Hofstra Law Review

Volume 3 | Issue 3 Article 13

1975

Linden Lumber Division, Summer & Co. v. NLRB

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LINDEN LUMBER DIVISION, SUMMER & CO. v. NLRB

LABOR LAW—*an employer may refuse to recognize a union which claims majority status based on signed authorization cards without filing a §9(c)(1)(B) petition for an NLRB conducted election.* ___ U.S. ___, 95 S.Ct. 429 (1974).

The United States Supreme Court's decision in *Linden Lumber Division, Summer & Co. v. NLRB*[1] signifies the beginning of a new stage[2] in the development of the forty year old National Labor Relations Act.[3] The Court held that in the absence of unfair labor practices,[4] an employer when presented with union authorization cards[5] purported to be signed by a majority of his employees, has neither a duty to bargain[6] with the designated union[7] nor

1. ___ U.S. ___, 95 S. Ct. 429 (1974) (5-4 decision).

2. There have been a number of fairly distinct stages in the development of the National Labor Relations Act, *as amended* [hereinafter the Act]:

(a) In 1935 Congress passed the original National Labor Relations Act also known as the Wagner Act [hereinafter Wagner Act], ch. 372, 49 Stat. 449 (1935), which established the rights of labor organizations;

(b) the Labor Management Relations Act of 1947 popularly known as the Taft-Hartley Act [hereinafter Taft-Hartley Act], ch. 120, 61 Stat. 136 (1947), amended the Wagner Act; and

(c) the Labor Management Reporting and Disclosure Act of 1959 which became known as the Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 519 (1959), amended the Taft-Hartley Act.

Each of these three stages—1935-47, 1947-59, and 1959-present—identifies a fairly distinct period in the evolution of the nation's labor laws. A theme of this article is that the *Linden* case signifies a preview of the next period, during which some of the administrative wrinkles of the Act which have surfaced in recent years will be subjected to remedial treatment. Admittedly, *Linden* should not be viewed as the actual start of a new segment in the labor history of this nation; however, as will be developed subsequently, a careful reading of the Supreme Court's decision suggests several major issues which Congress and the Board will have to address during the coming years.

3. Ch. 372, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. §§ 141-87 (1970).

4. Unfair labor practices are enumerated in Section 8 of the Act, 29 U.S.C. § 158 (1970); these violations defeat the intentions of the Act and therefore subject the violator to the sanctions at the disposal of the National Labor Relations Board [hereinafter the Board] as provided in Section 10 of the Act, 29 U.S.C. § 160 (1970).

5. Authorization cards are forms printed by a union which provide an employee with an opportunity to indicate, by signing, that the union is designated to represent the employee for purposes of collective bargaining and/or that the employee requests that a Board-conducted election be held to determine the representation question. If a union presents the Board with valid authorization cards for at least 30% of the employees in an appropriate unit, this substantial showing of employee interest will provide the basis for a Board-conducted election. *See* 29 C.F.R. § 101.18 (1974). *See also* West Virginia Pulp & Paper Co., 66 N.L.R.B. 309, 312 (1946).

6. N.L.R.A. §8(a)(5), 29 U.S.C. § 158(a)(5) (1970) provides:

a duty to activate the National Labor Relations Board's election machinery.[8] The five to four division of the Court,[9] the lengthy delays in the disposition of this issue,[10] and the vacillation by the Board in its policy on the substantive issue[11] suggest a need for Congress and the Board to refine the administration of the nation's labor-management policy.[12] Accordingly, in analyzing the *Linden* decision it will be necessary to examine not only the specific legal issue decided by the Court, but also to consider the

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It shall be an unfair labor practice for an employer—

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

7. N.L.R.A. § 9(a), 29 U.S.C. § 159(a) (1970) provides in pertinent part:

(a) Representatives *designated or selected* for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . . (emphasis added).

8. N.L.R.A. § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B) (1970) states:

(c)(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 . . .

