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Resolving the Uncertainties of the Employer's Duty to Bargain on the Basis of Authorization Cards: Truck Drivers Union Local No. 413 v. NLRB

RESOLVING THE UNCERTAINTIES OF THE EMPLOYER'S DUTY TO BARGAIN ON THE BASIS OF AUTHORIZATION CARDS: TRUCK DRIVERS UNION LOCAL NO. 413 v. NLRB

Although there is no explicit provision in the National Labor Relations Act[1] concerning the use of authorization cards[2] as a means of selecting collective bargaining representatives,[3] the courts repeatedly have approved their use as a substitute for secret elections[4] when there exists

1. 29 U.S.C. §§ 151-68 (1970).

2. For a detailed explanation of the procedural aspects of authorization card use, see Note, *Union Authorization Cards*, 75 YALE L.J. 805, 807-19 (1966).

3. Section 9(c)(1) of the Act provides for the selection of bargaining representatives upon the petition of an employer or employee for "an election by secret ballot." 29 U.S.C. § 159(c)(1) (1970). Section 9(a), however, speaks in terms of "[r]epresentatives designated or selected for the purposes of collective bargaining" (*id.* § 159(a)), and the Supreme Court has relied upon this language in holding that a union may attain majority status without an election. United Mine Workers of America v. Arkansas Oak Flooring Co., 351 U.S. 62, 74-75 (1956). *See generally* Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851, 861-62 (1967); Welles, *The Obligation to Bargain on the Basis of a Card Majority*, 3 GA. L. REV. 349 (1969); Comment, *Union Authorization Cards: A Reliable Basis for an NLRB Order to Bargain?*, 47 TEXAS L. REV. 87 (1968).

4. *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); United Mine Workers of America v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956); NLRB v. Ozark Motor Lines, 403 F.2d 356 (8th Cir. 1969); NLRB v. Atco-Surgical Supports, Inc., 394 F.2d 659 (6th Cir. 1968); NLRB v. Elliot-Williams Co., 345 F.2d 460 (7th Cir. 1965); NLRB v. Gorbea, Perez & Morell, 300 F.2d 886 (1st Cir. 1962); NLRB v. Philamon Laboratories, Inc., 298 F.2d 176 (2d Cir. 1962); NLRB v. Whitelight Prods. Div., 298 F.2d 12 (1st Cir. 1962); NLRB v. Kobritz, 193 F.2d 8 (1st Cir. 1951).

Although the use of authorization cards has been recognized as a valid alternative to secret elections, it is evident that the NLRB prefers the latter method for the selection of bargaining representatives. *See, e.g.*, Aaron Bros., 158 N.L.R.B. 1077, 62 L.R.R.M. 1160 (1966). In Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3594 (U.S. Apr. 22, 1974) (Nos. 73-1231 & 73-1234), the Court of Appeals for the District of Columbia Circuit acknowledged three reasons for this preference, stating:

> (1) There is greater opportunity for coercion of employees by union organizers, as compared with a secret ballot. (2) Arguably, employees may misunderstand the import of signing an authorization card, because of misreading, failure to read, or union misrepresentation. (3) When cards are used, the employer has no opportunity to speak to his employees concerning their determination to have union representation, and an employer's right to communicate to employees concerning representation is arguably guaranteed under § 8(c) of the Taft-Hartley Act.

Id. at 1107 (footnotes omitted).

Notwithstanding these negative considerations, the utility of authorization cards has been recognized by the Supreme Court: "The acknowledged superiority of the

"convincing evidence of majority support." [5] Attempts by the National Labor Relations Board to establish a practicable test for determining the circumstances under which an asserted card-based majority gives rise to an employer duty to bargain,[6] however, have been fraught with uncertainty and frequent reversals of position. The Court of Appeals

election process, however, does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective–perhaps the only–way of assuring employee choice." NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969). Indeed, it has been asserted that rerun elections are ineffectual since they generally produce victory for the party whose misconduct tainted the initial election. Pollitt, *NLRB Rerun Elections: A Study*, 41 N.C.L. Rev. 209, 212 (1963).

