1971

Recent Development, Employer Knowledge of Union Strength as a Basis for Bargaining Orders in Absence of Unfair Labor Practices or Elections--Summer & Co., 190 N.L.R.B. No. 116 (June 7, 1971)

Mark J. Loewenstein
University of Colorado Law School

whether he was at fault in the accident. Such a no-fault compulsory insurance system would seem to close the gaps which exist under today's plans and would afford the maximum possibility that compensation would be provided.

After *Bell* the states will be forced to choose between a financial responsibility law which is weaker than they wished or a compulsory insurance plan which is stronger than they wish. Whether the requirement of a hearing plus the effect of other recent[63] or forthcoming decisions will make the laws entirely unworkable is unanswered but unlikely. In any event, a trend toward compulsory insurance is preferable to an amended form of financial responsibility act. Many persons have sought to persuade legislative bodies to enact compulsory insurance laws as the best means of providing compensation for accident victims and fulfilling other social goals. Perhaps this decision, based on a realization that an individual has a basic constitutional right to a hearing before suspension of his driver's license because of application of a financial responsibility law, can hasten this goal.

M.F.L.

LABOR LAW—BARGAINING ORDERS—EMPLOYER KNOWLEDGE OF UNION STRENGTH AS A BASIS FOR BARGAINING ORDERS IN ABSENCE OF UNFAIR LABOR PRACTICES OR ELECTIONS—*Summer & Co.*, 190 N.L.R.B. No. 116 (June 7, 1971).

The National Labor Relations Act (NLRA)[1] protects the rights of employees to organize and by a majority designation choose their representative for collective bargaining. A union can gain recognition in three ways: the employer can voluntarily recognize the union;[2] the union can win a National Labor Relations Board conducted election;[3] and under certain circumstances, the Board may order the employer to bargain without an election.[4] A bargaining order is an equitable remedy which compels the employer to recognize and bargain with the aggrieved union. One instance in which the Board may issue a bargaining order without an election occurs when it finds

63. Perez v. Campbell, 402 U.S. 637, 91 S. Ct. 1704 (1971).

1. 29 U.S.C. §§ 151-68 (1970).

2. The employer may not even in good faith recognize a minority union. International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 81 S. Ct. 1603 (1961).

3. NLRA § 9(c), 29 U.S.C. § 159(c) (1970). Winning a Board conducted election certifies the union under the Act, giving it certain advantages. Section 8(b)(4)(c) prohibits a union from taking action directed to overthrowing an established certified representative. Other advantages of certification are explained in General Box Co., 82 N.L.R.B. 678 (1949).

4. NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S. Ct. 1918 (1969); United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62, 76 S. Ct. 559 (1956); Franks Bros. v. NLRB, 321 U.S. 702, 64 S. Ct. 817 (1944). In these cases, the Court approved Board-issued bargaining orders, which compelled the employer to bargain with a union even though it had not been certified.

that an employer's actions have rendered a fair election impossible.[5] The Supreme Court, in *NLRB v. Gissel Packing Co.*,[6] determined that a bargaining order is proper when employer unfair labor practices precluded a fair election. The case left undecided, however, the issue of whether or not a bargaining order could be proper in the absence of employer misconduct. The Board has considered this undecided issue[7] four times since *Gissel.* In three cases the Board found that the employer had knowledge of the union's majority status at the time recognition was requested.[8] The Board decided that because the employer had knowledge of the union's strength, an election would serve no useful purpose, so it ordered the employer to bargain. In the fourth case, *Summer & Co.*,[9] the Board lessened the significance of employer knowledge and refused the union's request for a bargaining order. Because *Summer & Co.* was the only Board decision to deny a union a bargaining order when the employer had knowledge of the union's majority, it must be analyzed to resolve the undecided issue. *Summer & Co.,* in turn, must be examined in light of *Gissel,* the most recent Supreme Court decision on bargaining orders.

In *NLRB v. Gissel Packing Co.*, the Court consolidated three similar cases from the United States Court of Appeals for the Fourth Circuit.[10] In each case the union waged an organizational campaign during which a majority of the employees signed authorization cards.[11] On the basis of the cards, each union demanded recognition by the employer; but each employer refused, claiming that authorization cards were unreliable indicators of employee desire. The employers then conducted vigorous antiunion campaigns which were marked by several unfair labor practices.[12] In one

5. Lillian Abrahamson Nursing Home, 181 N.L.R.B. No. 148 (April 2, 1970).

6. 395 U.S. 575, 89 S. Ct. 1918 (1969).

7. *See* Christensen & Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions in the NLRA*, 37 U. CHI. L. REV. 411 (1970), in which the phrase "undecided issue" is used.

8. Redmond Plastics, Inc., 187 N.L.R.B. No. 60 (Dec. 28, 1970) (*see* text accompanying notes 80-83 *infra*); Wilder Mfg. Co., 185 N.L.R.B. No. 76 (Aug. 27, 1970) (*see* text accompanying notes 59-64 *infra*); Pacific Abrasive Supply Co., 182 N.L.R.B. No. 48 (May 6, 1970) (*see* text accompanying notes 73-79 *infra*).

9. 190 N.L.R.B. No. 116 (June 7, 1971).

10. Actually four cases were consolidated for consideration: General Steel Prods., Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968); NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968); NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968); NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968). The three cases from the Fourth Circuit are concerned with authorization cards and bargaining orders. *Sinclair,* from the First Circuit, involved employer freedom of speech and is not relevant here.

11. An authorization card designates a union as a bargaining representative. If 30% of the employees of an appropriate unit sign authorization cards, the union has established a "showing of interest" and may qualify for a Board-conducted election.

