

NOTES AND COMMENTS

UNION AUTHORIZATION CARDS

The method of selecting a bargaining representative under the National Labor Relations Act is of central importance in the scheme of federal labor law.¹ The Act attaches great significance to the choice of the majority of employees. The union elected by a majority acts as the "exclusive representative" of *all* employees,² and the employer must bargain with that union about all terms and conditions of employment.³ Because of the significance of this choice, section 9(c) of the Act provides that election shall be by secret ballot on the petition of any interested party: employee, union, or management.⁴ In conducting these elections, the NLRB takes great care to prevent management and unions from coercing the voting employees.⁵ Nevertheless, the

1. Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964).

2. See Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 396 (1950). Houde Engineering Co., 1 N.L.B. 87 (Mar. 3, 1934) established the exclusive representative concept, enacted by section 9(a) of the Wagner Act, 49 Stat. 453 (1935).

3. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .
61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964).

4. Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a). . .

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

61 Stat. 144 (1947), 29 U.S.C. § 159(c) (1964).

5. See discussion accompanying notes 120-22 *infra*. The Board has characterized its efforts in regulating elections as the promotion of "laboratory" conditions, in order "to determine the uninhibited desires of the employees." General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

Board, under certain circumstances, has allowed unions to circumvent regulated secret ballot elections by permitting them to attain exclusive representation status⁶ on the basis of authorization cards secured from a majority of the employees.⁷ Prompted by recent NLRB decisions,⁸ unions have relied increasingly upon this authorization card procedure.⁹

Designation by cards rests upon a strained reading of the National Labor Relations Act.¹⁰ And beyond the question of interpretation, the Board has failed to evaluate fairly the card procedure with reference to important policy considerations.

Some of these policy considerations came to light during recent Senate Hearings on repeal of section 14(b) of the Act, which permits the states to enact right-to-work laws.¹¹ Two members of the subcommittee on labor proposed legislation to deal with some of the problems raised by authorization cards.¹² But neither the propriety nor the wisdom of the proposed legislative solutions can be considered without fully understanding the nature of the problem and the Board's present position.

6. *I.e.*, status as a § 9(a) representative and thus entitled to the benefits of the act. See, e.g., *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 n.8 (1956).

7. An "authorization card" can take many forms. Generally it is a printed form with appropriate blanks for the employee's name and/or signature, employer's name, and date. Some examples and suggested forms are found in Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434 (1965); and see also *International Union of Elec. Workers v. NLRB*, 352 F.2d 361, 363 n.1 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 902 (1965). The cards have been used for many years to show the requisite 30% interest needed to obtain a certification election, 29 C.F.R. § 101.18(a) (1965); but the type of card mentioned throughout this comment is an "authorization card" meaning a card giving the union authority to represent the employees in collective bargaining, or a "dual purpose" card, one giving the union authority to represent and/or petition for an election under § 9(c).

8. Particularly *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277 (1964), discussed at notes 82-89 *infra* and *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963), *enforced*, 351 F.2d 917 (6th Cir. 1965).

9. For statistics on the increased number of cases in which the unions have ultimately relied on the cards instead of on elections see Note, 33 U. CHI. L. REV. 387, 388 nn.7-11 (1966). Card supported bargaining orders in 1965 were up 50% from 1962; there were 236 in fiscal 1965.

10. Since the Act nowhere explicitly allows for authorization cards, their validity as a device for making a union a § 9(a) representative is supported only by statutory construction. See discussion at notes 30-31, 107-13 *infra*.

11. *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 89th Cong., 1st Sess. (1965) [hereinafter *Senate Hearings on § 14(b)*]. The policy consideration particularly emphasized was the protection of employee rights, see text accompanying notes 192-204 *infra*.

12. Senator Javits of New York introduced two bills: S. 2133, June 14, 1965, and S. 2395, 89th Cong., 1st Sess., August 11, 1965, superseding his first bill. Senator Fannin of Arizona introduced S. 2226, June 29, 1965. See text accompanying notes 192-204 *infra*.

THE AUTHORIZATION CARD PROCEDURE

Usually an organizing union wishing to be designated by authorization cards solicits signatures from employees, both at work and after hours.¹³ When a majority of employees has signed,¹⁴ the union writes or telegraphs the employer alleging¹⁵ its majority status and requesting formal bargaining.¹⁶ The union offers to prove its majority status by submitting the cards to an independent third party,¹⁷ usually the minister of the employer's choice,¹⁸ for verification against employment records.¹⁹ The union petitions the Board for an election either simultaneously or shortly afterward.²⁰

If the employer voluntarily bargains with the union, the plant has been organized and the union withdraws its election petition. But even if the employer refuses recognition,²¹ the union may still succeed in "organizing" the plant without winning an election. Should the employer demonstrate, at the time the cards are presented, that he does not doubt that the union has majority support, the Board may deny him an election and order him to bargain with the union upon its request.²² If the employer has good faith doubts about the union's

13. See *Senate Hearings on § 14(b)*, 190 for the many places cards are solicited. Unions, unlike employers, may take organizational efforts to employees' homes. *Plant City Welding & Tank Co.*, 119 N.L.R.B. 131 (1957). On home solicitation of cards see, e.g., *Universal Metal Finishing*, 156 N.L.R.B. No. 19, 1966 CCH N.L.R.B. ¶ 20,096 (1965). Some cards are even solicited by mail to be filled out at home. *Bauer Welding & Metal Fabricators, Inc.*, 154 N.L.R.B. No. 82, 1965 CCH N.L.R.B. ¶ 9663, 60 L.R.R.M. 1070 (1965).

14. Although a union usually requests bargaining as soon as a bare majority signs, they often continue their efforts. See, e.g., *Benson Veneer Co.*, 156 N.L.R.B. No. 74, 1966 CCH N.L.R.B. ¶ 20,148, 61 L.R.R.M. 1137 (1966) in which two cards, obtained 13 days later, proved to be the margin of victory.

15. See, e.g., *Irving Air Chute Co.*, 149 N.L.R.B. 627 (1964); *Retail Clerks Int'l Ass'n*, 153 N.L.R.B. No. 15, 1965 CCH N.L.R.B. ¶ 9464 (1965).

16. See, e.g., *Shopper's Fair*, 151 N.L.R.B. No. 155, 1965 CCH N.L.R.B. ¶ 9261, 58 L.R.R.M. 1658 (1965).

17. See, e.g., *New England Liquor Sales Co.*, 157 N.L.R.B. No. 16, 1966 CCH N.L.R.B. ¶ 20,218, 61 L.R.R.M. 1314 (1966).

18. See, e.g., *Ben Duthler, Inc.*, 157 N.L.R.B. No. 3, 1966 CCH N.L.R.B. ¶ 20,216, 61 L.R.R.M. 1305 (1966); *Kellogg Mills*, 147 N.L.R.B. 342, 345 (1964) (where the union brought a clergyman along with them).

19. See, e.g., *Dixon Ford Shoe Co.*, 150 N.L.R.B. No. 86, 1965 CCH N.L.R.B. ¶ 9016, 58 L.R.R.M. 1160 (1965); *Fred Snow & Sons*, 134 N.L.R.B. 709 (1961).

20. See, e.g., *Harvard Coated Prods. Co.*, 156 N.L.R.B. No. 4, 1966 CCH N.L.R.B. ¶ 20,076 (1965); *Irving Air Chute Co.*, 149 N.L.R.B. 627 (1964); *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277 (1964).

21. The employer may refuse immediately, e.g., *New England Liquor Sales Co.*, 157 N.L.R.B. No. 16, 1966 CCH N.L.R.B. ¶ 20,218, 61 L.R.R.M. 1314 (1966), or may simply stall the union inventing excuses and ignoring them, e.g., *Permacold Indus., Inc.*, 147 N.L.R.B. 885 (1964); *George Groh & Sons*, 141 N.L.R.B. 931 (1963).

22. The employer's conduct at the time he receives the bargaining demand may reveal that he believes the union has a majority. A card check may eliminate the union's need

majority status, the union awaits the election—either an ordinary certification election,²³ or, with the employer's consent, an expedited election provided for by the Act.²⁴ If the employer commits an unfair labor practice before the secret ballot, the union may withdraw the election petition, alleging that the unfair practice eliminates the possibility of a fair election.²⁵ Under the Board's present construction of the Act,²⁶ these unfair practices may lead to an order compelling bargaining.²⁷ Alternatively, the union may wait for the election, despite possibly illegal pre-election employer conduct. If the union loses, it may then allege that employer pre-election conduct constituted an unfair labor practice.²⁸ Once again, the employer may be ordered to

for an election, *Fred Snow & Sons*, 134 N.L.R.B. 709 (1961). The commencement of actual bargaining may have the same result, *Jem Mfg., Inc.*, 156 N.L.R.B. No. 62, 1966 CCH N.L.R.B. ¶ 20,128, 61 L.R.R.M. 1074 (1966); *N.L.R.B. v. Hyde*, 339 F.2d 568 (9th Cir. 1964), *enforcing*, 145 N.L.R.B. 1252 (1963).

23. See, e.g., *Dixie Cup*, 157 N.L.R.B. No. 9, 1966 CCH N.L.R.B. ¶ 20,217, 61 L.R.R.M. 1329 (1966); *Gafner Automotive & Machine Inc.*, 156 N.L.R.B. No. 63, 1966 CCH N.L.R.B. ¶ 20,125 (1966); *Western Saw Mfrs. Inc.*, 155 N.L.R.B. No. 131, 1966 CCH N.L.R.B. ¶ 20,062 (1965).

24. See, e.g., *J. M. Machinery Corp.*, 155 N.L.R.B. No. 100, 1966 CCH N.L.R.B. ¶ 20,018, 60 L.R.R.M. 1414 (1965); *Marvin A. Whitbeck*, 155 N.L.R.B. No. 14, 1965 CCH N.L.R.B. ¶ 9748, 60 L.R.R.M. 233 (1965). The consent election is authorized by § 9(c)(4) of the Act, 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(4) (1964).

25. See, e.g., *Crown Tar and Chemical Works, Inc.*, 154 N.L.R.B. No. 41, 1965 CCH N.L.R.B. ¶ 9632 (1965); *Bause Super Drug Stores, Inc.*, 150 N.L.R.B. No. 160, 1965 CCH N.L.R.B. ¶ 9091, 58 L.R.R.M. 1291 (1965).

26. The Board reasons that in light of these unfair practices, the employer could have no good faith doubt of the union's majority, and his prior refusal to bargain thus constitutes a violation of §8(a)(5):

It shall be an unfair labor practice for an employer — . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1964). See note 3 *supra* for § 9(a). For the full legal theory see notes 32-42 *infra* and accompanying text.

Although the real issue is refusal to recognize, not refusal to bargain, the two words are used interchangeably in the authorization card problem. Since the duty to bargain arises immediately upon a union's recognition, however, there may be some logic in viewing the issue as a single one.

27. The leading case upholding the propriety of the bargaining order is *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944).

28. All conduct occurring after the filing of a petition may now be used to impeach the validity of an election. This marks a recent extension both in stipulated elections, *Rockwell Mfg. Co. v. NLRB*, 330 F.2d 795 (7th Cir. 1964), *cert. denied*, 379 U.S. 890 (1964), and in consent elections, *Goodyear Tire & Rubber Co.*, 138 N.L.R.B. 453 (1962). For such pre-election violations subsequent to a card solicitation see, e.g., *Irving Air Chute Co.*, 149 N.L.R.B. 627 (1964); *Colson Corp.*, 148 N.L.R.B. 827 (1964), *enforced*, 347 F.2d 128 (8th Cir. 1964), *cert. denied*, 382 U.S. 904 (1965); *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277 (1964).

bargain.²⁹ No matter how it is obtained the compulsory bargaining order allows the union to organize the plant without winning an election.

The way to plant organization via authorization cards winds through a complex legal maze. The theory authorizing this card procedure involves the use of section 8(a)(5)³⁰ (an unfair labor practice provision) as a detour around section 9(c)³¹ (the secret ballot election provision).

The current interpretation of the relationship between sections 9(c) and 8(a)(5) comes from *Franks Bros. Co. v. NLRB*,³² a 1944 Supreme Court decision uniting earlier decisions under the then young statute.³³ This opinion upholds the propriety of the compulsory bargaining remedy for a "refusal to recognize" upon presentation of authorization cards. Franks Brothers committed an unfair labor practice³⁴ in an aggressive consent election campaign which followed after 45 of 80 employees had "designated" the union by signing cards. The union withdrew its election petition, alleging that there was no possibility for a fair election and the Board ordered compulsory bargaining as the remedy for improper refusal to bargain upon presentation of the cards.³⁵ Franks Brothers challenged the propriety of the remedy, alleging that 13 of 45 signers no longer worked for it.³⁶ The Board and Court answered that as long as a majority supported the union at the time of the illegal acts, a subsequent loss of majority support could not bar the bargaining remedy.³⁷ The Court declared the bargaining order permissible under 10(c), the section authorizing the board to fashion appropriate remedies.³⁸ *Franks Bros.* thus held compulsory

29. See, e.g., *Bauer Welding & Metal Fabricators, Inc.*, 154 N.L.R.B. No. 82, 1965 CCH N.L.R.B. ¶ 9663, 60 L.R.R.M. 1070 (1965); *Tuscon Ramada Caterers, Inc.*, 154 N.L.R.B. No. 44, 1965 CCH N.L.R.B. ¶ 9631, 60 L.R.R.M. 1001 (1965). The normal remedy for an overturned election is a re-run election. See Note, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243, 1257 (1963).

30. 29 U.S.C. § 158(a)(5) (1964), see note 26 *supra*.

31. 29 U.S.C. § 159(c) (1964), see note 4 *supra*.

32. 321 U.S. 702 (1944).

33. *NLRB v. P. Lorillard Co.*, 314 U.S. 512 (1942); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

34. Supervisory employees "sought to undermine the majority status of the union" by making statements to the effect that the plant would close if the union won; a violation of 8(1) of the Wagner Act now 8(a)(1) of the present Act, see note 67 *infra*, *NLRB v. Franks Bros. Co.*, 137 F.2d 989, 991-92 (1st Cir. 1943), *aff'd*, 321 U.S. 702 (1944).

35. *Franks Bros. Co.*, 44 N.L.R.B. 898 (1942).

36. 321 U.S. at 703.

37. 321 U.S. at 705.

38. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964):

Sec. 10(c) . . . If upon the preponderance of the testimony taken the Board shall

bargaining an appropriate remedy when (1) the union was a section 9(a) representative, and (2) the refusal to bargain was improper.³⁹

Although section 9(a) does not provide any procedure for determining whether there is a majority,⁴⁰ the courts apparently construe "representative designated or selected" in the alternative.⁴¹ A union attains its exclusive 9(a) status if "selected" by a secret ballot, or if "designated" by any other appropriate method, including, as in *Franks Bros.*, authorization cards.⁴²

The second prerequisite to an 8(a)(5) violation, an improper refusal to bargain, relates to the employer's conduct. Cases subsequent to *Franks Bros.* establish that this conduct will be evaluated by good faith standards.⁴³ In the leading case of *Joy Silk Mills, Inc. v. NLRB*,⁴⁴ the Court of Appeals for the District of Columbia enforced a compulsory bargaining order and, for the first time, clearly articulated the test of good faith which applied to a refusal to bargain upon presentation of cards. The union had presented the employer with cards from 38 of 52 employees; the employer refused to allow a neutral party to check

be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. (Emphasis added.)

39. These two requirements must be proved in every case, or disproved if the employer wants to avoid the order to bargain.

40. See *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71 (1956).

41. 351 U.S. at 74, 75. The court repeatedly refers to the card supported union as "designated."

42. 321 U.S. at 705. The Union is similarly referred to as "designated." The importance of the "designation" to the order to bargain can be seen in two types of cases. In one, although the employer has violated the Act, the union never obtains a factual majority of cards, e.g., *J. P. Stevens & Co.*, 157 N.L.R.B. No. 90, 61 L.R.R.M. 1437 (1966) (massive violations of virtually every type), *NLRB v. Koehler*, 328 F.2d 770 (7th Cir. 1964) (employer's good faith irrelevant once the union's majority was not proved); in the other, the union proceeds to an election before seeking a bargaining order on the cards and fails to impeach the election loss. If the election loss stands, the Board cannot rely on the cards. See, e.g., *Kolpin Bros.*, 149 N.L.R.B. 1378 (1964), analyzed in Note, 29 ALBANY L. REV. 368 (1965).

43. The employer must have a "good faith" doubt that the union lacks status as a majority representative. It should be noted, however, that in order to prevent him from retaliating against those of his employees who have supported the union, the employer has been denied access to the major source of legitimation for such doubts: the union's cards, which are supposed to be shown only to a neutral cross-checker. See, e.g., *NLRB v. George Groh & Sons*, 329 F.2d 265, 269 (10th Cir. 1964).

44. 185 F.2d 732 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951).

the signatures against employment records. His refusal to recognize the union forced an election which the union lost.⁴⁵ The Board sustained the union's complaint that the employer's unfair labor practices in connection with the campaign destroyed the validity of the election.⁴⁶ It further held that the unfair practices and refusal to participate in a card check proved the employer had no good faith doubt about the union's majority status.⁴⁷ The refusal to recognize the union thus constituted an 8(a)(5) violation. In finding an 8(a)(5) violation, the Court stated that

an employer may refuse recognition of a union when motivated by a good faith doubt as to that union's majority status [citation omitted]. When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a)(5) of the Act [citations omitted].⁴⁸

The Court's analysis focuses upon the employer's motivation at the time of his initial refusal to bargain, but the test which developed from the case imputes independent meaning to each of the court's statements.⁴⁹ Under the *Joy Silk* test eventually adopted in every circuit,⁵⁰ the bad faith of the employer's refusal can be established in either of two ways: (1) by showing that at the time the union presented its cards he could have had no good faith doubts about its majority status,⁵¹ or

45. The union lost 32 to 16. *Joy Silk Mills Inc.*, 85 N.L.R.B. 1263, 1270 (1949).

46. 85 N.L.R.B. at 1288. The employer violated 8(a)(1) by promising benefits (rest periods and shift rotations) and interrogating employees as to their union sentiments. *Id.* at 1286-88.

47. 85 N.L.R.B. at 1288. The Trial Examiner said that if the employer's good faith had continued, assuming it was bona fide at the start, he either would not have interfered with the consent election or would have voluntarily bargained with the union. The employer could not doubt the union's status if he committed the acts which made the election impossible.

48. 185 F.2d at 741. All the citations were to pre-Taft-Hartley decisions.

49. A violation of either part of the test alone suffices. See, e.g., *NLRB v. George Groh & Sons*, 329 F.2d 265, 269 (10th Cir. 1964); *NLRB v. Philamon Labs., Inc.*, 298 F.2d 176 (2d Cir. 1962).

50. *NLRB v. Whitelight Prods. Div.*, 298 F.2d 12 (1st Cir. 1962) (by indirect approval); *NLRB v. Pyne Molding Corp.*, 226 F.2d 818 (2d Cir. 1955); *NLRB v. Epstein*, 203 F.2d 482 (3d Cir. 1953); *Bilton Insulation, Inc. v. NLRB*, 297 F.2d 141 (4th Cir. 1961); *NLRB v. Stewart*, 207 F.2d 8 (5th Cir. 1953); *NLRB v. Armco Drainage & Metal Prods., Inc.*, 220 F.2d 573 (6th Cir. 1955); *NLRB v. Jackson Press, Inc.*, 201 F.2d 541 (7th Cir. 1953); *NLRB v. Decker*, 296 F.2d 338 (8th Cir. 1961); *NLRB v. Trimfit of California, Inc.*, 211 F.2d 206 (9th Cir. 1954); *NLRB v. Hamilton*, 220 F.2d 492 (10th Cir. 1955).

51. See, e.g., *Snow & Sons*, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

(2) by showing misconduct tending to dissipate the union's strength subsequent to his initial refusal.⁵² The second part of the test converts subsequent misconduct into a nearly conclusive presumption of previous bad faith.⁵³

The *Joy Silk* test has thus been applied in two groups of cases. In the first group, the employer acts improperly at the time of the card presentation.⁵⁴ Citing the employer's repeated refusal to answer the union's request for an election⁵⁵ or his admission that he wanted an election even though the cards accurately showed a majority,⁵⁶ or other actions inconsistent with good faith doubt about the union's majority status,⁵⁷ the Board finds that his refusal to bargain was in bad faith. The standard is especially strict when the refusal comes after a card check.⁵⁸ If the card check indicates a majority of signatures, the courts insist that the employer must have known that the union in fact had

52. This constitutes the most frequent use of *Joy Silk*. See, e.g., *S.N.C. Manufacturing Co.*, 147 N.L.R.B. 809, 810 (1964), *enforced per curiam*, *International Union of Elec. Workers v. NLRB*, 352 F.2d 361 (D.C. Cir. 1965); *Daylight Grocery Co.*, 147 N.L.R.B. 733, 742 (1964), *enforced*, 345 F.2d 239 (5th Cir. 1965).

53. See, e.g., the Trial Examiner's reasoning in *Joy Silk Mills Inc.*, 85 N.L.R.B. 1263, 1288 (1949), and *NLRB v. Austin Powder Co.*, 350 F.2d 973, 977 (6th Cir. 1965). The court enforced an order to bargain based on the Board's finding that the previous doubt was a sham. The misconduct was described as "rejection of the principle of collective bargaining," 141 N.L.R.B. 183 (1963). In its final form, the presumption becomes a conclusion by the Board, which the courts overrule only when there is not "substantial evidenced on the record viewed as a whole," *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); see also *NLRB v. George Groh & Sons*, 329 F.2d 265, 266 (10th Cir. 1964).

54. This group of cases stands apart because the employer is not found guilty of any unfair labor practice other than the refusal to bargain. See, e.g., *NLRB v. C. J. Glasgow Co.*, 356 F.2d 476 (7th Cir. 1966) in which the employer made no effort to discover information to justify his doubt of majority status and relied on the union's having filed an election petition, *enforcing as modified* 148 N.L.R.B. 98 (1964).

55. See, e.g., *Air Filter Sales & Service, Inc.*, 142 N.L.R.B. 384 (1963); *Henry Spcn & Co.*, 150 N.L.R.B. No. 21, 1964 CCH N.L.R.B. ¶ 13,672, 58 L.R.R.M. 1048 (1964).

56. See, e.g., *George Groh & Sons*, 141 N.L.R.B. 931 (1963), *enforced*, 329 F.2d 265 (10th Cir. 1964); *Fleming & Sons*, 147 N.L.R.B. 1271, 1279 (1964); *Greyhound Terminal*, 137 N.L.R.B. 87 (1962), *enforced*, 314 F.2d 43 (5th Cir. 1963).

57. See, e.g., *Jem Mfg., Inc.*, 156 N.L.R.B. No. 62, 1966 CCH N.L.R.B. ¶ 20,128, 61 L.R.R.M. 1074 (1966), where the employer first intimated he would recognize union, then reneged; *NLRB v. Hyde*, 339 F.2d 568 (9th Cir. 1964), *enforcing*, 145 N.L.R.B. 1252 (1964), where the employer signed a contract the day of the card check, under threat of picketing, and refused to bargain five days later when nine employees sent him a petition saying they had signed cards only in the belief they were necessary for an election, 339 F.2d at 571.

58. See, e.g., *Dixon Ford Shoe Co.*, 150 N.L.R.B. No. 86, 1965 CCH N.L.R.B. ¶ 9016, 58 L.R.R.M. 1160 (1965); *Kellogg Mills*, 147 N.L.R.B. 342 (1964), *enforced*, 347 F.2d 219 (9th Cir. 1965).

a majority.⁵⁹ The minister of his choice counted the cards; how could he in good faith doubt the truth of the union's claim?⁶⁰

In a second group of cases, the employer commits unfair labor practices subsequent to his initial refusal.⁶¹ Whether committed in an effort to impugn the union's alleged card majority, or in campaigning before the secret ballot, the employer's unfair practices⁶² are held to show a desire to dissipate union strength.⁶³ Having found this desire to undermine the union, the Board almost invariably presumes that the employer's prior refusal was motivated solely by a desire to gain time to engage in anti-union activity.⁶⁴ Thus, the subsequent misconduct proves that the employer previously had no good faith doubt of the union's majority status; the refusal to recognize when the cards were presented violated section 8(a)(5).⁶⁵

Under this presumption that unfair practices later in time conclu-

59. See, e.g., *Kellogg Mills*, *supra* note 58; *Snow & Sons*, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

60. See, e.g., *Snow & Sons*, *supra* note 59; in *Dixon Ford Shoe Co.*, 150 N.L.R.B. No. 86, 1965 CCH N.L.R.B. ¶ 9016, 58 L.R.R.M. 1160 (1965), a judge did the checking.

61. Generally, the relevant unfair practices occur after the bargaining demand. If they occur before, the union must show that the employer was aware of the card drive. E.g., *Hunt Oil Co.*, 157 N.L.R.B. No. 21, 1966 CCH N.L.R.B. ¶ 20,223, 61 L.R.R.M. 1365 (1966); cf. *Don Swart Trucking Co.*, 154 N.L.R.B. No. 115, 1965 CCH N.L.R.B. ¶ 9696, 60 L.R.R.M. 1219 (1965).

62. Unfair practices generally fall into two groups, though the distinction often breaks down. The first group contains unfair practices related to the cards: efforts to induce employees to repudiate the cards or to discover employee sentiment for the union. The second group relates to the election: the customary forbidden pre-election conduct such as promises of economic benefits or threats of reprisal if the union wins. Discharges of pro-union employees, since they do not alter the original card presentation, fall generally in the latter group.

63. See, e.g., *Permacold Indus., Inc.*, 147 N.L.R.B. 885, 887 (1964); *New England Liquor Sales Co.*, 157 N.L.R.B. No. 16, 1966 CCH N.L.R.B. ¶ 20,218, 61 L.R.R.M. 1315, 1316 (1966); *Daylight Grocery Co.*, 147 N.L.R.B. 733, 742 (1964), *enforced*, 345 F.2d 239 (5th Cir. 1965).

64. See, e.g., *Colson Corp.*, 148 N.L.R.B. 827, 829 (1964), *enforced*, 347 F.2d 128 (8th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965); *NLRB v. Elliott-Williams Co.*, 345 F.2d 460, 464 (7th Cir. 1965), *enforcing* 143 N.L.R.B. 811 (1963).

65. The curious reasoning that violation of § 8(a)(5) in effect gives the union the status as a § 9(a) representative, which in turn allows the finding of a violation of § 8(a)(5), has seemed circular to at least one Board member. Leedom, dissenting in *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277, 1291 (1964), pointed out that "the majority begs the question when it argues that the 8(a)(5) charges should be entertained because the [employer] violated 8(a)(5). . . ." And as one commentator has noted concerning the use of "good faith" to analyze the employer's conduct, "It would be artificial to analyze these cases [on recognition] in terms of good faith; that concept is not relevant until the bargaining relationship is established." Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 268 (1964).

sively demonstrate prior intent, the *Joy Silk* test operated for many years as a *per se* rule.⁶⁶ Virtually any unfair labor practice precluded the employer from proving good faith doubt when the cards were presented and triggered the order to bargain: questioning about union activity,⁶⁷ unilateral grants of economic benefits,⁶⁸ surveillance,⁶⁹ threats,⁷⁰ discriminatory discharge,⁷¹ promises of economic benefits,⁷² encouraging company unions⁷³ and even polling to test the majority

66. Although the *Joy Silk* test says nothing about unfair labor practices being necessary for finding lack of doubt of majority status, the *per se* use of *Joy Silk* makes any unfair practice *per se* a showing of a lack of good faith doubt of majority status.

67. Interrogation violates § 8(a)(1):

It shall be an unfair labor practice for an employer— . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . . 61 Stat. 140 (1947), 29 U.S.C. § 158(a) (1964). See, e.g., *Copeland Oil Co.*, 157 N.L.R.B. No. 12, 1966 CCH N.L.R.B. ¶ 20,214, 61 L.R.R.M. 1316 (1966); *Dixie Color Printing Corp.*, 156 N.L.R.B. No. 120, 1966 CCH N.L.R.B. ¶ 20,205, 61 L.R.R.M. 1285 (1966); *Swan Super Cleaners*, 152 N.L.R.B. No. 13, 1965 CCH N.L.R.B. ¶ 9285, 59 L.R.R.M. 1054 (1965); *Mid-West Towel & Linen Service, Inc.*, 143 N.L.R.B. 744 (1963), *enforced*, 339 F.2d 958 (7th Cir. 1964).

68. Also a violation of § 8(a)(1). See, e.g., *Tony R. Santangelo*, 154 N.L.R.B. No. 188, 1965 CCH N.L.R.B. ¶ 9714, 60 L.R.R.M. 1254 (1965). *Tucson Ramada Caterers, Inc.*, 154 N.L.R.B. No. 44, 1965 CCH N.L.R.B. ¶ 9631, 60 L.R.R.M. 1001 (1965); *Mantzowitz Mfg. Corp.*, 153 N.L.R.B. No. 134, 1965 CCH N.L.R.B. ¶ 9581, 59 L.R.R.M. 1670 (1965); *Frantz & Co.*, 153 N.L.R.B. No. 113, 1965 CCH N.L.R.B. ¶ 9550, 59 L.R.R.M. 1645 (1965); *Fritchof A. Fosdal*, 153 N.L.R.B. No. 2, 1965 CCH N.L.R.B. ¶ 9433, 59 L.R.R.M. 1446 (1965).

