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UNION AFFILIATIONS AND THE RIGHTS OF NONUNION EMPLOYEES

INTRODUCTION

It is a common practice for unions to affiliate. The National Labor Relations Board (NLRB or Board) has defined an affiliation as the alignment or association of a union with a new organization when such alignment or association does not result in the dissolution of an already existing union. Affiliations occur in two contexts: Two or more local unions may merge to form one larger union, or a small local union may merge into a larger national or international union.

When the NLRB examines an affiliation, it must determine whether the newly affiliated union should be afforded the protections of the National Labor Relations Act (NLRA or Act). This examination involves a two step inquiry. First, the Board must be satisfied that the decision to affiliate was made with "due process." Second, the Board will inquire whether "continuity of representation" exists between the pre- and post-
affiliation unions.  
In the past, the purpose of the inquiry was to determine whether the affiliation decision reflected the desire of the majority of the union's members.  

Because the Board viewed affiliations as purely internal union matters, it did not require that nonunion employees in the bargaining unit be allowed to vote in the affiliation decision.  

Recently, however, the Board overruled itself, and held that due process requires that nonunion employees have an opportunity to vote because union affiliations change the designated bargaining representative.  

The Board reasoned that it is basic to the collective bargaining process that all employees in the bargaining unit participate in selecting the bargaining representative.  

Under the new interpretation of the due process requirement, the Board will reach the question whether continuity of representation exists between the pre- and post-affiliation unions only if the affiliation decision was put to a unit-wide vote.  

The Fifth Circuit Court of Appeals has upheld the Board's new rule, holding that it is within "the wide discretion of the Board to establish procedures in an affiliation election that will ensure the fair and free choice of the bargaining representative of all the employees."  

The

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10. See infra notes 34-38 and accompanying text.


12. See Providence Medical Center, 243 N.L.R.B. 714, 714 (1979); Coca Cola Bottling Co., 239 N.L.R.B. 1199, 1200 (1979), enforced, 616 F.2d 949 (6th Cir.), cert. denied, 449 U.S. 998 (1980); Amoco Prod. Co., 239 N.L.R.B. 1195, 1195 (1979), remanded on other grounds, 613 F.2d 107 (5th Cir. 1980); East Dayton Tool & Die Co., 190 N.L.R.B. 577, 580 & n.11 (1971); Hamilton Tool Co., 190 N.L.R.B. 571, 574 (1971); 1 C. Morris, supra note 3, at 693; Union Mergers, supra note 1, at 600; see also Seattle-First Nat'l Bank, 245 N.L.R.B. 700, 700 (union affiliations are internal union matters), vacated, 265 N.L.R.B. 426 (1982) (vacated after new rule instituted); Hale, supra note 1, at 721-22 (noting long-standing Board position that affiliations are internal union matters and that nonunion members need not be afforded opportunity to vote).


16. Local Union No. 4-14 v. NLRB, 721 F.2d 150, 152-53 (5th Cir. 1983). Because
Ninth Circuit, however, has struck down the new rule.\textsuperscript{17} That court reasoned that because union affiliations are purely internal union matters, the new rule is irrational and inconsistent with established policies of federal labor law.\textsuperscript{18} The court also believed that the new rule may destabilize the bargaining relationship.\textsuperscript{19}

This Note argues that nonunion employees in a bargaining unit must be given an opportunity to vote in union affiliation decisions because the NLRA grants them a right to select their bargaining representative. Further, this opportunity is necessary to preserve the validity of the NLRB's certification and election procedures. Part I of this Note considers the Board's old procedure for examining union affiliations and concludes that it does not adequately protect the rights of nonunion employees. Part II argues that affiliations are not purely internal union matters. Part III examines the assertedly conflicting interests of employee free choice and preservation of stability in the collective bargaining relationship and concludes that the Board's new rule does not destabilize the bargaining relationship.

I. THE INADEQUACY OF THE BOARD'S OLD PROCEDURE

Before considering the Board's old procedure and its inadequacies, it is necessary to examine the circumstances under which the Board considers union affiliations.

Union affiliations come before the Board in two ways.\textsuperscript{20} Often the newly affiliated union will petition the Board to amend its certification.\textsuperscript{21} Such an amendment is usually a precondition to enforcing an employer's duty to bargain in good faith;\textsuperscript{22} it also ensures a union Board protection

Congress has given the NLRB authority to develop and apply federal labor policy, see 29 U.S.C. § 156 (1982), the Board's rulings are subject to limited judicial review. Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500-01 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963) (quoting NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957)); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). They must be upheld as long as they are rational and consistent with the NLRA. See Beth Israel Hosp., 437 U.S. at 501. The Board's "special competence in this field is the justification for the deference accorded its determination." NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975); accord American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965).

17. See Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 357, 368 (9th Cir. 1984).
18. See id. at 367-68.
19. See id. at 365-66, 368.
20. See 1 C. Morris, supra note 3, at 690; Dannin, supra note 1, at 171; Hale, supra note 1, at 709-10; Union Affiliations, supra note 1, at 432.
22. Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 359 (9th Cir. 1984); see Union Affiliations, supra note 1, at 432.
when an employer commits other unfair labor practices. Affiliations also come before the Board when an employer refuses to bargain with the newly affiliated union and the union files an unfair labor practice charge.