9. Mr. Justice Douglas delivered the opinion of the Court and was joined by Mr. Chief Justice Burger, Mr. Justice Brennan, Mr. Justice Blackmun, and Mr. Justice Rehnquist. Mr. Justice Stewart filed a dissenting opinion in which Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Powell joined.

It is appropriate to note at this point that NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), which was the forerunner of this case, was a unanimous decision. *See* text accompanying notes 42-53 *infra*. Therefore, an issue which warrants consideration is whether the sudden division of the Court on an issue that appeared somewhat settled as a matter of law antedates a firm resolution of the entire matter. *See* text accompanying notes 66-69 *infra*.

10. The median time for securing a ruling on an unfair labor practice charge is 388 days. In *Linden* the delay was 4½ years and in *Wilder*, the companion case, the time elapsed was 6¼ years. ___ U.S. ___, ___, 95 S. Ct. 429, 432 (1974).

11. In Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099, 1103 (D.C. Cir. 1973), *rev'd sub nom.* Linden Lumber Div., Summer & Co. v. NLRB, ___ U.S. ___, 95 S. Ct. 429 (1974), the Court of Appeals observed that:

[a]fter over 7 years, and three Board decisions representing a series of reversals in position, the Board now seeks to limit sharply the scope of any duty to bargain on the basis of any authorization cards.

12. The primary purpose of the Act is to achieve industrial peace. *See* Koenig, *The N.L.R.A.—An Appraisal*, 23 CORNELL L. Q. 392, 422-23 (1938). Therefore, judicial uncertainty coupled with delays in disposing of unfair labor practices and unsettled Board policies defeat the Act's fundamental objective.

administrative implications inherent in the Court's ruling.

The Supreme Court disposed of two similar cases in the *Linden* decision.[13] In *Linden Lumber Division, Summer & Co.*, the union presented the employer with authorization cards signed by a majority of its employees and demanded recognition for the purposes of collective bargaining. Linden refused this demand, expressed doubt concerning the union's majority status, and suggested that the union file a 9(c)(1)(A) petition with the Board for an election.[14] The union did file such a petition, but withdrew it[15] when the employer refused to agree to a consent election[16] and indicated an unwillingness to abide by any election on the ground that supervisors assisted the union's organizational drive.[17] The union subsequently struck for recognition and then filed an unfair

13. Linden Lumber Div., Summer & Co., 190 N.L.R.B. 718 (1971); Wilder Mfg. Co., 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972).

14. N.L.R.A. § 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A) (1970) states:

> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section (a) of this section; the Board shall investigate such petition . . . .

15. The apparent reason for the union withdrawing the 9(c)(1)(A) petition was to hasten the resolution of the representation question. Had the union permitted the employer to litigate his defense—that company supervisors improperly aided the union's organizational efforts—the best remedy the union could obtain would be a finding that supervisors did not assist the union. The Board would then most likely order an election which could be held one year after the original election petition was filed. From a tactical standpoint the union would be at a definite disadvantage because it would be most difficult to maintain employee interest in the union for such an extended period of time.

16. 29 C.F.R. § 101.19 (1974) states:

> The Board has devised and makes available to the parties two types of informal consent procedures through which representation issues can be resolved *without* recourse to *formal procedures*. These informal arrangements are commonly referred to as consent-election agreement, followed by regional director's determination, and consent-election agreement, followed by Board certification. . . . (emphasis added)

These provisions avoid formal procedures because the parties agree with respect to the appropriate unit, the payroll period to be used as the basis of eligibility to vote, and the place, date, and hours of balloting. Therefore, an election can be conducted much sooner than if the formal provision of 29 C.F.R. § 101.20 (1974) was used. For a more detailed explanation of the consent elections provisions see 29 C.F.R. § 101.19 (a) & (b).

17. *See generally* Comment, *The Role of Supervisors in Employee Unions*, 40 U. CHI. L. REV. 185 (1972) (discussion of the ambiguous role of the supervisor and the special treatment accorded supervisors under the Act).

labor practice charge against Linden based on its refusal to bargain.