5. Soon after passage of the National Labor Relations Act, it was held that an employer may be required to bargain collectively when confronted with "convincing evidence" of a union's majority support among employees within an appropriate bargaining unit. NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940); NLRB v. Remington Rand, Inc., 94 F.2d 862, 868 (2d Cir. 1938). The requisite form of such evidence, however, was never specified. Among the various indicia which have been held sufficient to support a bargaining relationship are strike votes (C.A. Lund Co., 6 N.L.R.B. 423, 2 L.R.R.M. 170 (1938); Remington Rand, Inc., 2 N.L.R.B. 626, 1 L.R.R.M. 88 (1937)); union membership applications (NLRB v. Somerset Shoe Co., 111 F.2d 681 (1st Cir. 1940); NLRB v. Louisville Refining Co., 102 F.2d 678 (6th Cir. 1939)); and acceptance of strike benefits (Rabhor Co., 1 N.L.R.B. 470, 1 L.R.R.M. 31 (1936)).

6. Section 8(a)(5) of the Act declares it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1970). The National Labor Relations Board is authorized "to prevent any person from engaging in any unfair labor practice . . . affecting commerce" (*id.* § 160(a)) and is specifically directed to "issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter . . . . (*id.* § 160(c)). The Supreme Court has consistently held that prior to issuance of a bargaining order, the Board must find that the petitioning union has been properly "designated or selected" as the bargaining agent for a majority of employees and that the employer's refusal to bargain with that representative violates section 8(a)(5) of the Act. NLRB v. Gissel Packing Co., 395 U.S. 575, 610 (1969); NLRB v. Katz, 369 U.S. 736, 748 n.16 (1962); Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944); NLRB v. P. Lorillard Co., 314 U.S. 512 (1942).

The ability of a union to obtain a bargaining order predicated on a card-based majority was limited by a waiver rule announced in Aiello Dairy Farms, 110 N.L.R.B. 1365, 35 L.R.R.M. 1235 (1954), the Board stating that a union with an authorization card majority which proceeded to and lost an election in the face of employer preelection unfair labor practices could petition for a rerun election but had waived its right to rely upon the authorization cards to obtain a bargaining order to redress the employer's initial refusal to bargain. In 1964 the Board reversed *Aiello*, holding in Bernel Foam Products, 146 N.L.R.B. 1277, 56 L.R.R.M. 1039 (1964), that a union does not waive its opportunity to proceed with a section 8(a)(5) hearing after an unsuccessful attempt to attain majority status through the election process.

for the District of Columbia Circuit, exasperated by the Board's erratic administrative history, recently directed in *Truck Drivers Union Local No. 413 v. NLRB*[7] that the Board define precisely the test it intends to apply in these situations. This Comment will trace the pendulating line of decisions which have created the current problem, examine the rationale behind two conflicting proposals, and offer a compromised, yet practical, solution supported by experience and cognizant of the needs of employer and employee.

The fundamental defense of an employer to a charge of refusal to bargain was enunciated by the Board in *Joy Silk Mills, Inc.*,[8] in which it was held that an employer may deny a bargaining request if it entertains a "good faith doubt" concerning the status of the union as majority representative of its employees. This clearly subjective test[9] was modified in 1966, the Board holding in *Aaron Brothers*[10] that its General Counsel, rather than the employer, has the burden of establishing the motivation behind a refusal to bargain.[11] Concurring in the Board's decision, Member Jenkins explained the reasons for this shift in the burden of proof:

> Thus, the concept of 'good-faith doubt of majority', whatever its relevance in other types of Section 8(a)(5) violations, has become irrelevant to the decision of cases . . . where the employer rejects the card showing but engages in no violations of the Act, no undermining of the union, no interference with the employees' freedom of choice, and does not otherwise exhibit bad faith. Retention of this concept in such cases can only confuse the

7. 487 F.2d 1099 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3594 (U.S. Apr. 22, 1974) (Nos. 73-1231 & 73-1234).