In either case, the Board must examine the affiliation to determine whether it violates certain NLRA provisions. Section 7 of the Act gives employees the right "to bargain collectively through representatives of their own choosing." Section 9(a) mandates that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives" of a bargaining unit's employees. Both sections set forth a condition for union certification or issuance of a bargaining order when a new affiliation is involved: The union must be a continuation of the old union under a new name rather than a substantially different organization. An affiliation has met this condition only if no "question concerning representation" exists.

23. See Hale, supra note 1, at 710-11. Section 8 of the NLRA, 29 U.S.C. § 158 (1982), protects union members from certain types of employer conduct, see id. § 158 (a)(1)-(4), and imposes on an employer a duty to bargain in good faith "with the representatives of his employees," id. § 158 (a)(5), (d). Generally, the Board will not enforce this duty unless the newly-affiliated union has had its certification amended. See supra note 22 and accompanying text.


25. See Hale, supra note 1, at 710-11. See infra notes 30-38 and accompanying text.


27. Id. § 159(a) (1982).


29. The Board will not amend a union's certification if a "question concerning representation" arises. Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 360 (9th Cir. 1984); State Farm Mut. Auto. Ins. Co., 225 N.L.R.B. 966, 967-68 (1976); Fall River House, Inc., 198 N.L.R.B. 1123, 1123 (1972); North Elec. Co., 165 N.L.R.B. 942, 942 (1967); 29 C.F.R. § 102.60(b) (1984). When a question concerning representation exists, the Board is required to use the administrative machinery provided by § 9(e) of the NLRA, 29 U.S.C. § 159(e) (1982), to determine whether the union represents a majority of employees in the bargaining unit. See id. § 159(e) (1982); 1 C. Morris, supra note 3, at 341. In the case of an affiliation, the Board will generally find that no question concerning representation arises unless the certified union opposes the affiliation, the bargaining unit is changed, or the unit's members are not given an opportunity to consider and vote on the affiliation decision. See American Bridge Div., United States Steel Corp. v. NLRB, 457 F.2d 660, 663 (3d Cir. 1972); Lord Jim's, 259 N.L.R.B. 1162, 1163 (1982). Compare Duquesne Light Co., 248 N.L.R.B. 1271, 1272-73 (1980) (affiliations approved when these conditions met) and F.W. Woolworth Co., 194 N.L.R.B. 1208, 1208-09 (1972) (same) with 1820 Central Park Ave. Restaurant Corp., 116 L.R.R.M. 1393, 1393 (1984) (amendment of certification denied when no employee in unit participated in affili-
A. The Board’s Old Procedure and the Need for Change

1. Procedure

The Board conducts a two step inquiry to determine whether an affiliation raises “a question concerning representation.” If the Board concludes that such a question exists, it is empowered to conduct a unit-wide election to ensure compliance with the Act. In the first step of the inquiry, the Board examines whether the affiliation decision was conducted with sufficient due process to ensure that it reflected the wishes of the majority of union members. If the due process test is satisfied, the
Board inquires whether "continuity of representation" exists between the pre- and post-affiliation unions. The continuity inquiry focuses on whether the union was substantially changed by the affiliation. It seeks to preserve the right of all employees to continued representation by a bargaining representative that has been selected by a majority of employees in the bargaining unit. In its old due process inquiry, the Board reasoned that any employee who wanted to vote on the affiliation could join the union. A finding of continuity of representation was thus held to be sufficient to protect the rights of nonunion employees.

2. Protecting Nonunion Employees

Theoretically, a finding of continuity of representation protects the question of affiliation before voting, and orderly voting by secret ballot. See Lord Jim's, 259 N.L.R.B. 1162, 1164 (1982); Providence Medical Center, 243 N.L.R.B. 714, 714 (1979); Amoco Prod. Co., 239 N.L.R.B. 1195, 1196 (1979), remanded on other grounds, 613 F.2d 107 (5th Cir. 1980); New Orleans Pub. Serv., 237 N.L.R.B. 919, 920 (1978); Quemetco, Inc., 226 N.L.R.B. 1398, 1398, 1408 (1976); Hamilton Tool Co., 190 N.L.R.B. 571, 574-75 (1971); Union Mergers, supra note 1, at 599 n.70. Affiliations need not comport with the Board's strict standards for certification elections. Aurelia Osborn Fox Memorial Hosp., 247 N.L.R.B. 356, 359 (1980); Hale, supra note 1, at 721; see Amoco Prod. Co., 239 N.L.R.B. at 1196; Quemetco, 226 N.L.R.B. at 1399. However, the election must not be so "lax" or "substantially irregular" as to "negate the validity of the election." Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 360 (9th Cir. 1984) (quoting NLRB v. Commercial Letter, Inc., 496 F.2d 35, 42 (8th Cir. 1974)) (quoting Hamilton Tool Co., 190 N.L.R.B. 571, 575 (1971)).

34. Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 360 (9th Cir. 1984); see, e.g., Providence Medical Center, 243 N.L.R.B. 714, 714 (1979); Quemetco, Inc., 226 N.L.R.B. 1398, 1399 (1976); Hamilton Tool Co., 190 N.L.R.B. 571, 575 (1971). 35. "In making its continuity determination, the Board consider[s] such factors as continuation of unit autonomy, retention of local officers, and continuation of established union procedures (such as grievance procedures, voting procedures, and by-laws)." Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 361 (9th Cir. 1984). Compare Sun Oil Co., 228 N.L.R.B. 1072, 1075 (continuity found where union retained assets and officers and bargaining relationship underwent no change of consequence), enforcement denied, 576 F.2d 553 (3d Cir. 1977) and Kentucky Power Co., 213 N.L.R.B. 730, 731 (1974) (continuity found where no change occurred in obligations of union to members or procedures for contract negotiations and grievance and arbitration handling) with Underwriters Adjusting Co., 227 N.L.R.B. 453, 454 (1976) (continuity not found where pre-affiliation officers not retained and new collective bargaining procedure implemented) and Independent Drug Store Owners, 211 N.L.R.B. 701, 701 (1974) (continuity not found where complete loss of identity of pre-affiliation union resulted from the affiliation), enforced sub nom. Retail Store Employees Union, Local 428 v. NLRB, 528 F.2d 1225 (9th Cir. 1975). See Hale, supra note 1, at 728-30, for a discussion of the origin of the continuity inquiry.

36. See Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 361 (9th Cir. 1984); Hale, supra note 1, at 715.


38. See Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 361 (9th Cir. 1981); Newspapers, Inc., 210 N.L.R.B. 8, 9 n.2 (1974), enforced, 515 F.2d 334 (5th Cir. 1975); Hale, supra note 1, at 715.
rights of nonunion employees by ensuring that the post-affiliation union is substantially the same as the pre-affiliation union.\textsuperscript{39} If the affiliation does not substantially change the bargaining representative, there is assertedly no need for employees to vote on the affiliation because it would not affect their rights under the Act.\textsuperscript{40} In practice, however, the Board often found continuity in affiliations that had resulted in significant changes in the bargaining representative.\textsuperscript{41} Section 9(a) of the Act demands that a collective bargaining representative be chosen by a majority of all employees in a bargaining unit.\textsuperscript{42} Under its old procedure, the Board often approved affiliations for which only a minority of employees in the unit had voted.\textsuperscript{43} Additionally, mergers of local unions were approved even when no employees in one of the units had the opportunity to vote.\textsuperscript{44} Thus, a finding of continuity of representation under the

\textsuperscript{39} See supra note 34 and accompanying text. The Board examines several factors to determine whether continuity exists. See supra note 35.

\textsuperscript{40} See House of the Good Samaritan, 248 N.L.R.B. 539, 539 (1980) (a separate vote for affiliation is not required where complete continuity in representation has been maintained); Aurelia Osborn Fox Memorial Hosp., 247 N.L.R.B. 356, 359 (1980) (same); American Enka Co., 231 N.L.R.B. 1335, 1337 (1977) (same).

\textsuperscript{41} Section 9(a) of the Act demands that a collective bargaining representative be chosen by a majority of all employees in a bargaining unit. See supra note 35.

\textsuperscript{42} See Dannin, supra note 1, at 175-79 (continuity inquiry does not further goals of NLRA); Hale, supra note 1, at 727-32 (continuity inquiry vague and inconsistent with its intended purpose); Union Affiliations, supra note 1, at 445-49 (continuity inquiry is misplaced theory derived from the common law of contracts). Furthermore, the inquiry has been applied inconsistently by the Board and the circuit courts. See Dannin, supra note 1, at 174-75; Hale, supra note 1, at 713-19; Union Mergers, supra note 1, at 588-97. Compare Quemetco, Inc., 226 N.L.R.B. 1398, 1399 (1976) (affiliation approved despite lack of continuity) with Independent Drug Store Owners, 211 N.L.R.B. 701, 701 (1974) (disapproval of affiliation when continuity not found) enforced sub nom. Retail Store Employees Union, v. NIR, 528 F.2d 1225 (9th Cir. 1975) and J. Ray McDermott & Co. v. NIR, 571 F.2d 850, 857 (5th Cir.) (court must consider whether changes occurred in right and obligations of union members), cert. denied, 439 U.S. 893 (1978) with NIR v. Pearson Candy Co., 471 F.2d 11, 12 (9th Cir. 1972) (sole inquiry is change in structure and character of union), cert. denied, 411 U.S. 982 (1973).

\textsuperscript{43} See supra note 30.

\textsuperscript{44} See NIR v. Pearl Bookbinding Co., 517 F.2d 1108, 1111 (1st Cir. 1975) (no vote
Board's old procedure did not ensure that the decision to affiliate reflected the wishes of all employees in the bargaining unit. As a result it was not always clear that the post-affiliation union was supported by the majority of employees. Approval of such an affiliation violates section 9(a)'s clear mandate that all employees in a unit be afforded the opportunity to choose their bargaining representative. The Board's old procedure therefore failed in practice to protect the rights of nonunion employees.

Even if the continuity inquiry were correctly and consistently applied, it might still be insufficient to protect the rights of nonunion employees because an affiliation may result in changes in the bargaining representative that were not apparent to the Board at the time of affiliation. For example, the affiliation could cause points of contention subsequently to arise between the employer and the union. Section 7 of the Act guarantees employees the right to bargain collectively "through representatives of their own choosing." This language should be interpreted to mean that all employees should be given the opportunity to vote on actions that result in any change in the bargaining representative. The Board's new rule ensures this opportunity.

