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## ARTICLES

### UNDERCUTTING *LINDEN LUMBER*: HOW A UNION CAN ACHIEVE MAJORITY-STATUS BARGAINING WITHOUT AN ELECTION

*Charles J. Morris\**

#### I. INTRODUCTION

The chief obstacle a union faces in seeking majority-based collective bargaining under the National Labor Relations Act ("NLRA" or "Act"),<sup>1</sup> is the specter of the Supreme Court's *Linden Lumber Division, Summer and Co. v. National Labor Relations Board* decision.<sup>2</sup> The theme of this article is that it is the *specter* of that decision, not its holding, that gives an employer the right to insist on an election as a precondition for collective bargaining, thereby rejecting the role of stand-alone union authorization cards as proof of majority status. This article points the way to a belated reopening of a critical non-election path to collective bargaining, the achievement of which was intended to be the essence of the NLRA, which in turn was intended to be a key feature of the American economy. Although Congress never intended that an election would be the sole route to collective bargaining,<sup>3</sup> it has

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1. National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2012)).

2. See *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 718 (1971), *enforcement denied sub nom.* *Truck Drivers Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd sub nom.*, *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

3. *Id.* at 312 (Stewart, J., dissenting) (citing H.R. REP. NO. 80-510, at 41 (1947) (Conf.

so developed that winning an election conducted by the National Labor Relations Board (“NLRB,” “Labor Board,” or “Board”) has become the *sine qua non* of almost all initiations of the process. As a consequence, a major impediment to a union achieving majority status, and thus the right to bargain as a majority-exclusive representative under section 8(a)(5),<sup>4</sup> is the requirement that it first prove its majority status through an election which, as the historical record shows,<sup>5</sup> has become an obstacle-course that strongly favors the employer.<sup>6</sup>

## II. BACKGROUND

The long-established basis for the foregoing requirement, which gives the employer the right to lawfully refuse to bargain unless the union has first won a Board-conducted certification election is the aforesaid *Linden Lumber* decision, which the Nixon NLRB issued in 1971.<sup>7</sup> That decision, after its initial rejection by the D.C. Court of Appeals,<sup>8</sup> was ratified by a sharply divided Supreme Court.<sup>9</sup> However, contrary to popular misconception, that Court’s majority opinion did not mandate the Board’s rule; rather, with the following language, it merely qualifiedly allowed it as a permitted precondition to collective bargaining: “[W]e cannot say that the Board’s decision that the union should go forward and ask for an election on the employer’s refusal to recognize the authorization cards was arbitrary and capricious or an abuse of discretion.”<sup>10</sup>

The *Linden* rule is thus only an agency’s “permissible” construction

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Rep.)).

4. See 29 U.S.C. § 158(a)(5). For statutory text, see *infra* note 17.

5. See KATE L. BRONFENBRENNER, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 80-82 (Sheldon Friedman et al. eds., 1994); see also Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 414-15 (1995).

6. See, e.g., *Harborside Healthcare, Inc.*, 343 N.L.R.B. 906, 916-17 & n.14 (2004) (Liebman & Walsh, Members, dissenting in part) (“At the direction of their employer, supervisors—up to the highest company official—may urge their subordinates to vote against unionization. Indeed, employers are free to compel employees to listen to their anti-union message, in captive audience meetings, one-on-one encounters, and other settings, while excluding union representatives.” (citations omitted)).

7. *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 718 (1971), *enforcement denied sub nom. Truck Drivers Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), *rev’d sub nom. Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

8. *Truck Drivers Local No. 413*, 487 F.2d at 1113.

9. *Linden Lumber*, 419 U.S. at 310.

10. *Id.* at 309-10.

of the statute—as it was correctly and expressly so labeled by Supreme Court Justice Stewart in his dissenting opinion.<sup>11</sup> As this article will confirm, it was not an agency’s “clear” and “unambiguous” mandatory construction of statutory text spelled out by Congress in accordance with the familiar but later-articulated standard expressed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>12</sup> Accordingly, the tribunal primarily responsible for the prevailing interpretation that an election can be a prerequisite for a union’s right to bargain was not the 1974 Supreme Court, but rather the 1971 NLRB.<sup>13</sup> Thus, responsibility for the failure to reverse that “permissible” reading, and to replace it with a reading more consistent with the Act’s true policy, lies with subsequent Labor Boards. Nevertheless, during the four-plus decades in which there has been no direct challenge to the application of the *Linden* rule, the labor-relations community appears to have accepted—with only rare and recent exceptions<sup>14</sup>—that this rule was unchangeably inscribed in stone by the Supreme Court.<sup>15</sup> Apparently based on that misunderstanding, the American labor movement spent an enormous amount of time and money seeking, unsuccessfully, to change that rule by congressional passage of the Employee Free Choice Act (“EFCA”)—an approach that proved counter-productive.<sup>16</sup>

Notwithstanding the passage of time, a Labor Board that is so inclined will have clear legal authority to change that regressive rule

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11. “I cannot agree with the Court’s conclusion that this Board policy constitutes a *permissible* interpretation of §§ 8 (a)(5) and 9(a) of the Act.” *Id.* at 310 (Stewart, J., dissenting) (emphasis added); see also *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

12. *Chevron*, 467 U.S. at 842-43; see also *infra* notes 79-102.

13. See *infra* notes 79-102.

14. See, e.g., Halima Woodhead, *Can Card-Check Be Unilaterally Imposed by the NLRB?*, 1 AM. U. LAB. & EMP. L.F. 85, 94 (2011). Prompted by the stir created within the employer community by the inclusion of a provision for card-check certification in the Employee Free Choice Act (“EFCA”), H.R. 1409, S. 560, 111th Cong. (1st Sess. 2009), the author answers her title-question with a “yes” but deems the process undesirable. *Id.* at 86-87, 99-100.