12. The Act establishes the following as employer unfair labor practices:

§ 8 (a)(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

(4) to discharge or otherwise discriminate against an employee because

case, the union never sought an election; in another, the election was never held; and in the third the union lost the election. In each case, the Board ordered the employer to bargain,[13] and the court of appeals reversed.[14] The Supreme Court, however, reversed the Fourth Circuit decision[15] and established the following criteria for bargaining orders:[16] A bargaining order is proper if the effects of the employer's unfair labor practices tend to undermine the union's majority strength and impede the election process.[17] A bargaining order is not proper, however, when the employer's unfair labor practices have a minimal impact on the election machinery.[18]

The Court justified its use of a bargaining order as a remedy because it not only redresses past election damage but also deters future employer

> he has filed charges or given testimony under this Act;
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . . .

The Board found that all three employers violated §§ 8(a)(1) & (5) while the employers in *Gissel* and *Heck's* violated § 8(a)(3).

13. Gissel Packing Co., Inc., 157 N.L.R.B. 1065 (1966) (election not sought); Heck's, Inc., 166 N.L.R.B. 186 & 674 (1967) (election never held); General Steel Prods., 157 N.L.R.B. 636 (1966) (union lost the election).

14. NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968); NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968); General Steel Prods., Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968).

15. Each case was remanded to the Board for reconsideration under the guidelines set forth in the opinion. In each case the Board affirmed its previous ruling. Gissel Packing Co., 180 N.L.R.B. No. 7 (Dec. 12, 1969); Heck's Inc., 180 N.L.R.B. Nos. 64 and 82 (Dec. 16, 1969 and Jan. 2, 1970); General Steel Prods., 180 N.L.R.B. No. 8 (Dec. 12, 1969).

16. NLRB v. Gissel Packing Co., 395 U.S. 575, 614-15, 89 S. Ct. 1918, 1940-41 (1969).

17. The Fourth Circuit would permit a bargaining order only in exceptional cases marked by "outrageous" and "pervasive" unfair labor practices such that "their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967). Other than semantics, there is no difference between the Supreme Court and the Fourth Circuit. Both courts agree that a bargaining order is proper if an election cannot be held; and they agree that a bargaining order is improper if a fair election can be held. The Supreme Court tried to distinguish its position: "The only effect of our holding is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." 395 U.S. at 614, 89 S. Ct. at 1940. The confusion would dissipate if the court held more simply that regardless of the pervasiveness of the unfair labor practice a bargaining order is proper if, and only if, a fair election cannot be held. The Fourth Circuit makes the same error as the Supreme Court, assuming that more pervasive practices have a greater tendency to preclude an election. This assumption has never been proved. The result has been that the Board does not examine the effects of an unfair labor practice, but rather examines its pervasiveness. If an employer's practices are particularly offensive to the Board, a bargaining order is issued. *See* Lillian Abrahamson Nursing Home, 181 N.L.R.B. No. 148 (April 2, 1970) (the employer's unfair labor practices were "so flagrant" as to require a bargaining order even in the absence of a § 8(a)(5) charge). If the Board is not particularly offended, a bargaining order will not issue. *See* J.A. Conley Co., 181 N.L.R.B. No. 20 (Feb. 12, 1970) (The "few instances of misconduct . . . were not sufficiently flagrant to prevent the holding of a fair election."); Schuckman Press, Inc., 181 N.L.R.B. No. 26 (Feb. 16, 1970) (the employer's unfair labor practices "made an election is less reliable indication of the employees' free choice than the cards."). *See also* footnotes 94-96 and accompanying text *infra*.

18. *See* J.A. Conley Co., 181 N.L.R.B. No. 20 (Feb. 12, 1970).

misconduct. Further, a bargaining order is not permanent since employees may disavow a union by filing a decertification petition. Regarding the claim that authorization cards are inherently unreliable, the Court ruled that an employee will be bound by the clear language of the card since he presumably read and understood what he signed. The validity of the card may be contested by a showing that the language on the card was explicitly contradicted by statements of the union organizer soliciting signatures.[19]

Gissel also marked the end of the good faith doctrine first announced by the Board in *Joy Silk Mills, Inc.*[20] Under this doctrine, an employer could refuse to bargain with the union claiming representative status if he in good faith doubted the union's majority status. The doctrine was based on section 8(a)(5) of the NLRA which reads: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees." This section had been interpreted as violated if an employer either could not have doubted the union's majority status[21] at the time the cards were presented or if he committed independent unfair labor practices subsequent to the union's recognition request.[22] The new guidelines of *Gissel*, however, focus on the effects of the employer's misconduct, not his motivation for refusing to bargain.[23] The court limited its holding in *Gissel* to situations in which unfair labor practices have occurred:

> Because the employer's refusal to bargain in each of these cases was accompanied by independent unfair labor practices which tend to preclude the holding of a fair election, we need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election process.[24]

19. The Court thus approved the rule of Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1964), but warned against a "too easy mechanical application of the rule." 395 U.S. at 606-09, 89 S. Ct. at 1936-37.

20. 85 N.L.R.B. 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950). *See* text accompanying notes 86-88 *infra*. For a critical analysis of the good faith test see Note, *Union Authorization Cards*, 75 YALE L.J. 805 (1966).

21. Snow & Sons, 134 N.L.R.B. 709 (1961), *enforced*, 380 F.2d 687 (9th Cir. 1962); H & W Constr. Co., 161 N.L.R.B. 852 (1966).

22. The employer's misconduct raises the presumption of bad faith. Aaron Bros. Co., 158 N.L.R.B. 1077 (1966); John P. Serpa, Inc., 155 N.L.R.B. 99 (1965).

23. May & Bigley, Inc., 178 N.L.R.B. No. 102 (Sept. 26, 1969) (unfair labor practices so coercive that an election is not as good an indicator of employee choice as the card majority); Garland Knitting Mills, 178 N.L.R.B. No. 62 (Sept. 11, 1969) (unfair labor practices preclude a fair rerun election).

24. 395 U.S. at 614, 89 S. Ct. at 1940. The Court stated this limitation at length:

> We thus need not decide whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether if he does not, he must bargain with a card majority if the union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good-faith doubts, or whether he can still insist on a union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute. In short, a union's right to rely on cards as a fully interchangeable substitute for elections where there has been no election interference is not put into issue here; we need only decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was set aside.

