SMU | Dedman School of Law

SMU Law Review

Volume 21 | Issue 3 Article 7

January 1967

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issued, the court exhibited the reluctance of the judiciary to interfere in matters involving the exercise of discretion in the absence of a clear abuse of such discretion. Under the circumstances of the case, the decision is based upon sound reasoning in the application of these principles.

The case provides deeper insight into the degree of discretionary authority which the Texas legislature has vested in the various boards which govern and control the state universities. The reasonable exercise of this discretionary authority does include the indefinite suspension of a student for gross misconduct; thus the remedy of mandamus is not available unless the authority is abused.

In essence *Cornette* indicated that the court would have upheld the writ of mandamus issued against university officials if Aldridge had not been given a fair hearing. This consideration of due process is significant in that the court definitely did not preclude the application of the fourteenth amendment to university disciplinary proceedings. Efficient administration of institutions of higher learning necessitates that university officials be allowed to exercise broad discretionary authority within the bounds of reasonableness. However, the student must not be denied the "rudimentary elements of fair play"[55] in university disciplinary proceedings.

Frederick W. Marsh, Jr.

Employer's Duty To Bargain After Union-Lost Elections

On June 7, 1963, a representation election was held in the Great Scot Super Market, a subsidiary of Conren, Inc. Two unions, one of which was the Retail Clerks,[1] were on the ballot, but neither received the number of votes needed to become a bargaining agent.[2] On March 19, 1964, nine and one-half months after the election, the Retail Clerks obtained authorization cards from a majority of Great Scot's employees[3] and demanded recognition as bargaining agent on this basis. Conren refused to bargain with the union. The basis for the refusal was section 9(c)(3) of the National Labor Relations Act,[4] which provides that a valid election bars a similar proceeding in the same bargaining unit for one year. Conren contended that section 9(c)(3) also eliminated, for a similar period of time, any duty on its part to bargain with a union having an authorization card majority. The Retail Clerks charged that Conren had committed an

[55] *See* note 27 *supra* and accompanying text.

[1] Local 550, Retail Clerks Int'l, AFL-CIO.

[2] The choices on an NLRB election ballot include the unions involved and "no union." Section 9(c)(3) of the National Labor Relations Act, 29 U.S.C. § 159(c)(3) (1964), hereafter referred to as the Act, provides for a run-off election if none of the choices on the ballot receives a majority. In *Conren*, "no union" received a majority of votes cast.

[3] Thus no problem was raised concerning the appropriateness of the bargaining unit itself.

[4] 29 U.S.C. § 159(c)(3) (1964), which in pertinent part 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."

unfair labor practice, in violation of section 8(a)(5) of the Act,[5] by refusing to bargain with a union representing a majority of Great Scot's employees. The Board upheld the charge and Conren appealed directly to the Seventh Circuit.[6] *Held, affirmed*: Section 9(c)(3) of the National Labor Relations Act[7] does not relieve an employer of the duty to bargain with a union which presents an authorization card majority within one year of a union-lost election. *Conren v. NLRB*, 368 F.2d 173 (7th Cir. 1966), *cert. denied*, 386 U.S. 974 (1967).

I. Time Limits on Recurring Elections Under Section 9(c)(3)

The National Labor Relations Act creates an affirmative duty on an employer to bargain with a union representing a majority of his employees.[8] The Act provides for a formal method, the representation election,[9] by which a union seeking to become a bargaining agent for an unorganized group of employees can demonstrate its majority status. But a union's representative status is not dependent solely on a Board-conducted election. There is a second, "informal"[10] method of becoming a bargaining agent based on section 8(a)(5) of the Act, which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ."[11] This provision has been interpreted to mean that the duty to bargain arises as soon as a union presents convincing evidence of majority status to the employer.[12] Refusal to bargain, absent a "good faith doubt"[13] that the union actually represents a majority of em-

[5] 29 U.S.C. § 158(a)(5) (1964), which provides: "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)]."

