Louisiana Law Review

Volume 27 | Number 3
The Work of the Louisiana Appellate Courts for the 1965-1966 Term: A Symposium
April 1967

Labor Law - Employer's Good Faith Doubt of Union's Majority

L. Edwin Greer

COMMENTS

LABOR LAW — EMPLOYER'S GOOD FAITH DOUBT OF UNION'S MAJORITY

Under the National Labor Relations Act[1] as amended there have developed two means by which a union may obtain recognition as exclusive bargaining representative. The first is through the election and certification procedure of section 9(c),[2] which provides for an election by secret ballot upon the filing of a petition by an employee, a labor union, or an employer. The second method, derived from the refusal to bargain provision of section 8(a)(5),[3] requires the employer to bargain "as soon as the union representative presents convincing evidence of majority support."[4]

The latter method is based on presentation of authorization cards[5] signed by a majority of the employees in the unit to be represented. The Supreme Court in *Franks Bros. Co. v. NLRB*[6] set forth the prevailing interpretation of the act which permits selection of a representative in this manner. It held that a wrongful refusal to bargain upon presentation of authorization cards constituted an unfair labor practice under section 8(a)(5)[7] and that this violation obviated the necessity of holding a section

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

2. 61 Stat. 144 (1947), 29 U.S.C. § 159(c) (1964): "Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board . . . . If the Board finds . . . that . . . a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

3. 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964): "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees. . . ."

4. NLRB v. Dalstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940).

5. Authorization cards, under rulings of the Board and the courts, may be in the form of regular union membership cards, see Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); cards showing explicit acceptance of the union as bargaining representative, see NLRB v. Stow Mfg. Co., 217 F.2d 900 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1954); applications for union membership, see NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318 (1940); or authorizations for the checkoff of union dues, see Lebanon Steel Foundry v. NLRB, 130 F.2d 404 (D.C. Cir. 1942), *cert. denied*, 317 U.S. 659 (1942).

6. 321 U.S. 702 (1944).

7. 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).

9(c) secret ballot election.[8] An order requiring the employer to bargain was declared the proper remedy under the theory that a fair election was no longer possible. The Court cited as authority section 10(c), which authorizes the Board "to take such affirmative action . . . as will effectuate the policies of this Act."[9] The importance placed by the courts on section 8(a)(5) is indicated by the post-1947 decisions which continued to apply the *Franks Bros.* reasoning even though the intervening Taft-Hartley Act[10] had extended section 9(c) to give an employer the right to petition for an election upon the presentation to him of any recognition claim.[11]

An employer's right to a Board election under section 9(c) is not absolute.[12] He may refuse to bargain and insist on an election as long as he doubts in good faith that a majority of employees have selected the union as their exclusive bargaining representative.[13] If the employer's good faith doubt is ascertained and a question of representation exists, an election is conducted by the Board. It may be an ordinary certification election[14] or a consent election as provided for in the Act.[15] But if a lack of good faith is shown, the Board will issue a bargaining order under the presumption that an election free from undue influence is no longer possible and that the authorization cards should be accepted as the best available evidence of the employees' wishes at the time of employer refusal to bargain.

A union can now seek a bargaining order even after having lost a certification election under the policy-making decision of *Bernel Foam Products Co.*[16] That case overruled the standard

8. When an employer has violated the act by a refusal to bargain with the union, the Board requires that the employer "bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority." Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944).

9. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

10. 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964).

11. Before the 1947 Taft-Hartley Act an employer could file a representation petition only when there were conflicting claims of two or more unions. This change permits him to file a petition when only one union claims majority status.

12. United Mine Workers of America v. Arkansas Oak Flooring, 351 U.S. 62, 74-75 (1956); NLRB v. Elliot-Williams Co., 345 F.2d 460 (7th Cir. 1965); NLRB v. Trimfit of California, 211 F.2d 206, 209 (9th Cir. 1954); Aaron Brothers Co., 158 N.L.R.B. No. 108 (1966).

13. Aaron Brothers Co., 158 N.L.R.B. No. 108 (1966).

14. Dixie Cup, 157 N.L.R.B. No. 9 (1966); Gafner Automotive & Machine, Inc., 156 N.L.R.B. 577 (1966); Western Saw Mfgs., 155 N.L.R.B. 1323 (1965).

15. Labor Management Relations Act § 9(c)(4), 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(4) (1964); Marvin v. Whitbeck, 155 N.L.R.B. 40 (1965); J. M. Machinery Corp., 155 N.L.R.B. 860 (1965).

