits.[33] During the period of viability of the *Joy Silk Doctrine*,[34] evidence of lack of good faith doubt was most often found in contemporaneous unfair labor practices.[35] The reasoning was that if the employer committed unfair labor practices after having a recognition request submitted to him, he could not be acting on the basis of a good faith doubt, but merely out of a desire to gain time and dissipate the union's majority.[36] This conduct would make his refusal to recognize the union a refusal to bargain in violation of section 8(a)(5). However, in an occasional case some other objective indicium were used to show that the employer could not have had a good faith doubt.[37] This reliance on objective criteria, such as other unfair labor practices, to determine the employer's subjective intent, indicates the uneasiness felt by the Board and courts with the *Joy Silk* test.

Throughout the period of vitality of the *Joy Silk* doctrine, the requirement remained that in order to justify a bargaining order the union had to obtain majority status at some time. The most common method used in making this showing was the production of signed authorization cards from a majority of an employers workers. However, this method magnified the importance of the question of the reliability of authorization cards both in general and as a basis on which to predicate a *Joy Silk* bargaining order. A court's attitude toward the reliability of authorization cards dictated, to some extent, its application of *Joy Silk*; that is, the facts on which a lack

33. Sheinkman, *Recognition of Unions Through Authorization Cards*, 3 GA. L. REV. 319, 321 n.9 (1969).

34. The demise of *Joy Silk* was first signaled by the Board's decision in Aaron Brothers Co., 158 N.L.R.B. 1077 (1966). In this case the Board indicated that bad faith on the part of the employer would have to be shown in order to find a refusal to bargain violative of section 8(a)(5). It also stated that an employer "will not be held to have violated his bargaining obligation . . . simply because he refused to rely upon cards, rather than an election, as the method for determining the union's majority." *Id.* at 1078. The *Gissel* decision all but completely emasculated *Joy Silk*, leaving it to *Linden Lumber* to destroy completely the last vestiges of *Joy Silk*.

35. NLRB v. Drives, Inc., 440 F.2d 354, 364 (7th Cir. 1971); DEVELOPING LABOR LAW 250, 262-63 (C. Morris ed. 1971) [hereinafter cited as DEVELOPING LABOR LAW]. *See, e.g.*, NLRB v. Mid West Towel & Linen Service, Inc., 339 F.2d 958 (7th Cir. 1964); NLRB v. Pyne Moldings Corp. 226 F.2d 818 (2d Cir. 1955); NLRB v. Stewart, 207 F.2d 8 (5th Cir. 1953); The Colson Corp., 148 N.L.R.B. 827 (1964); Dependable Machine Co., 104 N.L.R.B. 21 (1953); Squirrel Brand Co., 96 N.L.R.B. 179 (1951). It should be noted however, that the mere presence of an unfair labor practice would not automatically result in a finding of lack of "good faith doubt." *E.g.*, NLRB v. Great Atlantic Pacific Tea Co., 346 F.2d 936 (5th Cir. 1965); Hammond & Irving, Inc., 154 N.L.R.B. 1071 (1965).

36. This logic was subsequently challenged by the Second Circuit in NLRB v. River Togs, Inc., 382 F.2d 198 (2d Cir. 1967) (*citing* Lisnick, *Establishment of Bargaining Rights with out an NLRB Election*, 65 MICH. L. REV. 851, 855 (1967)).

37. Snow v. NLRB, 308 F.2d 687 (9th Cir. 1962) (verification, at request of employer and union, by a clergyman, on the basis of authorization cards, that of the employer's 49 employees, 31 were applicants for union membership). *See also* DEVELOPING LABOR LAW at 263-64.

of "good faith doubt" would be found varied from circuit to circuit, depending on the attitude of the particular circuit toward authorization cards.[38]

Originally the Board took the position that only the objective representations of the solicitor of the employee's signature or the actual presentation of the card itself were of significance.[39] This position was refined in *NLRB v. Cumberland Shoe Corp.*[40] There the Board held that an authorization card, unambiguous in its authorization of the union to act as the signatory's representative, would be a *valid and proper* basis for a bargaining order, unless the employee was told that the card was to be used *solely* for the purpose of obtaining an election. The subjective belief of the employee was immaterial.[41] However, the various circuits were not all in agreement with this approach. Some circuits even utilized several different rules depending on the nature of the challenge to the cards.[42] Eventually, even the Board became reluctant to apply it's own rule.[43] Finally in 1969 the Supreme Court in *Gissel*[44] took cognizance of the hopeless conflict among the various circuits and held in favor of the *Cumberland Shoe Doctrine*.[45]

38. DEVELOPING LABOR LAW, at 263.

39. Dan River Mills, Inc., 121 N.L.R.B. 645 (1958).

40. 144 N.L.R.B. 1268 (1963), *enforced*, 351 F.2d 917 (6th Cir. 1965).

