Under the current policy of the National Labor Relations Board, an employer will be ordered to bargain with a union which has gained support of a majority of employees in an appropriate unit, even though it has not won a representative election, if the employer improperly refused to recognize the union upon its demand. By using unfair labor practices committed by the employer after his rejection of the union’s demand for recognition as affirmative proof of improper refusal to bargain, the Board creates the nexus between its policy and the

*This Comment bears a date of December 31, 1967.

1 National Labor Relations Act §9(c), 29 U.S.C. §159(c) (1964), [hereinafter cited as NLRA] provides that an employer, union or employee may petition the Board for an election to determine the question of representation. If a union obtains a majority of the votes, it is certified by the Board as the employees’ exclusive bargaining representative.

2 Ascendancy to majority status without an election (through the use of authorization cards) is accomplished through the interplay of the following sections of the National Labor Relations Act:

1. Section 8(a) (5), 29 U.S.C. §158(a) (5) (1964), which provides:
   It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

2. Section 9(a), 29 U.S.C. §159(a) (1964), which provides in part:
   Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .

3. Section 10(c), 29 U.S.C. §160(c) (1964), which provides that the Board may order a party found to have been engaged in unfair labor practices:
   . . . to take such affirmative action . . . as will effectuate the policies of [the National Labor Relations Act]. . . .

If an employer refuses to bargain in violation of §8(a)(5), see text accompanying notes 16-22 infra, with the representatives of his employees chosen in accordance with §9(a), see text accompanying notes 10-15 infra, the Board will order him to commence bargaining through the power granted it in §10(c). See note 9 infra.

Of course, at the heart of the matter and, indeed, at the heart of National Labor Relations Act itself, is §7, 29 U.S.C. §157 (1964), which guarantees the employees' right to self-organization:

Employees shall 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 . . . .

3 For the purpose of clarity, the phrase “unfair labor practices,” as used throughout this comment, refers only to violations of NLRA §8(a)(1), 29 U.S.C. §158(a)(1) (1964), and NLRA §8(a)(3), 29 U.S.C. §158(a)(3) (1964); violations of NLRA §8(a)(5), 29 U.S.C. §158(a)(5) 1964, are not meant to be included. See note 17 infra.
justification for the issuance of the bargaining order.\(^4\) This justification is bottomed on the ground that the employer's unfair labor practices undermine the union's majority in two ways.

First, because regional directors usually will not process election petitions while unfair labor practice charges are pending,\(^5\) the election will be delayed while the charges are investigated and decided by the Board. Since the average period from time of filing to decision by the Board is four hundred and seventy-five days,\(^6\) this delay is substantial and could have the effect of destroying a majority which the union otherwise might have had.\(^7\) New employees who subsequently might have joined the bargaining unit, either as replacements or as additions required by business growth, may not support the union. In addition, enthusiasm for the union may wane—well over a year has passed and the union has not yet lived up to its promises of higher wages and better working conditions. In short, the delay

\(^4\) See Aaron Bros., 158 N.L.R.B. 1077, 1079 n.10, 1966 CCH NLRB Dec. 20,437 at 25,945 n.10, where the Board notes its


This procedure, apparently aimed at remedying employer misconduct in order to protect the integrity of an election, is subject to abuse by unions. The Pacemaker case is an example. There the court observed:

Possibly for some reasons of strategy near the close of the hearing, the Union asked for an adjournment. Thereafter it filed a second amended charge of unfair labor practice. By such strategy the Union was able to and did stall and postpone indefinitely the representative hearing. In our opinion the Board's practice is unfortunate, but we do not think we have any power in the instant case to do anything about it.


\(^7\) See Franks Bros. v. NLRB, 321 U.S. 702, 704 (1944); P. Ross, The Government as a Source of Union Power (1965), where the author, who conducted an empirical survey of the effect of violations of §8(a)(5), noted that "the passage of time ordinarily works to reinforce the employer's position and to weaken the union's hold among its members." Id. at 201. See Address by Frank W. McCulloch, "New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction," Nov. 3, 1961, quoted in P. Ross, supra at 258.
brought about by the employer's unfair labor practices works to his advantage. Second, the unfair labor practices themselves can result in dissuading employees from supporting the union. The coercive effect of the employer's illegalities can carry over to restrain employees from voting for the union if an election were ordered.

In order to remedy these problems and to effectuate the policies of the Act, an order directing the employer to bargain with the affected union is deemed appropriate. A prerequisite to the issuance of a bargaining order is the attainment of majority status by the union. This usually is accomplished by means of authorization cards signed by a majority of employees. In determining whether an authorization card should be counted in support of the union's majority claim, the essential question is whether the employee designated the union as his bargaining agent. This question cannot be answered simply by examining the card itself—a signed authorization card will be invalidated if the union solicitor misrepresented the pur-

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8 See note 23 infra.

9 It has been argued that Congress intended to make the representative election under NLRA §9(c), 29 U.S.C. §159(c) (1964), the exclusive method by which a union may attain representative status and, therefore, ordering an employer to bargain with a union on the basis of authorization cards signed by a majority of employees does not effectuate the policies of the Act. See Comment, Union Authorization Cards, 75 Yale L.J. 805, 820-23 (1966). But the contrary interpretation, founded on the notion that NLRA §9(a), 29 U.S.C. §159(a) (1964), which provides that representatives may be "designated or selected," permits employees to "designate" a union through the authorization card route, repeatedly has been recognized, although not thoroughly considered, by the Supreme Court. See UMW v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956); Brooks v. NLRB, 348 U.S. 96 (1954); Franks Bros. v. NLRB, 321 U.S. 702 (1944).

Making the election process the exclusive means of achieving representative status was discussed in the Senate hearings on the repeal of §14(b) of the Taft-Hartley Act. Hearings on the Repeal of Section 14(b) of the National Labor Relations Act Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 89th Cong., 1st Sess. 16-26, 180-89 (1965).

10 See, e.g., Maphis Chapman Corp. v. NLRB, 368 F.2d 298 (4th Cir. 1966). In fact, recognition of a union which has not achieved majority status is a violation of NLRA §8(a)(2), 29 U.S.C. §158(a)(2) (1964), which provides in part: "It shall be an unfair labor practice for an employer—to dominate or interfere with the formation of any labor organization . . ." See International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961). Since intent is not an element of the offense, it is no defense for the employer to assert that he acted in good faith. Id. at 739.

11 The card is a printed form with blanks for the employer's name, employee's name and signature, and date. See NLRB v. Glasgow Co., 356 F.2d 476, 480 (7th Cir. 1966), where a copy of the card is included in the opinion. Basically there are two types of cards: the single purpose card states that the signer authorizes the union to act as his collective bargaining representative; the dual purpose card, in addition to authorizing representation, states that the signer desires an NLRB-conducted election to determine the question of representation. Both types may be used to support a petition for a Board election for which a thirty per cent showing of interest is needed. See NLRA §9(c)(1), 29 U.S.C. §159(c)(1) (1964); 29 C.F.R. §101.17 (1967).

pose of the card, misrepresented that a majority of employees already had signed, or used coercion.