16. 146 N.L.R.B. 1277 (1964).

of *Louis Aiello*,[17] which held that a union must select either an NLRB-conducted election or an unfair labor practice charge of refusal to bargain in order to be recognized as employee representative — but not both. *Bernel* reinstates the pre-*Aiello* policy in holding that a union does not waive one means of proving its majority by electing to pursue another. In permitting unions to bring refusal-to-recognize charges after losing an election, the Board encourages them to proceed to elections and denies the employer any benefit from the delay involved in prosecuting an unfair labor practice charge.[18] *Kolpin Bros. Co.*[19] drew the necessary boundary to this policy, limiting valid subsequent refusal-to-bargain charges to cases where an election has been set aside on the basis of meritorious objections, thus wisely eliminating cases where there was no interference with the election from application of the *Bernel Foam* rule.

To sustain a refusal to bargain charge and secure a bargaining order the General Counsel of the Board must prove the existence of four vital elements.[20] First, the union must represent a majority of employees as exclusive collective bargaining agent at the time of the employer's alleged refusal to bargain. This may be either the date the employer receives the request for recognition[21] or the date he refuses recognition.[22] Second, there must be a positive request for recognition by the union, either oral or written and either presented in person or sent by registered letter or wire. Third, this communication must specify a unit of employees appropriate for bargaining.[23] Finally, the General Counsel must show employer bad faith.

DETERMINING GOOD OR BAD FAITH

The determination of employer good or bad faith is the crucial issue when a union seeks a bargaining order based on authorization cards. One standard for judging good or bad faith

17. 110 N.L.R.B. 1365 (1954).

18. The extensive hearings and litigation required would serve as a bonus in time of possibly several years, costing a wilfully anti-union employer little compared to the increased wages and benefits that unionization might produce.

19. 149 N.L.R.B. 1378 (1964).

20. Orlove, *An Employer's Obligation to Recognize a Union Absent an NLRB Election*, 47 CHI. B. RECORD 107, 108 (1965).

21. Allegheny Pepsi-Cola Bottling Co., 134 N.L.R.B. 388 (1961), *enf'd*, 312 F.2d 529 (3d Cir. 1962).

22. Burton-Dixie Corp., 103 N.L.R.B. 880 (1953), *enf'd*, 210 F.2d 199 (10th Cir. 1954).

23. See Ash Market & Gasoline, 130 N.L.R.B. 641 (1961).

was established in the leading case of *Joy Silk Mills, Inc. v. NLRB*[24] and has subsequently been followed in every circuit. The Court of Appeals for the District of Columbia, enforcing a bargaining order, held that

> "an employer may refuse recognition to a union when motivated by a good faith doubt as to that union's majority status. . . . When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a) (5) of the Act."[25]

The Board decision in *Joy Silk* confirmed its policy explicitly as establishing a lack of good faith where the employer's insistence on an election is motivated "by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union."[26] In setting forth the relevant factors the Board held that good or bad faith of the employer at the time of refusal must be determined "in the light of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct."[27] The General Counsel had the burden of proving a lack of good faith doubt.

> "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."[28]

The General Counsel must show affirmative proof of bad faith, although recent decisions require the employer to justify his refusal to bargain once he or a neutral party has counted the cards, placing on him a heavy duty amounting almost to the

24. 85 N.L.R.B. 1263 (1949), *enf'd*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

25. 185 F.2d 732, 741 (D.C. Cir. 1950).

26. 85 N.L.R.B. 1263, 1264 (1949), quoting Matter of Artcraft Hosiery Co., 78 N.L.R.B. 333 (1948).

27. 85 N.L.R.B. 1263, 1264 (1949).

28. John P. Serpa, Inc., 155 N.L.R.B. 99, 100-01 (1965). But where there is a prior certification or contract there is a rebuttable presumption that the union still maintains a majority status, laying the burden of proof on the employer.

effective burden of proof.[29] As a good faith doubt is presumed until the asserted bad faith doubt is proven, a survey of the cases is necessary to find where the employer has been held lacking good faith.