69. On surveillance, a § 8(a)(1) violation, see, e.g., *Piggly Wiggly El Dorado Co.*, 154 N.L.R.B. No. 32, 1965 CCH N.L.R.B. ¶ 9624, 59 L.R.R.M. 1759 (1965); *Comfort, Inc.*, 152 N.L.R.B. No. 106, 1965 CCH N.L.R.B. ¶ 9386, 59 L.R.R.M. 1260 (1965); *Sullivan Surplus Sales, Inc.*, 152 N.L.R.B. No. 12, 1965 CCH N.L.R.B. ¶ 9290, 59 L.R.R.M. 1011 (1965); *Smeco Indus., Inc.*, 151 N.L.R.B. No. 123, 1965 CCH N.L.R.B. ¶ 9235, 58 L.R.R.M. 1592 (1965).

70. On threats, see, e.g., *Samuel B. Gass*, 154 N.L.R.B. No. 62, 1965 CCH N.L.R.B. ¶ 9647, 60 L.R.R.M. 1021 (1965); *Southwestern Transp. Co.*, 154 N.L.R.B. No. 23, 1965 CCH N.L.R.B. ¶ 9610, 59 L.R.R.M. 1753 (1965); *Donald Skillings*, 152 N.L.R.B. No. 108, 1965 CCH N.L.R.B. ¶ 9373, 59 L.R.R.M. 1302 (1965); *Associated Beer Depots, Inc.*, 152 N.L.R.B. No. 44, 1965 CCH N.L.R.B. ¶ 9314, 59 L.R.R.M. 1102 (1965).

71. 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1964):

Sec. 8(a). It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization See, e.g., *B.B.S.A., Inc.*, 151 N.L.R.B. No. 58, 1965 CCH N.L.R.B. ¶ 9162, 58 L.R.R.M. 1507 (1965); *Shoppers Fair*, 151 N.L.R.B. No. 155, 1965 CCH N.L.R.B. ¶ 9261, 58 L.R.R.M. 1658 (1965).

72. The promises violate § 8(a)(1), see, e.g., *Bause Super Drug Stores Inc.*, 150 N.L.R.B. No. 160, 1965 CCH N.L.R.B. ¶ 9091, 58 L.R.R.M. 1291 (1965); *Hamburg Shirt Corp.*, 156 N.L.R.B. No. 51, 1966 CCH N.L.R.B. ¶ 20,123, 61 L.R.R.M. 1075 (1965).

73. 61 Stat. 140 (1947), 129 U.S.C. § 158(a)(2) (1964):

Sec. 8(a). It shall be an unfair labor practice for an employer— . . . (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .

status.⁷⁴ In September, 1965, however, the Board denied that *Joy Silk* had operated as a *per se* rule.⁷⁵ It held that an employer who had illegally interrogated a few employees nonetheless had demonstrated that his prior doubt was in good faith. However, it is questionable whether the interrogation in this case was illegal.⁷⁶ More important, the Board's continued use of *Joy Silk* as a *per se* rule in the vast majority of cases suggests that it may have made only a token gesture in an easy case.⁷⁷

In both groups of cases, then, the Board's General Counsel has only to make out a *prima facie* case—to prove any of the acts which give rise to the presumption of bad faith—and the burden shifts to the employer, who must justify his doubt about the union's status.⁷⁸ Under

See, e.g., *Bauer Welding & Metal Fabricators, Inc.*, 154 N.L.R.B. No. 82, 1965 CCH N.L.R.B. ¶ 9663 (1965); *Laura Jayne, Inc.*, 152 N.L.R.B. No. 139, 1965 CCH N.L.R.B. ¶ 9404, 59 L.R.R.M. 1289 (1965).

74. Such polling may frequently constitute 8(a)(1) violations: e.g., *NLRB v. Mid-West Towel & Linen Service, Inc.*, 339 F.2d 958 (7th Cir. 1964), enforcing 143 N.L.R.B. 744 (1963); *Hamburg Shirt Corp.*, 156 N.L.R.B. No. 51, 1966 CCH N.L.R.B. ¶ 20,123, 61 L.R.R.M. 1075 (1965); *Pizza Prods. Corp.*, 153 N.L.R.B. No. 78, 1965 CCH N.L.R.B. ¶ 9524 (1965).

75. *Hammond & Irving, Inc.*, 154 N.L.R.B. No. 84, 1965 CCH N.L.R.B. ¶ 9681, 60 L.R.R.M. 1073 (1965).

76. The "interrogation" was relatively innocuous questioning of 6 employees out of 110, asking them how they intended to vote in the pending elections. Furthermore, the case was easily decided on other grounds since the Trial Examiners found that the union did not have a valid majority of cards. The Board did not reach the card issue, 60 L.R.R.M. at 1074.

77. E.g., *Hammond & Irving, Inc.*, *supra* note 75, the cards majority may have been insufficient; in *John P. Serpa, Inc.*, 155 N.L.R.B. No. 12, 1965 CCH N.L.R.B. ¶ 9753, 60 L.R.R.M. 1235 (1965), the Trial Examiner called the union's majority "flecting and evanescent" since two employees repudiated the union immediately; in *Oklahoma Sheraton Corp.*, 156 N.L.R.B. No. 69, 1966 CCH N.L.R.B. ¶ 20,135, 61 L.R.R.M. 1115 (1966), the Trial Examiner had found doubt over the appropriate union sufficient to support the employer's doubt; in *Harvard Coated Prods. Co.*, 156 N.L.R.B. No. 4, 1965 CCH N.L.R.B. ¶ 20,076 (1965), the only § 8(a)(1) violation was by a supervisor specifically instructed not to talk about the union. Yet in these cases, the Board talked about the General Counsel's failure to sustain his burden of proving the employer's good faith. Meanwhile the vast majority of cases find bad faith "automatically" upon the commission of unfair labor practices, and the courts must abide by the determination unless there is insufficient evidence for the Board to reasonably conclude that the original refusal was in bad faith. *Jas. H. Matthews & Co. v. NLRB*, 354 F.2d 432 (8th Cir. 1965); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950). A good example of the "new" *per se* rule in action occurred in *Ben Duthler, Inc.*, 157 N.L.R.B. No. 3, 1966 CCH N.L.R.B. ¶ 20,216, 61 L.R.R.M. 1305 (1966) in which an employer opposed the union at two separate stores. One led to an 8(a)(5) solution, standard variety, the other, at a new store, did not. But the latter was an easy case. The store had not opened when the drive started, and the evidence shows that another union was also interested in the new employees.

78. Reliance on doubts as to the proper unit is no defense. See, e.g., *Southland Paint Co.*, 156 N.L.R.B. No. 2, 1966 CCH N.L.R.B. ¶ 20,083, 60 L.R.R.M. 1546 (1965). If an

the *Joy Silk* test, this burden has been almost impossible to sustain. The employer acts at his peril—at least since 1964.⁷⁹

Joy Silk was decided in 1950; but from 1954 to 1964, a procedural obstacle limited the utility of authorization cards as a union organizing weapon.⁸⁰ During this period, the union could present cards and the employer's unfair practices could lead to an 8(a)(5) bargaining order. But if the union filed an election petition, the Board considered authorization cards irrelevant to the question of representation.⁸¹ Therefore, unfair labor practices committed by the employer either before or after the petition, which arguably will prove the employer's bad faith doubt of majority status, could not lead to a bargaining order supported by the cards. Filing an election petition barred the union from alleging employer misconduct prior to the petition.

In 1964, in *Bernel Foam Products Co.*,⁸² the Board dropped the bar created by a petition and restored authorization cards as a lethal union organizing weapon.⁸³ Now, the wise union always solicits authorization cards before petitioning for an election.⁸⁴ Since the petition is no longer a bar, a pre-petition demand that an employer bargain on the basis of cards establishes the necessary precondition which may ripen into an 8(a)(5) refusal to bargain.⁸⁵ Unfair labor practices committed

employer has doubts he must do something to resolve them. *Kay Allen Classics, Inc.*, 152 N.L.R.B. No. 134, 1965 CCH N.L.R.B. ¶ 9401, 59 L.R.R.M. 1308 (1965).

79. See *NLRB v. Elliott-Williams Co.*, 345 F.2d 460, 464 (7th Cir. 1965).

80. This procedure stemmed from *Aiello Dairy Farms*, 110 N.L.R.B. 1365 (1954). *Aiello* was a departure from the earlier rule found in *H. M. Davidson Co.*, 94 N.L.R.B. 142 (1951).

81. The theory was apparently two-fold, (1) that cards and election were inconsistent procedures to use in proving a majority—the cards assumed a majority existed; and (2) without the rule elections could be held while 8(a)(5) charges were pending, thus increasing expense and administrative burden; 110 N.L.R.B. at 1368-70. See Note 33 U. CHI. L. REV. 387, 401-02 (1966).

82. 146 N.L.R.B. 1277 (1964) (endorsed in *International Union of Elec. Workers v. NLRB*, 352 F.2d 361 (D.C. Cir. 1965)); see Note, 113 U. PA. L. REV. 456 (1965); Note, 39 N.Y.U.L. REV. 866 (1964).

83. Since *Bernel Foam* the number of cases involving cards has risen drastically. See note 9 *supra*. In fiscal 1965 alone, the increase was 36%. For a brief outline of union strategy see Shuman, *Requiring a Union to Demonstrate Its Majority Status by Means of Election Becomes Riskier*, 16 LAB. L.J. 426 (1965).

84. For an example of the precise impact of *Bernel Foam* see *Colson Corp.*, 148 N.L.R.B. 827 (1964), in which the *Bernel* rule necessitated extensive modification of the Trial Examiner's conclusion. One commentator has declared that the unions now have "the best of both worlds," Shuman, *supra* note 83 at 433.

85. Under the *Joy Silk* rationale, any subsequent unfair labor practice, after the card presentation, warrants the finding of an 8(a)(5) violation. If the employer acts carefully at the time the cards are presented, the defeat of the subsequent unfair practice may well eliminate the 8(a)(5) charge. *E.g.*, *Peter Paul, Inc.*, 156 N.L.R.B. No. 116, 1966 CCH N.L.R.B. ¶ 20,192, 61 L.R.R.M. 1277 (1966).

during an election campaign can now create a presumption that the employer acted improperly when the cards were presented to him. Since this presumption is difficult to reverse, a bargaining order will usually follow. This situation is aggravated since conduct normally permissible frequently constitutes an unfair labor practice in the context of an election campaign.⁸⁶

The judicial endorsement of authorization cards provides unions with rather efficient election insurance. On occasion, the Board and the courts have made articulate the conception of the Act by which they justify side-stepping the secret ballot. They import into the Act the deceptively simple maxim that a man should not benefit from his own wrong.⁸⁷ Thus in *Bernel Foam*, when the employer interfered with the efficacy of the election, he could not be permitted the luxury of the ordinary remedy, a re-run election.⁸⁸ Parties who destroy the election process usually win on such re-runs;⁸⁹ the employer must not be allowed to benefit from his misconduct. As the court argued earlier in *Joy Silk*, the secret ballot surely was not intended to provide the employer with a procedural weapon to defeat unionization.⁹⁰

In other words, the Board views the problem solely as one of remedy. When an intransigent employer commits unfair labor practices in order to win an election, the Board can remedy his violations by using a limited number of devices: re-run elections, cease and desist orders, and, on occasion, injunctions.⁹¹ These remedies require protracted administrative action, hearings, litigation, and appeal, which sometimes

86. If the union proceeds with an election and loses, the election loss must be impeached. *Kolpin Bros. Co.*, 149 N.L.R.B. 1378 (1964). In the context of elections, borderline cases easily become violations. See, e.g., *Copeland Oil Co.*, 157 N.L.R.B. No. 12, 1966 CCH N.L.R.B. ¶ 20,214, 61 L.R.R.M. 1316 (1966), where questioning an employee became illegal because of the pending election; Prepared Statement of Thomas E. Shroyer, *Senate Hearings on § 14(b)*, 180, 183.

87. The employer should be denied "any benefit from its unlawful refusal." *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277, 1281 (1964). See also Sandler, *Another Worry for Employers*, U.S. News & World Report, March 15, 1965. Reprinted in *Senate Hearings on § 14(b)*, 190-94.

88. The "principle . . . serves as a valuable . . . deterrent to employer interferences." Memorandum from Secretary Wirtz to Senator Javits, *Senate Hearings on § 14(b)*, 24. The employer is not allowed to "reap the benefits." *Irving Air Chute Co. v. NLRB*, 350 F.2d 176, 182 (2d Cir. 1965).

89. See Pollitt, *NLRB Re-Run Elections: A Study*, 41 N. CAR. L. REV. 209, 212 (1963): the results changed only in "a third" of re-run elections in 1960, 1961, and in the first nine months of fiscal 1962.

90. *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950).

91. See generally Note, 72 YALE L.J. 1243, 1257 (1963), and, on injunctions, Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 128-29 (1964).

lasts for years. Therefore, the wilfully anti-union employer has nothing to lose from repeated violations except the expense, disruption, and inconvenience of Board orders and re-run elections. The bargaining order precludes the employer from capitalizing on repeated unfair labor practices. Furthermore, by compelling the one thing the obstinate employer seeks to avoid, the bargaining order hopefully provides an effective deterrent to other employers faced with unionization.

The ultimate justification for this remedy, however, must be the protection of employee free choice. The Act authorizes the Board to protect employee free choice, not to penalize the employer.⁹² Conceding *arguendo* that a re-run election is not a wholly adequate remedy,⁹³ the availability and propriety of the bargaining order as an alternative remedy nevertheless requires two assumptions: first, that a majority of authorization cards is not only an accurate index of majority support, but is more accurate than the election which they replace; and second, that if the employer does not and should not have an absolute right to an election, then his subjective belief about the union's majority status properly delineates the class of case in which he may be deprived of an election. Neither assumption survives examination.