The continuity inquiry also fails to protect the rights of nonunion employees by providing them with no way to challenge the decision to affiliate. Such employees would probably be unable to file a decertification on merger taken because majority of employees signed union authorization cards), enforcing 213 N.L.R.B. 532 (1974); House of the Good Samaritan, 248 N.L.R.B. 539, 539 (1980) (no vote of employees required because complete continuity found); Aurelia Osborne Fox Memorial Hosp., 247 N.L.R.B. 356, 359 (1980) (same); American Enka Co., 231 N.L.R.B 1335, 1337 (1977) (same); Kentucky Power Co., 213 N.L.R.B. 730, 732 (1974) (after-the-fact affiliation vote held sufficient); Safway Steel Scaffolds Co., 173 N.L.R.B. 311, 311-12 (1968) (same).


46. See supra note 27 and accompanying text.

47. See Hale, supra note 1, at 740 n.152. An affiliation will likely cause an employer to alter its bargaining stance or strategy because it will be dealing with a larger, more sophisticated organization. See id. Although an employer may not choose its employees' union, NLRB v. Canton Sign Co., 457 F.2d 832, 840 (5th Cir. 1972); Newspapers, Inc., 210 N.L.R.B. 8, 10 (1974), enforced, 515 F.2d 334 (5th Cir. 1975), it may be less willing to bargain with the larger post-affiliation union. Employees who had previously enjoyed a close working relationship with the employer may wish to consider this possible consequence before voting on the affiliation.


49. Cf. Union Mergers, supra note 1, at 602-03 (rule requiring participation of nonunion employees in affiliation decisions is arguably consonant with and tailored to protect employee's § 7 rights).

50. Under the NLRA, the NLRB has the power to certify a union as the exclusive bargaining representative of a bargaining unit after a Board-conducted election. Brooks v. NLRB, 348 U.S. 96, 98 (1954); see 29 U.S.C. § 159(c)(1)(A)(i) (1982). The Act also gives the Board the power to hold an election to decertify a union on a petition of the unit's employees demonstrating a loss of majority support. R. Gorman, Basic Text on Labor Law 49 (1976); see 29 U.S.C. § 159(c)(1)(A)(ii) (1982). After initial certification the union enjoys a true presumption of majority status for one year and a rebuttable pre-
petition immediately after the affiliation because pre-existing contract,\(^{51}\) election,\(^{52}\) and certification\(^{53}\) bars would remain in effect after the affiliation.\(^{54}\) As a practical matter, even after these bars were lifted, it is unlikely that individual nonunion employees would be sufficiently familiar with labor law to organize a decertification petition or have a sufficient personal stake to make the expense worthwhile. Sole reliance on the continuity inquiry violates the rights of nonunion employees because it not only fails to guarantee their participation in the affiliation decision, but also provides no opportunity to challenge it.

The Ninth Circuit has argued that the continuity inquiry is sufficient because employees desiring to protect their own interests may join the union.\(^{55}\) Under the Board's old procedure, however, affiliations were approved in which nonmembers were not only excluded from voting, but were also denied the opportunity to join the union in time to participate in the election.\(^{56}\) More important, section 7 of the Act expressly gives

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\(^{51}\) Under the contract bar rule, "the Board will dismiss as untimely an election petition which is filed during the term of a collective bargaining agreement . . . which has a duration of less than three years, or which is filed during the first three years of an agreement of longer fixed duration." R. Gorman, supra note 50, at 54; see General Cable Corp., 139 N.L.R.B. 1123, 1124-1125 (1962).

\(^{52}\) The NLRA states: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159(c)(3) (1982).

\(^{53}\) Under the certification bar, the Board will consider untimely an election petition filed within twelve months of the certification of a union. R. Gorman, supra note 50, at 52-53; see In re Kimberly-Clark Corp., 61 N.L.R.B. 90, 92-93 (1945); In re Bohn Aluminum and Brass Corp., 57 N.L.R.B. 1684, 1686 (1944); In re Aluminum Co., 57 N.L.R.B. 913, 915-16 (1944); In re Beatty Logging Co., 55 N.L.R.B. 810, 811-12 (1944); In re Monarch Aluminum Mfg. Co., 41 N.L.R.B. 1, 4-5 (1942).

\(^{54}\) See Hale, supra note 1, at 740-41. The Board does not consider the approval of an affiliation to be a new certification. See, e.g., Duquesne Light Co., 248 N.L.R.B. 1271, 1273 (1980); Montgomery Ward & Co., 188 N.L.R.B. 551, 553 (1971); Safway Steel Scaffolds Co., 173 N.L.R.B. 311, 312 (1968); Emery Indus., 148 N.L.R.B. 51, 53 (1964). Therefore, the existence of a contract at the time of an affiliation still bars an election for the length of its term. See NLRB v. Bernard Gloekler N.E. Co., 540 F.2d 197, 203 (3d Cir. 1976); Hale, supra note 1, at 740. This has led some to call for changes in the application of the contract bar rule in affiliation cases. See Hamilton Tool Co., 190 N.L.R.B. 571, 576 (1971) (Miller, Chairman, concurring) (arguing that Board should allow mid-contract Board election to determine whether a different agent should administer the contract for its duration); Hale, supra note 1, at 741 (arguing that presumption of majority status following an affiliation should be rebuttable).

\(^{55}\) See Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 363 n.10 (9th Cir. 1984).