Even if the union has procured valid authorization cards from a majority of the employees, a bargaining order usually will not issue unless the employer improperly has refused to recognize the union, that is, refused to bargain, without a "good faith doubt" with respect to the existence of a union majority—a violation of section 8(a)(5). The most frequent complaint is that the solicitor told the employee that the card was for an election. In such cases, the Board follows the now notorious "sole purpose" test of Cumberland Shoe Corp., 144 N.L.R.B. 1268, enforced, 351 F.2d 917 (6th Cir. 1965)—if the employee was not told that the only purpose of the card was to secure an election, the card is valid. See, e.g., Brandenburg Tel. Co., 164 N.L.R.B. No. 26, 1967 NLRB Dec. ¶ 21,376 (May 22, 1967) (single purpose cards); Sandy's Stores, Inc., 163 N.L.R.B. No. 95, 1967 CCH NLRB Dec. ¶ 21,210 (March 31, 1967) (single purpose cards); Shelby Mfg. Co., 155 N.L.R.B. 484, 1965 CCH NLRB Dec. ¶ 19819 (May 27, 1965) (single purpose cards); Lenz Mfg. Co., 153 N.L.R.B. 1399, 1965 CCH NLRB Dec. ¶ 9564 (July 13, 1965) (single purpose cards).

Under the "sole purpose" test the employee's signature on the card is held to be nearly conclusive proof of his intention to authorize the union to act for him. Only if the union organizer uttered the magic word "only" can the card be invalidated. Testimony as to what the employee thought the card meant is deemed irrelevant.

The "sole purpose" test has met with disfavor in the circuit courts. Although some courts have adopted it, Lincoln Mfg. Co. v. NLRB, 382 F.2d 411 (7th Cir. 1967); Furr's Inc. v. NLRB, 381 F.2d 562 (10th Cir. 1967), most have rejected it. NLRB v. Southbridge Sheet Metal Works, Inc., 380 F.2d 851 (1st Cir. 1967); S. E. Nichols Co. v. NLRB, 380 F.2d 438 (2d Cir. 1967); Crawford Mfg. Co. v. NLRB, 56 CCH Lab. Cas. ¶ 12,270 (4th Cir. Oct. 27, 1967); NLRB v. Swan Super Cleaners, Inc., 384 F.2d 609 (6th Cir. 1967); Bauer Welding & Metal Fabricators, Inc. v. NLRB, 358 F.2d 766 (7th Cir. 1966). See note 7 infra. One court draws a distinction between single purpose cards and dual purpose cards, applying the sole purpose test in the former, UAW v. NLRB, 363 F.2d 702 (D.C. Cir. 1965), and discarding it in the latter. Amalgamated Clothing Workers v. NLRB, 365 F.2d 898 (D.C. Cir. 1966) (the dual purpose card is labeled "ambiguous" and an examination of the subjective intent of the signer is deemed necessary to resolve the ambiguity).

Criticism of the "sole purpose" test has not been limited to the courts. See Lesnick, Establishment of Bargaining Rights Without an NLRB Election, 65 Mich. L. Rev. 851 (1967); 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 (1966); Comment, Union Authorization Cards, 75 Yale L.J. 805 (1966).

The Board will invalidate cards so obtained if they would "not have been subscribed but for the erroneous representation ...." I.T.T. Semi-Conductors, Inc., 165 N.L.R.B. No. 98, 1967 CCH NLRB Dec. ¶ 21,323 at 28,079 (June 21, 1967). Compare John Kinkel & Son, 157 N.L.R.B. 744, 1966 CCH NLRB Dec. ¶ 20,284 (March 16, 1965) (Board considers evidence of employee's subjective intent, but refuses to invalidate the card because of absence of evidence indicating reliance by such employee on the union organizer's misrepresentation) with Merrill Axle & Wheel Service, 158 N.L.R.B. 1113, 1966 CCH NLRB Dec. ¶ 20,450 (May 26, 1966) (subjective intent of signers cannot overcome the overt act of having signed the card and the misrepresentation that a majority of the employees had already signed is immaterial in determining the validity of the cards). But cf. Amalgamated Clothing Workers v. NLRB, 365 F.2d 898, 908 (D.C. Cir. 1965).

See Dixie Cup, 157 N.L.R.B. 167, 224-31, 1966 CCH NLRB Dec. ¶ 20,217, where the cards were invalidated because the employees signed under pressure of a false statement that those who did not sign would later be subjected to an initiation fee of fifty dollars. Accord, I.T.T., Semi-Conductors, Inc., 165 N.L.R.B. No. 98, 1967 CCH NLRB Dec. ¶ 21,323 at 28,079 (June 21, 1967) (card invalid if "misrepresentation operated coercively by putting signers in fear of majority reprisal").

But see cases cited note 27 infra.


The following are examples of unfair labor practices frequently committed during the organizational period which are considered as evidence tending to show the employer's lack of good faith doubt:
of the Act. This concept began as an attempt to define those situations in which a bargaining order would be appropriate in the absence of a union victory at the polls. Under present law, a refusal to recognize without a good faith doubt is considered a "rejection of the collective bargaining principle or . . . a desire to gain time within which to undermine the union." In applying this formulation, an employer's subsequent unfair labor practices are considered as evidence tending to show bad faith. That the union proceeded to an election which it

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20 Aaron Bros., 158 N.L.R.B. 1077, 1079, 1966 CCH NLRB Dec. 21,437. This statement, if taken literally, would indicate that lawful dissipation of the union's majority would be grounds for the issuance of a bargaining order. Such has not been the case—the Board inquiry focuses on violations of the Act—and it must be presumed that only unlawful dissipation is relevant to lack of a good faith doubt. See Converters Gravels Serv., Inc., 164 N.L.R.B. No. 53, 1967 CCH NLRB Dec. 21,319 (May 5, 1967), where the Board noted: "At no time did [the employer] make a free election impossible by attempting to dissipate the union's majority by unlawful means." Id. at 27,768 (emphasis added).

21 Joy Silk Mills v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), cert. denied, 341 U.S. 914 (1951), is the leading example.

Unfair labor practices both before (but only if the employer knows of organizational activity) and after the refusal to bargain are given weight in determining whether the employer entertained a good faith doubt at the time of such refusal. See, e.g., S.N.C. Mfg. Co., 147 N.L.R.B. 809 (1964), enforced sub nom., IUE v. NLRB, 352 F.2d 361 (D.C. Cir. 1965).

In comparison, employer misconduct occurring after an election petition has been filed may be used to impeach the results of the subsequent election. See Goodyear Tire & Rubber Co., 138 N.L.R.B. 453 (1962); Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275 (1961). The time when the union files the election petition and the time when it presents its bargaining demand to the employer do not usually coincide. Thus, in cases where the union is claiming that an election is invalid because of employer misconduct, the employer conduct that will be considered may differ from that considered in refusal-to-recognize cases because the time over which such conduct is evaluated may not be the same.
lost is not a bar to the finding of a section 8(a)(5) violation. A union may institute an action either before or after an election; the bargaining order remedy is available in both cases.

This Comment will demonstrate that the good faith doubt standard, as applied by the Board, is either irrelevant or unworkable, depending on the category of case under discussion. The Comment will analyze four different general fact situations, explain why good faith doubt should not be employed and, finally, present a standard which the Board, after enacting a proposed procedural reform, could apply in all situations where the controversy is whether a bargaining order should issue.

For purposes of analysis, the following types of cases will be distinguished:

1. Cases where the employer’s unfair labor practices caused or would have caused the union to lose the election and the carry-over effect of such unlawful activity would affect the result of a subsequent election if the Board ordered one.

2. Cases where, although the employer’s unfair labor practices caused or would have caused the union to lose the election, the unlawful activity would not affect the result of a subsequent election if the Board ordered one.

3. Cases where the employer’s unfair labor practices did not cause or would not have caused the union to lose the election.

4. Cases where the employer has committed no unfair labor practices.

As these classes of cases are defined, it is possible either that a prior election has been held, or that an election has not been held because unfair labor practice charges filed by the union served to hold the election petition in abeyance. In the latter type of cases, the evaluation of the effect of the employer’s conduct must be based on a determination of what would have occurred had there been an election. It is not suggested that these categories are sufficiently definable to serve as any more than a guide in evaluating the propriety of the bargaining order.