Authorization cards are an unreliable index of employee choice. Compared with the secret ballot they replace, their solicitation is a woefully defective process, guaranteeing to employees neither a free nor a reasoned choice. Their admitted inferiority to a properly conducted secret ballot should preclude their use absolutely when the employer has not committed an unfair practice interfering with employee free choice. And even when the employer does illegally interfere with free choice, authorization cards are so unreliable that a re-run election—

92. The Board's mandate to safeguard employer choice derives ultimately from § 7 of the Act, note 114 *supra*, which guarantees, generally, three employee rights: to organize; to choose between unions; and to refrain from organizing. See the excellent analysis in Summers, *Freedom of Association and Compulsory Unionism in Sweden and the United States*, 112 U. PA. L. REV. 647, 694-95 (1964). In prohibiting even marginal employer coercion, the Board protects the right to organize. See, e.g., *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962). In protecting the right to choose between unions the Board itself has labelled cards a "notoriously unreliable method of determining majority status of a union. . . ." *Sunbeam Corp.*, 99 N.L.R.B. 546, 550-51 (1952). In the recent decision in *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965), the court recognized in dictum that the authorization card procedure similarly may undercut the right to refrain. Apparently no one denies that the secret election procedure provides a more accurate reflection of employees' true desires than a check of authorization cards. See, e.g., *NLRB v. Hannaford Bros.*, 261 F.2d 638, 641 (1st Cir. 1958); *Wirtz, supra* note 88 at 19.

93. Of course, a re-run is not a negligible affair, and does interrupt the normal operation of any employer. The administrative proceedings cost the employer time and money, especially if they lead to litigation.

or two or three or ten—better protects employee freedom. A causal relationship between employer misconduct and election results has never been proven, despite statistical⁹⁴ and scientific case studies.⁹⁵ It is as likely as not that a union loss, even when the employer has committed unfair practices in the campaign, accurately reflects employee wishes.⁹⁶ Statistics on authorization cards, on the other hand, have corroborated their unreliability.⁹⁷ It is ironic that the Board denies an election or re-run in order to protect employee free choice and then orders bargaining on the basis of cards which offer even less protection.

The second assumption, that the good faith belief of the employer regarding the union's majority determines whether he is entitled to an election, runs counter to the face and pattern of the statute and its legislative history. More important, the good faith test obscures the important issue about employee choice by making the issuance of a bargaining order depend upon an unrelated and grossly unsophisticated conception of employer motivation.⁹⁸ If the real issue is the devising of remedies to protect employee free choice, it is particularly difficult to justify depriving both employees and employers of an election when there has been neither unfair labor practices nor an election campaign.

Finally, in all its applications, the good faith test overlooks entirely employer rights incident to a 9(c) secret ballot.⁹⁹ The good faith test assumes that the need to deter employer misconduct outweighs other important policies of the Act.¹⁰⁰

94. See, e.g., Pollitt, *supra* note 89. The statistics in this study justify no conclusion about the causality between employer and union conduct and election results.

95. See generally Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Note, 72 YALE L.J. 1243 (1963).

96. In response to suggestions that the employer have an absolute right to an election, Secretary Wirtz argues that the employer needs no such protection. Although clear and unequivocal cards do evidence a desire to be represented—the known desires of the employees for unionism—if the employer insists on an election and does nothing else, Secretary Wirtz insists he can have one. Despite the fact that the present state of the law does not support Secretary Wirtz, he is accurate in stating that employer choice and employer conduct are two different matters, and that the propriety of the remedy rests on an assumption that the cards actually reflect the wishes of the employees. *Senate Hearings on § 14(b)*, 19-25.

97. See note 156 *infra*.

98. See commentary in Loomis, *Determination of Union Majority Status*, 47 CHI. BAR RECORD 113, 116-18 (1965).

99. These are the statutory benefits which attach to an election, the one year election bar of § 9(c)(3), the freedom from harassment from second unions in § 8(b)(7), the right to campaign against the union guaranteed by § 8(c).

100. See text accompanying note 189 *infra*. Secretary Wirtz suggests a justification of

THE STATUTORY FRAMEWORK

The history of the NLRA, particularly the revisions of 1947, strongly suggest that the secret ballot was intended to provide an exclusive procedure for selecting a bargaining representative.¹⁰¹ Before 1947, section 9(c) empowered the Board, in deciding a question of representation, to "take a secret ballot of employees or utilize any other suitable method to ascertain [sic] such representative."¹⁰² The Taft-Hartley revisers completely rewrote section 9(c), providing only the secret ballot procedure for deciding a question of representation.¹⁰³ The majority and minority reports of Senator Taft's committee suggest that the section was revised to grant the employer an absolute right to an election.¹⁰⁴ The right was granted in the face of minority arguments that an employer could use it to work against unions.¹⁰⁵ The use of cards in lieu of elections apparently had been quite prevalent before 1947; the minority report lamented their elimination.¹⁰⁶

Despite this legislative history, the courts have endorsed the pre-revision interpretation of section 9(a) permitting a union to become an exclusive representative without a 9(c) election.¹⁰⁷ The opening

the focus on employer misconduct in his memorandum to Senator Javits by declaring it "the fundamental purpose of the act to encourage collective bargaining," *Senate Hearings on § 14(b)*, 25.

101. Under the National Labor Relations Act (Wagner Act), § 9(c), 49 Stat. 453 (1935), the Labor Board was not required to utilize the secret ballot, but they used the election to resolve representation questions whenever possible since elections best effectuated the policies of the Act. *The Cudahy Packing Co.*, 13 N.L.R.B. 526, 531-32 (1939).

102. National Labor Relations Act (Wagner Act), 49 Stat. 453 (1935). (Emphasis added.)

103. The Senate's proposal for the new § 9(c) was eventually adopted by the committee of conference although the House also fully intended to reverse the prior practice and make it a statutory right for an employer to obtain an election even when only one union claimed representation. H.R. REP. NO. 245, 80th Cong., 1st Sess. 35 (1947). The old option of election by other means was gone. *Id.* at 55-56. In reporting on § 8(a)(5), Mr. Hartley's committee suggested changing "subject to the provisions of section 9(a)" to "currently recognized by the employer or certified as such (exclusive representative) under section 3." *Id.* at 30, 53. But the change was dropped in conference with no reason given. H.R. REP. NO. 510, 80th Cong., 1st Sess. 41 (1947). Perhaps the conferees felt the thorough revision of § 9(c) obviated any need to change § 8(a)(5). The House Minority Report suggests that the main concern with § 8(a)(5) was related to the subject of bargaining as distinct from recognition. H.R. REP. NO. 245 at 82.

104. S. REP. NO. 105, 80th Cong., 1st Sess., Part 1, 25, Part 2, 11 (1947).

105. *Id.*, Part 2, 11.

106. *Id.* at 34; the cards were apparently used in over 20% of the adjusted representation cases.

107. See, e.g., *NLRB v. Philamon Labs., Inc.*, 298 F.2d 176, 179 (2d Cir. 1962). The controlling case continually cited is *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956). The Court there had to find an 8(a)(5) duty to bargain when the union was unable to obtain a certification or election because it had not complied with the old non-communist provisions of §§ 9(f), (g), & (h). After pointing out that § 9(a) says

words of section 9(a), "Representatives designated or selected," are read to imply that there is more than one procedure for registering employee choice.¹⁰⁸ But another construction, equally plausible textually, is consistent with allowing elections to be the exclusive procedure. Both "designated" and "selected" describe election by secret ballot, "designated" referring to the single union and "selected" to the multi-union contest.

Neither the terms of section 9(a) nor the six references to it in the Act require it to serve any purpose other than to attach exclusive status to an elected union.¹⁰⁹ Whether the Act deals with the closed shop,¹¹⁰ the duty to bargain,¹¹¹ or the invocation of election procedures,¹¹² 9(a) defines what kinds of unions are included in the provisions, not what procedure the Board can use to determine when the union fits the 9(a) definition. But despite the apparently definitional role of 9(a) and the Taft-Hartley revision of 9(c), the courts have endorsed, with shockingly little analysis, the Board's construction of 9(a) as justifying the card detour.¹¹³

At the same time as the secret ballot became an exclusive method of selection under 9(c), section 7 was expanded to guarantee employees the right to refrain from organizing;¹¹⁴ "and that right is implemented

nothing about how representatives are to be chosen and citing for authority a 1942 case, *id.* at 71, the Court cited in footnote 8, *id.* at 72, several cases, many involving authorization cards, which had held that an election was not the only way to attain exclusive status. Throughout the opinion, the miners are referred to as "designated." See also note 42 *supra*.

108. Before the Taft-Hartley revisions, the ways in which the union was "designated" were many: applications for membership in union, registration cards, participation in strike vote, participation in a strike, acceptance of strike benefits and authorized check-off of union dues. See, e.g., *Lebanon Steel Foundry v. NLRB*, 130 F.2d 404, 406-08 (D.C. Cir. 1942), and cases cited at notes 6-10 therein.

109. Section 9(a) appears as a cross reference in § 8(a)(3), the closed shop proviso, and in § 8(d), allowing termination of some of the specific duties of bargaining, if loss of exclusive status occurs.

110. Section 8(a)(3) provides *inter alia* that "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employees as provided in section 9(a) . . ."

111. This includes both the general duty to bargain of § 8(a)(5), see note 26 *supra*, and the specific duties of bargaining spelled out in § 8(d).

112. See text of § 9(c)(1), note 4 *supra*.

113. The courts consistently cite pre-Taft-Hartley cases for their authority, or cases which in turn cite pre-1947 decisions, with no consideration of the intervening changes in the law. See note 118 *infra*.

114. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective

by § 9(c)(1) which provides for representation elections by secret ballot."¹¹⁵ Despite these extensive revisions, in virtually every authorization card case the Court relies on *Franks Bros. v. NLRB* for the propriety of the compulsory bargaining remedy.¹¹⁶ The endorsement of this remedy in *Franks Bros.* may have effectuated the policies of the Act in 1944, but in 1947 the policies changed.¹¹⁷ Nevertheless, pre-1947 precedent that secret elections were not exclusive has survived unexamined, screened by a myriad of cross-citations to precedents which endorse cards without reflection.¹¹⁸ The key case holding that an employer has no vested right to an election, for example, is a post-revision case adjudicating a controversy which arose under the old law.¹¹⁹ Since

bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

61 Stat. 140 (1947), 29 U.S.C. § 157 (1964). (Emphasis added.) See also Summers, *Freedom of Association and Compulsory Unionism in Sweden and the United States*, 112 U. PA. L. REV. 647, 666 (1964): "In the Taft-Hartley amendments of 1947, the individual's freedom to refrain from collective action became a dominant theme."

115. *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965).

116. 321 U.S. 702 (1944). See, e.g., *NLRB v. Philamon Labs., Inc.*, 298 F.2d 176, 182 (2d Cir. 1962). This is the only case that even suggests that Congress may not have intended the bargaining order to survive the 1947 amendments in card cases. But the reliance on legislative silence is not particularly justified since the only amendment since 1947, the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffiths Act), 73 Stat. 519 (1959), came at a time when the use of cards was quite infrequent. For a typical use of *Franks Bros.* see *NLRB v. Gotham Shoe Mfg. Co.*, 52 CCH Lab. Cas. ¶ 16,845 (2d Cir. 1966).

117. "[T]he policy of encouraging the spread of union organization and collective bargaining yielded to official indifference." Cox, *LAW AND THE NATIONAL LABOR POLICY* 15 (1960). This change, reflected throughout the Act, is particularly evident in § 7, which "places the rights not to organize, not to bargain collectively, and not to engage in concerted activities upon a parity with the original rights to engage in such activities." *Id.* at 39.

118. For instance, the authorities for the *Joy Silk* test (see text at note 48 *supra*) were four pre-1947 decisions. *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 741 (D.C. Cir. 1950). The decisions cited in *United Mine Workers v. Arkansas Oak Flooring*, 351 U.S. 62, 71, 72 n.2 (1955), are either pre-1947 cases, or decisions by Courts of Appeals which similarly are supported by rote citation of old cases. It should be noted that although *Arkansas Oak Flooring* stands today as controlling precedent for the rule that cards will create the duty to bargain (e.g., *New England Liquor Sales Co.*, 157 N.L.R.B. No. 16, 1966 CCH N.L.R.B. ¶ 20,218, 61 L.R.R.M. 1314, 1315 (1966)) in footnote 2 of the opinion the court clearly stated that it was not considering "the questions that would have been presented if there had been a bona fide dispute as to the existence of authorization from a majority of the eligible employees." 351 U.S. at 68 n.2.

119. *Iob v. Los Angeles Brewing Co.*, 183 F.2d 398 (9th Cir. 1950), though decided after the act was amended, explicitly was decided with reference to the old version of § 9(c), 49 Stat. 452 (1935), cited in full at 403 of the opinion. This case in turn constitutes the authority for the holding in *NLRB v. Trimfit of California, Inc.*, 211 F.2d 206, 209 (9th Cir. 1954), currently cited as the controlling case for an employer's not having an absolute right to an election as he would appear to have on the face of the statute.

1964, the use of authorization cards has increased significantly. The propriety of circumventing the apparently exclusive provisions of 9(c) must be supported by more than the recitation of ancient and unreasoned precedent. An examination of the cards and the methods of their solicitation supports the argument that section 7 rights would be best protected by requiring that election be the exclusive way to choose a bargaining representative.

CARDS AS A REPLACEMENT FOR AN ELECTION—EMPLOYEES' RIGHTS

The secret ballot election is regulated by an elaborate body of law designed to ensure that the election will take place in "laboratory conditions," in order to insure the employee the maximum opportunity to exercise a free and reasoned choice.¹²⁰ By comparison, the solicitation of authorization cards is virtually unregulated.¹²¹

When an employee casts a secret ballot there can be little doubt that he is making a decision for or against having the union act as his bargaining agent.¹²² The cards, on the other hand, frequently obscure by ambiguous wording whether the signatures will be used to support a direct demand for recognition or to obtain an election.¹²³ In *Lenz Co.* for example,¹²⁴ the Trial Examiner considered cards with "I WANT AN NLRB ELECTION NOW" in large print at the top of the card. Underneath, small print added: "I authorize IUE-AFL-CIO to act as my bargaining agent." The Examiner decided that these cards did not support a valid claim to majority representation; the Board reversed.¹²⁵ Employer attacks based on such ambiguities have usually failed.¹²⁶

120. *E.g.*, *General Shoe Corp.*, 77 N.L.R.B. 124 (1948); *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962); Note, 72 *YALE L.J.* 1243 (1963), Bok, *supra* note 95, at 65.

121. *Cf.* Burger, J., concurring in *International Union of Elec. Workers v. NLRB*, 352 F.2d 361, 363 (D.C. Cir. 1965). See also *NLRB v. Flomatic Corp.*, 347 F.2d 74, 79-80 (2d Cir. 1965), which pointed out how a union attains exclusive status regardless of whether it prevailed in an election, and that this result has the same practical effect as certification. For a recent brief comparison of the two processes see Bok, *supra* note 95, at 122, especially at n.231.

