CASE NOTES

Labor Law—Labor Management Relations Act—Refusal to Bargain—Use of Authorization Cards to Establish Majority Status Within One Year of Election Defeat.—*Conren, Inc. v. NLRB.*[1]—In December 1962, Conren, Inc., operator of the Great Scot Supermarket, learned of organizational activity by Retail Clerks Local 550, and filed a representation petition. Soon thereafter, Conren withdrew the petition and, without any election, signed a collective-bargaining contract with Teamsters Local 144. Retail Clerks promptly filed a section 8(a)(2)[2] charge against Conren, which was countered with a section 8(b)(7)(A)[3] charge against Retail Clerks. Conren, however, withdrew this charge and joined with the Teamsters in signing a settlement agreement, approved by a Regional Director of the National Labor Relations Board, which provided in part that Conren would not recognize the Teamsters unless and until they were certified. Conren then filed another representation petition. Shortly thereafter, a Board-conducted election was held to determine whether Local 550 of the Retail Clerks Union (hereinafter called the union), the Teamsters, or no union was to represent Conren's employees at its Great Scot store. Both the Retail Clerks and the Teamsters lost the election, and the Board certified this result. The validity of this election has not been attacked.

Nine months and sixteen days after the valid election, Conren received a demand from the union for recognition as the collective-bargaining representative for a unit consisting of fifty-three employees, thirty-two of whom had designated the union as their representative by signing authorization cards. Conren ignored this demand, whereupon the union filed section 8(a)(5)[4] charges. Conren's defense rested on Section 9(c)(3) of the Labor Management Relations Act, which states that "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."[5] Conren contended that there was no duty to bargain with the union, since it had lost a valid election within the past year. Although section 9(c)(3) of the act expressly embraces only an "election" within its limitation, Conren reasoned that the national

[1] 368 F.2d 173 (7th Cir.), enforcing 156 N.L.R.B. No. 43, 61 L.R.R.M. 1090 (1966).

[2] Section 8(a)(2) of the LMRA provides that "it shall be an unfair labor practice for an employer . . . (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(2) (1964).

[3] Section 8(b)(7)(A) of the LMRA provides that:

> It shall be an unfair labor practice for a labor organization or its agents . . . (7) to picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . (A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization . . . .

73 Stat. 525 (1959), 29 U.S.C. § 158(b)(7)(A) (1964).

[4] Section 8(a)(5) provides that "it shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [9(a)] . . . ." 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).

[5] 61 Stat. 143 (1947), 29 U.S.C. § 159(c)(3) (1964).

labor policy of furthering industrial stability equally afforded a basis for precluding a union which had lost a representation election from acquiring within the prescribed twelve-month period a representational status by other means, such as the signing of authorization cards by a majority of the employees involved.[6]

The Board upheld the Trial Examiner's findings that Conren had violated sections 8(a)(1), (2), (3), and (5) of the act, and ordered Conren to cease and desist from the unfair labor practices found.[7] Affirmatively, the Board required, *inter alia,* that Conren, upon request, bargain collectively with the union.[8] The Court of Appeals for the Seventh Circuit enforced the Board order. HELD: An employer violates section 8(a)(5) of the LMRA by refusing to bargain with a union which demands recognition on the basis of authorization cards, even though the union has lost a representation election within the preceding twelve months, unless a good-faith doubt as to majority status can be shown.