22 Bernel Foam Products, 146 N.L.R.B. 1277 (1964); accord, Borden Cabinet Corp. v. NLRB, 375 F.2d 891 (7th Cir. 1967); NLRB v. Frank C. Varney Co., 359 F.2d 774 (3d Cir. 1965); International Union of Elec. Workers v. NLRB, 350 F.2d 791 (D.C. Cir. 1965), cert. denied, 383 U.S. 943 (1966); Irving Air Chute v. NLRB, 350 F.2d 176 (2d Cir. 1965); Colson Corp. v. NLRB, 347 F.2d 128 (8th Cir. 1965), cert. denied, 382 U.S. 904 (1965); see 113 U. PA. L. REV. 456 (1965).
FLAGRANT UNFAIR LABOR PRACTICES

The term "flagrant" will be used to refer to those unfair labor practices which caused or would have caused the union to lose a prior election and which are so serious that their carry-over effect would also cause the union to lose either the initial or a Board ordered re-run election. In such cases, valid authorization cards from employees are the best measure of support for the union, and such cards procured from a majority of employees are a proper basis for an order directing the employer to bargain. The determination that a bargaining order should issue in this type of case can be made without resort to section 8(a)(5) and the rubric of good faith doubt. Whatever the employer's motivation for refusing the union's demand for recognition, the bargaining order should issue.

Nevertheless, in cases where flagrant violations of the Act have been committed by the employer, the Board has perfunctorily "found"

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23 See Pollitt, NLRB Re-run Elections: A Study, 41 N.C.L. Rev. 209, 215 (1963), which indicates that a re-run election is least likely to alter the result of the original election where the employer's unfair labor practices consisted of, for example, threats to close his operations if employees vote for the union, threats to discharge employees in the event of a union victory, or promises of wage increases if the union is defeated.

24 In the cases where employers have committed flagrant violations of the Act, the Board's strict test for invalidating authorization cards on the ground of misrepresentation, see note 13 supra, may be justified. If the coercive effect of the employer's unlawful activity can carry-over to taint future secret ballot elections, see note 23 supra, such coercion may have the same effect on employee testimony with respect to why they signed the card and what the organizer said to them when he solicited the cards.

The solution to this problem, however, should not be a strict rule which applies across-the-board. Rather, the better answer would be to relax the requirement of majority support in cases of flagrant violations. See Bok, The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 138 (1964), where the author suggests thirty per cent as a minimum.

25 Such card majorities must by necessity be deemed evidence of the status quo ante where the employer's conduct has been so flagrantly hostile to the organizing efforts of a union that a secret election has undoubtedly been corrupted as a result of the employer's militant opposition.

26 The Board's power to grant such orders is derived from NLRA § 10(c), 29 U.S.C. § 160(c) (1964), authorizing the Board to grant such relief "as will effectuate the policies of the Act." See note 4 supra.

The Board has held that a bargaining order would not effectuate the policies of the Act where the union has not achieved majority status, even though the employer had committed flagrant unfair labor practices which not only would taint an election, but also would prevent the union from getting majority support at the outset. J. P. Stevens & Co., 163 N.L.R.B. No. 24, 1967 CCH NLRB Dec. ¶ 21,148 (March 6, 1967).

27 See, e.g., NLRB v. Delight Bakery, Inc., 353 F.2d 344 (6th Cir. 1965); D. H. Holmes Co. v. NLRB, 179 F.2d 876 (5th Cir. 1950); Northwest Eng'r Co., 158 N.L.R.B. No. 48, 1966 CCH NLRB Dec. ¶ 20,392 (May 3, 1966); Bannon Mills, Inc., 146 N.L.R.B. 611 (1964). In each of the above cases, the issuance of a bargaining order without a finding of a § 8(a)(5) violation was justified as the only way to restore the status quo ante in the face of the employer's flagrant unfair labor practices.
lack of a good faith doubt and the consequent section 8(a)(5) violation. The Board then declares that whether the employer actually had such a doubt is not controlling—the bargaining order will issue in any event. The Board’s rationale appears to be that the employer should be ordered to bargain because he has prevented a fair election; since orders to bargain follow a finding of lack of good faith doubt, the employer is conclusively presumed to have lacked such a doubt when he rejected the union’s demand for recognition. But it cannot be questioned that there are cases in which an employer honestly doubts a union’s majority status at the time of his refusal to bargain and yet subsequently commits flagrant violations of the Act. To establish a conclusive presumption that good faith doubt cannot exist when violations make a free election impossible is to admit that the bargaining order is issued, not because of improper motivation on the part


29 The circuit courts have not recognized the Board’s “conclusive presumption.” In Wausau Steel Corp., 160 N.L.R.B. No. 47, 1966 CCH NLRB Dec. ¶20,684, the Board adopted the trial examiner’s finding that the employer had violated §8(a)(1) of the Act by promising benefits and threatening reprisals. The employer contended that he had a good faith doubt of the union’s majority claim and therefore his refusal to bargain was justified. The employer based his doubt on the fact that two years previously the union had claimed to have a majority of cards and yet had failed to organize the employees, and on the fact that the union had never offered proof of its majority claim in this case. The trial examiner, the Board later approving, rejected this contention:

This defense might well have been available had the [employer] refrained from unfair labor practices, but on this record the [employer’s] illegal conduct precludes its assertion of a good-faith doubt.

Id. at 26,533.

The trial examiner then went on to say that the employer:

having foreclosed by illegal conduct the customary means of resolving majority [an election], the proof of majority status may be made by cards, and in the light of such proof a bargaining order is appropriate to restore the status existing prior to the violation of Section 8(a)(1), even assuming arguendo that the record did not warrant a finding of unlawful refusal to bargain.

Id. at 26,533 (emphasis added).

On appeal, the court refused to find a lack of good faith doubt on the part of the employer. Wausau Steel Corp. v. NLRB, 377 F.2d 369 (7th Cir. 1967). The prior election loss, the union’s failure to show proof of its majority and the employer’s prompt agreement to a consent election outweighed any inference of bad faith that might be drawn from the §8(a)(1) violations. However, the court enforced the bargaining order on the ground that the employer’s unlawful conduct was of such a degree that it precluded a fair election. Id. at 373; accord, D. H. Holmes Co. v. NLRB, 179 F.2d 876 (5th Cir. 1950); see Summit Mining Corp. v. NLRB, 260 F.2d 894 (3d Cir. 1958).

of the employer, but rather to remedy the employer's flagrant unfair labor practices.

In sum, the Board's determination that a bargaining order should issue in these cases does not turn on the employer's state of mind at the time of his refusal to bargain. Instead, his flagrant violations of the Act necessitate this remedy. That good faith doubt is immaterial here is implicit in the Board's decisions, and its mention is simply make-weight, adding nothing to clarity and contributing much to confusion.

**No Unfair Labor Practices**

If the employer commits no unfair labor practices, he will not be found to have violated section 8(a)(5) by lacking a good faith doubt of the union's majority claim if, in response to the union's demand to bargain, he either expresses his doubt of the union's majority or simply rejects the demand without signifying his reasons for doing so. The presence of employer unfair labor practices is not, however, a *sine qua non* to a finding of bad faith. An employer is held to have violated section 8(a)(5), in the absence of other violations of the Act, if he expressly bases his refusal to bargain on grounds other than a

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31 One commentator has suggested that a bargaining order based on authorization cards should be issued only in cases involving "serious" violations of the Act by the employer. Bok, *The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 138 (1964).