122. See, *e.g.*, the sample ballot in *Oak Mfg. Co.*, 141 N.L.R.B. 1323, 1332 (1963).

123. See, *e.g.*, *International Union of Elec. Workers v. NLRB*, 352 F.2d 361 (D.C. Cir. 1965); *NLRB v. Peterson Bros.*, 342 F.2d 221 (5th Cir. 1965). *But cf.* *NLRB v. Glasgow Co.*, 356 F.2d 476 (7th Cir. 1966).

124. 153 N.L.R.B. No. 120, 1965 CCH N.L.R.B. ¶ 9564, 59 L.R.R.M. 1636 (1965).

125. The Board chastized Trial Examiner Funke for not following Board precedent, and noted that the cards were the same ones upheld in *S.N.C. Mfg. Co.*, 147 N.L.R.B. 809 (1964), *enforced*, 352 F.2d 361 (D.C. Cir. 1965). Trial Examiner Funke frequently objects that the cards do not reflect employee choice. See, *e.g.*, *Piggly Wiggly El Dorado Co.*, 154 N.L.R.B. No. 32, 1965 CCH N.L.R.B. ¶ 9624, 59 L.R.R.M. 1759 (1965), note 157 *infra*.

126. See, *e.g.*, *Winn-Dixie Stores, Inc.*, 143 N.L.R.B. 848, 850 (1963), *enforced*, 341 F.2d 750 (6th Cir. 1965).

Great significance attaches to the act of signing, and according to the majority view,

[A]n employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent.¹²⁷

If this rule were applied consistently, the act of signing would be absolutely conclusive, for even the most flagrant misrepresentation is offensive only because the duped party misunderstood the intended consequences of his action. But the Board has not applied the rule in all cases; if the misrepresentation was sufficiently "gross," the signature could be impeached.¹²⁸

To deal with misrepresentation about the purpose of the cards the Board has developed the "only" or "sole purpose" doctrine.¹²⁹ Trial Examiners should reject cards only when the employee was told that the "only purpose" or "sole purpose" of the cards was to petition for an NLRB election. If, however, the organizer represents that "a purpose" is to obtain an election, the cards are upheld.¹³⁰

A recent dissent by District Judge Timbers sitting with the Second Circuit in *NLRB v. Gotham Shoe Mfg. Co.*¹³¹ reviews in detail a solicitation of cards upheld by the Board and a majority of the court. The cards were signed after the union requested bargaining, fourteen were signed by employees who could not read, eight had dubious or unknown dates, two were signed by employees who testified they did not know the meaning of "representative in collective bargaining." Three employees signed only because they saw others sign.

127. *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 743 (D.C. Cir. 1950). See also *Jas. H. Matthews & Co. v. NLRB*, 354 F.2d 432 (8th Cir. 1965), *enforcing* 149 N.L.R.B. 161 (1964); *Colson Corp. v. NLRB*, 347 F.2d 128, 135 (8th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965). Only the Fifth Circuit has so far refused to enforce a bargaining order because cards were ambiguously worded. *NLRB v. Peterson Bros.*, 342 F.2d 221, 224 (5th Cir. 1965); *contra*, *NLRB v. Glasgow Co.*, 356 F.2d 476 (7th Cir. 1966), where the same cards were used.

128. See, e.g., *Dixie Cup*, 157 N.L.R.B. No. 9, 1966 CCH N.L.R.B. ¶ 20,217, 61 L.R.R.M. 1329 (1966); *S. E. Nichols Co.*, 156 N.L.R.B. No. 106, 1966 CCH N.L.R.B. ¶ 20,184, 61 L.R.R.M. 1234 (1966).

129. Originally, any representation that the cards were for an election would defeat their validity. E.g., *NLRB v. Koehler*, 328 F.2d 770 (7th Cir. 1964); *Englewood Lumber Co.*, 130 N.L.R.B. 394 (1961). But the new rule came with the Board's new endorsement of the card procedures. E.g., *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268, 1269 (1963), *enforced*, 351 F.2d 917 (6th Cir. 1965), *accord*, *Happach v. NLRB*, 353 F.2d 629 (7th Cir. 1965).

130. See, e.g., *Gotham Shoe Mfg. Co.*, 149 N.L.R.B. 862 (1964).

131. 52 CCH Lab. Cas. ¶ 16,845, 61 L.R.R.M. 2177 (2d Cir. 1966).

One card was signed by a deaf-mute, one by the non-employed brother of an illiterate employee, and one by an employee who died shortly afterwards. All cards counted. Although seven other cards were excluded by the "only" rule, the Board counted eighteen cards whose signers were told the purpose was to get an election. Not one of the eighteen was told that the cards would authorize the union to represent him without an election. Even an *organizer* testified that she thought the cards were only for an election. After this review of the facts, Judge Timbers condemned the "only" rule as an attempt to distinguish degrees of fraud, an attempt which injects into the statute a wholly irrational basis for determining union majority status. He aptly characterized the distinctions used in card evaluation as perilously similar to the "little bit pregnant" notion.

Ambiguously worded authorization cards and misrepresentation about the cards' purpose prevent the "reasoned choice" promoted by the secret ballot. Moreover, organizers frequently obtain the signatures by persuasion bordering on coercion or fraud.¹³² Consider the typical organization drive: "mob psychology" induces many to sign because "everyone else has."¹³³ Employees who do not particularly want a union are sometimes led to believe the cards are to "scare" the employer into giving a raise.¹³⁴ In one instance an employee signed from fear based on previous union experience in another city.¹³⁵ Employees have signed when told that sufficient signatures will persuade the union to come and explain its offer,¹³⁶ or that if they do not sign and the union "gets in" anyway they might lose their jobs.¹³⁷

132. In *Engineers & Fabricators Inc.*, 156 N.L.R.B. No. 86, 1966 CCH N.L.R.B. ¶ 20,171, 61 L.R.R.M. 1156 (1966), the cards were upheld even though the signers were told they would have the right to vote as they chose in an election. Employees have signed because they thought they would be invited to a union party, *Permacold Indus., Inc.*, 147 N.L.R.B. 885, 889 n.6 (1964), or to get vacation payments due to former members of the union, *John Kinkel & Son*, 157 N.L.R.B. No. 64, 61 L.R.R.M. 1470, 1473 (1966).

133. See, e.g., *NLRB v. Adhesive Prods. Corp.*, 281 F.2d 89 (2d Cir. 1960); *Engineers & Fabricators Inc.*, 156 N.L.R.B. No. 86, 1966 CCH N.L.R.B. ¶ 20,171, 61 L.R.R.M. 1156, 1158 (1966). Cf. *TMT Trailer Ferry, Inc.*, 152 N.L.R.B. No. 147, 1965 CCH N.L.R.B. ¶ 9418, 59 L.R.R.M. 1353 (1965), where "band wagon psychology" was held to defeat two cards in a case where the employer had not committed any unfair labor practices and there was a problem on the eligible stevedores in the unit. See also *John Kinkel & Son*, 157 N.L.R.B. No. 64, 61 L.R.R.M. 1470, 1473 (1966).

134. *NLRB v. Koehler*, 328 F.2d 770 (7th Cir. 1964), *enforcing as modified* 139 N.L.R.B. 945 (1962).

135. *Colson Corp. v. NLRB*, 347 F.2d 128, 134-35 (8th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965).

136. *Kolpin Bros.*, 149 N.L.R.B. 1378 (1964).

137. See, e.g., *Heck's Inc.*, 156 N.L.R.B. No. 73, 1966 CCH N.L.R.B. ¶ 20,155, 61

The standards by which the Board evaluates union behavior are inadequate.¹³⁸ The Board has apparently transplanted the standards used to evaluate union activity during election campaigns to authorization card drives. In elections, economic threats or promises, illegal for employers, are held to be lawful union persuasion. The greater leeway granted to unions is said to be justified because a union cannot enforce its promises and threats unless it wins the election.¹³⁹ When union election coercion can be proven, each instance normally overturns one vote.

The "election law" approach is clearly inapposite in the authorization card context. In an election, many statements, particularly from unions, are permitted on the ground that the other side can simply rebut the misrepresentation.¹⁴⁰ But union representations made to secure signatures cannot be rebutted so easily. Moreover, cards do not preserve the secrecy of the employee's choice.¹⁴¹ If the employee thinks the cards will lead to a secret ballot, he can insure himself against the possibility of future retaliation and present harassment only by signing.¹⁴² Such an employee may sign a card planning to vote against the union or at least intending to reserve decision until he hears the employer's views or talks to fellow employees.¹⁴³ As the First Circuit has

L.R.R.M. 1128, 1130 (1966); *Hamburg Shirt Corp.*, 156 N.L.R.B. No. 51, 1966 CCH N.L.R.B. ¶ 20,123, 61 L.R.R.M. 1075, 1076 (1965).

138. The Board repeatedly gives great weight to the "presumption of validity flowing from the authorizations which appear on the face of the cards." *E.g.*, *Colson Corp.*, 148 N.L.R.B. 827, 840 (1964). No testimony was allowed to contradict the face of the cards. *Gary Steel Prods. Corp.*, 144 N.L.R.B. 1160 (1963). The presumption works even when cards are in English and employees read only Spanish. *NLRB v. Security Plating Co.*, 356 F.2d 725 (9th Cir. 1966).

139. See generally Drotning, *NLRB Policy Toward Employer Objections to Election Misconduct*, 16 LAB. L.J. 370 (1965).

140. See generally Bok, *supra* note 95, at 82-91. It also seems rather naive of the Board to continue to disregard misrepresentations made by other employees who are not officially union agents. The unofficial status of these employees may make their statements non-fraudulent in the open atmosphere of an election, but it hardly supports the presumption of reasoned authorizations attributed to the cards. *E.g.*, *Jas. H. Matthews & Co. v. NLRB*, 354 F.2d 432 (9th Cir. 1965).

141. For example, even in elections, when employees' anonymity was lessened by giving a waiver of dues only if they signed up before certification, the inducement was found illegal. *E.g.*, *Lobue Bros.*, 109 N.L.R.B. 1182 (1954). See Note, 33 U. CHI. L. REV. 887, 890 (1966).

142. For instance the AFL-CIO Guidebook for Union Organizers (1961), quoted in *Senate Hearings on § 14(b)*, 190, says: "N.L.R.B. pledge cards are at best a signifying of intention at a given moment. Sometimes they are signed to 'get the union off my back' . . ."

143. See, *e.g.*, *Engineers & Fabricators Inc.*, 156 N.L.R.B. No. 86, 1966 CCH N.L.R.B. ¶ 20,171, 61 L.R.R.M. 1156 (1966); *Senate Hearings on § 14(b)*, 183-84.

pointed out: "a man might sign a union card as a hedge if it [thus] costs him nothing, and yet on a secret ballot not vote for the union. . . ."144

Even in the case of cards which clearly authorize the union to seek bargaining without an election, the absence of secrecy makes threats of wage and seniority reprisal and promises to waive initiation fees more than mere predictions. True, the union cannot, at the time, enforce its threats. But since his signature will be a matter of public record, the undecided employee must carefully assess the possible consequences of being counted in the minority should enough fellow employees sign.¹⁴⁵ And, as in elections, each instance of union coercion and misrepresentation overturns only one vote.

In short, the coercive effect of union statements made during an authorization card drive is entirely different from that of statements made in a secret ballot campaign. A union organizing by means of authorization cards is in at least as effective a position to coerce as is an employer in a secret ballot campaign.¹⁴⁶ And even a brief review of secret ballot "election law" impresses one with the number of decisions overturning election results on the mere suggestion that employers coerced or restrained employees in their free choice. The line between permissible "predictions" or future conditions and impermissible "threats of reprisal or promises of economic benefit" is often resolved in favor of the latter.¹⁴⁷

Not only do the cards make it more possible for the union to coerce employees, but the card procedure is not at all suited to providing them with the information upon which they can make a reasoned

144. *NLRB v. Gorbea, Perez, & Morell*, 300 F.2d 886, 888 (1st Cir. 1962), considering a promise to waive initiation fees. On remand to the Board, 142 N.L.R.B. 475 (1963), the Board again followed its consistent argument that waiver of the fees was the same in the card context as in the election campaign. The court then denied enforcement a second time, 328 F.2d 679, 681 (1st Cir. 1964), noting that such inducements to obtain signatures before an election were hardly inconsequential. *But see Amalgamated Clothing Workers v. NLRB*, 345 F.2d 264 (2d Cir. 1965), which upheld the same cards and the same waiver by the same union.

145. See, e.g., Statement of Andrew Biemiller, *Senate Hearings on § 14(b)*, 83, 87.

146. Secretary Wirtz, who admits that "[T]he procedure for determining a majority wish for union representation by means of cards is uniformly recognized as less satisfactory than a secret vote in an election," nonetheless seems confident that the General Counsel will seek a bargaining order only when he has no reason to believe the cards were obtained by improper means. Secretary Wirtz adds that the employer has no duty to seek evidence that the cards do not reflect the employees' true choice, but fails to suggest how an employer's doubt can be supported. Memorandum from Secretary Wirtz to Senator Javits, *Senate Hearings on § 14(b)*, 19-26.

147. See generally Bok, *supra* note 95, at 77-82.

choice.¹⁴⁸ The union is not likely to describe accurately the probable advantages of organizing, much less to present the disadvantages. In contrast, the election campaign preceding a secret ballot pits adversary candidates against each other, increasing the probability that the employee will hear both sides of the story, and that any union chosen will be supported by a genuine majority.¹⁴⁹

Authorization cards have become the functional equivalent of secret ballot elections because the courts accept the compulsory bargaining order as an appropriate remedy for the employer's refusal to bargain upon presentation of cards.¹⁵⁰ But the propriety of this remedy must be re-examined. *Franks Bros.*, which upheld the remedy under section 10(c) because it "effectuat[ed] the policies of [the] Act," was decided before the Taft-Hartley revisions.¹⁵¹ Those revisions altered the Act's policies. The policed secret ballot campaign stands in contrast with the virtually unregulated authorization card drive.¹⁵² The bargaining order which allows the cards to replace the secret ballot constitutes a significant modification of the statutory scheme.

THE GOOD FAITH TEST AND EMPLOYER MOTIVATION

The law of authorization cards subordinates a consideration of employee free choice to concern with policing employer conduct. Under the *Joy Silk* good faith test, the bargaining order issues when an employer's refusal to recognize is not supported by a good faith doubt of the union's majority status. The lack of good faith doubt is established by employer conduct at the time of his refusal or is conclusively presumed from employer misconduct subsequent to his refusal. The difficulty of proving that the employer's doubt was in bad faith by using as evidence his acts at the time of the bargaining request has forced the Board to rely almost exclusively upon misconduct occurring days and even months after the refusal.¹⁵³

148. See, e.g., Sandler, *Another Worry for Employers*, U.S. News & World Report, Mar. 15, 1965, reprinted in *Senate Hearings on § 14(b)*, 191-92.