41. The reasoning behind this approach was the thought that an employee should be bound by the clear language of what he has signed, unless the words used by the solicitor to induce him to sign wer calculated to cause the signor to disregard the lamguage of the card. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 606 (1969). The approach also indicates another instance in which the Board has opted for an objective test in order to avoid the necessity of determining a person's subjective intent.

42. The District of Columbia Circuit, First Circuit and Tenth Circuit followed *Cumberland Shoe*. UAW v. NLRB (Preston Products Co.), 392 F.2d 801 (D.C. Cir. 1967); NLRB v. Southbridge Sheet Metal Works, Inc., 380 F.2d 851 (1st Cir. 1967); Furr's, Inc. v. NLRB, 381 F.2d 562 (10th Cir. 1967). The Fifth Circuit required that in the case of dual purpose cards or of any claim of misrepresentation the employee's subjective intent in signing the card must be shown in order for the authorization cards to provide the basis for a bargaining order in the face of an employer's refusal to recognize the union. NLRB v. Peterson Brothers, Inc., 342 F.2d 221 (5th Cir. 1965) (dual purpose cards); Engineers & Fabricators, Inc. v. NLRB, 376 F.2d 482 (5th Cir. 1967) (misrepresentation claim). A similar position was taken by the Eighth Circuit as to ambiguous representations. Bauer Welding and Metal Fabricators, Inc. v. NLRB, 358 F.2d 766 (8th Cir. 1966). The Second, Sixth and Seventh Circuits took the position that in the event of misrepresentations the court would look to determine if the signatory's *belief* was that the card was only for the purpose of obtaining an election. If such was found to be the case, the authorization card would be invalidated and enforcement of a bargaining order denied. NLRB v. S. E. Nichols Co., 380 F.2d 438 (2d Cir. 1967); NLRB v. Swan Super Cleaners, Inc., 384 F.2d 609 (6th Cir. 1967) (misrepresentation); NLRB v. Dan Howard Mfg. Co., 390 F.2d 304 (7th Cir. 1968). However, the Sixth Circuit takes a slightly different position with regard to dual purpose cards. NLRB v. Lenz Co., 396 F.2d 905 (6th Cir. 1968).

43. Levi Strauss & Co., 172 N.L.R.B. 732 (1968) (indicating a fear that mechanical application of *Cumberland Shoe* could result in a failure to insure employee free choice).

44. 395 U.S. 575 (1969).

45. *Id.* at 606.

Gissel is significant in at least three other respects. First, the Court held that, though authorization cards as a basis for a bargaining duty were inferior to a Board election, they could adequately reflect employee sentiment when the election process had been impeded.[46] Therefore, a bargaining order would be an appropriate remedy where (1) there were contemporaneous independent unfair labor practices of such a nature as to give only slight assurances of a fair election by use of traditional remedies, and (2) employees' sentiments had been expressed on valid authorization cards.[47]

Second, while validating the use of authorization cards as a basis for a bargaining order in the event of contemporaneous unfair labor practices, *Gissel* provided the basis for a development which has apparently undermined the importance of authorization cards. In *Steel-Fab, Inc.*[48] the Board majority read *Gissel* as opening the door for a revision of the early assumption that a bargaining order must have as its basis a section 8(a)(5) violation. The Board took this occasion to announce that in *Gissel* type situations (contemporaneous unfair labor practices), it would dispense with finding a section 8(a)(5) violation.[49] This meant that any resulting remedial bargaining order would date from the time of the Board's decision rather than from the date of the employer's refusal to recognize the union, as had been the case in section 8(a)(5) remedial orders.[50] This holding may be seen to detract materially from the significance of an authorization card majority in that the presence of such will no longer be used by the Board to find a duty to bargain. However, the significance of this position is lessened by the fact that one of the requisites of a *Gissel*-type bargaining

46. *Id.* at 603.