15. As one commentator observed as recently as 2009, the *Linden* rule was “enshrined in the national labor policy by . . . the Supreme Court.” Henry H. Drummonds, *Beyond the Employee Free Choice: Unleashing the States in Labor-Management Relations Policy*, 9 CORNELL J. L. & PUB. POL’Y 83, 99 (2009).

16. Employee Free Choice Act, H.R. 1409, S. 560, 111th Cong. (2009). Aside from not achieving passage, this bill served to educate the employer lobby about the NLRA to organized-labor’s disadvantage. Among the fall-out products of the EFCA effort was the ammunition it provided that lobby with some of the means to block former union attorney Craig Becker from full NLRB membership with the argument that he would use the appointment to achieve, through NLRB action, union card-majority certification, which Congress had rejected as a part of EFCA. See Editorial, *Back Door Card Check*, WALL ST. J., (Sept. 14, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748703597204575483882585485368>.

without further legislation, as this article will demonstrate. First in order, however, is an examination of the Act's pertinent language and the historical treatment of the underlying issue.

### *A. Statutory Text and Historical Treatment*

The statutory text governing majority-union bargaining is simple and straight-forward. Section 8(a)(5) provides that it shall be an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).”<sup>17</sup> Section 9(a) provides that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .”<sup>18</sup> However, the Act does not specify how such a representative (i.e. a union), shall be so “designated” or “selected,” or provide definitions of those key words;<sup>19</sup> these are therefore words which Congress left to the NLRB for interpretation.<sup>20</sup>

Under the original Wagner Act, a union's section 9(a) majority was not dependent on an election, for section 9(c) expressly allowed the Board to certify majority status by “a secret ballot . . . or . . . any other suitable method,”<sup>21</sup> which was typically union authorization cards.<sup>22</sup> In 1939, however, in *Cudahy Packing Co.*,<sup>23</sup> the Board abandoned that reliance on authorization cards and confined certifications to the

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17. National Labor Relations (Wagner) Act of 1935 § 8(a)(5), 29 U.S.C. § 158(a)(5) (2012) (emphasis added). In addition, section 8(a)(1), 29 U.S.C. § 158(a)(1), more generally provides that it “shall be an unfair labor practice for an employer . . . to interfere with, restrain, employees in the exercise of the rights guaranteed in section 7 . . . .” *Id.* And the pertinent part of section 7, 29 U.S.C. § 157, reads as follows:

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 may refrain from such activities pursuant to this section].

*Id.* § 157.

18. 29 U.S.C. § 159(a) (emphasis added).

19. *Id.*

20. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); see also *infra* notes 79-102 and accompanying text.

21. 29 U.S.C. § 159(c) (1947).

22. See ABA SECTION OF LABOR AND EMPLOYMENT LAW, *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 788 (John E. Higgins, Jr. et al. eds., 6th ed. 2012) [hereinafter *THE DEVELOPING LABOR LAW*].

23. *Cudahy Packing Co.*, 13 N.L.R.B. 526 (1939).

election-process.<sup>24</sup> Thus, except where it could be shown that the employer lacked a good-faith doubt that the union represented a majority of the employees in an appropriate bargaining unit, the requirement of an election became the Board's standard certification policy.<sup>25</sup>

Nevertheless, as it had been recognized from the Wagner Act's very beginning and continued long thereafter, it was understood that union bargaining-rights were not limited to the election process, for the language of section 8(a)(5)—which has never been changed—is unequivocal in its requirement that an employer has a duty to bargain “with the representatives of his employees, subject to the provisions of section 9 (a)” —text which contains no mention of elections or certifications.<sup>26</sup> In 1940, in *NLRB v. Dahlstrom Metallic Door Co.*, the Second Circuit expressly approved that concept by confirming that an employer's duty to bargain existed whenever the union presented “convincing evidence of majority support.”<sup>27</sup> And as the Supreme Court in 1956 held in *United Mine Workers v. Arkansas Flooring Co.*,<sup>28</sup> and reconfirmed in 1969 in *NLRB v. Gissel Packing Co. Inc.*,<sup>29</sup> “[a] Board election is not the only method by which an employer may satisfy itself as to the union's majority status.”<sup>30</sup>

With passage of the Taft-Hartley Act in 1947,<sup>31</sup> by virtue of three distinct actions Congress played a key role in defining the collective bargaining obligation here in issue: (1) it amended section 9(c) to make the election process the sole basis for certification;<sup>32</sup> (2) it expressly rejected in conference committee a provision in the House bill which would have confined the bargaining obligation only to unions certified pursuant to an NLRB election or currently recognized by the employer;<sup>33</sup>

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24. *Id.* at 531-32.

25. *Id.*

26. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596 (1969).

27. *NLRB v. Dahlstrom Metallic Door Co.*, 112 F.2d 756, 757 (2d Cir. 1940) (“The contention that bargaining was not mandatory until the Board had accredited [the union] as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support.”); *see also* *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 868 (2d Cir. 1938), *cert. denied*, 304 U.S. 576 (1938).

28. *United Mine Workers v. Ark. Oak Flooring Co.*, 351 U.S. 62, 72-75 (1956).

29. *Gissel Packing Co.*, 395 U.S. at 597; *see also* *infra* Part III.

30. *United Mine Workers*, 351 U.S. at 72 n.8.

31. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

32. 29 U.S.C. § 159(c)(1) (2012).

