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UNION DECERTIFICATION UNDER THE NLRA

JANICE R. BELLACE*

The labor law of the United States is premised on the belief that employees have a right to bargain collectively through representatives of their own choosing and that an employer must recognize this right when a majority of his employees designates a union as its bargaining agent. That employees should also have the right to refrain from bargaining collectively if they so desire can be viewed as a logical corollary of this premise. In 1947, Congress, accepting this line of reasoning, amended the Wagner Act to provide a means whereby employees may decertify their union as bargaining agent.

In the years immediately following the enactment of the Taft-Hartley Act, rival unionism between affiliates of the American Federation of Labor and the Congress of Industrial Organizations led frequently to the raiding of each other's locals, thus focusing attention on the decertification procedures of the National Labor Relations Act. Since the merger of the AFL with the CIO in 1955, the incidence of

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1. Section 7 of the National Labor Relations Act provides:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.


2. The principle that the will of the majority controls is set out in § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1976).


4. Such a statutory provision is one which may well be unique. In Western Europe, for instance, no country provides a statutory mechanism whereby employees can oust their union. Few countries, however, have statutory procedures akin to union certification.


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raiding has declined greatly and, with it, the interest in decertification. The recent sharp increase in the number of decertification petitions filed with the National Labor Relations Board has generated renewed interest in the subject of union decertification. In order to discuss the balance between employees' free choice and industrial stability that the rules and regulations governing decertification have achieved, this article first outlines the development of these rules through decisions of the NLRB and the courts.

TYPES OF DECERTIFICATION

The label "decertification" is correctly used to describe two very different situations. In the first, an incumbent union loses its status as exclusive bargaining agent and is not replaced by another union. In the second, the employees' allegiance is transferred from one union to another, either immediately or within the year. Unfortunately, the literature on the subject of decertification frequently fails to acknowledge this crucial distinction. This failure may be attributed in part to the record-keeping method of the NLRB, which does not indicate whether a rival union was involved in a decertification effort, thereby making research on this point difficult.

For the most part, the process of decertification falls within the first category described above. Decertification petitions are usually filed by employees pursuant to section 9(c)(1)(A)(ii) of the Act and, if successful, usually lead to a "no union" situation. In some instances where there is an incumbent union, an employer will file a petition for an election under section 9(c)(1)(B) of the Act on the grounds that he has a good faith doubt about the union's continuing majority status. Although uncommon, it is possible for an initial certification election to result in the loss of bargaining rights for an incumbent union that had previously been voluntarily recognized by the employer.

Rival unionism undoubtedly does account for some proportion of decertification activity, although it is extremely difficult to glean any information on this from the statistics. A rival union acting on behalf of the unit employees may directly file a decertification petition. With

7. See note 13 infra and accompanying text. The decline is attributable in great part to the no-raiding pact among AFL-CIO affiliates. Non-AFL-CIO affiliates, such as the UAW and the Mineworkers, tend to avoid raiding other unions' members. Some Teamsters' locals continue to engage in raiding as part of their general organizing effort.
8. Hereinafter referred to as the NLRB or the Board.
10. Id. § 159(c)(1)(B) (1976). See text accompanying note 21 infra.
the requisite showing of interest, a rival union can secure a position on the ballot. In some instances, rival unions more or less explicitly instigate an employee decertification petition but do not make any attempt to appear on the ballot, preferring to wait out the twelve-month period prescribed by section 9(c)(3) before seeking a representation election. This strategy is usually followed by AFL-CIO unions not wishing to violate openly the federation’s no-raiding pact. In order to clarify which union he should recognize for the purposes of collective bargaining, an employer may also file an election petition if two or more unions are competing to represent his employees.

Finally, it is possible for a union to lose its bargaining rights without any party approaching the National Labor Relations Board to file a petition or unfair labor practice charges. This occurs when an incumbent union voluntarily relinquishes its role as bargaining agent upon realizing that it no longer commands majority support within the unit. Without pertinent data, it is not possible to speculate on the frequency of such occurrences, but labor practitioners mention that it is not unknown.

**THE NLRB’S DECERTIFICATION CASELOAD**

In examining the NLRB’s statistics on decertification cases since the passage of the Taft-Hartley Act in 1947, the most striking figure that emerges is the nearly threefold increase in the number of employee decertification petitions since 1967. In addition, the period since 1975 has marked a sharp decline in the fortunes of unions. Unions now win

11. Section 9(c)(3) of the Act provides:

No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.


12. In December 1953, officers of the American Federation of Labor and the Congress of Industrial Organizations signed a “no-raiding” agreement which pledged their respective affiliates to refrain from organizing another union’s members. The protection against raiding has been seen as the chief benefit of affiliation to the AFL-CIO. See A. Sloane & F. Whitney, Labor Relations 144-46 (3d ed. 1977).

13. See, e.g., R. Prosten, Special Analysis of 1970 NLRB Election Victories (June 23, 1976) (internal AFL-CIO memorandum from Research Director to the Executive Board of the federation’s Industrial Union Department).

14. These figures were obtained from the NLRB Annual Reports for the years 1948 through 1979. 13-14 NLRB Ann. Rep. (1948-1979).
less than 30% of decertification elections; a record low was reached in 1977 when unions won only 22.8% of decertification elections.

The number of "RD" cases, the Board's designation for employee decertification petitions, hovered in the 330-490 range during the decade 1948-1958. During the next decade, there was a slow, slight movement upward. Since 1967, however, the decertification caseload has nearly tripled, from 624 petitions in 1967 to 1,793 petitions in 1979. The number of decertification elections conducted has followed a similar pattern; likewise, the number of eligible voters has almost tripled since 1967.

The average size of units in which decertification elections are held, however, has been declining gradually since 1962. The decline may explain to some extent why the union success rate has also declined, since it is generally believed that unions are more likely to win a decertification election in larger bargaining units.\(^{15}\) In 1979, for instance, unions won elections in units averaging ninety employees and lost in units averaging thirty-eight employees.\(^{16}\) Although the number of decertification elections had been increasing, the success rate of unions showed no consistent fall prior to 1975. In that year, unions won under 30% of decertification elections, and this lower success rate (in the mid-20% range) now seems to be the pattern.

The data also reveal that fewer decertification cases are now being withdrawn or dismissed. Prior to 1953, only about 30% of decertification cases reached an election. This figure hovered in the 35-40% range until 1974. Here, too, a major change has occurred since 1975. Significantly fewer cases are being withdrawn or dismissed, with a record high of 47.9% of cases reaching an election in 1977.

THE STATUTORY FRAMEWORK

When the Wagner Act\(^ {17}\) was enacted in 1935, section 9 set out the procedure enabling employees in an appropriate bargaining unit to select a union as their exclusive bargaining representative.\(^ {18}\) The Wagner Act, however, contained no provision whereby employees dissatisfied

15. Between 1951-1962, the average size of units was fairly stable, not falling below 65. The average has declined since 1962, with the average unit size in 1979 being 51 employees. Charles J. McDonald, Assistant to the Director, Organizing and Field Services Dept', AFL-CIO, estimates that unions win 40% of all decertification elections in units having more than 100 employees, but only 20% of those elections involving units of less than 100 employees. See Cook, Divorce Union Style, INDUSTRY WEEK, June 25, 1979, at 38 [hereinafter referred to as Cook].
17. See note 3 supra.
with their union could rescind their choice. Nor did the Act provide a means whereby an employer could initiate the NLRA’s election process. In 1947, as part of the revision of national labor policy embodied in the Taft-Hartley Act, section 9(c)(1)(A) was inserted to provide that an election petition could be filed:

by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection [9](a). 20

Section 9(c)(1)(B) of the Taft-Hartley Act gives an employer the right to file a representation election petition “alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection [9](a).” 21

In debating the amendments to section 9 of the Wagner Act, Congress focused its attention in large measure on the desirability of curbing industrial conflict arising from the rampant rival unionism of the era. In the Senate, proponents of the amendment bill repeatedly referred to the plight of the employer who, having recognized and bargained with a union, found himself helpless when a union from the rival federation picketed his plant and neither union would file for an election. 23 In response to this predicament, opponents of the bill unsuccessfully supported an amendment that would have given employers the right to request certification but would have left decertification solely within the discretion of the NLRB. 24

When the proposed statutory decertification process was addressed, its proponents emphasized that it was necessary to ensure employee freedom of choice, an argument to which labor’s backers had difficulty in responding directly. Not until near the end of the Senate debate did one senator point out what impact section 9(c) could have in conjunction with section 9 as it then read. Senator Pepper presented the hypothetical situation of a bargaining unit in which no election had occurred during the previous year and where workers who were engaged in an economic strike had been replaced. 25 He noted that, since

19. See note 4 supra.
21. Id. § 159(c)(1)(B).
22. For the Senate debates, see II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1948) [hereinafter referred to as LEGISLATIVE HISTORY II].
23. See, e.g., id. at 965, 983, 990, 1066, 1077, 1496, 1523.
24. Id. at 1452-53.
25. Id. at 1606 (statement of Senator Pepper).
only the replacements would vote, it was nearly certain that the union would be decertified. He concluded that, if an employer wanted to break a union, he had the power to do so. Curiously, most other opponents of the bill predicted rather unlikely effects for section 9(c). For example, it was feared that employers would repeatedly file for a decertification election at the expiration of every collective agreement or that unions would be tempted to make unreasonable bargaining demands as a means of retaining their members' allegiance in the face of an employer decertification attempt.

RAISING A VALID QUESTION OF REPRESENTATION

In order to secure a decertification election, a petitioner must satisfy the Board that a number of requirements have been met, some of which are dictated by the Act and others of which have resulted from the Board's policy and procedures. Essentially, the petitioner must demonstrate that a "question of representation" exists at the time the election is directed. To make such a determination, the Regional Director checks that:

1. the petitioner can establish the requisite showing of interest;
2. the petition emanates from an appropriate source;
3. the petition relates to a unit that is appropriate for collective bargaining;
4. there is currently a union that claims bargaining rights;
5. the petition is "timely"; and
6. there are no pending unfair labor practice charges which serve to "block" the petition.

If the petition meets these conditions, the Regional Director will direct an election; otherwise, the petition will be dismissed. The Regional Director's decision can be appealed to the five-member Board in Washington. This paper examines the requirements that must be satisfied to secure a decertification election and then considers the likeli-

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26. Between 1935-1947, the right of replaced economic strikers to vote was in dispute. Section 9(c)(3) of the Taft-Hartley Act denied economic strikers the right to vote in representation elections. In 1959, § 9(c)(3) was amended so that economic strikers who are not eligible for reinstatement are entitled to vote in an NLRB election for 12 months following the commencement of the strike. See note 11 supra.
27. Legislative History II, supra note 22, at 1042 (statement of Senator Murray).
28. Section 9(c) of the Act provides that the Board shall direct an election upon finding that a question of representation exists. 29 U.S.C. § 159(c) (1976).
29. In 1959, § 3(b) of the Act was amended, enabling the five-member NLRB to delegate to its Regional Directors its powers under § 9 to process and decide representation cases. The Board delegated this authority in 1961. The five-member Board may, at its discretion, accept representation cases for review. If the Board refuses to review, the Regional Director's decision becomes final.
hood of an election's being held, given the Board's policy on presumption of majority.  

**The Showing of Interest**

In decertification cases, the party filing for an election must show within forty-eight hours of filing the petition that 30% of the employees in the appropriate bargaining unit desire an election. The Board has consistently held that determining the adequacy of the showing of interest is an administrative matter within the Board's discretion that is not subject to subsequent challenge. The Board supports its position by noting that any election held will effectively protect the interests of the parties.

Employee decertification petitions are checked to determine if 30% of the unit employees have signed the petition. Representation election petitions filed by rival unions may be validated in the same way, or the rival union may present signed authorization cards.

Before 1966, employer petitions were allowed solely on the grounds that the employer had shown that he was faced with a claim for recognition. When an employer petitioned for a decertification election, the employer merely had to show that the union was currently recognized, either voluntarily or as a result of certification, for the unit concerned, that the union had expressed its intention of remaining the bargaining agent and that the employer had rejected or otherwise questioned the union's continued majority status. Believing that the legislative history of the Taft-Hartley Act did not support any qualification of the employer's right under section 9(c)(1)(B) to question the majority status of an incumbent union, the Board did not question the good faith of the employer's doubt of the union's majority status.

In 1966, in *United States Gypsum Co.*, the Board modified its policy on employer petitions after concluding that not only did the statute not prohibit the Board from exercising its discretion to dismiss employer petitions where there was no good faith doubt, but that its exercise of such discretion actually accorded with the legislative intent.

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30. For a thorough discussion of the NLRB's policies, see *R. Williams, P. Janus & K. Huhn, NLRB Regulation of Election Conduct* (1974). For an article dealing specifically with conduct during decertification campaigns, see Krupman & Rasin, Decertification: Removing the Shroud, 30 LAB. L.J. 231 (1979). See also Krislov, Decertification Elections Increase but Remain No Major Burden to Unions, MONTHLY LAB. REV., Nov. 1979, at 30; Anderson, Busman & O'Reilly, What Factors Influence the Outcome of Decertification Elections, MONTHLY LAB. REV., Nov. 1979, at 32.

31. 15 NLRB ANN. REP. 33 (1950).

