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LABOR LAW—UNIONS—UNION MUST PETITION FOR AN ELECTION

The union possessed authorization cards¹ from a majority of the employees and demanded recognition as the exclusive bargaining representative. The employer refused either to recognize the union or to petition the National Labor Relations Board² for an election.³ The union filed an unfair labor practice charge against the employer for refusing to bargain collectively with the representative of the employees,⁴ but the Board refused to issue a bargaining order.⁵ The court of appeals reversed the Board’s decision, holding that it was inconsistent with the National Labor Relations Act⁶ for the Board not to find the employer guilty of an unfair labor practice.⁷ The United States Supreme Court granted certiorari.⁸ Held, reversed. The Supreme Court held in a five to four decision that for practical administrative reasons, it was not an abuse of discretion for the Board to refuse to issue a bargaining order when an employer refused to recognize a union that possessed authorization cards from a majority of employees and also refused to petition for an election. Linden Lumber Division, Summer & Co. v. NLRB, 95 S. Ct. 429 (1974).

The use of authorization cards as a means of obtaining exclusive representative status has been a source of much litigation.⁹

¹ An authorization card is a signed statement by an employee designating a particular union to represent him as his sole bargaining agent under the National Labor Relations Act. An example of an authorization card may be found in NLRB v. Cumberland Shoe Corp., 351 F.2d 917, 918 (6th Cir. 1965).
² Hereinafter referred to as the Board.
⁴ “It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a).” 29 U.S.C. § 158(a)(5) (1970).
⁵ If an employer’s unfair labor practices tend to make a fair election improbable, the Board will order him to bargain with the union. Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962).
⁹ See Gorden, Union Authorization Cards and the Duty to Bargain, 19 LAB. L.J. 201 (1968); Rains, Authorization Cards as an Indefensible Basis for Board Directed Union Representation Status; Fact and Fancy, 18 LAB. L.J. 227 (1967);
Under the Wagner Act, an employer could petition for an election only when two or more unions each claimed to represent the same employees. Thus, when a single union demanded recognition based on authorization cards, the employer would either have to recognize the union or refuse recognition and risk being found guilty of the unfair labor practice of refusing to bargain. In Franks Brothers Co. v. NLRB, the Supreme Court held that the Board could order the employer to bargain with the union it had wrongfully refused to recognize, even though that union had subsequently lost its majority status.

Section 9(c)(1)(B) of the Taft-Hartley Act expanded the right of employers to petition for an election by allowing employer petitions even when only one union demanded recognition. The Board’s test for allowing an employer to refuse a demand for recognition and petition for an election, however, was that the employer must have a “good faith doubt” of the union’s majority status. The petition could not be used to gain time to dissipate the union’s majority, and employer unfair labor practices tending to do so would be evidence of a lack of a good faith doubt. If the Board in its investigation and hearing found that a good faith doubt of the majority status existed, it would then conduct an election. The burden of proving a good faith doubt remained on the employer until 1965, when the Board held that its own General Counsel had

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15 185 F.2d at 741.


17 29 U.S.C. § 159(c)(1) (1970) provides, in part:

Whenever a petition shall have been filed . . . the Board shall investigate such petition and . . . provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that a question of representation exists, it shall direct an election by secret ballot and certify the results thereof.
the burden of proving employer bad faith before it would issue a bargaining order.\textsuperscript{19}

The good faith test continued in effect until 1969, when the Board announced in oral argument in \textit{NLRB v. Gissell Packing Co.} that it was abandoning it.\textsuperscript{20} While \textit{Gissel} held that an employer who committed unfair labor practices likely to dissipate a union's majority status could not insist upon an election before it must bargain with the union,\textsuperscript{21} the important aspect of the case was the Board's decision not to issue a bargaining order solely on the basis that the employer refused either to recognize a union that possessed authorization cards purporting to establish the union's majority or to petition the Board for an election.\textsuperscript{22} Thus, the Supreme Court's decision in \textit{Linden} gives judicial sanction to procedural policy that the Board adopted in \textit{Gissel}.