8. 85 N.L.R.B. 1263, 24 L.R.R.M. 1548 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). *See, e.g.*, Traders Oil Co., 119 N.L.R.B. 746, 41 L.R.R.M. 1180 (1957); Harrisonburg Building Units Co., 116 N.L.R.B. 334, 38 L.R.R.M. 1265 (1956).

9. The potential subjectivity of the test may be observed in the Board's explanation of its operation: "In cases of this type the question of whether an employer is acting in good or bad faith at the time of the refusal is, of course, one which of necessity must be determined in the light of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct." Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264, 24 L.R.R.M. 1548, 1550 (1949).

10. 158 N.L.R.B. 1077, 62 L.R.R.M. 1160 (1966).

11. *Id.* at 1078-79, 62 L.R.R.M. at 1161. *See, e.g.*, H & W Construction Co., 161 N.L.R.B. 852, 63 L.R.R.M. 1346 (1966); John P. Serpa, Inc., 155 N.L.R.B. 99, 60 L.R.R.M. 1235 (1965).

> parties, the bar, and the Trial Examiner, and thereby increase the Board's own work load.[12]

This decision effectively limited the use of authorization cards and forced unions generally to seek to establish majority status through the preferred electoral process.

Prior to the modification of the *Joy Silk* doctrine, the Board had held in *Snow & Sons*[13] that a defense of good faith would be unavailing if it could be established that an employer had refused to bargain while in possession of actual knowledge of the union's majority status. The finding of "independent knowledge" [14] in *Snow & Sons* was premised upon the employer's voluntary agreement to have an autonomous third party verify authorization cards and its continued refusal to bargain once the cards had been verified.[15] The immediate effect of the Board's decision was not significant, since an employer could escape its application simply by refusing to submit authorization cards for independent verification.

Two subsequent decisions, however, expanded the "independent knowledge" test and thus diminished substantially an employer's ability to assert a defense of "good faith" doubt of union majority status. In *Pacific Abrasive Supply Co.*,[16] the employer's conversations with certain pro-union employees and the presence of recognitional strikes were held indicative of sufficient "independent knowledge" to support a bargaining order. Similarly, independent knowledge was found in a second decision arising from organizational activities by employees of the Wilder Manufacturing Company,[17] the Board relying upon the presence of a

12. 158 N.L.R.B. at 1081, 62 L.R.R.M. at 1162.

13. 134 N.L.R.B. 709, 49 L.R.R.M. 1228 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

14. Although the term "independent knowledge" does not appear in the *Snow & Sons* opinion, the decision is continually cited as the source of this doctrine.

15. 134 N.L.R.B. at 710, 49 L.R.R.M. at 1228. *See, e.g.*, Furr's, Inc., 157 N.L.R.B. 387, 61 L.R.R.M. 1388 (1966); Strydel, Inc., 156 N.L.R.B. 1185, 61 L.R.R.M. 1230 (1966); Dixon Ford Shoe Co., 150 N.L.R.B. 861, 58 L.R.R.M. 1160 (1965); Kellog Mills, 147 N.L.R.B. 342, 56 L.R.R.M. 1223 (1964).

16. 182 N.L.R.B. 329, 74 L.R.R.M. 1113 (1970). Circumstances found to indicate "independent knowledge" in this case included management's direct acknowledgment to the union organizer that the signatures on all of the cards were genuine, management's receipt of direct, oral expressions of support for the union from each of the employees in the appropriate bargaining unit, and a recognitional strike in support of the union. *Id.* at 329-30, 74 L.R.R.M. at 1114.

17. Wilder Mfg. Co., 185 N.L.R.B. 175, 75 L.R.R.M. 1023 (1970). *See* note 21 *infra*.

recognitional strike and an admission by one of the employer's officers that a majority of employees in the appropriate bargaining unit supported the union.