In *United States Gypsum*, the Board announced that it would require employers not only to show that the union claimed recognition and that this had been questioned, but also to "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." Supporting this change in policy, the Board stated that the requirement of objective evidence would enhance bargaining stability. Unless there was some basis in reality for the employer's doubt of its majority status, a union would no longer have to fight an election campaign at a time when it should be preparing for negotiations on a new collective agreement.34

The Appropriate Source

Under section 9(c)(1)(A)(ii) of the Act, decertification petitions may be filed by employees or by agents acting on behalf of the employees. Thus, the Board has found petitions filed by lawyers and labor relations consultants acceptable.35 A union's objection to the filing of a petition by a lawyer or consultant who has previously done work for the employer will be dismissed unless it is determined that the petitioner has, in reality, been acting as an agent for the employer in the decertification campaign.36

The Board has taken the view that an employer cannot instigate or encourage decertification, since such activity would be incompatible with the performance of his continuing statutory obligation to recognize and bargain with the union as the representative of his employees. It should be noted that this restraint on the employer's freedom of speech ceases to operate once it is decided that there exists a valid question of representation regarding the unit.

Consonant with this view, the Board will not entertain any decertification petition filed by managerial or supervisory personnel, since it does not regard such a petition as raising a valid question of representation.37 As with cases dealing with inclusion or exclusion of alleged supervisors in the bargaining unit, this policy has required the Board to

33. *Id.* at 656.

34. The question of what constitutes a good faith doubt of majority status often arises in the wider context of a charge under § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976). Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees. For a discussion of good faith doubt of majority status, see text accompanying notes 202-18 *infra*.


37. *See* Clyde J. Merris, 77 N.L.R.B. 1375 (1948).
make a number of judgments about the nature of a supervisor's work. The Board's starting point is section 2(11) of the Act, which states:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.38

The extent of similarity between the alleged supervisor's duties and the work of other unit members is a major factor in the determination.39 In view of the very great diversity of work situations, coupled with the changing duties a person may assume in a small, informal company, it is not surprising that the members of the Board often disagree on a person's status.40

Even if the person who filed the petition is found not to be a supervisor, the petition may still be dismissed if the Board believes it has been tainted by the employees' perception that the person was a supervisor or that the person was acting at the behest of the employer. For instance, in Columbia Building Materials, Inc.,41 the son of a plant supervisor prepared and circulated the decertification petition. The son's work tasks, while varied, were clearly superior to those of the other unit employees in the job hierarchy. In addition, the son was the only unit employee not on the timeclock. The Board found that the circulation of the petition was attributable to the employer, even assuming that the son was not a supervisor, since a number of employees reasonably believed that the son was in charge when his father was absent from the plant premises.42

Similarly, in Maywood Plant of Grede Plastics,43 the person who circulated the decertification petition was one of only two bilingual employees in a unit where many employees, but none of the supervisors, spoke Spanish. Her bilingualism and the fact that she had substantially more seniority than any other employee combined to place her in a powerful intermediary position between management and the other unit employees. Although she was clearly at a level below the other

40. A typical case is Custom Bronze & Aluminum Corp., 197 N.L.R.B. 397 (1972), where Chairman Miller dissented from his colleagues' finding that the petitioner was a supervisor on the grounds that he was really only a leadman. Id. at 398-99.
41. 239 N.L.R.B. 1342 (1979).
42. Id. at 1346-47.
members of the supervisory staff, the Board found that she was a sup-
ervisor within the meaning of the Act since she assigned and checked
work and effectively had the power to hire and to impose minor disci-
pline. In finding her decertification petition tainted, the Board relied
not only on her supervisory status but also on her conduct. As the Ad-
ministrative Law Judge stated:

She was the dominant figure, leading employees to believe that she
was reflecting management's desires in soliciting their signatures,
promising better things if the Union were ousted, and threatening
loss of jobs if it were not. Even if higher supervision and manage-
ment had been totally unaware of Martinez' activities and represen-
tations, the effect on employees would have been the same as if it had
couraged and approved her conduct.44

Supervisory status becomes an issue in a decertification case when
it is asserted that the alleged supervisor was instrumental in preparing
the decertification petition and in soliciting support for the decertifica-
tion. If the alleged supervisor takes a direct role in the preparation of
the petition itself, the petition will usually be dismissed on the grounds
that it emanated from an improper source. If the incumbent union sus-
perts supervisory participation in the decertification campaign, it may
file a charge under section 8(a)(1).45 If the Regional Director issues a
complaint, the decertification petition will nearly always be dismissed
under the Board's blocking charge policy.

Prior to 1958, Board policy dictated that, before finding that a
decertification petition raised a valid question of representation, the
Regional Director should consider whether the petition had been insti-
gated by the employer. In Georgia Kraft Co.,46 the Board altered this
policy by stating that allegations of supervisory participation in the
decertification effort should not, in the future, be entertained in the rep-
resentation proceedings and should be investigated only administra-
tively by the Board.47 The Board has clearly distinguished the
principle of excluding the issue of supervisory participation from hear-
ings on the petition from its continuing refusal to accept decertification
petitions filed by supervisors.48

Not all interference by a supervisor during a decertification cam-

44. Id. at 376.
45. Section 8(a)(1) of the Act provides:
It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or
coerce employees in the exercise of the rights guaranteed in Section 157 of this title.
46. 120 N.L.R.B. 806 (1958).
47. Id. at 808. Such evidence is now presented by the parties to the Regional Director.
paign is unlawful. The Board has long distinguished between employer instigation of a decertification petition and assistance rendered after the employees have decided to act. Since employees dissatisfied with their union but uninformed of their statutory options will often enter into a discussion with their supervisor regarding what can be done about the union, the line between employer instigation and assistance can be extremely fine. In general, the Board seeks to determine who initiated the conversation and whether the employee’s questions to the supervisor indicated that decertification was already in the employee’s mind. 49 Although a supervisor may outline the decertification procedure in response to an employee’s question, the more active a role the supervisor takes in assisting the employee-generated decertification, the more likely it is that the employer will be found to have violated section 8(a)(1).

If a supervisor merely adds “individual and isolated encouragement to an independently originated decertification drive,” 50 his conduct may violate section 8(a)(1) but not taint the decertification petition. In GAF Corp., 51 a supervisor suggested to an employee dissatisfied with the union that an in-plant committee be formed to oust the union, a suggestion that was never acted upon. One month later, the same employee initiated a conversation critical of the union with the same supervisor. At this time, the supervisor suggested that the employee telephone the regional office of the NLRB to obtain information concerning the filing of a decertification petition. The Board found the in-plant committee suggestion unlawful but held that it was not sufficiently closely connected with the petition conversation so as to render the later conversation violative of section 8(a)(1). 52 Hence, the employer was found not to have instigated or unlawfully assisted the decertification campaign.

When it is clear that a supervisor has discussed decertification with unit employees, thus violating section 8(a)(1), and an employee decertification petition is later filed, the question becomes whether the supervisor’s comments amount to employer inducement of the decertification petition. Since first-line supervisors are in constant, close and informal contact with unit employees, their seemingly insig-

52. Id. at 169.
significant comments may be interpreted as having great import and influence. Not surprisingly, as *National Cash Register Co.*\(^{53}\) illustrates, the Board and the courts do not always agree on whether a supervisor's comments have had a coercive impact.

In *National Cash Register*, the union won elections in the winter of 1970 in Duluth, Detroit and New York City to represent a unit of technical services representatives. In May 1970, the union signed a one-year contract, backdated to January 1. In July, the union filed a charge under section 8(a)(1) alleging that a supervisor in New York City had outlined the procedure for decertification and had stated that certain pay increases would be retroactive if decertification occurred. The supervisor's comments were made to some unit employees during routine performance appraisal interviews. It was alleged that in all three cities, supervisors were noting during performance appraisal interviews that the employees would normally have been entitled to wage increases under the company's merit plan but that this was not permitted under the union contract. With the contract due to expire at the end of 1970, decertification petitions were timely filed in late October.\(^{54}\)

In November, the Regional Director decided against issuing a complaint on the union's charge. The union appealed, and the Regional Director's decision was reversed. The decertification petitions were then dismissed under the Board's blocking charge rule,\(^{55}\) and the case proceeded to a hearing on the unfair labor practice complaint. In June 1972, the Administrative Law Judge recommended finding that the General Counsel had failed to prove by a preponderance of the evidence that the employer had induced the filing of the employee decertification petitions in all three cities. In February 1973, the Board unanimously rejected this recommendation.

Emphasizing that the supervisors' conversations with employees during performance appraisals constituted a pattern of direct dealing with employees over terms and conditions of employment in derogation of the union's status as bargaining agent, the Board concluded that the company's "conduct, although widely scattered geographically . . . was pursuant to a carefully orchestrated plan to sow dissatisfaction among the employees with union representation for the purpose of in-

\(^{53}\) 201 N.L.R.B. 1034 (1973), *enforcement denied in material part*, 494 F.2d 189 (8th Cir. 1974).

\(^{54}\) Petitions were filed in New York City and Detroit in late October. The Duluth unit did not file a petition until early 1971.

\(^{55}\) *See* text accompanying notes 227-55 *infra*. 
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The Board pointed out that the General Counsel had conceded that there was no direct evidence of company involvement in the filing of the decertification petitions but had argued that it could be reasonably inferred that there was such involvement. Agreeing that such an inference could be reasonably drawn, the Board noted that the filing of the petition “resulted in large measure, if not entirely,” from the company’s unlawful conduct.

On appeal, the Eighth Circuit agreed that the supervisors' comments regarding the employees' entitlements under the merit plan violated section 8(a)(1), but the court did so “reluctantly” since there was much disputed testimony and the Board’s finding of coercive impact was “highly speculative.” The Eighth Circuit, however, refused to accept the Board’s finding that the decertification petition was the intended effect and direct product of the employer’s misconduct, and held that the Board’s inferences were impermissible.

Impressed by the fact that the employee filing the petition in New York City had not been present during any conversation in which a supervisor made unlawful comments, the court took the Administrative Law Judge’s position that there was no substantial evidence linking the employer to the filing of the petition.

The question of what constitutes an appropriate bargaining unit arises in all representation election cases. After the passage of the Taft-Hartley Act, the Board decided to apply the same general principles it had developed in certification cases to decertification cases. Ordinarily, the unit appropriate for decertification is “the unit previously certified or the one recognized in the existing contract unit.” The main unit issues that the Board has had to resolve relate to the attempts of employees to secure decertification elections in distinct sections of multiplant or multiemployer bargaining structures.

In the years immediately following the passage of the Taft-Hartley Act, the Board permitted severance by specific subgroups within certified units. Craft and professional employees were the main benefi-

56. 201 N.L.R.B. at 1034.
57. Id.
58. National Cash Register Co. v. NLRB, 494 F.2d 189, 192-93 (8th Cir. 1971).
59. Id. at 193.
60. Id.
In 1955, however, the Board reversed its stance and held that decertification elections should no longer be used to achieve severance.\(^6\)

In general, the Board has refused to direct decertification elections for subgroups where there has been a demonstrable history of multiunit or multiemployer bargaining.\(^6\) The mere fact that the unit in question had previously been certified separately does not per se justify separate decertification where those employees have participated in a joint negotiating structure. The Board’s view on this point with regard to multiemployer bargaining is open to serious criticism. Where a number of employers bargain as a group with one union and the employees of one employer no longer want that union as their bargaining agent, the employees’ objective of ridding themselves of the union could be achieved easily if their employer would take appropriate action to withdraw from the multiemployer bargaining group. The Board’s view, however, allows the employer to lock the employees into a situation not to their liking. Hence, it would seem that this view denies the employees the right to select representatives of their own choosing as guaranteed by the Act.

Each case is examined on its own merits. For instance, the technicality that the employers sign separate collective agreements will not outweigh a factual analysis that points to multiemployer bargaining.\(^6\) In cases involving multiemployer bargaining, the Board has viewed a significant history of multiemployer bargaining as an important factor arguing for a finding that a multiemployer unit exists. But it is not the controlling factor. Rather, the Board seeks to determine “whether the parties have demonstrated an unequivocal intention to be bound by group action.”\(^6\) Not unexpectedly, unit determinations under this test are less predictable than under a history-of-bargaining test.

Similar problems arise when decertification for a subgroup of employees subject to a multiplant agreement is sought. The Board’s position on subunit decertification has not been entirely consistent. For instance, in 1961, the Board held that despite a history of wider bargaining, elections would be appropriate in separately certified

\(^6\) See, e.g., Kelsey Hayes Wheel Co., 85 N.L.R.B. 666 (1949); Gabriel Steel Co., 80 N.L.R.B. 1361 (1948).
\(^6\) See General Motors Corp., 120 N.L.R.B. 1215 (1958) and cases cited therein.
subunits.\footnote{Goodyear Tire & Rubber Co., 130 N.L.R.B. 889 (1961); Mission Appliance Corp., 129 N.L.R.B. 1417 (1961).} Where joint bargaining had only existed for a short while and there was evidence that the employees had accepted its introduction only under pressure from the union, decertification petitions would be accepted by the Board.\footnote{Jos. Schlitz Brewing Co., 206 N.L.R.B. 928 (1973).} After \textit{Duke Power Co.},\footnote{191 N.L.R.B. 308 (1971).} some observers believed that the Board was once again taking a more favorable view towards subunit decertification. In \textit{Duke Power}, the short length of time in which multiplant bargaining had been applied to the subunits was considered by the Board, which directed decertification elections in three units that had all been certified less than five years and had been added to a systemwide bargaining unit.\footnote{Id. at 311. Member Brown sharply criticized the Board's decision as a departure from previous practice. \textit{Id.} at 312-13. See Owens-Illinois Glass Co., 108 N.L.R.B. 947, 950 (1954), where the Board specifically held that inclusion in a multiplant unit for a period of one year was sufficient to merge the certified unit into the larger bargaining unit.} Yet, in \textit{Westinghouse Electric Corp.},\footnote{227 N.L.R.B. 1932 (1977). At issue here was the IUE's coordinated bargaining approach toward Westinghouse through the IUE-Westinghouse Conference Board. \textit{See also} General Elec. Co., 180 N.L.R.B. 1094 (1970), which dealt with the attempted decertification of a unit included in the IUE-GE Conference Board.} the Board found that a unit which had been certified only fourteen months had been effectively merged into a nationwide bargaining agreement that permitted local agreements to supplement the national master agreement. In \textit{Westinghouse}, the Board declared that the local union had failed to retain "a sufficiently separate, independent bargaining position from the other locals . . . in matters of collective bargaining."\footnote{227 N.L.R.B. at 1933.}

The current status of the Board's policy is difficult to evaluate. It can be said with some certainty that the Board will refuse to accept decertification petitions from units that are included in a multiplant bargaining arrangement that has a long and stable history. But where the history of multiplant bargaining is shorter and where supplemental local agreements are of considerable importance, the Board's determination cannot be predicted with any certainty.