[6] 29 U.S.C. § 160(f) (1964).

[7] 29 U.S.C. § 159(c)(3) (1964).

[8] The duty is created by section 8(a)(5) of the Act. *See* note 5 *supra* for text of section 8(a)(5).

[9] Election procedure is governed by section 9 of the Act, 29 U.S.C. § 159 (1964). To obtain an election a union first files with the Board a petition showing that at least 30 per cent of the employees in a given bargaining unit are interested in union representation. Then, if certain standards as to the execution of the petition and appropriateness of the bargaining unit are met, the Board will conduct a secret ballot election. The union will be certified as the exclusive bargaining agent for that unit if it receives a majority of votes *cast*. Marlin-Rockwell Corp. v. NLRB, 116 F.2d 586 (2d Cir. 1941).

[10] Arrow, Hart & Hegeman Elec. Co., 77 N.L.R.B. 258 (1948).

[11] 29 U.S.C. § 158(a)(5) (1964).

[12] Colson Corp. v. NLRB, 347 F.2d 128 (8th Cir. 1965); NLRB v. Philamon Laboratories, Inc., 298 F.2d 176 (2d Cir. 1962), *cert. denied*, 370 U.S. 919 (1962); NLRB v. Sunrise Lumber & Trim Corp., 241 F.2d 620 (2d Cir. 1957), *cert. denied*, 355 U.S. 818 (1957). Unions most commonly show convincing evidence of majority support by obtaining authorization cards from employees. Authorization cards may consist of: (a) the employee's designation (on a card) of the union as his exclusive bargaining agent. NLRB v. Stow Mfg. Co., 217 F.2d 900 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); NLRB v. Geigy Co., 211 F.2d 553 (9th Cir. 1954), *cert. denied*, 348 U.S. 821 (1954); (b) regular union membership cards, NLRB v. Federbush, 121 F.2d 954 (2d Cir. 1941); (c) applications for union membership, NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318 (1940); NLRB v. Somerset Shoe Co., 111 F.2d 681 (1st Cir. 1940); and (d) authorizations for the checkoff of union dues, Lebanon Steel Foundry v. NLRB, 130 F.2d 404 (D.C. Cir. 1942), *cert. denied*, 317 U.S. 659 (1942).

[13] Peoples Serv. Drug Stores, Inc. v. NLRB, 375 F.2d 551 (6th Cir. 1967); NLRB v. Dan River Mills, 274 F.2d 381 (5th Cir. 1960); NLRB v. Remington Rand, 94 F.2d 862 (2d Cir. 1938), *cert. denied*, 304 U.S. 576 (1938). If the employer can show a good faith doubt he can refuse to bargain and insist that the union prove that it has the support of a majority of employees by a Board-conducted election. Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *accord*, DuBois Chemicals, Inc., 140 N.L.R.B. 103 (1962), *enf'd*, 327 F.2d 494 (5th Cir. 1964). Generally, whether an employer's refusal to bargain

ployees, is an unfair labor practice, resulting in a bargaining order which can be enforced through the courts.[14]

Although prior to the 1947 Taft-Hartley Act[15] a union could theoretically use either the election or the informal method to become a bargaining agent, in practice such was not the case. The Board's policy at this time was to require an election to settle contested representation questions.[16] When a union won an election the result was certified by the Board and was conclusive for "a reasonable period of time," usually one year.[17] The reason for this certification-year bar was to give the union winning the election time to bargain free from representation claims of rival unions.[18] Consequently, the bar did not apply in the event of unusual circumstances which negated the reason for its existence[19] or after a union-lost election. Since prior to 1947 there were no restrictions as to when an election could be held, the Board, upon the filing of an appropriate petition, would direct a second election within a year in the event of unusual circumstances or after a union-lost election.