Id. at 601 n.18, 89 S. Ct. at 1933 n.18.

The court indicated, however, that a bargaining order may be proper in the ab-

The Board faced the issue of whether a bargaining order is appropriate in a case in which there was no interference with the election process. In *Summer & Co.*,[25] the union requested recognition after obtaining authorization cards from all 12 employees in an appropriate unit.[26] Simultaneous with the recognition request, the union filed a representation petition.[27] The employer refused recognition, claiming that the union did not represent a majority. At a prehearing conference,[28] however, in response to a union request for a consent election,[29] the employer alleged that the cards were solicited by supervisors, thus rendering them invalid.[30] The hearing officer at the conference ruled that evidence of supervisory taint would not be received because an employer may not challenge the adequacy of the union's showing of interest. This ruling provoked the employer to say, "[I]f [the Board] holds an election, the Company will not bargain with the Union." The union then withdrew its representation petition.

Later the employer indicated that he would agree to a consent election if the union submitted a new petition supported by a new 30% showing of interest. The next day the union presented a statement signed by nine employees who expressed their desire to be represented by the union.[31]

sense of employer unfair labor practices:

> Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of section 8(a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote . . . .

Id. at 596-97, 89 S. Ct. at 1931.

25. 190 N.L.R.B. No. 116 (June 7, 1971). The Board stated: "The resolution of the instant proceeding now requires the Board to face and decide one of the difficult issues left open in *Gissel*: whether, absent election interference, an employer who insists on an election must initiate the election by his own petition." *Id.* at 9.

26. The NLRA, § 9(c)(4), 29 U.S.C. § 159(c)(4) (1970), provides for unit determination by agreement of the parties, subject to the Board's rules and regulations, or by the Board, § 9(b). The chief criteria of appropriateness are the organizational history of the employees involved or other employees in the industry; the duties, skills, wages, and working conditions of the employees; relationship between the proposed unit and the employer's organization; and desires of the employees. 14 NLRB ANN. REP. 32-33 (1949).

27. NLRA § 9(c), 29 U.S.C. § 159(c)(1) (1970). The petition alleges that a substantial number of employees wish to be represented for collective bargaining and that their employer refuses to recognize their representative as their exclusive bargaining representative. Other information required in the petition is specified in 29 C.F.R. § 102.61 (1971).

28. The purpose of this hearing is to ascertain whether the employer's operations affect commerce within the meaning of the Act, the appropriateness of the unit, the existence of a bona fide question of representation, and whether the election would effectuate the policies of the Act and reflect the free choice of the employees. 29 C.F.R. § 101.18(a) (1971).

29. A consent election provides a prompt and informal method for determining representation questions. In a consent election the parties agree to the appropriate unit, the payroll period to be used as the basis of voter eligibility, and the place, date, and hours of balloting. Procedures are detailed at 29 C.F.R. § 101.19 (1971).

30. NLRB v. Hawthorne Aviation, 406 F.2d 428 (10th Cir. 1969); Pulley v. NLRB, 395 F.2d 870 (6th Cir. 1968). Authorization cards solicited by supervisors may not be counted when the cards are the basis of a bargaining order. The theory is that supervisors can unduly influence an employee into signing a card. The validity of the cards cannot be questioned in a repesentation hearing.

31. Two employees, alleged by the employer to be supervisors, did not sign the

The employer again refused recognition, claiming supervisory taint. The nine employees then went out on strike in support of the union's demand for recognition. When the strike ended after three and one-half months, the employer refused to reinstate two workers,[32] and refused to recognize the union. Consequently, the union filed charges alleging violations of section 8(a)(3) of the NLRA, for the wrongful discharge of two employees, and section 8(a)(5), for refusal to bargain.[33]

The Board accepted the trial examiner's determination that the employer committed an unfair labor practice by refusing to reinstate the two discharged workers. Under the guidelines of *NLRB v. Gissel Packing Co.*,[34] however, the Board concluded that the unfair labor practice did not warrant a bargaining order: "We conclude that Respondent's violations here did not have such an impact on the employees that a fair and truly representative election could not be held."[35] The Board next considered whether, "aside from the rationale of *Gissel*," a bargaining order was appropriate, or in other words, whether the absence of effective unfair labor practices precluded the issuance of a bargaining order. The Board split 3-2 on this question, with the majority refusing to issue a bargaining order.[36] Both the majority and dissenters agreed that independent[37] unfair labor practices are not always a prerequisite for a bargaining order. They also agreed that if an employer knows that the union represents a majority, he must bargain, but they could not agree on what constitutes "employer knowledge."[38]

The majority opinion, in effect, dispensed with employer knowledge as a criterion for a possible section 8(a)(5) violation. To reach this position, the majority first found it necessary to clarify its current practice, which the Supreme Court discussed in *Gissel*:

> Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices . . . . The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriate-

petition. Two days later, Shafer, who the Board ultimately determined to be a supervisor, resigned.

32. The employer alleged that one had quit and that the other had committed unlawful acts of violence on the picket line.

33. *See* note 12 *supra.*

34. 395 U.S. 575, 615, 89 S. Ct. 1918, 1940 (1969): "[M]inor or less extensive unfair labor practices, which because of their minimal impact on the election machinery, will not sustain a bargaining order."

35. 190 N.L.R.B. No. 116 (June 7, 1971). The Board did not explain why the violations did not preclude a fair election. It merely stated this as a matter of fact. This practice of the Board has been criticized. *See* note 95 *infra.*

36. Chairman Miller and Board members Jenkins and Kennedy comprised the majority; Board members Fanning and Brown dissented in a separate opinion. It is unusual for all five members to hear a case, and this indicates an important decision.