The progression of *Snow & Sons*, *Aaron Brothers*, *Pacific Abrasive Supply Co.*, and *Wilder II* indicated an inclination by the Board to abandon the uncertainty and arbitrariness engendered by prior application of the *Joy Silk* subjective test of good faith doubt and to place determination of the validity of an employer's refusal to bargain on a more objective plane. This trend was formally recognized when the Board, in oral argument before the Supreme Court, announced "that it had virtually abandoned the *Joy Silk* doctrine altogether." [18]

In *Linden Lumber Division, Summer & Co.*[19] and a third *Wilder Manufacturing Co.* decision,[20] however, the Board abruptly reversed this progressive trend in holding that voluntary agreement by an employer to abide by a third-party verification, as in *Snow & Sons*, is a necessary predicate to invocation of the independent knowledge test and removal of the good faith defense to a charge of refusal to bargain. These cases subsequently were combined in the appeal to the Court of Appeals for the District of Columbia Circuit in *Truck Drivers Union.*

The initial bargaining demand leading to the *Wilder Manufacturing Co.* decisions[21] was made in 1965 when the union presented to the em-

18. NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1969).

19. 190 N.L.R.B. 718, 77 L.R.R.M. 1305 (1971), *rev'd sub nom.* Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3594 (U.S. Apr. 22, 1974) (Nos. 73-1231 & 73-1234).

20. 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972), *rev'd sub nom.* Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3594 (U.S. Apr. 22, 1974) (Nos. 73-1231 & 73-1234). *See* note 21 *infra.*

21. A capsuled description of decisions arising out of the organizational activities at the Wilder Manufacturing Company will facilitate the discussion to follow. In the first decision in this series, 173 N.L.R.B. 214, 69 L.R.R.M. 1322 (1968), hereinafter referred to as *Wilder I*, the Board held that there were no grounds for the issuance of a bargaining order. In Textile Workers Union v. NLRB, 420 F.2d 635 (D.C. Cir. 1969), the case was remanded to the Board for reconsideration in light of the intervening Supreme Court decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). The Board subsequently issued a supplemental decision and order reversing its former position and holding in favor of the union. This decision, 185 N.L.R.B. 175, 75 L.R.R.M. 1023 (1970), will be referred to as *Wilder II.* The employer petitioned for review in the Court of Appeals for the District of Columbia Circuit, but, after transfer to the Court of Appeals for the Second Circuit, 454 F.2d 995 (D.C. Cir. 1971), the case was remanded to the Board for further reconsideration in light of its decision in Linden Lumber Division, Summer & Co., 190 N.L.R.B. 718, 77 L.R.R.M. 1305 (1971). The result of this review was another reversal of position by the Board, 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972), in what will be referred to as *Wilder III.* The

ployer signed authorization cards purportedly evidencing its support among a majority of employees in the bargaining unit. When the company manager, having examined the cards, refused to recognize the union as the employees' bargaining representative, a picket line was established and maintained for eight months. In response to the employer's continued refusal to bargain, a complaint was filed with the Board alleging violations of sections 8(a)(1)[22] and 8(a)(5)[23] of the Act. The trial examiner, finding the employer had no good faith doubt of union majority at the time the cards were presented, held that a duty to bargain arose at that time.[24] The Board, however, rejected these findings, holding that the General Counsel had failed to establish the employer's bad faith in rejecting the bargaining demand. Upon petition for review, the Court of Appeals for the District of Columbia Circuit remanded the case to the Board for reconsideration in light of the intervening decision of the Supreme Court in *NLRB v. Gissel Packing Co.*,[25] stating: "[I]t would appear useful for the Board to look at this case again not only in the light of what the Court decided in *Gissel* but also by reference to what the Court said it understood the Board's practice to be in situations not involving independent unfair labor practices but where the employer stands upon a doubt as to the appropriateness of the unit." [26]

The Supreme Court in *Gissel* had decided several important questions concerning the use of authorization cards to establish a union's majority status. Referring to judicial interpretations of the National Labor Relations Act and the legislative history of the Taft-Hartley amendments, the Court held that a duty to bargain could arise in the absence of a Board-conducted election and that the Taft-Hartley amendments indicated no congressional intent to change previous policy on this point.[27]

decision of the Court of Appeals for the District of Columbia Circuit in Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3594 (U.S. Apr. 22, 1974) (Nos. 73-1231 & 73-1234), reversing the Board decisions in *Linden Lumber* and *Wilder III*, was made more than eight years after the initial demand for bargaining to the Wilder Manufacturing Company.