In a strong dissenting opinion, Judge Kiley took the position that Conren had not violated section 8(a)(5) by refusing to bargain, and that the authorization cards were insufficient to put Conren under a duty to bargain, because the union had lost a valid election within the preceding year. The dissent reasoned that the prohibition in section 9(c)(3) is not limited merely to elections, but to all forms of recognitional demands, and that this section indicates a congressional policy of industrial peace which would be disrupted as much by the solicitation of authorization cards as by a second election. Judge Kiley argued, moreover, that although Congress had placed a time limit on only one means of selecting representatives, the court was not precluded from imposing this limit on other means of securing representatives when the policy of the act would thereby be furthered. Specifically, the dissent contended that where a "solemn and costly" Board-conducted election is lost by a union, and within a year the union demands recognition by a less "solemn" expression of majority support, the election result should prevail over the less formal determination of majority status.[9]

It is submitted that the court, in holding that Conren had violated section 8(a)(5), recognized both the basic purpose and policy of the act and the fact that a bargaining representative may be selected by means other than a formal election. Further, the court recognized that the only available defense to a section 8(a)(5) charge, where no union has yet been selected, is good-faith doubt as to the union's majority status, which Conren concededly did not have.

The fundamental purpose of the LMRA, as succinctly stated in the preamble, is "to eliminate the causes of certain substantial obstructions to the

[6] 368 F.2d at 174.

[7] 156 N.L.R.B. No. 43, 61 L.R.R.M. 1090 (1966).

[8] Conren was also directed to disestablish and withhold recognition from an employee organization that it was found to have instigated, aided, and supported in violation of the act. Further, Conren was required to offer reinstatement and back pay to certain employees it was found to have discriminatorily discharged for union activity.

[9] 368 F.2d at 176.

free flow of commerce . . . by encouraging . . . collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . ."[10] This basic policy must be kept in mind when a restrictive provision such as section 9(c)(3) is analyzed, for such provisions are specific and should not be broadly construed.[11] The design of the act is to foster the principle of collective bargaining with the end of insuring industrial peace,[12] and the Board has been entrusted with the task of facilitating this goal.[13] To implement the basic policy of the act, certain affirmative organizational rights are given to employees in section 7,[14] and exclusive representatives for effectuation of these rights are selected pursuant to section 9(a).[15] Significantly, section 9(a) does not provide any specific or preferable method of selecting representatives. It merely establishes the requirement that a majority of the employees in an appropriate bargaining unit make the selection. Accordingly, collective-bargaining representatives have been selected or designated by either a formal or an informal process.[16]

The *formal* process, involving a Board-conducted election, is provided for in section 9(c)(1) of the act,[17] but its use is limited. The election is merely a means for expressing free choice, and if such choice has been manifested otherwise, there is no need for this procedure.[18] Further, an election is not conducted merely because it was sought, but depends on the discretionary determination by the Board that a "question of representation" exists.[19] Because of this inherent limitation on the use of a Board-conducted election, the procedure in section 9(c)(1) cannot be considered the exclusive method of obtaining representation.

The *informal* methods of obtaining representation are not explicitly enumerated in the act, but have been used and approved many times.[20] A union can obtain representational status by authorization cards,[21] by a state-

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10 61 Stat. 136 (1947), 29 U.S.C. § 151 (1964).

11 See NLRB v. Teamsters Union, 362 U.S. 274 (1960); Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); Local 861, IBEW, 135 N.L.R.B. 250 (1962).

12 International Harvester Co., 138 N.L.R.B. 923, 926 (1962).

13 Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

14 "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

15 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1964).

16 See UMW v. Arkansas Oak Flooring Co., 351 U.S. 62, 71-72 & n.8 (1956); NLRB v. Western Meat Packers, Inc., 350 F.2d 804, 806 (10th Cir. 1965); NLRB v. Johnnie's Poultry Co., 344 F.2d 617, 619 (8th Cir. 1965); Shuman, Requiring a Union to Demonstrate Its Majority Status by Means of an Election Becomes Riskier, 16 Lab. L.J. 426 (1965); Note, Union Authorization Cards, 75 Yale L.J. 805 (1966).

17 61 Stat. 143 (1947), 29 U.S.C. § 159(c)(1) (1964).