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is in good faith can be tested only by surrounding circumstances. Peoples Serv. Drug Stores, Inc. v. NLRB, 375 F.2d 551 (6th Cir. 1967); Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). However, some guidelines have been established. An employer does not act in good faith if the reason for his refusal is to gain time in which to dissipate the union majority. Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *accord*, NLRB v. Taitee, 261 F.2d 1 (7th Cir. 1958); NLRB v. Jackson Press, 201 F.2d 541 (7th Cir. 1953). When faced with conflicting claims of majority from rival uncertified unions an employer may not recognize either until a Board election has been held. Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945). This is true even where one of the rival unions has a majority of authorization cards. Novak Logging Co., 119 N.L.R.B. 1573 (1958). But there is conflict as to whether an employer's refusal to bargain with a union having an authorization card majority, standing alone, constitutes a bad faith refusal. Holding that such a refusal is prima facie bad faith are: Drug King, Inc., 157 N.L.R.B. 343 (1966); Jem Mfg. Co., 156 N.L.R.B. 643 (1966); Snow & Sons, 134 N.L.R.B. 709 (1961), *enf'd*, 308 F.2d 687 (9th Cir. 1962). Holding that the union must show more evidence of bad faith than the mere refusal to bargain after the presentation of authorization cards are: Ben Ruthler, Inc., 157 N.L.R.B. 69 (1966); Strydel, Inc., 156 N.L.R.B. 1185 (1966); Oklahoma Sheraton Corp., 156 N.L.R.B. 681 (1966); and John P. Serpa, Inc., 155 N.L.R.B. 99 (1965).

[14] For a typical bargaining order, see Burgie Vinegar Co., 71 N.L.R.B. 829 (1946).

[15] Labor Management Relations Act, 29 U.S.C. §§ 151-67 (1964). The Taft-Hartley Act amended the original Wagner Act, 49 Stat. 449 (1935).

[16] In 1948 the Board stated an employer's obligation when confronted with an authorization card demand as follows: "An employer acting in good faith may insist, as a condition precedent to recognition, that a union submit proof that it represents a majority of employees in the unit and that the proof be made through the medium of a Board directed election." 13 NLRB ANN. REP. 60 (1948).

At this time, and for several years thereafter, there was only one instance in which an employer who refused to recognize a union having an authorization card majority was found not to be acting in good faith. This occurred when he completely rejected the collective bargaining principle and sought to use the election process to gain time in which to destroy the union's majority. Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). Thus, an employer faced with an authorization card demand could insist on an election so long as he did not engage in conduct of a *Joy Silk* nature.

[17] Kimberly-Clark Corp., 61 N.L.R.B. 90, 92 (1945); Monarch Aluminum Mfg. Co., 41 N.L.R.B. 1 (1942); Whittier Mills Co., 15 N.L.R.B. 457 (1939), *enf'd*, 111 F.2d 474 (5th Cir. 1940).

[18] Ludlow Typograph Co., 108 N.L.R.B. 1463 (1954); NLRB v. Appalachian Elec. Power Co., 140 F.2d 217 (4th Cir. 1944).

[19] Kimberly-Clark Corp., 61 N.L.R.B. 90 (1945). Unusual circumstances were found where: (a) the union winning the election went defunct during the certification year, Container Corp., 61 N.L.R.B. 823 (1945); Public Serv. Elec. & Gas Co., 59 N.L.R.B. 325 (1941); (b) there was a schism in which the officers and members of the winning union transferred their allegiance to another union, Carson Pirie Scott & Co., 69 N.L.R.B. 935 (1946); Brightwater Paper Co., 54 N.L.R.B. 1102 (1944); and (c) there was a sudden, radical change in the size of the bargaining unit, Westinghouse Elec. & Mfg. Co., 38 N.L.R.B. 404 (1942).