33. Section 8(a)(5) in H.R. 3020 was rejected in Conference. H.R. REP. NO. 80-510, at 41-42 (1947) (Conf. Rep.). This was so noted in *NLRB v. Gissel Packing Co.*, 395 U.S. at 598, and in the court of appeals opinion in *Truck Drivers Local No. 413 v. NLRB*, 487 F.2d 1099, 1110 (D.C. Cir. 1973), and also in the Supreme Court's dissenting opinion in *Linden*, 419 U.S. 301, 312 (1974).

and (3) it granted employers a right to petition for an election under the new Section 9(c)(1)(B), the pertinent text of which is the following:

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such a hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.<sup>34</sup>

Shortly after passage of Taft-Hartley the Board issued a decision in *Joy Silk Mills, Inc.*, which established the rule that if an employer has a “good faith” doubt as to a union’s majority based on authorization cards, it could lawfully refuse to bargain and thus require the union to prove its majority through an NLRB election.<sup>35</sup> The employer, however, had no burden of proving any basis for its doubt; rather, it was deemed the General Counsel’s burden to disprove the legitimacy of the employer’s claim.<sup>36</sup> Notwithstanding various adjustments that were made from time to time, the *Joy Silk* rule remained the commonly described rule until the Supreme Court’s 1969 *Gissel* decision,<sup>37</sup> although in actual practice it had been modified to equate commission of serious unfair labor practices with an absence of good faith doubt, which the Supreme Court described in its *Gissel* opinion as follows:

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(Stewart, J., dissenting).

34. 29 U.S.C. § 159(c)(1)(B).

35. *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1264-65 (1949), *enforced*, 185 F.2d 732 (1950).

36. See *John P. Serpa, Inc.*, 155 N.L.R.B. 99, 100 (1965) (“Where the General Counsel seeks to establish a violation of section 8(a)(5) on the basis of a card showing, he has the burden of proving not only that a majority of employees in the appropriate unit signed cards designating the union as bargaining representative, but also that the employer in bad faith declined to recognize and bargain with the union.”); see also *Aaron Bros. Co.*, 158 N.L.R.B. 1077, 1081 (1966) (making clear this shift of burden of proof to the General Counsel, on behalf of the charging-party union, to show the employer’s bad faith in refusing to rely on authorization cards).

37. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596 (1969).

[T]he Board announced at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether. Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election.<sup>38</sup>

### III. THE *GISSEL* CASE

In *Gissel* the Court reviewed four appellate cases that had raised, under varying circumstances, the extent of the employer's duty to bargain where the union's majority in each had been based solely on union authorization cards.<sup>39</sup> After reviewing pertinent legal history, including administrative and judicial decisions such as the cases noted above, the Court began its analyses by stating that it "need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes,"<sup>40</sup> which was the issue that would be treated later in *Linden*.<sup>41</sup> It then addressed the double-barreled question of "whether a union can establish a bargaining obligation by means other than a Board election and whether the validity of alternate routes to majority status, such as cards, was affected by the 1947 Taft-Hartley amendments."<sup>42</sup> The Court responded to the first half of that question by stressing that a "union is not limited to a Board election,"<sup>43</sup> citing the statutory language in sections 8(a)(5) and 9(a) and the sufficiency of "convincing evidence of majority support" that was highlighted in the 1940 *Dahlstrom Metallic Door Co.* case,<sup>44</sup> whereupon it reiterated that:

Almost from the inception of the Act, then, it was

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38. *Id.* at 594.

39. *Id.*

40. *Id.* at 595.

41. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

42. *Gissel Packing Co.*, 395 U.S. at 595-96.

43. *Id.* at 596 (deciding a Board election is not the only method by which an employer can achieve union's majority status); see also *United Mine Workers v. Ark. Oak Flooring Co.*, 351 U.S. 62, 71-72 & n.8 (1956) (deciding a Board election is not the only method by which an employer can achieve union's majority status).

44. *NLRB v. Dahlstrom Metallic Door Co.*, 112 F.2d 756, 757 (2d Cir. 1940).

recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of § 8(a)(5). . . . We see no reason to reject this approach to bargaining obligations now. . . .<sup>45</sup>

Responding to the second half of the question, the *Gissel* Court called attention to a version of the bill in the House that would have amended section 8(5) (the present 8(a)(5)) by limiting the Board's findings of a refusal-to-bargain violation only to where an employer had failed to bargain with a currently recognized or election-certified union.<sup>46</sup> That amendment, which would have eliminated any reliance on authorization cards, was rejected in conference.<sup>47</sup> The Court further stated that the Taft-Hartley addition of a means for an employer to petition for an election under section 9(c)(1)(B) was not a grant of "an absolute right to an election at any time" but was rather a means for employers "to test out their doubts as to a union's majority in a secret ballot election."<sup>48</sup> The Court stated definitively that; "[W]e hold that the 1947 amendments did not restrict an employer's duty to bargain under § 8(a)(5) solely to those unions whose representative status is certified after a Board election."<sup>49</sup>

The Court then addressed the question of "whether authorization cards are such inherently unreliable indicators of employee desires that, whatever the validity of other alternate routes to representative status, the cards themselves may never be used to determine a union's majority and to support an order to bargain."<sup>50</sup> Regarding the proffered objections, to wit, that

cards cannot accurately reflect an employee's wishes, either because an employer has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one, or because the

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45. *Gissel Packing Co.*, 395 U.S. at 596-98 (citing National Labor Relations (Wagner) Act of 1935 §§ 8(a)(5), 9(a), Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 158(a)(5), 159(a))).

46. *Id.* at 598.

