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The Reliability of Card Checks in Establishing Collective Bargaining Representative Status

THE RELIABILITY OF CARD CHECKS IN ESTABLISHING COLLECTIVE BARGAINING REPRESENTATIVE STATUS

I. INTRODUCTION

An election conducted by the National Labor Relations Board among a group of previously unorganized employees has long been the normal procedure by which a union may become the designated collective bargaining representative for those employees.[1] Recently, however, an alternative method of establishing representative status has been used with greater frequency by unions engaged in organization.[2] Under this alternative method, the union solicits authorization cards from a majority of the employees in an appropriate unit, informs their employer of the existence of such cards, and requests recognition as bargaining representative. The employer is obligated to bargain with the union unless he has a good faith doubt as to the validity of the union's majority status or as to the appropriateness of the proposed unit. The obligation to bargain arises out of section 8(a)(5) of the National Labor Relations Act, which states: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ."[3] This statutory language has been interpreted by the courts to impose a duty upon the employer to bargain with a union once it "presents convincing evidence of majority support."[4] Authorization cards have been held to constitute such evidence,[5] whether they take the form of an explicit designation of the union as the employee's bargaining representative,[6] regular union membership cards,[7] applications for union membership,[8] or even authorizations for the check-off of union dues.[9] If

1. The procedure for election and certification is found in the National Labor Relations Act § 9, 29 U.S.C. § 159 (1964). When the union files a petition with the Board showing that at least 30% of the employees in the proposed bargaining unit are interested either in representation by the union or in an election, the Board, if it finds the unit appropriate and the expression of interest reasonably valid, conducts a secret ballot election within the unit. The election may call upon the employees to choose between two or more unions, or to simply decide whether they wish any union representation at all. If a union receives a majority of votes cast, the Board certifies it as the exclusive bargaining representative for all members of the unit, and the employer must bargain with it. See 1968 CCH Guidebook to Labor Relations §§ 400-12.

2. See statistics noted in Lesnick, Establishment of Bargaining Rights Without an NLRB Election, 65 Mich. L. Rev. 851, n.1 (1967).

3. 29 U.S.C. § 158(a)(5) (1964).

4. NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940). See also NLRB v. Philamon Laboratories Inc., 298 F.2d 176 (2d Cir.), cert. denied, 370 U.S. 919 (1962); NLRB v. Sunrise Lumber & Trim Corp., 241 F.2d 620 (2d Cir.), cert. denied, 355 U.S. 818 (1957).

5. NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940).

6. NLRB v. Stow Mfg. Co., 217 F.2d 900 (2d Cir. 1954), cert. denied, 348 U.S. 964 (1955); NLRB v. Howell Chevrolet Co., 204 F.2d 79 (9th Cir.), aff'd, 346 U.S. 482 (1953).

7. Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951); NLRB v. Federbush Co., 121 F.2d 954 (2d Cir. 1941).

8. NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318 (1940); NLRB v. Consolidated Mach. Tool Corp., 163 F.2d 376 (2d Cir.), cert. denied, 332 U.S. 824 (1947).

the employer rejects the evidentiary significance of the cards, the union can present them to a neutral third party for the purpose of checking the signatures against payroll records.[10] If more than 50% of the signatures on the cards are found valid, the employer must bargain or expose himself to a charge of having violated section 8(a)(5).[11] If, upon petition to the Board by the union, the employer is found to have lacked a "good faith doubt" as to the union's majority status or as to the appropriateness of the unit, and if the union actually did have majority status in an appropriate unit, a bargaining order will issue without an election.[12]

Therefore, it is unlikely that a well-advised employer will summarily reject cards which he can see contain the valid signatures of a majority of the employees in the proposed unit. It is even more unlikely that he will reject cards which have been checked by a third party. In the cases where such cards are rejected, the employer's usual contention is that some of the cards should be invalidated because of the methods used in obtaining them. It is the employer's argument in these cases that, despite the authenticity of the signatures, some of the employees did not actually wish to designate the union as their bargaining representative, thereby bringing into question the union's alleged majority status. Everytime an employer makes such a contention, he questions the reliability of authorization cards and the fairness of union organizational methods.