Board policy focuses primary attention on the employer's motivation at the time of his initial refusal, but two separate guidelines have developed for its determination. Lack of good faith can be established by the employer's conduct at the time of his refusal[30] or by subsequent conduct[31] tending to dissipate the union's strength which establishes a conclusive presumption that the employer's doubt was not in good faith.[32] This latter area marks the most frequent use of the *Joy Silk* test and is best identified by the employer's commission of other unfair practices. Under this analysis the cases fall into two general categories: (1) those involving other unfair labor practices (usually occurring after the refusal to bargain with bad faith presumed where there was an attempt to dissipate the union's majority) and (2) those void of any other unfair labor practices (the significant conduct coming at the time of refusal with a violation grounded on a rejection of the collective bargaining principle).

First, committing other unfair labor practices either in an effort to reduce the union's alleged majority or in compaigning for a union defeat before an election almost invariably gives rise to the presumption that the employer's insistence on an election lacked good faith.[33] These unfair labor practices frequently take the form of threats,[34] interrogation concerning union activity,[35]

29. See Shuman, *Requiring a Union To Demonstrate its Majority Status by Means of an Election Becomes Riskier*, 16 LABOR L.J. 426, 430 (1965).

30. See William S. Shurett d/b/a Greyhound Terminal, 137 N.L.R.B. 87 (1962), *enf'd*, 314 F.2d 43 (5th Cir. 1963).

31. Occasionally cases arise where the conduct took place prior to the bargaining demand, but these are infrequent and require a showing that the employer was aware of the card drive. See Witbeck, d/b/a Witbeck's IGA Supermarket, 155 N.L.R.B. 40 (1965); Warren Co., 90 N.L.R.B. 689 (1950); Lancaster Garment Co., 78 N.L.R.B. 935 (1948).

32. See, *e.g.*, International Union of Electrical Radio & Machine Workers v. NLRB, 352 F.2d 361 (D.C. Cir. 1965); Daylight Grocery Co., 147 N.L.R.B. 733, 742 (1964), *enf'd, per curiam*, 345 F.2d 239 (5th Cir. 1965); S.N.C. Mfg. Co., 147 N.L.R.B. 809, 810 (1964).

33. Aaron Brothers Co., 158 N.L.R.B. No. 108 (1966); see, *e.g.*, Colson Corp., 148 N.L.R.B. 827, 829 (1964), *enf'd*, 347 F.2d 128 (8th Cir. 1964), *cert. denied*, 382 U.S. 904 (1965); NLRB v. Elliott-Williams Co., 143 N.L.R.B. 811 (1963), *enf'd*, 345 F.2d 460, 464 (7th Cir. 1965).

34. See, *e.g.*, Better Val-U Stores, 161 N.L.R.B. No. 71 (1966); Sonora Sundry Sales, Inc., 161 N.L.R.B. No. 53 (1966); Southwestern Transp. Co., 154 N.L.R.B. 374 (1965); Donald Skillings, 152 N.L.R.B. 1018 (1965).

35. See, *e.g.*, Consolidated Rendering Co., 161 N.L.R.B. No. 3 (1966); Copeland

promises or grants of benefits,[36] surveillance,[37] and discriminatory discharges.[38] In *Bauer Welding & Metal Fabricators, Inc.*,[39] employer encouragement of company unions was sufficient to overrule an assertion of good faith. Even polling to test the validity of the union card count has been found an unfair labor practice imputing bad faith.[40]

The Board, supported by the courts, has held that these violations indicate an attitude of bad faith at the time of the original refusal to bargain and prevent the possibility of an impartial election so that the fairest solution is a bargaining order based on the authority of the signed cards. Thus, as a general rule, the employer's refusal to recognize a union in conjunction with other unfair labor practices will stand as proof of a lack of good faith and a violation of section 8(a)(5).[41] However, not all violations of the act support a refusal-to-bargain finding. The nature and gravity of the unfair labor practice must be examined to determine if they are "of such a character as to reflect a purpose to evade an obligation to bargain."[42] This is adhering to the Board policy set forth in 1965 in *Hammond & Irving, Inc.*[43] where an employer's good faith doubt was upheld though, after refusing to bargain, he unlawfully interrogated 6 out of 110 employees. The Board held:

> "[N]ot every act of misconduct necessarily vitiates the respondent's good faith . . . For there are some situations in which the violations of the Act are not truly inconsistent with a good-faith doubt that the union represents a majority of

Oil Co., 157 N.L.R.B. No. 12 (1966); Dixie Color Printing Corp., 156 N.L.R.B. 1431 (1966); Clark Printing Co., 146 N.L.R.B. 121 (1964); Mid-West Towel & Linen Serv., Inc., 143 N.L.R.B. 744 (1963), *enf'd*, 339 F.2d 958 (7th Cir. 1964).