However, the Board's power to hold a second election in either of these situations was eliminated by section 9(c)(3) of the 1947 Taft-Hartley Act, which provides that all elections, whether union-won or union-lost, must be spaced one year apart.[20] But this provision does not mention the other, informal method of becoming a bargaining agent. Thus section 9(c)(3) left open the question of whether Congress, by barring an election for one year, also intended to relieve an employer of his section 8(a)(5) duty to bargain for a similar period in the event that no union was chosen in the election. This question became particularly pertinent when the Board attempted to continue pre-1947 policies in regard to union-lost elections and unusual circumstances by requiring an employer to bargain with a union having an authorization card majority when a second election was prohibited by section 9(c)(3).

II. The Interpretation of Section 9(c)(3)

In *Brooks v. NLRB*[21] the United States Supreme Court interpreted the congressional intent underlying section 9(c)(3). In that case a union won an election and then, a short time later, was informally repudiated by an employee petition. The employer, claiming that the union no longer represented a majority of his employees, refused to bargain. The court upheld the union's unfair labor practice charge, basing its decision on a conclusion that Congress had, through section 9(c)(3), "fixed the spacing of elections with a view toward furthering industrial stability."[22] To permit the result of an election to be set aside within a short time would conflict with this congressional purpose of "industrial peace."[23] The court further pointed out, with apparent approval, that the policy of the Board prior to the enactment of section 9(c)(3) had been to hold union-won elections conclusive for one year, in the absence of unusual circumstances. This reference to the Board's earlier practices clouded the meaning of *Brooks*, making it unclear whether the Supreme Court viewed section 9(c)(3) as indicating a congressional intent to make all elections conclusive for one year or whether it viewed the new statute as merely continuing the pre-1947 policies of the Board. Hence the value of *Brooks* as a guideline in cases involving unusual circumstances and union-lost elections was somewhat nominal.

Eight years later, in *Rocky Mountain Phosphates, Inc.*,[24] the Board established the ramifications of *Brooks* in unusual circumstance situations. There the union which won the election went defunct during the certification year, and the employees attempted to transfer their allegiance to another union by informal vote. The employer refused to bargain with the second union, and plead section 9(c)(3) as a defense to the second union's

[20] *See* note 4 *supra* for the pertinent part of section 9(c)(3). Section 9(c)(3) uses the language "valid election," thus imposing a one-year ban after any election, whether union-won or union-lost.
[21] 348 U.S. 96 (1954).
[22] *Id.* at 103.
[23] *Id.*
[24] 138 N.L.R.B. 292 (1962).

charge of unfair labor practice. This situation, where prior to 1947 the Board would have held a second election,[25] squarely posed the question: Could pre-1947 policies be continued by substituting the informal method for the election, or, more precisely, did section 9(c)(3), as interpreted by the Supreme Court in *Brooks*, eliminate the employer's duty to bargain? The Board upheld the union's unfair labor practice charge. *Brooks*, it noted, had ostensibly approved of the pre-1947 policy of allowing the selection of a second bargaining agent by election in the event of unusual circumstances, and thus *Brooks* should be read as implied authority to continue the policy by replacing the election with the informal means of selecting a bargaining agent.

But the Board was not content to rely on *Brooks'* implied approval of earlier policies as a basis for the *Rocky Mountain* decision. It sought to further justify the result by clearly removing section 9(c)(3) as a bar to an informal demand within a year of an election. The Board concluded that Congress was aware of both methods of becoming a bargaining agent when it enacted section 9(c)(3)[26] and had intended to limit only the election by that provision. The Board had taken its position, but the rationale behind *Rocky Mountain* was not tested by an appellate court, for the decision was not appealed.