22. Section 8(a)(1) declares it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the [organizational and bargaining] rights guaranteed in section 157 of this title . . . ." 29 U.S.C. § 158(a)(1) (1970).

23. *Id.* § 158(a)(5). *See* note 6 *supra*.

24. *See* Wilder Mfg. Co., 173 N.L.R.B. 214, 221, 69 L.R.R.M. 1322, 1323 (1968).

25. 395 U.S. 575 (1969).

26. Textile Workers Union v. NLRB, 420 F.2d 635, 637 (D.C. Cir. 1969).

27. 395 U.S. at 595-600.

The Court further stated that, in light of the controls placed upon the use of authorization cards and the methods employed to test their validity, single-purpose cards[28] are generally "reliable enough" to provide a valid route for establishing the majority status of a union.[29] Finally, while reiterating that the Board is clothed with sufficient power to issue a bargaining order to redress an employer's refusal to bargain, the Court limited such relief to situations in which "an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside." [30] Although the decision injected certainty into several areas of authorization card use, it left unresolved the question which had been presented in *Wilder I* and which subsequently would arise in *Linden Lumber*, the Court stating:

> [W]e are not here faced with a situation where an employer, with 'good' or 'bad' subjective motivation, has rejected a card-based bargaining request without good reason and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to disturb the 'laboratory conditions' of that election. We thus need not decide whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute.[31]

28. Single-purpose authorization cards indicate the signers' intent to be represented by a particular union. Dual-purpose cards, although evidencing employee desire for union representation, predicate support for a particular union upon the results of an election. Single-purpose cards, because they authorize a specific representative, generally are preferred by unions and management.

29. 395 U.S. at 601-10.

30. *Id.* at 610. The Court added that "under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order. There is, the Board says, no *per se* rule that the commission of any unfair practice will automatically result in a § 8(a)(5) violation and the issuance of an order to bargain." *Id.* at 615.

31. *Id.* at 601 n.18. The Court continued: "In short, a union's right to rely on cards as a freely interchangeable substitute for elections where there has been no

Reconsidering on remand its decision in *Wilder I* in light of *Gissel*, the Board reversed the order in favor of the employer, basing its decision upon a finding that the employer had gained "independent knowledge" of the union's majority status as a result of its examination of the authorization cards.[32] The Board also noted the paucity of evidence that the employer was willing to resolve any doubts it may have had concerning the purported union majority and suggested that the employer should have evidenced its "willingness" to utilize the Act's election procedures either by filing an election petition itself or by pressing the union to file: "In the interest of encouraging all parties to avail themselves of our election procedures, we would not be inclined to enter a bargaining order if, absent independent unfair labor practices, the record supported a finding that the Respondent had in good faith indicated a willingness to utilize those procedures, since, as the Supreme Court has said, a Board-conducted election is indeed the 'preferred route' for determining employee desires." [33] Finding evidence of neither good faith nor willingness to proceed to an election, the Board held that the employer's actions violated section 8(a)(5) and issued a bargaining order. While a petition for enforcement was pending, however, the Board made another abrupt reversal in policy.