47. *Id.* at 614.

48. 212 N.L.R.B. No. 25, 86 L.R.R.M. 1474 (1974).

49. *Id.* at ___, 86 L.R.R.M. at 1478. Section 8(a)(5) was shorn of the excess baggage traditionally placed on it in order to justify a bargaining order as a remedy for other unfair labor practices. Thus, future decisions as to bargaining orders based on unfair labor practices are relived of the necessity of traveling the ficticious and circuitous route through employer lack of "good faith doubt" and are able to focus on the key determinations: (1) Were the employer's unfair labor practices so "outrageous" and "pervasive" as to justify a bargaining order without making an inquiry into union majority status. 395 U.S. at 613 Such a finding has apparently never been made by either the Board or courts. DEVELOPING LABOR LAW (Supp. 1973) at 62. *But see* NLRB v. Okla-Inn, 488 F.2d 498 (10th Cir. 1973) (The court found that the employer's unfair labor practices were such as to place the case "squarely" in this category. However such a finding was unnecessary in light of the fact that the union had majority status through cards. *Id.* at 508)). Or, (2) though less pervasive, were the unfair labor practices sufficient to "have the tendency to undermine majority strength and impede the election processes. 395 U.S. at 614 (For further application see Milgo Industrial, Inc., 203 N.L.R.B. 1196, 83 L.R.R.M. 1280 (1973); Fotomat Corp., 202 N.L.R.B. 59 (1973); DEVELOPING LABOR LAW (Supp. 1973) at 60-62. Or (3) were the unfair labor practices so minor as to have a "minimal impact on the election machinery." 395 U.S. at 615. (For application see Northeastern Dye Works, Inc., 203 N.L.R.B. 1222, 83 L.R.R.M. 1225 (1973); WCAR, Inc., 203 N.L.R.B. 1235, 83 L.R.R.M. 1440 (1973); DEVELOPING LABOR LAW (Supp. 1973) at 62-63; DEVELOPING LABOR LAW (Supp. 1972) at 53-54.

50. 212 N.L.R.B. at ___, 86 L.R.R.M. at 1479 (Member Fanning dissenting in part).

order is the presence of majority representation by the union at some time.[51] Authorization cards can be used to fulfill this requisite. But there can be no doubt that authorization cards have been shifted from being the basis for a bargaining order, to being only one of the requisites of such an order.

Third, the Supreme Court implicitly recognized a movement by the Board away from the "good faith doubt" test of *Joy Silk*. The Board's practice, as outlined by the Court, was one in which the Board would not look to the subjective intent of the employer if the atmosphere was free of contemporaneous unfair labor practices, and the employer had, after deciding not to recognize the union on the basis of a card majority, petitioned for an election under section 9(c)(1)(B).[52] Whether this was an accurate interpretation of the practice of the Board was subsequently disputed[53] but, by the time of *Gissel*, the Board had actually progressed past this point as witnessed by the original decision in *Wilder*.[54] There the Board held that absent an affirmative showing of bad faith on the part of the employer, the employer's refusal to recognize the union and refusal to petition for a section 9(c)(1)(B) election would not be treated as a violation of section 8(a)(5). With the addition of the Board decision in *Linden Lumber* declining to "re-enter the 'good faith' thicket of *Joy Silk*,"[55] the conforming of *Wilder* to *Linden Lumber*,[56] and the subsequent reversal of both decisions by the court of appeals,[57] the stage was set for the Supreme Court to decide an issue expressly reserved in Gissel.[58] This issue was stated by Petitioner Linden Lumber:

> May an employer be compelled to bargain with a union asserting to represent its employees where the union's majority status has not been established through the National Labor Relations Board's election processes and the employer has not interferred with such processes so as to preclude a fair election.[59]

The Supreme Court, as had the Board, answered this question in the negative. Justice Douglas, writing for the majority, began by stating that

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51. 395 U.S. at 614-15.

52. *Id.* at 591. This approach was contrary to the approach being taken by many of the circuits. *E.g.*, NLRB v. Richman Brothers Co., 387 F.2d 809 (7th Cir. 1967); NLRB v. Great Atlantic & Pacific Tea Co., 346 F.2d 936 (5th Cir. 1965); NLRB v. Winn-Dixie, 341 F.2d 750 (6th Cir. 1965); NLRB v. Hyde, 339 F.2d 568 (9th Cir. 1964).