The issue in \textit{Linden} of whether an employer who refuses recognition must petition the Board for an election centered around the interpretation of three provisions of the Act.\textsuperscript{23} Two of these sections\textsuperscript{24} clearly impose a duty on the employer to bargain with the representative chosen by a majority of employees in an appropriate unit.\textsuperscript{25} However, neither section prescribes the manner in which this representative must be chosen.\textsuperscript{26} The employer is free to recognize the union on the basis of authorization cards,\textsuperscript{27} but the pre-

\textsuperscript{19} John P. Serpa, Inc., 155 N.L.R.B. 99, 100 (1965).
\textsuperscript{21} Id. at 600.
\textsuperscript{22} Id. at 594.

Section 158(a)(5) provides that "[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a)."

Section 159(a) provides, in part, "Representatives . . . selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all employees in such unit . . . ."

Section 159(c)(1)(B) provides, in part, "Whenever a petition shall have been filed . . . by an employer, alleging that one or more . . . labor organizations have presented to him a claim to be recognized as the representative defined in section a; the Board shall . . . direct an election . . . ."

\textsuperscript{25} 95 S. Ct. at 434 n.1.
\textsuperscript{26} Id. at 434-35.

\textsuperscript{27} See \textit{NLRB v. Gissel Packing Co.}, 395 U.S. 575, 596. However, an employer may not recognize a minority union. \textit{Garment Workers Union v. NLRB}, 366 U.S. 731 (1961). If this happens, the Board requires that the employer withhold recognition until an election can be held. \textit{Id.} at 739.
ferred method is a Board-conducted election. Justice Stewart, joined by Justices White, Marshall, and Powell, dissented and agreed with the conclusion of the court of appeals—that Congress, by enacting the section that authorizes employer petitions, was placing the burden on the employer to petition for an election if he chose not to recognize the demand based on authorization cards. Justice Douglas, writing for the majoritys concluded, however, that this section was enacted only for the purpose of eliminating the discrimination against employers that occurred under the Board’s prior rules permitting an employer to petition for an election only when two or more unions each claimed to represent the same employees and that this section was not intended to place a burden on either party. Justice Douglas observed that the Board has more expertise in this area and that it was the Board’s judgment that employer petitions should not be required. For these reasons, the Court held that the Board’s decision to place the burden on unions to invoke the election process when an employer refused recognition was not an abuse of discretion.

Perhaps the most important effect of the burden-shifting aspect of Linden will be to aid in reducing the time involved in determining employee representation. For example, an important issue in deciding the representation question is the determination of the appropriate unit to be represented. Employer petitions often request a unit larger than the one the union wants so that the union will not have the majority backing it would have in the smaller unit. If these two units differ significantly, the Board will dismiss the employer’s petition, placing the burden on the union to file its own petition. With the decision in Linden, a union, knowing that the employer is not required to file a petition, will

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28 95 S. Ct. at 431.
29 Truck Drivers Local 413 v. NLRB, 487 F.2d 1099, 1111 (D.C. Cir. 1973).
31 95 S. Ct. at 435 (dissenting opinion).
32 95 S. Ct. at 433. Justice Douglas cites the debate on the bill, where Senator Taft, one of the sponsors of the bill, stated that the purpose of this section is simply to allow an employer to petition. No reference was made to making an employer petition mandatory. 93 Cong. Rec. 3838 (1947).
33 95 S. Ct. at 434.
34 Id.
35 Id. at 433.
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file its own petition and thus shorten the process. Also, a union that petitions for an election, rather than filing unfair labor practice charges will expedite this recognition process. As the Court pointed out, the Board's ruling in *Linden* took approximately four and one-half years, and the ruling in *Wilder Manufacturing Co.* took approximately six and one-half years, while the average time for processing an election petition is only forty-five days.

*Linden*, then, leaves an employer with four alternatives when presented with a demand for recognition based on authorization cards. First, he may simply recognize the union. Second, he may petition for a Board-conducted election. Third, he may agree to be bound by the results of an expedited consent election. Finally, he can refuse to recognize the union or to petition for an election and, as in *Linden*, transfer the burden of invoking the Board's election process to the union.

William G. Mercer

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37 95 S. Ct. at 433-34.
38 81 L.R.R.M. 1039 (1972). This case was consolidated with *Linden* before the court of appeals. See note 7 supra.
39 95 S. Ct. at 432.
40 Id. at 435-36.
43 See 29 C.F.R. § 102.62 (1974) which provides, in part, that when a petition has been duly filed, the employer and the labor organization may enter into an agreement providing for a waiver of hearing and a consent election.
44 95 S. Ct. at 434.