37. "Independent" unfair labor practices refers to violations other than a § 8(a)(5) violation (refusal to bargain). *See* note 12 *supra.*

38. The Board has never proposed a precise definition of what constitutes employer knowledge. Several cases indicate, however, that it is a criterion for issuing a bargaining order. *See, e.g.*, Redmond Plastics, Inc., 187 N.L.R.B. No. 60 (Dec. 28, 1970); Wilder Mfg. Co., 185 N.L.R.B. No. 76 (Aug. 27, 1970); Pacific Abrasive Supply Co., 182 N.L.R.B. No. 48 (May 6, 1970).

ness of the unit and then later claim, as an afterthought, that he doubted the union's strength.[39]

The majority assumes that the statement "if he *knew*, through a personal poll for instance," referred to *Snow & Sons*.[40] This assumption is essential, for the majority then limits *Snow & Sons* to its facts and virtually eliminates the concept of knowledge.[41]

In *Snow & Sons* the Union presented the employer authorization cards from 31 of 52 employees. The employer initially refused recognition, but subsequently agreed to have an impartial third party verify the signatures. The card check revealed that the signatures were authentic, but the employer still refused to recognize the union. Later, 12 employees walked out in protest and were joined by 7 more the next day.[42] The union later filed charges alleging a violation of section 8(a)(5). The Board issued a bargaining order, concluding that the employer "had no reasonable doubt as to the union's majority status"[43] and therefore violated the Act when it refused to bargain. Thus, the decision turned on the Board's determination that the employer knew the union represented a majority.[44]

The Board in *Summer & Co.*, however, gave *Snow & Sons* a slightly different meaning: the key fact is the employer's breached agreement.[45] It stated that the "case rested not only on the fact of employer *knowledge*, but also upon the fact that the employer breached his agreement to permit majority status to be determined by means other than a Board election."[46] The Board then distinguished *Summer & Co.* from *Snow & Sons* because in *Summer & Co.* the employer never agreed to any "legally permissible means, other than a Board-conducted election, for resolving the issue of union majority status."[47]

The dissenters reject the majority's narrow criterion for issuing bargaining orders. Their view, based on broad interpretation of section 8(a)(5)[48]

39. 395 U.S. at 594, 89 S. Ct. at 1930 (emphasis by Court).

40. 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

41. Summer & Co., 190 N.L.R.B. No. 116 (June 7, 1971). "There is some question as to whether the summary [of current practice] is entirely accurate. The statement that an employer could not refuse to bargain 'if he *knew*, through a personal poll for instance, that a majority of his employees supported the union,' may well have referred to [*Snow & Sons*]."

42. The reviewing court placed little reliance on the strike. "[T]he number of employees who indicate a willingness to strike is not a reliable guide to the number represented by the union, at least when an actual count of signed union application cards is known." Snow v. NLRB, 308 F.2d 687, 693 (9th Cir. 1962).

43. This reference was apparently to Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949). *See* text accompanying notes 86-88 *infra*.

44. Redmond Plastics, Inc., 187 N.L.R.B. No. 60 (Dec. 28, 1970); Aaron Bros. Co., 158 N.L.R.B. 1077 (1966); Jem Mfg., 156 N.L.R.B. 643 (1966); Maintenance, Inc., 148 N.L.R.B. 1299 (1964).

45. The Board's interpretation of *Snow & Sons* in *Summer & Co.* is narrow, as it limits it to its facts. Support for this interpretation can be found in Furr's, Inc., 157 N.L.R.B. 387 (1966); Strydel, Inc., 156 N.L.R.B. 1185 (1966). *See* Welles, *The Obligation To Bargain on the Basis of a Card Majority*, 3 GA. L. REV. 349, 361 (1969).

46. 190 N.L.R.B. No. 116 (June 7, 1971) (emphasis in original).

47. *Id.*

48. Section 8(a)(5) was given a broad interpretation in H & W Constr. Co., 161 N.L.R.B. 852 (1966): "The Act imposes an obligation upon an employer to bargain upon request with a union that has been designated by a majority of employees in

and prior case law, would allow bargaining orders in three instances: when employer independent unfair practices have impeded the Board's election process,[49] when no real dispute exists that a union has majority support,[50] and when an employer is convinced (by a card check, independent poll of employees, or some other means) that a union represents a majority.[51] The dissent argued that *Summer & Co.* is controlled by those cases supporting bargaining orders when no dispute exists concerning a union's majority support. In *H & W Construction Co., Inc.*,[52] the union presented the employer with authorization from all five employees in the unit and requested recognition. The employer refused recognition, claiming that his company was not engaged in commerce "within the meaning of the Act." It was not until the union filed a section 8(a)(5) complaint, however, that the employer challenged the union's strength. The Board issued a bargaining order because the employer's refusal to bargain was based on an erroneous interpretation of the law, rather than a doubt of the union's majority status.[53] The Board has also issued bargaining orders when the employer's refusal to bargain was based on an erroneous belief that the unit requested by the union was inappropriate,[54] or that the union representatives were under a legal disability which prevented them from binding the union,[55] or that his employees were independent contractors.[56] In each of these cases, the employer did not doubt the union's majority.

After establishing these three criteria for a bargaining order, the dissent concluded that the employer's refusal to bargain "was grounded solely upon an erroneous belief that supervisors had influenced the unit employees."[57] The opinion noted that only one of the two alleged supervisors actually was a supervisor, and there was no evidence that he influenced the employees. Furthermore, neither he nor the other alleged supervisor signed the statement requesting recognition.[58] Moreover, the employee, later found to be a supervisor, had quit nine days before the strike and so could not have improperly influenced that decision. Based on these facts and the reasoning

an appropriate unit, and this obligation exists whether or not the union has been certified by the Board." A narrower interpretation would require an election as the only means by which a majority can make its designation.

49. NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S. Ct. 1918 (1969).

50. 190 N.L.R.B. No. 116, at 15-16 (June 7, 1971) (dissenting opinion).

51. Snow & Sons, 134 N.L.R.B. 709 (1961), *enforced,* 308 F.2d 687 (9th Cir. 1962). The dissent established these three criteria; however if there is "no real dispute" that the union represents a majority, then the employer must be "convinced." The only distinction in the cases cited by the dissent is that under those cited in the second instance the employer refused recognition solely for reasons other than a doubt of majority status. In the third instance, the employer not only refused recognition, but also breached an agreement to recognize the union.