In *Wilder Mfg. Co.*, the union requested recognition based on signed authorization cards from a majority of the employees in the production and maintenance unit. The employer failed to respond and recognitional picketing began. The union filed an unfair labor practice charge against Wilder because of its refusal to bargain.[18]

The unions argued before the Board that the employers had a duty to bargain because the authorization cards when coupled with the recognitional strike and recognitional picketing provided convincing evidence of majority support. The General Counsel of the Board contended on behalf of the companies that there was no employer duty to bargain in the absence of either unfair labor practices or any agreement to determine majority status through means other than a Board-conducted election. In each case the Board held that the employer's refusal to bargain did not constitute an unfair labor practice.[19] The Court of Appeals for the District of Columbia reversed both cases on review[20] but was itself reversed by the Supreme Court.[21]

In order to scrutinize the Court's reasoning, it is necessary to discern the rationale for the passage of the statutory provisions on which the Court relied,[22] as well as to trace the development of the relevant case law. After this information is presented it will be possible to project the impact that the *Linden* decision will have on the nation's labor law.

In 1947 the Wagner Act was amended to permit an employer

18. The union in *Wilder* also filed additional unfair labor practice charges which are not germane to the instant case. Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099, 1100-03, (D.C. Cir. 1973); *rev'd sub nom.* Linden Lumber Div., Summer & Co. v. NLRB, ___ U.S. ___, 95 S. Ct. 429 (1974).

19. Linden Lumber Div., Summer & Co., 190 N.L.R.B. 718 (1971); Wilder Mfg. Co., 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972).

20. Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973).

21. Linden Lumber Div., Summer & Co. v. NLRB, ___ U.S. ___, 95 S. Ct. 429 (1974).

22. The *Linden* case is interesting because the appellate courts viewed the issue in different ways: the court of appeals based its reversal on a determination that 9(c)(1)(B) created an employer duty to file a petition; the majority of the Supreme Court reversed this holding by concluding that the legislative history indicated that this section was not intended to create such a duty; and, although the dissent agreed with the majority finding as to 9(c)(1)(B), it reasoned that Sections 8(a)(5) and 9(a) required that the union position be sustained. *See* text accompanying notes 54-60 *infra*.

to petition the Board to conduct an election.[23] This was done in order to give an employer recourse when a union presented a demand for recognition. It is useful to repeat the oft-quoted remarks[24] of Senator Taft which capture the employer's dilemma as it was perceived during the 1947 Congressional debates on the Taft-Hartley amendments to the Wagner Act.[25] Senator Taft stated:[26]

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

Although it is difficult to isolate the precise Congressional intent for the enactment of a statute from debates in the Senate, it appears from the statements made prior to the approval of the Section 9(c)(1)(B) amendment that the legislators viewed the changes regarding the actual filing of a petition for an election as establishing a right for employers, rather than a duty. Several factors account for the passage of 9(c)(1)(B) in its final form: the realization that the Wagner Act did not provide an adequate means for an employer to deal with the dilemma which Senator Taft identified;[27] the Congressional desire to treat employers and

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23. *See* note 8 *supra*.

24. *See* Linden Lumber Div., Summer & Co. v. NLRB, ___ U.S. ___, ___, 95 S. Ct. 429, 433 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 599-600 n.16 (1969); Truck Drivers Union Local No. 413 v. NLRB, 487 F.2d 1099, 1110 n.45 (D.C. Cir. 1973).

25. In analyzing the legislative history of the relevant statutory provisions, the ambit of the inquiry will be restricted to Section 9(c)(1)(B) which deals with the employer petition for an election. Although the dissent in *Linden* relied upon Sections 8(a)(5) and 9(a) of the Act to conclude that Congress actually intended to impose a duty on employers, this writer feels that the Congressional intent as to whether an employer has a duty or a right to file a 9(c) petition is properly resolved by an examination of that specific section rather than by following the troublesome approach of the dissent which widened the scope of the inquiry to additional sections whose application is far broader. *See generally* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958). *Cf.* text accompanying notes 59-60 *infra*.