\textbf{Timeliness}

A decertification petition does not raise a question of representation unless it is timely, both in relation to the one-year election bar under the Act and to the contract bar created by the Board. Under section 9(c)(3) of the Act, no election can be held in a unit within

\begin{itemize}
\item \footnote{Goodyear Tire & Rubber Co., 130 N.L.R.B. 889 (1961); Mission Appliance Corp., 129 N.L.R.B. 1417 (1961).}
\item \footnote{Jos. Schlitz Brewing Co., 206 N.L.R.B. 928 (1973).}
\item \footnote{191 N.L.R.B. 308 (1971).}
\item \textit{Id.} at 311. Member Brown sharply criticized the Board's decision as a departure from previous practice. \textit{Id.} at 312-13. See Owens-Illinois Glass Co., 108 N.L.R.B. 947, 950 (1954), where the Board specifically held that inclusion in a multiplant unit for a period of one year was sufficient to merge the certified unit into the larger bargaining unit.
\item \footnote{227 N.L.R.B. 1932 (1977). At issue here was the IUE's coordinated bargaining approach toward Westinghouse through the IUE-Westinghouse Conference Board. \textit{See also} General Elec. Co., 180 N.L.R.B. 1094 (1970), which dealt with the attempted decertification of a unit included in the IUE-GE Conference Board.}
\item \footnote{227 N.L.R.B. at 1933.}
\end{itemize}
twelve months of a valid representation election. The twelve-month period runs from the date the election was held. If a union wins a representation election, however, the twelve-month period runs from the date of the certification, absent unusual circumstances. The Board established this one-year certification bar on the basis that the union is entitled to a full twelve months as bargaining agent and that its status as bargaining agent is not definite until certification. In a case where the employer voluntarily recognized a union and concluded a one-year contract with it prior to a certification election, the Board held that the certification identifies the bargaining agent "with certainty and finality" for one year.\textsuperscript{73} In \textit{Brooks v. NLRB},\textsuperscript{74} the United States Supreme Court accepted the Board's view that the one-year period should run from the date of certification rather than from the date of election as within the allowable area of the Board's discretion in carrying out the purposes of the Act.\textsuperscript{75} A much more frequently encountered barrier to the filing of a decertification petition is an existing collective bargaining agreement, which may bar the petition under longstanding Board policy.

\textit{Contract Bar}

In attempting to effectuate the sometimes conflicting statutory objectives of fostering stability in labor relations while according employees freedom to select representatives of their own choosing, the Board has resorted to a policy whereby the employees' ability to vote in a Board election is postponed for a certain period of time because a valid collective agreement is in effect. This doctrine, called contract bar, is premised on the belief that:

\begin{quote}
[c]ontracts established the foundation upon which stable labor relations usually are built. As they tend to eliminate strife which leads to interruptions of commerce, they are conducive to industrial peace and stability. Therefore, when such a contract has been executed by an employer and a labor organization . . . the postponement of the right to select a representative is warranted for a reasonable period of time.\textsuperscript{76}
\end{quote}

The Board's contract bar doctrine dates from 1939, when it was applied to postpone a representation election.\textsuperscript{77} After the passage of the Taft-Hartley Act, the doctrine was extended to decertification cases.\textsuperscript{78}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{73} Kimberly-Clark Corp., 61 N.L.R.B. 90, 92 (1945).
\item \textsuperscript{74} 348 U.S. 96 (1954).
\item \textsuperscript{75} \textit{Id.} at 104.
\item \textsuperscript{76} Paragon Prods. Corp., 134 N.L.R.B. 662, 663 (1961).
\item \textsuperscript{77} National Sugar Ref. Co., 10 N.L.R.B. 1410 (1939).
\item \textsuperscript{78} Snow & Neally Co., 76 N.L.R.B. 390 (1948).
\end{enumerate}
\end{footnotesize}
precise application of the doctrine has been modified several times, with a thorough reconsideration of the rules in a series of cases in 1958. The establishment of the contract bar doctrine and various rules implementing it has usually been deemed to be within the discretion of the Board as an exercise of its administrative expertise.

The contract bar rules are complex and embrace several issues. The major issues include (1) the duration of the contract, (2) the adequacy of the agreement, (3) changed circumstances during the life of the contract, (4) the status of the contracting union, and (5) the existence of unlawful contract provisions.

Duration of the Contract

The contract bar doctrine restrains the employees' right to select their representatives at certain times, a restraint that is not mentioned in the statute. Because of this, the Board has several times considered whether the length of the contract bar was proving an unwarranted restraint of the employees' section 7 rights. In Pacific Coast Association of Pulp & Paper Manufacturers, the Board recognized that not only must employees be afforded an opportunity to select their representatives at reasonable intervals, but such intervals should occur at easily predictable times. As a result, the Board announced in Pacific Coast that a contract would serve as a bar to the filing of a petition for the life of the contract or two years, whichever came first. The Board further reasoned that, since the main justification for the contract bar doctrine was the promotion of industrial peace, no contract should operate as a bar unless it represented a commitment to stability in industrial relations. Hence, contracts having no fixed duration, such as contracts lacking termination or duration provisions or contracts terminable at will, do not serve as a bar to the filing of a petition.

The Board construes its rules strictly, and, at times, with unneces-

80. See, e.g., Local 1545, United Bhd. of Carpenters v. Vincent, 286 F.2d 127 (2d Cir. 1960); NLRB v. Efco Mfg., Inc., 203 F.2d 458 (1st Cir. 1953) (per curiam).
81. 121 N.L.R.B. at 990 (1958).
82. In Pacific Coast, the Board abandoned its "substantial part of the industry" test which required it to determine in which industry the employer belonged and what was the normal length of contracts in that industry. In many cases, the answer to one or both questions was far from predictable. Id. at 992.
83. In General Cable Corp., 139 N.L.R.B. 1123 (1962), the Board adopted its current three-year rule. Id. at 1125.
84. 121 N.L.R.B. at 993-94.
sary inflexibility. For instance, in *Cind-R-Lite Co.*, a three-year contract expired on April 1, 1978. On April 4, the employer submitted a final proposal to the union that included no termination date but did call for three annual wage increases to take effect on April 1, 1978, 1979 and 1980. The union accepted the offer on April 5. The following day, a decertification petition was filed. The Regional Director dismissed the petition as untimely on the basis of the contract bar doctrine. The Board, however, adhered strictly to its rule that the contract must contain an expiration date that is apparent from the face of the contract. Since, on its face, the contract's final annual wage increase could be construed to continue indefinitely, the Board held that the contract contained no express expiration date and, therefore, it was no bar to a decertification election.

The precision of these rules is of great help to those employees seeking to file a decertification petition, since the NLRB will consider a petition timely only if it is filed not more than ninety nor less than sixty days before the expiration of the contract for a contract not exceeding three years in length, or at any time after three years for a longer contract. The filing period has been longer in the past and it can be argued that it is too short at present, but the length of the filing period is an issue only when its reasonableness is questioned. Thirty days is a reasonable filing period if employees have adequate advance notice of the period so that they can mount a campaign and collect sufficient signatures on a decertification petition in due time. Since many employees are likely to have only a thirty-day period once every three years in which to file for decertification, it is of utmost importance that the filing period should be easily calculated in advance, and the Board's present rules ensure that this can be done.

A more serious objection to the present rules concerning the filing period relates more to its placement than its duration. The Board has set sixty days prior to the expiration of a contract not exceeding three years in length as the termination of the filing period, since unions are required by section 8(d)(1) of the Act to serve notice in writing to the

86. *Id.* at 1256.
87. *Id.*
89. *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958), set the filing period at not more than 150 nor less than 60 days before the expiration of the contract.
90. Section 8(d)(1) provides:

| Where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party |
employer at least sixty days before the expiration of the contract of their intent to modify the contract. The union’s status as bargaining agent is in doubt, this should be known before the employer sits down to bargain with that union. Under the Board’s present rules, however, it is not unusual for a union to mail notice of its intent to modify the contract at about the same time a decertification petition is being filed. The employer may well receive the union’s letter with its request that a date for negotiations be set before he receives notice from the Regional Director that employees have filed for decertification. The employer may be aware of the decertification campaign and may be uncertain whether to begin bargaining or to delay responding to the union’s request. Likewise, the union may have concentrated its energies on the imminent negotiations only to discover suddenly that bargaining will be delayed pending the outcome of the decertification effort. Clearly, it would foster stable labor relations if the possibility of such uncertainty were removed from the onset of negotiations. Such a goal could be achieved merely by moving back the filing period fifteen days, which would enable the regional office of the NLRB to process the petition prior to the commencement of the bargaining period.

Adequacy of the Agreement

In keeping with its view that postponing the employees’ right to select their representative is warranted by the stability a collective agreement promotes, the Board held in Appalachian Shale Products Co. that a contract would not serve as a bar to a decertification election unless it contained “substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship.” The Board, therefore, seeks to determine whether the agreement being put forward as a contract barring decertification contains terms sufficiently to such contract shall terminate or modify the contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification. . . .


91. The filing period is 120-90 days prior to contract expiration for health care employees since 90 days notice of intent to modify is required in health care units by § 8(d)(4)(A). 29 U.S.C. § 158(d)(4)(A) (1976).


93. 121 N.L.R.B. 1160 (1958).

94. Id. at 1163. The term specifically mentioned by the Board in Appalachian Shale was wages.
important and definite so as to minimize the likelihood of industrial conflict during the life of the contract.

The contract must be in writing and signed by the parties. This does not, however, require that a formal document be signed for the contract to serve as a bar. In *Valley Doctors Hospital, Inc.*, the employer mailed a complete contract proposal to the union with a cover letter that clearly indicated that a contract would result if the union accepted the offer without modification. The employees voted to accept the contract on May 7, at which time the union telephoned the employer with this information. The following day, a decertification petition was filed. On May 14, the union mailed the employer a copy of the contract signed by the union officers and dated May 7. The Board held that the exchange of a written proposal and a written acceptance satisfied the contract bar rule of *Appalachian Shale*. A similar case, *Diversified Services, Inc.*, highlighted the common practice of attorneys acting for the parties at the bargaining table. There, the union’s attorney sent a telegram to the employer’s attorney, stating that the union accepted the employer’s last offer and requesting that the attorney forward a contract for signature. The employer’s attorney then sent two unexecuted copies of a contract based on the parties’ written agreements during bargaining and on the employer’s position on unresolved issues. The contract was accompanied by a cover letter signed by the employer’s attorney, requesting that the two copies be signed and returned. The union promptly did so. Shortly thereafter, a decertification petition was filed. The Regional Director found that the contract did not serve as a bar on the grounds that the attorney’s signature on the cover letter did not constitute the employer’s signature on the contract and that the employer had not given the attorney power to bind the employer without approval of the employer’s executive board. The Board disagreed. Emphasizing that the attorney conducted all the negotiations for the employer and that throughout the negotiations he had represented to the union that he had the authority to bind the employer on matters arising at the bargaining table, the Board found that the attorney’s signature on the cover letter and the union’s signature on the contract were sufficient to satisfy the rule in *Appalachian Shale*.

95. *Id.* at 1161.
96. *Id.* at 1162.
97. *Id.*
100. *Id.* at 1092.
Once the contract's expiration date has passed, the parties are often committed to reaching an agreement as quickly as possible so that a strike may be averted or terminated. As a result, the employer's last offer may be communicated to the union's membership before it is fully set down in writing. Members dissatisfied with the union's performance at the bargaining table may, at this point, seek to file a decertification petition if it seems likely that the membership will accept the employer's offer. Whether or not a decertification petition will be accepted in such situations depends on whether the petition is filed before the agreement is set down in writing to some extent. Liberty House\textsuperscript{101} illustrates the uncertainty of the application of Appalachian Shale in such circumstances.