18 NLRB v. Air Master Corp., 339 F.2d 553, 556 (3d Cir. 1964).

19 NLRB v. American Mfg. Co., 351 F.2d 74, 78 (5th Cir. 1965).

20 See authorities cited note 16 supra.

21 UMW v. Arkansas Oak Flooring Co., supra note 16. See generally Lewis, The Use and Abuse of Authorization Cards in Determining Union Majority, 16 Lab. L.J. 434 (1965).

conducted election,[22] or by a Board order to bargain.[23] The historic *Bernel Foam Prods. Co.* decision[24] has given added importance to the use of cards to prove majority status, particularly where an election could not be fairly conducted.[25] Recent cases have significantly expanded the employer's obligation to bargain on the basis of nonelective showings of majority status.[26] Finally, although the informal methods may interfere with certain employer rights which would be available if a Board-conducted election were held,[27] this does not dictate that the informal methods of determining representatives are limited.

Although section 9(c)(3) limits the use of the formal method of selecting representatives, the one-year election bar should not restrict use of the informal methods. This contention is supported by the legislative history of section 9(c)(3). Under the Wagner Act, the Board was given authority to certify a union upon determination by election or by "any other suitable method" that the union commanded majority support.[28] The Board developed a "working rule" that if the certification were based on a Board-conducted election, it would be honored for a reasonable time, ordinarily one year, in the absence of unusual circumstances. This working rule, the predecessor of section 9(c)(3), was expressly directed at limiting a second election, and was not applicable to the informal methods of obtaining representatives. The committee reports and floor statements prior to the enactment of Taft-Hartley do not specifically address themselves to the scope of section 9(c)(3).[29] However, both the history of the section's application prior to 1947, and the fact that it speaks explicitly of "election," indicate that Congress was concerned only with limiting the frequency of Board-conducted elections when it enacted this provision.

There is no doubt that section 9(c)(3) was enacted to provide for industrial stability, but this stability is that which *flows from* collective bar-

[22] NLRB v. Western Meat Packers, Inc., supra note 16.

[23] Irving Air Chute Co., 148 N.L.R.B. 59 (1964); Bernel Foam Prods. Co., 146 N.L.R.B. 1277 (1964); Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), enforced, 185 F.2d 732 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951). See Note, 75 Yale L.J. 805, 807-08 (1966), for ways in which a union can obtain a compulsory bargaining order and thus organize the plant without winning an election.

[24] 146 N.L.R.B. 1277 (1964). This case held that a union need not elect between the filing of a § 8(a)(5) charge and participation in an election.

[25] See 1964-1965 Annual Survey of Labor Law, 6 B.C. Ind. & Com. L. Rev. 815, 844 (1965).

[26] E.g., NLRB v. Cumberland Shoe Corp., 351 F.2d 917 (6th Cir. 1965); Snow & Sons, 134 N.L.R.B. 709 (1961), enforced, 308 F.2d 687 (9th Cir. 1962). See also Comment, 33 U. Chi. L. Rev. 387 (1966). Employee participation in a union-called strike or strike vote can also be evidence of union support, resulting in an obligation to bargain. Century Mills, Inc., 5 N.L.R.B. 807 (1938); Rabhor Co., 1 N.L.R.B. 470 (1936).

[27] For example, according to § 8(c), it is not an unfair labor practice, with certain exceptions, for an employer to publicize his views. Without a formal election date, the employer may be unaware of organizational activity and thus might not avail himself as fully of his rights under § 8(c) as where a Board-conducted election will be held.

[28] NLRA § 9(c), 49 Stat. 453 (1935).

[29] See S. Rep. No. 105, 80th Cong., 1st Sess. 418, 431 (1947).

gaining, not the stability achieved by the election itself, or the "stability" achieved by creating a vacuum in which there is no collective labor activity at all. One of the main purposes of section 9(c)(3) is to define clearly the duty of the employer when a representative has been selected.[30] Similarly, another purpose of the one-year rule is to allow a newly certified union a reasonable time in which to fashion a labor agreement.[31] The Board has stated that

> the fruition of collective bargaining in an agreement often requires negotiations lasting several months. It is therefore essential to the effectuation of the policies of the Act that the representative status, *once established,* be vested with a substantial degree of stability.[32] (Emphasis added.)