47. See *supra* note 33 and accompanying text.

48. *Gissel Packing Co.*, 395 U.S. at 599.

49. *Id.* at 600.

50. *Id.* at 601.

choice was the result of group pressures [and] . . . too often obtained through misrepresentation and coercion[.]<sup>51</sup>

The Court found none of these reasons sufficiently persuasive; it therefore concluded that “cards, though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded . . . .”<sup>52</sup> The Court observed that

[t]he Board itself has recognized . . . that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support. The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice.<sup>53</sup>

Whether the NLRB’s secret ballot elections a half-century later continue to be the preferred-method to determine whether a union has majority support remains to be seen—as we shall see later.<sup>54</sup> More important, however, the *Gissel* Court specifically left open several issues dealing with the reliability of cards, asserting that it

need not decide whether, absent election interference by an employer’s unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board’s ultimate determination of the card results regardless of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute. In short, *a union’s right to rely on cards as a freely interchangeable substitute for*

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51. *Id.* at 602.

52. *Id.* at 603.

53. *Id.* at 602.

54. *See infra* text accompanying notes 110-14.

*elections where there has been no election interference is not put in issue here . . . .*<sup>55</sup>

Notwithstanding the subsequent decision in *Linden Lumber*,<sup>56</sup> those issues remain to this day mostly open.

#### IV. *LINDEN LUMBER* AND ITS *CHEVRONITE* APPLICATION

The aforesaid open issues were partially addressed by the Board in 1971 in *Linden Lumber*.<sup>57</sup> However, as I shall demonstrate, the final decision in that case, i.e., the Supreme Court's, failed to provide a definitive resolution of the issues that it had left open in *Gissel*—contrary to what the labor-relations community generally, but inaccurately, has assumed.<sup>58</sup> Our attention begins with the majority-opinion of the three Republican Board members,<sup>59</sup> which held that an employer in denying union recognition will not be found guilty of a refusal to bargain in violation of section 8(a)(5) where the only evidence of the union's claimed majority consists of union authorization cards, with motive not an issue absent the commission of serious unfair labor practices; whereupon the union's claim of majority status can be resolved only by its petitioning for an NLRB secret ballot election.<sup>60</sup> Purporting to address the *Gissel* open issue of whether the employer who insists on an election must initiate the election process, the majority reasoned that the facts of the case

have caused us to reassess the wisdom of attempting to divine, in retrospect, the state of employer (a)

55. *Gissel Packing Co.*, 395 U.S. at 601 n.18 (emphasis added).

56. *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 718 (1971), *enforcement denied sub nom. Truck Drivers Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd sub nom. Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

57. *Linden Lumber*, 190 N.L.R.B. at 720-21.

58. See *supra* notes 14-16 and accompanying text. And note that the standard treatise on the NLRA carelessly records that the Supreme Court "answered those questions in *Linden Lumber*" and "adopted the Board's position." THE DEVELOPING LABOR LAW, *supra* note 22, at 832 (emphasis added). In the interest of full disclosure, I was the Editor-in-Chief of the second edition of that treatise and therefore take responsibility for its earlier careless allegation that stated that: "the Court held" what the Board had ruled. THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 348-490 (Charles J. Morris et al. eds., 2d ed. 1983). Although its full description at 522-23 was accurate. *Id.* at 522-23.

59. Chairman Edward B. Miller and members Howard Jenkins, Jr. and Ralph E. Kennedy. See Stephen C. Vladeck, *Nixon Board and Retail Bargaining Units*, 61 CORNELL L. REV. 416, 416, 429-30 (1976).

60. See *Linden Lumber*, 190 N.L.R.B. at 721.

knowledge and (b) intent at the time he refuses to accede to a union demand for recognition. Unless . . . the employer has agreed to let its “knowledge” of majority status be established through a means other than a Board election, how are we to evaluate whether it “knows” or whether it “doubts” majority status? And if we are to let our decisions turn on an employer’s “willingness” to have majority status determined by an election, how are we to judge “willingness” if the record is silent . . . or doubtful, as here, as to just how “willing” the Respondent is in fact? We decline, in summary, to reenter the “good-faith” thicket of *Joy Silk* . . . . These considerations lead us to the conclusion that Respondent should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election.<sup>61</sup>

Rather than focusing pointedly on the broad implications of the majority’s decision, the two Democratic Board members<sup>62</sup> concentrated in their dissent on the undisputed evidence which showed, based on a “strike in which a majority of the employees [had] openly reaffirmed their support of the union,” that the employer “had knowledge, independently of the authorization cards, that a majority of its employees supported the Union”; accordingly, they contended that those facts warranted a bargaining order.<sup>63</sup>

The D.C. Court of Appeals, however, recognized in its reviewing opinion the far-reaching implications of the majority’s decision when it asserted that the Board had

adopted a “voluntarist” view of the duty to bargain. Absent unfair labor practices or an agreement to determine majority status through means other than an election, such as a poll, the employer has no duty to recognize the union. This means, in effect, that *as a matter of law, the decision to recognize a union on the*

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61. *Id.* at 720-21 (citing *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949), *enforced*, *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (1950)).

62. Members John H. Fanning and Gerald A. Brown dissented. *Linden Lumber*, 190 N.L.R.B. at 721-24.

63. *Id.* at 722.

