Minority Unionism: Exclusive Recognition, Conditional Recognition, and Members-Only Recognition in Light of the Garment Workers Rule

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INTRODUCTION

In International Ladies Garment Workers Union v. NLRB,\(^1\) the United States Supreme Court reaffirmed the general proposition that an employer's exclusive recognition of a union which represented a minority of the employees in the appropriate bargaining unit was an unfair labor practice that violated sections 8(a)(1) and 8(a)(2) of the National Labor Relations Act.\(^2\) The rule was deemed a necessary consequence of the employees' basic freedom to choose a bargaining representative, as guaranteed by section 7 of the Act.\(^3\)

In the eight years since the Garment Workers decision, the National Labor Relations Board and the courts have applied the rule broadly in a variety of representation controversies arising under section 8(a)(2) of the Act, and in a number of other unfair labor practice situations treated under section 8(a)(5) of the Act.\(^4\) The Board has also relied on the Garment Workers rule in altering its view of the legality of

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1. 366 U.S. 731 (1960), aff'g 280 F.2d 616 (D.C. Cir. 1960), enforcing sub nom., Bernhard-Altmann Texas Corp., 122 N.L.R.B. 1289 (1959). [The Supreme Court decision is hereinafter referred to as Garment Workers.]

2. §8. (a) It shall be an unfair labor practice for an employer—
   1) to interfere with restrain or coerce employees in the exercise of the rights guaranteed in §7.
   2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it


3. §7 provides, in relevant part, that:
   [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 shall also have the right to refrain from any or all of such activities.


"conditional representation" contracts. The articulation and interpretation of the rule has also raised serious doubt as to the continued validity of the once-popular "members-only" representation agreements.6

The purpose of this discussion is three-fold. First, it traces the development and application of the Garment Workers rule as espoused in cases arising under sections 8(a)(2) and 8(a)(5) of the Act, noting limitations and exceptions placed upon the rule due to conflicts with other goals basic to national labor relations policy. Second, the operation of the rule in relation to "conditional representation" contracts is explored, with emphasis upon their resultant validity or invalidity. Also, "members-only" contracts are measured against the Garment Workers rule in an attempt to determine their present viability. Finally, a proposal is presented whereby members-only recognition can be applied, within the letter and spirit of the Garment Workers rule, as a remedial device to further the basic organizational rights of employees.

APPLICATION OF THE Garment Workers RULE IN 8(a)(2) CASES

In Garment Workers, the Court for the first time found an employer to be in violation of section 8(a)(2) for rendering exclusive recognition to a minority union without in fact having "dominated or interfered" with the union's formation or administration. The unfair act of the employer, committed in initial labor relations dealings with a union, was based on a misplaced good-faith belief that the union actually represented a majority of the employees. The Court relied heavily upon NLRB v. Pennsylvania Greyhound Lines, a decision in which the section 8(a)(2) violation was predicated upon actual control of a local union created and thereafter dominated by the employer.10 This

distinction, however, was not noted with any degree of precision by the Court in *Garment Workers*,\(^\text{11}\) since the employer's interference with his employees' freedom of choice was attributed solely to the fact that the union lacked majority support at the time of recognition.\(^\text{12}\)


11. The Court held that the employer's "good faith" in extending premature recognition was immaterial, there being no element of scienter needed to sustain a §8(a)(2) violation, due to the overriding harm done to prejudice the employees' basic right of self-determination in selecting a bargaining representative. The Court concluded that

[t]o countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibition will go far to assure freedom of choice and majority rule in employee selection of representatives. 366 U.S. 731, 738-39 (1961).

As to the sufficiency of "good faith" as a defense to unfair labor practice charges under §8(a)(2), see *NLRB v. Burnup and Sims*, Inc., 379 U.S. 21, 24 (1964); *Welch Scientific Co. v. NLRB*, 340 F.2d 199, 203 (2d Cir. 1965)

The Board had earlier examined the "good faith" argument in *Garment Workers* and, without renouncing its availability as a defense (which the Supreme Court later did), found it wanting in the particular case. The Board held that since neither the company nor the union had taken "reasonable precautions" (as by the comparing of authorization cards against the employer's payroll) to ascertain whether the union actually had a majority at the time of recognition, the defense did not apply 122 N.L.R.B. 1289, 1292 (1959) See also *International Metal Products Co.*, 104 N.L.R.B. 1076, 1077 (1953).

12. The fact that the union did manage to obtain majority employee support by the date that the formal collective bargaining agreement was executed and put into effect was also deemed irrelevant. The earlier wrongful exclusive recognition was viewed as a "fait accompli," allowing the union "a marked advantage over any other in securing the adherence of the employees," 366 U.S. 731, 736 (1961), quoting in part from *NLRB v. Greyhound Lines*, 303 U.S. 261, 267 (1938). Thus, it is unnecessary to show that the union's success in later obtaining a majority was influenced by the prior recognition; "the impropriety lies in its possible, rather than its actual, effect." C.C.H. GUIDEBOOK TO LABOR RELATIONS § 614 (1967).