In Liberty House, the employer operated two department stores in different shopping centers. The union represented salesclerks at both stores in one unit and office employees at both stores in another unit. In June 1975, the contracts expired. In November, a new contract covering the salesclerks was concluded. On December 4, the employer wrote to the union concerning the office employees' contract. Referring to a telephone conversation in the interim about a new wage scale, the employer stated that he would make other appropriate changes to bring the office employees' agreement into line with the salesclerks' agreement. On December 9, an early morning meeting was called at which time the employees present voted to accept the employer's offer. The union president signed the employer's letter and immediately after the meeting contacted the stores to inform them that the contract had been accepted. Within the hour, a decertification petition was filed. Following Appalachian Shale, the Regional Director found that the petition was not barred by the agreement since there existed neither a formal document executed by both parties nor an exchange of a signed written proposal and acceptance.

The Board, however, disagreed. The Board held that the employer's proposal, which included a wage scale and incorporated by reference to the salesclerks' contract other terms and conditions of employment, contained "substantial terms and conditions of employment."\textsuperscript{102} By signing this proposal, the union formed a contract that would serve to bar the petition.

The Board's contract bar rules in this area are thus open to varying interpretation. For the sake of certainty, it would seem preferable to

\textsuperscript{101} 225 N.L.R.B. 869 (1976).
\textsuperscript{102} Id. at 869.
adhere closely to the rule that the contract, either in a formal document or set out in a proposal, must be in writing and that this written statement of the agreement must contain substantial terms and conditions of employment. If such a rule were consistently applied, unions would be on notice that the contract should be reduced to writing as soon as its terms are known. To be lenient in this regard places the Board in a position of allowing certain agreements to operate as a bar when important contractual terms can only be filled in on the basis of oral understandings; yet oral contracts do not serve as a bar. In addition, the tenor of such a policy does not comport with the Board's general rule in contract bar cases that extrinsic evidence should not be introduced in order to clarify the meaning of ambiguous contract terms.

In certain circumstances, the terms of the contract must be examined to determine whether the contract serves as a bar. For instance, to serve as a bar, a contract does not have to be ratified by the membership except when the contract itself specifies that it will take effect only upon ratification.103 Thus, if a union's bylaws require ratification and a decertification petition is filed before the membership ratifies the union's acceptance of the contract, the contract will serve as a bar. Similarly, a requirement that an international union approve the contract will not prevent the contract from serving as a bar if a decertification petition is filed prior to the international's expressing its approval unless the contract by its own terms makes the international union's approval a condition precedent to the contract's validity.104 In most instances, union members will be aware of ratification or international approval requirements. Hence, they will normally presume that the contract is not valid until such requirements are met. The Board's view, however, results in these reasonably based expectations being upset with very little justification. Surely, it would not be difficult for the Board to examine a copy of the local union's or international union's bylaws to determine whether a ratification or approval requirement exists.

Changed Circumstances

In certain situations, a contract may cease to serve as a bar to a decertification election because of changed circumstances between the date of signing the contract and the date of petition. In 1958, in General

103. 121 N.L.R.B. at 1162. The ratification requirement must be in writing. Id.
Extrusion Co.,\textsuperscript{105} the Board laid down a series of rules relating to situations in which the contract bar rule might not operate because of changed circumstances.

In \textit{General Extrusion}, the Board modified prior cases by adopting the rule that a contract would not serve as a bar if the contract had been executed:

(1) before any employees had been hired or (2) prior to a substantial increase in personnel. When the question of a substantial increase in personnel is in issue, a contract will bar an election only if at least 30 percent of the complement employed at the time of the hearing had been employed at the time the contract was executed, \textit{and} 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was executed.\textsuperscript{106}

In \textit{General Extrusion}, the Board also modified its view on mergers and relocations. It decided that there would be no bar if changes had occurred in the nature of the operation involving a merger of two or more operations into an entirely new operation with major personnel changes or if there was a resumption of operations after an indefinite period of closure with new employees. Mere relocation of a plant with substantially the same employees, management and type of work would not prevent the contract from serving as a bar.\textsuperscript{107} Although there have been some minor modifications to the \textit{General Extrusion} principles,\textsuperscript{108} their flexibility, yet reasonably predictable certainty, has not created a need for any substantial revision.

\textbf{Schism and Defunctness}

A contract can stabilize the bargaining relationship only if the signatory union is able and willing to enforce it. Situations have arisen in which the union is either so fragmented or so weak that it is unable to perform its duties as bargaining agent. As a result, the Board has been required to assess whether a contract should serve as a bar when the union's status as bargaining agent is in doubt.

The Board has taken the view that, when a union becomes defunct, its contract does not bar a decertification election. In \textit{Hershey Chocolate Corp.},\textsuperscript{109} a schism case, the Board stated that a bargaining

\textsuperscript{105} 121 N.L.R.B. 1165 (1958).
\textsuperscript{106} \textit{Id.} at 1167 (emphasis in original).
\textsuperscript{107} \textit{Id.} at 1167-68.
\textsuperscript{109} 121 N.L.R.B. 901 (1958).
agent is defunct "if it is unable or unwilling to represent the employees." The Board further stressed that "mere temporary inability to function does not constitute defunctness; nor is the loss of all members in the unit the equivalent of defunctness if the representative otherwise continues in existence and is willing and able to represent the employees." Under the Hershey Chocolate doctrine, the status of the signatory union is examined only if the issue of defunctness is raised. It is irrelevant that a nonsignatory parent body indicates its willingness to administer the local union's contract.

The Board has given the defunctness exception to the contract bar doctrine a narrow application. In Road Materials, Inc., where the union had not processed any grievances or visited the plant for several years and where the employer had implemented unilateral pay increases, the Board still refused to hold that the union was defunct. In overruling the Regional Director's determination in this case, the Board regarded the union's willingness to represent the employees as the crucial issue. Since the employees had not approached the union for grievance handling or the holding of meetings, the Board found no evidence of any unwillingness on the part of the union to represent the employees. It seems that for defunctness to be found to exist, the union either must have disappeared by virtue of losing all its members or it must have abandoned its status as bargaining agent, since a union that is able to sign a collective agreement periodically will probably be held to have demonstrated its willingness to represent the employees. The defunctness doctrine, then, can have the unintended effect of locking unit employees into a situation where the union, for some reason, does not actively represent its members during the life of the contract. Although this arrangement may satisfy the union and the employer, the Board should adopt a position that does not unjustifiably penalize employees.

The Board has recognized that there are times when a schism

110. Id. at 911.
111. Id.
112. Id. at 911-12.
114. Id. at 991.
115. Id.
116. See, e.g., Sahara-Tahoe Corp., 229 N.L.R.B. 1094, 1109 (1977), aff'd, 581 F.2d 767 (9th Cir. 1978); Sierra Dev. Co., 231 N.L.R.B. 22, 24 (1977), aff'd, 604 F.2d 606 (9th Cir. 1979), where the union had maintained an extremely low profile, filing virtually no grievances over a 10-year period in a unit of over 10,000 employees and rarely, if ever, visiting the casinos to enforce the contract. A series of three-year contracts were signed despite this inactivity. The union may have been quiescent but the Board dismissed the suggestion that it was defunct.
within a union so disrupts bargaining relationships that an exception should be made to the contract bar doctrine. In the 1950s, when revelations of corruption and communist infiltration within certain unions led to a rash of schism cases, the Board reconsidered the application of the contract bar doctrine to schism situations in the leading case of *Hershey Chocolate*.117 That case concerned a split within the Bakery and Confectionery Workers International Union118 caused by the members' reaction to its expulsion from the AFL-CIO for uncorrected corrupt practices. The AFL-CIO subsequently chartered a rival union, the American Bakery and Confectionery Workers International Union,119 with the same jurisdiction as the BCWIU. When BCWIU locals attempted to disaffiliate and affiliate with the new ABCWIU, the BCWIU informed employers that they should not recognize the ABCWIU locals for the purposes of collective bargaining. Faced with claims by two unions for recognition, the employer filed for an election. The question presented was whether the existing contract between the employer and the BCWIU local barred the election. Observing that it had generally found a schism to exist when a local union's disaffiliation occurred "in the context of a basic intraunion conflict," the Board held that such "a basic intraunion conflict is a necessary prerequisite to a finding that a schism exists warranting an election."120 The Board then defined "basic intraunion conflict" to be "any conflict over policy at the highest level of an international union . . . which results in a disruption of existing intraunion relationships."121 Since the split within the BCWIU was at all levels and was disrupting intraunion relationships, the contract bar doctrine was held not to apply.122

The Board does not lightly classify dissident movements within a union as a "schism." For instance, in *B & B Beer Distributing Co.*,123 a Teamsters local sought to affiliate with another international union when the International Brotherhood of Teamsters was expelled from the AFL-CIO for corruption. When the rival union, which traditionally had overlapping jurisdiction with the Teamsters in beer distributing, petitioned for an election, the petition was dismissed. On appeal, the Board agreed with the Regional Director that the narrow exception carved out of the contract bar doctrine in *Hershey Chocolate* should not

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117. 121 N.L.R.B. 901 (1958).
118. Hereinafter referred to as the BCWIU.
119. Hereinafter referred to as the ABCWIU.
120. 121 N.L.R.B. at 906-07.
121. Id. at 907.
122. Id. at 908-09.
be applied on these facts. The Board distinguished *Hershey Chocolate* by pointing out that there was no open split within the Teamsters union; that the AFL-CIO had not assigned the Teamsters' existing jurisdiction to any other union so that two unions, with some claim of right, could assert bargaining rights; and that no group was intensively campaigning to win the allegiance of Teamsters locals. Finding that the facts did not amount to a basic intraunion policy conflict and that there was no evidence that the Teamsters' expulsion threatened the stability of its bargaining relationships, the Board held that the existing contract was a bar to an election.\(^{124}\)

A local union that wants to disaffiliate from its parent union and affiliate with another international union without waiting until the current collective bargaining agreement expires may find its path blocked, as *Allied Chemical Corp.*\(^{125}\) demonstrates. There, a weak international union, District 50, was a prime candidate for merger with one of two large international unions. Two District 50 national officers were actively seeking to have the national executive board support their respectively favored unions. A District 50 local preferred a third international union and voted to affiliate with it. This international union, the Oil, Chemical and Atomic Workers,\(^{126}\) then filed to have certification of the bargaining representative amended to reflect the local's change in affiliation. On the basis of the contract bar doctrine, the Regional Director dismissed the case. District 50 subsequently placed the local in trusteeship. On appeal to the Board, the OCAW argued that, under *Hershey Chocolate*, a schism existed; therefore, the contract was no bar to an election. Reviewing the principles enunciated in *Hershey Chocolate*, the Board emphasized that a schism exists only where a basic intraunion policy conflict disrupts existing intraunion relationships.\(^{127}\) The Board pointed out that the local's disaffiliation was not related to any policy conflict, observing that there was no split within District 50 as there had been in *Hershey Chocolate*. Critical to the Board's determination was its characterization of the dissention within the union: the rivals were trying to gain control of District 50; they were not fragmenting it.\(^{128}\) The *Allied Chemical* case exemplifies the limited nature of the schism exception as set out in *Hershey Chocolate*. As the Board stated in *Hershey Chocolate*, an election should not be

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124. *Id.* at 1422-23.
125. 196 N.L.R.B. 483 (1972).
126. Hereinafter referred to as the OCAW.
127. 196 N.L.R.B. at 484.
128. *Id.*
directed in a unit with a current contract unless the existing contract no longer serves to promote industrial stability. A contract may fail to further industrial stability where there is such confusion that bargaining relationships are unstable. This would seem to be the case only where the employer is confronted with two groups, each of which can, with some show of legitimacy, claim to be the certified bargaining agent or its heir. Accordingly, routine disaffiliation by a local dissatisfied with its parent body would rarely, if ever, qualify as a "true schismatic situation" under the Board's view.

If the identity of the contracting local can still be pinpointed at the time a decertification petition is filed, the Board will find an election barred by the existing contract. It can be argued, however, that the Board's narrow schism exception unjustifiably restrains employee freedom of choice in situations where it is unlikely that industrial stability will be disrupted. In Allied Chemical, for instance, where both the membership and the leadership of the contracting local supported the transfer of affiliation from District 50 to the OCAW, there was no indication that the change of affiliation would have any impact on the existing collective bargaining relationship between the local and the employer. Since the relationship between the employer and the union was stable, the underlying rationale for the contract bar doctrine was absent. Nevertheless, the doctrine was applied, thereby compelling the employees to accept affiliation with an international union not of their choosing.