\(^{56}\) See NLRB v. Pearl Bookbinding Co., 517 F.2d 1108, 1111-12 (1st Cir. 1975); NLRB v. Commercial Letter, Inc., 496 F.2d 35, 40 (8th Cir. 1974); Providence Medical Center, 243 N.L.R.B. 714, 717 (1979) (Jenkins, Member, concurring in part, dissenting in part); Hamilton Tool Co., 190 N.L.R.B. 571, 574 (1971); North Elec. Co., 165 N.L.R.B. 942, 942-43 (1967).
employees the choice of participating in or refraining from engaging in union activities.\textsuperscript{57} Requiring an employee to join a union in order to exercise the section 9 right to designate a bargaining representative violates section 7.\textsuperscript{58}

The old procedure also undermined the Board's certification and election procedures.\textsuperscript{59} The Board has established strict procedures for initial certification of a bargaining representative to ensure that the representative is the true choice of an uncoerced majority of all the employees in the bargaining unit.\textsuperscript{60} The Board does not, however, require that affilia-

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\item \textsuperscript{57} Section 7 of the NLRA provides that employees have the right "to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities." 29 U.S.C. § 157 (1982).
\item \textsuperscript{58} See Amoco Prod. Co., 262 N.L.R.B. 1240, 1241 (1982), enforced sub nom. Local Union No. 4-14 v. NLRB, 721 F.2d 150 (5th Cir. 1983).
\item \textsuperscript{59} See id.; Van de Water, \textsuperscript{supra} note 13, at 641.
\item Before collective bargaining may begin, the identity of the proper collective bargaining representative must be determined. R. Gorman, \textsuperscript{supra} note 50, at 40. An employer may voluntarily recognize a union as the representative of its employees. \textit{Id.}; 1 C. Morris, \textsuperscript{supra} note 3, at 488; see, e.g., Landmark Int'l Trucks, Inc., 257 N.L.R.B. 1375, 1375 (1981), \textit{vacated on other grounds}, 699 F.2d 815 (6th Cir. 1983); Nevada Lodge, 227 N.L.R.B. 368, 369 (1976), enforced, 584 F.2d 293 (9th Cir. 1978); Tahoe Nugget, Inc., 227 N.L.R.B. 357, 357 (1976), enforced, 584 F.2d 293 (9th Cir. 1978); Keller Plastics E., Inc., 157 N.L.R.B. 583, 587 (1966). If such recognition is withheld, a union may petition the Board to hold an election under § 9(c) of the NLRA so that the union may be certified as the exclusive representative of the bargaining unit. See 29 U.S.C. § 159(c)(1)(A)(ii) (1982). Even a union that can secure voluntary recognition may choose to petition for a Board election because such an election leads to Board certification of its results, and the Act gives favored treatment to unions that have been certified rather than informally recognized. See 29 U.S.C. § 158(b)(1)(C)(i)(ii) (protection for certain forms of concerted activity). The Board investigates the petition, and will hold a hearing "if it has reasonable cause to believe that a question of representation affecting commerce exists." \textit{Id.} § 159(c)(1). If the Board finds that such a question exists, "it shall direct an election by secret ballot and shall certify the results thereof." \textit{Id.} All employees in the unit are eligible to vote in the election, which is conducted under the supervision of agents from the regional office of the NLRB. R. Gorman, \textsuperscript{supra} note 50, at 41, 43. \textit{See generally id.} at 40-49 (discussion of certification and election procedures).
\item 60. Before certifying a union as the exclusive bargaining representative of a group of employees, the Board conducts an election supervised by agents from its regional offices. See \textsuperscript{supra} note 59. These elections are held under strict conditions: Ballots are furnished by the Board, and only a Board agent and the voter may handle a ballot. See NLRB Field Manual 11306. Polling is conducted and supervised by Board agents, and voting is by secret ballot and takes place in voting booths to ensure absolute secrecy. R. Gorman, \textsuperscript{supra} note 50, at 46-47; 1 C. Morris, \textsuperscript{supra} note 3, at 395.
\item The Board also has the power to police pre-election campaigns to ensure that the parties do not engage in conduct that may affect the free choice of the employees in the unit. See NLRB v. Sanitary Laundry, Inc., 441 F.2d 1368, 1369 (10th Cir. 1971); Kerona Plastics Extrusion Co., 196 N.L.R.B. 1120, 1120 (1972) (quoting New York Tel. Co., 109 N.L.R.B. 788, 790 (1954)). The Board's goal is to conduct elections under laboratory conditions "as nearly ideal as possible, to determine the uninhibited desires of the employees" and to provide "an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice." Sewell Mfg. Co., 138 N.L.R.B. 66, 69-70 (1962) (quoting General Shoe Corp., 77 N.L.R.B. 124, 127 (1948), enforced, 192 F.2d 504 (6th Cir. 1951), cert. denied, 343 U.S. 904 (1952)).
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tion elections comply with these procedures. Therefore, a union could amend its certification after an affiliation election that did not comport with the Board's strict standards for certification elections and that denied participation to a number of employees. If the Board accepts privately conducted elections as a basis for an amendment of certification, it should require that all employees be permitted to vote.