26. 93 CONG. REC. 3838 (1947).

27. 93 CONG. REC. 4904 (1947) (remarks of Senator Murray):

> We also concur in so much of the proposed amendment contained in section 9(c)(1) which would *permit* employers to request certification of bargaining representatives whenever an unrecognized union claims the right to represent

employees equally;[28] and the need to limit an employer's strategic utilization of the election petition to quash a union's organizational efforts.[29] The Congressional debates, therefore, do not suggest that the final statutory enactment was intended to create an employer's duty to file such a petition.

It is also useful to examine the extensive case law on this subject in order to determine the employer's legal responsibilities with respect to the presentation of authorization cards prior to *Linden*.[30] The 1944 Supreme Court decision in *Franks Bros. Co. v. NLRB*[31] indicated that the Board could order an employer who violated Section 8(a)(5)[32] to bargain with a union designated by a majority of employees as their bargaining agent through the use of authorization cards, even though prior to Board action a change in the members of the work force through normal attrition resulted in a loss of the union's majority status. This loss of majority support was due to the fact that seven months elapsed between the filing of the unfair labor practice charge and the issuance of a complaint by the Board.[33] The Court, in disposing of the case, approved the Board's contention that ". . . a requirement that union membership be kept intact during delays inci-

employees—or whenever the employer is *confronted* by competing unions both seeking the right to represent the same employees. (emphasis added).

28. *See* 93 CONG. REC. 5014 (1947) (remarks of Senator Ball):

> A few additional rights are given to employers. I think that is done on the basis that if a free economy and a free enterprise system are to be maintained, employers as well as employees must be entitled to the *same rights* and to equal justice under the law. One such right is the right to petition the National Labor Relations Board for an election to determine the bargaining representative of an employer's workers, whenever one or more unions present to the employers a demand for recognition as representing the employees. . . . I think the employer is also *entitled* to know, through the secret ballot provided by the bill, whether the union really represents and is the choice of the majority of his employees. (emphasis added).

29. *See* S. REP. No. 105, 80th Cong., 1st Sess. 11 (1947). The report recognized that:

> . . . if an employer could petition at any time, he could effectively frustrate the desire of his employees to organize by asking for an election on the first day that a union organizer distributed leaflets at his plant.

30. Since the Court includes recognitional picketing and the organizational strike in conjunction with its discussion of authorization cards, these two union tactics may also be analyzed as if they were authorization cards in terms of their reliability. *See* Linden Lumber Div., Summer & Co. v. NLRB, ___ U.S. ___, ___, 95 S. Ct. 429, 482 (1974).

31. 321 U.S. 702 (1944).

32. *See* note 6 *supra*.

33. For the impact of delay on a union trying to maintain its majority status, see Comment, 39 U. CHI. L. REV. 314, 326 (1972).

dent to hearings would result in permitting employers to profit from their own wrongful refusal to bargain. . . ."[34] Consequently, majority status could be established by the use of authorization cards and without a Board-conducted election.

Yet the Board and the courts recognized that an employer could have a "good faith doubt" about the view of his employees with respect to unionism or a particular union after having been presented with purportedly valid authorization cards. Thus, *Joy Silk Mills, Inc. v. NLRB*[35] established as permissible behavior within the meaning of the Act, an employer's right to refuse to bargain with a union so long as the employer substantiated his reason for having such doubt.[36] Since the burden rested on the employer to prove his claim of doubt, if he failed to satisfy this requirement the Board could infer bad faith and issue a bargaining order. The Board could also prove bad faith if the employer committed unfair labor practices, aside from refusing to bargain,[37] since the Board could view the claim of "doubt" merely as a pretext by the employer to gain time to persuade the employees to support his anti-union position. Under this policy the Board became enmeshed in the time consuming task of investigating employer intent and then had the ultimate burden of determining whether good faith existed.