52. 161 N.L.R.B. 852 (1966).

53. Old King Cole, Inc. v. NLRB, 260 F.2d 530, 532 (6th Cir. 1958).

54. Summer & Co., 190 N.L.R.B. No. 116, at 16 (June 7, 1971) (dissenting opinion), citing United Aircraft Corp. v. NLRB, 333 F.2d 819 (2d Cir. 1964), *cert. denied,* 380 U.S. 910, 85 S. Ct. 893 (1965); Florence Printing Co. v. NLRB, 333 F.2d 289 (4th Cir. 1964).

55. Summer & Co., 190 N.L.R.B. No. 116, at 16 (June 7, 1971) (dissenting opinion) citing NLRB v. Burnett Constr. Co., 350 F.2d 57 (10th Cir. 1965).

56. Summer & Co., 190 N.L.R.B. No. 116, at 16 (June 7, 1971) (dissenting opinion) citing NLRB v. Keystone Floors, Inc., 306 F.2d 560 (3d Cir. 1962).

57. Summer & Co., 190 N.L.R.B. No. 116, at 16 (June 7, 1971) (dissenting opinion).

58. *See* note 31 and accompanying text *supra.*

of *H & W Construction*, the employer's refusal to bargain violated section 8(a)(5). The dissent read *H & W Construction* as requiring a bargaining order if the employer's refusal to bargain was founded on reasons other than a doubt of the union's majority status. Here, the employer's refusal to bargain was grounded on a misinterpretation of the supervisor's role.

The dissent in *Summer & Co.* found additional support for its position in *Gissel* and a recent Board decision, *Wilder Manufacturing Co.*[59] *Gissel* reaffirmed the notion that an election is not essential to obligate an employer to bargain:

> [I]t was early recognized that an employer had a duty to bargain whenever the union representative presented 'convincing evidence of majority support'. . . . [A union] could establish majority status . . . by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees . . . .[60]

Because the union in *Summer & Co.* clearly established its majority support by authorization cards, by a statement requesting recognition which nine employees signed, and by a lengthy strike, the employer was obligated to bargain.

In *Wilder*, the union gave the employer authorization cards from 11 of 18 employees in the unit and demanded recognition. Recognition was refused and later that day, the 11 employees struck. According to the Board, the issue turned on whether the employer had knowledge of the union's majority status. "[The issue is] whether, recognizing that there are no independent unfair labor practices involved, the facts here require a conclusion that this Employer *knew* that a majority of his employees supported the Union and nevertheless refused to bargain."[61] In *Wilder*, the Board concluded that the employer knew the union represented a majority because the union had authorization cards from 11 of 18 employees, because these 11 employees participated in a strike, and because the employer remarked to a fellow officer that the union had "10 of the 11."[62] This knowledge along with the employer's lack of willingness to seek an election was sufficient to justify a bargaining order.[63]

Wilder is very similar to *Summer & Co.* In both cases, the unions completed an organizational drive in a single day; at the time of the demand, the unions clearly represented a majority; the employers expressed an unwillingness to resort to the election process; and the unions staged a well-supported strike following the employers refusal to bargain. Based on these similarities, the dissent in *Summer & Co.* concluded that *Wilder* was controlling.[64]

59. 185 N.L.R.B. No. 76 (Aug. 27, 1970).
60. 395 U.S. at 596-97, 89 S. Ct. at 1931.
61. 185 N.L.R.B. No. 76 (Aug. 27, 1970) (emphasis by the Board).
62. *Id.*
63. *Id.* The Board did not explain how significant the employer's lack of willingness was in deciding the case.
64. *Wilder* was originally decided before the *Gissel* opinion was handed down. In *Wilder*, the Board dismissed the complaint because there was no showing that the employer refused to bargain "in bad faith." Further, there was no interference which precluded a fair election. Wilder Mfg. Co., 173 N.L.R.B. 214 (1968). The appellate court, on an appeal by the union, reversed for reconsideration in light of *Gissel*, just decided. Textile Workers v. NLRB, 420 F.2d 635 (D.C. Cir. 1969). On remand, the Board reversed its earlier decision, holding that the employer had knowledge of the union's majority and was therefore obligated to bargain. Wilder Mfg. Co., 185 N.L.R.B. No. 76 (Aug. 27, 1970).

Aside from its novel interpretation of knowledge, *Summer & Co.* is important because of its contrast to other Board decisions. Since the Supreme Court decided *Gissel*, several Board decisions have dealt with employer knowledge.[65] Knowledge was the determining factor in *Wilder*,[66] *Redmond Plastics, Inc.*,[67] and *Pacific Abrasive Supply Co.*[68] In each of these cases, a bargaining order was issued despite the absence of unfair labor practices. Of these cases, the majority in *Summer & Co.* cited only *Wilder*, but failed to distinguish or overrule it. Since the Board rarely encounters the issue of employer knowledge, an analysis of these cases is important in determining the current state of the law.