B. The New Rule and Its Role

Sole reliance on the continuity inquiry to protect the rights of nonunion employees has led to impositions on them of bargaining representatives whom they had no opportunity to choose. Because this result violates the spirit and purpose of the Act, the Board has adopted a requirement that all employees in the bargaining unit be given the opportunity to vote on affiliation decisions. The new rule is necessary to protect the rights of nonunion employees under sections 7 and 9(a) of the Act. It does not, however, eliminate the need for the continuity inquiry. Even if all employees have the opportunity to vote on the affiliation conduct on the part of either the employer or the union tends to coerce or influence the free choice of the employees in the unit, the Board may set aside the results and order a new election. See, e.g., NLRB v. Exchange Parts Co., 375 U.S. 405, 409-10 (1964) (employer promised benefits to employees who voted against union); Al Long, Inc., 173 N.L.R.B. 447, 448 (1968) (general atmosphere of confusion, violence and threats of violence); Michem, Inc., 170 N.L.R.B. 362, 362-63 (1968) (campaigning too close to polls); Wagner Elec. Corp., 167 N.L.R.B. 532, 533 (1967) (grant of benefits by union to employees); Sewell Mfg. Co., 138 N.L.R.B. 66, 72 (1962) (employer appeal to racial prejudice). See generally C. Morris, supra note 3, at 309-40, 393-412 (discussing certification elections and restrictions on pre-election activity).

61. See supra note 33.

62. See Hamilton Tool Co., 190 N.L.R.B. 571, 575-76 (1971) (certification amended after union conducted affiliation election from which 30 employees were excluded); North Elec. Co., 165 N.L.R.B. 942, 942-43 (1967) (certification amended after union held election in which 50 employees were denied participation).


64. See supra notes 41-46 and accompanying text.


66. See supra notes 46-62 and accompanying text.

67. In Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356 (9th Cir. 1984), the Ninth Circuit criticized the Board's new rule as irrational because it is "unreasonably duplicative." Id. at 367. After a unit-wide election in which the affiliation was approved, the Board could still call a formal representation election if its continuity inquiry determined that the post-affiliation union was substantially different from the pre-affiliation union.
tion, a new union may be a substantially different organization. If so, the Board will conduct a unit-wide vote under conditions stricter than required in the original affiliation election. The continuity inquiry is thus an additional safeguard of employee rights under the Act.

II. BOARD INTERVENTION IN UNION AFFILIATIONS

The Ninth Circuit has struck down the new requirement, urging that it is "irrational and inconsistent" with federal labor policy because affiliations are purely internal union matters relating to a union's self-governance into which the Board does not ordinarily intrude. Internal union

68. American Bridge Div., United States Steel Corp. v. NLRB, 457 F.2d 660, 662-63 (3d Cir. 1972) (all employees permitted to vote on affiliation of 304-member union with 1,120,000 member union); Quemetco, Inc., 226 N.L.R.B. 1398, 1399 (1976) (all unit members voted on affiliation that resulted in change in local officers and transfer of pre-affiliation union's assets).

69. The Board does not require that affiliation elections comport with the same standards as its certification elections. See supra text accompanying note 61.

70. Preservation of the continuity inquiry would also help prevent subversion of the contract bar rule because it would not allow substitution of a new and different bargaining representative during the life of an existing contract. Cf. American Bridge Div., United States Steel Corp. v. NLRB, 457 F.2d 660, 665 (3d Cir. 1972) (to permit amendment of certification procedure to allow changes in identity of bargaining representatives without Board elections would be contrary to the purposes of the Board's rules). See supra note 51.

71. Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 362-64 (9th Cir. 1984). There is a longstanding federal labor policy of avoiding unnecessary interference in union affairs:

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees . . . . The employee may disagree with many of the union decisions but is bound by them. "The majority-rule concept is today unquestionably at the center of our federal labor policy." "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must allowed a statutory bargaining representative in serving the unit it represents . . . ."

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (footnote omitted) (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) and Wellington, Union, Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1333 (1958)). Nonunion members "have no voice in the affairs of the union." Allis-Chalmers, 388 U.S. at 191 (footnote omitted). Therefore, the Board has recently stated that it has not required that they be allowed to vote in internal union matters such as strike votes, contract ratification votes, and the selection of officers, stewards and negotiators. See Amoco Prod. Co., 239 N.L.R.B. 1195, 1196 (1979), remanded on other grounds, 613 F.2d 107 (5th Cir. 1980); see also North Coast Counties Dist. Council of Carpenters, 197 N.L.R.B. 905, 906 (1972) (nonunion members not required to vote on contract ratification); M & M Oldsmobile, Inc., 156 N.L.R.B. 903, 905 (1966) (contract ratifications need only comply with union's constitution), enforced, 377 F.2d 712 (2d Cir. 1967).

72. See Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 362-63 (9th Cir. 1984); see also North Coast Counties Dist. Council of Carpenters, 197 N.L.R.B.
matters are only those that relate to a union's self-governance. An affiliation changes the bargaining representative, and the Board has held that "[a]ny change in the collective-bargaining representative has the potential to affect the interests of all employees [in the bargaining unit]." Because affiliations directly affect the NLRA rights of nonunion employees, the decision to affiliate cannot be regarded as a strictly internal union affair.