Unlawful Contract Provisions

Since 1935, the Board has taken the view that contracts contravening the basic policies of the National Labor Relations Act do not bar an election. After the Taft-Hartley Act was enacted, application of this principle was extended to union security clauses. Thus, if a clause was not executed in conformity with the requirements of section 8(a)(3), the contract was not a bar. The mere existence of such a clause was sufficient to eliminate the bar, even if the clause had not been put into

129. 121 N.L.R.B. at 906.
130. 196 N.L.R.B. at 484.
132. District 50 subsequently merged with the United Steelworkers of America.
133. 29 U.S.C. § 158(a)(3) (1976). Section 8(a)(3) was amended in 1947 by the Taft-Hartley Act so that employers and unions could execute a union shop agreement requiring union membership as a condition of continued employment on or after 30 days following the employee's employment. See G. Bloom & H. Northrup, Economics of Labor Relations 222-24 (9th ed. 1981) for a description of the most common union security arrangements.
In 1958, during its thorough reconsideration of the contract bar doctrine, the Board decided *Keystone Coat, Apron & Towel Supply Co.*,\(^{135}\) which represented a codification of prior cases on unlawful contract clauses. Under *Keystone*, any contract containing a union security clause that did not, on its face, conform with the requirements of the Act or that had been found unlawful in an unfair labor practice proceeding would not bar an election. Any union security clause with ambiguous language would not constitute a bar. To assist the parties in drafting a clause that would meet the Board’s standards, a “model clause” was set out. Supporting its stance, the Board argued forcibly that it could not be regarded as burdensome to observe the law in express terms. Three years later, in *NLRB v. News Syndicate Co.*,\(^ {136}\) the Supreme Court faulted the Board’s approach, holding that a collective bargaining agreement could not be deemed unlawful merely because it did not affirmatively disclaim all illegal objectives.\(^ {137}\) The Board accordingly modified its policy in this respect in *Paragon Products Corp.*\(^ {138}\)

In *Paragon Products*, the Board stated that only those contracts containing a “clearly unlawful” union security clause or a clause that had been declared unlawful in an unfair labor practice proceeding would not bar an election.\(^ {139}\) A clearly unlawful clause was defined as “one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a)3 and is therefore incapable of a lawful interpretation.”\(^ {140}\) Hence, ambiguous clauses, unless determined to be unlawful in an unfair labor practice proceeding, would not bar an election since extrinsic evidence of actual practice would not be considered in a representation proceeding.\(^ {141}\)

The Board’s self-imposed rule against considering extrinsic evidence can have a harsh impact. In *Jet-Pak Corp.*,\(^ {142}\) the union security provision was lawful on its face, but the contract that was executed on September 16, 1976, was made effective retroactive to July 1, 1976. As a result, some new employees might have been denied their thirty-day grace period in which to join the union. The Regional Director consid-

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137. *Id.* at 699-700.
139. *Id.* at 666.
140. *Id.*
141. *Id.* at 667.
nered extrinsic evidence, which took the form of stipulations by both parties to certain facts, since he believed that such uncontroverted evidence did not present "dangers normally present in a non-adversary representation hearing."\textsuperscript{143} Having considered this evidence, the Regional Director found that an election was barred. The Board, however, adhered strictly to its rule and stated, "[W]e are permitted only to examine the terms of the contract as they appear within the four corners of the instrument itself."\textsuperscript{144}

The application of the Board's rule against extrinsic evidence in cases such as \textit{Jet-Pak Corp.} seems unduly inflexible since "boilerplate" contract clauses are often drafted in advance of contract expiration to take effect at 12:01 A.M. on the day following the date of expiration of the old contract. In so doing, the drafters anticipate that, even if a new contract is not actually settled by that date, it will often be made retroactive to it. That the union security clause as stated could then be construed to be unlawful is a fact that may well escape many local union officials.\textsuperscript{145}

The Board's rigid adherence to this rule also produces cases in which minor technicalities have a major impact. In one case, for example, the contract was concluded on May 20, 1968, but the formal document was not signed until June 10, 1968.\textsuperscript{146} The formal contract document stated that the contract had been made and entered into on May 20 and was effective from May 20. When a decertification petition was filed, the Regional Director found it was not barred by the contract because the union security clause was unlawful in possibly denying some employees the full thirty-day grace period. In so finding, the Regional Director stated that the different effective and signing dates transformed the contract into one that was retroactively effective. The Board disagreed, stating that, by its very terms, the contract took effect on the very day it was entered into.\textsuperscript{147} As a result, the union security clause was unlawful, and the contract was a bar to an election. There is no reason to believe, however, that the nonunion employees in this case received any more notice of the contents of a contract that had not yet been reduced to writing than the employees in \textit{Jet-Pak}. The Board's position is that the rights of these employees could be vindicated in an

\textsuperscript{143} \textit{Id.} at 553.
\textsuperscript{144} \textit{Id.} The Board's final consideration was whether the clause in the contract was lawful on its face. The Board found the clause lawful since it gave employees a statutory 30-day grace period to become union members. Accordingly, it found that an election was barred. \textit{Id.}
\textsuperscript{145} \textit{See, e.g.}, Standard Molding Corp., 137 N.L.R.B. 1515 (1962), and cases cited therein.
\textsuperscript{147} \textit{Id.} at 619.
unfair labor practice proceeding, a position that is equally applicable to the employees in *Jet-Pak*.

The scope of the unlawful contract exception to the contract bar doctrine extends beyond union security clauses. Contracts that on their faces contained provisions clearly unlawful with regard to such issues as dues checkoff, seniority, preferential hiring and racial discrimination have been held not to bar an election. Somewhat inconsistently, an unlawful hot cargo clause did not influence the employees’ choice of a bargaining representative. Such reasoning would seem to be equally valid on the question of a seniority clause. If a union breaches its duty under a contract that is lawful on its face, that contract will serve to bar a decertification election.

**Presumption Of Majority**

If an employer suspects that a union no longer has the support of a majority of the employees in the bargaining unit, he may wish to cease recognizing the union for the purposes of collective bargaining. Whether he can do this without violating his section 8(a)(5) duty to bargain in good faith depends on whether he has a good faith doubt of the union’s continued majority status and whether, at that particular time, the presumption of continued majority status is rebuttable. Since an employer will often doubt the union’s majority status once he learns that there is a campaign to decertify the union, the issue of presumption of majority frequently arises in a decertification context.

*Irrebuttable Presumption of Majority*

There are certain protected periods of bargaining when the presumption of the union’s continuing majority cannot be challenged, for instance, during the certification year and for a reasonable period following voluntary recognition, the issuance of a bargaining order and the settlement of 8(a)(5) charges. At those times, decertification petitions will be dismissed as untimely even if the signatures on the petition indicate that a clear majority of the employees in the unit wants to oust

152. *See, e.g.*, Loree Footwear Corp., 197 N.L.R.B. 360, 360 (1972), where it was asserted that the contract was no bar to an election because the union had breached its duty of fair representation. Because the contract was lawful on its face and because of the Board’s policy of not permitting extrinsic evidence to be introduced at the hearing on a decertification petition, the Board held that the contract did serve as a bar to an election.
the union.\textsuperscript{153}

During Certification Year

In \textit{Brooks v. NLRB},\textsuperscript{154} the Supreme Court held that, absent unusual circumstances,\textsuperscript{155} an employer has a duty to bargain with the union certified as the bargaining agent for his employees for one year from the date of certification.\textsuperscript{156} In \textit{Brooks}, where the union lost a majority of its members shortly after the election through no fault of the employer, the Supreme Court affirmed the longstanding Board position that the union should still have one year in which to carry out its mandate.\textsuperscript{157} While noting that this rule promoted "a sense of responsibility in the electorate and needed coherence in administration,"\textsuperscript{158} the Court was not unaware of other, more pragmatic considerations underscoring such a policy. The Court stated:

It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent.\textsuperscript{159}

Consonant with the Court's reasoning in \textit{Brooks} is the Board's rule, promulgated in \textit{Mar-Jac Poultry Co.},\textsuperscript{160} that the certification year will be extended if the employer's unfair labor practices have frustrated the union's ability to carry out its duties as bargaining agent during the original certification year. In \textit{Mar-Jac}, the company shut down six months after bargaining had commenced. Two years later, the same stockholders resumed business under a different name. The union requested that the company resume bargaining. When the company refused, stating that the union no longer had majority support,\textsuperscript{161} the union filed a charge under section 8(a)(5). When an employee decertification petition was filed, it was dismissed by the Board on the grounds that the union had not received the benefit of bargaining for a

\textsuperscript{153} See NLRB v. Big Three Indus., Inc., 497 F.2d 43, 52 (5th Cir. 1974).
\textsuperscript{154} 348 U.S. 96 (1954).
\textsuperscript{155} The Court cited defunctness and schism as examples of unusual circumstances. \textit{Id.} at 98.
\textsuperscript{156} \textit{Id.} at 104.
\textsuperscript{157} The Board had taken the position as early as 1939 that a union should have a reasonable period in which to carry out its mandate. See Whittier Mills Co., 15 N.L.R.B. 457, 463 (1939), enforced, 111 F.2d 474 (5th Cir. 1940) (seven months). For the formalization of the one-year rule, see Thompson Prods., Inc., 47 N.L.R.B. 619, 621 (1943).
\textsuperscript{158} 348 U.S. at 99.
\textsuperscript{159} \textit{Id.} at 100.
\textsuperscript{160} 136 N.L.R.B. 785 (1962).
\textsuperscript{161} The company's statement was probably factually accurate since the composition of the workforce had changed substantially.
substantial part of the certification year, a period, as the Board noted, "when Unions are generally at their greatest strength." 162

In remediaying the unfair labor practices in Mar-Jac, the Board ordered the employer to bargain for a full year, thus taking no account of the six months during which bargaining had occurred in the original certification year. In Brooks, the employer had been ordered to continue recognizing the union for the remainder of the certification year. Although the Board did not do so, Mar-Jac can be distinguished from Brooks on the grounds that the employer in Mar-Jac had displayed an intransigent attitude toward the union, which, in large part, contributed to its loss of majority, whereas in Brooks, the employees repudiated the union on their own.

Whether employees who no longer support the union and who perhaps have never supported the union should be locked into an extended period of union representation without the opportunity of expressing their choice raises difficult questions, both legal and practical in nature. Practically, the efficacy of such a remedy is questionable. In such situations, the employees' confidence in the union's ability to win concessions may have been severely undermined, if not destroyed, by the employer's tactics. 163 At most, the union will have one year in which to regain the allegiance of the employees. Aware that the only way the union is likely to accomplish this is by concluding a collective agreement that represents a substantial improvement in terms and conditions of employment, the employer will doubtless be in no haste to sign such an agreement. At the end of the year, the employees may very well decertify the union. If the end result is the same, 164 the justification for applying the Mar-Jac rule, which postpones the employees' section 7 rights, must lie elsewhere.

The Fifth Circuit responded to this point in a case where it enforced a Board order that extended the certification year. The court asserted:

It would be particularly anomalous, and disruptive of industrial peace, to allow the employer's wrongful refusal to bargain in good

162. 136 N.L.R.B. at 787.
163. Particularly destructive of the union's support may be the substantial length of time which can elapse between the filing of the unfair labor practice charge and the handing down of a decision by a federal court of appeals enforcing the Board's order. See, e.g., Bishop v. NLRB, 502 F.2d 1024 (5th Cir. 1974), where five years had passed without the unfair labor practice charge being resolved.
164. There is no empirical data on the efficacy of Board orders extending the certification year. Labor relations practitioners on both sides pinpoint as the most common factor motivating decertification the members' perception that the union is ineffective at the bargaining table. Cook, supra note 15, at 38.
faith to dissipate the union's strength, and then to require a new election which "would not be likely to demonstrate the employees' true, undistorted desires,"... since employee disaffection with the union in such cases is in all likelihood prompted by the employer-induced failure to achieve desired results at the bargaining table.165

The Fifth Circuit's observation was made in a case where the employer displayed a particularly belligerent and obstructionist attitude toward bargaining with the union and had committed numerous unfair labor practices.166 This fact is of utmost importance since the Board's remedial power "is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices."167 If there has been no unfair labor practice, a Board order requiring bargaining for an extended certification year would seem to be a punitive, rather than remedial, measure.168

The limitations on the Board's remedial powers were raised by the Seventh Circuit in NLRB v. Gebhardt-Vogel Tanning Co.169 In that case, the union was certified on July 9, 1963. During the certification year, the employer delayed in disclosing wage information to the union during bargaining. The union filed a charge under section 8(a)(5) in October alleging that the employer had delayed five months in handing over the information. In November, the employer furnished the wage information, and the union withdrew the unfair labor practice charge. On July 28, 1964, a decertification petition was filed. The Regional Director, dismissing the petition on the basis of the rule in Mar-Jac, stated that the union did not have the benefit of the full certification year since the employer had unlawfully delayed in disclosing the wage information. The Seventh Circuit refused to enforce the Board's order extending the certification year since, on the facts presented, there was no finding that the employer had committed an unfair labor practice.170 Although the Seventh Circuit was technically correct, its decision had the effect of penalizing a union which had declined to use the procedures of the NLRB to engage in unnecessary litigation. Such a deci-

165. NLRB v. Big Three Indus., Inc., 497 F.2d 43, 51-52 (5th Cir. 1974) (citations omitted).
166. Id. at 45. For example, the employer had threatened to shut down the plant, had dismissed a union activist, had told employees they would get nothing more and had taunted employees to go on strike. Id.
168. Although the punitive/remedial terminology is less than clear conceptually, a punitive order is one where there is a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943).
169. 389 F.2d 71 (7th Cir. 1968).
170. Id. at 75. There had never been a hearing on the unfair labor practice charge and no evidence relating to it was offered at the hearing on the decertification petition.
sion can only lead other unions to refuse to withdraw charges for fear that it may redound to their disadvantage.

Although the Mar-Jac rule remains a vital remedy in the Board’s enforcement scheme for 8(a)(5) violations, the Board will, in its discretion, refuse to extend the certification year in circumstances where the rule arguably applies. In one case, the union was certified to represent a unit of dental laboratory technicians in March 1973. Shortly thereafter, the employer contracted out the lab work, and all the technicians were dismissed. The union immediately filed unfair labor practice charges. Several months later, the employer reopened the lab, and by mid-1974 the number of employees in the unit had attained its earlier level. In 1974, the Board found that the closing of the lab was economically motivated but that the employer had violated section 8(a)(5) by not bargaining about the impact of the closing. In January 1976, the Ninth Circuit enforced the Board’s order and the issue of back pay was referred to the NLRB’s regional office. At this point, the parties voluntarily agreed to negotiate a contract covering the lab technicians, none of whom had been employed in March 1973. Bargaining ceased after six sessions when the parties learned that a decertification petition had been filed. The union appealed the Regional Director’s direction of an election, claiming that since it had bargained for a total of only three months under its certification, the certification year should be extended and the decertification election barred. Considering the applicability of the Mar-Jac rule, the Board held that the extension of the certification year was not warranted in these “rather unusual circumstances.” In reaching this conclusion, the Board found persuasive the fact that the closing of the lab was economically motivated and that the hiatus in bargaining was not attributable to an employer unfair labor practice.