A representation election conducted by the Board must be held in circumstances free from any coercion under what the Board terms "laboratory conditions."[13] When a bargaining order is issued solely on the basis of a card check, the "laboratory conditions" surrounding a secret ballot election are necessarily replaced by the solicitation techniques surrounding the organizational drive for signed cards. Commenting upon the effect of such techniques on the trustworthiness of card checks, the Fourth Circuit has recently stated: "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands."[14] While this exaggerates the situation, it is true that certain coercive acts and misrepresentations are often used in obtaining the signatures of employees. In direct contradiction to its policy of closely scrutinizing the conditions surrounding an election, the Board has usually ignored these acts and misrepresentations by upholding almost any card with a valid signature. The

9. Lebanon Steel Foundry v. NLRB, 130 F.2d 404 (D.C. Cir.), cert. denied, 317 U.S. 659 (1942).

10. See NLRB v. George Groh & Sons, 329 F.2d 265 (10th Cir. 1964).

11. See text accompanying note 3 supra.

12. See, e.g., Aaron Bros. Co., 158 N.L.R.B. 1077 (1966); Colson Corp., 148 N.L.R.B. 827 (1964), enforced, 347 F.2d 128 (8th Cir.), cert. denied, 382 U.S. 904 (1965). In a more unusual situation, a bargaining order will issue even though the employer had a good faith doubt, if it is found that the employer committed unfair labor practices so flagrant as to make a fair election impossible. See J.C. Penney Co. v. NLRB, 384 F.2d 479 (10th Cir. 1967).

13. See General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

14. NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 565 (4th Cir. 1967). This harsh view of NLRB bargaining orders has been rejected by other courts, e.g., Thrift Drug Co. v. NLRB, 404 F.2d 1097 (6th Cir. 1968).

circuit courts, on the other hand, have rejected the Board's policy by invalidating cards they find to have been unfairly solicited.[15] Despite consistent reversals by the courts, the Board has remained firm in its policy and has thereby created the necessity for an employer to appeal his case twice[16] before obtaining what he and the courts consider to be a just decision.[17]

II. Common Misrepresentations

A. *Purpose of the Card*

A review of recent NLRB and court decisions reveals that the most common misrepresentation made by solicitors is that the purpose of the card is to present the showing of interest necessary to obtaining a representation election.[18] The employee is told that "the purpose of the cards is to get a vote" or "if we get enough cards we will ask the Board to hold an election." The effect of this misrepresentation on the validity of the card was originally considered in *NLRB v. Cumberland Shoe Corp.*[19] Known as the "*Cumberland* rule," the court stated that a card would be invalid if the organizer or campaign literature used words akin to "sole" or "only." In other words, for the card to be invalidated, it must have been represented to the signer that the card would be used only as part of a showing of interest necessary to get an election.[20]

In a recent case concerning election misrepresentations,[21] the Fourth Circuit refused to enforce the Board's bargaining order, holding that the union never had legitimate majority status because the employees had signed the cards under misrepresentations as to their purpose. The misrepresentations arose at a meeting where the organizer, after referring to an election, had answered ques-

15. For a discussion of the criticism that the Board's approach has experienced from the courts, see Lewis, The Use and Abuse of Authorization Cards in Determining Union Majority, 16 Lab. L.J. 434 (1965).

16. Board cases are first heard by an independent trial examiner who is bound by Board law. His determination is appealable to the Board as a matter of right. The Board's decision may then be appealed by right to a circuit court of appeals.

17. The Supreme Court has finally taken cognizance of the differing credence given authorization cards not only between the Board and the circuit courts but even between different circuits. It agreed to decide NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir.), cert. granted, 393 U.S. 997 (1968) and NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir.), cert. granted, 393 U.S. 997 (1968). In Gissel, the court refused to enforce a bargaining order, holding the employer had a good faith doubt of the union's majority status despite evidence presented him in the form of a majority of signed cards, since cards are "such unreliable indicators." 398 F.2d at 337. In Sinclair, the court, when faced with an almost identical situation, enforced the bargaining order. 397 F.2d at 161-62. Perhaps the Supreme Court's decision in these cases will clarify what reliance should be given cards in the future and will give some direction to the effort to regulate their solicitation.

18. See Chief Judge Haynsworth's brief discussion of various misrepresentations in NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 565-66 (4th Cir. 1967).

19. 351 F.2d 917, 920 (6th Cir. 1965).

