Rethinking the NLRB's Approach to Union Recognition Agreements

Andrew Strom*

One response by unions to the difficulties of the National Labor Relations Act (NLRA) election process has been to negotiate "recognition agreements" with employers in which the employer promises to remain neutral during the organizing drive, or to recognize the union if a majority of workers indicate their support. For these agreements to have practical meaning, they must also contain assurances that the company will agree to substantive contract terms. However, the National Labor Relations Board (NLRB) has held it to be illegal for the employer to discuss substantive contract terms with a union before the union represents a majority of the workers. In addition, where recognition agreements contain arbitration clauses, the NLRB has refused to defer to the decisions of arbitrators on representational questions. This article argues for reversal of both these NLRB rulings. First, Mr. Strom argues that the NLRA neither compels nor suggests the conclusion that it is illegal for the employer to discuss substantive contract terms before the union represents a majority of workers. Second, he advocates the use of these agreements as a way to promote labor peace and notes that for this goal to be achieved, their enforceability must be certain. Thus, he believes that the NLRB should defer to arbitrators' decisions regarding representational issues as it defers to other arbitration decisions.

Union officials and academic observers have noted in recent years that the NLRA[1] allows employers to take advantage of both procedural delays

* Associate, Davis, Cowell & Bowe, San Francisco, CA; J.D. 1993, Harvard Law School.
The author would like to thank Richard McCracken, Larry Engelstein, and David Charny for their comments and suggestions, and Joyce Mascola for her invaluable secretarial assistance.

1. 29 U.S.C.A. §§ 151-169 (West 1973 & Supp. 1993)

and the lack of remedies in order to defeat union organizing drives.[2] Uncooperative employers can postpone an election for years by litigating the scope of the appropriate bargaining unit.[3] Then, during the campaign itself, employers are able to use arguably coercive techniques such as holding mandatory group and one-on-one anti-union meetings, and disseminating false or misleading information about the union.[4] Another key weakness in the current law is that there is no meaningful remedy for an employer's failure to bargain in good faith.[5] As a result, in more than forty percent of the cases where workers vote for a union, they never obtain a first contract.[6]

In some cases, unions have responded to the ineffectiveness of the NLRB by negotiating for an employer promise to remain neutral during the organizing drive and/or to recognize the union once a majority of workers have indicated their support rather than holding an election. However, recognition by itself has little practical meaning absent some assurance that the company will agree to substantive contract terms. Where an employer operates at more than one facility, a union that already represents workers at one location can conduct negotiations for contract terms that will apply at additional locations before it obtains a majority at those locations.[7] But if the union does not represent any employees at a company, then the NLRB's holding in *Majestic Weaving Co.*[8] makes it illegal for the employer to discuss substantive contract terms with the union. The union must represent a majority of the workers at some facility. I will argue that the

2. For criticism of the NLRA by union officials, *see* John J. Sweeney, *Is There a Need to Amend the NLRA?*, 52 FORDHAM L. REV. 1142 (1984) (President of the Service Employees International Union arguing that the NLRA might as well be repealed); Cathy Trost & Leonard M. Avcar, *AFL-CIO Chief Calls Labor Laws a Dead Letter*, WALL ST. J., August 16, 1984, at 8 (advocating repeal of the NLRA). The most prominent academic critic of NLRB procedures is Paul Weiler. *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984). Weiler expands his arguments in PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR & EMPLOYMENT LAW (1990) [hereinafter "WEILER"].

3. The median length of time from the filing of a petition until a Board decision was issued was 314 days in fiscal year 1990. 55 NLRB Annual Report 196 (1990) (Table 23). If the Board rules that a larger unit is appropriate, then the union must start from scratch among a new group of workers. For example, at Harvard University, the clerical and technical workers in the Medical Area, a separate campus three miles from the main campus, originally tried to organize on their own. The President & Fellows of Harvard College, 269 N.L.R.B. 821, 822 (1984). After the NLRB ruled in 1984 that the clerical and technical workers at the Harvard Medical area belonged in a unit with the entire university, the union had to reach out to approximately 2,400 additional workers. *See* The President & Fellows of Harvard College, 229 N.L.R.B. 586, 598 (1977). It took four more years for the union to generate enough support to win a university-wide election.

4. *See* Midland Nat'l Life Ins., 263 N.L.R.B. 127, 128-29 (1982) (employer disseminated arguably misleading information about union's finances and strike tactics).