As interpreted in *Summer & Co.*, *Wilder* was properly decided because "the employer had independent knowledge of the union's majority status" and he made no effort to "resort to Board election procedures."[69] On the basis of this two-pronged test, *Wilder* and *Summer & Co.* are not easily reconciled. The employer in *Summer & Co.* was clearly unwilling to resort to the election process, since at one point he said, "[T]he Board can do what it wants. If it holds an election, the Company will not bargain with the Union."[70] Applying the first prong of the test, however, poses some difficulties. The Board in *Summer & Co.* stated it would no longer attempt to ascertain "the state of employer (a) knowledge and (b) intent at the time he refuses . . . a union demand for recognition."[71] Therefore, the first prong of the *Wilder* test, showing employer knowledge, must qualify under the *Snow & Sons* formulation—knowledge can exist only when the employer has agreed to let a means other than a Board election determine the union's support.[72] A literal application of the two-pronged *Wilder* test, as modified by *Summer & Co.*, would require a union seeking a bargaining order based on knowledge to prove not only that the employer agreed to be bound by the results of a nonelection procedure (e.g., a card majority) and that the procedure established the union's majority but also that the employer demonstrated an unwillingness to resort to an election. It is highly unlikely, however, that an employer who agrees to be bound by a card check would be unwilling to resort to an election. He probably would prefer an election and the opportunity to campaign but agrees to forego an election because of union pressure. Conversely, the employer who is unwilling to resort to an election is even less willing to agree to such procedures as a card check. Ironically, the facts of neither *Wilder* nor *Snow & Sons* would require a

65. Knowledge had been an alternative ground, in addition to unfair labor practices, for issuing a bargaining order. *See* Escondido Ready Mix Concrete, Inc., 189 N.L.R.B. No. 69 (March 30, 1971); Li'l General Stores, 188 N.L.R.B. No. 117 (Mar. 5, 1971); Davis Wholesale Co., 181 N.L.R.B. No. 2 (Feb. 5, 1970); U-Tote M of Oklahoma, 179 N.L.R.B. No. 141 (Dec. 2, 1969). Other Board decisions seem to turn on whether the employer had knowledge. *See* World Carpets, 188 N.L.R.B. No. 10 (Jan. 26, 1971); Bill Pierre Food, Inc., 181 N.L.R.B. No. 155 (Apr. 3, 1970).

66. 185 N.L.R.B. No. 76 (Aug. 27, 1970).

67. 187 N.L.R.B. No. 60 (Dec. 28, 1970).

68. 182 N.L.R.B. 329 (1970).

69. 190 N.L.R.B. No. 116 (June 7, 1971).

70. *Id.* at 8.

71. *Id.* at 10.

72. Using the word knowledge here, as the Board does in *Summer & Co.*, is misleading. The employer does not really let his knowledge be determined. Rather, if he agrees to a method other than an election to determine if the union has a majority, then the Board will not let him renege. The word knowledge is unnecessary in such a rule.

bargaining order under this two-pronged test. In *Wilder*, the employer never "agreed to be bound"; and in *Snow & Sons*, the employer was willing to resort to an election. Apparently, the Board in *Summer & Co.* was not really concerned with an employer's "unwillingness" to resort to an election. Rather, the key inquiry was whether or not he ever agreed to be bound by some nonelection procedure. If this is accurate, then *Wilder*, even as modified, is no longer sound, and an examination of employer knowledge, as the term was used in *Wilder*, is irrelevant.

Another case where the Board recognized the significance of employer knowledge was *Pacific Abrasive Supply Co.*[73] On April 22, 1969, the union organizers in *Pacific Abrasive* presented the employer's manager with signed authorization cards from all four employees in the unit. The manager received the cards and acknowledged the authenticity of the signatures. He refused, however, to grant recognition, stating that only the company's president could do so. The next day, the manager had a discussion with all four employees, and each expressed his desire to be represented by the union. On April 24, the manager informed the union that the company would not grant recognition. The following day all four employees went on strike and formed a picket line. Two employees stopped picketing in the middle of May, and the other two stopped in early June. The union then sought a bargaining order, alleging a violation of section 8(a)(5). As in *Wilder*[74] and *Summer & Co.*,[75] the Board announced that it was deciding the undecided issue of *Gissel*:[76] "[The question is] whether a defense of 'good faith doubt' is available to an employer who refuses the union's demand but does not interfere with the election process."[77] The Board answered this question in the negative. If no bona fide dispute exists as to the union's majority status, then the employer is under an obligation to bargain.[78] A combination of elements, including the authorization cards, the manager's discussions, and the strike, proved that there could be no bona fide dispute in this case. *Pacific Abrasive*, therefore, stands for the proposition that a bargaining order is proper when the employer has knowledge of the union's majority status and that the employer's "knowledge" is evaluated on the facts in each case.[79] This proposition is easily reconcilable with *Wilder*, for in both cases a bargaining order issued because of employer knowledge. In *Summer & Co.*, however, a bargaining order would not issue, despite employer knowledge.

The most recent case in which the Board discussed employer knowledge is *Redmond Plastics, Inc.*[80] In *Redmond*, the union began its organizational drive on March 27 and by March 29 had obtained a card majority. A few

73. 182 N.L.R.B. 329 (1970).
74. *See* text accompanying note 61 *supra*.
75. *See* note 25 *supra*.
76. *See* note 24 and accompanying text *supra*.
77. 182 N.L.R.B. at 330.
78. *Id.* The court explained as follows:

> We find on these facts that 'any bona fide dispute as to the existence of the required majority of eligible employees' which might have existed at the time the Union made its demand upon Respondent [Employer] was dissipated by the subsequent discussion between . . . [the manager] and the employees, and the fact, known to Respondent, that all four unit employees were on the picket line.

Id. at 331.
79. *See, e.g.*, Acker Indus., 184 N.L.R.B. No. 51 (July 7, 1970) (dissenting opinion).
80. 187 N.L.R.B. No. 60 (Dec. 28, 1970).

days later, the union organizers presented the employer with the cards, while 12 of 21 employees in the unit remained outside the plant. The employer acknowledged the union's majority and agreed to bargain. He refused to sign a recognition agreement, however, until he had discussed the matter with other company officers.[81] Later that day the employer again refused to sign the agreement and suggested that the union seek a consent election. The Board issued a bargaining order based on *Snow & Sons* because the employer reneged on an agreement, and on *Wilder* because the employer had no doubt as to the union's majority.[82] The employer was denied an election because its only function is to resolve legitimate disputes and no legitimate dispute existed. The Board would not allow the election process to be used as a "loophole in the law" through which an employer could delay his bargaining obligations and thus deny his employees their statutory rights under section 7 to bargain collectively.[83]

In *Summer & Co.* the focus seemed to be on the employer's right to an election regardless of knowledge; in *Redmond* the focus was on the union's right to recognition when no doubt existed as to its strength. A more significant change in focus appears when *Wilder, Pacific Abrasive,* and *Redmond* are considered together. All three cases indicate the Board's willingness to issue a bargaining order when no dispute exists as to the union's majority. By rejecting this criterion, the majority in *Summer & Co.* has developed a new policy.