149. See Bok, *supra* note 95, at 97-106, on problems of equal access to employees. When cards are used, there is always a chance that the union will lack faithful support. COX, LAW AND THE NATIONAL LABOR POLICY 41:

Since a finding concerning the employees' wishes on the date of the employer's refusal to bargain may depend upon inference or conflicting evidence, there is often substantial risk of making an erroneous finding which would fasten an unwanted representative upon both employees and employer.

150. See, e.g., Burger, J., concurring in *International Union of Elec. Workers v. NLRB*, 352 F.2d 361, 363 (D.C. Cir. 1965), *cert. denied*, 86 S. Ct. 235.

151. See text accompanying notes 32-39, 115-17 *supra*.

152. See, e.g., Sandler, *supra* note 148, at 193.

153. See cases and text at notes 49-79 *supra*, and notice in *Jem Mfg. Inc.*, 156 N.L.R.B.

Finding in subsequent acts a prior lack of good faith doubt about majority status necessitates accepting an unfounded presumption: that an employer who takes action against a union must believe that the union represents a majority of his employees. But acting against the union implies absolutely nothing about the employer's belief about its majority status. An employer might honestly doubt the union's majority, and at the same time take action to insure that it does not gain one. Moreover, the good faith test, by its own terms, relates to the employer's belief regarding the union's representation of a majority of his employees, not simply whether a majority of signatures appear on the cards.¹⁵⁴ An employer could believe that a majority has signed cards and nevertheless doubt, in good faith, that his employees wish to be represented for the purposes of collective bargaining. Nothing demands that the employer blind himself to the deficiencies in authorization cards as a medium for registering employee choice.¹⁵⁵ Not only is their solicitation frequently irregular but experience with cards has revealed their statistical unreliability. In an address to the American Bar Association, Board chairman McCulloch himself pointed out:

In 58 elections, the unions presented authorization cards from 30 to 50% of the employees; and they won 11 or 19% of them. In 87 elections, the unions presented authorization cards from 50 to 70% of the employees; and they won 42 to 52% [*sic*—42 or 48%] of them. In 57 elections, the unions presented authorization cards from over 70% of the employees, and they won 43 or 74% of them.¹⁵⁶

No. 62, 1966 CCH N.L.R.B. ¶ 20,128, 61 L.R.R.M. 1074 (1966), how once the General Counsel makes out a prima facie case based on these actions, the employer bears the burden of going forward. In *Metal Craft Co.*, 151 N.L.R.B. No. 148, 1965 CCH N.L.R.B. ¶ 9253, 58 L.R.R.M. 1628 (1965), the employer had the burden of proof on the issue of good faith doubt.

154. The *Joy Silk* test, 185 F.2d 732 (D.C. Cir. 1950), in fact says nothing about cards. In *Dixie Color Printing Corp.*, 156 N.L.R.B. No. 120, 1966 CCH N.L.R.B. ¶ 20,205, 61 L.R.R.M. 1285 (1966), the test was applied to an employer who received a petition, not cards. The employer's doubt is often rather summarily dismissed. See, e.g., *Peoples Service Drug Stores, Inc.*, 154 N.L.R.B. No. 118, 1965 CCH N.L.R.B. ¶ 9740, 60 L.R.R.M. 1183 (1965), in which an employer grounded his doubt of card checks on experience—*i.e.*, on the fact that in each of the nine previous occasions on which he had agreed to a card check with various unions, the unions had lost the subsequent election. The assertion that this would support his doubt was labelled "inherently unreasonable."

155. Nothing, that is, but the Board. See *Jem Mfg. Co.*, 156 N.L.R.B. No. 62, 1966 CCH N.L.R.B. ¶ 20,128, 61 L.R.R.M. 1074 (1966).

156. 1962 PROCEEDINGS, SECTION OF LABOR RELATIONS LAW, AMERICAN BAR ASSOCIATION 14-17. See also *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617, 620 (8th Cir. 1965).

If for no other reason than this proven unreliability of cards as a medium for registering employee choice, an employer would appear always to have grounds for a good faith doubt of majority status.¹⁵⁷ Moreover, in some circumstances recognizing the union on the basis of these cards becomes an unfair labor practice, even if done in good faith, if the union does not, in fact, have a majority.¹⁵⁸

Ignoring the complex problems raised by authorization cards, the Board focuses almost exclusively upon the employer's subsequent misconduct. The *Joy Silk* rationale in effect authorizes a sanction, almost penal in nature, not otherwise available to the Board.¹⁵⁹ Normally, when an employer commits an unfair practice during union organization, the Board issues a cease and desist order. If the illegal conduct occurs in an election campaign, the Board may, in addition, order a re-run election.¹⁶⁰ But the rationale of *Joy Silk* makes possible a more drastic remedy: the procedure of soliciting cards before seeking an election may be used by the union as a device for enabling the Board to order compulsory bargaining. If the employer complains about the

157. In *Piggly Wiggly El Dorado Co.*, 154 N.L.R.B. No. 32, 1965 CCH N.L.R.B. ¶ 9624, 59 L.R.R.M. 1759 (1965), Trial Examiner Funke argued that the "floodtide" of decisions in which the Board had ignored *NLRB v. Johnnie's Poultry Co.*, *supra* note 156, which gives the employer a defense if he has reasonable doubt, forced him to stick to the *Joy Silk* standard. Needless to say, the Board expressly repudiated the Trial Examiner's "extraneous comments."

158. *Bernard-Altman, I.L.G.W.U. (Garment Workers) v. NLRB*, 366 U.S. 731, 738-39 (1961). However, in *NLRB v. Air-Master Corp.*, 339 F.2d 553, 556 (3d Cir. 1964), the Third Circuit, citing *Garment Workers*, *supra* at 739 n.11, stated that an employer could discharge his responsibility by taking a card check, and in *NLRB v. Whitelight Products*, 298 F.2d 12, 15 (1st Cir. 1962), the First Circuit held that *Garment Workers* did not apply when the union presented a clear majority of cards. Still, the Supreme Court's decision remains, declaring that good faith belief of majority status is no defense, 366 U.S. at 739. In *NLRB v. Signal Oil & Gas Co.*, 303 F.2d 785 (5th Cir. 1962), the Fifth Circuit argued that there is no reason to worry about this situation since the Board uses as a remedy a "necessary and desirable" election. However, precisely such an election is at issue in the card situation. Of course the election is crucial to those who view cards as an opportunity for a sweetheart union. See Senator Javits' comment in *Senate Hearings on § 14(b)*, 188-89. This line of argument as well as the apparent conflict between circuits might be a successful way to avoid some of the evidentiary barriers to getting the authorization card problem before the Supreme Court.

159. Of course, the recent decision in *NLRB v. Delight Bakery*, 353 F.2d 344 (6th Cir. 1965) calls this into doubt. The customary order to bargain comes only after the bargaining relationship has been established; in *Delight Bakery* the order to bargain came for § 8(a)(1) violations only—interrogation, granting of benefits—and was enforced despite the union's lack of majority. Not only had no bargain relationship ever commenced, but the employer did not violate the *Joy Silk* test since he successfully grounded his doubt in the fact that the union requested recognition for an abnormal unit. *Contra NLRB v. Flomatic Corp.*, 347 F.2d 74 (2d Cir. 1965).

160. See, e.g., Note, 72 YALE L.J. 1243, 1257 (1963).

severity of the remedy, the Board answers that the employer cannot be permitted to "reject the collective bargaining principle."¹⁶¹

The *Joy Silk* test condemns the employer for opposing the union and does not permit him to raise as a defense the unreliability of cards. Yet employer opposition to unionization is not only permitted but anticipated by the NLRA.¹⁶² Since unionization may well cost the employer money and alter the way he runs his business, he certainly has an interest in having his employees know his side of the argument.¹⁶³ The simplistic *Joy Silk* test, in focusing solely upon employer misconduct, does not provide a realistic standard for evaluating the employer's motivation when faced with a sudden demand.¹⁶⁴

SECRET BALLOT ELECTIONS AND THE NLRA—EMPLOYERS' RIGHTS

The NLRA attaches several consequences to a secret ballot election which do not attach to authorization cards. These consequences often benefit the employer, but they may benefit the employees and union as well. When the Board and the courts accept authorization cards they overlook important policies of the Act.

For example, the employer's right to express his views, guaranteed to some extent by section 8(c) of the Act and by the First Amendment, is curtailed by the authorization card procedure.¹⁶⁵ If the card-soliciting union moves quickly and quietly, the employer will not discover the drive until too late.¹⁶⁶ In this situation the employer, at best, will not

161. See *Ben Duthler, Inc.*, 157 N.L.R.B. No. 3, 1966 CCH N.L.R.B. ¶ 20,216, 61 L.R.R.M. 1305 (1966) where the Trial Examiner dismissed the idea that the remedy was severe. See also *Jem Mfg. Co.*, 156 N.L.R.B. No. 62, 1966 CCH N.L.R.B. ¶ 20,128, 61 L.R.R.M. 1074 (1966), and *NLRB v. Austin Powder Co.*, 350 F.2d 973, 977 (6th Cir. 1965).

162. See note 73 *supra* for the provisions of § 8(a)(2), intended to prevent union-management collusion and note 165 *infra*, for those of § 8(c), granting the employer protection to express his views—presumably against the union.

163. According to Cox, the elimination of the rule making interrogation of employees by employers illegal per se amounts to a recognition of the employer's "legally cognizable interest in preventing the unionization of his plant." COX, *LAW AND THE NATIONAL LABOR POLICY* 40.

164. Cf. the discussion of the difficulties presented by sudden demands in *NLRB v. Great Atlantic & Pacific Tea Co.*, 346 F.2d 936, 940-41 (5th Cir. 1965).

165. 61 Stat. 142 (1947), 29 U.S.C. § 158(c) (1964):

Sec. 8. . . .

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

166. See, e.g., *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926 (1st Cir. 1965), in which there was a 2 day "quickee" campaign; *Gafner Automotive & Machine, Inc.*, 156 N.L.R.B. No. 63, 1966 CCH N.L.R.B. ¶ 20,125, 61 L.R.R.M. 1107 (1966), in which the employer was apparently surprised by the cards, and reacted with anger.

have the opportunity to exercise his free speech rights until after the card presentation. And unless he has a good faith doubt about the union's majority status, he will never have the opportunity to express his views. He cannot force an election merely by saying that he wishes to have the opportunity to exercise his 8(c) or constitutional rights. Since the *Joy Silk* test makes the right to an election turn solely on doubt about majority status, when the employer is surprised by the union's presentation of cards, he has no free speech rights at all.¹⁶⁷

If the employer does have a doubt about the union's status, he will be given the opportunity to campaign. But he must take particular care not to do or say anything before the election which the Board might later find improper.¹⁶⁸ For having been presented with cards, he faces the threat of compulsory bargaining.¹⁶⁹

The imminent bargaining order cannot fail to discourage an employer from campaigning vigorously. He will be deterred not only from engaging in potentially coercive activity, but also from perfectly permissible activity.¹⁷⁰ The standards of unfair campaign tactics are not so unequivocal that he can predict confidently what activity is allowed and what is not.¹⁷¹ Indeed the rationale of *Joy Silk* would seem to reach employer misconduct falling short of unfair labor practices.¹⁷² Unless the employer actually favors the union—and this the Act frowns upon¹⁷³—virtually anything the employer says or does in his campaign will be intended to dissipate the union's strength. Why else would he bother to campaign? Under *Joy Silk* such statements could help to demonstrate that the initial refusal to bargain was not based

167. See, e.g., *Senate Hearings on § 14(b)*, 181; 111 CONG. REC. 14584 (daily ed. June 29, 1965). In *Cosmodyne Mfg. Co.*, 150 N.L.R.B. No. 1, 1964 CCH N.L.R.B. ¶ 13,642, 58 L.R.R.M. 1063 (1964), the employer was condemned for wanting an opportunity to bring home to the employees his anti-union view. The employer in this case insisted that he had no prior intimation of unionization before the demand and received a repudiation petition 6 days later.

168. See, e.g., *Wirtz*, *supra* note 88, at 24. See also the lengths to which the Board goes to find coercion, e.g., the interpretation of the letters in *Marion Bottling Co.*, 156 N.L.R.B. No. 100, 1966 CCH N.L.R.B. ¶ 20,166, 61 L.R.R.M. 1190 (1966); and in *Lord Baltimore Press*, 142 N.L.R.B. 328 (1963).

169. The employer acts at his peril. See, e.g., *NLRB v. Elliott-Williams Co.*, 345 F.2d 460, 464 (7th Cir. 1965).

170. See, e.g., *Bok*, *supra* note 95, at 112, where he argues that a restrictive policy on interrogation is permissible since only a re-run election is in the offing and the employer is not being judged to have violated the law.

171. See generally *Bok*, *supra* note 95, at 111, particularly his discussion of the confusion over what constitutes interrogation.

172. See, e.g., Note, 33 U. CHI. L. REV. 387, 403-04 (1966). This could easily result by combining the approach of *Snow & Sons*, 134 N.L.R.B. 709 (1961), with *Bernel Foam*.

173. See § 8(a)(2), *supra* note 73.

on a good faith doubt of majority status.¹⁷⁴ Thus even when the employer succeeds in insisting upon a secret ballot the exercise of his right to free speech is significantly dampened by the threat of a bargaining order.

If, on the other hand, the employer discovers the drive before the bargaining demand, he may have an opportunity to present his employees with arguments against unionization. But again this chance hardly replaces the opportunity he would have had in an election campaign. The authorization card drive is generally a fast-moving and concealed union effort.¹⁷⁵ When the employer learns of the drive, he may not know which union is involved, and, more important, he usually will not know the details of the union's promises and claims.¹⁷⁶ How can such an employer engage in any intelligent adversary dialogue? Absent cooperative informants and spies,¹⁷⁷ the employer must gain his information through interrogation and surveillance.¹⁷⁸ But interrogation and surveillance are dangerous forms of self-help and easily lead to unfair labor practice charges.¹⁷⁹

174. If the union proceeds with the election and loses, all it must do is defeat the validity of the election, e.g., *Kolpin Bros.*, 149 N.L.R.B. 1378 (1964), where the union failed to impeach the election result before charging an 8(a)(5) violation. This does not require an unfair labor practice by the employer; see *Bok*, *supra* note 95, at 42; the anti-union pressure and improper conduct may come from local business men, e.g., *Hamburg Shirt Corp.*, 156 N.L.R.B. No. 51, 1966 CCH N.L.R.B. ¶ 20,123, 61 L.R.R.M. 1075 (1965). It must be said, to the Board's credit, that they have always found an actual violation of the Act in turning over an election loss and ordering bargaining on the cards. But the line between illegal campaigning and an unfair labor practice is quite obscure; and the strong possibility exists that some "violations" are found with the bargaining order as a goal. So much was suggested by the court in *Indiana Rayon Corp. v. NLRB*, 355 F.2d 535, 540 (7th Cir. 1966), when they spoke of the "self-supporting scaffolding of unfair labor practice findings."