Both before and after the Taft-Hartley Act, the Board and the courts did not apply the one-year rule to a collective-bargaining relationship established by other than a certified election.[33] Thus, once a representative has been designated by an election, section 9(c)(3) aids the collective-bargaining process, *at this point,* by clearly initiating the obligations and rights of both sides for one year.

That section 9(c)(3) cannot be used as a procedural obstacle to collective bargaining is manifested by the Supreme Court's approval of exceptions to the one-year rule, emphasizing its limited applicability.[34] One such exception is illustrated by *Rocky Mountain Phosphates, Inc.*[35] There the union which was selected in a Board-conducted election became defunct during the subsequent year, and a majority of the employees signed authorization cards designating another union as their representative. The issue was whether an employer, in firm knowledge that the elected union is defunct, can use the one-year certification rule to deprive employees of collective bargaining for the balance of the year simply because the new representative was barred by section 9(c)(3) from establishing its majority status through a Board-conducted election. The Board ordered the employer to bargain, holding that section 9(c)(3) does not deprive employees of their right to select bargaining representatives during the certification year by means other than a Board election.

The continuing duty to bargain is manifest in other areas of the act. For example, the existence of individual employment contracts does not delay the obligation to bargain with a designated union,[36] nor does a contract with one union prevent a craft severance and the obligation presently to bargain with

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30 Soss Mfg. Co., 56 N.L.R.B. 348, 352 (1944).

31 Rocky Mountain Phosphates, Inc., 138 N.L.R.B. 292 (1962).

32 Appalachian Elec. Power Co., 47 N.L.R.B. 821, 828 (1943), enforced, 140 F.2d 217 (4th Cir. 1944).

33 See NLRB v. Mayer, 196 F.2d 286, 289 (5th Cir. 1952); Squirrel Brand Co., 104 N.L.R.B. 289, 290 (1953); Joe Hearin, Lumber, 66 N.L.R.B. 1276, 1283 (1946).

34 See Brooks v. NLRB, 348 U.S. 96 (1954).

35 138 N.L.R.B. 292 (1962).

36 J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

the new group.[37] Disagreement with the Board's determination of the appropriate unit will not relieve an employer from the obligation to bargain.[38] Union picketing in violation of section 8(b)(7)(C) will not be a defense to a section 8(a)(5) charge of refusal to bargain.[39] The employer cannot insist on an election[40] or certification[41] as a condition precedent to bargaining, nor can he insist on a "clear-cut" request for recognition as exclusive bargaining representative when he has no good-faith doubt of union majority status.[42] Filing a representation petition does not suspend the employer's duty to bargain.[43] Furthermore, when a union seeks recognition by authorization cards, there is no requirement that they be delivered or exhibited to the employer as a prerequisite to a demand for bargaining or to a finding of a section 8(a)(5) violation.[44] The act is thus permeated with the philosophy that procedural obstacles cannot be placed in the path of establishing a collective-bargaining relationship. Clearly there is no employer right *not* to bargain. The present state of the law is that once an employer is informed in any manner[45] that a majority of his employees desire representation, and there has been no deceit or coercion by the union, he is required to recognize and bargain in good faith.[46]

Conren had no doubts about the majority status of the union, and was using section 9(c)(3) to shield it from an obligation imposed by both an explicit legislative policy and a clear history of case law. The only defense to a section 8(a)(5) charge which Conren could have invoked is genuine good-faith doubt as to the majority status of the union.[47] But Conren was clearly acting in bad faith, since it had no doubt about the majority status of the union *at the time of* the request.[48] The dissent, which contended that

37 American Potash & Chem. Corp., 107 N.L.R.B. 1418, 1421 (1954); American Seating Co., 106 N.L.R.B. 250, 255 (1953).

38 See May Dep't Stores Co. v. NLRB, 326 U.S. 376 (1945).

39 Greenfield Printing & Publishing Co., 137 N.L.R.B. 363 (1962).

40 NLRB v. Johnnie's Poultry Co., supra note 16; NLRB v. Decker, 296 F.2d 338 (8th Cir. 1961); Snow & Sons, supra note 26.