20. See the procedure outlined in note 1 supra.

21. Crawford Mfg. Co. v. NLRB, 386 F.2d 367 (4th Cir. 1967), cert. denied, 390 U.S. 1028 (1968).

tions in such a manner as to indicate that he assumed there would be a secret ballot election.[22] In addition, the organizer stated at an organization committee meeting that the cards "would be used first to obtain an election" and that the signers were not members until the election had been won and a contract negotiated.[23] The court found the issue to be not the words used, but "whether the cards were signed as a power to the union to act for the employees."[24] Concerning the narrow "*Cumberland* rule" followed by the Board, the court stated: "Despite the regard we hold for the contrary opinion . . . we will not stick mechanically to the literal phrasing of the cards. A ghost of the parol evidence rule, such literalism subordinates what really counts: the actual understanding of the signers."[25]

In *NLRB v. S.E. Nichols Co.*,[26] the Second Circuit was asked to enforce a bargaining order based on a card check and on a finding that the employer lacked a good faith doubt as to the union's majority when he refused to bargain. The court refused to enforce the order because there were enough invalid cards to destroy the union's majority. Although recognizing that the cards clearly stated that the signer authorized the union to represent him for purposes of collective bargaining, Judge Friendly, delivering the opinion of the court, observed that such written clarity "should constitute [only] the beginning of any effort to show a majority on the basis of authorization cards" and that "the clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the 'witty diversities' of labor law."[27] Therefore, the court looked beyond the language of the cards to the representations made by the organizers in obtaining signatures.

Two of the cards challenged in *Nichols* were attacked because of misrepresentations that their purpose was to obtain an election.[28] One employee was told that there would have to be an election and that she would be able to change her mind if she wanted to by voting against the union. The second employee was told that the cards were needed for presentation to the government "for a vote," and that a voting booth would be set up. Neither card was counted by the court because both employees were led to believe that the cards were merely preparatory to a vote, and neither employee understood that they were authorizing the union to act as their representative by signing the card.[29] A third card was invalidated because the signer was told that the cards would be used to bring about an investigation of working conditions. When the signer asked if the card was for an election she was told by the organizer that it was " 'not necessarily for an election, that it could be for an election if we couldn't reach a majority

22. Id. at 371.
23. Id.
24. Id.
25. Id. at 372.
26. 380 F.2d 438 (2d Cir. 1967).
27. Id. at 442.
28. There were other cards challenged and invalidated for reasons not germane to this discussion.
29. 380 F.2d at 444.

status to make our demand for recognition upon the company.' "[30] The court found that this explanation was insufficient because it failed to make it clear that the union could claim to be the exclusive bargaining agent on the strength of a majority card check and without the need for an election.[31]

In recent years, other circuits have similarly invalidated cards induced by election misrepresentations.[32] In fact, the Sixth Circuit (which originally laid down the "*Cumberland* rule") has now discontinued the requirement that the words "sole" or "only" be used in order to bring about invalidation. In *NLRB v. Swan Super Cleaners, Inc.*,[33] one card was invalidated because of a statement by the solicitor to the effect that there would be a secret vote, and another was invalidated because, when the signer said she was against the union, the solicitor assured her that "he was trying to get a percentage of the girls to sign the cards so they could come in and vote for the union . . . ."[34] Indeed, among the circuit courts faced with the issue, it appears that only the District of Columbia Circuit continues to adhere to the "*Cumberland* rule."[35]

Nearly all the cases which invalidate cards because of election misrepresentations cite *NLRB v. Stow Manufacturing Co.*,[36] where Judge Learned Hand dis-

30. Id. at 443.

31. Id.

32. See, e.g., NLRB v. Lake Butler Apparel Co., 392 F.2d 76 (5th Cir. 1968); NLRB v. Dan Howard Mfg. Co., 390 F.2d 304 (7th Cir. 1968); Engineers & Fabricators, Inc. v. NLRB, 376 F.2d 482 (5th Cir. 1967); Bauer Welding & Metal Fabricators, Inc. v. NLRB, 358 F.2d 766 (8th Cir. 1966).

33. 384 F.2d 609 (6th Cir. 1967).