*basis of cards is entirely within the control of the employer; neither “bad faith” or “independent knowledge” can lay the predicate for recognition because those concepts are deemed unworkable.*<sup>64</sup>

That opinion noted that although the Board’s decision allowed an employer who was not guilty of misconduct to give no affirmative reason for rejecting a recognition request based on authorization cards or a majority indicated by a strike, a refusal to bargain was nevertheless deemed justified based on the employer’s independent knowledge of the union’s majority.<sup>65</sup> The court observed that “[w]hile it may be that there would be difficulties in determining the state of past employer knowledge . . . we cannot accept the view that this requires a union petition for an election as the only means for obtaining recognition,” whereupon, it proceeded to examine another predicate for issuance of a bargaining order.<sup>66</sup>

That other predicate pointed to the employer’s failure to evidence its own “good faith doubt” by itself petitioning for an election under section 9(c)(1)(B), stressing that the *Gissel* Court had noted that the legislative history of this provision indicated that “the right to petition for an election was a way in which the employer could remove his doubt.”<sup>67</sup> The court of appeals therefore charged the Board with ignoring “the very intent behind [that] statutory provision” and being “willing to resolve every assertion of doubt in the employer’s favor, without permitting any ‘test’ of those doubts.”<sup>68</sup> Accordingly, it concluded with the following statement reversing the Board’s decision:

While we have indicated that cards alone, or recognitional strikes and ambiguous utterances of the employer, do not necessarily provide such “convincing evidence of majority support” so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is

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64. *Truck Drivers Union Local No. 413 v. NLRB*, 487 F.2d 1099, 1106 (D.C. Cir. 1973) (emphasis added).

65. *See id.* at 1110.

66. *Id.*

67. *Id.* at 1110-11.

68. *Id.* at 1111.

to avoid both any duty to bargain and any inquiry into the actuality of his doubt.<sup>69</sup>

A closely divided Supreme Court reversed that decision.<sup>70</sup> How that was achieved might seem to pose an enigma—but only superficially—for the concluding language in Justice Douglas’s majority opinion that sustained the Board’s holding might be viewed, at least in a surface reading, as a *final* determination of the issues that were left open in *Gissel*—which is how it has been generally viewed historically<sup>71</sup>—but a careful reading of the opinion, particularly the paragraph preceding that final paragraph and its unchallenged labeling by the dissenting opinion, clearly and fully resolves any enigmatic problem.<sup>72</sup> Here is the closing paragraph in Justice Douglas’s opinion:

In sum, we sustain the Board in holding that, unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board’s election procedure.<sup>73</sup>

That this was a timely but not a final determination of the issues is confirmed by the immediately preceding paragraph, which indicated that this policy was *permissible* because it met the requirements of the canon of statutory construction regarding judicial deference to an agency’s interpretation of statutory text that Congress left for agency interpretation.<sup>74</sup> Here is that penultimate paragraph:

In light of the [Act’s] statutory scheme and the practical administrative procedural questions involved, *we cannot*

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69. *Id.* “The Board might, in order to reduce litigation and delay in these matters, adopt the rule that an employer must, when presented with an authorization card majority, either recognize the union or, within a reasonable time, petition for a certification election.” *Id.* at 1111 n.47.

70. A five-to-four decision with majority opinion by Justice Douglas was joined by Chief Justice Burger, Justices Blackman, Brennan, and Rehnquist, *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 301 (1974); dissenting opinion by Justice Stewart was joined by Justices White, Marshall, and Powell. *Id.* at 310.

71. See *supra* notes 14–16, 58 and accompanying text.

72. See *Linden Lumber*, 419 U.S. at 309–10 & n.10.

73. *Id.* at 310 (emphasis added) (citation omitted).

74. See *id.* at 309–10.

say that the Board's decision that the union should go forward and ask for an election on the employer's refusal to recognize the authorization cards was *arbitrary and capricious or an abuse of discretion*.<sup>75</sup>

Further confirmation that this was but a *permissible* construction is contained in the opening paragraph of Justice Stewart's dissenting opinion, where he stated: "I cannot agree with the Court's conclusion that this Board policy constitutes a *permissible* interpretation of §§ 8(a)(5) and 9(a) of the Act."<sup>76</sup> Thus, although the Court's majority accepted the Board's decision, this was but their judicial recognition of the *permissible* nature of the construction in accordance with Justice Douglas's penultimate paragraph, that the Board's decision was not "arbitrary and capricious or an abuse of discretion."<sup>77</sup> It was definitely not a *Chevron*-type mandatory reading of statutory text, i.e., an "unambiguously expressed intent of Congress."<sup>78</sup> Rather, it was an agency's *Chevron*-type second-step construction of a provision as to which

the statute is silent or ambiguous with respect to the specific issue [where] the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . Such legislative regulations are given controlling weight unless they are *arbitrary, capricious*, or manifestly contrary to the statute.<sup>79</sup>

75. *Id.* (emphasis added); see *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

76. *Linden Lumber*, 419 U.S. at 310 (Stewart, J., dissenting) (emphasis added).

77. *Id.* at 310.

78. *Chevron*, 467 U.S. at 843.