41 Wheeling Pipe Line, Inc., 111 N.L.R.B. 244 (1955), enforced, 229 F.2d 391 (8th Cir. 1956).

42 Joy Silk Mills, Inc., supra note 23; Differential Steel Car Co., 75 N.L.R.B. 714 (1948).

43 Master Transmission Rebuilding Corp., 155 N.L.R.B. No. 35, 60 L.R.R.M. 1317 (1965); Irving Air Chute Co., supra note 23; Permacold Indus., Inc., 147 N.L.R.B. 885 (1964). The only time that the filing of a representation petition suspends the duty to bargain is when two or more unions file petitions, thus creating "a question of representation affecting commerce," and a Board-conducted election must be held under the *Midwest Piping* doctrine. Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945).

44 Retail Clerks Union, 153 N.L.R.B. 204 (1965).

45 See Shuman, supra note 16, at 426, 427.

46 Jas. H. Matthews & Co., 149 N.L.R.B. 161 (1964), enforced, 354 F.2d 432 (8th Cir. 1965); Irving Air Chute Co., supra note 23; Elliott-Williams Co., 143 N.L.R.B. 811 (1963), enforced, 345 F.2d 460 (7th Cir. 1965); Dahlstrom Metallic Door Co., 11 N.L.R.B. 408 (1939), enforced, 112 F.2d 756 (2d Cir. 1940).

47 Colson Corp. v. NLRB, 347 F.2d 128, 135 (8th Cir. 1965); Larry Faul Oldsmobile Co., 138 N.L.R.B. 697 (1962), enforced, 316 F.2d 595 (7th Cir. 1963); Rocky Mountain Phosphates, Inc., supra note 35; Trimfit, Inc., 101 N.L.R.B. 706 (1952), enforced, 211 F.2d 206 (9th Cir. 1954); Joy Silk Mills, Inc., supra note 23.

48 Cf. Snow & Sons, supra note 26.

Conren owed no duty to bargain with a union that had lost an election within a year, relied heavily on two particular cases. Upon examination, however, these cases can be reconciled with the majority opinion.

In *Brooks v. NLRB*,[49] the union won a Board-conducted election and was duly certified. Shortly thereafter, however, the union concededly lost its majority status without fault of the employer. The Supreme Court held that the employer was under a statutory duty to bargain in spite of the union's manifest support by a minority only. The dissent in *Conren* argued that the converse of *Brooks* should apply, so that the union's defeat in the election would mean there was no statutory duty to bargain for one year. The *Brooks* case, however, supports the basic policy of the act by requiring collective bargaining between the employer and the union which *won* the election. Though a majority no longer supported the union, the frustration of employee desires was justified because the result *furthered* collective bargaining. The case is thereby distinguishable from *Conren*, in which the employer attempted to use section 9(c)(3) to avoid recognition and to frustrate employee desires *at the expense of* collective bargaining. Finally, in both *Brooks* and *Conren*, the Board decisions were affirmed and enforced, giving deference to the Board's administrative authority to apply section 9(c)(3) in a manner conducive to furthering collective bargaining.

In *NLRB v. Blades Mfg. Corp.*,[50] the union lost a Board-conducted election. The union then filed objections, whereupon the Board, after a hearing, set the election aside on the basis of antiunion coercive statements made by the employer during the preelection period. When a second election was won by the union, the company refused to bargain. In the unfair labor practice hearing which followed, the Board concluded that the first election was in fact valid, and therefore, because of section 9(c)(3), the second election was invalid and imposed no duty on the employer to bargain.[51] *Blades*, however, in no way indicated that the union would be prohibited from seeking representation by informal methods within the twelve months following the valid election.