53. Truck Driver Local 413 v. NLRB (Wilder Mfg. Co.), 487 F.2d 1099, 1109 (D.C. Cir. 1973).

54. 173 N.L.R.B. 214 (1968).

55. 190 N.L.R.B. 718, 721 (1971).

56. Arthur F. Derse, Sr. (Wilder Mfg. Co.), 198 N.L.R.B. ___ (1972).

57. 487 F.2d 1099 (D.C. Cir. 1973).

58. 395 U.S. at 601 n.18.

59. Brief for Petitioner Linden Lumber at 2, Linden Lumber v. NLRB, ___ U.S. ___, 95 S. Ct. 429 (1974).

any approach based on inquiries into the "good faith" of the employer had been put to rest by *Gissel's* approval of the Board's retreat from such an approach,[60] thereby discounting the argument advanced by the union and the approach proposed by Justice Stewart, writing for the dissenters. The opinion then suggested the crux of the problem: "[s]hould the burden be on the union union to ask for an election or should it be the responsibility of the employer?"[61] The scope of the inquiry to be undertaken in seeking an answer was then outlined:

> Our problem is not one of picking favorites but of trying to find the congressional purpose by examining the statutory and administrative interpretations that squint one way or another. Large issues ride on who takes the initiative.[62]

At that point the practical effects of the choice on a single common problem—selection of the appropriate unit—were analyzed, with the conclusion being that by placing the burden on the employer the potential for litigation and further delay in the election process was increased.[63] The Court then, without further analysis, stated:

> In light of the statutory scheme and the practical administrative procedural questions involved, we cannot say that the Board's decision that the union should go forward and ask for an election on the employer's refusal to recognize the authorization cards was arbitrary and capricious or an abuse of discretion.[64]

From this it must be concluded that the Board's reluctance to make decisions in this area based on after-the-fact determinations of a party's subjective motive or belief,[65] and its new-found desire to remove from the analytical process those standards of semantic difficulty which had clouded central issues over the years,[66] have received the Supreme Court's approval.

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60. ___ U.S. at ___, 95 S. Ct. at 432.

61. *Id.* at ___, 95 S. Ct. at 432-33. Though this question reflects the conflict between the Board and the Ninth Circuit, it was not, as the dissenting opinion indicated, seen by all concerned to be the central issue.

62. *Id.* at ___, 95 S. Ct. at 433.

63. The unexpressed assumption being that the more expeditiously the election can be held within limits necessary to ensure free choice by an informed electorate, the more likely it is that the purpose of the Act, which is to insure industrial peace and avoid industrial strife, will be served.

64. ___ U.S. at ___, 95 S. Ct. at 434. This quote raises an interesting question with potentially far-reaching ramifications: Does this establish a new test to be used by the courts in guaging the propriety of policy decisions made by the Board? Though this question will not be dealt with in this article, it is submitted that an affirmative answer would signal an extensive new acquisition of power by the Board. *Compare* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 681 n.1 (1944).

65. *See* note 47 and accompanying text *supra*.

66. *See* note 56 and accompanying text *supra*.

Justice Stewart, writing for the dissenters, attacked the majority opinion on four fronts and proposed as the proper test an approach advanced by the respondent union. The first attack was based on the language of the Act: because neither section 9(a) nor section 8(a)(5) expressly directs how the representative of the employees is to be "designated or selected,"

> [t]he language of the Act thus seems purposefully designed to impose a duty upon an employer to bargain whenever the union representative presents convincing evidence of majority support, regardless of the method by which that support is demonstrated.[67]

Though the Act fails to prescribe a means of demonstrating majority support and makes no reference to "convincing evidence" of majority support, it does establish an absolute requirement of majority status. In addition, the Act is equally susceptible to a reading which supports the majority decision,[68] that is, the Act does not require an employer to bargain with a party only professing to be a majority representative.

The dissent's second challenge is related to the first in that it looked to the policy behind the Act to find support for the conclusion expressed in the first attack. The dissent pointed to the 1947 Taft-Hartley Amendments[69] and noted with regard to one early version of the house bill that

> [t]he proposed change, which would have eliminated any method of requiring employer recognition of a union other than a Board-supervised election, was rejected in Conference. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41.[70]

Although, once again, this language can be read to "strengthen [the dissent's] interpretation of the Act,"[71] it can as plausibly be read[72] as merely a rejection of an attempt to wrest from the Board the power to issue bargaining orders in cases where the employer had engaged in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election.