79. *Id.* at 843-44 (emphasis added). With regard to review of the NLRB's construction of statutory text, *Chevron* was an articulation of the Supreme Court's long-established standard of judicial review of administrative statutory interpretation, not a change in that interpretive authority, as confirmed by the Court. *Id.* at 843 & n.11. This is illustrated by the following pre-*Linden* cases: *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) ("[Board action was] not inadequate, irrational or arbitrary . . . [The Board has a] special function of applying the general provisions of the Act to the complexities of industrial life . . ."); *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957) (discussing the function of balancing "conflicting legitimate interests" so as to "effectuate national labor policy is often a difficult and delicate responsibility, which the Congress [has] committed primarily to the [NLRB], subject to limited judicial review"); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) ("[Congress] charge[d] the Board with the task of devising remedies to effectuate the policies of the Act. . . [T]he power, which is a broad discretionary one, is for the Board to wield, not for the courts."); *NLRB v. A. J. Tower Co.*, 329

We are thus dealing here with the multifaceted word “designated” in section 9(a), which is the key word to which the agency must affix a permissible meaning in determining what is required for majority-union representational status.<sup>80</sup> The Court’s approval of the Board’s construction in *Linden* was an approval of but one of many conceivable readings of that word, one that—despite its shortcomings—was deemed by the Court’s majority not to be “arbitrary” or “capricious,”<sup>81</sup> these being the age-old standards which, as noted above, the Court spelled out as criteria for disapproval of an alleged impermissible reading in its 1984 *Chevron* decision.<sup>82</sup>

## V. PROPOSED REPLACEMENT RULE

### A. The Essential Elements

As noted, the current *Linden* rule is derived from an apparently permissible—albeit contrived—construction of what “designated” means in section 9(a) of the Act.<sup>83</sup> From this, the Supreme Court approved the Board’s allowing an employer’s reasonless insistence on an election-certification as a precondition for its duty to bargain.<sup>84</sup> Although that is the exact precondition for bargaining that Congress expressly rejected in passing Taft-Hartley,<sup>85</sup> with its acceptance by the Court in *Linden* there is no choice but to recognize it as a permissible reading, hence a lawful construction of the Act. Fortunately, however, it is only *permissible*, hence replaceable. In fact—given the will by the NLRB—it should be easily replaceable by a more satisfactory permissible rule.

The soon-to-be-described rule-change that I shall here propose can

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U.S.: 324, 330 (1946) (“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.”); *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 131 (1944) (“[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited.”); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (“[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . .”).

80. See *Chevron*, 467 U.S. at 842-43; *supra* notes 78-79 and accompanying text; *infra* notes 81-102 and accompanying text.

81. *Linden Lumber*, 419 U.S. at 310.

82. See *Chevron*, 467 U.S. at 842-43.

83. See *supra* notes 77-82 and accompanying text.

84. See *Linden Lumber*, 419 U.S. at 309-10.

85. See *supra* note 33 and accompanying text.

be viewed as the result of a normal evolutionary process that is comparable to the rulemaking procedure which the Supreme Court reviewed in *Chevron*, where, with reference to the agency's earlier interpretation of the statutory term in issue, the Court observed that the "agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."<sup>86</sup> That is exactly what the NLRB has often accomplished with its changes to existing rules—and with judicial approval. As the Court emphasized in *NLRB v. J. Weingarten, Inc.*,

[t]he use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development of [an] important aspect of the national labor law would misconceive the nature of administrative decisionmaking. . . . The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.<sup>87</sup>

Also pertinent here is the Court's rationale in *NLRB v. Curtin Matheson Scientific, Inc.*, that "a Board rule is entitled to deference even if it represents a departure from the Board's prior policy."<sup>88</sup> In fact, there are numerous cases where the Board has altered a rule or practice in order to revise its coverage or respond to changed conditions.<sup>89</sup> For example, with reference in the above *Weingarten* case, the Board changed its position as to whether an employer's denial of an employee's request for union presence during an investigative disciplinary interview violates sections 7 and 8(a)(1).<sup>90</sup> And in *American Hospital Ass'n v. NLRB*,<sup>91</sup> the Supreme Court approved the Board's changing of its long-standing policy regarding the appropriateness of a comprehensive health-care bargaining unit.<sup>92</sup>

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86. *Chevron*, 467 U.S. at 863-64.

87. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975).

88. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990); see also *NLRB v. Local Union No. 103, Int'l Ass'n of Iron Workers*, 434 U.S. 335, 351 (1978) (regarding a defensible construction of the statute: "An administrative agency is not disqualified from changing its mind . . .").

89. See *infra* notes 90-102 and accompanying text.

90. *J. Weingarten, Inc.*, 420 U.S. at 265-66.

91. *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991).

92. *Id.* at 618.

Probably the most famous—some might say infamous—example of the Board’s rule-replacement process can be found in the saga of the aforesaid *Weingarten* rights in the nonunion workplace.<sup>93</sup> The Board first articulated the existence of that right in the 1982 *Materials Research Corp.* case,<sup>94</sup> which was overruled three years later in *Sears, Roebuck & Co.*, where the Board held that rejection of the *Material Research* rule was compelled by the Act.<sup>95</sup> This was followed by an intricate series of decisions, appeals, and remands that began with *E.I. Du Pont de Nemours & Co.*<sup>96</sup> and substantially culminated with the Board’s 1989 decision in *Slaughter v. NLRB*,<sup>97</sup> the ultimate result of which was that such rejection of coverage, though enforceable, was only a permissible and not a mandatory construction, which the Board conceded.<sup>98</sup> The next episode in this saga was the Board’s overruling of the *Du Pont* decision in *Epilepsy Foundation of Northeast Ohio*,<sup>99</sup> which the D.C. Court of Appeals affirmed.<sup>100</sup> That was followed by the most recent episode, which was the Board’s reversal of *Epilepsy* in *IBM Corp.*<sup>101</sup> with recognition that either interpretation is permissible.<sup>102</sup> All of which reinforces the Board’s authority to replace one permissible reading of the Act with another permissible reading.<sup>103</sup>

Accordingly, to fulfill the declared purpose of the Act of “encouraging the practice and procedure of collective bargaining,”<sup>104</sup> the *Linden* rule needs to be replaced with a fresh and more sensible rule that will restore the original intended meaning to the statutory requisite for collective bargaining under section 9(a). That replacement rule should be based on a simple but reasonably verifiable assessment of whether a majority of the employees in the appropriate bargaining unit have “designated” the union as their collective bargaining representative. That is all that is required for such bargaining. As the historical and

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93. See *Weingarten*, 420 U.S. at 265-66; see also Jeff Sloan et al., *Public Employees Entitled to Union Rep at Accommodation Meetings*, 25 NO. 2 CAL. EMP. L. LETTER 1, (Apr. 2015) (noting the famous *Weingarten* rights).