In conclusion, although section 9(c)(3) does prohibit the holding of a second election within a year, it does not preclude determination of representative status by other means. The purpose of the election procedure is to ascertain majority status when doubt exists, not to supply the employer with a procedural device to obstruct collective bargaining. By submitting to the election, employees do not waive other rights under the act.[52] Although it might be easier to administer section 9(c)(3) so as to prohibit collective bargaining for one year after the union loses an election, an abridgement of rights under the act should not be sanctioned where the purposes of the

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49 348 U.S. 96 (1954).

50 344 F.2d 998 (8th Cir. 1965), denying enforcement to 144 N.L.R.B. 561 (1963).

51 It is suggested that there was no reason for the Board to order a second election at all in *Blades*, since the Board, had it found coercive activity, could have set aside the election which the union lost, and ordered the employer to bargain. Bannon Mills, Inc., 146 N.L.R.B. 611, 613 (1964); Western Aluminum, Inc., 144 N.L.R.B. 1191, 1192 (1963); Joy Silk Mills, Inc., supra note 23.

52 Bernel Foam Prods. Co., supra note 23.

act are defeated. As the Board has noted in a comparable context, "Whatever may be lost in maximum industrial efficiency . . . is more than compensated for by the gain in industrial democracy . . . ."[53] If section 9(c)(3) is to be construed as prohibiting collective bargaining for one year after an election lost by the union, this mandate should issue from Congress and not through judicial legislation.[54]

RUTH R. BUDD

Labor Law—Labor Management Relations Act—Unfair Labor Practices —Breach of the Duty of Fair Representation.—*Local 12, United Rubber Workers v. NLRB.*[1]—Petitioner, Local 12, was the exclusive bargaining representative of all the employees at an Alabama Goodyear plant. Although the bargaining contract negotiated and administered by Local 12 appeared to provide otherwise, separate seniority rolls were maintained for White and Negro employees, and, as a result, Negro employees had no greater rights than White employees with less seniority. In addition, although not prescribed by the contract, racially separate plant facilities were maintained. In the Fall of 1961, a Negro employee was laid off even though a White employee with less seniority was being retained. As a result of this action, he and seven other Negroes, who were also in layoff status, appeared before the union grievance committee and demanded reinstatement with back pay, transfer privileges as provided in the contract, and desegregation of plant facilities. The committee rejected their claims, and the complainants appealed to the International President of the union, who reversed the local's refusal to process the grievances. Local 12 then obtained an agreement from the company dissolving the separate seniority rolls, but it continued in its refusal to process the grievances concerning back pay and segregated plant facilities. Consequently, the complainants filed unfair-labor-practice charges against Local 12.

Reversing the trial examiner, the National Labor Relations Board ruled[2] that, by refusing to process these grievances, Local 12 had not only violated Sections 8(b)(2) and (3) of the Taft-Hartley Act,[3] but had also violated section 8(b)(1)(A) by restraining or coercing complainants in their section 7 right to be represented "without invidious discrimination."[4] Local 12

[53] American Potash & Chem. Corp., supra note 37, at 1423.

[54] Certiori has recently been denied in the principal case. 35 U.S.L. Week 3330 (U.S. March 21, 1967).

[1] 368 F.2d 12 (5th Cir. 1966).

[2] Local 12, United Rubber Workers, 150 N.L.R.B. 312 (1964).

[3] 61 Stat. 141 (1947), 29 U.S.C. §§ 158(b)(2), (3) (1964). The violations of these sections are not discussed by the court, and thus are not subjects of this note.

[4] 150 N.L.R.B. at 315. LMRA § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964) provides that

> 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 . . . .