175. See, e.g., *Senate Hearings on § 14(b)*, 183.

176. See, e.g., *Samsonite Corp.*, 157 N.L.R.B. No. 5, 1966 CCH N.L.R.B. ¶ 20,212 (1966), where apparently the name of the union was unknown.

177. See, e.g., *DeKalb Telephone Co-op.*, 156 N.L.R.B. No. 125, 1966 CCH N.L.R.B. ¶ 20,195 (1966); even with informants, the information may reveal little. In *Bernel Foam Prods.*, 146 N.L.R.B. 1277 (1964), the employer actually attended the union meeting; but this rarely happens. In *Hamburg Shirt Corp.*, 156 N.L.R.B. No. 51, 1966 CCH N.L.R.B. ¶ 20,123, 61 L.R.R.M. 1075 (1965), the employer was criticized for relying on information provided by only 3 of 123 employees, suggesting that he ought to try to get as much information as possible at least to protect himself.

178. Consider even in elections the employer's incentive to interrogate, e.g., *Bok*, *supra* note 95, at 106. In *Pueblo Supermarkets, Inc.*, 156 N.L.R.B. No. 65, 1966 CCH N.L.R.B. ¶ 20,139 (1966), the employer tried to conduct a secret poll to discover union strength while preserving employee anonymity—the poll was found illegal.

179. See, e.g., *supra* notes 67, 69 and *Kay Allen Classics, Inc.*, 152 N.L.R.B. No. 134, 1965 CCH N.L.R.B. ¶ 9401, 59 L.R.R.M. 1308 (1965); *Associated Beer Depots*, 152 N.L.R.B. No. 44, 1965 CCH N.L.R.B. ¶ 9314, 59 L.R.R.M. 1102 (1965); *S. S. Logan Packing Co.*, 152 N.L.R.B. No. 40, 1965 CCH N.L.R.B. ¶ 9313, 59 L.R.R.M. 1115 (1965).

Even if the employer educates himself without committing an unfair practice, he will find it more difficult to campaign effectively and lawfully against cards than in an election. An election, for example, takes place at a fixed future time, and for twenty-four hours before the election, the Board prohibits both sides from communicating with captive audiences.¹⁸⁰ This rule prevents last minute claims on either side from going unchallenged if inaccurate or fraudulent. When cards replace the secret ballot, an employee may sign at any time; and when a majority sign, the contest may be over.¹⁸¹ Thus the employer frequently loses the opportunity to refute the final persuasive union argument. If that argument involves inaccurate or fraudulent assertions about the employer's business or the union's past record, any employer rebuttal comes too late to be effective.

Under these circumstances the contest between union and management rapidly deteriorates. The employer's campaign is directed not at the group of employees, but at each individual, card by card.¹⁸² Employer speech directed at a single employee easily loses the protection of 8(c) by constituting a threat of reprisal or promise of benefit.¹⁸³ The cards place the employer in a campaign dilemma:¹⁸⁴ his campaign is likely to be either ineffective or unlawful.¹⁸⁵ And by encouraging

180. Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

181. The majority at the time of the illegal refusal determines the issue. The subsequent loss of support for the union, even if produced by legitimate persuasion, is disregarded once illegal conduct occurs, all attention returning to the time of the card presentation. See, e.g., *NLRB v. Kellogg's, Inc.*, 347 F.2d 219 (9th Cir. 1965); *NLRB v. Philamon Labs., Inc.*, 298 F.2d 176 (2d Cir. 1962).

182. The problems of individual as opposed to group confrontation are often quite complicated and many factors such as situs of confrontation play a part. See, e.g., *Peoples Drug Stores, Inc.*, 119 N.L.R.B. 634, 637 (1957), especially member Rodgers dissenting.

183. See, e.g., *Senate Hearings on § 14(b)*, 194, where the environment of a card solicitation was characterized as a "gold fish bowl" rather than a "laboratory atmosphere."

184. In *Ben Duthler Inc.*, 157 N.L.R.B. No. 3, 1966 CCH N.L.R.B. ¶ 20,216, 61 L.R.R.M. 1305 (1966), the Trial Examiner Funke described the card-supported bargaining demand as placing the employer in "triple jeopardy": if he recognizes the union and it does not, in fact, have a majority, he violates § 8(a)(2); if he undertakes his own investigation to support his doubts, "he must exercise scrupulous care" or he will violate § 8(a)(1); if he refuses to recognize and the union does represent a majority, he violates § 8(a)(5).

185. In *NLRB v. Dan River Mills*, 274 F.2d 381, 388-89 (5th Cir. 1960), Judge Brown accurately described the entire problem:

Assuming that despite its unilateral choice of the alternative of a Board proceeding, the Union would have still agreed to this method and an impartial person had been chosen, even this might have proved to be insufficient. For it was the Employer's contention—then and since—that a great number of these cards did not represent the voluntary wishes of such employees.

How was this critical fact to be determined? True, an employer does have the legal right to interrogate to find out. [Citation omitted.] But like Odysseus, he stands almost helpless as he makes the perilous passage between Scylla and Charybdis. If he

self-help, the cards defeat the Act's goal of preserving industrial peace.¹⁸⁶

Authorization cards interfere with industrial peace in other ways as well. The twelve month election bar of section 9(c)(3) does not operate unless there has been an election.¹⁸⁷ Similarly, recognitional picketing by a rival union is prohibited by section 8(b)(7) only if the existing bargaining agent won a secret ballot election.¹⁸⁸ Until a contract is signed, the employer is not—as he is after losing a secret ballot—secure from harassment by other unions. And a rival union is free not only to harass by petitioning for an election but also to picket to support its demand for recognition.

In these situations the secret ballot is the procedure selected to ac-

makes a simple inquiry of each employee and accepts the simple answer, the very pressures apprehended may well bring about the employee's confirmation as well. If he probes deeper, the inquiry unavoidably becomes an investigation and soon it is inescapable that there be insinuations or intimations in terms of relative evaluation of union or nonunion conditions. At that point, undefined and undefinable, the inquisitor trespasses either on forbidden ground or flounders in the Serbonian bog, [citation omitted], surrounding it so that what started out to be a means of compliance with law is turned into an affirmative charge of an unfair labor practice. And all the while, all that is done, all that is said, all that is asked, all that is answered, rests in the uncertain recollection of the partisan participants. What begins as the employer's quest now ends in the employer's flight. And now no longer will his conduct be judged alone by what was said. Now, through the unavoidable nature of our legal administrative machinery, [citation omitted], it will be judged by what interested partisans say one said was said, or what others said to have said was said.

As we have pointed out, [citation omitted], self-help under these circumstances is tortuous and fraught with danger. Substituting partisan determination of controversies through the means of volcanic pressures of an industrial conflict for that of impartial disinterested governmental machinery ought not to be encouraged.

186. See, e.g., *NLRB v. Great Atlantic & Pacific Tea Co.*, 346 F.2d 936, 940 (5th Cir. 1965).

187. See, e.g., *National Waste Material Corp.*, 93 N.L.R.B. 477 (1951). The card check does not create a bar. When the union loses an election, the bar operates. *Hotpoint, Inc.*, N.L.R.B. Cas. No. 31-RC-38, Nov. 16, 1948, CCH LAB. L. REP. ¶ 2720.244. And an employer can refuse to bargain on cards for one year after an election loss, e.g., *Dow Chemical Co.*, 152 N.L.R.B. No. 122, 1965 CCH N.L.R.B. ¶ 9390 (1965); unless the loss was in a rival union election which no union won, e.g., *Conren, Inc.*, 156 N.L.R.B. No. 43, 1966 CCH N.L.R.B. ¶ 20,131, 61 L.R.R.M. 1090 (1966).

188. 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7) (1964). The limitation of sub-section A would be satisfied, curtailing rival picketing, if a contract has been signed—the "contract bar" preventing a question of representation from being raised under § 9(c). E.g., *McLeod v. Local 202, Int'l Bhd. of Teamsters*, 239 F. Supp. 452 (S.D.N.Y. 1965). And if the "card" union had lost the election, picketing would be barred for a year. E.g., *Lumber Workers, Local 2797*, 156 N.L.R.B. No. 47, 1966 CCH N.L.R.B. ¶ 20,108, 61 L.R.R.M. 1046 (1965). Both the employer and employee have an interest in freedom from organization after the union loses an election. See Comment, *Picketing by An Uncertified Union: the New Section 8(b)(7)*, 69 YALE L.J. 1393, 1404 (1960).

commodate the Act's complicated and frequently conflicting policies.¹⁸⁹ And the benefits to the employer are paralleled by benefits to the employee. Surely the employee, too, has an interest in promoting industrial peace and hearing the employer's arguments against the union. The singleminded concern over employer conduct which marks the legitimization of authorization cards neglects and oversimplifies these policies.

SOLVING THE PROBLEM

The Problems

Different parties, as we have seen, may claim to have been injured in different ways by the authorization card detour around an election.

The Employee. (1) The employee's signature may have been coerced or procured by fraud. (2) He may not have understood the consequences of signing, believing, for example, he had signed to get an election. (3) He may have signed willingly and knowingly, but desire to change his mind because subsequently he obtained more information about unionization or the particular union. (4) Finally, he may, after having signed, simply feel uncertain and desire to hear the employer's arguments.

The Employer. (1) The employer may genuinely disbelieve the cards represent the majority wishes of his employees. His disbelief may be based upon proven or suspected instances of forgery, fraud, or coercion, or upon a studied distrust of card solicitation. (2) The employer may believe that some employees would change their minds if he could present his full argument. (3) The employer may want to take advantage of the benefits which accrue after an election.

The Union. The union benefits by an election; for example, it may obtain protection against a rival union, or the right to engage in secondary boycotts.¹⁹⁰

Third Parties. Rival unions or the Board itself may feel that the

189. The policies are frequently simplified as promoting industrial peace, protecting employee rights, and advancing collective bargaining. See § 1 of the N.L.R.A., 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964); Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59, 86-87 (1965). The election serves several functions under the act to harmonize the conflict: the expedited election to insure recognition picketing is legitimate—§ 8(b)(7)(c), note 188 *supra*; the election permitting certification in order to insure a union secondary boycott is proper—§ 8(b)(4)(c), 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4) (1964); the decertification election open to unionized employees—§ 9(c)(1)(A)(ii), note 4 *supra*; the de-authorization election allowing employees to terminate a union or "closed" shop—§ 9(c)(1), 65 Stat. 601 (1951), 29 U.S.C. § 159(c) (1964).

190. For the advantages of elections see, *e.g.*, Bauer Welding & Metal Fabricators, Inc., 154 N.L.R.B. No. 82, 1965 CCH N.L.R.B. ¶ 9663, 60 L.R.R.M. 1070 (1965). See also Note, 39 N.Y.U.L. Rev. 866 (1964); and General Box Co., 82 N.L.R.B. 678 (1949).

cards permitted a collusive or "sweetheart" arrangement between employer and union.¹⁹¹

Recently Proposed Solutions

In the first session of the present Congress, two Senators proposed legislation relating to the authorization card procedure.¹⁹² The bills were proposed during the Senate consideration of the repeal of section 14(b) of the NLRA, the provision allowing states to forbid closed or "union" shops.¹⁹³ Under a union shop agreement, permitted by section 8(a)(3), an employee is forced to pay union initiation fees and dues as a condition of employment.¹⁹⁴ Senators Javits and Fannin were concerned that repealing 14(b) without regulating the authorization card procedure would make it possible to force all employees to support a union which did not actually represent a majority.¹⁹⁵

The proposed revisions attempt to clarify the relation among sections 9(a), 9(c), 8(a)(5) and 10(c). Senator Fannin would modify 9(a) and 10(c).¹⁹⁶ A union would become a 9(a) representative only by winning

191. Although the collusive or "sweetheart" situation may be over-emphasized by some critics of the cards, it does exist. See, e.g., the "sweetheart" union situations in *Continental Distilling Sales v. NLRB*, 348 F.2d 246 (7th Cir. 1965); *NLRB v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir. 1965); *NLRB v. Fotochrome, Inc.*, 343 F.2d 631 (2d Cir. 1965); *NLRB v. Adhesive Prods. Corp.*, 281 F.2d 89 (2d Cir. 1960); *Kilpatrick's Bakeries, Inc.*, 155 N.L.R.B. No. 36, 1965 CCH N.L.R.B. ¶ 9788, 60 L.R.R.M. 1313 (1965); *Star-Lite Electronics Corp.*, 154 N.L.R.B. No. 150, 1965 CCH N.L.R.B. ¶ 9738, 60 L.R.R.M. 1212 (1965). See also *Senate Hearings on § 14(b)* 189, for another type of collusion—the so-called "racket union."

192. Senator Javits introduced S.2133 on June 14, 1965, 111 CONG. REC. 12989, 12994 (daily ed. June 14, 1965) but revised it substantially in his second bill S.2395, introduced on Aug. 11, 1965, 111 CONG. REC. 19308 (daily ed. Aug. 11, 1965). Senator Fannin introduced S.2226 on June 29, 1965, 111 CONG. REC. 14584 (daily ed. June 29, 1965).

193. S.256, 89th Cong., 1st Sess. (1965), to repeal § 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1964).

194. 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1964).

195. Although Senator Javits was particularly concerned about lack of a majority in collusive and "racket" union situations, *Senate Hearings on § 14(b)*, 189, employers in a non-collusive situation occasionally have been ordered to bargain even when a union has lost its initial "card majority." See cases cited at note 181 *supra*; and see also *Henry Spen & Co.*, 150 N.L.R.B. No. 21, 1964 CCH N.L.R.B. ¶ 13,672, 58 L.R.R.M. 1048, 1051 n.3 (1964).

196. S.2226, 89th Cong., 1st Sess. (1965):

That section 9(a) of the National Labor Relations Act, as amended, is amended by inserting before the first proviso therein the following: "Provided further, That such bargaining representatives shall have been certified by the Board as the result of an election conducted in accordance with section 9(c), unless the employer shall have engaged in a course of conduct in violation of section 8 with intent to undermine a majority secured without coercion or misrepresentation by the labor organization or organizations seeking recognition in accordance with section 9(c)."

Sec. 2. Section 10(c) of such Act is amended by inserting before the period at the

a secret ballot election, unless prior to the election the employer commits an unfair labor practice with intent to undermine the union's majority. This union majority, furthermore, must have been secured "without coercion or misrepresentation." A parallel revision of 10(c) would limit the issuance of a compulsory bargaining order to the situation described in the new 9(a).