Linden Lumber Division, Summer & Co.,[34] like *Wilder*, involved an employer's refusal to bargain when confronted with an authorization card majority. When, after the union filed an election petition, the employer persisted in its rejection of union demands and asserted that it would not bargain even after an election, the union withdrew its request for an election and struck in support of its bargaining demand. The Board rejected the trial examiner's determination that the company had violated section 8(a)(5), citing *Gissel* and holding that the employer's violation of section 8(a)(3)[35] in refusing to reinstate two

election interference is not put in issue here; we need only decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside." *Id.*

32. Wilder Mfg. Co., 185 N.L.R.B. 175, 176, 75 L.R.R.M. 1023, 1024 (1970), *remanded on juris. grounds*, 454 F.2d 995 (D.C. Cir. 1971).

33. 185 N.L.R.B. at 176, 75 L.R.R.M. at 1024-25.

34. 190 N.L.R.B. 718, 77 L.R.R.M. 1305 (1971), *rev'd sub nom.* Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3594 (U.S. Apr. 22, 1974) (Nos. 73-1231 & 73-1234).

35. Section 8(a)(3) provides, in pertinent part: "It shall be an unfair labor practice for an employer . . . 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 . . . ." 29 U.S.C. § 158(a)(3) (1970).

of the strikers was not sufficiently serious to support a bargaining order.[36] Declining to "re-enter the 'good-faith' thicket of *Joy Silk*" [37] and severely restricting the employer's duty to bargain on the basis of authorization cards, the Board held that unless, as in *Snow & Sons*, an employer has agreed to abide by an independent verification of majority status, the independent knowledge test could not be invoked as the basis for a bargaining order.[38]

After its decision in *Linden Lumber*, the Board petitioned the Court of Appeals for the District of Columbia Circuit to have *Wilder II* remanded to it for reconsideration.[39] Applying its recently announced position, the Board again reversed itself, holding in *Wilder III* that a bargaining order was improper because the employer had engaged in no independent unfair labor practices and had neither attempted nor agreed to determine majority status on the basis of the authorization cards by independent means.[40]

Petitions for review of the Board decisions in *Linden Lumber* and *Wilder III* were consolidated before the Court of Appeals for the District of Columbia Circuit in *Truck Drivers Union Local No. 413 v. NLRB*.[41] Holding that the Board erred in limiting the scope of the independent knowledge test to the facts of *Snow & Sons*, the court suggested that the position of the Board advanced in *Linden Lumber* and *Wilder III* was inconsistent with the purposes of the Act. It was noted that "[t]he abandonment of *Wilder II* means that even if an employer acts in total disregard of 'convincing evidence of majority status,' he has no duty to recognize a union," and that, under the Board's present position, a duty to bargain "can only be triggered by [the employer's] own permission, in allowing an impartial party to assess union strength." [42]

Emphasizing the necessity of preventing "an employer's deliberate flouting and disregard" of authorization cards, the court, in ordering the Board to reconsider its position, observed: "If no 'independent

36. 190 N.L.R.B. at 719, 77 L.R.R.M. at 1307.

37. *Id.* at 721, 77 L.R.R.M. at 1309.

38. *Id.* at 720-21, 77 L.R.R.M. at 1309.

39. The Board's petition for remand was considered together with the employer's objections to jurisdiction. The case was transferred to the Court of Appeals for the Second Circuit, 454 F.2d 995 (D.C. Cir. 1971), which subsequently remanded it to the Board.

40. Wilder Mfg. Co., 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039, 1040 (1972).

41. 487 F.2d 1099 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3594 (U.S. Apr. 22, 1974) (Nos. 73-1231 & 73-1234).

42. *Id.* at 1109.

knowledge' or 'good faith' test is to be used by the Board, the employer must be put to some other kind of test to evidence good faith." [43] The court proposed that an employer be required to evidence its good faith doubt with respect to a union's majority status by petitioning for a Board-conducted election[44] and that an employer which failed to petition for a certification election would assume the risk that its "conduct as a whole, in the context of 'convincing evidence of majority support,' may be taken as a refusal to bargain." [45]

The suggestion of the court in *Truck Drivers Union* that an employer be required to petition for a representation election as evidence of its good faith doubt whether to bargain with an asserted card-based majority, as well as the position of the Board in *Linden Lumber* permitting an employer in "good faith" to refuse to bargain unless it had voluntarily agreed to an independent card check, would inject a degree of certainty into authorization card use which in recent years has been notably absent. It is submitted, however, that each of these tests represents an unnecessary extreme.