The National Labor Relations Board recently held hearings on the propriety of granting back pay to employees who would have received wage increases had it not been for the employer's unlawful refusal to bargain. *NLRB Hearings on New Bargaining Remedies*, 65 Lab. Rel. Rep. 183 (1967). Restricting such a remedy to cases where the employer has committed flagrant violations would have the merit of using the strongest measure in cases where it is most needed. Moreover, the possibility of abuse of this remedy by unions seeking to coerce employers into bargaining without a representative election would be minimized.

32 Couching the justification for directing the employer to bargain in the alternative of a § 8(a)(5) violation may be of some utility to the Board in the event that court enforcement is sought. Although there are no cases on point, it is conceivable that a court may find that the employer's unfair labor practices were not "flagrant" but, nevertheless, showed lack of a good faith doubt. In such cases, the court would enforce the bargaining order on the basis of a § 8(a)(5) violation. Had the Board not rested on the alternative ground of lack of a good faith doubt, enforcement would have been denied.

33 *See* Sperti Sunlamp Div., Cooper-Hewitt Elec. Co., 162 N.L.R.B. No. 109, 1967 CCH NLRB Dec. ¶21,058 (Jan. 25, 1967); Monroe Mfg. Co., 162 N.L.R.B. No. 8, 1967 CCH NLRB Dec. ¶20,948 (Dec. 12, 1966); Oklahoma Sheraton Corp., 156 N.L.R.B. 681, 1966 CCH NLRB Dec. ¶20,135. *But see* Snow & Sons, 134 N.L.R.B. 709 (1961), enforced, 308 F.2d 687 (9th Cir. 1962), where the employer committed no unfair labor practices before or after the union's bargaining demand and simply stated that he doubted the union's majority. The employer consented to a card check which "confirmed" the union's claim. The Board held that the check negated any doubt that the employer could have had and, since he did not question the accuracy of the check, he had refused to bargain without a good faith doubt of the union's majority status in violation of §8(a)(5). Continued reliance on the *Snow* decision is dubious at best since the case has been largely distinguished away. *See, e.g.*, Strydel, Inc., 156 N.L.R.B. 1185, 1966 CCH NLRB Dec. ¶20,179 (where the Board held that the employer did not have to agree to a card check and that his refusal to bargain was in good faith). *See* Lesnick, *supra* note 13, at 852-53.

doubt of the union's majority. The rule governing such cases is purportedly an evidentiary one—"the General Counsel . . . must come forward with evidence and affirmatively establish the existence of . . . bad faith." Bad faith in this type of case does not mean an

35 Thus, where the employer refuses on the ground that the NLRB does not have jurisdiction, he will be held to have violated § 8(a)(5). H & W Constr. Co., 161 N.L.R.B. No. 77, 1967 CCH NLRB Dec. ¶ 20,065 (Nov. 10, 1966). Similarly, when the employer refuses the union's demand on the ground that the bargaining unit in which the majority is claimed is inappropriate, he will be found to have violated § 8(a)(5) if the unit question is later resolved in favor of the union. See, e.g., Galbreath Bakery, Inc., 163 N.L.R.B. No. 41, 1967 CCH NLRB Dec. ¶ 21,166, at 27,518 n.7 (March 15, 1967).

In the unit cases, the Board is on shaky ground. Logically, a doubt as to the unit may be a doubt of the union's majority. For example, if the union obtains cards from six employees in a unit of ten and the employer claims that the unit should be twenty, the employer is actually saying that the union does not have majority status. It appears that doubt as to majority has not been deemed relevant in these cases. As one court put it:

That the company's refusal to bargain was undertaken in the good faith belief that the trainees were not members of the bargaining unit is of no consequence. . . . The regular procedure for challenging the appropriateness of a bargaining unit is to refuse to bargain and then defend against an unfair labor practice charge on the ground that the unit is inappropriate.

United Aircraft Corp. v. NLRB, 333 F.2d 819, 822 (2d Cir. 1964) (emphasis added).

There is, of course, an alternative to the "regular procedure" described in United Aircraft. The question of the appropriateness of the unit could be determined by the Regional Director upon the filing of an election petition. 29 C.F.R. § 101.18 (1967). By allowing doubt as to the unit as a defense, the union would have to go the election route, either on its own or the employer's petition. The primary advantage of this procedure (over that above) is that the question of unit appropriateness would be more quickly decided (assuming, as one must, that unions would not file refusal to recognize charges, after the transitional period, in cases where the employer has committed no other violations of the Act and his doubt is based on a challenge of the unit). "In 91% of the cases [where petitions for an election are filed and objections to the petition made], the election will not be delayed much more than two months." Note, The Employer's Duty of Neutrality in the Rival Union Situation: Administrative and Judicial Application of the Midwest Piping Doctrine, 111 U. Pa. L. Rev. 930, 934 n.21 (1963). On the other hand, the average "contented unfair labor practice charge consumes 475 days from filing to a board decision . . . ." P. Ross, The Government as a Source of Union Power 171 (1965). Thus, the policy of discouraging procedural delays, which is one objective of the bargaining order, is not furthered. See text accompanying note 5 supra. The Board, in fact, is encouraging procedural delays. This, coupled with the desirability of an election and the fact that a dispute concerning a unit can show doubt as to majority status, clearly points to the conclusion that good faith doubt as to the appropriateness of the unit should be a defense, where the employer has committed no other unfair labor practices.

It might be added that, where the employer rests his refusal on both a doubt of the union's majority and a challenge to the union's demand on other grounds, e.g., appropriate unit, he will not be found to have violated § 8(a)(5) by refusing to bargain, if he has committed no other violations. Oklahoma Sheraton Corp., 156 N.L.R.B. 681, 682, 1966 CCH NLRB Dec. ¶ 20,135, at 25,305. The employer in Oklahoma Sheraton did not seek an election, but he did question the union's majority claim.

Although it has not yet been litigated, it is probable that an employer who does not otherwise violate the Act, would not be held to have violated § 8(a)(5), i.e., lacked a good faith doubt, if he petitions for an election, while at the same time refusing to bargain with the union on grounds other than a doubt of its majority. See Aaron Bros., 158 N.L.R.B. 1077, 1079, 1966 CCH NLRB Dec. ¶ 20,437, at 25,946 (concurring opinion by Member Zagoria).

36 Aaron Bros., 158 N.L.R.B. 1077, 1079, 1966 CCH NLRB Dec. ¶ 20,437, at 25,944. This oft-cited "rule" is derived from the Board's decision in John P. Serpa,
EMPLOYER "GOOD FAITH DOUBT"

intent to dissipate unlawfully the union's majority, nor does it mean
that an untainted election is impossible. Rather, the Board orders the
employer to bargain on the ground that the delay involved in processing
the unfair labor practices might adversely affect the union in a Board
ordered election; this consideration is not counterbalanced
by any
employer interest, since the employer did not manifest a doubt of the
union's claim and, instead, rested his refusal on other grounds.37

The Board's rationale presents some problems. First, the delay
created by litigating the claims cannot by itself justify the bargaining
order—if this were so, a bargaining order would be proper in every
refusal-to-recognize case that reached the Board. Only when the
employer's unfair labor practices trigger the delay 38 should this be a
relevant consideration. If the union was compelled to accept a delay
of the election while it sought a Board order directing the employer
to cease and desist from his unfair labor practices, the bargaining order
may be proper. But where there are no unlawful acts by the employer,
and the union could have proceeded to an election, the delay rationale
for issuing the bargaining order evaporates.

Second, even conceding that the employer's interest should not
be protected simply because he does not express a doubt (and this
is indeed tenuous),39 the Board's rationale ignores the interests of the
employees. Where the employer has committed no unfair labor prac-
tices, an election, rather than authorization cards, is the best gauge of
employee wishes.40 But by issuing bargaining orders in cases where
the employer has committed no unfair labor practices, the Board is
encouraging unions, especially those who doubt that they will succeed
in an election, to circumvent the election process.