36. See, *e.g.*, Wickland Oil Co., 161 N.L.R.B No. 39 (1966); Tucson Ramada Caterers, Inc., 154 N.L.R.B. 571 (1965); Mantzowitz Mfg. Corp., 153 N.L.R.B. 1517 (1965); Lively Serv. Co., 127 N.L.R.B. 290 (1960). However, in Leeds Shoe Stores, 117 N.L.R.B. 585 (1957), a grant of shorter hours just prior to a union's claim of majority status was found to be a coincidence, thus not impairing the employer's good faith.

37. See, *e.g.*, Baldwin Supply Co., 159 N.L.R.B. No. 67 (1966); Piggly Wiggly El Dorado Co., 154 N.L.R.B. 445 (1965); Comfort, Inc., 152 N.L.R.B. 1074 (1965); Smeco Indus. Inc., 151 N.L.R.B. 1240 (1965).

38. See, *e.g.*, Post Houses, Inc., 161 N.L.R.B. No. 102 (1966); River Togs, 160 N.L.R.B. No. 2 (1965); Shoppers Fair, 151 N.L.R.B. 1604 (1965); Merner Lumber & Hardware Co., 145 N.L.R.B. 1024 (1964).

39. 154 N.L.R.B. 954 (1965), violation of § 8(a)(2).

40. NLRB v. Mid-West Towel & Linen Serv., Inc., 143 N.L.R.B. 744 (1963), *enf'd*, 339 F.2d 958 (7th Cir. 1964).

41. See Orlove, *An Employer's Obligation To Recognize a Union Absent an NLRB Election*, 47 CHI. B. RECORD 107, 110 (1965).

42. Aaron Brothers Co., 158 N.L.R.B. No. 108 (1966).

43. 154 N.L.R.B. 1071 (1965).

> the employees. Whether the conduct involved reflects on the good faith of the employer requires an evaluation of each case."[44]

Other recent cases[45] have borne out this approach, and the Board seems to have rejected the earlier per se application of the *Joy Silk* test,[46] now looking to the nature and extent of the unfair labor practices to determine if they were committed to delay the holding of a fair election and to allow time to dissipate the union's majority, as a manifestation of the employer's bad faith.[47]

A second broad category concerning an employer's doubt of a union's majority status is composed of cases with no unfair labor practices present other than the alleged refusal to bargain. In this line of cases the issue of good or bad faith doubt is usually judged by employer action at the time of card presentation. In *George Groh & Sons*,[48] the trial examiner set forth the prevailing attitude, which was approved by the Board and the court:

> "An analysis of the cases wherein the Board has made this good-or-bad faith determination 'suggests rather strongly the pervading importance' of contemporaneous unlawful conduct as a cardinal criteria. However, it does not perforce follow that a finding of such unlawful conduct is the *sine qua non* to a rejection of a good faith defense. While accompanying unlawful conduct may render more discernible an unlawful motive, its absence is but a factor, and not a preclusive one, to be weighed in a 'discriminating analysis and appraisal of all the relevant evidence.' The absence of good

44. *Id.* at 1073.

45. Clermont's, Inc., 154 N.L.R.B. 1397 (1965). Coercive speeches, apparently in reaction to first hearing of union activity, were made two months prior to the union's request for recognition and never repeated. This, along with two isolated incidents of coercive statements and surveillance by minor supervisors with respect to two employees, failed to indicate bad faith in refusing to bargain. Cameo Lingerie, 148 N.L.R.B. 535 (1964), while ultimate decision here rested on lack of a majority by the union, the court stated that the § 8(a)(1) violation, consisting of threats by a minor supervisor to a handful of employees out of a unit of 250 employees, standing alone was not sufficient evidence on which to base a refusal to bargain charge.

46. For many years the *Joy Silk* test operated to make any unfair labor practice per se a showing of a lack of good faith doubt of majority status. See Comment, 75 YALE L.J. 805, 814 (1966). For significant exceptions to the early per se approach, see Caldwell Packaging Co., 125 N.L.R.B. 495 (1959); Traders Oil Co. of Houston, 119 N.L.R.B. 746 (1957); Howard W. Davis, d/b/a The Walmac Co., 106 N.L.R.B. 1355 (1953).