The Board gradually revised its policy over the next fifteen years and formally clarified these changes in *Aaron Brothers*.[38] In that case the union relied on authorization cards to substantiate its demand for recognition and the employer violated the Act by committing unfair labor practices. In explaining its position the Board recognized that:[39]

> [w]hile an employer's right to a Board election is not absolute, it has long been established Board policy that an employer may refuse to bargain and insist upon such an election as proof of a union's majority unless its refusal and insistence were not

34. Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944).

35. 185 F.2d 732 (1950), *enforcing* 85 N.L.R.B. 1263 (1949).

36. For example, improperly worded cards could be used as a basis for employer doubt. *See* Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963), *enforced*, 351 F.2d 917 (6th Cir. 1965). *See generally* Comment, *Union Authorization Cards*, 75 YALE L. J. 805 (1966).

37. For an extensive discussion of other unfair labor practices see Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 66-123 (1964).

38. 158 N.L.R.B. 1077 (1966).

39. *Id.* at 1078.

> made with a good-faith doubt of the union's majority. An election by secret ballot is normally a more satisfactory means of determining employees' wishes, although authorization cards signed by a majority may also evidence their desires. Absent an *affirmative showing of bad faith*, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority. (footnotes omitted, emphasis added).

Aaron Brothers clearly overruled *Joy Silk*. The Board shifted the burden of proving bad faith from the employer to the union. Thus, if the union failed to establish bad faith, no bargaining order would issue.[40] Moreover, the union now had to show that an unfair labor practice committed by an employer had the effect of jeopardizing the majority status of the union in order for such conduct to constitute grounds for a bargaining order remedy. Although unfair labor practice violations no longer meant, a fortiori, that bad faith existed,[41] serious infractions still provided a basis for the issuance of a bargaining order. *Aaron Brothers* also acknowledged that the reliability of cards was inferior to elections.

The next important ruling in this line of decisions was *NLRB v. Gissel Packing Co.*[42] In *Gissel* the following events transpired: the union solicited authorization cards from a majority of employees in an appropriate unit; it demanded recognition from the employer as the bargaining agent; the employer refused the union request; and he then committed unfair labor practices. The employer contended in defending his position that authorization cards were, as a general rule, not only inferior to elections but were so inherently unreliable as evidence of employee sentiment that they should never be used to create an employer duty to bargain with a union.[43] In support of this argument, the employer

40. *Id.* at 1079.

41. *See* Hammond & Irving, Inc., 154 N.L.R.B. 1071, 1073 (1965).

42. 395 U.S. 575 (1969). It should be noted that in *Gissel* four similar cases were combined by the Court; for the purposes of this analysis they will be treated as one.

43. The following steps represent the reasoning in support of this position: (a) Section 9(a) of the Act authorizes a union designated by a majority of employees in an appropriate unit to be the exclusive representative; (*see* note 7 *supra*); (b) the standard used to demonstrate majority status is "convincing evidence of majority support" (*see* NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940); (c) if cards are inherently unreliable then they cannot be convincing evidence; and (d) a fortiori the employer prevails. *Cf.* NLRB v. Gissel Packing Co., 395 U.S. 575, 585-86 (1969).

claimed that cards were gathered without management having had a chance[44] to campaign effectively against the union[45] and were often obtained by the use of fraud and coercion.[46] Therefore, the purported expression of employee choice was always made while the employees were uninformed of the company's position and as a result such a designation must be declared invalid.[47]

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44. An employer, in support of this contention, might advance the argument that at least the *chance* to campaign against a union should exist regardless of the extent of pro-union employee sentiment by analogizing to the line of cases in the corporate law area which hold that the members of a Board of Directors of a corporation can exercise their authority only when they convene as a Board. The rationale for this traditional requirement is that a minority director must have an opportunity to persuade the majority members of the Board of Directors—which is a deliberative body—to adopt an alternate position. Similarly, since Section 7 of the Act accords employees the rights to join as well as to refrain from joining labor organizations and since Section 9(b) of the Act refers to an appropriate unit rather than to individual employees, a fundamental orientation of the statute is for employees to function as an entity in the same sense that a Board of Directors of a corporation is to act as a unit. Accordingly, a determination of majority status is not appropriate until all employees and the employer, who is certainly an interested and legitimate party to this determination (*see, e.g.*, Section 8(c)), have an opportunity to persuade all employees to adopt a particular position.