CASES INVOLVING "NON-BRAGANT" UNFAIR LABOR PRACTICES

Remaining are cases in which the employer's unfair labor practices
caused or would have caused the union to lose a prior election, but
would not cause the union to lose a subsequent election, and cases in
which the employer's unfair labor practices have not or would not have

155 N.L.R.B. 99 (1965), which was recently denied enforcement in Retail Clerks
Union, Local 1179 v. NLRB, 376 F.2d 186 (9th Cir. 1967). The Board, despite the
circuit court's ruling, has continued to adhere to the Serpa rationale. See United
Buckingham Freight Lines, 168 N.L.R.B. No. 90, 1968 CCH NLRB Dec. ¶21,963
(Dec. 4, 1967).

37 As the Board pointed out in H & W Construction Co., 161 N.L.R.B. No. 77,
1967 CCH NLRB Dec. ¶20,865, at 26,935 (Nov. 10, 1966):
To require the Union now to go to an election, which at the time of its
refusal to bargain the [employer] did not seek, to re-establish a previously
demonstrated majority, which the [employer] did not then question, would
in our opinion serve to defeat rather than effectuate statutory policy.

38 See note 5 supra.

39 See Member Zagoria's dissent in H & W Construction Co., 161 N.L.R.B.

affected even the result of a prior election. Since neither the Board nor the courts distinguish these two types of cases, they will be referred to as cases involving "non-flagrant" unfair labor practices for the purpose of assessing the present state of the law.

Although it had been thought that lack of a good faith doubt would be found in every case where the employer had committed unfair labor practices, regardless of their severity, the Board has refused to follow a per se rule. Instead, the employer will not be ordered to bargain unless he lacked a good faith doubt (as defined below) of the union’s majority, even though he has committed other violations of the Act. Since lack of a good faith doubt is defined in these cases as a refusal to recognize with intent to dissipate the union’s majority, the Board only must determine whether the employer actually intended his unlawful conduct to delay the holding of an election so that he could destroy the union’s majority in the interim by unfair labor practices.

As previously noted, the employer’s unfair labor practices are considered a strong indication that he had just such an intention and, thus, lacked a good faith doubt. Although the cases do not lend themselves to easy generalization, a few factors can be perceived that, when present, may have the effect of offsetting the implication to be derived from such employer illegality.

**Employer Election Petitions**

An employer’s petition for an election, promptly filed after rejection of the union’s demand for recognition, is a strong indication

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42 In Aaron Bros., 158 N.L.R.B. 1077, 1079, 1966 CCH NLRB Dec. ¶20,437, at 25,945, the Board stated that: Where a company has engaged in substantial unfair labor practices calculated to dissipate union support, the Board . . . has concluded that employer insistence on an election was not motivated by a good-faith doubt of the union’s majority, but rather by a rejection of the collective-bargaining principle or by a desire to gain time within which to undermine the union. However, this does not mean that any employer conduct found violative of Section 8(a)(1) of the Act, regardless of its nature or gravity, will necessarily support a refusal-to-bargain finding.
44 See note 18 supra.
45 See note 21 supra.
46 NLRA §9(c)(1)(B), 29 U.S.C. §159(c)(1)(b) (1964), states that a petition for an NLRB conducted election to determine the question of representation can be filed "by an employer, alleging that one or more individuals have presented to him a claim to be recognized" as the collective bargaining representative of his employees.
47 An employer cannot file a petition for an election until there has been a demand for recognition presented to him by the union. See note 46 supra.
that the employer desires to settle quickly the question of representation.\footnote{48} Since, in the Board's view, an intention to gain time points toward lack of a good faith doubt,\footnote{49} the contrary implication flowing from the filing of an election petition by an employer should be evidence of the presence of good faith doubt.\footnote{50}

\textit{Information Concerning the Union's Organizational Campaign}

Where the employer has some factual basis upon which to rest his doubt of the union's paper majority, the inference of lack of a good faith doubt from unfair labor practices is not drawn so easily. A showing of such factual basis constitutes affirmative proof of good faith. The Board has stated that an employer need not have a reasonable

\footnote{48} This type of action is in contradistinction to employer stalling which evidences a desire to delay the question of representation as long as possible, with the hope of unlawfully dissipating the union's majority. It is the latter conduct which should be prevented and which, in fact, was one of the evils sought to be avoided by the issuance of the bargaining order in Franks Bros. v. NLRB, 321 U.S. 702 (1944).\ See text accompanying notes 5, 7 supra.

\footnote{49} See text accompanying note 44 supra.

\footnote{50} See Hercules Packing Corp., 163 N.L.R.B. No. 35, 1967 CCH NLRB Dec. \textsection 21,149 (March 7, 1967), where the employer violated \textsection 8(a)(1) by giving a coercive speech. The Board labeled this illegality as "not truly inconsistent with a good-faith doubt" and found that the employer had such a doubt when he refused to bargain with the union. Although the Board does not explicitly state why the employer's unlawful act was not indicative of bad faith, it appears that two factors militated in the opposite direction. First, the union had a history of election losses, (see text accompanying notes 71-75 infra for a suggestion that such history may support a good faith doubt); second, the employer promptly entered into a consent election which the union on the next occasion lost. See Montgomery Ward & Co. v. NLRB, 377 F.2d 452 (6th Cir. 1967), where the court held that the employer violated \textsection 8(a)(1) by unlawful interrogation and threats to suspend and \textsection 8(a)(3) by discriminatory discharges. However, the employer entered into a consent election with the union—\textit{held:} no violation of \textsection 8(a)(5); employer had a good faith doubt of the union's majority.

Similarly, in the recent decisions in 20th Century Glove Co., 165 N.L.R.B. No. 122, 1967 CCH NLRB Dec. \textsection 21,540 (June 22, 1967), and Shelby Williams, Inc., 165 N.L.R.B. No. 108, 1967 CCH NLRB Dec. \textsection 21,528 (June 21, 1967), it was stressed that the employer's prompt filing of a petition for an election or his entering into a consent election with the union was a step which showed an intent to get the matter over with and tended toward good faith on his part. However, these cases might be explained on the ground that the employer committed no other unfair labor practices. See text accompanying notes 33-34 supra.

Where there has been an election within one year previous to the union's bargaining demand, an employer's petition for an election in response to the union's demand would be futile. NLRA, \textsection 9(c)(3), 29 U.S.C. \textsection 159(c)(3) (1964), bars elections in any bargaining unit "within which in the preceding twelve-month period, a valid election shall have been held." It has been held, however, that \textsection 9(c)(3) does not bar unions from seeking representative status through the authorization card route. Conren, Inc. v. NLRB, 366 F.2d 173 (7th Cir. 1966), \textit{cert. denied}, 386 U.S. 974 (1967); see 80 Harv. L. Rev. 1805 (1967). Although the employer's petition for election would be barred in such cases, thus eliminating one indicator of good faith doubt, a legitimate doubt may be supported by the very fact that a union demanding recognition in the same bargaining unit has lost an election within the year. The history of an election loss, especially one so recent, casts doubt on the validity of the card majority as a reflection of the true wishes of the employees and gives the employer a factual basis for expressing doubt. See text accompanying notes 71-75 infra.
basis for asserting a doubt of the union’s majority. This appears to be a corollary of the general rule that an employer does not have to come forward with proof of his good faith if he has not otherwise violated the Act. But where the employer has committed unfair labor practices, affirmative proof that he had some ground upon which to base his claim of good faith doubt may be necessary to dissuade the Board from drawing the contrary conclusion.