III. The Conren Decision

Conren involved the other fact situation—a union-lost election—where the Board, before the advent of section 9(c)(3), would have conducted a second election. In view of the Board's strong language in *Rocky Mountain*,[27] its holding in *Conren* was no surprise. The Board simply restated the position that section 9(c)(3) was not intended to bar the informal method and referred the reader to *Rocky Mountain* for the reasoning behind that position. When the employer appealed from the Board's decision, a court, for the first time, was given an opportunity to decide the consequences of *Brooks'* industrial peace doctrine. The case was heard by the Seventh Circuit. That court, in a two-to-one decision, upheld the strict interpretation given section 9(c)(3) by the Board in *Rocky Mountain* and *Conren*. It engaged in the same syllogistic reasoning as the Board: Congress knew of both the election and the informal method when it enacted section 9(c)(3); Congress had limited only the election by that

[25] This case was an unusual circumstances situation. *See* note 19 *supra* and accompanying text.

[26] The conclusion that Congress was aware of both the election and the informal means of becoming a bargaining agent was based on the fact that section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1964), makes an employer's duty to bargain with the representatives of his employees subject to the provisions of section 9(a). Since section 9(a) speaks of representatives "designated" (presumably by the Board after an election) and "selected" (presumably by some other means), the Board reasoned that Congress knew of the alternative methods by which a bargaining agent could be chosen. The Supreme Court had earlier taken this position in UMW v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956).

[27] 138 N.L.R.B. at 295 (1962), where in reference to UMW v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956), the Board stated: "Manifestly, this Supreme Court precedent should set at rest any notion that Section 9(c)(3) withdraws existing rights of employees under . . . Section 7 freely to reject or select a labor organization during the certification year by means other than a Board election."

provision; therefore Congress did not intend to limit the informal method. The court rejected the contention that the congressional purpose underlying section 9(c)(3), which requires that a union-won election be conclusive for one year, equally affords a basis for holding a union-lost election conclusive for a similar period. Speaking for the majority, Judge Castle stated, "Congress not only established the policy [of industrial peace] but it also selected the means to aid in effectuating it. . . . That Congress chose one method of furthering a prime objective of its legislative purpose does not afford a basis for this Court to select and impose an additional but different means."[28]

In reaching their respective, but identical, decisions, both the Board and the Seventh Circuit relied on the fact that "Congress was aware of the alternative methods of establishing and determining union representative status"[29] when it enacted section 9(c)(3). The *Conren* dissent did not dispute this point, but argued that the courts had, in fact, evolved the principle that "only the most reliable"[30] of the two means should be used. The dissent viewed *Brooks* as illustrative of this principle in that an informal demand within a year of an election is not the most reliable means. There should be no distinction, it contended, between a union-won and a union-lost election. The basis for the dissent's argument was twofold. First, it felt that the reasons given by the Supreme Court, in *Brooks*, for holding a union-won election conclusive; *i.e.*, industrial peace and the unreliability of the informal method were equally applicable to a union-lost election situation. Secondly, it regarded the fact that the Taft-Hartley Act requires certification whether the union wins or loses the election[31] while the Wagner Act required certification only when the union won as evidence of congressional intent that the two situations be treated identically.

IV. Conclusion

On the surface *Conren* appears sound, for its basis, that Congress was aware of both methods of selecting a bargaining agent when it enacted section 9(c)(3), cannot logically be disputed. But the decision overlooks the fact that Congress could have been aware of the two methods only as they existed in 1947. At that time, though either method was theoretically available to a union seeking to become a bargaining agent, Board policies were such that a union, in the great majority of cases, had to win

[28] Conren v. NLRB, 368 F.2d 173, 174 (7th Cir. 1966).

[29] *Id.*; *see* note 26 *supra*.

[30] *Id.* at 176 (dissent). In support of its position the dissent cited: Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951) (informal method preferred when employer uses election process to destroy union), *see* notes 13 and 16 *supra*; Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945) (election preferred where there are conflicting claims of rival unions), *see* note 13 *supra*; Rocky Mountain Phosphates, Inc., 138 N.L.R.B. 292 (1962) (informal method preferred after union-won election when unusual circumstances occur), *see* text accompanying note 24 *supra*; NLRB v. Blades Mfg. Co., 344 F.2d 990 (8th Cir. 1965) (valid first election preferred over second election held within one year).