In holding that affiliations are strictly internal, the Ninth Circuit relied on four Supreme Court cases. This reliance was unfounded. In the one case involving union activities that affected nonunion members, the Court upheld a union rule that prohibited nonunion members and non-employees from contributing to union election campaigns. Unlike an affiliation decision, the election of union officials has no potential for infringing the rights of nonunion employees. The Court emphatically declared in a companion case to one cited by the Ninth Circuit that potential infringement justifies Board interference. The other cases cited by the Ninth Circuit involved union rules having no effect on

905, 906 (1972) (contract ratification vote); M & M Oldsmobile, Inc., 156 N.L.R.B. 903, 905 (1966) (same), enforced, 377 F.2d 712 (2d Cir. 1967).

73. Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 363 (9th Cir. 1984); see Amoco Prod. Co., 239 N.L.R.B. 1195, 1195-96 (1979), remanded on other grounds, 613 F.2d 107 (5th Cir. 1980); see also North Coast Counties Dist. Council of Carpenters, 197 N.L.R.B. 905, 906 (1972) (Board will not interfere in contract ratification vote); M & M Oldsmobile, Inc., 156 N.L.R.B. 903, 905 (1966) (same), enforced, 377 F.2d 712 (2d Cir. 1967).

74. See Dannin, supra note 1, at 175 (continuity inquiry looks for change where change always occurs); see also Union Mergers, supra note 1, at 175 (affiliation's effect on bargaining relationship requires Board to inquire whether bargaining representative has changed); cf. Amoco Prod. Co., 239 N.L.R.B. 1195, 1196 (1979) (any change in the bargaining representative has the potential to affect all employees), remanded on other grounds, 613 F.2d 107 (5th Cir. 1980); Van de Water, supra note 13, at 641 (same).

75. Amoco Prod. Co., 239 N.L.R.B. 1195, 1196 (1979), remanded on other grounds, 613 F.2d 107 (5th Cir. 1980); see Van de Water, supra note 13, at 641.

76. Even under its old procedure, the Board did not treat affiliations as internal union affairs. See Amoco Prod. Co., 262 N.L.R.B. 1240, 1241 (1982) (old due process inquiry required scrutiny of union-conducted elections), enforced sub nom. Local Union No. 4-14 v. NLRB, 721 F.2d 150 (5th Cir. 1983). Indeed, if Congress had not intended the Board to involve itself in union affiliations, it would not have required the Board to determine whether a question concerning representation exists before amending a union's certification. See 29 C.F.R. § 102.60(b) (1984).


80. See Booster Lodge No. 405 v. NLRB, 412 U.S. 84, 87-90 (1973) (union attempt to discipline nonunion members for exercising § 7 rights constitutes an unfair labor practice).

81. Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 362 (9th Cir.
nonunion employees. Two of these cases dealt with union discipline of union members who failed to observe picket lines and one concerned the suspension of union members who had violated a union rule relating to production ceilings. All were decided under an NLRA section unrelated to union affiliations.

In fact, rather than precluding Board interference in union affiliation decisions, two of these cases demonstrate that even if union affiliations are strictly internal union matters, Board intervention would still be justified. In those cases, the Court held that the Board may intervene in an internal union matter when a statutory labor policy has been infringed. The Act and its legislative history, as well as decisions of the Board and the courts, show clearly that preserving employees' right

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84. All three of these cases were decided under § 8(b)(1)(A) of the NLRA, which provides that "[i]t shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . employees in the exercise of [their § 7] rights." 29 U.S.C. § 158(b)(1)(A) (1982); see NLRB v. Boeing Co., 412 U.S. 67, 68 (1973); Scofield v. NLRB, 394 U.S. 423, 426-27 (1969); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 178 (1967).


86. Section 1 of the NLRA provides:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.


89. See NLRB v. Raytheon Co., 398 U.S. 25, 27 (1970) (Act is designed to protect employees in the exercise of their organizational rights); International Ass'n of Machinists v. NLRB, 311 U.S. 72, 79 (1940) (employee free choice is the essence of collective
to choose their own bargaining representative is one such policy. Because exclusion of nonunion employees from affiliation votes violates this policy, Board intervention should not be precluded.

III. EMPLOYEE FREE CHOICE AND STABILITY IN THE BARGAINING RELATIONSHIP

Board review of union affiliation decisions raises questions concerning the sometimes conflicting federal labor policies of employee free choice and promotion of stability in the collective bargaining relationship. The Ninth Circuit states that the Board has traditionally favored the latter over the former and that the Board's new rule irrationally departs from this policy by effectively decertifying a union before its loss of majority status can be established. However, an affiliation in which nonunion employees do not participate frequently casts doubt on the union's continuing majority status. Furthermore, although preservation of stability in the bargaining relationship is an important policy of federal labor law, the Board has also given great weight to the right of employees

bargaining); NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 265-66 (1938) (Act's purpose was to secure employees' § 7 rights); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (right of employees to select representatives of their own choosing is fundamental); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 512 (5th Cir. 1982) (principal policy of Act is to protect exercise of full freedom of designation of bargaining representatives), cert. denied, 104 S. Ct. 335 (1983); NLRB v. Western & S. Life Ins. Co., 391 F.2d 119, 123 (3d Cir.) (same), cert denied, 393 U.S. 978 (1968).