34. Id. at 616.

35. United Automobile Workers v. NLRB, 381 F.2d 265 (D.C. Cir.), cert. denied, 389 U.S. 857 (1967). The court therein expressed concern that any other rule would require a court to adjudge the credibility of each witness. It also questioned the reliability of testimony of employees given under the eye of company officials. Judge Friendly answered these two arguments recently in his concurring opinion in Bryant Chucking Grinder Co. v. NLRB, 389 F.2d 565 (2d Cir. 1967), cert. denied, 392 U.S. 908 (1968). On the issue of witness credibility he argued that: "[T]his could hardly have meant that the Cumberland rule avoids these tasks; it simply narrows the scope of inquiry to whether the solicitor used a particular form of words. Furthermore, . . . judges reviewing agency action do not 'adjudge the credibility of each witness' or 'weigh the evidence.' While ease of review is indeed desirable, this can never justify narrowing the inquiry to eliminate relevant facts . . . ." 389 F.2d at 570. On the question of the reliability of employee testimony, Judge Friendly noted that while it is "somewhat suspect, there is no reason to suppose the testimony of union organizers is any less so. So far as memory is concerned, an employee would seem rather more likely to be able to recall what was said to him than an organizer would be to remember what he said to each of scores of employees in many campaigns . . . ." Id. at 570 n.2. The following decisions are recent examples of the circuit courts (other than the District of Columbia) which have been presented with the issue and which have uniformly not followed the "Cumberland rule." NLRB v. Dan Howard Mfg. Co., 390 F.2d 304 (7th Cir. 1968); Crawford Mfg. Co. v. NLRB, 386 F.2d 367 (4th Cir. 1967); NLRB v. Swan Super Cleaners, Inc., 384 F.2d 609 (6th Cir. 1967); NLRB v. S.E. Nichols Co., 380 F.2d 438 (2d Cir. 1967); Engineers & Fabricators, Inc. v. NLRB, 376 F.2d 482 (5th Cir. 1967); Bauer Welding and Metal Fabricators, Inc. v. NLRB, 358 F.2d 766 (8th Cir. 1966).

36. 217 F.2d 900 (2d Cir. 1954), cert. denied, 348 U.S. 964 (1955).

cussed the effect such misrepresentations have on the designation of a bargaining representative. He pointed out that if the signer looked upon the card only as a request for an election at which he would be free to vote as he pleased, his act in signing could not be considered a designation of the union as his representative.[37] Therefore, if the union organizer contributed to this misapprehension in any way, the authorization card should not be used to establish majority status no matter how plain it is on its face. The *Nichols* decision observed that employees who believe that they can later vote secretly will sign cards during an organizational drive to avoid retaliation or harassment, all the while intending to vote against the union or at least to reserve decision.[38] Their motive is obviously inconsistent with an authorization card that purports to designate the union as their bargaining agent and, if the organizer is responsible for the signers' mistaken beliefs, the cards should be invalidated.

B. *Initiation Fees*

A common "promise" made by a union organizer during a campaign is not to exact initiation fees from those who sign cards. Such a statement may constitute either a misrepresentation or an illegal inducement, depending upon the particular facts involved.[39] Often, all the members of a unit for which a union is certified as representative are not liable for initiation fees upon joining the union if they were employees at the time of certification, whether or not they signed cards during the organization campaign.[40] Only employees joining the unit after certification might be required to pay an initiation fee. In such cases, a representation that the employee could avoid a fee by signing a card during the campaign would be false. Another common policy is that all new members must pay a fee. In that case, the promise not to exact a fee is an illegal inducement,[41] akin to bribery.

In *NLRB v. Gorbea, Perez & Morell, S. en C.*,[42] the Board petitioned for enforcement of a bargaining order based on a card check. The authorization cards in question contained the following statement: "NON PAYMENT OF INITIATION FEE Those who join now shall never have to pay an initiation fee. Those who wait until the contract is signed, shall have to pay the regular initiation fee."[43] The union actually had no initiation fee, although this fact was not determinative. The court pointed out that the offering of improper inducements by a union in order to attract membership is just as illegal as an

37. Id. at 902.

38. 380 F.2d at 445.

39. See NLRB v. Gorbea, Perez & Morell, S. en C., 328 F.2d 679, 682 (1st Cir. 1964).

40. See Gilmore Indus., Inc. 140 N.L.R.B. 100 (1962), enforcement denied, 341 F.2d 240 (6th Cir. 1965), and cases cited in NLRB v. Gorbea, Perez & Morell, S. en C., 300 F.2d 886, 888 (1st Cir. 1962).

41. See NLRB v. Gorbea, Perez & Morell, S. en C., 328 F.2d 679, 682-83 (1st Cir. 1964), where the court, in commenting on such a promise, said: "We do not have here a genuine waiver supported by the economic reasons advanced by the Board with the inducing effects merely a concomitant incident. Rather, we have an inducement expressly sought for its own sake; a bold attempt to buy membership at a phonily [sic] reduced rate."