There are several ways in which an employer may be able to establish that he did entertain a good faith doubt of the union’s majority. One source of information which may be available is the company grapevine. If the employer learns that the union has coerced his employees into signing or that it has misrepresented the purpose of the authorization cards, the validity of such cards becomes questionable, since the employee’s signature is not conclusive in determining whether a card should be counted in support of the union’s majority. In such cases, the employer has a reasonable ground upon which to assert a good faith doubt of the union’s majority claim when confronted with a bargaining demand.

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[A]n employer who in good faith withholds recognition because of a doubt of majority though his doubt is founded on no more than a distrust of cards, may have an election to resolve that doubt, and will not be subjected to an 8(a)(5) violation simply because he is unable to substantiate a reasonable basis for his doubt. (Emphasis added.)

52 See note 36 supra.

53 Compare the Board’s statement in H & W Construction Co., supra note 51, with its statement in Hammond & Irving, Inc., 154 N.L.R.B. 1071, 1073, 1965 CCH NLRB Dec. ¶ 9681, at 16,392:

... an employer may insist upon a Board conducted election as proof of a union’s majority if it has a reasonable basis for a bona fide doubt as to the union’s representative status. (Emphasis added.)

In Hammond the employer committed violations of § 8(a)(1) while in H & W Construction Co. there were no employer violations of the Act other than the refusal to bargain.

54 See text accompanying notes 11-15 supra.

55 See NLRB v. River Togs, Inc., 382 F.2d 198 (2d Cir. 1967) (employer violated §8(a)(1) by unlawful questioning, threats to close plant and creating impression of surveillance; employer did not violate §8(a)(5) because he had a good faith doubt based on information that an anti-union petition had been signed by a majority of employees and that cards were signed to get dinner—not to authorize union, and on the fact that many employees did not speak English); Peoples Serv. Drug Stores, Inc. v. NLRB, 375 F.2d 551 (6th Cir. 1967) (employer violated §8(a)(1) by threats of discharge and elimination of work; employer did not violate §8(a)(5) because he had a good faith doubt of the union’s majority based in part on information which he received from employees indicating that they signed cards under pressure); Edward Fields, Inc. v. NLRB, 325 F.2d 754 (2d Cir. 1963) (employer violated §8(a)(1) by unlawful interrogation; employer had a good faith doubt of the union’s majority based, in part, on anti-union petition signed by majority of employees); Hannaford Bros. Co. v. NLRB, 261 F.2d 638 (1st Cir. 1958) (employer violated §8(a)(1) by promising benefits and threats to cease operations; employer did not violate §8(a)(5) because he had a good faith doubt of the union’s majority based on information that employees intended to vote against the union at the election).

The Board has not expressly stated that employer knowledge of union misconduct in procuring authorization cards or employee desire to repudiate such cards will out-
In order to ascertain the validity of the union's majority, the employer may wish to take reasonable affirmative action: he may conduct a poll (systematic questioning of a substantial number of employees in the unit) or simply question a few individual employees with respect to their desires regarding unionization.

In Struksnes Construction Co., the Board listed the safeguards which must be followed by an employer who takes a poll of his employees:

1. The purpose of the poll [must be] to determine the truth of the union's claim of majority,
2. This purpose [must be] communicated to the employees,
3. Assurances against reprisal [must be] given,
4. The employees [must be] polled by secret ballot, and
5. The employer [must not have] engaged in unfair labor practices or otherwise created a coercive atmosphere.


The Supreme Court has indicated that it is the duty of employers to take reasonable steps to verify a majority claim in order to protect the § 7 rights of their employees. See International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731, 739-40 (1961):

If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate . . . he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful . . . Individual and collective rights may not be trampled upon merely because it is inconvenient to avoid doing so.

The employer must be extremely careful if he takes such affirmative action. If questioning exceeds permissible bounds, he violates § 8(a)(1), which in turn becomes affirmative evidence of bad faith to support a § 8(a)(5) charge. See, e.g., American Sanitary Products Co. v. NLRB, 382 F.2d 53 (10th Cir. 1967). The employer's dilemma was strikingly portrayed by Judge Brown in his opinion in NLRB v. Dan River Mills, Inc., 374 F.2d 381, 388 (5th Cir. 1960):

If he makes a simple inquiry of each employee and accepts the simple answer, the very pressures apprehended [union coercion] may well bring about the employee's confirmation as well. If he probes deeper, the inquiry unavoidably becomes an investigation and soon it is inescapable that there be insinuations or intimations in terms of relative evaluation of union or nonunion conditions. At that point, undefined and undefinable, the inquisitor trespasses either on forbidden ground or founds in the Serbonian bog . . . surrounding it so that what started out to be compliance with the law is turned into an affirmative charge of an unfair labor practice.

The case was before the Board on remand from International Union of Operating Eng'rs, Local 49, 353 F.2d 852 (1965), denying enf. of 148 N.L.R.B. 1358 (1964).

By this requirement, employer polling before the union has made a bargaining demand would be unlawful. Similarly, a poll taken after the employer has refused to bargain would be violative of § 8(a)(1). Struksnes Constr. Co., 165 N.L.R.B. No. 102, 1967 CCH NLRB Dec. ¶ 21,558, at 28,132 (June 26, 1967).
In the Board’s view, any attempt to ascertain employee desires tends to cause fear of reprisal in the mind of an employee who is sympathetic to the union. Thus, if the above safeguards are not observed, the tendency toward coercion and interference is presumed to warrant a finding of a section 8(a)(1) violation.

The Board has not yet sought enforcement in the circuit courts of a decision in which the Struksnes safeguards have been applied. The primary innovation of Struksnes is the requirement of a secret ballot. Obviously, an employer, if he is to abide by the rules of the Board, must be advised of this requirement—a secret ballot poll would not appear to be the type of action normally taken by an employer, even with the most admirable of motives. In light of previous decisions in some circuits, the failure to comply with this requirement may not be sufficient to justify a finding of coercion.

If a lawfully conducted poll indicates that a majority of employees do not favor unionization, the validity of the paper majority becomes questionable. On this basis, the employer may assert a good faith doubt of the union’s claim and reject the bargaining demand. On the other hand, if the poll confirms the union’s claim, the employer is precluded from claiming such a doubt and must grant recognition.

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61 Id. at 28,131.
62 Id. at 28,132.
63 Although there is no direct evidence on this point, it appears that many employers do consult attorneys before making a decision on whether to grant recognition and, thus, have an opportunity to receive advice on polling. See, e.g., NLRB v. Tom’s Supermarket, Inc., 55 CCH Lab. Cas. ¶12,026 (7th Cir. June 27, 1967); NLRB v. Lorben Corp., 345 F.2d 346 (2d Cir. 1965).
64 But see NLRB v. Crystal Laundry & Dry Cleaning Co., 308 F.2d 626 (6th Cir. 1962), where the employer conducted a secret ballot poll even though there was no specific Board requirement that a poll be so conducted.
65 S. H. Kress & Co. v. NLRB, 317 F.2d 225 (9th Cir. 1963), is the leading example; the court held that there must be an ad hoc determination in each case based on (1) whether the employee actually was coerced, and (2) whether it was reasonable for him to feel coerced. The Board’s per se rule that the employer’s failing to comply with certain prescribed standards made his questioning unlawful was rejected by the court. The result is that court decisions which follow Kress do not develop any specific rules of conduct which an employer must follow. See NLRB v. Howard Quarails, Inc., 362 F.2d 236 (8th Cir. 1966); NLRB v. Lorben Corp., 345 F.2d 346 (2d Cir. 1965).
66 Along with the requirement of the secret ballot, the Struksnes opinion raises another problem—the relevance of other unfair labor practices by an employer. The Board stated that “the employer must not have engaged in unfair labor practices or otherwise created a coercive atmosphere.” See text accompanying note 60 supra. Does this mean that an employer who has violated the Act, no matter how seriously, will be precluded from conducting a poll of his employees? Or does it mean that only unfair labor practices which create an atmosphere of coercion will make the poll violative of §8(a)(1)? If the former meaning is intended, the Struksnes test would appear to go too far—unfair labor practices do not necessarily coerce employees to such an extent that they would be restrained from voting in favor of the union in a secret ballot poll. Cf. NLRB v. Flomatic Corp., 347 F.2d 74 (2d Cir. 1965).
67 See cases cited in note 55 supra.
If the employer does not undertake a poll and simply questions a few employees with respect to their union sympathies, does he violate section 8(a)(1) by failing to use a secret ballot, even if he follows all the other requirements of Struksnes? Although the Board has not expressly stated its position on this question, decisions after Struksnes indicate that it will not apply a per se rule forbidding all employer questioning relating to employee desires for unionization. Instead, the Board probably will determine on a case-by-case basis whether the employer's questions reasonably invoked fear of reprisal; and the Struksnes standards (not including the secret ballot) probably will serve as a guide for determining whether the questioning was coercive. If lawful questioning indicates either that the employees do not desire unionization or that the cards were obtained through union coercion or misrepresentation, the employer should be entitled to base his claim of good faith doubt on this information.