90. See infra notes 93-96 and accompanying text.

91. In furtherance of the Act's purposes, the Board has created rules to ensure that once a union has been certified as an exclusive bargaining representative, the collective bargaining relationship is given time to succeed. See supra notes 53-55, infra note 108 and accompanying text. A goal of the NLRA is the promotion of industrial peace. See 29 U.S.C. § 151 (1982). The Board believes that this goal will be furthered by preservation of continuity in the bargaining structure. Financial Inst. Employees Local No. 1182 v. NLRB, 752 F.2d 356, 364-65 (9th Cir. 1984) (quoting NLRB v. Silver Spur Casino, 623 F.2d 571, 578 (9th Cir. 1980), cert. denied, 451 U.S. 906 (1981)).

92. Section 8(d) of the NLRA defines collective bargaining as:

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . .


93. Union Affiliations, supra note 1, at 433; see Hamilton Tool Co., 190 N.L.R.B. 571, 576 (1971) (Miller, Ch., concurring).


95. See Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 365-66 (9th Cir. 1984).

96. See supra notes 43-44 and accompanying text.

97. See infra note 98 and accompanying text.
freely to choose their own bargaining representative. Indeed, both the Board\textsuperscript{99} and the Courts\textsuperscript{100} have held that preserving employee free choice is of primary importance under the Act. In the rules and procedures it has established, the Board never intended to sacrifice free choice to bargaining stability. The certification bar was created only after the Board realized that a bargaining relationship must be allowed a certain amount of time to succeed.\textsuperscript{101} The contract bar rule was not intended to favor one policy over another, but to balance free choice with industrial stability.\textsuperscript{102}

It is not likely, as the Ninth Circuit claims, that the Board’s new rule will promote instability in the bargaining relationship. That court argued that the rule will encourage employers to withdraw from collective bargaining contracts with unions that have affiliated without a unit-wide vote.\textsuperscript{103} Unions considering affiliation, however, will undoubtedly become familiar with Board procedure.\textsuperscript{104} Those unions that fear a lack of majority support for the affiliation will fail to hold a unit-wide election.\textsuperscript{105} The new rule will decertify a newly affiliated union only if the affiliation decision was not put to a vote of all employees in the bargaining unit.\textsuperscript{106} In these cases, Board approval of the affiliation would violate

\textsuperscript{98} See supra note 95, infra note 106 and accompanying text. \textit{Cf.} NLRB v. Western \& S. Life Ins. Co., 391 F.2d 119, 123 (3d Cir. 1968) (preservation of bargaining stability not to be afforded greater weight than employee free choice), cert. denied, 393 U.S. 978 (1968).


\textsuperscript{101} R. Gorman, supra note 50, at 53; see In re Kimberly-Clark Corp., 61 N.L.R.B. 90, 92-93 (1945) (certification bar created to encourage formation of collective bargaining contracts and promote industrial peace); Centr-O-Cast \& Eng'g Co., 100 N.L.R.B. 1507, 1508 (1952) (same).

\textsuperscript{102} See General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962); R. Gorman, supra note 50, at 52. Furthermore, the Ninth Circuit failed to recognize that, in balancing conflicting interests of federal labor law, "'[t]he function of striking that balance . . . Congress committed primarily to the [NLRB], subject to limited judicial review.'" NLRB v. Erie Resistor Corp., 373 U.S. 221, 226 (1963) (quoting NLRB v. Truck Drivers Union, 353 U.S. 87, 96 (1957)); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 499 (1960) (same).

\textsuperscript{103} See Financial Inst. Employees, Local No. 1182 v. NLRB, 752 F.2d 356, 359 (9th Cir. 1984).

\textsuperscript{104} \textit{Cf.} Hale, supra note 1, at 711 (practical result of new rule will be to induce unions contemplating affiliation to comply with Board procedure).

\textsuperscript{105} \textit{Cf.} Bartenders Ass'n., 213 N.L.R.B. 651, 655 (1974) (Kennedy, Member, dissenting) (union's refusal to demonstrate its continuing majority status through expeditious election generates suspicion that it is not confident of majority support).

the rights of nonunion employees\textsuperscript{107} and undermine the Board's certification and election procedures.\textsuperscript{108} The Board's new rule will endanger the bargaining relationship only when a union endangers the rights of nonunion employees by failing to follow Board procedure.

\textbf{Conclusion}

The NLRB has ruled that due process requires that nonunion employees in a bargaining unit be given an opportunity to participate in union affiliation decisions. The Ninth Circuit struck down the new rule, holding that it is irrational in light of prior Board procedure and inconsistent with established federal labor policy. The Board's new rule is necessary, however, because prior procedure in such cases inadequately protected the right of nonunion employees to select their bargaining representative. Board intervention in such cases is appropriate because union affiliations are not purely internal affairs and affect all employees in a bargaining unit. The rule will endanger the bargaining relationship only when unions endanger the rights of nonunion employees. It is a rational interpretation of the Act and consistent with federal labor policy. It should therefore be upheld.

\textit{Edward J. O'Connell}

\textsuperscript{enforced}, 732 F.2d 60 (6th Cir. 1984); Amoco Prod. Co., 262 N.L.R.B. 1240, 1240-41 (1982), \textit{enforced sub nom.} Local Union No. 4-14 v. NLRB, 721 F.2d 150 (5th Cir. 1983).

\textsuperscript{107} See \textit{supra} notes 41-58 and accompanying text.

\textsuperscript{108} See \textit{supra} notes 59-63 and accompanying text.