42. 300 F.2d 886 (1st Cir. 1962).

43. Id. at 887.

employer's offers of improper inducements made to discourage membership.[44] It reasoned that the waiving of initiation fees before an election may be a harmless way of buying cards for the showing of interest necessary to obtain an election, but that such a waiver ceases to be harmless when the union has paid for the votes it needed.[45] Apparently it makes no difference whether the promise of waiver is a misrepresentation or an inducement because, in either event, it constitutes an illegal purchase of votes where the cards are used as the basis of a bargaining order. On remand, the Board affirmed its decision to issue a bargaining order, and the case went back to the First Circuit.[46] This time, the court refused enforcement, holding that the promise not to charge an initiation fee was an improper and illegal inducement as well as a serious misrepresentation.[47] Thus, while the Board viewed the promise as irrelevant, the court held that it invalidated the authorization cards as an illegal purchase of votes.

Many analagous statements by union organizers as to waiver of fees and dues have since been held to have been improper inducements or misrepresentations. In *NLRB v. Southbridge Sheet Metal Works, Inc.*,[48] a card was invalidated because the signer was told that if he did not sign the card, and the union was later certified or recognized, he would have to pay increased union dues.[49] In *NLRB v. Gilmore Industries, Inc.*,[50] an election won by the union was set aside because the union had offered to waive an initiation fee (rumored to be $300) in the event that it won.

There is no judicial conflict of authority where the initiation fee representation is false. While the Board is willing to ignore this misrepresentation, all the circuits have invalidated cards so induced. However, where the promise is only an inducement (where there is a fee to avoid) there is some disagreement among the circuits.[51] The Board has consistently held that as long as the reduced rate is available to all employees, the inducement does not vitiate signed cards.[52] Again, the conflict between the Board and the courts as to misrepresentations concerning fees, and the conflict among the circuits as to using waiver of fees as inducements, should be resolved so that an employer knows when he may reject cards in good faith.

C. *A Majority Has Already Signed*

Another common misrepresentation made by union organizers to prospective signers is that a majority of the employees in the unit have already signed. In

44. Id.

45. Id. at 888.

46. 328 F.2d 679 (1st Cir. 1964).

47. Id. at 682-83.

48. 380 F.2d 851 (1st Cir. 1967).

49. Id. at 856.

50. 341 F.2d 240 (6th Cir. 1965).

51. See Amalgamated Clothing Workers v. NLRB, 345 F.2d 264 (2d Cir. 1965), wherein a bargaining order was upheld despite initiation fee promises which were not misrepresentations. Judge Friendly criticized this point in the decision but concurred because the union had 90 cards in a unit of 120 employees.

52. See General Steel Prods., Inc., 157 N.L.R.B. 636 (1966), modified, 398 F.2d 339 (4th Cir. 1968); Gafner Automotive & Machine, Inc., 156 N.L.R.B. 577 (1966), enforced, 400 F.2d 10 (6th Cir. 1968).

NLRB v. H. Rohtstein & Co.,[53] the Board had issued a bargaining order based on eight signed cards in a unit of fifteen. One employee testified that he signed the card because when he asked the solicitor if anybody else had signed, the solicitor answered that the union had "got the majority." The Board had held that the statement, although untrue, did not affect the employee's grant of bargaining authority. The court disagreed and refused to enforce the bargaining order, noting that many employees, although anti-union, will want to appear to be on what is already said to be the winning side. It refuted the Board's contention that the employee could check to determine who had already signed by pointing out that such a check would be too hard to carry out, even in a unit of only fifteen employees.[54]

Despite other recent decisions invalidating cards induced by a misrepresentation that a majority had already signed,[55] the Board has not altered its position regarding such misrepresentations. For example, in *G & A Truck Line, Inc.*,[56] it held that such statements, even though relied upon by the signer, were "harmless sales-talk or puffing, which do not operate 'to overcome the effect of . . . [the employee's] overt action in signing.' "[57]

Some standard should be established so that the union organizer knows what he may tell an employee who asks him how the campaign is going. The natural desire of an employee to want to be in the "good graces" of what he believes is already the winning side should not be allowed to negate his free choice as to union representation.