47. Orlove, *An Employer's Obligation to Recognize a Union Absent an NLRB Election*, 47 CHI. B. RECORD 107, 112 (1965).

48. 141 N.L.R.B. 931 (1963), *enf'd*, 329 F.2d 265 (10th Cir. 1963).

faith, then, may be manifested as well by attitudes and conduct demonstrating a rejection of the collective bargaining concept as by more overt, readily discernible Section 8(a)(1) and 8(a)(3) conduct potentially more immediately destructive of the Union's majority status."[49]

A leading case is *Snow & Sons*[50] wherein the employer originally assented to and participated in a card count of the union's majority and later refused to recognize the union, insisting on an election. The court held the employer's action to be a rejection of the collective bargaining concept and his expressed doubt to be in bad faith. This principle has been applied both where the employer himself has checked the cards[51] and where a third party has checked them.[52] The court in *Snow & Sons* went so far as to state that reliable information from any source, "whether by accident or design, or even while the employer is seeking to avoid receiving it," is sufficient to destroy any genuine doubt of majority representation.[53] The test under which this principle has apparently been applied requires the objective facts to furnish a "reasonable basis" for the asserted doubt in order to render a finding of good faith.[54] Thus, "the assertion must be supported by objective considerations."[55]

Sufficient "objective considerations" were found in *Briggs IGA Foodliner*,[56] where several employees reported that their signatures had been procured by union threats that those who refused to sign could be discharged and by union officials' repre-

49. *Id.* at 939.

50. 134 N.L.R.B. 709 (1961), *enf'd*, 308 F.2d 687 (9th Cir. 1962).

51. See, *e.g.*, William S. Shurett, d/b/a Greyhound Terminal, 137 N.L.R.B. 87 (1962), *enf'd*, 314 F.2d 43 (5th Cir. 1963) (employer insisted on election two days after acknowledging union); Jem Mfg., Inc., 156 N.L.R.B. 643 (1966) (employer checked cards, was satisfied of the union's majority, and commenced bargaining before asserting a doubt of majority status, after consulting a new attorney).

52. See, *e.g.*, Dixon Ford Shoe Co., 150 N.L.R.B. 861 (1965) (card check by a judge followed by employer rejection of results); Kellogg Mills, 147 N.L.R.B. 342 (1964), *enf'd*, 347 F.2d 219 (9th Cir. 1965) (third party card check and collective bargaining before insistence on an election). In each case the Board ruled that the employer could not have a good faith doubt as to the union's majority status as he had agreed to an impartial card check.

53. 308 F.2d 687, 692 (9th Cir. 1962).

54. Laystrom Mfg. Co., 151 N.L.R.B. 1482 (1965). Proof of good faith doubt requires more than employer's "mere assertion of it and more than proof of the employer's subjective frame of mind." The case also cites the early case of Celanese Corp. of America, 95 N.L.R.B. 664 (1951).

55. 151 N.L.R.B. 1482, 1484 (1965). This has appeared to deny any effect to a possible sincere doubt as to the reliability of the card check process itself and has recently been limited by Aaron Brothers Co., 158 N.L.R.B. No. 108 (1966), to apply only where there was employer participation in the card check.

56. 146 N.L.R.B. 443 (1964).

sentation that the cards meant nothing until there was an election. Similarly, in *Cameo Lingerie, Inc.*,[57] objective grounds for employer doubt existed as the authorization cards were misdated and numerous employees had told the plant superintendent that they did not wish to be represented by the union though they had signed cards. Other grounds for good faith doubt were present in *Neuman Transit Co.*,[58] where it was uncertain what class of workers constituted the asserted bargaining unit and where, during an ensuing strike, a majority of employees remained at their jobs. And in *Poe Machine & Engineering Co.*,[59] a good faith doubt was found where there was knowledge that some employees were interested in a rival union, though it had not made a request for recognition.