94. See *Materials Research Corp.*, 262 N.L.R.B. 1010, 1014 (1982), overruled in relevant part by *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985).

95. See *Sears, Roebuck & Co.*, 274 N.L.R.B. at 230 & n.1.

96. See *E.I. DuPont De Nemours*, 289 N.L.R.B. 627, 630-31 & n.16 (1988).

97. See generally *Slaughter v. NLRB*, 876 F.2d 11 (3d Cir. 1989).

98. *Id.* at 13.

99. *Epilepsy Found. of Ne. Ohio*, 331 N.L.R.B. 676, 682 (2000).

100. *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1105 (D.C. Cir. 2001).

101. *IBM Corp.*, 341 N.L.R.B. 1288, 1295 (2004).

102. *Id.*

103. See *supra* notes 90-102.

104. National Labor Relations (Wagner) Act of 1935 § 1, 29 U.S.C. § 151 (2012).

judicial records have demonstrated, Congress specifically rejected the requirement of election-certification as a precondition for an enforceable duty to bargain.<sup>105</sup>

Indeed, as the text of the Act and its legislative history indicate, an election is the intended secondary, not primary, means for establishing a bargainable majority.<sup>106</sup> The statutory text stipulates that an election can be ordered only if the Board “has reasonable cause to believe that a question of representation affecting commerce exists,”<sup>107</sup> which is the Taft-Hartley Act’s retention of the same key requirement in the original section 9(c), that a question concerning representation must exist as a precondition for conducting an election.<sup>108</sup> Thus, as the text of the Act literally requires for recognition, where a union represents a validly designated majority of employees in an appropriate bargaining unit and requests recognition and bargaining—and the employer refuses—an election cannot be ordered because a question concerning representation does not exist. Those facts describe an unfair labor practice—*i.e.*, a refusal to bargain in violation of sections 8(a)(1) and 8(a)(5)—for which a valid charge and complaint would be appropriate.

In order to fully understand the meaning of the key words of section 9(a) in issue—primarily the word “designated,” but also the less-applicable word “selected”—one should recognize that both of these words involve *communication* and *action*. “Selected” is appropriate where there is more than one union vying for representation, which occurs only rarely. “Designated,” the broader term that applies to a single representative, is therefore the word that requires our primary attention. According to its standard dictionary meaning, “designated” is an adjective that equates with the past tense of the verb “designate,” which means to “show,” “indicate,” “mark,” “point out,” “signify,” “specify,” “denote,” or “name.”<sup>109</sup> It is an indication of a communicated action, not of a determined or quiescent state of mind. It is not intended to convey absolute certainty, or choice, such as the words “chosen” or “accepted,” which would carry a sense of decisional finality. To indicate union-majority support, Congress simply required that employees who favor such representation give simple notice of that fact, not necessarily notice of decisional certainty. In other words,

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105. See *supra* note 33 and accompanying text.

106. See *supra* text accompanying notes 21-22.

107. 29 U.S.C. § 159(c)(1)(B); see also *supra* text accompanying note 34.

108. See *supra* note 33 and accompanying text.

109. *Designate*, DICTIONARY.COM, <http://www.dictionary.com/browse/designate> (last visited Nov. 25, 2017).

“designated” connotes the minimum action and communication Congress required to initiate the bargaining process that the Act endorses. And *designation* by the employee’s signature on a verifiable union authorization card—which is comparable to myriad examples in commercial transactions that require only a signature—should again be sufficient to require bargaining under section 8(a)(5), absent a showing of a critical number of those cards to be fraudulent. Such a process complies with the central policy of the Act, for according to statutory text<sup>110</sup> and the Supreme Court’s assessment, “[t]he central purpose of the Act was to protect and *facilitate* employees’ opportunity to organize unions to represent them in collective-bargaining negotiation.”<sup>111</sup> In view of what has happened to the election process in recent years—with employers having effectively gained tactical control of that process<sup>112</sup>—*facilitating* employees in the means by which they demonstrate their majority status is certainly appropriate.

The Board should therefore follow the Supreme Court’s reminder in *Gissel* that the Act “refers to the representative as the one ‘designated or selected’ . . . without specifying precisely how that representative is to be chosen.”<sup>113</sup> And the Court there reiterated that “[w]e have consistently accepted this interpretation of the Wagner Act and the present Act, particularly as to the use of authorization cards” and “that a ‘Board election is not the only method by which an employer may satisfy itself as to the union’s majority status.’”<sup>114</sup> Accordingly, it is time—in fact long past the time—for the Board to complete the answer to the specific questions that the Court left open in *Gissel*.<sup>115</sup> The time has come to undercut *Linden Lumber*.

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110. National Labor Relations Act § 1, 29 U.S.C. § 151. The Act’s *policy clause* reads as follows:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

*Id.*

111. *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 609 (1991) (emphasis added).

112. *See supra* notes 5-6.

113. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596 (1969).

114. *Id.* at 597 (quoting *United Mine Workers v. Ark. Flooring Co.*, 351 U.S. 62, 72 n.8 (1956)); *see also supra* notes 28-30.