See H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 208 (2d ed. 1970). *Compare* Baldwin v. Canfield, 26 Minn. 43, 1 N.W. 261 (1879) *with In re* B-F Building Corp., 284 F.2d 679, 681 (6th Cir. 1960). *But see* Kessler, *The Statutory Requirement of a Board of Directors: A Corporate Anachronism*, 27 U. CHI. L. REV. 696, 701 (1960).

45. Normally, a union will formally notify an employer of an organizational effort in order to subject the employer to the unfair labor practice provisions of the Act. The reason for notification is to establish the causation element of an employer's violations, namely, that the employer specifically acted in contravention of the employees' Section 7 rights in order to defeat the union. The union will sometimes delay the formal notification if it feels the element of surprise will aid it strategically. *See* Comment, *Union Authorization Cards: A Reliable Basis for an NLRB Order to Bargain*, 47 TEX. L. REV. 87, 91 (1968). *Cf.* N.L.R.A. § 7, 29 U.S.C. § 157 (1970) which states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

46. *See* Dixie Cup Div. of Am. Can Co., 157 N.L.R.B. 167 (1966).

47. For an example of this type of problem see Levi Strauss & Co., 172 N.L.R.B. 732 (1968).

This contention can be better understood by placing it within the context of the "informed consent doctrine," which provides that an exchange of all relevant information is a condition precedent to a grant of authority from one party to another. The reason for this needed dialogue is that a transfer of power must be done with a full appreciation of the consequences and therefore in its absence the grant is uninformed and invalid. This

The Court in *Gissel* summarized the position of the Board on the issue in the following way:[48]

> . . . a company could not be ordered to bargain unless (1) there was no question about a Union's majority status (either because the employer agreed the cards were valid or had conducted his own poll so indicating), or (2) the employer's §§ 8(a)(1) and (3) unfair labor practices committed during the representation campaign were so extensive and pervasive that a bargaining order was the only available Board remedy irrespective of a card majority.

The "independent knowledge" exception could arise if the employer conducted a poll[49] or agreed to have a neutral person ascertain the desires of the employees.[50] Where additional sources confirmed the reliability of the cards the evidence would be convincing, thus preventing the employer from questioning the reliability of the cards.[51] The second exception was based on necessity since if unfair labor practices precluded the holding of a fair election, cards provided the best substitute.[52] The Court limited its holding to the second exception because the fact pattern in *Gissel* in-

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analogy is especially accurate when it is applied to a union-employee relationship since the union acts as the agent of the employees. For a discussion of informed consent as it pertains to the doctor-patient relationship see Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship*, 79 YALE L. J. 1533 (1970).

48. NLRB v. Gissel Packing Co., 395 U.S. 575, 586 (1969).

49. The rules regarding polling are enumerated in Struksnes Construction Co., 165 N.L.R.B. 1062, 1063 (1967):

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisals are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

50. *See* Snow & Sons, 134 N.L.R.B. 1077 (1966).

51. At oral argument in *Gissel* the Board confirmed that the employer's good faith doubt was largely irrelevant and that the controlling factor regarding an order to bargain was whether an election could be held. NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1969). This is somewhat paradoxical since an absence of knowledge—doubt—was deemed to be irrelevant while knowledge when classified as "independent knowledge" was the basis for an order to bargain.