D. *Discrimination Against Non-Signing Employees*

Coercion in the form of threats to discriminate against non-signers has long been recognized by the courts as destroying the validity of authorization cards obtained thereby. In *NLRB v. Dadourian Export Corp.*,[58] three cards were invalidated when the employees testified that they were unwilling to sign and did not want the union, but signed because the organizer threatened them with loss of their jobs.[59] Such cases of coercion have led to a unified policy insuring freedom of choice. Because it is an unfair labor practice for the union to exercise such coercion,[60] any cards obtained thereby will be invalidated by both the Board and the courts.

53. 266 F.2d 407 (1st Cir. 1959).

54. Id. at 409.

55. See, e.g., NLRB v. Dan Howard Mfg. Co., 390 F.2d 304 (7th Cir. 1968); NLRB v. S.E. Nichols, Co., 380 F.2d 438 (2d Cir. 1967).

56. 168 N.L.R.B. No. 106, 1968-1 CCH NLRB Dec. ¶ 21,984 (1967), enforced, 407 F.2d 120 (6th Cir. 1969).

57. 1968-1 CCH NLRB Dec. at 28,891. The Sixth Circuit, in enforcing the bargaining order, said that the statements "were in fact misrepresentations and not puffing. The statements were false and meant to mislead the two employees." 407 F.2d at 122. However, it found the two employees in this case were not in good faith as they were former union members and aware that the statements were likely to be false, and thus it did not invalidate their cards. Id. at 123.

58. 138 F.2d 891 (2d Cir. 1943).

59. Id. at 892. See also NLRB v. United Mineral & Chem. Corp., 391 F.2d 829, 836 (2d Cir. 1968); NLRB v. James Thompson & Co., 208 F.2d 743, 746-48 (2d Cir. 1953).

60. 29 U.S.C. § 158(b)(1) (1964).

E. *Employees Who Cannot Read English*

Even in the absence of coercion or misrepresentation by union organizers, an analogous problem arises where an employee signs a card printed in a language with which he is unfamiliar. To effectively designate a collective bargaining representative, the employee must understand what he is signing. It is generally accepted by both the courts and the Board that if the card is in an unfamiliar language and the organizer used an unfamiliar language in soliciting the employee's signature, the presumption is that the signer did not make a valid authorization.[61] If the card is in an unfamiliar language but the organizer spoke the signer's native tongue and explained the effect of signing to the employee, the card is generally valid.[62] Where the card is printed in the employee's primary language, the presumption is that he intended to make a designation by signing.[63]

In *Brancato Iron Works, Inc.*,[64] the Board invalidated a card which was printed in English and signed by an employee who understood no English. The credited testimony of the signer was that he did not understand anything said by the solicitor, nor did he know the purpose of the card. The solicitor testified that he spoke to the employee in Spanish, and thought that the employee understood. The Board indicated that since the intent and understanding of the employee are the relevant issues, the testimony of the employee should take precedence over that of the solicitor, who *thought* he was making himself clear.[65]

However, in *NLRB v. River Togs, Inc.*,[66] the Board had validated cards printed in English and signed by Polish speaking employees who could not read or speak English. The solicitor testified that she had explained the meaning of the cards to the employees in Polish, but the employees testified that they were mislead into signing the cards and that they had no understanding of what the cards were for. Although the court's decision did not necessitate a ruling on the validity of the cards, the opinion reflects a marked disagreement with the Board on its validation.[67] Since the situation as it stands now depends to such a large extent on whose testimony is being credited, there is too much opportunity for abuse by both organizer and union. There is a clear necessity for some guideline to prevent such abuse and to help the employer determine whether the union is really the choice of his non-English speaking employees.

F. *Miscellaneous*

In addition to the five misrepresentations or acts of coercion thus far discussed, there are other less common ones which sometimes arise when the issue of the reliability of authorization cards is presented before the Board or the

61. See NLRB v. River Togs, Inc., 382 F.2d 198 (2d Cir. 1967); Brancato Iron Works, Inc., 170 N.L.R.B. No. 10, 1968-1 CCH NLRB Dec. ¶ 22,212 (1968).

62. See cases cited in note 61 supra.

63. This rule is rebuttable with proof of misrepresentations.

64. 170 N.L.R.B. No. 10, 1968-1 CCH NLRB Dec. ¶ 22,212 (1968).

65. Id. at 11.

66. 382 F.2d 198 (2d Cir. 1967).