The Court, earlier in the same term had foreshadowed the outcome of *Garment Workers* by declaring that a union-security clause, negotiated as a part of an exclusive bargaining contract at a time when the union represented less than a majority, would have been voided if the action had not been barred by the applicable statute of limitations. *See Machinists' Local 1424 v. NLRB*, 362 U.S. 411 (1960) Actually, a series of earlier decisions found violations of §§8(a)(1) and 8(a)(2), 29 U.S.C. §§158(a)(1)-(2) (1964), when an employer either recognized, bargained, or contracted with a union lacking majority status. The presence of other "aggravating factors" in these cases, not found in *Garment Workers*, such as the concurrent organizational efforts of another union or the inclusion of a union security clause in the contract, more clearly justified the result. *See, e.g.*, *Dixie Bedding Mfg. Co. v. NLRB*, 268 F.2d 901 (5th Cir. 1959); *District 50, UMW v. NLRB*, 234 F.2d 565 (4th Cir. 1956); *United Transports, Inc.*, 123 N.L.R.B. 668 (1959).
The general rule has since been applied by both the labor board and the courts in a variety of other section 8(a)(2) situations where actual control or domination by the employer of the recognized union were also absent. Thus, an unfair labor practice was found in *Lively Photos, Inc. and Waldorf Pen Co.*,\(^{13}\) where the union's majority status at the time of recognition was partially achieved through apparently inadvertent solicitation by an office employee of the signatures of other employees on union membership application forms designed for later use by prospective employees. The disallowance in *Garment Workers* of good faith as an employer defense under section 8(a)(2) virtually dictated this result due to the otherwise elementary aspects of the case.

More ambiguous are those situations where the *Garment Workers* rule has been used to establish section 8(a)(2) violations by an employer who, when caught between two rival unions in an initial recognition situation, extends recognition in good faith to one of the rivals without ascertaining that it actually possesses a majority. In such a situation, the offending employer would transgress the *Garment Workers* rule. At the same time, his conduct may also fall within the Board's *Midwest Piping* doctrine, which holds that an employer is guilty of an 8(a)(2) violation when he recognizes one of two competing unions at a time when the representation question generated by the unions is pending before the Board.\(^4\) This occurred in *NLRB v. Trosch*,\(^{15}\) where the employer in good faith recognized an independent employee association, even though another union was picketing, while the Board was in the process of determining the scope of the proper bargaining unit.

Unfair labor practice charges under section 8(a)(2) have also been sustained on the basis of the *Garment Workers* rule in "renewed recog-


\(^{14}\) Midwest Piping and Supply Co., 63 N.L.R.B. 1060 (1945). The Board held that an employer faced with rival representation claims must maintain a strictly neutral position and that the recognition of one of the rival unions, at a time when the representation question was before the Board, constituted unlawful assistance in violation of 88(a)(2). *See also* NLRB v. Signal Oil and Gas Co., 303 F.2d 785 (5th Cir. 1962). The *Midwest Piping* rule has since been limited in the seventh circuit, however, by an exception in which the employer is obliged to recognize one of the rival unions where it presents "unmistakable evidence of majority support." *NLRB v. Indianapolis Newspapers*, 210 F.2d 501 (7th Cir. 1954).

nition" cases. The rule was found particularly applicable in *Alco-Gravure, Division of Publication Corp.*,\(^{16}\) where the employer unilaterally maintained an expired exclusive recognition agreement with a union which no longer enjoyed majority support.

Although the circumstances in *Alco-Gravure* appear to justify the result, the employer acting in good faith may find it difficult to avoid violating the spirit, if not the letter, of that decision in situations where the incumbent union, though no longer enjoying majority support, seeks to maintain its bargaining position after contract expiration. This danger becomes clear when seen in the light of two cases involving decertified unions which apparently construct an implicit limitation on the scope of the *Garment Workers* rule. In *Douds v. Local 1280*,\(^{15}\) a minority union, after decertification, was deemed to have standing in a grievance proceeding even though the majority of employees in the bargaining unit had recognized another union with whom the employer had already negotiated an agreement. In *United States Gypsum Co v. United Steelworkers*,\(^{18}\) a similarly decertified union no longer representing a majority was given comparable standing. The *Douds* decision\(^{19}\) rested upon a finding that the grievance sought to be adjusted lay outside the superseding collective bargaining agreement but within an earlier agreement concluded by the decertified union. In *United States Gypsum* the union's continued standing was based on the fact that the substantive rights sought by the union arose under a legitimate contract and had ripened into a form of relief which became "operative" prior to decertification.\(^{20}\) The decision in *United States Gypsum* suggests that the employer would be under a duty to deal with the decertified union regarding other matters originally negotiated with it, even in the presence of a newly certified majority union. Thus, if the range of subjects covered within this obligation were ever held to include such basic issues as wages, hours, and working conditions, the relevance of the *Garment Workers* rule would be even further obscured.

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16. 124 N.L.R.B. 1027 (1959) The remedy ordered therein, as in *Garment Workers* and most other exclusive minority representation cases, consisted of a cease and desist order prohibiting the employer from recognizing the union, and likewise prohibiting the union from accepting such recognition "until said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election." *Id.* at 1035.
17. 173 F.2d 764 (2d Cir. 1949)
19. 173 F.2d 764, 769 (2d Cir. 1949).
20. 384 F.2d 38, 45-46 (5th Cir. 1967)
Another indication of possible limitations on the Garment Workers rule in section 8(a)(2) situations was revealed in the sixth circuit's ruling in *AIW Local 620 v. NLRB* involving employer actions regarding the determination of appropriate bargaining units. The court held that the employer committed an unfair labor practice by contractually including employees in a new and separate plant in the existing bargaining unit, so as to place in doubt the validity of the employer's recognition of the incumbent union due to the consequent diminution of the union's majority status. The *AIW* decision, however, was based on other more empirical criteria, the court expressly disavowing the use of the inflexible and mechanistic Garment Workers rule. Other factors such as the existence of separate administrative units, degree of functional integration, geographic distance and interchange of employees between plants were stressed in order to determine whether the workers in the two plants possessed a sufficient "community of interest" to justify the inclusion of the employees at the new plant in the existing unit without their consent.22

A final limitation to the scope of the Garment Workers rule in section 8(a)(2) cases was engrained in *Keller Plastics Eastern, Inc.* where the Board postponed application of the Garment Workers standard to allow a validly recognized union a "reasonable time" to exercise its mandate, despite an intervening loss of majority support between recognition and the date of execution of the bargaining agreement. Garment Workers was distinguished in *Keller* because the initial recognition extended in the former was invalid, while in *Keller* it was not. The Keller rule had since been broadened to exclude from the purview of Garment Workers those representation cases where majority support has been lost after a valid recognition but before the signing of a bargaining contract.24

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22. 375 F.2d 707, 711 (6th Cir. 1967).