Although petitioning for an election has always been a practical option for an employer faced with a card-based bargaining demand,[46] a rule requiring such a petition as an indicium of good faith would advance neither the best interests of the parties nor the policies of the Act. Section 8(a)(5) mandates bargaining whenever the employees have selected a representative pursuant to section 9(a).[47] An employer's

43. *Id.* at 1113.

44. *Id.* at 1111 n.47. Section 9(c)(1)(B) of the Act permits an employer confronted with a representation claim to petition the Board to conduct an election. That section provides, in pertinent part:

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (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 subsection (a) of this section;
>
> the Board shall investigate such petition and . . . shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1)(B) (1970).

45. 487 F.2d at 1112.

46. *See* Hall & Court, *Selecting a Union Representative: Management's Role*, 26 OKLA. L. REV. 38 (1973).

47. 29 U.S.C. § 159(a) (1970) provides, in part, that "[r]epresentatives 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 . . . ."

duty to bargain, however, depends not upon a mere assertion that a particular union represents a majority of employees but upon the employer's knowledge of the union's majority status.[48] Requiring that an employer either bargain on the basis of an asserted card-based majority or petition for an election would tend to make the use of authorization cards a "freely interchangeable substitute for elections," [49] notwithstanding that the Supreme Court has found the preferred means for obtaining majority status to be the election process.[50] While authorization cards are "reliable enough" to support bargaining orders in some circumstances,[51] their use as a basis for requiring affirmative employer action either in bargaining or in seeking a representation election should be carefully circumscribed.

The proposal of the court in *Truck Drivers Union* places employers on a narrow tightrope, since a petition for an election when the union does not, in fact, have sufficient support to warrant such an election may violate section 8(a)(2), which forbids employer aid to unions.[52] Even more troublesome is the possibility that an employer, fully confident that a union has majority support among employees in the bargaining unit, could refuse to bargain, petition for an election, and attempt during the period preceding the election to dissipate that majority. Were the mere filing of an election petition deemed to establish an employer's good faith, it would seem that the employer would have a valid defense to a section 8(a)(5) charge based on its refusal to bargain, notwithstanding its knowledge of the union's majority status. Conceivably, the Board might become involved in questions whether an employer's petition was filed in "good faith," which would entail all the problems associated with administration of the *Joy Silk* rule.

Finally, requiring that an employer, in certain circumstances, file an election petition would curtail the employer's rights in relation to the electoral process, since an employer filing a section 9(c)(1)(B)

48. *See, e.g.*, NLRB v. Chicago Apparatus Co., 116 F.2d 753, 758-59 (7th Cir. 1940); Remington Rand, Inc., 2 N.L.R.B. 626, 1 L.R.R.M. 88 (1937).

49. NLRB v. Gissel Packing Co., 395 U.S. 575, 601 n.18 (1969).

50. *Id.* at 596.

51. The Supreme Court noted in *Gissel* that authorization cards, "though admittedly inferior to the election process, reflect employee sentiment when [the election] process has been impeded . . . ." *Id.* at 603.

52. Section 8(a)(2) declares it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." 29 U.S.C. § 158(a)(2) (1970).

petition must define the appropriate bargaining unit and is precluded from requesting a hearing on this matter.[53] Although the court in *Truck Drivers Union* argued this limitation on employer rights in support of its proposal as an expediting factor,[54] it is submitted that the election process should be viewed as a means for careful and ultimate determination of the right of employees under section 7 of the Act either to join or refrain from joining a union,[55] rather than a sporting contest between employer and union. The employer should be entitled to make certain valid objections; those which are frivolous or intended merely to delay are subject to dismissal at the discretion of the regional director.[56] While expedience certainly is an important consideration, it should not be permitted to override protection of employer rights in the election process.