Recently in *John P. Serpa, Inc.*[60] the Board seems to have taken a significant step contrary to the usual policy of strict adherence to card checks in the absence of other objective considerations. Five of seven salesmen signed authorization cards which union representatives spread in front of the employer at a meeting called for discussing representation. The employer asked for time to consult his attorney and the union representatives agreed. He consulted his attorney but did not call the union, and four days later the union filed refusal to bargain charges. The Board refused to find employer bad faith, stating:

> "The fact that the Union placed the cards in front of the Respondent in such a way that Respondent saw the names and signatures cannot create the obligation to bargain or establish Respondent's bad faith."[61]

The Board stated that the General Counsel had not met his burden of proving that "the employer in bad faith declined to recognize and bargain with the union" — that he has rejected the collective bargaining principle or seeks to gain time within which to undermine the union and dissipate its majority.[62] The case is distinguished from *Snow & Sons*,[63] where the employer agreed to a third-party card check and thereafter rejected the

57. 148 N.L.R.B. 535 (1964).
58. 138 N.L.R.B. 659 (1962).
59. 107 N.L.R.B. 1372 (1954).
60. 155 N.L.R.B. 99 (1965).
61. *Id.* at 101.
62. *Ibid.*
63. 134 N.L.R.B. 709 (1961).

results and sought a Board election. Here the General Counsel presented no indication that the employer examined the cards or made any statement accepting the fact of union majority. Further, the employer did not begin bargaining with the union, as was done in the *Jem Mfg.* case.[64]

Similarly, in *Aaron Bros. Co.*[65] the union obtained a majority of authorization card signatures and requested recognition and bargaining. The employer rejected the request and urged a Board election. As the employer "did not engage in any contemporaneous misconduct and the General Counsel did not introduce other affirmative evidence from which an inference of bad faith might be drawn," the Board ruled that the General Counsel had failed to establish improper motivation in the employer's insistence upon an election. With these decisions the Board appears to be limiting employer conduct for which it will find existence of a bad faith doubt.[66] Under this recent 8(a)(5) policy limitation an employer "who in good faith withholds recognition because of a doubt of majority, though his doubt is founded on no more than a distrust of cards, may have an election to resolve that doubt, and will not be subject to an 8(a)(5) violation simply because he is unable to substantiate a reasonable basis for his doubt."[67] This may even be an indication that the Board is getting away from the motivation concept in favor of looking to more objective means of determining good or bad faith.

CONCLUSION

The cases analyzed seem to indicate that the Board and the courts have applied the refusal to bargain provision to its fullest extent. The concept is meritorious in that it allows designation of a bargaining representative based on authorization cards in situations where a free election is impossible, and it denies an employer any benefit from unlawful interference. The Board in recent cases has begun to limit the application of section 8(a)(5), taking a realistic approach in view of the deficiency of authorization cards as indicators of employee choice.[68] Gen-

64. 156 N.L.R.B. 643 (1966).
65. 158 N.L.R.B. No. 108 (1966).
66. See Orlove, *An Employer's Obligation To Recognize a Union Absent an NLRB Election*, 47 CHI. B. RECORD 107, 112 (1965).
67. H & W Constr. Co., 161 N.L.R.B. No. 77, at 7 (1966).
68. In an often-quoted address Board Chairman McCulloch stated: "In 58 elections, the unions presented authorization cards from 30 to 50% of the employees; and they won 11 or 19% of them. In 87 elections, the unions presented

erally the card check process has two significant shortcomings when compared to NLRB election and certification procedures.[69] First, lack of secrecy permits subtle coercion to influence an employee's vote, including dual purpose cards, friendship influences, and union pressure. In conjunction with this is the diminished reflection by employees due to the informal atmosphere. The second major shortcoming is that employees are often deprived of the employer's viewpoint when he has no knowledge of the campaign until he is presented with a demand for immediate recognition.

The Board under present policy recognizes that there is a valid good faith element inherent in an expressed doubt due to the inadequacies of the card check process. No longer is any other objective consideration necessary to show good faith and thus overcome any possible bad faith derived from union assertion of a card majority. But this is limited to instances where the employer has refused a card count.

In order to insure employees of representation by a union of the choice of the majority, this policy might well be extended to include other situations where there has been no destruction of the possibility of a fair election. The Board has been understandably reluctant to require an election in cases where the employer has counted the cards or assented to a third party card count in view of the general policy of permitting an employer to recognize a majority union voluntarily. Another important consideration involves the administrative problems that would arise, for it would then become necessary to determine how long a period would be allowed for the employer to reject the card check and request an election. Union bargaining stability requires either recognition[70] or certification[71] at some point beyond which an employer will not be allowed to assert a valid doubt of the union's majority.

But it appears that the importance of ascertaining the true

authorization cards from 50 to 70% of the employees; and they won 42 to 52% [sic — 42 or 48%] of them. In 57 elections, the union presented authorization cards from over 70% of the employees, and they won 43 or 74% of them." 1962 PROCEEDINGS, SECTION OF LABOR RELATIONS LAW, AMERICAN BAR ASSOCIATION 14-17.