23. 157 N.L.R.B. 583 (1966). See also NLRB v. Montgomery Ward & Co., 399 F.2d 409 (7th Cir. 1968); N.J. MacDonald and Sons, 155 N.L.R.B. 67 (1965), where the employer was found to be under a duty to bargain with a union despite its loss of a majority shortly after concluding a settlement agreement with the employer.

24. See remarks of NLRB Member John Fanning, in 20 N.Y. CONF. ON LAOR 7, 17 (1967), as quoted in 1967 LABOR RELATIONS YEARBOOK 210-11. A distinction has more recently been made, however, in representation cases, between "substantiated" recognition and "mere" recognition obtained without a preferred showing of majority support, apparently meaning that in the latter case an employer extending such recognition
The *Garment Workers* rule thus covers many section 8(a)(2) situations, but is limited or excluded in others. An employer's interest in following the rule in making recognition decisions cannot be overemphasized. Even though an employer is sincerely interested in the stability of labor relations, he may wish to recognize a union only if it displays unmistakable majority support, thus adopting a non-believer's stance in the face of a union's proffered showing of a bare or conjectured majority. Otherwise, he may find himself obliged to deal with a union which will soon represent only a minority of his employees, thus exposing him to the later organizational efforts of other unions without relieving him fully of the duty to maintain bargaining relations with the existing minority union.

**The Garment Workers Rule and Section 8(a)(5)**

The *Garment Workers* rule has frequently been cited in cases where the alleged employer unfair labor practice falls within the refusal-to-bargain provision of section 8(a)(5) of the Act. Before the *Garment Workers* decision, it was established that when a union had obtained a majority, and the employer refused to bargain while not entertaining a good-faith doubt of such majority, he was required to bargain after an unfair labor practice charge was upheld. This had to occur even if the union lost its majority status in the meantime, because the right of employer to bargain is not arbitrary. Where an unfair labor practice is found against an employer under this section of the Act, the Board's remedy is generally of an affirmative nature, in the form of an order to the employer to bargain with the aggrieved union.

25. 29 U.S.C. §158(a)(5) (1958). Where an unfair labor practice is found against an employer under this section of the Act, the Board's remedy is generally of an affirmative nature, in the form of an order to the employer to bargain with the aggrieved union.


27. NLRB v. Kobritz, 193 F.2d 8 (1st Cir. 1951). See also Brooks v. NLRB, 348 U.S. 96 (1954) and Hexton Furniture Co., 111 N.L.R.B. 342 (1955), where it was held that an employer must continue to bargain with a union officially certified by the Board under the provisions of §9(c) of the Act, 61 Stat. 143, 29 U.S.C. §159(c) (1964), for the one-year period of certification despite the union's loss of majority support, or the employer's good-faith doubt as to the continued existence of such support. This result was necessary in order to impart stability to collective bargaining and to give the union time to exercise its earlier mandate. Thus, absent unusual circumstances, only formal decertification proceedings initiated under §9(e)(3) of the Act, 61 Stat. 143-144, 29 U.S.C. §159(e) (1964) is sufficient to deprive the union of its collective bargaining status during the certification period.
employees to bargain collectively is not conditioned upon antecedent certification of the union by the Board under section 10(c) of the Act. Although before Garment Workers it was held that the union was obliged to make a showing of its majority status before the employer was obligated to bargain, more emphasis has since been placed upon the need for such a showing, at least in cases not involving an election. That greater emphasis on proof of majority at the time recognition is demanded, is undoubtedly due to a desire of the Board and the courts to avoid a situation in which a union would gain an advantage with only minority support since such an act, if committed independently by the employer, would result in a section 8(a)(2) violation. Thus, the duty of the employer to bargain in a non-election case is said to arise "only at such times as the union representative presents convincing evidence of majority support." This obligation of showing majority support also extends to the Board's General Counsel when prosecuting a section 8(a)(5) charge. The nature of the General Counsel's duty has been determined to constitute a part of the burden of proof which, if not satisfied, results in a dismissal of the charge without regard to an investigation into the element of the employer's good faith doubt of the union's majority at the time of his refusal to bargain. This burden of proof obligation was given further dimension by the fifth circuit in Engineers and Fabricators, Inc. v. NLRB. There it was ordered that when the General Counsel attempts to satisfy the burden through the production of actual signed authorization cards, and when the authenticity of the cards is challenged by the employer's defense of good faith because of alleged misrepresentations as to purpose made during their procurement, an additional element is added to the General Counsel's burden of proof. In such a situation, the General Counsel must further show that the objective

30. Edward Fields, Inc. v. NLRB, 325 F.2d 754, 761 (2d Cir. 1963). See also NLRB v. Morris Novelty Co., 378 F.2d 1000, 1006 (8th Cir. 1967); NLRB v. Alva Allen Industries, 369 F.2d 310, 316 (8th Cir. 1966). However, an exception of a kind was created for multi-employer bargaining units in NLRB v. Sheridan Creations, Inc., 357 F.2d 245 (2d Cir. 1966). In the latter case, an employer was required to adhere to a multi-employer agreement recognizing a union since it had obtained the majority support of employees in the overall unit, though not of the company's own employees; the obligation to bargain arose from the employer's untimely withdrawal from the unit after commencing recognition discussions.
31. See Maphis Chapman Corp. v. NLRB, 368 F.2d 298, 303 (4th Cir. 1966).
32. Id.
33. 376 F.2d 482, 487 (5th Cir. 1967).
intent of the signatory employees to authorize representation was not vitiated by the possible misrepresentation.\textsuperscript{34} The fourth and eighth circuits have arrived at essentially the same result, though with a slight variation in the arrangement of the General Counsel's burden, by making the lack of a showing of objective intent in authorization card signing a partial determinant of the employer's good faith.\textsuperscript{35} The fourth circuit has also upheld the General Counsel's duty to comply with the burden of proof requirement when a "good faith" defense is raised by the employer, even when the employer has indisputably committed other unfair labor practices aimed at dissipating the union's strength.\textsuperscript{36}