Senator Fannin's proposal to render ineffective cards obtained through coercion or misrepresentation does not seem to change the law at all, since even under present case law such cards do not count. The defect in the present law is in the standards, transplanted from election law, which permit all but the most extreme and offensive union tactics. The bill fails to modify these standards.

But perhaps Senator Fannin intended his bill to place clearly on the Board the burden of proving that the union obtained the card majority without the coercion or misrepresentation. If the bill were construed in this way, the Board would probably have great difficulty in affirmatively proving the cards were legitimately procured without first instituting procedures to guarantee effective review of the solicitation.¹⁹⁷ This solution, though possible in theory, would be extremely difficult in practice. The difficulty of regulating elections suggests that regulating card solicitations would be even more difficult. If Senator Fannin's bill is intended to increase the probability of an election, it seems to fail. By permitting any employer unfair labor practice to eliminate the necessity of a 9(c) secret ballot, the bill allows the Board to continue to find an 8(a)(5) violation on the basis of the *Joy Silk* rationale. In short, Senator Fannin's proposal does nothing except make *Joy Silk* statutory and possibly shift to the Board the burden of overcoming a presumption that the cards do not reflect free choice. And even this change is not explicit but depends upon interpretation by the Board and courts.

end of the third sentence thereof a colon and the following: "Provided further, That the Board shall not issue an order to bargain in any case in which the bargaining representative shall not have been certified as a result of an election conducted in accordance with section 9(c), unless the employer shall have engaged in a course of conduct in violation of section 8 with intent to undermine a majority secured without coercion or misrepresentation by the labor organization or organizations seeking recognition in accordance with section 9(c)."

197. For instance the Board would probably have to allow full discovery as under the Federal Rules, allow testimony from all employees, signers or not, as to typical representations made to get the cards, prohibit any testimony as to a signature except from the signer himself, consider whether employees had changed their minds subsequent to signing but before the employer committed any unfair labor practices, etc. The administrative burden in time and money would appear tremendous.

Senator Javits felt that the best way to secure employee rights was to strengthen the employer's right to an election.¹⁹⁸ He would amend 9(c) and 8(a)(5). Under his new 9(c)(6), an employer presented with cards would have a right to a secret ballot, regardless of an alleged 8(a)(5) refusal to bargain, unless, prior to the election, he commits other unfair labor practices which dissipate the union's majority or eliminate the possibility of a fair election. In addition, section 8 would be modified by the addition of a new subsection (g) making the employer's *refusal to recognize* on the basis of cards an 8(a)(5) violation. However, the new provision explicitly grants two defenses to a charge of refusal to recognize: (1) that the employer had a good faith doubt about the union's majority status; and (2) that he had petitioned for a secret ballot under the new subsection 9(c)(6). An employer presented with cards would have an absolute right to an expedited election.¹⁹⁹ And if the employer sought such an election, the Board could

198. S.2395, 89th Cong., 1st Sess. (1965):

That section 9(c) of the National Labor Relations Act is amended by adding the following new paragraph:

"(6) In any case in which it is alleged in a petition filed by an employer pursuant to paragraph (1)(B), that a labor organization seeking recognition as the representative of the employees of such employer has presented evidence purporting to show that a majority of employees in the appropriate bargaining unit desires to be represented by such labor organization, it shall be the duty of the Board, if it determines that in all other respects a question of representation affecting commerce exists, to forthwith, without regard to the provisions of paragraph (1), direct the holding of such an election in such unit as the Board finds to be appropriate and to certify the results thereof. The consideration of the petition and the holding of the election, in any such case, shall not be delayed by reason of the pendency of an unfair labor practice charge based upon the refusal of the employer to bargain collectively with the labor organization, and no such unfair labor practice charge based upon a refusal to bargain prior to the election shall thereafter be considered unless the Board determines that the labor organization had once been authorized to represent a majority of the employees in the bargaining unit, but that as a result of unfair labor practices committed by the employer (other than unfair labor practices under section 8(a)(5)), (a) such labor organization is no longer authorized to represent such majority or (b) the conditions required for the holding of a fair election no longer exist."

SEC. 2. Section 8 of such Act is amended by adding the following new subsection:

"(g) it shall be an unfair labor practice under subsection (a)(5) of this section for any employer to refuse to recognize a labor organization as the representative of his employees if such employer—

"(1) has been presented with evidence purporting to show that a majority of employees in the appropriate bargaining unit desires to be represented by such labor organization;

"(2) has no bona fide doubt that such majority desires to be so represented; and

"(3) has failed within a reasonable time to file a petition pursuant to paragraph (1)(B) of section 9(c), containing the allegations referred to in paragraph (6) of such section."

199. Senator Javits intended the same expedited election now used under § 8(b)(7). 111 CONG. REC. 19308 (daily ed. Aug. 11, 1965).

not compel bargaining unless the employer committed some unfair labor practice other than an 8(a)(5) refusal to bargain after his petition for an election. Javits' bill would modify *Joy Silk* by limiting the subsequent employer misconduct which can trigger a bargaining order, thus eliminating the potential use of *Joy Silk* to compel bargaining when lack of good faith doubt of majority status was proved by misconduct falling short of unfair practices.²⁰⁰

Under this reading of the bill, once the employer did commit an unfair labor practice, the full *Joy Silk* rationale would apply. Another possible interpretation would eliminate *Joy Silk* completely. If the new section 8(g) were deemed to describe the *exclusive* way a *refusal to recognize* could constitute an 8(a)(5) *refusal to bargain*, then the 8(a)(5) route to compulsory bargaining would be unavailable in all card cases once the employer had promptly moved for an election. Filing a petition is a defense to 8(g). This extreme construction of the bill probably would not come from the Board or courts, however, especially since Senator Javits apparently intended to have the present use of 8(a)(5) survive as partially modified.²⁰¹

The Javits bill does more than the Fannin bill to increase the probability of elections. The employer would have the right to insist on an election simply because he wanted to present his views on unionization. The threat of a bargaining order rather than the re-run election might still deter permissible speech. But since misconduct not amounting to an unfair labor practice could never lead to a bargaining order, the objection to cards as preventing free speech loses some of its force. However, as long as the cards retain any potential for allowing compulsory bargaining instead of a re-run election, some First Amendment problems persist.²⁰² The potential detriment to free speech seems particularly strong in light of the present Board's proclivity to find coercion in arguably innocuous campaign statements.²⁰³

The Fannin proposal suggests that the Act should be amended to

200. See text accompanying notes 172-174 *supra*.

201. 111 CONG. REC. 19308 (daily ed. Aug. 11, 1965).

202. The argument can be made that it is perfectly permissible to deter employer speech by a mere re-run election, since the employer has not been found to have violated the Act, and is not being punished. But the bargaining order is far stronger medicine, not mere administration of the Act's mandate to conduct, according to rules, an election. To the employer vehemently opposed to a union, the remedy will appear a criminal sanction. One might also consider in this context that an employer could be vehemently opposed to a particular union—yet not unalterably against unionization itself.

203. See, e.g., *Laars Engineers, Inc.*, 142 N.L.R.B. 1341 (1963), *modified*, 332 F.2d 664 (9th Cir. 1964); *Remington Rand Corp.*, 141 N.L.R.B. 1052 (1963); and general discussion of these and other cases in Bok, *supra* note 95, at 78-82.

make it unlikely that the cards will interfere with employee free choice. This approach might discourage ambiguously worded cards and abuses in the solicitation procedure. But this approach, in order to be effective, would probably involve difficult and time-consuming administrative policing procedures.²⁰⁴ More important, the standards for determining fraud and coercion must be modified to reflect the difference between secret ballots and cards: the employee's signature is public. Only the preservation of employee anonymity would eliminate the possibility of union coercion. But card solicitation would then become virtually identical to a secret ballot, the only difference being that employees could make their designation at any time.

Neither the Fannin bill nor the Javits bill guarantees that the employees will have heard and considered any employer arguments before making an irrevocable designation. The better of the bills in this respect, Senator Javits', would still, in some situations, hold the employee to a signature generally made before the employer has expressed his views.

Suggested Solutions

The Javits bill, by granting the employer an initial absolute right to an election and limiting to unfair labor practices the conduct which can lead to a bargaining order, corrects some of the defects of the *Joy Silk* test. But a bargaining order, saddling the employees with an unelected union, is a drastic remedy, unresponsive to many of the Act's policies. For this reason, the Board should assess the employer's unfair labor practice with regard to its probable coercive effect upon employee free choice. The bargaining order should not issue automatically, but only when a re-run is clearly not likely to reflect employee choice.²⁰⁵

More important, the Javits bill should be supplemented to minimize the probability that signatures will be obtained by subtle misrepresentation or coercion. The Board should be required to judge union solicitation conduct according to more realistic standards. And some provision should be made for policing card drives. For example, unions might be required to register all card drives with the appropriate

204. See note 197 *supra*.

205. Leaving the matter thus to the Board's discretion, the decision to fall back on the cards, in lieu of an election or re-run, would easily be made as often as it is today. The suggestion that reliance on the cards should occur only in a few situations is parallel to the rationale in *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78-79 (2d Cir. 1965), where the court rejected the bargaining order because the unfair labor practices were not sufficiently aggravated.

NLRB Regional Director, who would then approve the form and wording of the cards. If the union failed to register, the cards could still be used to petition for an election, but not to warrant a bargaining order.

Supervising the solicitation would be much more difficult. A perfectly unambiguous card, if obtained by misrepresentation or coercion, should not count as a valid designation. As a slight safeguard against illegitimate solicitation, any employee should be permitted to revoke his signature at any time before voluntary recognition, an election, or the filing of unfair labor practice charges. A further safeguard might be introduced by requiring 60% or 65% of the employee signatures rather than a bare majority. But probably in order to check union misconduct realistically, the employer must be allowed to question his employees regarding the card solicitation. If the employer were later charged with unfair labor practices, he can then raise as a defense to a bargaining order the illegitimate union solicitation. Further, if the employer succeeds in proving three or four instances of misrepresentation or coercion, a pattern or practice of illegitimate solicitation should be deemed established and *all* cards invalidated. The difficulties of supervising the solicitation are apparent. Employer interrogation which is clearly coercive should not be tolerated, but if the solicitation is to be adequately policed, the employer must be permitted some leeway in the questions he asks. Drawing the line between permissible and impermissible interrogation may well be impossible.

Even if the solicitation could be policed in order to insure that employee signatures were not obtained illegitimately, compelling bargaining on the basis of cards deprives the employees of the opportunity to hear the employer's arguments. The employee's choice is free only in the most superficial sense. A choice of apples over oranges can hardly be described as free if the chooser does not know what an orange is. Only by permitting the employer to persuade his employees not to sign or to withdraw their signatures can the employees be provided with sufficient information.²⁰⁶ But to permit this would be equivalent to holding the election campaign earlier, under conditions that would make it infinitely more difficult to police, while focusing the campaign upon individual employees who are deprived of voting anonymity.

One sensible modification of the Act would provide at least a partial check on illegitimate union solicitation and at the same time enable the employees, in a manner of speaking, to hear both sides of the argument. Employees organized by cards should be able to "decertify" their

206. Such persuasion presently violates the Act. *E.g.*, Heck's, Inc., 156 N.L.R.B. No. 73, 1966 CCH N.L.R.B. ¶ 20,155, 61 L.R.R.M. 1128 (1966).

union relatively easily. In this way, employees who were defrauded or cajoled into signing, or who changed their minds after hearing the employer or watching the union perform, would be granted partial protection.²⁰⁷ When cards serve as the basis of recognition, it might be wise to permit ten, or even five per cent, rather than the present thirty per cent to petition for decertification. Such a change would also serve to prevent "sweetheart" arrangements.

Finally, the employer compelled to recognize and bargain with a union should be granted the same protection against subsequent harassment by rival unions as is granted to employers who have lost an election. Naturally, the Board must simultaneously take precautions against inadvertently protecting "sweetheart" arrangements; but except for this situation, there is no reason to deny an employer the benefits of the Act.

These extensive revisions, if workable, would retain the bargaining order threat to deter overzealous employer conduct and provide procedures for assuring that the cards were uncoerced. Unfortunately, some of the proposals, the most important ones, would probably prove unworkable. It is difficult to imagine a procedure for policing union card solicitation drives which is administratively feasible, immune from employer abuse, and also effective. Perhaps more important, there seems to be no way short of a pre-election election campaign to provide the employees with sufficient information to make a reasoned and truly free choice. And when the employee cannot vote anonymously, he is necessarily subject to additional pressures, if only from fellow employees. The blatant inadequacies of authorization cards may be remedied. The inherent inadequacies will persist.

Perhaps the best way of solving all the problems raised by authorization cards would be to abolish them as a means for designating a bargaining representative. Abolition could be accomplished by construing 9(c) as an exclusive provision for selecting a 9(a) representative.²⁰⁸ The chief objection to this proposal, that it would leave the NLRB impotent to deal with pre-election employer misconduct, depends in large measure upon the accuracy of the unproven assumption that employer misconduct so taints the election that a re-run is an inadequate remedy.²⁰⁹

207. See *Senate Hearings on § 14(b)*, 188, on the present difficulty of employees' obtaining a decertification election.

208. This would of course repair the "sweetheart" or collusive union problems by requiring a union to win an election before being in a position to obtain a "closed shop."

209. And one should remember that for the 10 years before *Bernel Foam* the re-runs were not so clearly inadequate.

But even if the re-run were proved inadequate, the propriety of the compulsory bargaining remedy would still be open to question. Just as no one could contend that a re-run is wholly inadequate (the employer frequently loses if that is the measure of adequacy), no one could contend that a bargaining order is wholly appropriate. And on balance, the cards do more harm than good. Abolishing them might force the Congress, the courts, or the Board to devise more appropriate if less summary means of preventing employer coercion.²¹⁰ Secret ballot elections are not perfect. But they are the best procedure yet devised for enabling the citizen and the working man to register his choice.

210. Before an election, for example, a representative of the NLRB might briefly address the assembled employees, explain their rights, and dispel their fears. Fines perhaps would serve as a supplemental remedy for other than 8(a)(1) violations. Hitting the employer's pocketbook could also take another form: the posting of a bond before each election, forfeited if there are any violations, and increased substantially with very re-run. Some additional ease in obtaining injunctions might give the Board needed power. For an excellent discussion of potential remedies see Bok, *supra* note 95, at 124-132, although Professor Bok's recommendations concerning a bargaining order must be rejected when supported only by authorization cards. As pointed out, only *Franks Bros. v. NLRB*, 321 U.S. 702 (1944), supports the legality of this remedy—a remedy developed when the statute was unabashedly pro-union.