5. *See infra* notes 40-48 and accompanying text.

6. *See* WEILER, *supra* note 2, at 354-55 n.5.

7. Houston Div. of Kroger Co., 219 N.L.R.B. 388, 388-89 (1975).

8. 147 N.L.R.B. 859, 860 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966).

Majestic Weaving rule is wrong, both because it is inconsistent with other Board holdings, and because nothing in the NLRA compels or even suggests such a rule.

Beyond the *Majestic Weaving* rule, decisions by the Board and the courts cast doubt upon the enforceability of all recognition agreements. Federal courts are reluctant to decide questions concerning representational issues, because they view such matters as within the primary jurisdiction of the NLRB.[9] Although courts have been willing to compel arbitration where the parties previously have agreed to arbitrate disputes arising out of recognition agreements,[10] the NLRB has a policy of refusing to defer to arbitration awards regarding representational questions.[11] The NLRB's non-deferral policy threatens to render agreements to arbitrate meaningless because the losing party can relitigate the issue before the Board. I will argue that recognition agreements help further the purposes of the NLRA by promoting labor peace and facilitating collective bargaining. But, in order for these agreements to promote labor peace, there must be certainty about their enforceability. To accomplish this, the NLRB should adopt a policy of deferring to arbitration awards regarding representational issues, just as it defers to all other arbitration awards.[12]

Section I begins with a brief discussion of the failures of NLRB representation law and procedures that have led unions to shun NLRB-supervised elections. Section II discusses the need for reform of the *Majestic Weaving* holding that negotiating with a minority union is a *per se* violation of section 8(a)(2) of the NLRA,[13] even if the contract is not executed until the union achieves majority status.[14] I will demonstrate that this rule is inconsistent with the Board's treatment of "additional store"[15] clauses, and that it is at odds with both the meaning and the purposes of the NLRA. In place of the blanket prohibition, I will argue for a case-by-case approach under which the Board would find such negotiations illegal only where there is actual evidence of employer domination. Section III addresses the enforcement of recognition agreements. I begin with a

9. *See, e.g.*, Amalgamated Clothing & Textile Workers Union v. Facetglas, 845 F.2d 1250 (4th Cir. 1988).

10. Hotel & Restaurant Employees Union, Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 566 (2d Cir. 1993); International Union, UAW v. Telex Computer Prods., 816 F.2d 519, 525-26 (10th Cir. 1987).

11. Combustion Eng'g Inc., 195 N.L.R.B. 909 (1972).

12. Olin Corp., 268 N.L.R.B. 573, 573-74 (1984).

13. 29 U.S.C.A. § 158(a)(2).

14. *Majestic Weaving*, 147 N.L.R.B. at 860.

15. This term originated in the supermarket industry where such agreements are common. It refers to contract clauses that provide that the contract will be extended to additional facilities once the union obtains a majority at those sites. These clauses are also sometimes referred to as "after-acquired" clauses. However, that term is misleading because it suggests that the contract can be extended only to newly acquired facilities, and not to existing non-union facilities. My use of the term "additional store" is meant to be generic, referring to all types of workplaces.

discussion of federal court jurisdiction under section 301 of the Labor Management Relations Act (LMRA).[16] A review of the relevant cases indicates that courts hesitate to decide representational issues, but they generally will enforce agreements to compel arbitration of disputes involving representational questions.[17] This suggests that in order to craft an enforceable agreement, the parties are well advised to include a provision to arbitrate all disputes. Unfortunately, the NLRB's refusal to defer to arbitration awards involving representational issues allows employers to utilize the cumbersome NLRB procedures in attempting to overturn unfavorable arbitration awards, or to delay inevitable union victories. I will argue that the Board's rationale for its non-deferral policy is without merit. Arbitrators are capable of deciding these questions, and the parties ought to be able to bind themselves to an agreement to settle their disputes through arbitration. I conclude by arguing that the *Majestic Weaving* rule and the NLRB's refusal to defer to arbitration awards regarding representational issues both serve to undermine, rather than promote, collective bargaining in violation of the NLRA's stated purpose. The paper ends by calling for the Board to modify both rules.