Aside from casting doubt upon the efficacy of authorization cards as a true index of the wishes of a majority of employees, these decisions graphically show the desire of the courts to avoid conflict with the \textit{Garment Workers} rule, in section 8(a)(5) non-election cases since a violation would yield a different remedy than would be given under the section by which the rule was formulated.\textsuperscript{37}

Neither the Board nor the courts, however, have been as concerned about avoiding theoretical conflicts with the \textit{Garment Workers} rule in section 8(a)(5) cases when unfair labor practices have been found to affect the outcome of a representation election. In such cases, where the union had earlier requested recognition based on a showing of

\begin{footnotesize}
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\item \textsuperscript{34} \textit{Id.} See generally NLRB v. Winn-Dixie Stores, 341 F.2d 750, 754 (6th Cir. 1965), \textit{cert. denied}, 382 U.S. 830 (1965).
\item \textsuperscript{35} See Crawford Mfg. Co. v. NLRB, 386 F.2d 367 (4th Cir. 1967); NLRB v. Morris Novelty Co., 378 F.2d 1000, 1006 (8th Cir. 1967) \textit{See also} Lane Drug Co. v. NLRB, 391 F.2d 812, 820 (6th Cir. 1968), where the employer's claim of "good faith" doubt for refusal to bargain was upheld in absolving him of a §8(a)(5) charge even though the union actually possessed a slim majority when making its original bargaining demand.
\item \textsuperscript{36} See NLRB v. S.S. Logan Packing Co., 386 F.2d 562 (4th Cir. 1967) wherein the fourth circuit overruled a series of its earlier decisions which had held that authorization cards furnish ample proof of majority representation. \textit{See, e.g.,} Bilton Insulation, Inc. v. NLRB, 297 F.2d 141 (4th Cir. 1961); NLRB v. Greensboro Coca-Cola Bottling Co., 180 F.2d 840 (4th Cir. 1950). \textit{See generally} \textit{Note, Authorization Cards}, 75 YALE L.J. 805 (1966).
\item \textsuperscript{37} As further evidence of the court's desire not to allow §8(a)(5) remedies in non-election cases to violate the policy of §8(a)(2) as expressed by the \textit{Garment Workers} rule, \textit{see also} \textit{Garment Workers Local 57 v. NLRB}, 374 F.2d 295, 299 (D.C. Cir. 1967). There the court refused enforcement of a Board order attempting to force a "runaway shop" employer to bargain with workers at a new plant 1,000 miles from the original facility regardless of a lack of a union majority at the new plant, the court expressed the belief that:

\begin{quote}
Removing the benefit of the employers' wrongdoing against the workers at the old plant by infringing equally fundamental rights of employees at the new plant is unjustified. \textit{Id.}
\end{quote}
\end{itemize}
\end{footnotesize}
majority support, the Board’s remedy generally includes an order directing the employer to bargain, notwithstanding the union’s later lack of a majority as displayed in the election. An illustrative case is *Bernel Foam Products, Co.*, where the operative rationale is that the employer’s unfair labor practices committed before the election were responsible for the diminution of the union’s majority strength and the loss of the election.

Several other decisions, however, show that the *Bernel Foam* exception is not absolute and that the Board has attempted to apply it in view of the *Garment Workers* decision. Thus, the refusal of the Board to order an employer to recognize a union which neither enjoyed majority support at the time of its demand nor thereafter proceeded to an election, despite the employer’s commission of unfair labor practices, established some preconditions to the application of *Bernel Foam*. This is buttressed by the Board’s refusal to order an employer to bargain with a union which enjoyed an actual majority at the time it made a recognition demand and proceeded to an election, but failed to otherwise state a “meritorious claim” for relief.

Within these limits, *Bernel Foam* harmonizes well with other cases under both section 8(a)(2) and section 8(a)(5) of the Act, which together place restrictions on the *Garment Workers* rule by compelling bargaining after recognition despite later loss of majority support. Included are cases in which the duty to bargain is based on antecedent cer-

38. 146 N.L.R.B. 1277 (1964), wherein the Board overruled an earlier line of decisions starting with *Aiello Dairy Farms*, 110 N.L.R.B. 1365 (1954). Under the *Aiello* rule, if the union gained knowledge of the employer’s unfair labor practice before the election, it was required to choose between two courses of conduct: it could bring an unfair labor practice charge before the Board under the appropriate sub-section of the Act, thus postponing the election pending disposition of the charge; or, alternatively, it could proceed into the election thus waiving the opportunity to bring the unfair labor practice charge and binding itself by the result of the election. *See North Electric Co., 129 N.L.R.B. 675, 676-77 (1960).* Under the *Bernel Foam* rule, however, the union may proceed into the election without waiving the right to bring unfair labor charges thereafter. Thus, the union may now gain recognition, through a Board order, despite the result of the election. *See, e.g.*, NLRB v. Southbridge Sheet Metal Works, Inc., 380 F.2d 851 (1st Cir. 1967); International Union of Elec. Workers v. NLRB, 352 F.2d 361 (D.C. Cir. 1965), *cert. demed*, 382 U.S. 902 (1965); Colson Corp. v. NLRB, 347 F.2d 128 (8th Cir. 1965), *cert. demed*, 382 U.S. 904 (1965).


tification, an order of the Board, settlement agreements, and prior voluntary acts of recognition. In all situations recognition is based upon the conclusion that the union had earlier obtained majority support at the time of its valid recognition demand.