69. See Comment, 33 U. CHI. L. REV. 387, 390 (1966).

70. An employer is required to bargain with a "recognized" union for a reasonable period of time. See Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944).

71. If a union has been certified through an NLRB election, the employer must bargain with it for one year after the date of certification. Brooks v. NLRB, 348 U.S. 96 (1954).

majority choice of the employees should override the consideration of union stability in the initial bargaining period and require an extension of 9(c) elections with reduction of 8(a)(5) bargaining orders.

The Board might adopt the policy of upholding a refusal to bargain charge in absence of other unfair labor practices only when the employer asserts a doubt as to the union's majority after commencing substantive bargaining. Once an employer begins to bargain collectively over wages, hours, or other terms and conditions of employment, he has effectively accepted the union as representative of his employees and should not thereafter be entitled to asert a doubt as to the legitimacy of this representation. Prior to commencement of bargaining an employer's section 9(c) right to an election[72] should be maintained unless he destroys its fairness. This protects the innocent employer who counts the cards but still doubts the union's actual majority status.

This method would be a valid application of the "good faith doubt" test as it allows an effective assertion of doubt (which is inherent in the card check process) up to the point where the employer begins literal bargaining, and thus presumably has no doubt that his employees have chosen the particular union, or has abandoned any desire of further proof of that fact. As the Trial Examiner in *Mutual Industries, Inc.* stated: "It is inconceivable that [Respondent] would discuss the Union's bargaining demands . . . if Respondent entertained any good faith doubt as to the Union's majority."[73] The Board in *Atlanta Journal Co.* had earlier stated: "Our experience shows, and it is common knowledge, that where an employer sincerely doubts the majority status of a union that is claiming such status, the employer will normally refuse to bargain with the union until the status is proved."[74]

A subjective determination of employer good faith would not be required, eliminating this difficult and often inappropriate

72. The Taft-Hartley revision of § 9(c) sets forth the employer's right to an election explicitly. An employer has only to file a petition and show that a question of representation exists and that a claim for recognition has been made by a labor union. See Lassman, *Employer Petitions for NLRB Elections and the Board's Disclaimer Doctrine*, 17 LAB. L.J. 341, 343 (1966). But courts often cite cases that were decided before the Taft-Hartley changes or cases that in turn cite pre-1947 rulings. See Comment, 75 YALE L.J. 805, 820 (1966).

73. 159 N.L.R.B. No. 73, at 9 (1966).

74. 82 N.L.R.B. 832, 835 (1949).

means of deciding whether a card count or an election will be used to reveal the employees' choice. This would also bring into clearer focus the meaning of the refusal to bargain charge itself in this area as the employer, after commencing collective bargaining, has literally refused to continue. This policy would protect the union's desire for stability when it is most essential—during the actual bargaining process—and give greater weight to the desirability of an accurate determination of employee choice before this time. The union still has the right to file for an NLRB election to counteract any delay in bargaining by the employer.[75] Under present procedure a union is able to secure a certification election within ten to seventy days after filing a petition,[76] causing a minimum of delay. The proposed policy looks to determining employee choice in the most effective manner, placing priority on section 9(c) elections with section 8(a)(5) bargaining orders operative in the exceptional cases where the employer has destroyed the possibility of a fair election or has accepted the union and begun to bargain before asserting a doubt of its majority.

L. Edwin Greer

THE AFTER-ACQUIRED TITLE DOCTRINE IN LOUISIANA MINERAL LAW

If *A* acquires ownership of property he previously sold while not the owner to *B*, his after-acquired title inures to *B*. This Comment explores the operation of this after-acquired title doctrine generally and in Louisiana mineral rights.

PART I. FOUNDATION AND GENERAL APPLICATION

A. Foundation

Without express code authority, Louisiana courts have repeatedly asserted that the after-acquired title doctrine is a means

75. The union could file at the time of card presentation. Then if the employer commits unfair labor practices, destroying a free election, refusal to bargain charges could be filed. Under Bernel Foam, 146 N.L.R.B. 1277 (1964), the union could utilize both methods.

76. Local Regional Directors are now permitted to decide representation questions and to direct elections, thus allowing speedy determination of questions which formerly had to be channeled to Washington. Shuman, *Requiring a Union To Demonstrate its Majority Status by Means of an Election Becomes Riskier*, 16 LAB. L.J. 426, 428 (1965).