Following Voluntary Recognition

For a reasonable period of time following an employer’s voluntary recognition of a union, the employer cannot lawfully refuse to bargain with that union even when it is clear that the union has lost its majority; the union’s presumption of majority is irrebuttable. The genesis of

174. The Regional Director considered whether the principles of Keller Plastics Eastern, Inc., 157 N.L.R.B. 583 (1966) were applicable. See text accompanying notes 182-83 infra.
175. 231 N.L.R.B. at 847.
this rule can be traced to the 1944 United States Supreme Court decision in *Franks Brothers Co. v. NLRB*. In *Franks*, an employer refused to bargain with the union on the basis of its having authorization cards from a majority of the employees. When the union filed for an election, the employer engaged in a course of antiunion conduct, and the union filed unfair labor practice charges, which blocked the holding of the election. More than a year later, it was held that the employer had violated sections 8(a)(1) and 8(a)(5) of the Act. Rather than direct an election, the Board ordered the employer to bargain with the union even though the turnover in the work force indicated that the union had lost its majority status. The Supreme Court enforced the Board's order, stating that, if the bargaining order remedy were unavailable and elections had to be held when shifts in the work force during the pendency of unfair labor practice charges had occurred, then recalcitrant employers might be tempted to commit unfair labor practices in order to postpone indefinitely their bargaining obligation. In responding to the employer's arguments, the Court pointed out that the bargaining order was not designed to establish a permanent bargaining relationship but that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." The Board regards this statement as support for its rule that an employer can be ordered to continue bargaining with a union that has lost its majority support even when the employer in no way caused the loss of support.

The Board took this position in *Keller Plastics Eastern, Inc.*, where the employer had voluntarily recognized the union and commenced bargaining. Within three weeks of recognition, raiding by a rival union had caused the bargaining agent to lose its majority. Citing the statement quoted above from *Franks Brothers*, the Board held that the employer was required to continue recognizing the union for a reasonable period of time. In *Keller*, the Board found it unnecessary to decide what constituted "a reasonable period of time" since clearly it is

177. *See* text accompanying notes 227-55 *infra*.
178. The union had gained a card majority in June 1941. The Board's decision was handed down in October 1942. The high turnover stemmed mainly from the mobilization following America's entry into World War II. *Franks Bros. Co.*, 44 N.L.R.B. 898 (1942).
179. 321 U.S. at 705.
180. *Id*.
more than three weeks.183

The Keller doctrine becomes operative as soon as an employer recognizes a union. In one case,184 a majority of the employees signed a petition to oust the union only three days after the employer had voluntarily recognized it on the basis of a card check. The decertification petition was dismissed on the grounds that it was untimely since the union had not yet had a reasonable period of time in which to carry out its mandate as bargaining agent.185 Similarly, the employer's refusal to engage in bargaining once the decertification petition was filed was held unlawful since the presumption of the union's majority at that point was irrebuttable.186 In responding to the employer's argument that it was unfair to bind the employees for a lengthy period on the basis of such an informal and uncertain method of selection, the Seventh Circuit noted that there was no reason to distinguish between the two modes of bargaining agent selection authorized by section 9 of the Act in deciding that the bargaining relationship, once rightfully established, should have an opportunity to function.187 The court observed that the employer or employees should have challenged the lawfulness of the voluntary recognition if they doubted its validity.188

If the union at the time of the employer's voluntary recognition did not have a majority, the bargaining relationship will not be given a reasonable period in which to function since it was not rightfully established. The Board has held that it is irrelevant under Keller Plastics that the employer's recognition was "purely voluntary"; recognition must be based on a demonstrated showing of majority.189

The Board has long held that an employer who agrees to bargain with a union, in return for the union's withdrawing an unfair labor practice charge, is obligated to honor that agreement "for a reasonable time after its execution without questioning the representative status of

183. Id. at 587.
184. NLRB v. Montgomery Ward & Co., 399 F.2d 409 (7th Cir. 1968).
185. The court did note that, unlike the situation in Franks, there were no employer unfair labor practices in Montgomery Ward which contributed to the union's loss of majority. The court, however, found persuasive the Supreme Court's reasoning in Brooks v. NLRB, 348 U.S. 96 (1954), supporting an enforced year of bargaining. 399 F.2d at 411-12.
186. Id. at 412-13.
187. Id. at 412.
188. Id. It can be seriously argued that it is unrealistic to expect employees, on their own, to challenge the employer's voluntary recognition of a union.
189. In Jack L. Williams, D.D.S., 231 N.L.R.B. 845 (1977), after the dental laboratory re-opened, the employer voluntarily recognized the union for the purpose of representing the unit employees, most of whom were new, without any showing of majority. The Board upheld the Regional Director's refusal to apply Keller Plastics. Id. at 846.
the Union." The Fourth Circuit, affirming the Board's order in Poole Foundry & Machine Co. v. NLRB, stated. "If a settlement agreement is to have real force, it would seem that a reasonable time must be afforded in which a status fixed by the agreement is to operate." Hence, an employer who has agreed to bargain with the union as part of a settlement agreement cannot refuse to do so on the grounds that a majority of its employees have signed a decertification petition. In such circumstances, the petition will be dismissed as untimely.

Subsequent to a Bargaining Order

Following similar reasoning, the Board has held that once bargaining commences in compliance with an NLRB bargaining order, the bargaining relationship must have a reasonable period of time in which to function regardless of the union's actual majority status. In NLRB v. Kaiser Agricultural Chemicals, the employer asserted that the employee decertification petition meant that the employees no longer wanted the union as their bargaining agent. In upholding the Board's dismissal of the decertification petition as untimely, the Fifth Circuit suggested that it was an equally plausible assumption that the unfair labor practices continued to affect employee sentiment, making a fair election impossible.

Rebuttable Presumption of Majority

Once a union has established its majority status on the basis of either a certification election or a lawful voluntary recognition by the employer, there is a presumption that the union continues to enjoy majority status. This presumption is irrebuttable at certain times, as discussed above. At other times, the presumption of majority is rebuttable.

To rebut the presumption of majority status, an employer must show that the union, in fact, no longer enjoys majority status or that it

192. Id. at 743.
194. 473 F.2d 374 (5th Cir. 1973).
195. Id. at 385.
197. See text accompanying notes 153-93 supra.
has a good faith doubt about the union's continuing majority status.\textsuperscript{198} To constitute a "good faith doubt," the employer's doubt must be based on objective considerations, and it must be raised in a context free of unfair labor practices.\textsuperscript{199}

If the collective bargaining agreement is due to expire shortly and the employer suspects that the union no longer commands majority support in the unit, the employer may contemplate refusing to bargain with the union on a new contract. Such a course of action, however, presents a dilemma. If an employee decertification petition is timely filed subsequent to the employer's refusal to bargain,\textsuperscript{200} it will most likely be dismissed under the Board's blocking charge rule, assuming that the union has filed an 8(a)(5) charge in response to the employer's refusal to bargain.\textsuperscript{201} If the employer does refuse to bargain and it is later determined that his suspicions did not amount to a "good faith doubt," he will be found to have violated section 8(a)(5). A bargaining order will be issued, and he will not be permitted to question the union's majority status for a reasonable period of time. As a result, in deciding whether or not to bargain with the union, it is of utmost importance to the employer that he be able to estimate with reasonable certainty whether his suspicions constitute a "good faith doubt" in the Board's view.

\textit{Good Faith Doubt of Majority Status}

It can be said with reasonable certainty that the employer's doubt must arise in an atmosphere free of unfair labor practices if there is to be any likelihood that it will be classified "good faith."\textsuperscript{202} A finding that the employer's conduct violated section 8(a)(1) or 8(a)(5) will undermine his claim of good faith. Even if the employer's conduct does not amount to an unfair labor practice, if it is claimed that the conduct


\textsuperscript{199.} Firestone Synthetic Rubber & Latex Co., 173 N.L.R.B. 1179, 1180 (1968); Celanese Corp. of America, 95 N.L.R.B. 664, 673 (1951).

\textsuperscript{200.} \textit{See} notes 81-92 \textit{supra} and accompanying text. Since a union seeking to modify the contract is statutorily required to give the employer 60 days advance notice of this fact, a union often sends a letter to the employer in the period 90-60 days before contract expiration. This same period of time is the open period for the filing of decertification petitions. As such, an employer who is aware that a decertification campaign is afoot may receive the union's letter before he is certain that a decertification petition will be filed or before the NLRB's regional office notifies him that a petition has been filed. \textit{See} Telautograph Corp., 199 N.L.R.B. 892 (1972).

\textsuperscript{201.} For a discussion of the circumstances where the filing of a charge under § 8(a)(5) will not block a decertification election, \textit{see} notes 222-26 \textit{infra} and accompanying text. For a more typical case, \textit{see} Stresskin Prods. Co., 197 N.L.R.B. 1175 (1972).

\textsuperscript{202.} Celanese Corp. of America, 95 N.L.R.B. 664, 673 (1951).
was "aimed at causing disaffection from the union," the Board may well conclude that the atmosphere has become tainted so that any doubt of the employer cannot be classified as a good faith one.

Much more difficult to predict are the factors on which an employer may reasonably rely in concluding that the union has lost its majority. While certitude is not required, the Board has tended to look with disfavor on anything less than a very high degree of probability. The Board has admitted that there is no simple formula for determining when a good faith doubt exists. As such, the Board examines the totality of the circumstances in which the doubt arises.

The Board takes the view that the employer's doubt must be based on "objective considerations" of the union's loss of majority. Reliable information that more than 50% of the unit employees support decertification usually suffices to raise a good faith doubt. The employer must, however, possess more or less precise information; statements that "many" employees do not want to be in the union are too vague. An estimate that more than 50% of the employees probably no longer support the union, based on a common sense appraisal of the situation, will usually be insufficient to raise a good faith doubt. For instance, in *Massey-Ferguson, Inc.*, the employer based its doubt on the fact that the union had won a narrow victory shortly before, that there had been high turnover in the unit, and that supervisors had reported that many employees were dissatisfied with the union. The Board held that the employer did not possess a good faith doubt.

Stating that the narrow election victory was insignificant, the Board observed that high turnover was a factor to consider but in itself was not sufficient to establish good faith doubt since new employees are presumed to support the union in the same ratio as those they have replaced.

203. Id. at 673.
204. Id.
208. In *Massey-Ferguson*, the employer had unilaterally implemented a wage increase after reaching impasse which was better than its last offer to the union, thereby violating § 8(a)(5). Thus, the employer's doubt did not arise in a context free of unfair labor practices. The Board did not consider separately the issue of whether the doubt was based on objective considerations. Id. at 641.
209. Id. This presumption was applied in a case where there was 100% turnover in the unit and the size of the unit had doubled. King Radio Corp., 208 N.L.R.B. 578, 581-83 (1974), en-
The weight that can be placed on supervisors' reports of employee sentiments is unclear. In *Massey-Ferguson*, the Board stated that the evidence of employee dissatisfaction must come from the employees themselves, not from supervisors on their behalf. Some weight, however, seems to be given to supervisors' observations when they are buttressed by employee comments. For instance, in *Stressskin Products Co.*, a good faith doubt was based primarily on "numerous and substantially identical reports from presumably trustworthy supervisors and employees." Comments evincing dissatisfaction with the union made by employees directly to supervisors are persuasive evidence of the union's loss of support; but supervisory personnel must be extremely careful in their contacts with employees regarding the union. Since supervisors cannot interrogate employees about their feelings about the union without violating section 8(a)(1), the employer must depend on employees' volunteering their opinions to supervisory personnel. Likewise, attempts by supervisors to steer the conversation toward the subject of the union's popularity, unless done neutrally, might be construed as attempts to cause disaffection with the union.

The Board carefully scrutinizes the objective considerations put forward by the employer to determine whether they indicate that the employees no longer want the union to be their bargaining agent. As a result, the fact that less than 50% of the employees in the unit belong to the union, in itself, is not determinative since it can be argued that there are employees who want the benefits of union representation without the obligations of union membership. Similarly, the fact that some employees abandoned a strike and crossed the union's picket line cannot necessarily be interpreted as a sign that they no longer wish the union to represent them since their return to work might have been wholly for personal reasons unrelated to the union's stance.

In some cases, the employer lists several reasons why he doubted the union's majority status. Taken individually, each factor may be insufficient to support a finding of good faith doubt, but if taken together, the reasons may well provide the basis for such a finding. Although the Board has not been altogether consistent in its approach, it


210. 184 N.L.R.B. at 641.
211. 197 N.L.R.B. 1175 (1972).
212. *Id.* at 1180. About 400 employees were in the unit. Nowhere was it contended that a majority of those employees spoke individually with a supervisor.
214. *Celanese Corp. of America*, 95 N.L.R.B. 664, 674 (1951).
has displayed a marked tendency toward a weighing of each factor on its own.