52. *Cf.* Aaron Bros., 158 N.L.R.B. 1077, 1079 n.10 (1966) wherein the Board stated:

> [w]here an employer has engaged in unfair labor practices, the results of a Board-conducted election are a less reliable indication of the true desires of employees than authorization cards, whereas, in a situation free of such unlawful interference, the converse is true.

volved employer unfair labor practices.[53] Therefore, after *Gissel*, if an employer had committed serious unfair labor practices the Board could issue a bargaining order based on valid authorization cards obtained from a majority of employees in an appropriate unit. The holding did *not* extend to situations where no unfair labor practices were present, nor did the decision rule on the reliability issue. Accordingly, the Board's policy as enunciated in *Aaron Brothers* remained intact.

Linden provided the Supreme Court with an opportunity to review the Board's approach with respect to authorization cards when an employer committed no unfair labor practices. The majority held that an employer does not have a duty to file a 9(c)(1)(B) petition for an election[54] when he is presented with a union demand for recognition based on authorization cards. In dismissing the main thrust of the Court of Appeals' position that the legislative intent of 9(c)(1)(B) was to place the burden on an employer to petition for an election, the majority concluded that the legislative history of that provision clearly indicated a Congressional intent merely to accord employers the right to petition for a Board-conducted election. The Court recognized that if the employer did not have to petition for an election then the union would have two options: to file a 9(c)(1)(A) petition for an election[55] which is a comparatively speedy mechanism[56] or to file an 8(a)(5) unfair labor practice charge which is frequently subject to protracted delays.[57] In dealing with the first option, the Court clearly placed the burden on the union to file a 9(c)(1)(A) petition

53. 395 U.S. 575, 612 n.18 (1969).

54. A Section 9(c)(1)(B) petition can be filed by an employer only after a union *claims* that it represents a majority of employees in an appropriate unit. *See, e.g.*, Amperex Electronic Corp., 109 N.L.R.B. 353, 354 (1954).

55. By winning a Board-conducted election and becoming certified, a union is accorded several significant statutory benefits: Section 8(b)(4)(C) prohibits recognitional strikes and concerted activities by any individual; Section 8(b)(7)(B) prohibits recognitional and organizational picketing by a rival labor organization; and Section 9(c)(3) guarantees the union a twelve month grace period for the union to establish itself in the bargaining unit during which time no other union can petition for an election. In evaluating whether to petition for an election at the outset, a union must assess its chances of winning and thereby gaining these benefits with the possibility of losing and thereby being barred for one year under Section 9(c)(3) from another opportunity to be certified in the same unit.

56. [T]he median time between the filing of the petition for an election and the decision of the regional director is about 45 days. Linden Lumber Div., Summer & Co. v. NLRB, ___ U.S. ___, ___, 95 S. Ct. 429, 432 (1974).

57. *See* note 10 *supra*.

if it wanted to invoke the Board's election machinery. As for the 8(a)(5) approach, the Court found that although cards may be reliable,[58] because of the difficulty of making such a determination, the Board in some instances could in its discretion abolish the entire refusal to bargain alternative.[59]

The dissent, however, argued that: Section 8(a)(5) requires an employer to bargain with the representative of his employees as determined pursuant to Section 9(a); Section 9(a) permits employees to designate a union; the Board has consistently applied the standard of "convincing evidence of majority support" in making this determination; and, the legislative history of Section 9(a) indicated that Congress approved of the authorization card method.[60] Thus, the dissent found that the statutory provisions when taken as a whole required an employer to bargain with a union designated by authorization cards.[61]

The majority opinion, therefore, is most interesting not for what it said, but for what it left unsaid. The majority specifically refrained from dealing directly with the grounds upon which the four dissenting Justices relied. It could have said that in its discretion[62] the Board has found that cards are inherently unreliable and therefore cannot provide "convincing evidence of majority support." It would therefore follow that a union could not be

58. Linden Lumber Div., Summer & Co. v. NLRB, ___ U.S. ___, ___, 95 S. Ct. 429, 432 (1974) (the Court raises the reliability deficiencies of various union tactics).