In *NLRB v. Gissel Packing Co.*, the Court dispensed with the good faith standard as a criterion for bargaining orders, at least when unfair labor practices have occurred.[84] But since that decision was explicitly limited to cases involving unfair labor practices, the vitality of the standard in other situations remained in doubt.[85] The majority in *Summer & Co.* rejected the good faith standard completely: "We decline, in summary, to reenter the 'good faith' thicket of *Joy Silk*, which we announced to the Supreme Court in *Gissell* we had 'virtually abandoned . . . altogether.' "[86] Arguably, however, the good faith question was not presented in *Summer & Co.* For if the record indicated that the employer knew or must have known that the union represented a majority, an inquiry into his subjective feelings is irrelevant. Conceptually, a "good faith doubt" and a "bona fide dispute" are not synonymous. In the former, the Board must inquire into the reasons the employer declined recognition. If, for instance, he wished to gain time to dissipate the union's strength, or if he simply rejected the collective bargaining concept, then he would be guilty of bad faith.[87] But determining whether

81. Chairman Miller, in his dissenting opinion, argued that this fact indicated that the employer never agreed to recognize the union.

82. Redmond Plastics, Inc., 187 N.L.R.B. No. 60 (Dec. 28, 1970). The Board stated:

> [I]t is difficult to see that the . . . [Employer's] request for an election indicated such genuine willingness to resolve 'any lingering doubts' concerning the Union's majority when, in fact, no such doubts lingered. . . . [The employer,] even after requesting an election, repeated that he had no doubts as to the Union's majority.

Id. at 8.

83. *Id.*

84. *See* text accompanying notes 20-23 *supra.*

85. *See* Christensen & Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Union in the NLRA,* 37 U. CHI. L. REV. 411 (1970).

86. 190 N.L.R.B. No. 116, at 11 (June 7, 1971).

87. Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949).

a bona fide dispute exists requires no such inquiry. All that is required is an analysis of the facts. If, for instance, all four employees in a unit sign authorization cards and participate in a strike, there can be no bona fide dispute as to the union's status.[88] The Board need not determine whether the employer had a good faith doubt, but rather, whether he could have any doubt.

A bargaining order based on employer knowledge raises several issues. Arguably, a Board election should be held to afford the employer an opportunity to campaign regardless of the union's card majority and apparent strength.[89] The employers in *Gissel* contended that employees could not make an informed choice because the card campaign was over before the employer could present his side.[90] To this, the Court replied that the union normally informs the employer of its organizational drive.[91] Thus the employer has ample opportunity to campaign against the union, and the subsequent employee choice, be it through authorization cards or a strike, is likely to be a free choice. Significantly, the Court's reply was not based on empirical research, but rather on an unsupported assumption that employers are usually aware of union campaigns. If this assumption proves false, then the policy of promoting free choice has suffered, for the employees' choice after a fair campaign may be quite different.

Justifying a bargaining order predicated on employer knowledge, as the dissent in *Summer & Co.* did, assumes that a fair representation campaign would not change employee sentiments. Some support for this assumption may be found in Professor Bok's article on campaign tactics, in which he observed that the employee's vote is often not based on logical reasoning, but is rather "a reaction to the pressures of the moment."[92] But again, if this assumption proves false, the policy of free choice is frustrated.

Finally, a bargaining order based on employer knowledge relies heavily on the proposition that the intent of the Act is to require an employer to bargain with a union that presented clear and convincing evidence of majority support.[93] Arguably, however, this may require a bargaining order based on authorization cards alone, for clear, unambiguous cards from a majority of employees may be convincing evidence. To avoid such a result, the convincing evidence must be a result of free choice. If a majority of the employees picketed in support of a union, this alone would not be sufficient evidence of majority support unless the decision to strike was shown to be a free and reasoned one. No such showing was made by the union in *Summer & Co.;* however, no such showing was required.

In conclusion, the Board's current practice on issuing bargaining orders appears inconsistent with its policy of promoting employee free choice. An examination of cases decided by the Board since *Gissel* reveals that the Board has often issued a bargaining order when unfair labor practices have

88. Pacific Abrasive Supply Co., 182 N.L.R.B. No. 48 (May 6, 1970).

89. *See* Note, *Union Authorization Cards,* 75 YALE L.J. 805 (1966).

90. 395 U.S. at 602-03, 89 S. Ct. at 1934.

91. The union later may have to prove employer awareness to substantiate allegations of unfair labor practices.

92. Bok, *The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act,* 78 HARV. L. REV. 38, 50 (1964).

93. *See, e.g.,* NLRB v. Marsellus Vault & Sales, 431 F.2d 933, 938 (2d Cir. 1970), *enforcing* 170 N.L.R.B. No. 99 (Mar. 29, 1968). "Under the circumstances of this case the Company was under a duty to bargain collectively with the Union, for the Union had shown 'convincing evidence of majority support'."

occurred without the required showing of why a fair election cannot be held.[94] This practice has been criticized[95] because it is contrary to the guidelines established in *Gissel*.[96] In *Gissel*, the Court explicitly instructed the Board to ascertain the effects of employer misconduct on the election process. Because the Board has failed to make such findings, bargaining orders may have been issued in cases in which the unfair labor practices did not disturb the election process or the union recognized did not represent a majority.

The Board will issue a bargaining order if the employer has agreed to be bound by a card check and later reneges on his agreement.[97] But this approach does not promote employee free choice, for it should not matter if the employer has made such an agreement. The crucial inquiry in such cases should be into the employees' actions, not the employer's. If the card majority was preceded by a campaign in which both management and labor participated and the employees' choice was a free and reasoned one then a bargaining order may be proper regardless of whether or not the employer agreed to be bound.