I
THE FAILURES OF THE NLRB

The NLRB has failed to protect the right of workers to "form, join or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."[18] Anti-union employers undermine the rights of their employees through procedural delays, intimidating campaign tactics and even the firing of union supporters. Even where such tactics are illegal (such as firing pro-union workers), the Board's remedial measures offer insufficient deterrence.

In *Linden Lumber Division, Summer & Co. v. NLRB*,[19] the Supreme Court upheld an NLRB ruling that found lawful an employer's refusal to recognize a union that presented signed authorization cards from a majority of workers.[20] As a result of this decision, the standard procedure for unions wishing to obtain recognition from a hostile employer is to file for an election supervised by the NLRB. If the union and the employer can agree on the appropriate bargaining unit, then the NLRB Regional Director generally will direct an election in approximately forty-five days.[21] But there are

16. 29 U.S.C.A. § 185 (West 1978 & Supp. 1993).

17. *See infra* parts III.A.-B.

18. 29 U.S.C.A. § 157.

19. 419 U.S. 301 (1974).

20. *Id.* at 310. Even after *Linden Lumber*, an employer is still free to recognize the union in the absence of an NLRB supervised election.

21. *See Linden Lumber*, 419 U.S. at 306 (noting that the median time between the filing of an election petition and the decision of the Regional Director is 45 days).

many ways to challenge a unit as inappropriate, and thus it is possible to delay the proceedings for years.[22] During the period leading up to the election, the employer is allowed to campaign against the union. Although workers generally are not permitted to solicit one another during work time,[23] employers often require workers to attend "captive audience" meetings during the workday which are entirely devoted to anti-union propaganda, including speeches and films.[24] There is nothing to prevent an employer from fabricating information about the union, because the Board has held that it "will no longer probe into the truth or falsity of the parties' campaign statements, and that [it] will not set elections aside on the basis of misleading campaign statements."[25] Another form of pressure is the one-on-one meeting, where a supervisor confronts a worker directly, telling her why she should vote against the union.[26] It is illegal for employers to make threats about what will happen if workers vote to unionize, but employers are allowed to make predictions, and "the line between predicting adverse consequences and threatening to bring them about is a fine one."[27]

The NLRB has stated that "[i]n election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."[28] Although there is some academic debate about just how effective anti-union campaigns are,[29] a comparison of union suc-

22. *See supra* note 3. Since unions recognize that delay can be fatal to a campaign, they are often forced to compromise and settle for a unit of the employer's choosing, rather than risk the delays that result from going to a hearing. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 534 n.171 (1993).

23. In Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), the Supreme Court cited with approval the Board's holding in Matter of Peyton Packing Co., 49 N.L.R.B. 828 (1943), that a rule prohibiting union solicitation during work time is presumptively valid absent evidence that the rule was adopted for a discriminatory purpose. *Id.* at 803 n.10.

24. The Board has forbidden captive audience meetings only during the 24 hours before an election. Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953). In an article that challenges many of the assumptions underlying current law in this area, Craig Becker has argued not only that it ought to be illegal for an employer to require workers to attend captive audience meetings, but that employers ought to be bound by their own restrictions on workplace solicitation. Becker, *supra* note 22, at 592, 593.

25. *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982).

26. The Board has even held that the *Peerless Plywood* 24 hour rule (*see supra* note 24) does not apply to such statements. Electro-Wire Prods., Inc., 242 N.L.R.B. 960 (1979).

27. NLRB v. Village IX, Inc., 723 F.2d 1360, 1368 (7th Cir. 1983). Ironically, the decision in this case made the line even finer; one might even say that Judge Posner's opinion made it invisible. In a speech to its employees, the owner of Shenanigans restaurant said, "If the union exists at Shenanigans, Shenanigans will fail. That is it in a nutshell. . . . I am not making a threat. I am making a statement of fact." *Id.* at 1364. The court ruled that this speech did not cross the line from prediction to threat, because the owner provided objective support for his prediction by pointing out that the only unionized restaurant in town was struggling. *Id.* at 1368.