Six cases in which the employer questioned the majority status of the hotel and bartenders union in the same city illustrate this tendency.\(^{215}\) In all six cases, the employer belonged to the Reno Employers' Council, which had a collective bargaining relationship with the union dating from 1959. Realizing in early 1974 that the union's membership was so low as to jeopardize the negotiation of a new contract later in the year,\(^{216}\) local union officers sought to enlist the aid of the international union. In June 1974, the international sent out organizers in a campaign to increase the local's membership. In mid-summer, local newspapers ran articles on this union activity and quoted an international trustee as stating that only about 20% of eligible employees in the area were members of the union.\(^{217}\) In this same period, the employers noted union activity within the casino-hotels, and supervisors received complaints from employees who did not want to join the union. In late summer, each employer timely withdrew from the multiemployer association and subsequently refused to bargain with the union, asserting doubt about the union's majority status. Except for this refusal to bargain, there was no allegation that any employer had engaged in unfair labor practices.

In its defense to the 8(a)(5) charge, one employer made the following arguments: (1) the union had never demonstrated a majority since it had been voluntarily recognized; (2) the size of the unit had tripled since the union was recognized; (3) turnover in the unit since the last contract was 500%; (4) the statements of the international trustee indicated that the membership of the local union was very low, and the union was engaged in an organizing drive; (5) many employees had indicated to their supervisors that they were dissatisfied with the union and were not interested in joining it; (6) the union had filed only one grievance in a twelve-year period during which there had been 10,000 employees at the hotel; and (7) there was no union security or dues

\(^{215}\) Sierra Dev. Co., 231 N.L.R.B. 22 (1977), aff'd, 604 F.2d 606 (9th Cir. 1979); Sahara-Tahoe Corp., 229 N.L.R.B. 1094 (1977), aff'd, 581 F.2d 767 (9th Cir. 1978); Carda Motels, Inc., 228 N.L.R.B. 926 (1977); Barney's Club, Inc., 227 N.L.R.B. 414 (1976), modified, 623 F.2d 571 (9th Cir. 1980); Nevada Lodge, 227 N.L.R.B. 368 (1976), aff'd, 584 F.2d 293 (9th Cir. 1978); Tahoe Nugget, Inc., 227 N.L.R.B. 357 (1976), aff'd, 584 F.2d 293 (9th Cir. 1978).

\(^{216}\) Tahoe Nugget, Inc., 227 N.L.R.B. 357, 360 (1976), aff'd, 584 F.2d 293 (9th Cir. 1978). The local union had approximately 900-1000 members out of a possible 10,000 at that time. Sahara-Tahoe Corp., 229 N.L.R.B. 1094, 1109 (1977), aff'd, 581 F.2d 767 (9th Cir. 1978).

\(^{217}\) The local union had been placed in trusteeship by the international union. The trustee stated that the local's membership had increased from 900 to 1800 since the campaign began and estimated a 20% unionized rate. 229 N.L.R.B. at 1109.
checkoff provision in the contract. The Board considered each argument on its own and found only two arguments relevant to the issue of majority status: the employees' complaints and high turnover. Since only 29 out of 202 employees had complained to their supervisors and since new employees are presumed to support the union in the same ratio as the employees they replace, the Board found that the employer could not have possessed a good faith doubt about the union's majority status in the particular unit. Coming to the same conclusion in all six cases, the Board demonstrated that what an employer believes to be true after a careful review of the situation may fall short of what the Board demands as the basis for a good faith doubt.

**Effect of a Decertification Petition**

In many cases, the employer's doubts of the union's majority status are heightened when a decertification petition is filed. The question, therefore, often arises whether an employer can refuse to bargain with the union because a decertification petition has been filed with the NLRB.

The mere filing of a decertification petition, which requires only that 30% of the employees desire an election, does not raise a real question of representation. Therefore, if an employer ceases to recognize the union as the representative of his employees subsequent to the filing of a decertification petition, he will violate section 8(a)(5) of the Act, unless it is determined that he possessed a "good faith doubt" of the union's majority status at the time he ceased recognizing the union. It should be noted that if an absolute majority of the unit employees sign the decertification petition, the real question of representation is usually raised, and the employer may refuse to bargain with the union.

In *Telautograph Corp.*, the Board considered the predicament of an employer who sought to postpone bargaining on a new contract until after the decertification election was held. In *Telautograph*, the employer and the union had agreed to meet on September 14, 1970, to

220. See, e.g., Firestone Synthetic Rubber & Latex Co., 173 N.L.R.B. 1179 (1968), where the employer refused to bargain after a decertification petition was filed but before the Regional Director determined that a question of representation existed. The employer was able to establish that it possessed a good faith doubt as to the union's majority status. Id. at 1180.
221. This assumes that no employer unfair labor practices have contributed to the undermining of the union's status. If this is the case, such a decertification petition clearly indicates that the union has lost its majority status and an employer relying on such a petition would be basing his refusal to bargain on objective considerations.
commence bargaining on a new contract. On September 3, an employee decertification petition was filed. On October 23, the Regional Director found that the petition was timely filed. The bargaining session did not take place as scheduled. Shortly after the hearing on the petition, the union contacted the employer regarding meeting to begin bargaining. Awaiting the Regional Director's decision, the employer did not respond. After the Regional Director found that the petition was timely filed and directed an election, the employer replied that it would not enter into bargaining on a new contract at that time because the question of representation remained to be settled. The union then filed an 8(a)(5) charge, at which point the Regional Director applied the Board's blocking charge rule and indefinitely postponed the holding of the decertification election pending the outcome of the unfair labor practice charge.

The employer in *Telautograph* did not possess a "good faith doubt" about the union’s majority status under the criteria discussed above. Ordinarily, it would have been found to have violated section 8(a)(5), but the Administrative Law Judge refused to recommend the finding of a violation in the "special circumstances" of that case, namely that the employer refused to bargain only after the Regional Director had determined that a question of representation existed. The Administrative Law Judge emphasized that a "critical factor" in his recommendation was that the employer's refusal to bargain had occurred in a context totally devoid of any antiunion animus. In adopting the Administrative Law Judge's findings and recommendations, the Board stressed that the decertification petition must raise a "real question of representation" in order for it to justify an employer's refusal to bargain on a new contract. The Board further clarified its stance by stating that the union could continue to administer the contract and could still process grievances.

*Telautograph* provides guidance for an employer confronted with a union demand that bargaining on a new contract take place even though a decertification petition has been filed. The employer should not refuse to bargain until the Regional Director finds that a question of representation exists and directs an election. Providing that the em-

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223. The employer and the union had a longstanding collective bargaining relationship covering a unit of 11 employees. The employer did not assert that it had possessed any doubts prior to the filing of the petition. *Id.* at 893.
224. *Id.*
225. *Id.* at 894.
226. *Id.* at 892.
ployer has engaged in no antiunion conduct, his refusal to bargain on a new contract while continuing to recognize the union should not block the prompt holding of the decertification election, assuming that the Regional Director does not mechanically apply the blocking charge rule.

THE BLOCKING CHARGE RULE

In an exercise of its discretion under the Act, the Board has long taken the position that it will generally not conduct an election in a unit during the pendency of unwaived unfair labor practice charges relating to that unit.\textsuperscript{227} Since the unfair labor practice charge "blocks" the holding of the election, this policy has been labelled the "blocking charge" rule.

The blocking charge rule is based on the premise that it would contravene the purposes of the Act to proceed with an election arguably tainted by an employer's unfair labor practices.\textsuperscript{228} As one court succinctly noted, "it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing."\textsuperscript{229} The evident rational underpinning to this rule has led numerous courts to cite it with approval.\textsuperscript{230} The Board's application of the rule, however, has not always met with the uncritical approval of the courts.

In a series of cases arising in the Fifth Circuit, the courts have had occasion to scrutinize the Board's procedures for delaying the holding of a decertification election upon the filing of unfair labor practice charges. In each case, the threshold question was whether the federal district court had jurisdiction, since the challenged ruling was an interim order in a representation case. Generally, decisions of the NLRB in representation cases are not reviewable by the district courts,\textsuperscript{231} and under section 10(f),\textsuperscript{232} only final orders of the Board are subject to re-

\begin{itemize}
  \item \textsuperscript{227} The blocking charge rule was first applied in United States Coal & Coke Co., 3 N.L.R.B. 398 (1937).
  \item \textsuperscript{228} See text accompanying note 165 supra. See also Newport News Shipbldg. & Dry Dock Co. v. NLRB, 631 F.2d 263 (4th Cir. 1980).
  \item \textsuperscript{229} Bishop v. NLRB, 502 F.2d 1024, 1029 (5th Cir. 1974).
  \item \textsuperscript{230} See id. and cases cited therein.
  \item \textsuperscript{231} R. GORMAN, BASIC TEXT ON LABOR LAW 59-65 (1976).
  \item \textsuperscript{232} Section 10(f) provides in pertinent part:

  Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

\end{itemize}

view by the circuit courts. The United States Supreme Court decision in *Leedom v. Kyne* was seen as providing the basis for jurisdiction in the blocking charge cases. In *Leedom v. Kyne*, the Court held that the federal district courts are empowered to grant injunctive relief in representation cases where the Board has acted contrary to a specific provision in the Act and where the employees' rights under the statute will otherwise be denied because there is no statutory mechanism by which they can enforce their rights.

In *Templeton v. Dixie Color Printing Co.*, employees brought suit complaining that their decertification petition filed in 1968 had been held in abeyance for three years because of an unfair labor practice charge filed in 1964. Stating that the only issue in the case was the arbitrary use of the blocking charge procedure, the Fifth Circuit commented, "The short of the matter is that the Board has refused to take any notice of the petition." The court limited the applicability of its holding by stating that it was not considering how the blocking charge rule should be applied against employers or when it would be within the Board's discretion to refuse to process a decertification petition. The thrust of the *Templeton* court's decision is that by delaying, the Board had failed to act in accordance with a specific provision of the Act and, as a result, employees were being denied their statutory right to determine whether they wanted to be represented for the purposes of collective bargaining. The court, therefore, ordered the Board to consider the decertification petition without delay. Although the court in *Templeton* did not order that the decertification election be held, it made quite clear in dicta that the underlying rationale for the blocking charge rule was inapposite in that case and that the election should be held promptly.

234. 444 F.2d 1064 (5th Cir. 1971).
235. The union filed charges in 1964. In early 1966, the Board found that the employer had violated §§ 8(a)(1) and 8(a)(5), and ordered reinstatement of the unfair labor practice strikers. Dixie Color Printing Corp., 156 N.L.R.B. 143 (1966). In 1966, the Board's order was enforced. Dixie Color Printing Corp. v. NLRB, 371 F.2d 347 (D.C. Cir. 1966). Bargaining ceased in October 1967 when impasse was reached. 444 F.2d at 1066. In January 1968, an employee decertification petition was filed. *Id.* Later in the year, both the Board and the union went back to the District of Columbia Circuit seeking a contempt citation. This was still pending in 1971. *Id.*
236. *Id.* at 1069.
237. *Id.* at 1070.
238. Section 9(c)(1) provides in pertinent part:

> [W]henever a petition shall have been filed, . . . the Board shall investigate such petition.

239. 444 F.2d at 1070.
240. For instance, the court observed that it was "unlikely that there are past unfair labor
The ramifications of Templeton were explored the following year in Surratt v. NLRB,\textsuperscript{241} a case also arising in the Northern District of Alabama. In Surratt, an employee decertification petition was filed in December 1970, fourteen months after the union had been certified. After the petition was filed, the union filed charges under section 8(a)(5), alleging that the employer had not been bargaining in good faith since June 1970. Approximately six weeks later, the Regional Director dismissed the decertification petition on the basis of the blocking charge rule. After the Board affirmed the dismissal, employees filed suit in federal district court. When the case came before the Fifth Circuit, the Board has not yet rendered its decision on the 8(a)(5) complaint, but it was known that the Administrative Law Judge had recommended that the charges be dismissed. The court in Surratt stated:

The Board should not be allowed to apply its "blocking charge practice" as a per se rule without exercising its discretion to make a careful determination in each individual case whether the violation alleged is such that consideration of the election petition ought to be delayed or dismissed.\textsuperscript{242}

The court clarified its position when responding to the Board's argument that Surratt should be distinguished from Templeton on the grounds that the delay in Templeton was much longer. The court noted that this was a difference of degree, not principle, and that the Board should make a careful determination before deciding to delay the decertification election.\textsuperscript{243}

The limited utility that Templeton has for employees seeking to compel the Board to conduct a decertification election became apparent in Bishop v. NLRB.\textsuperscript{244} In Bishop, the union filed unfair labor practice charges against the employer, Winn-Dixie Stores,\textsuperscript{245} in late 1969. The case was still slowly making its way up to the Board when an employee decertification petition was filed in April 1972. The Regional Director determined that the unfair labor practice charges had merit and then applied the blocking charge rule and dismissed the petition.

practices which have a present impact upon the fair and free choice of bargaining representatives by the employees." \textit{Id.} The court's observations are problematical since in the seven years since the original unfair labor practice charge, no contract had ever been concluded and 17 strikers had not yet been reinstated. In addition, the contempt citation was still pending.