In allowing Bernel Foam and other related exceptions, the Board has overlooked one basic element which creates a very real conflict with the objectives of the Garment Workers rule. The union must stand on a "meritorious claim" in seeking to achieve recognition through such an order, which presumably means, inter alia, that it must have enjoyed the support of a majority of employees at the time of its original demand for recognition. The time span which may elapse between the date such demand is made and the date the Board renders a decision compelling recognition may be considerable. Thus, through normal employee turnover the union's majority may have long since disappeared with no fault of the employer. This factor, rather than the union's quest for recognition, coupled with the Act's policy of protecting employees' freedom to choose a bargaining representative, or to choose not to be represented by a collective bargaining agent at all, is of utmost importance. Thus, even the carefully limited Bernel Foam decision clearly establishes another departure from the spirit of the Garment Workers rule.

THE STATUS OF "CONDITIONAL REPRESENTATION" AGREEMENTS

The impact of the Garment Workers rule has resulted in a change in the Board's view of the legality of "conditional representation" agreements, wherein the union is recognized by the employer on the condition that it later produce evidence of majority support before a bargaining agreement may be executed or become effective. The validity of such an arrangement was upheld by the Board against an alleged illegal assistance violation of section 8(a)(2) by the employer in Julius

46. See Bernel Foam Products Co., 146 N.L.R.B. 1277 (1964). See also NLRB v. Arkansas Grain Corp., 390 F.2d 824 (8th Cir. 1968).
47. Thus, in Aiello Dairy Farms, 110 N.L.R.B. 1365 (1954), the delay between the date of respondent employer's refusal to bargain and the date of the Board's order was 26 months. In Bernel Foam Products, Co., 146 N.L.R.B. 1277 (1964), the delay amounted to 18 months.
Resnick, Inc.\textsuperscript{49} There the conditional agreement was deemed merely "precipitate,"\textsuperscript{50} the absence of a violation being predicated upon the fact that the union had obtained a majority by the time the agreement went into force. In the aftermath of the Garment Workers decision, however, the Board turned what had been regarded as precipitous employer conduct into illegality, by finding a section 8(a)(2) illegal assistance violation for such employer conduct in Majestic Weaving Co.,\textsuperscript{51} Resnick was expressly overruled.

A close examination of the dissimilar factual settings of the two cases reveals that, while the result in Majestic necessarily dictated the reversal of Resnick, such reversal was largely gratuitous to the Board's rationale in Majestic. In Resnick, recognition was granted and a contract prepared before the union actually began soliciting employee support.\textsuperscript{52} Several months later, after the union had obtained majority backing, the contract was formally executed by the parties and placed into effect. In Majestic, however, after some solicitation had been carried out by the union, the employer, though refusing recognition due to the union's lack of majority status at the time, offered at the union's request to discuss possible terms which might be included in an eventual contract. The union then conducted a membership campaign among the employees while discussions continued. The company later prepared a draft of a contract, based on the discussions, and tendered it to the union for examination. After ascertaining the union's wish to execute the contract, the employer was offered and accepted proof of the union's majority status. The union was then recognized and the parties executed the contract. Thus, unlike the factual development in Resnick, recognition was never granted in Majestic until after the union had proven the existence of its majority. Therefore, the employer's act of extending exclusive recognition to a minority union, the precise act condemned as an unfair labor practice by the Garment Workers rule, never actually occurred in Majestic, either intentionally as in Resnick or unintentionally as in Garment Workers. Also, in Majestic there was no rival union attempting to contemporaneously organize which would have been prejudiced by the conditional agreement, as in Resnick.

\textsuperscript{49} Id. at 39.

\textsuperscript{50} Id.

\textsuperscript{51} 147 N.L.R.B. 859 (1964), enforcement refused on other grounds, 355 F.2d 854 (2d Cir. 1966).

\textsuperscript{52} 86 N.L.R.B. 38, 39 (1949). This type of conduct, inherently violative of §8(a)(2), is known as "organizing from the top." See American Standard Cargo Container Co., 151 N.L.R.B. 1399, 1408 (1965).
Furthermore, since there was no actual premature recognition extended by the employer in Majestic, there was no written agreement operative to bind the parties at a time when the union lacked a majority, as there was in both Resnick and Garment Workers. These distinctions were observed, at least in part, by the trial examiner in his intermediate report in Majestic, but were ignored by the Board members who wrote the final decision. Using the general statement in Garment Workers that "section 9(a) guarantees employees freedom of choice and majority rule" in selecting a bargaining representative, the Board characterized the bilateral dealings in Majestic as negotiations between a minority bargaining representative and an employer who was thereby guilty of an unfair labor practice. In moving for enforcement of the Majestic order in the second circuit, the board attempted to change its earlier rationale by no longer insisting that the result was necessarily dictated by the Garment Workers decision. The Board averred instead that the premature grant of exclusive bargaining status to a union, even if conditioned on the attainment of a majority before execution of a contract, is similar to formal recognition "with respect to the deleterious effect upon employee rights." This approach would seem sufficiently broad to cover a situation such as that in Majestic, and thus, a fortiori, a set of circumstances approximating those in Resnick. It thus appears that the Board's disaffirmance of conditional representation contracts, independent of assistance from the Garment Workers rule, is certain. That such a disavowal would doubtless win acceptance in the appellate courts can be observed in the dicta of the second circuit in Majestic:

54. 366 U.S. 731, 742 (1961)
55. 147 N.L.R.B. 859, 860 (1964).
57. See Allied Super Markets, Inc., 167 N.L.R.B. — (No. 48), 66 L.R.R.M. 1044 (1967). There, as in Resnick, an employer executed a multi-unit bargaining contract with a union that possessed a valid majority at his primary place of business but only a minority, on the date of contract execution, at a separate store considered within the unit. Even though the union acquired a majority at the second store a short time later, the Board held that another interested union could demand a representation election since it filed its petition, under §9 of the Act, before the first union had obtained a majority and thus before the conditional representation contract became effective. This decision illustrates a possible remedy open to the Board in conditional representation situations where a rival union is on the scene and acts in a timely manner. In addition, the decision underscores the Board's continued opposition to such contracts.
[R]ational basis exists for some such specification of the language of Section 8(a)(2) even in cases like this where no other union was on the scene when negotiations occurred.\textsuperscript{58}

**The Validity of "Members-Only" Recognition**

The enunciation of the *Garment Workers* rule also cast doubt upon the continued efficacy of "members-only" agreements, found valid in several early NLRB decisions.\textsuperscript{59} This doubt was raised by the Supreme Court's approval of the Board's order enjoining the employer from recognizing the union as the representative of "any of its employees."\textsuperscript{60} Indeed, the Board's opinion did not clarify the questionable status of members-only agreements, which appear to have been defined out of existence in the Board's unequivocal pronouncement that:

> Employees have not only the right to be represented by a majority representative but also the right to bargain independently and individually with their employer in the absence of a majority representative.\textsuperscript{61}

The Board further clouded the issue in a case decided after its opinion in *Garment Workers*, but before the Supreme Court's decision therein, by observing that the making of members-only agreements is permissible in an abstract sense.\textsuperscript{62} Therefore, it may well be that the legality of such agreements is dependent upon the circumstances surrounding their inception. Decisions rendered in the few cases in point before *Garment Workers*, and in several later cases tangential to the members-only question, tend to bear out this assumption.

In *Solvay Process Co.*,\textsuperscript{63} while two rival unions competed for membership among the employees in his plant, the employer recognized one on a members-only basis. This action was upheld by the Board in the absence of proof of other section 8(a)(2) violations such as management domination of the union or prior acts showing favoritism to the union ultimately given recognition. The Supreme Court extended this ap-

\textsuperscript{58} 355 F.2d 854, 859-60 (2d Cir. 1966).
\textsuperscript{61} 122 N.L.R.B. 1289, 1292 (1959).
\textsuperscript{62} Alco-Gravure, Division of Publication Corp., 124 N.L.R.B. 1027, 1029 (1959).
\textsuperscript{63} 5 N.L.R.B. 330 (1938)
approach in Consolidated Edison Co. v. NLRB, by finding such recognition permissible, again in the absence of a showing of actual employer domination or assistance to the recognized union, even where the employer had committed unfair labor practices violating other sections of the Act. The determinative fact in Edison was that these unfair labor practices were unrelated to the circumstances of the recognition agreement. Thus, the strong implication of these early decisions is that the members-only contract is subject to invalidation only where the employer dominates or gives actual assistance to the union, and that its negotiation may take place regardless of the concurrent organizational efforts of rival unions. Neither those efforts nor the holding of an election resulting from their success are barred. The Court upheld this result in Edison, where the employer was a public utility.

Maintenance of the status of a minority union, until an election might well serve the purpose of protecting commerce from interruptions and obstructions caused by industrial strife [since] there shall be no interference with an exclusive bargaining agency if one other than the [union] should be established in accordance with the Act.

The goal of avoiding industrial strife during organizational campaigns was carried a step further by the Board in The Hoover Co through the suggestion that an employer, faced with recognition demands from two or more competing unions, may validly grant recognition to each on a members-only basis without violating the Board's Midwest Piping doctrine. The likelihood that this is the employer's most appropriate response in such a situation is buttressed by several recent decisions holding that, due to the unreliability of authorization cards in determin-

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64. 305 U.S. 197 (1938).
68. 63 N.L.R.B. 1060 (1945). Thus, the Midwest Piping doctrine, considered in light of Edison and Hoover, holds that an employer violates §8(a)(2) of the Act only if, during the pendency before the Board of a representation question involving two or more unions, he grants exclusive recognition to one of the unions. This formulation was limited by the sixth circuit in NLRB v. Standard Steel Spring Co., 180 F.2d 942 (6th Cir. 1950), where it was held that an employer must extend recognition to one of the competing unions in such a situation where proof of its majority is "clear cut."
ing majority status in multi-union recognition campaigns, an employer who grants exclusive recognition to one of the unions solely on the basis of a showing of vaguely-worded authorization cards is guilty of an unfair labor practice.\(^6\)

Though these cases support the validity of members-only agreements, the subsequent rendering of *Garment Workers*, coupled with the several later opinions of the Board invalidating such agreements in light of that decision,\(^7\) and the absence of any post-*Garment Workers* judicial or Board opinions upholding them could form a basis for concluding that members-only agreements are now invalid. A closer examination of *Garment Workers* does not, however, support this view. The minority bargaining agreement in *Garment Workers* was of the exclusive variety, as opposed to the members-only variety. The Court fully noted this distinction and expressly directed its condemnation only toward the exclusive recognition clause in the contract, branding it "the vice in the agreement."\(^71\)

When both the *Garment Workers* case and later Board opinions are viewed in such a manner, it becomes apparent that, standing alone, members-only agreements are often placed into bargaining contracts as escape clauses and are intended to legitimate otherwise forbidden minority exclusive representation. Thus, in *Garment Workers*, the Court refused to give effect to a separability clause in the contract which attempted to continue the agreement's existence as a members-only arrangement should the dominant clause be invalidated. The Court ruled that since the agreement was obtained due to the union's false and misleading claim of majority support, the unlawful genesis of the agreement precluded its partial validity.\(^12\)