67. Id. at 204-05.

courts. One such statement is that the card is insignificant. In *NLRB v. Dan Howard Manufacturing Co.*,[68] a card was invalidated because, in addition to being told that the card was insignificant, the signer was told that the purpose of the card was to enable her to attend union meetings. Similarly, in the *Nichols* case, a card was invalidated because the solicitor said that the cards were needed to prompt an NLRB investigation into working conditions at the plant. A variation of the misrepresentation as to an election occurs where a signer is told that the card enables him to vote in a secret ballot election.[69]

The reliability of an authorization card may also be called into question in the absence of coercion or misrepresentation. It is generally agreed that where the signer attempts to retrieve or withdraw his card, it cannot then be used to determine majority status.[70] Similarly, cards that have been filled out but left unsigned cannot be counted unless the employee testifies that the lack of a signature was mere inadvertence on his part.[71]

III. Conclusions and Suggestions

There appears to be a general lack of control over unions during campaigns to achieve recognition of majority status. While a Board-run election must be conducted under "laboratory conditions," a campaign to attain majority status solely through authorization cards is under no such requirement. Certain standards must be established to conform the reliability of card authorizations to those won in elections, if both procedures are to continue to result in certification.[72] Indeed, the disparity between what the Board and the courts have found to be permissible solicitation techniques has often forced employers to pursue their objections to a third forum before obtaining a just result.

It must be recognized, however, that the very nature of card solicitation discourages any attempt to control the oral representations of the solicitor. Any set of rules aimed at governing what may and may not be said might result in a credibility issue in almost every case because of the secretive conditions under which most solicitation takes place. Similarly, a requirement that all card solicitation take place before witnesses would create an opportunity for employer

68. 390 F.2d 304 (7th Cir. 1968).

69. Such a statement implies that signing the card is equivalent to registration prior to political elections.

70. See NLRB v. S.E. Nichols Co., 380 F.2d 438, 442 (2d Cir. 1967); TMT Trailer Ferry, Inc., 152 N.L.R.B. 1495, 1507 (1965). A split in authority exists where the employee attempts to withdraw his card after an unfair labor practice has been committed by his employer. Compare NLRB v. Abrasive Salvage Co., 285 F.2d 552 (7th Cir. 1961), with NLRB v. Quality Markets, Inc., 387 F.2d 20 (3d Cir. 1967).

71. See Shelby Mfg., 155 N.L.R.B. 464, 466 (1965), modified, 390 F.2d 595 (6th Cir. 1968); Von Der Ahe Van Lines, Inc., 155 N.L.R.B. 126, 144 (1965); I. Taitel & Son, 119 N.L.R.B. 910 (1957), enforced, 261 F.2d 1 (7th Cir. 1958), cert. denied, 359 U.S. 944 (1959).

72. While the viability of authorization card elections has been an implicit assumption of the foregoing, it should be noted that there are those who question this assumption. See Judge Timbers' separate opinion in NLRB v. Gotham Shoe Mfg. Co., 359 F.2d 684, 693-703 (2d Cir. 1966); Comment, Union Authorization Cards, 75 Yale L.J. 805, 818-19 (1966).

opposition and would, of course, defeat the element of secrecy which many unions feel is necessary for a successful organization drive.[73] Accepting the premise that any attempt to govern oral solicitation directly will prove unsatisfactory, one is left with the possibility of formulating standards as to the cards themselves.

Such an attempt was envisioned by Judge Friendly in the *Nichols* opinion: "Bearing in mind that the function of authorization cards used as a basis for creating a duty in the employer to recognize the union is to demonstrate that a majority of the employees have 'clearly manifested an intention to designate the Union as their bargaining representative,' . . . there seems to be no reason why cards could not state in large type that if a majority signed, the union would claim representative status without an election."[74] Carrying this suggestion one step further, the establishment of one standard card to be used by all unions under the jurisdiction of the Board would, if correctly worded, lead to greater employee understanding and might reduce the confusion resulting from oral misrepresentations.[75] Such a card might contain the heading "Selection of Union Agent," followed by a clear statement that the union is authorized to represent the signer *without the further step of an election.* There should also be blanks wherein the employee fills in the name of the union, his employer, his own name and the date. Such blanks would avoid confusion in the event that two or more unions are attempting to organize the same unit.[76]

While careful wording of the "Selection of Union Agent" card would eliminate

73. See Comment, Refusal-to-Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice, 33 U. Chi. L. Rev. 387, 390 (1966).

74. 380 F.2d at 442 n.4 (citations omitted).