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

29. *See, e.g.*, JULIUS C. GETMAN, STEPHEN B. GOLDBERG, & JEANNE HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976) (arguing that employer campaigns do not make much difference); Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953 (1991) (disputing Weiler's conclusions

cess in organizing public sector workers versus private sector workers suggests that employer opposition is the key variable in determining the outcome of organizing drives. In the public sector, management is much less likely to wage an anti-union campaign. Where management does campaign against the union, the campaigns tend to rely on disseminating information, rather than on more intimidating tactics.[30] Over the past thirty years, while union representation has continued to decline in the private sector, it has increased in the public sector.[31]

A simple look at the tools available to each side in a union election campaign suggests that management has an advantage. While union organizers are denied access to company property,[32] management can convey its message daily to the captive workforce.[33] Moreover, any message conveyed by someone who has the authority to hire, fire, promote or discipline has an undercurrent that is inherently coercive.[34] Although workers may talk to each other about the union if they are allowed to talk about other topics,[35] they may solicit each other only during break time in non-work spaces.[36] The NLRB has justified giving management a monopoly on work time by giving unions the exclusive privilege to contact workers in person at their homes.[37] But contacting workers individually at their homes re-

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that employer violations of the NLRA are a major explanation for union decline). Weiler responded to the latter article in Paul Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015 (1991). Richard Freeman and James Medoff have argued that management opposition explains one quarter to one-half of the decline of union electoral success. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 237 (1984).

30. *See* RICHARD C. KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR 116 (2d ed. 1992) (observing that use of illegal tactics such as threats and reprisals to suppress unions is less common in the public sector); David M. Silberman, *New Approaches to Organizing and Representing Workers*, *in* PROCEEDINGS OF THE NEW YORK UNIVERSITY 45TH ANNUAL NATIONAL CONFERENCE ON LABOR 212 (1993) ("Opposition to unionization in the public sector is muted as compared to what happens in the private sector.").

31. There are, of course, other possible explanations for this. But even Leo Troy, who is firmly in the camp of those arguing that employer opposition does not explain union decline, has acknowledged that union organizing in the public sector requires "neither the blood, sweat, nor tears associated with organizing private-sector unions because public employers in general offer little resistance." Leo Troy, *Will a More Interventionist NLRA Revive Organized Labor?*, 13 HARV. J.L. & PUB. POL'Y 583, 629 (1990).

32. Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992).

33. *See* Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953) (citing the Livingston Shirt case, Chalet, Inc., 107 N.L.R.B. 109 (1953), for the proposition that an employer may make a non-coercive speech to his employees, while denying the union an opportunity to reply on company premises).

34. Others have made this same point in the context of workplace sexual harassment. *See* Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 7 (1990) (arguing that "[w]hen made by a person in a position of authority, . . . the [sexual] invitation should be viewed as a demand.").

35. An employer is prohibited from treating pro-union activity differently from other comparable activity that does not implicate section 7 rights. *See* South Nassau Hosp., 274 N.L.R.B. 1181 (1985) (finding a section 8(a)(3) violation where a no-solicitation rule was disparately applied).

36. An employer is not required to prohibit solicitation during work time, but such a prohibition will be upheld under Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945).

37. While the NLRB has upheld the right of unions to conduct home visits, the Board has found that it is coercive for the employer to do so. *See* Phelps Dodge Corp., 177 N.L.R.B. 531, 532 n.3 (1969)

quires tremendous resources, and many people resent home visits, viewing them as an invasion of their privacy.

Perhaps even more important than what the law allows employers to do is the category of illegal conduct where the available remedies are inadequate. For example, it is an unfair labor practice for an employer to fire a worker for supporting the union. However, the only remedy is reinstatement with backpay, less the amount that the worker earned (or could have earned) in the interim.[38] Many employers apparently have determined that this is a small price to pay to eliminate key union supporters.[39] There is also no meaningful remedy if the employer continues to fight the union after its workers vote for unionization. For example, the Supreme Court has held in *H.K. Porter Co. v. NLRB*[40] that if the employer refuses to bargain in good faith, the NLRB is powerless to "compel a company . . . to agree to any substantive contractual provision of a collective bargaining agreement."[41]

H.K. Porter left open the possibility that the Board could offer employees a make-whole remedy apart from ordering an employer to agree to a particular contract provision.[42] Thus, in *Ex-Cell-O Corp.*,[43] in order to compensate workers for the employer's delaying tactics, the Administrative Law Judge (ALJ) ordered the company to pay each worker the amount "which it is reasonable to conclude that the Union would have been able to obtain" if the company had not refused to bargain.[44] In a 3-2 decision, the Board reversed. Although the dissenters pointed out that "the remedy contemplated in no way 'writes a contract' between the employer and the union, for it would not specify new or continuing terms of employment and would not prohibit changes in existing terms and conditions,"[45] the majority held that it was up to Congress to create a remedy.[46] As a result of the *Ex-*

(referring to Board findings that such conduct "tends to restrain and coerce employees in their union activities").