[31] Section 9(c)(1)(B) of the Act, 29 U.S.C. § 159(c)(1)(B) (1964), provides: "If the Board finds . . . a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

an election before an employer had a duty to recognize it.[32] Thus, the practical effect of section 9(c)(3) was to prevent a union from becoming a bargaining agent for a year following any election, whether union-won or union-lost. With this fact in mind, the more logical conclusion is that Congress was aware of the disruption of industrial peace by constant union organization campaigns and sought to end them through section 9(c)(3).[33]

The result of *Conren* is that an employer is now required to recognize an informal demand in situations in which a second election used to be held. This result alone seems sufficient to indicate that the congressional intent underlying section 9(c)(3) has been misinterpreted. That Congress would choose to replace the election with an admittedly less reliable means of selection[34] is highly unlikely. Perhaps a better interpretation of section 9(c)(3) is that it was intended to provide that the *desires* of employees, as expressed by the most reliable means, the election, should be conclusive for one year. Such an interpretation underlies the *Conren* dissent's position that only the most reliable means of selecting a bargaining agent should be used. This position would serve the dual purpose of promoting industrial stability while protecting the employee's freedom of choice. It would permit an informal demand during the certification year when employees have voted for a union in the prior election, but would deny one when the earlier election has resulted in a union loss.[35]

Looking to the future, *Conren* raises an interesting question concerning

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[32] *See* note 16 *supra*. Under the concept of good faith doubt which prevailed at the time section 9(c)(3) was enacted, and for several years thereafter, an employer could insist on an election so long as he did not engage in conduct calculated to destroy the union majority. Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

[33] Legislative history reveals that Congress was aware of this problem. "At present, if a union loses, it may on presentation of additional membership cards secure another election within a short time . . . ." S. REP. No. 105, 80th Cong., 1st Sess. 25 (1947).

[34] Authorization cards have long been considered unreliable by the Board. *See, e.g.*, Electro Metallurgical Co., 69 N.L.R.B. 772 (1946), where the Board stated that it "will not consider the card check as satisfactory as the election method of ascertaining the true desires of employees." *See also* Joe Hearin Lumber Co., 66 N.L.R.B. 1276 (1946).

In addition, Secretary of Labor W. Willard Wirtz has stated: "The procedure for determining a majority wish for union representation by means of cards is uniformly recognized as less satisfactory than a secret vote in an election." *Hearings on S. 256 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 89th Cong., 1st Sess. 19-20 (1965). *See* Drotning, *The NLRB's New Rule on Organizing: A Note*, 18 LAB. L.J. 283 (1967), for a study of the association between the percent of a bargaining unit which signs authorization cards and the percent of a unit which votes for the union on election day.

[35] This position would also protect unions from employer unfair labor practices which result in union loss of an election. Under such circumstances the election would not be reliable, and the informal demand would be preferred. In *Conren*, employer unfair labor practices were a strong factor in the Board's decision. *See* Great Scot Super Market, 156 N.L.R.B. 592 (1966). The Board apparently viewed the *Conren* situation as one which merited the recognition of the union as a "remedy" for the employer's unfair labor practices. The vesting of bargaining authority in a union as a remedy, or penalty, for employer unfair labor practices has long been a Board practice. *See* Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); Bernel Foam Prods. Co., 146 N.L.R.B. 1277 (1964). In such "remedy" cases, the Board and courts have generally reasoned that employer unfair labor practices committed around the time of the union's demand for recognition establish that the employer lacked a good faith doubt of the union's majority. This logic has recently been rejected by the Second Circuit in NLRB v. River Togs, Inc., 65 L.R.R.M. 2987 (2d Cir. 1967), where the court held that employer unfair labor practices coupled with a refusal to recognize do not show a lack of good faith doubt because they are as consistent with a desire to prevent the union from achieving majority status as with a purpose of destroying a majority already obtained.