The same reasoning was used by the Board when invalidating an attempted members-only contract in *Alco-Gravure*,\(^72\) where the employer unilaterally extended an exclusive bargaining contract past its expiration date. An attempt was then made to modify this agreement in order to continue recognizing the incumbent union on a members-only basis. The members-only recognition was struck down not solely on its own merit, but due to the Board's finding that it was inseparably connected with

\(^72\) Id.  
\(^73\) 124 N.L.R.B. 1027, 1029 (1959).
the prior expired contract in which the union’s exclusive agency was thus tainted by its lack of uncoerced majority support.\textsuperscript{74}

Even though a strong argument still exists in favor of the validity of members-only recognition and bargaining agreements, the fact remains that judicial and Board decisions focusing upon them are few. One reason for the paucity of cases may be that the making of such agreements is now largely voluntary on the part of employers, since organized labor’s privilege of using concerted action to pressure the employer into such arrangements has been sharply diluted due, \textit{inter alia}, to the passage of coercive picketing provisions contained in section 8(b)(7) of the Act.\textsuperscript{75} Moreover, the utility of such agreements to unions may at times not seem worth the organizational effort to gain what would often be only a few added members, particularly in view of the fact that such agreements are not a bar to subsequent elections and organizational campaigns initiated by rival unions. Despite their apparent lack of use, however, members-only agreements appear to have retained their legal vitality as long as they are not used to aid in masking either employer dominance or the equivalent union deprivation of the freedom of the majority of employees to select their own bargaining representatives.

\textbf{A Proposal}

Section 7 of the National Labor Relations Act, as amended, expresses the basis of our national labor policy as a desire to create and preserve in employees the right of self-organization, including the freedom “to bargain collectively through representatives of their own choosing.”\textsuperscript{76} Further, a necessary corollary to the possession of this freedom by the employees is that, when used on a mass scale, its exercise must be guided by the principles of majority rule.\textsuperscript{77} Thus, the fairness of the Garment Workers rule prohibiting the actions of a minority of employees to bind all of their fellow workers in the selection of an exclusive bargaining representative is readily apparent. The fairness of the remedies imposed in certain situations under both section 8(a)(2) and section 8(a)(5), however, may actually be illusory in regard to the current wishes of a substantial number of employees. Whether or nor an election is involved, the standard remedy in cases under section 8(a)(2) is a rather blunt

\textsuperscript{74} However, the Board gave the unqualified opinion that “members-only contracts are permissible under the law.” \textit{Id.}

\textsuperscript{75} 29 U.S.C. §158(b)(7) (1964)


\textsuperscript{77} \textit{Id.}
punitive instrument, especially since the union, as a consequence of its commission of a section 8(b)(1)(A) violation, ceases to act as the representative of all employees.\textsuperscript{78} The remedy may, however, ignore the subjective desires of the employees, many of whom may wish to retain the union as their bargaining representative, particularly if the union had not been under the actual control or domination of the employer.

In a section 8(a)(5) case where refusal to bargain charges are brought after the union's loss of an election due to alleged unfair conduct of the employer before the election, the result may often be even more destructive of the rights of employees. Through the remedial order compelling management to bargain on an exclusive basis with the aggrieved union, not only is a rather harsh penalty visited on the employer in conjunction with an often undeserved windfall to the union,\textsuperscript{79} but the wishes of many, perhaps even a majority, of employees may be subrogated to the union's victory. Since the union's loss of majority support in the period between the employer's commission of the unfair labor practice and the Board's supposed rectification of the damage even where due solely to the passage of time,\textsuperscript{80} is generally thought irrelevant, the employees are left with no choice as between the victorious union and another union, or between that union and a decision not to be represented at all, a right guaranteed by section 7 of the Act.\textsuperscript{81} Thus the basic right of employees to self-organization cannot be said to enjoy fair protection in post-election cases arising under section 8(a)(5) of the Act.

It is here suggested that more desirable remedies, aimed at protecting primarily the employee's section 7 rights, should be adopted both in section 8(a)(2) cases and in post-election section 8(a)(5) cases. Accordingly, it is suggested that in such situations the Board order that an election be conducted at the earliest feasible time, so as to determine the true wishes of the employees. Such an election should allow the employees in the proper bargaining unit to choose between:

1) The union acting as incumbent representative, in section 8(a)(2) cases; or the union which lost the unfair prior election in 8(a)(5) cases;
2) the union aggrieved, \textit{i.e.}, the charging party, in a section 8(a)(2) case;

\textsuperscript{79} See Bernel Foam Products Co., 146 N.L.R.B. 1277 (1964).
\textsuperscript{80} Id. \textit{But cf.} Josephine Furniture Co., 172 N.L.R.B. – (No. 22), 68 L.R.R.M. 1311 (1968).
3) any other union expressing an interest in organizing the employees in the period between the date of the employer's unfair labor practice and the date of the Board's decision (or alternatively, between the date of the unfair labor practice and a reasonable time before the election) in both section 8(a)(2) and 8(a)(5) cases; and

4) no union.

It is acknowledged that the feasible length of time until an election could be held may vary due to the difference in violations and in case-by-case circumstances, being perhaps longer in section 8(a)(2) cases of employer domination of the incumbent union. The end result, however, would assure greater ultimate protection of employees' basic rights. An additional short-run remedy should also be given in all cases where no finding of employer domination is made, in order to best assure protection of basic rights in the interim period.

Such a remedy would be to allow members-only agreements between employers and interested employees, acting through the unions listed above until an election is held. This would permit a continuation of some type of union representation, where in the employees' judgment its presence was warranted, without unfairly binding a possible majority to acceptance of the union, which is a distinct possibility under the existing remedy. Such members-only recognition could also be utilized where no union had obtained a majority, but one or more unions had displayed considerable strength.