59. Therefore, the *Gissel* exceptions still hold. *See* text accompanying note 48 *supra*.

60. Since existing law at that time as determined by the Board recognized cards for purposes of designating unions, one could argue by implication that Congress intended for cards to be honored subsequently. Linden Lumber Div., Summer & Co. v. NLRB, ___ U.S. ___, ___, 95 S. Ct. 429, 435 (1974).

61. It should be pointed out that a proposal which would have eliminated the use of cards was defeated.

62. Since the Act is silent regarding authorization cards, one could argue that such a "gap" in the law was intended to be resolved by the administrative agency (the Board) which could adopt the proper approach based on its experience and expertise. Had Congress intended to require the Board to always accord cards the same status of a Board-conducted election in terms of the duty to bargain, it could have so specified. In fact, the Congressional desire to base representation on majority rule, as specified in Section 7, necessitates that "designations" be by a true majority with the determination being within the Board's jurisdiction.

Cf. National Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672, 689 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 751 (1974) wherein the court stated:

> In determining the legislative intent, our duty is to favor an interpretation which would render the statutory design effective to terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute (citation omitted).

designated through reliance on them and an employer would have no duty to bargain with a union designated in such a manner. The Court could have further strengthened this argument by analogizing to the political process where petitions are used to place a candidate's name on the ballot,[63] and insist that the use of authorization cards be limited solely to demonstrate a showing of interest for purposes of placing a union's name on the ballot.[64] Moreover, cards should not normally constitute a substitute for an election,[65] just as petitions signed by a majority of constituents in an election district would not obviate the need for a formal general election.[66]

What happened in *Linden* is indicative of a major problem that exists in the administration of the nation's labor law. Because policies are unsettled, practitioners must examine a surfeit of case law in order to try to predict how current behavior will be judged when it is ultimately litigated.[67] Therefore, the reluctance of the majority in *Linden* to identify specifically the Board's policy on the reliability of authorization cards may have been due to either the uncertainty of that policy or the Board's history of reversing itself.[68]

Yet there is a solution for this problem. The Board should utilize its rule making power[69] and conduct hearings on the reliability of various methods used to demonstrate majority support. Unions, employer associations, and Board field personnel could formally provide data and suggestions on the merits of the proper approach to pursue in the absence of a precise provision in the

63. Jenness v. Fortson, 403 U.S. 431, 432 (1971).

64. *See* note 5 *supra*.

65. *See* note 52 *supra* and accompanying text.

66. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) where the Court stressed the high priority the right to vote is accorded:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

See generally, Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228 (1968).

67. *See* notes 10-11 *supra*.

68. *See* note 11 *supra*.

69. N.L.R.A. § 6, 29 U.S.C. § 156 (1970) provides:

> The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

Act itself. The Board would then presumably have complete information on the subject and could issue a formal ruling complete with clear standards to guide subsequent conduct by the parties.[70] In this way the uncertainty that survives as a result of the *Linden* decision, which left the reliability issue unclear, could be eliminated.[71]

At the outset of this analysis,[72] an argument was advanced that *Linden*, when read closely, provides an indication of the future focus of labor law. *Linden* exemplifies three things: the Court's division on how to interpret provisions of the labor law as shown by the five-four split; the lengthy delays in processing cases; and the Board's constantly changing position on substantive issues. Were the Board to adopt rule making as a method of clarifying its policies, these problems would be solved. During the coming years the Board must apply its energies in this direction if the Act's machinery is to function efficiently.

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70. *See* Bell Aerospace Co. Div. of Textron, Inc. v. NLRB, 475 F.2d 485, 496-97 (2d Cir. 1973) (Friendly, J.) wherein the court stated:

> . . . the argument for rule-making is especially strong when the Board is proposing to reverse a long standing and oft-repeated policy on which industry and labor have relied. (footnote omitted).

71. For extensive discussions of this issue which is beyond the scope of the present analysis, see Kahn, *The N.L.R.B. and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. REV. 63 (1973); Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L. J. 571 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

72. *See* note 2 *supra*.