A third challenge was bottomed on the 1947 Amendment which added section 9(c)(1)(B) allowing an employer to petition for an election. The

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67. ___ U.S. at ___, 95 S. Ct. at 435.

68. Under such circumstances the Board construction is to be accorded great deference. *Cf.* Udall v. Tallman, 380 U.S. 1 (1965).

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the . . . agency charged with its administration . . . . Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion [and] of making the parts work efficiently and smoothly . . . ." *Id.* at 16 (citations omitted).

69. 61 Stat. 136 (1947).

70. ___ U.S. at ___, 95 S. Ct. at 435.

71. *Id.*

72. *See* note 68 *supra*.

dissent saw this amendment as forcing the employer to choose between recognizing the union, petitioning for, or consenting to an election, and taking his chances in a section 8(a)(5) action.[73] This view of the addition of section 9(c)(1)(B) overlooks the history behind the amendment and the defect it was designed to correct. Senator Taft, in explaining the reason for the amendment, said:

> Today an employer is faced with this situation. A man comes into his office and says, "I represent your employees. Sign this agreement, or we strike tomorrow." Such instances have occurred all over the United States. The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the *right* to go to the Board under those circumstances, and say, "I want an election. I want to know who is the bargaining agent for my employees."[74]

Thus, section 9(c)(1)(B) presents the employer with an opportunity, not with a requirement.[75]

The final attack made on the majority decision termed as "unwarranted" the suggestion that to base bargaining orders on an employer's refusal to recognize a union would "compel the Board to re-enter the domain of subjective 'good faith' inquiries"[76] The validity of this attack depends on the availability of an alternative test which would not encompass inquiries into the employer's motive. Such a test was proposed[77] in the *Dahlstrom Metallic Door* "convincing evidence of majority support" test.[78] However, the dissent itself indicated one of the difficulties with this test:

> I do suggest that the support of a bare majority of employees, whether demonstrated by authorization cards, a strike, or a strike vote, would not necessarily constitute convincing evidence. Given the possibility of undue peer pressure or even coercion in personal card solicitation or nonsecret strike votes, a higher level of objective dependability might be obtained by requiring a greater show of support than a bare majority.[79]

Where is the line to be drawn?[80] If it is not, as the above quote indicated,

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73. ___ U.S. at ___, 95 S. Ct. at 435-36.

74. 93 CONG. REC. 3838 (1947) (emphasis added). Note the use of the permissive term "right" as opposed to the obligatory term "duty."

75. ___ U.S. at ___, 95 S. Ct. at 437.

76. *Id.* at ___, 95 S. Ct. at 436.

77. *Id.*

78. NLRB v. Dahlstrom Metallic Door Co., 122 F.2d 756 (2d Cir. 1940). "An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support." *Id.* at 757. "Convincing evidence" was found in Dahlstrom in the presence of 295 dues paying members out of a work force of 310. As a test, the "convincing evidence" requirement did not receive any support at the time.

79. ___ U.S. at ___ n.5, 95 S. Ct. at 436-37 n.5.

80. In one study conducted under the auspices of the Board it was shown that even in instances where the union had more than a seventy per cent showing of card support it prevailed in only seventy-three per cent of the cases in which there was a subsequent election.

to be a test per se — that is, a majority of signed authorization cards would not *per se* be "convincing evidence" — then other problems are presented. Convincing to whom? Few employers, presented for the first time with a recognition demand, are convinced that their employees "really" want a union. Given the dissent's own admission of the "possibility of undue peer pressure or even coercion in personal card solicitation," is even a clear card majority likely to convince an employer who is "certain" of the loyalty of his employees?[81] Or, is a hypothetical reasonable employer to be the standard? Perhaps the standard should be that evidence of a majority status which would be convincing to the Board. If such is to be the test, the employer is left without guidelines for gauging his conduct, because the Board in each case will not be deciding until after the fact. In the last analysis the Board, under the dissent's "convincing evidence" test, would be required to make determinations comparable to those which led to the Court-approved rejection of *Joy Silk*.