History of Union Election Losses

A history of union election losses may create a reasonable basis upon which an employer may doubt that the union actually represents a majority of his employees. Even though the union exhibits a paper majority, its past defeats open to question the accuracy of authorization cards as a reflection of employee desires, especially if the union also had a card majority prior to such defeats. In Peoples Service Drug Stores v. NLRB, the employer, in response to the union's demand for recognition on the basis of a card majority, wrote back rejecting the demand and adding that "[c]ard checks to determine majority status have always proven unreliable." The store manager who refused the union's demand based his distrust of the card majority, in part, on his experience in other stores where the union, on nine different occasions, had lost an election even though it had claimed

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68 See Cohen Bros. Fruit Co., 166 N.L.R.B. No. 2, 1967 CCH NLRB Dec. ¶21,571 (June 28, 1967), where the Board stated that not all questioning about union activities has a coercive effect if the employer takes certain precautions, presumably those (other than the secret ballot) set down in Struksnes. See text accompanying note 55 supra.

69 See text accompanying note 55 supra, for the standards.

70 See cases cited note 55 supra.

71 See, e.g., Wausau Steel Corp. v. NLRB, 377 F.2d 369, 373 (7th Cir. 1967); Nalco Chem. Co., 163 N.L.R.B. No. 19, 1967 CCH NLRB Dec. ¶21,122 at 27,436 (Feb. 21, 1967). But see NLRB v. Overnight Transp. Co., 308 F.2d 279 (4th Cir. 1962). The latter case may be distinguished by the fact that the employer was seeking to rely on union election losses in other plants, whereas the other cases cited above involved election losses in the same plant. This distinction, however, will not explain the decisions in Peoples Serv. Drug Stores v. NLRB, 375 F.2d 551 (6th Cir. 1967) and NLRB v. Hannaford Bros. Co., 261 F.2d 638 (1st Cir. 1958). See text accompanying notes 72-75 infra.

72 375 F.2d 551 (6th Cir. 1967), denying enf. of, 154 N.L.R.B. 1516 (1965).

73 Id. at 555.
a card majority before the balloting. In reversing the Board’s finding of a section 8(a)(5) violation because the employer lacked a good faith doubt, the court stated that “[p]revious experience with card checks and union elections is a factor which must be considered in determining the good faith doubt of an employer.” The court concluded that the employer had such a doubt, even though he had coercively questioned his employees and threatened discharges and withdrawal of benefits if the union became bargaining agent. In sum, past experience tending to show untrustworthiness of authorization cards may support a good faith doubt, even though the employer commits other violations of the Act when such other violations are not “flagrant.”

Summary

The factors outlined above by no means exhaust the list of objective criteria deemed by the courts and the Board to be indicative of good or bad faith. Much of the uncertainty in the area has been generated by disagreements concerning not only the factors which are relevant in determining the existence of a good faith doubt, but also the weight to be accorded each such consideration in the variegated factual situations that arise. If there is one salient feature arising from the cases in this area, it is that the use of the concept of good faith doubt has failed to establish any ascertainable rules of conduct for employers and unions at this critical stage in the organizational process.

At the core of the problem is the difficulty in accommodating all the interests involved. This is especially acute in the “non-flagrant” cases. Thus, the issuance of a bargaining order in every case where the employer has violated the Act not only would preclude the employees from expressing their preferences in a free election, but also would deprive the employer of the opportunity to inform his employees of what he considers cogent reasons for not joining a union. On the other hand, if the employer were given the privilege in every case to campaign against the union and to reap the benefits of his campaign in an election, regardless of the degree of his violations of the Act, the result would be unfair in two respects. First, the union would be denied a remedy against employer illegalities which might cause a loss of its majority by tainting or delaying the election. In addition, the effect on the employees’ freedom of choice guaranteed by section 7 of the

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74 Interestingly, there was evidence regarding only one of the nine election campaigns the employer referred to; this evidence indicated that the election the union had lost was set aside because the Company’s pre-election conduct prevented a fair election. Brief for Respondent at 35, People’s Serv. Drug Stores v. NLRB, 375 F.2d 551 (6th Cir. 1967).

75 375 F.2d at 557.

76 See, e.g., cases cited note 55 supra.
Act would be ignored. The question thus becomes how to strike the proper balance.

The resolution of this question has focused on the employer's good faith doubt at the time of his refusal to bargain. But it is clear that the intricate process of accommodating the tripartite interests mentioned above cannot be hinged on such an elusive and one-sided factor as the employer's state of mind. The employer's unfair labor practices are considered relevant only as they bear on his subjective intent. As a result, the propriety of the bargaining order becomes merely a secondary consideration, and issuance hinges not on the effect of the employer's unlawful conduct on an election, but rather on whether the employer had an insidious motive for refusing to recognize the union. Moreover, the door is closed to considerations that may be relevant to the propriety of a bargaining order in a specific case, although not relevant to the subjective intent of the employer. In short, good faith doubt is not a workable concept.

If, however, good faith doubt is abandoned in favor of a case-by-case evaluation of the effect of the employer's illegalities on the election choice of the employees, the Board would be faced with the determination of an exceedingly complex issue. This, in part, is attributable to the fact that unions may press for bargaining orders either before or after an election. The determination also is made more difficult because petitions for elections are held in abeyance while unfair labor practice charges are decided, thus placing unions who are unable to sustain their majority during this period at a disadvantage. These problems will become apparent in the following analysis of the propriety of the bargaining order in the two types of "non-flagrant" cases.

First, in those cases where an election has been held and it is found that the employer's unfair labor practices did not affect its result, there appears to be no reason to issue a bargaining order. By hypothesis, it is the employees who have caused the union to lose—they have expressed their preferences at the polls by rejecting the union, and the election should stand. However, the question is complicated if the Board is called upon to decide whether to order the employer to bargain when there has been no prior election. By attempting to decide whether the employer's unlawful conduct would have affected the result of an election, the Board would be venturing

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77 For example, procedural delays that put the union at a disadvantage should be relevant to the efficacy of the bargaining order, even if they are not pertinent to the employer's state of mind at the time of his refusal to bargain. Similarly, if an election has been held it may be significant that the employer's post-demand unfair labor practices were committed long before the balloting. Although their proximity to the employer's refusal to bargain suggests greater probative value with respect to his subjective intent, the fact that a long period of time elapsed before the election may indicate that they had little effect on the balloting and that the bargaining order is therefore inappropriate.