75. This recommendation and the others made herein may be implemented by the Board under its general rule making powers, see 29 U.S.C. § 156 (1964), or by a decision, see Lewis, The Use and Abuse of Authorization Cards in Determining Union Majority, 16 Lab. L.J. 434, 441 n.37 (1965). Of course, should the Board fail to act, appropriate legislation might be enacted by Congress.

76. The standard card to achieve majority status, with language borrowed from 29 U.S.C. § 159 (1964), might read:

SELECTION OF UNION AGENT

I designate ———— as my collective bargaining representative in respect to wages, hours of employment or other conditions of employment. I understand that this card may be used to establish majority status WITHOUT AN ELECTION.

Name ———— Date ————

Address ————

Employer ————

Signature ————

some of the effects of oral misrepresentations, the establishment of a second standardized card would help negate confusion resulting from the misrepresentations as to an election. The second card would be used only to obtain an election, and could not be counted toward majority status for purposes of designation without an election. This card could be of a different size or color and might contain the heading "Interest in Election," followed by a concise statement of its effect.[77] While the establishment of two separate cards might sound confusing, it is to be remembered that these would be the only two kinds of cards acceptable to employers and the Board.[78] Of even greater significance, however, is the fact that the difference between the cards would emphasize the two options open to employees. The knowledge that a "green" card means immediate representation while a "blue" card means a Board-conducted election would tend to destroy the confusion created by the oral representations of the solicitor. Where the union cannot determine at the outset of the campaign whether it will be able to obtain majority status or merely enough authorizations for a Board-run election, employees could be solicited to sign both forms.

In addition to the adoption of standardized cards, which is aimed basically at only one of the common misrepresentations, every union engaged in organizing activity should be required to distribute a leaflet to every employee before taking his signature on a card. The wording of the leaflet should be approved by the local office of the NLRB prior to distribution, and the contents should include a simple statement of the union's dues policy with the further proviso that the union cannot financially discriminate against those who do not sign during the campaign. The leaflet should also point out that any verbal or written promises respecting the dues policy not contained in the leaflet are completely unenforceable. Finally, the leaflet should make it clear that the union must represent all

77. A standard card to be used to petition the NLRB for an election could appear as follows:

INTEREST IN ELECTION

I support ———————'s petition for certification as the collective bargaining representative (so as to OBTAIN AN ELECTION under the supervision of the National Labor Relations Board).

Name ———————— Date ————————

Address ————————

Employer ————————

Signature ————————

78. The Fifth Circuit suggested the advisability of different cards for different purposes in NLRB v. Peterson Bros., Inc., 342 F.2d 221, 225 (5th Cir. 1965). The court's dictum on the subject led to specific recommendation in Lewis, The Use and Abuse of Authorization Cards in Determining Union Majority, 16 Lab. L.J. 434, 440-41 (1965).

employees equally once it is certified or recognized as collective bargaining agent. Both the cards and the leaflet should be written in the signer's language in order to render his signature effective.[79] To insure that these leaflets are distributed, the Board might provide either that a signed card would be void unless the signer received a leaflet first, or that an employer would be permitted to prominently display a statement or distribute an informational flyer alleging the union's failure to properly distribute leaflets.[80]

The combined effect of the standardized cards and the informational leaflets would be to make the employees aware that certain misrepresentations are made, and that the truth is easily ascertainable from sources other than the organizer. While these recommendations may seem onerous to the union or to the Board in terms of additional expense or work, all sides involved in an organizational campaign will benefit from them. The employees will know more about what they are signing and will have less cause to feel tricked or cheated afterwards. The employer will have less cause to suspect the legitimacy of a card check and will be faced with a more uniform policy with respect to the validity of signed cards. The Board will be operating under a more defined policy toward card checks and solicitation techniques, and will probably be presented with fewer disputes over the validity of cards. Finally, the union will be on surer ground in presenting "Selection of Union Agent" cards to the employer and will not have to contend with the numerous protestations of "good faith doubt" that arise today.[81] Although there is no sure way of eliminating the effects of oral misrepresentations made by organizers during card solicitation, standardized card forms and procedures will strengthen the reliability of card checks and will more closely approximate the "laboratory conditions" surrounding the conduction of an election.

79. This requirement could be waived upon testimony that the employee received a full and truthful explanation of their contents in his native tongue.

80. These mandatory flyers might be made available without cost to the unions and employers at the local Board office to prevent too great a financial burden on them.

81. See Comment, Union Authorization Cards, 75 Yale L.J. 805, 828-36 (1966).