Further, members-only agreements in general should continue to enjoy the sanction of labor relations law, where two conditions have been met. First, the members-only contract's paramount aim must be to truly provide for such recognition, and not to serve as a secondary exculpatory contract clause aimed at allowing some form of representation where minority exclusive representation classes are invalidated. Second, there must be a lack of proof that the members-only union is under the actual domination or control of the employer, and that it received actual assistance from him in its organizational efforts.

As a means of securing the right of self-organization to the greatest possible number of employees, it would be entirely feasible that mem-

82. Such a remedy could be a logical extension of that applied in the Garment Workers case, where both employer and union were ordered to cease and desist until (the union) shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election. 122 N.L.R.B. 1289, 1294 (1959)
bers-only recognition be made compulsory upon employers where the showing of sufficient employee interest, short of majority support, can be produced. This legal sanction would reduce the employer's chance of mistakenly conferring exclusive recognition upon a minority union, yet it would allow representation for many employees, on an individual basis, whose desires may be stifled due to the application of the majority exclusivity requirement. Also, no hardship would be worked on the majority of employees not desiring such organized representation.

As a guide to determining what would constitute a sufficient display of interest in organized members-only recognition, an analogy could be drawn from the Board's "representative complement" rule, which validates exclusive representation agreements executed at or after a time when the employer has engaged thirty percent of his ultimate complement of employees, who are at work in half or more of the number of ultimate job categories. Thus, the compelling of members-only recognition at the request of thirty percent of the employees in an appropriate unit would allow effective representation to be provided to a substantial number of employees, short of a majority, while not infringing the rights of those not desiring such representation and not burdening the employer by forcing him to negotiate with a union which represents a nonsubstantial number of employees.

This change in recognition policy would not upset existing case law and, more particularly, would not be prohibited by an application of the Garment Workers rule which forbids only those agreements between employers and minority unions that give the union exclusive representation status.

This view should also continue to prevail in situations where more than one union is seeking recognition, within the limitations expressed above. Members-only recognition in the midst of multi-union organizational contests has been expressly permitted in the Hoover case, which was not disavowed in Garment Workers or any subsequent decisions.

The adoption of such a position would provide for continuity with the Board's historic approach to minority unionism. Such a policy would enable many working men, such as those employed in "white-collar" occupations where the specter of unionism in a "professional"

84. 90 N.L.R.B. 1614 (1950).
atmosphere may conflict with the personal ideals of a majority of their fellows, to enjoy the exercise of the basic right to self-organization.

Furthermore, the fostering of members-only recognition as an immediate and expedient answer to representation problems should lead to the placing of more reliance upon Board-conducted elections, \(^86\) by both unions and employers, as a means of determining exclusive recognition rights. This would result in a more accurate determination of the wishes of the majority of employees to the question of ultimate exclusive representation. This expectation is based upon the interrelation of two factors. First, the extension of members-only recognition does not now create a bar to a labor election where an exclusive representative may be named by majority vote.\(^87\) Second, the logical result of compulsory members-only recognition should lead to the placing of far less reliance upon the use of authorization cards, widely regarded as highly inaccurate measurements of employee desires, \(^88\) as a final means of determining majority support for exclusive representation purposes, since a form of representation status could be given to a union short of proof of majority support.

Finally, in cases where conditional representation agreements are invalidated, the allowance of members-only representation could also be an appropriate remedy, one which would preserve the primacy of employee rights by refraining from penalizing those employees desiring representation while still disestablishing an incumbent union and its invalid exclusive bargaining statute.

However, the illegality of all conditional representation agreements should not thus be broadly presumed. Such an assumption, while heavily supported by the Board’s decision and the appellate court’s dicta in *Majestee*, \(^89\) should nevertheless not be dispositive of the validity of all such agreements. Though the *Garment Workers* rule would clearly seem to apply in forbidding such agreements where concluded before the union obtains a majority, and thereafter used by either the union or the employer to coerce additional employees to affiliate with the union and so taint its eventual majority, it should be recognized that this may not always be the result. Thus, where the employees are not

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\(^86\) The administration of representation elections is governed by §9 of the Act. 29 U.S.C. §159 (1958).


\(^88\) See Midwest Piping and Supply Co., 63 N.L.R.B. 1060 (1945). See also NLRB v. Golub Corp., 388 F.2d 921 (2d Cir. 1967); NLRB v. Flomatic Corp., 347 F.2d 74 (2d Cir. 1965).

\(^89\) 147 N.L.R.B. 859, 861 (1964).
informed of such agreements before the union attains a majority, and where, as in *Majestic*, the employer not only refrains from executing an exclusive bargaining contract but also withholds the granting of recognition until the union proves its majority status, there can be no possibility that the employees were coerced and that the union's later attainment of majority support was anything but a legitimate expression of employee wishes. Indeed, it would be at least theoretically possible for a company to contemporaneously negotiate such conditional agreements with several unions attempting to win recognition. In examining the validity of conditional representation agreements, therefore, the Board and the courts should seek to determine whether these noncoercive elements are present in the history of the formation of the agreement, and decide accordingly. Consequently, where such conditional representation agreements may be found nonviolative in the absence of coercive circumstances, they could serve as a stimulant to the expediting of the collective bargaining process by reducing both the time consumed and the range of issues dealt with in negotiations.

Through the adoption of these suggestions, the administration of labor relations could be more viably geared to foster optimum possibilities for increasing the effective exercise of employees' basic right to self-organization within this framework, the *Garment Workers* rule would stand unabated as a protective measuring stick to be used in invalidating attempts at deprivations of this right by the self-serving actions of unions and employers.

John C. Sours