\textsuperscript{241} 463 F.2d 378 (5th Cir. 1972).
\textsuperscript{242} \textit{Id.} at 381.
\textsuperscript{243} \textit{Id.}
\textsuperscript{244} 502 F.2d 1024 (5th Cir. 1974).
\textsuperscript{245} The Fifth Circuit noted that the employer was "no stranger to this Court in unfair labor practice proceedings." \textit{Id.} at 1025 n.1 (listing five such cases involving the employer).
The employees then filed suit in federal district court seeking an order compelling the National Labor Relations Board to process their petition. The Fifth Circuit responded by noting that the district court should have dismissed the case for lack of jurisdiction over the subject matter since the "carefully circumscribed jurisdiction" carved out in *Leedom v. Kyne*, *Templeton* and *Surratt* did not reach the instant case. The court noted that jurisdiction would exist only where the Board had failed to act in accordance with a specific provision of the Act. Here, the Board had acted in accordance with section 9(c)(1). It had investigated the petition when it was filed, and it had made a determination to dismiss the petition after careful consideration of the merits of the individual case. The court emphasized that the Board had not followed a mechanistic approach as it had in *Templeton* and *Surratt* in applying the blocking charge rule as if it were a per se rule.

Subscribing to the view that the employees' desire to rid themselves of the union might well be the result of the employer's unfair labor practices, the court in *Bishop* commented that if the employees still wanted to oust the union after it had had an opportunity to operate free from the employer's unlawful conduct, they then could file another decertification petition. As *Hamil v. Youngblood* illustrates, however, the employees may be stymied the second time around.

In *Hamil*, the Board found in 1972 that the employer had violated section 8(a)(5). The following year, the Tenth Circuit enforced the Board's order and bargaining commenced. In late autumn of 1973, the union charged that the employer was still bargaining in bad faith and asked that the Tenth Circuit hold the employer in contempt. A decertification petition filed in 1975 was dismissed. In February 1976, the union and the employer signed a collective agreement. On September 8, 1976, a Special Master for the Tenth Circuit recommended that the employer be held in contempt of the court's 1973 order. Two weeks later, the employees filed their second decertification petition. It

246. *Id.* at 1026 n.2. The court commented that the matter seemed moot since the Board had "processed" the petition by virtue of affirming the Regional Director's determination that no real question of representation existed. The Fifth Circuit rendered a decision in the case in order not to add its "mite to this intolerable delay." *Id.* at 1027 n.2.

247. *Id.* at 1027.

248. *Id.* at 1031.

249. *Id.* at 1029.


251. The charge alleged that the employer refused the union access to the plant in 1973, and that there were some unilateral job classifications and merit increases during this period. *Id.* at 3021.

252. The contract was made retroactive to November 1975. *Id.* at 3022.
was dismissed two days later by the Regional Director on the basis of the blocking charge rule. In his letter, the Regional Director cited the contempt charge still pending in the Tenth Circuit, a charge that related to conduct during negotiations for a contract that was by then approaching expiration.

Asserting that it is the responsibility of the court to determine whether the Board has rationally exercised its discretion in applying the blocking charge rule, the district court in *Hamil* found that it could not make such a determination because the Regional Director had not made an investigation or subjective determination on the merits of the individual case and that he had not articulated his reasons for dismissing the petition. Accordingly, the court held that, before the Regional Director applies the blocking charge rule, an investigation should be made to determine whether the alleged unlawful conduct of the employer was of such a nature as to make a free election unlikely. Further, the Regional Director should set out the factors on which he based his decision, thereby providing the basis for proper judicial review.

The court in *Hamil* would not go so far as to detail the nature of the required investigation. The court did note that such an investigation would be tailored to the requirements of each case, which would reflect whether the Board was already familiar with events relating to the unit.

The *Hamil* court's formulation strikes a balance between permitting unfettered Board discretion and hampering the Board unnecessarily in the application of the blocking charge rule. As the court indicated, the Board will, in some cases, possess sufficient knowledge of the unfair labor practices affecting the unit employees, and these facts, if not stale, will obviate the need to undertake a time-consuming and costly formal investigation.

The court in *Hamil* was sensitive to the rationale behind the blocking charge rule: that the employer's alleged unlawful conduct could prevent a reasoned choice by the employees. Unless it is determined that the employer's conduct is likely to restrain the employees in exercising their free choice, there is no reason to dismiss a decertification petition, thereby thwarting the employees' statutory rights. The *Hamil* decision also eliminates one unintended side effect of the blocking charge rule: that unions, anticipating a mechanistic application of

253. *Id.* at 3021-23.
254. *Id.* at 3021.
the rule, might be encouraged to file unfair labor practice charges to forestall a decertification election.\textsuperscript{255}

**Conclusion**

With management attorneys and labor relations consultants explaining the mechanics of the decertification process at seminars for company executives,\textsuperscript{256} it is not surprising that the unions' success rate in decertification elections has been declining. What is more difficult to pinpoint are the reasons why the number of petitions filed has increased so sharply in the past five years and how much of this increase can be attributed to the activities of labor relations consultants. One spokesman for the labor movement has charged that companies encourage "spontaneous" decertification drives as part of a "deliberate, calculated campaign" to destroy unions.\textsuperscript{257} Regardless of the accuracy of this allegation, it is clear that an increasing number of employers have become more sophisticated in the ways in which they communicate to their employees their viewpoint that the employees do not need the union.\textsuperscript{258}

The decertification scenario envisioned by opponents of the Taft-Hartley Act does occur, but only infrequently. In briefly discussing "the power of an employer to break a labor union if he chooses to do so," Senator Pepper in 1947 argued that an employer who had taken a very hard bargaining stance and thereby provoked a strike could permanently replace economic strikers and then petition for a decertification election in which the striking employees would not be entitled to vote.\textsuperscript{259} Now that striking employees retain their right to vote in an NLRB election for one year,\textsuperscript{260} an employer must be in a position to

\textsuperscript{255} Id. at 3022. See also NLRB v. Minute Maid Corp., 283 F.2d 705, 710 (5th Cir. 1960).


\textsuperscript{257} Remarks of Thomas Donahue, Executive Assistant to AFL-CIO President George Meany, before the convention of the Louisiana AFL-CIO, Mar. 20, 1979. DAILY LAB. REP. (BNA), MAR. 20, 1979, AT E1-2.

\textsuperscript{258} See, e.g., Raskin, *Big Labor Strives to Break Out of Its Rut*, FORTUNE, Aug. 27, 1979, at 32-40. See also Oversight Hearings, supra note 256, at 246, for a report of a labor consultant's specific recommendations on how companies can achieve and maintain nonunion status.

\textsuperscript{259} LEGISLATIVE HISTORY II, supra note 22, at 1606. At that time, the only statutory limitation on the immediate holding of the decertification election would have been if an election had been held in the same unit within the preceding year.

\textsuperscript{260} In 1959, § 9(c)(3) of the Taft-Hartley Act was amended so that economic strikers who are not eligible for reinstatement are nevertheless entitled to vote in an NLRB election for 12 months following the commencement of the strike.
operate during a very long strike in order to achieve decertification in this fashion.\textsuperscript{261} Hence, few decertifications are of this type, although the ones that are tend to excite very strong emotions.\textsuperscript{262}

Labor relations practitioners commonly believe that, in the majority of cases, the employees' main reason for filing a decertification petition is their perception that the union has been ineffective at the bargaining table.\textsuperscript{263} The employees' disenchantment with the union is especially likely to occur during the life of the first contract when their expectations of improvements in wages and conditions are not met.

It may be that employers are now more attuned to the possibility of decertification when confronting a vulnerable union as contract expiration draws near.\textsuperscript{264} As one court noted, "there comes a point when hard bargaining ends and obstructionist intransigence begins."\textsuperscript{265} Admittedly, this dividing line is not always easy to detect,\textsuperscript{266} but if an employer takes a vigorous hard bargaining stance yet is able to remain within the arena of lawful good faith bargaining, there is the distinct possibility that it may undermine the employees' confidence in the union's ability sufficiently so that the employees are moved to decertify the union. One example of this occurred in \textit{Firestone Synthetic Rubber & Latex Co.}\textsuperscript{267}

In \textit{Firestone}, the union was certified in 1965. Not until August 1966 was a contract concluded, and this contract was for one year only with provision for a wage reopener after three months. In November 1966, the union reopened negotiations on wages. Unable to reach agreement on this issue, the union struck in mid-January 1967. On April 28, 1967, the employer wrote to each employee to communicate its last offer. Within a week, the union indicated that it would accept

\textsuperscript{261} Typically, the employer is able to hire persons who are willing and able to permanently replace the strikers. Now that an increasing number of plants can be operated, if not at full capacity at least near full capacity, by non-exempt, non-unit personnel, the employer may be given time at the beginning of a strike to consider hiring replacements.

\textsuperscript{262} \textit{See, e.g.}, \textit{Coors Undercuts Its Last Big Union}, \textit{Business Week}, July 24, 1978, at 47-48. \textit{See also} \textit{Cook, supra} note 15, at 38.

\textsuperscript{263} Id.

\textsuperscript{264} Whether an employer wishes to capitalize on this vulnerability is a strategic question. An employer who is aware of the union's weakness may not welcome decertification if another, more aggressive union is actively organizing in the area. It cannot be denied, however, that some labor consultants view bargaining to impasse as a "prelude to union ouster." \textit{See Oversight Hearings, supra} note 256, at 32 (statement of Alan Kistler, Director of the AFL-CIO's Dep't of Organization and Field Services). \textit{See also} \textit{Unions: Turning Them Out, The South Magazine, Nov. 19, 1979, at 40, for the advice of a management labor lawyer.}

\textsuperscript{265} \textit{NLRB v. Big Three Indus., Inc.}, 497 F.2d 43, 47 (5th Cir. 1974).

\textsuperscript{266} \textit{See, e.g.}, \textit{Murphy, Impasse and the Duty to Bargain in Good Faith}, 39 U. PIT. L. REV. 1, 11 (1977).

\textsuperscript{267} 173 N.L.R.B. 1179 (1968).
this offer but conditioned its acceptance on certain terms relating to the resumption of work, terms that the company found unacceptable. On June 2, 1967, an employee decertification petition was timely filed. On June 7, the union gave notice, as required by statute, of its desire to begin bargaining on a new contract because the current one was due to expire on August 5. At this point, the company refused to bargain, claiming that it had a good faith doubt about the union's majority status. On July 27, 1967, the employer unilaterally implemented its last wage offer and cancelled the striking employees' medical and life insurance. The union then filed unfair labor practice charges. The Board held that at no point did the employer violate the Act; hence, the strike at all times was an economic strike. In addition, the employer was found to have a good faith doubt of the union's majority status; therefore, its refusal to bargain on a new contract was lawful.

In Firestone, it is not surprising that the employees were disenchantment with the union. In the eighteen months following certification, they had worked under a union contract for less than six months, had been out on strike over four months and had seen their union achieve little more than could have been expected with no union on the scene.

Similarly destructive of the union’s support is an inability to conclude a first contract, particularly where the employer’s conduct is deemed to be lawful. Even when unlawful employer conduct occurs, the impact on the employees may be just as likely to inspire decertification. When hard bargaining slips over the line into bad faith bargaining, the remedy for the section 8(a)(5) violation will normally be an order to cease and desist from such conduct and to undertake bargain-
ing in good faith. As noted above, a decertification election will not be held for a reasonable period following the commencement of good faith bargaining, but it has never been suggested that this period should exceed one year; and yet, as one court has noted, "some practices may be of such pernicious nature that their effect upon employees is clearly apparent and longlasting."275 Thus, if this second round of bargaining should be drawn out, the employees may become demoralized. From their perspective, they have waited during one fruitless period of (bad faith) bargaining; then nothing happened for a substantial period of time (while the case worked its way up through the Board and the courts); and now, renewed bargaining still has not yielded a contract. The reaction of employees in one such case, as expressed in their decertification petition, was predictable: "It is our feeling that [the union] has accomplished nothing in our favor, therefore [sic] we would like a new election."276

Unlike Western European unions, which draw on a well of class-based ideological support, American unions have always appealed to workers on the basis of the material results that unions can achieve. Yet, as the Firestone case indicates, American employers are increasingly willing to take a firm stance277 to demonstrate to their employees their conviction that unionization does not necessarily bring better terms and conditions of employment. In some instances, no doubt, the employer's hard bargaining stance is largely the product of the employer's refusal to accept collective bargaining and the concomitant resolve to thwart the bargaining process.278 In such cases, whether the employer actually bargains in good faith and whether the employer will be found to have bargained in good faith by the Board are issues that have little impact on the dynamics of industrial relations. When the unit employees come to the conclusion that the union's achievements fall short of the anticipated standard, decertification becomes a distinct possibility.

275. Hamil v. Youngblood, 96 L.R.R.M. 3016, 3023 (N.D. Okla. 1977). The court in Hamil was referring to the validity of applying the blocking charge rule when the conduct complained of had occurred three years earlier. The unfair labor practice case had not yet been closed.

276. NLRB v. Big Three Indus., Inc., 497 F.2d 43, 52 (5th Cir. 1974). In this case, the employer challenged the NLRB's bargaining order and extension of the certification year as a means of remedying the § 8(a)(5) violation. See text accompanying note 164 supra.

277. Unions charge that some employers deliberately offer unacceptable terms during bargaining as part of a strategy to force the union to go out on strike. Having already planned to operate during the strike, the employer suffers minimally from the strike while inflicting serious damage on the union. See AFL-CIO NATIONAL ORGANIZING COORDINATING COMMITTEE, 21 REPORT ON UNION BUSTERS 3 (Oct. 1980).

278. See, e.g., Taking Aim at "Union-Busters," BUSINESS WEEK, Nov. 12, 1979, at 98, 102 for a report on tactics advocated by some labor consultants.