Though the majority opinion is short on expressed logic and visible reasoning, it does, by supporting the Board's decision, establish the most practically feasible approach among those advanced. Three distinct lines of reasoning support this assertion. First there is the potential unrealiability,[82] and admitted inferiority,[83] of any determination of majority support based solely on cards, strikes or strike votes. The weaknesses of these secondary indicia of majority support have been repeatedly catalogued by the Board,[84] the courts,[85] commentators,[86] and even the AFL-CIO.[87] These authorities indicate that there is an apprehension that the support shown by cards is a reflection of fear, misrepresentation, peer pressure, coercion, or the plain "difficulty of saying 'no' ".[88] An employee has a right to choose

McCulloch, *A Tale of Two Cities: or Law in Action*, ABA SECTION OF LABOR RELATIONS LAW 14, 17 (1962).

81. *See* NLRB v. S/S. LOGAN PACKING CO., 386 F.2d 562, 566 (4th Cir. 1967).

82. ___ U.S. at ___ n.5, 95 S. Ct. at 436-37 n.5 (dissenting opinion).

83. NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).

84. *E.g.*, Novak Logging Co., 119 N.L.R.B. 1573 (1958); Sunbeam Corp., 99 N.L.R.B. 546, 550-51 (1952).

85. *E.g.*, NLRB v. S/S. LOGAN PACKING CO., 386 F.2d 562, 565-67 (4th Cir. 1967); NLRB v. Flomatic Corp., 347 F.2d 74, 78 (2d Cir. 1965).

86. *E.g.* Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LABOR L.J. 434 (1965); Browne, *Obligation to Bargain on Basis of Card Majority*, 3 GA. L. REV. 334 (1969); Comment, *Union Authorization Cards*, 75 YALE L.J. 805 (1966). Contra, Lesnick, *Establishment of Bargaining Rights without an NLRB Election*, 65 MICH. L. REV. 851 (1967); Comment, *Union Authorization Cards: A Reliable Basis for an NLRB Order to Bargain?*, 47 TEX. L. REV. 87 (1968).

87. *See* NLRB v. S/S. LOGAN PACKING CO., 386 F.2d 562, 565 n.9 (4th Cir. 1967).

88. Though these arguments were "rejected" by the Court in *Gissel*, this rejection must read in the context of the opinion and questions facing the Court. Read in this context it is apparent that the court was merely saying that these apprehensions were not of sufficient weight to "mean that cards are thereby rendered *totally* invalid, for where an 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 (emphasis added).

his owm representative and an equal right to refrain from such choice and from other concerted activity.[89] Therefore, the imposition on an employer of the responsiblity of recognizing a representative "chosen" by such unrealiable secondary indicia can be an abuse of the very employee rights which the Wagner Act seeks to protect.

A second advantage of this approach is that it provides a clear and reliable guide which can be easily followed by both employers and unions without fear that later Board or court action will find the employer or union conduct lacking in some subjective element. The employer knows that if he doubts a union's majority support he can refuse its recognition request without later having to justify the sufficiency or *bona fide* nature of his doubt. On the other hand, the union knows that if the employer refused to recognize it, an election will have to be sought if a bargaining duty is to arise. This should also produce an added bonus, because a union, faced with the real possibility of a campaign and Board election from the beginning, will tailor its representations and campaign around only those issues which it can support against employer attack. The probability of a truly informed free choice will thereby be enhanced.

Finally, if, as indicated by the Act,[90] the goal is employee free choice and if the employee sentiment expressed by the cards or strike represents an informed an unpressured choice, then, absent employer misconduct which would infect the "laboratory" conditions of a Board election, such majority support will be reflected in the results of a Board election. The election process has the additional advantage of guaranteeing an employer the opportunity to exercise his section 8(c) speech rights. This will have the concomitant effect of providing the employee with both sides of the important issues. Again, the probability of an informed choice is enhanced.[91]

Though the Court decision in *Linden Lumber* and the Board decision in *Steel-Fab* have the practical effect of relegating authorization cards and other secondary indicia of majority support to a position of insignificance, they do, when combined with *Gissel*, provide this area of labor law with a refreshing clarity which cannot help but stem litigation and enhance industrial peace.

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89. 29 U.S.C. §157 (1947).

90. 29 U.S.C. §159 (1959).

91. It is the

> [b]oard's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice.

Excelsior Underwear Inc., 156 N.L.R.B. 1236, 1240 (1966) (footnotes omitted), *approved*, NLRB v. Wyman-Gorden Co., 394 U.S. 759, 767 (1969).