115. *See supra* text accompanying note 48.

### 1. A Pragmatic Proposal

As the foregoing analyses have established, a literal reading of the Act supports recognition that union authorization cards obtained from a majority of the employees in an appropriate bargaining unit should suffice to support majority-based duty to bargain under section 9(a) of the Act and that such a determination by the Board would be a permissive application of statutory text that passes judicial muster.<sup>116</sup> Notwithstanding, however, such a bare-bones approach to the authorization card issue leaves room for improvement because a proper majority-verification system that relies solely on authorization cards should also seek to assure both a high degree of accuracy in its designations and a means to discourage and guard against fraudulent use of those cards. A valid complaint that has been raised against relying only on cards instead of secret ballot elections is that some cards may be dishonestly obtained by forgery or involuntary signing.<sup>117</sup> Although such improprieties may be rare, the fact that they might occur and go undetected is reason enough to favor a procedure that will discourage or prevent such inappropriate conduct. Wholesale substitution of elections for all card-checks, however, would be throwing out the baby with the bath—as the *Linden* rule has done.<sup>118</sup> There is a better way, indeed a simple unobtrusive way that conforms to statutory intent while also discouraging fraudulent use of cards. Such a prophylactic approach is here proposed.

What I am proposing is the following:

*A union's authorization cards signed by a majority of the employees in an appropriate bargaining unit will establish that union's section 9(a) majority-status, provided the voluntary signing of each such card was observed and verified by a witness who has so indicated by also signing that card, which shall be dated accordingly.*

*An employer who has been requested to recognize and bargain with a union that purports to rely upon such cards as the section 9(a) representative of its employees will be required to grant such*

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116. See *supra* notes 113-14.

117. See Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J.L. & POL. 39, 68-69 (2010).

118. See *Linden Lumber Div., Summer & Co.*, 190 N.L.R.B. 718, 720-21 (1971), *enforcement denied sub nom. Truck Drivers Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd sub nom.*, *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

*recognition and bargain collectively unless, within fourteen (14) calendar days following the union's request for recognition, it gives notice to that union, with a copy to the Regional Director of the NLRB, that it declines to accept the reliability of those cards and files a petition for an election pursuant to section 9(c)(1)(B). Upon the filing of such petition, the Board, acting through its Regional Office in accordance with its normal procedures under applicable rules and regulations, shall take temporary possession of those cards, which it shall investigate along with any proffered proof provided by any of the parties regarding their reliability. If, in accordance with normal representation-case rules and regulations applicable to section 9(c), it finds that there is no convincing proof of the invalidity of the union's majority claim, it will have no "reasonable cause to believe that a question of representation"*<sup>119</sup> *exists, whereupon an election will not be conducted and the employer will have a duty to recognize and bargain with the union in good faith pursuant to the Act's unfair-labor-practice provisions. If, however, it finds that the union's alleged card-majority is unreliable, it shall conduct an election pursuant to the aforesaid section 9(c)(1)(B), in which event the result of that election shall prevail. However, should the employer withdraw its objection to the union's cards at any time prior to the holding of an election, the union's card-majority shall be deemed valid and the requirements for bargaining by the employer pursuant to sections 8(a)(1), 8(a)(5), and 9(a) shall apply.*

In compliance with the above proposed rule, a union that wishes to base its bargaining status on a card-majority may do so by following a few easy steps. It should simply see to it, and require, that all authorization cards be voluntarily signed by each employee in the presence of a witness, and that the witness verifies that fact by signing and dating the card.

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119. National Labor Relations (Wagner) Act of 1935 § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B) (2012). For the full pertinent text of the applicable clause, see *supra* note 34.



adjudication,<sup>121</sup> or through the formal rulemaking procedure provided by section 6 of the Act.<sup>122</sup> Either means would be appropriate.<sup>123</sup>

## VI. CONCLUSION

I fully realize that the anti-union employer lobby will oppose this proposed rule on the ground that it is likely to drastically reduce, if not virtually eliminate, the role of union elections in the collective bargaining process. Congress did not require such elections, however, and—as legislative history and Supreme Court reviews unequivocally confirm—the Taft-Hartley Congress expressly rejected such a requirement.<sup>124</sup> This is not to say, however, that there will be no further role for union elections. They will still be used and sometimes required. Union organizing for collective bargaining rights based solely on card majorities will be but one path to union recognition, and it is likely that many union organizational drives will continue to rely on the familiar election process.<sup>125</sup> Let the market decide the usage.

The anti-union lobby will also complain that card-authorizations will limit employers in their opportunities to engage in free-speech presentations to employees regarding the pros and cons of union representation. Based on how employers have misused pre-election speech in the past,<sup>126</sup> however, such limitations, which only affect timing, are appropriate. Employers in nonunion workplaces have unlimited control over when, where, and how they communicate with their workforce.<sup>127</sup> Replacing *Linden Lumber* with the rule proposed here will simply restore what Congress intended: that employees should have the right to easily obtain union representation that will give them meaningful participation in determining their wages and other conditions of employment. The lessons of history remind us that widespread collective bargaining by a strong labor movement can be a key element in helping to rebuild the American middle-class and a healthy economy.

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121. This is how the *Linden* rule was promulgated. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 310 (1974).

122. 29 U.S.C. § 156 (2012). This is how the rule in *American Hospital Ass'n* was promulgated. *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 618 (1991).

123. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-93 (1974).

124. See *supra* Section II.A.

125. See *NLRB v. Gissel Packaging Co.*, 395 U.S. 575, 602 (1968).

126. See *supra* notes 5-6.

127. See *supra* text accompanying note 6.