This inquiry is also necessary for cases like *Summer & Co.*, *Wilder*, *Pacific Abrasive*, and *Redmond*. Mere proof of employer knowledge is insufficient, for of what does the employer have knowledge? All he really knows is that at one point the union represented a majority of his employees. More important, however, is whether each employee made a free and reasoned choice. In small units, in which the employer has had an opportunity to discuss the issues with his employees, the employer may

94. Lilliam Abrahamson Nursing Home, 181 N.L.R.B. No. 148 (April 2, 1970); New Alaska Dev. Corp., 180 N.L.R.B. No. 150 (Jan. 27, 1970); Renner Plumbing, Inc., 179 N.L.R.B. No. 103 (Nov. 19, 1969); Garland Knitting Mills, 178 N.L.R.B. No. 62 (Sept. 11, 1969); Marie Phillips, Inc., 178 N.L.R.B. No. 53 (Sept. 5, 1969). In the following cases, the Board held that the unfair labor practices had a minimal effect on the election process. But again, there was no showing of the precise effect, if any, that the unfair labor practices had on the election process: Dent Poultry Co., 188 N.L.R.B. No. 112 (Feb. 25, 1971); J.A. Conley Co., 181 N.L.R.B. No. 20 (Feb. 12, 1970); Central Soya of Canton, 180 N.L.R.B. No. 86 (Jan. 6, 1970); Blade-Tribune Publishing Co., 180 N.L.R.B. No. 56 (Dec. 16, 1969); Stoutco, Inc., 180 N.L.R.B. No. 11 (Dec. 15, 1969); Schrementi Bros., 179 N.L.R.B. No. 147 (Dec. 3, 1969); Seymour Transfer Co., 179 N.L.R.B. No. 5 (Oct. 10, 1969).

95. *See* NLRB v. Drives, Inc., 440 F.2d 354 (7th Cir. 1971); NLRB v. General Stencils, Inc., 438 F.2d 894 (2d Cir. 1971); Alaska Dev. Corp. v. NLRB, 76 L.R.R.M. 2689 (7th Cir. 1971). *See also, e.g.*, NLRB v. American Cable Systems, Inc., 414 F.2d 661 (5th Cir. 1969), in which the court was particularly adamant in requiring the Board to substantiate its bargaining order. The alleged unfair labor practices occurred in 1965, and the Board issued a bargaining order the following year. American Cable Systems, Inc., 161 N.L.R.B. 332 (1966). The Court of Appeals for the Fifth Circuit refused enforcement, remanding for further consideration in light of *Gissel*. NLRB v. American Cable Systems, Inc., 414 F.2d 661 (5th Cir. 1969). On remand, the Board affirmed its prior order, holding that *Gissel* required a bargaining order. But the Board failed to show why a fair election could not be held. American Cable Systems, Inc., 179 N.L.R.B. No. 149 (Dec. 3, 1969). The employer again appealed to the circuit court, and again enforcement was denied. The court, with rather strong language, remanded the case and instructed the Board to demonstrate the effects of the unfair labor practices. NLRB v. American Cable Systems, Inc., 427 F.2d 446 (5th Cir. 1970).

96. *See* note 17 and accompanying text *supra*.

97. Snow & Sons, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962). *See* text accompanying notes 40-47 *supra*.

be aware of their decision process. If he knows that his employees understand his arguments but still prefer the union and would vote for one in an election, then he has sufficient knowledge to justify a bargaining order. *Summer & Co.*, however, rejects a bargaining order in such instances, for the Board will "no longer attempt to ascertain the state of employer . . . knowledge." Ironically, a bargaining order would be proper if the employer agreed to be bound by a card check, while remaining completely ignorant of how his employees reached their decision.

If the Board's policy is to encourage secret ballot elections, then it should do so consistently. It should ascertain if an election can be held despite unfair labor practices; it should require an election despite a reneged agreement. It would follow then that an election is necessary regardless of employer knowledge.

M.J.L.

LABOR LAW—THE ENFORCEMENT POWER OF THE SECRETARY OF LABOR UNDER SECTION 402 OF THE LMRDA—*Hodgson v. Local 6799, United Steelworkers of America*, 403 U.S. 333, 91 S. Ct. 1841 (1971).

In response to reports of "instances of breach of trust, corruption . . . and other failures to observe high standards of responsibility and ethical conduct"[1] in the labor and management fields, Congress enacted the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).[2] Among the new restrictions and requirements to which unions were subjected were the election provisions of title IV.[3] Section 401 contained the substantive guarantees designed to provide free and democratic elections. Section 402 established a statutory method to enforce the section 401 provisions. Although this method vested wide enforcement power in the Secretary of Labor,[4] the exact scope of his power was not apparent from the language of section 402.[5]

1. Labor Management Reporting and Disclosure Act (LMRDA) § 2(b), 29 U.S.C. § 401(b) (1970).

2. LMRDA §§ 1-705, 29 U.S.C. §§ 401-531 (1970).

3. *Id.* §§ 401-04, 29 U.S.C. §§ 481-83.

4. "Congress deliberately gave exclusive enforcement authority to the Secretary having decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest." Wirtz v. Glass Bottle Blowers Ass'n, 389 U.S. 463, 473, 88 S. Ct. 643, 649 (1968), citing Calhoon v. Harvey, 379 U.S. 134, 140, 85 S. Ct. 292, 296 (1964).

5. Besides § 401 and § 402, title IV of the LMRDA contained two other sections. Section 404 dealt with the date on which the provisions were to take effect and is no longer relevant. Section 403 dealt with alternative methods of correcting alleged union election abuses. Although it preserved "existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof," it provided that the remedy afforded by this title for "challenging an election already conducted shall be exclusive." Prior to the enactment of the LMRDA, however, courts were generally not accessible to parties complaining of internal union abuses. For a thorough discussion of the availability of pre-LMRDA union election relief see R. SLOVENKO, SYMPOSIUM ON THE LABOR-