The position of the Board in *Linden Lumber* and *Wilder III*, on the other hand, permitting an employer, in the absence of a voluntary agreement to abide by third party verification of authorization cards, to refuse to bargain regardless of other circumstances, appears overly restrictive. Under this rule silence becomes virtue, the employer being able by inaction simply to disregard a presentation of authorization cards. Moreover, if the union then proceeds to an election, the employer could, frequently with impunity, deny its employees' rights to representation by interfering with the election through conduct which, while violative of the Act, is not sufficiently serious to support a bargaining order. As a result, the use of authorization cards would decline drastically, the Board and the courts being severely hampered in their ability to remedy even clear instances of employer bad faith.

It is submitted that the Board, while avoiding determinations of subjective motivation, could identify a number of factual patterns other than agreement to third party verification of authorization cards from

53. *See* Comment, *Employer Recognition of Unions on the Basis of Authorization Cards: The "Independent Knowledge" Standard*, 39 U. CHI. L. REV. 314, 326 (1972) [hereinafter cited as *Employer Recognition*].

54. 487 F.2d at 1111-12. The court noted the statement in *Employer Recognition*, *supra* note 53, at 325 n.48, that "an election contested through submission of objections at a pre-election hearing is likely to take sixty to sixty-three days between petition and balloting, while a consent election, in which the hearing is waived, is likely to take only twenty to twenty-three days." 487 F.2d at 1112 n.48.

55. Section 7 guarantees employees various rights 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 bargaining." 29 U.S.C. § 157 (1970).

56. *See Employer Recognition*, *supra* note 53, at 327.

which independent knowledge by an employer of union majority status could be inferred.[57] Such knowledge, the inference of which would remove from the employer the defense of good faith doubt, might be deemed to arise, for example, as a result of support for a union by picketing and recognitional strikes or from statements by an employer representative acknowledging majority support for the union.[58] Although determining an employer's independent knowledge is more difficult than applying a strict per se rule like that suggested in *Truck Drivers Union*, such inquiries are a proper function of the NLRB, since "[o]ne of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." [59]

CONCLUSION

Although the mechanical proposals of the court in *Truck Drivers Union* and of the Board in *Linden Lumber* and *Wilder III* would remove the necessity of establishing standards and determining violations through case-by-case adjudication, each appears to entail significant sacrifices of employer or employee rights in the process of selecting collective bargaining representatives. The decisions of the Board in *Pacific Abrasive* and *Wilder II* expanding the independent knowledge test beyond the facts of *Snow & Sons*, on the other hand, suggest the results which could flow from a concentrated effort to develop certainty in the use of authorization cards. Returning to the approach taken

57. Two commentators have rejected such an approach, stating:

> There are so many variations on individual types of unfair labor practices, and so many combinations thereof, that it would be virtually impossible to foresee and set guidelines for all, or substantially all, types of employer conduct. As soon as any such guidelines were established, new or different combinations of unfair labor practices not covered thereby would surely be committed. Labor relations, like life, "has relations not always capable of division into inflexible compartments. The molds expand and shrink."

Doppelt & Ladd, *Gissel Packing Company—The NLRB Applies The Standards*, 49 CHI.-KENT L. REV. 161, 164 (1972) (footnote omitted).

58. *See* notes 16-17 *supra* & accompanying text. Although the court in *Truck Drivers Union* suggested that employees may refuse to cross picket lines for a variety of reasons and that recognitional strikes are inconclusive evidence of a union's support among employees, 487 F.2d at 1110 n.44, it is submitted that such activities do indicate majority support, the relative weight of which indications should be determined by the Board.

59. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945).

in these cases, the Board should carefully define the circumstances surrounding a refusal to bargain with an asserted card-based majority from which it will infer an employer's independent knowledge of the union's majority status. As a result, employers would be provided definite guidelines within which to operate when presented with a demand for bargaining predicated upon authorization cards, while the rights of employers as well as employees in the selection of bargaining representatives would be preserved.