78 See note 22 supra.

79 See notes 5, 7 supra.

80 See NLRB v. Flomatic Corp., 347 F.2d 74 (1965).
very far into the relatively unknown area of voter psychology.21
Even if it somehow could be determined that the employer's unlawful
conduct would not have affected the result of an election had one been
held, the inquiry could not end there. The Board would still have to
decide what would have been the outcome of such an election, that is,
whether the employees would have voted for or against the union—
a decision which can be based on little more than conjecture.

It might be argued that the Board could stop short of this latter
inquiry and simply order an election. Unfortunately, the matter is not
so simple. If the reason that there were no prior election lies in the
fact that the union's election petition was held in abeyance because
of the pending unfair labor practice charges, the union could make a
strong argument in favor of a bargaining order and against a Board
ordered election. Why should the union be required to sustain a
majority it already had acquired during the time it takes to have
the employer's unlawful conduct remedied? For all but the strongest
unions, to order an election at this time would be to give the employer
an advantage—an advantage he does not deserve since it was his un-
lawful conduct that brought about the delay which may have dis-
sipated the union's prior support.22

In those cases where there has been an election and it is found
that the employer's unfair labor practices caused the union's defeat,
It is clear that the election must be set aside. Assuming that the
union can show majority status through authorization cards, the ques-
tion becomes whether the Board should order the employer to bargain
or should order a re-run election. Because of the delay involved in
processing the union's charges of employer interference with the
election, the re-run election is plainly inadequate. Although this type
of delay is somewhat different from the delay in holding the election
mentioned above, the effect on the union's support can be the same.
To order a re-run election would be to allow the employer to profit
from his own wrongdoing, at the expense of the union and the em-
ployees who desire unionization. The bargaining order thus appears
to be appropriate in this type of case.

The same result would appear to be correct even in the absence
of a prior election, as long as the determination can be made that the
employer's unfair labor practices would have caused the union to lose
had an election been held. The employer's unlawful conduct is the
same and a similar delay is present—stalling the election while the
union's claims against the employer are being decided. However, as
noted above, what would have been the effect of employer illegality
had there been an election is a question that is extremely difficult to
resolve without any precise data on voter behavior.

21 See generally Bok, The Regulation of Campaign Tactics in Representative
22 See notes 5, 7 supra.
In sum, employer good faith doubt is not an acceptable touchstone for deciding whether to issue a bargaining order. However, the alternative approach outlined above involves an exceedingly complex calculus. This complexity is attributable in part to the fact that the Board must determine what would have occurred in cases where no prior election has been held. Moreover, even if this determination could be made, the procedural delay causing election petitions to be held in abeyance when unfair labor practice charges are filed militates in favor of the bargaining order, thus causing the resolution of the question to become even more difficult. The conclusion of this Comment will discuss a recommended procedure that would alleviate much of this difficulty.

CONCLUSION

Initially unions should be required to proceed to an election in every case in which they seek representative status. If the employer commits unfair labor practices during the interim preceding the election, the union may file charges against him. These charges, however, should run concurrently with the election petition.

If the union wins the election, its charges against the employer may be withdrawn. On the other hand, if the union loses, the only questions for determination by the Board should be: (1) did the employer commit the unfair labor practices as alleged by the union; and (2) if so, did those violations cause the union to lose the election. If both questions are answered in the affirmative, the employer should be ordered to bargain with the union if the union, through authorization cards, can demonstrate prior majority support. If, however, the union's loss cannot be attributed to the employer's unlawful conduct, a bargaining order should not issue.

In NLRB v. S. S. Logan Packing Co., 56 CCH Lab. Cas. ¶12,278 (4th Cir. Oct. 27, 1967), the Fourth Circuit, in considered dictum, indicated that it was abandoning the "good faith" test and would, in the future, issue bargaining orders only in "extraordinary" cases. The court stated that cease and desist orders would be an adequate remedy in the great majority of cases where the employer commits §8(a)(1) violations prior to an election. The court noted, however, that where employer unfair labor practices have made a free election impossible, the bargaining order would be an appropriate remedy.

But the dictum in Logan goes too far too fast. If bargaining orders issue only in cases involving "flagrant" violations, employers are given a free hand to delay an election indefinitely. An employer may commit "non-flagrant" violations of the Act before the election. Logan suggests that this kind of action can be remedied by cease and desist orders. The problem with this is that the union, in order to have its claims of employer misconduct decided, would have to accept a delay in the election. See note 5 supra. And during the period from the time of filing the unfair labor practice charges to decision by the Board, which may consume well over a year, see note 6 supra, the union would have to maintain the majority it had previously obtained. For unions with only marginal strength, this may be an impossible task. See note 7 supra. Thus, until the procedural delay is eliminated, the Logan approach leaves recalcitrant employers free to dampen organizational drives by unlawful means.

Of course, this does not exclude the possibility of ordering a re-run election combined with cease and desist orders, requisite notice, letters informing employees
Of course, one possible advantage of this procedure would be reduction in the Board’s workload—those cases where the union wins the election, but would have filed refusal to recognize charges in lieu of proceeding to an election, would be eliminated. However, the primary advantage of this procedure is that it clears the way for more precise analysis of the effect of employer unfair labor practices on election results. Few would quarrel with the proposition that the influence of procedural deficiencies on substantive law should be minimized. But the presence of election delay under present Board procedure cannot escape consideration. To ignore the delay would result in unfairness to the union; but to recognize it and issue a bargaining order as a remedy for it would be to penalize employers whose violations are minimal. The solution lies in correcting the procedural deficiency, rather than compensating for it. Thus, the recommended procedure, by eliminating the election delay triggered by the union’s filing of unfair labor practice charges, prevents this factor from exerting any influence on the decision of whether to order the employer to bargain.

In addition the abstract question of what would have occurred had there been an election, a question which would arise under present procedure, would not have to be faced—an election would be held in every case under the new procedure. It might be claimed that even with a prior election the Board could not determine with any certainty what effect the employer’s unfair labor practices had on the result. The obvious answer is that just such determinations are now made in certain cases. Admittedly, certain assumptions about voting behavior will have to be made. However, the entire process of regulating NLRB election campaigns proceeds on many of the same kind of assumptions.

Authorization cards may prove helpful in this regard. Such cards will have a greater claim to being an index of employee sentiment as the tests for determining their validity become more realistic. Board regulation of the content and method of procurement of such cards also would enhance their reliability. A wide disparity between the tests for determining their validity and the only purpose of the card was for an election, the card is invalid. See note supra.

Similarly, this procedure is not meant to preclude unions from seeking cease and desist orders before an election has been held. A union could process an unfair labor practice charge before an election by agreeing to hold the petition in abeyance, but the remedy of the bargaining order would not be available.


See NLRB v. Flomatic, 347 F.2d 74 (2d Cir. 1965), and cases cited note supra.

See Bok, note 31 supra.

See, e.g., S. E. Nichols Co. v. NLRB, 380 F.2d 438 (2d Cir. 1967), where the court held that if the remarks of the union solicitor led the employee to believe that the only purpose of the card was for an election, the card is invalid. See note 13 supra.

See Lesnick, supra note 13, at 856-58.
the number of votes for the union and the number of authorization cards the union had procured may be some indication that employees were persuaded to change their mind by the employer's unlawful conduct, especially when the employer has not undertaken any lawful campaign activity.

Moreover, under the procedure advocated, the opportunity is presented for gathering and evaluating empirical data on the effects of employer misconduct on employee choice in an election. A recurrence of slight disparities between the number of authorization cards and the number of votes for the union in the presence of, for example, employer violations of section 8(a)(1) by grants of wage increases, may be cause for re-examination of the assumption that such conduct interferes with employee free choice. There can be little doubt that this kind of information is sorely needed.