38. *See, e.g.*, Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1, 51 (1935) (ordering the award of backpay, less the amount earned by each employee after the discharge); American Bottling Co., 116 N.L.R.B. 1303, 1307 (1956) (holding that "a condition precedent to any award of back pay is due diligence on the part of the discharged employee to find other work").

39. Weiler has observed that in 1985, for every 10 votes that were cast in union elections, there was one illegal discharge meriting later reinstatement by the Board. Although not every one of these firings took place during an organizing drive, Weiler argues that the comparison is still meaningful because on the other side of the equation, not every employee who is fired for union activity brings charges successfully. WEILER, *supra* note 2, at 112.

40. 397 U.S. 99 (1970).

41. *Id.* at 102.

42. *Id.* at 108 (acknowledging that the Board's remedial powers under § 10 of the Act are "broad").

43. 185 N.L.R.B. 107 (1970).

44. *Id.* at 126.

45. *Id.* at 116.

46. *Id.* at 110. Even if *Ex-Cell-O* went the other way, it would have had only limited impact. In *Ex-Cell-O*, the union already represented workers at five of the company's six plants. *Id.* at 126. Thus,

Cell-O decision, the only remedy available to workers is a Board order directing the employer to bargain in good faith.[47] This only has the effect of ordering the employer back to the bargaining table, where it still cannot be compelled to reach an agreement.[48]

The other key weakness in Board proceedings, from the point of view of workers desiring union representation, is the potential for long delays while issues are resolved. Unfair labor practice charges are first investigated at the regional level.[49] If the regional office finds merit in a charge, it issues a formal complaint,[50] which is followed by a full trial-type hearing before an ALJ.[51] Then, if any party files an exception to the ALJ's ruling, the ALJ's decision is reviewed by the Board, which issues a formal decision and order.[52] Otherwise, the Board merely adopts the ALJ's order. But Board orders are not self-enforcing, so the case must then go to one of the circuit courts.[53] This entire procedure takes an average of almost three years.[54]

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it was relatively easy to determine the wages and benefits that the workers at the sixth plant might have received had the company been willing to negotiate. In a more typical case, there is no clear benchmark to look to. Thus, in Tiidee Prods., 194 N.L.R.B. 1234 (1972), the Board concluded, "we know of no way by which the Board could ascertain with even approximate accuracy . . . what the parties would have agreed to if they had bargained in good faith." *Id.* at 1235.

47. *See, e.g.*, 29 U.S.C.A. § 160(c) (exemplifying Board authority to issue orders; here to cease and desist from unfair labor practices).

48. For an egregious example of the failure of a bargaining order as a remedy, *see* Sparks Nugget, Inc. v. NLRB, 968 F.2d 991 (9th Cir. 1992). In 1977, the NLRB found that the employer had been guilty of bargaining in bad faith beginning in 1974. John Ascuaga's Nugget, 230 N.L.R.B. 275 (1977). After the Court of Appeals enforced the Board order in NLRB v. Silver Spur Casino, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981), the employer continued its pattern of bad-faith bargaining. In 1984, an ALJ once again found that the employer was bargaining in bad faith. In 1990, the Board upheld the ALJ's decision, ordering the employer back to the bargaining table. John Ascuaga's Nugget, 298 N.L.R.B. 524 (1990). Once again, the employer appealed to the Ninth Circuit, and on July 8, 1992, 17-1/2 years after the employer began flouting the law, the court merely enforced the Board order requiring the company to return to the bargaining table. Sparks Nugget, Inc. v. NLRB, 968 F.2d 991, 998 (9th Cir. 1992).

49. 29 C.F.R. § 101.2 (1993).

50. 29 C.F.R. § 101.8 (1993).

51. 29 C.F.R. § 101.10 (1993).

52. 29 C.F.R. § 101.12 (1993).

53. 29 C.F.R. § 101.14 (1993).

54. WEILER, *supra* note 2, at 235. In 1990, the median time-lapse from the filing of an unfair labor practice claim until the Board issued a decision was 688 days. 55 NLRB Annual Report 196 (1990) (Table 23). In two separate opinions, NLRB v. Village IX, 723 F.2d 1360 (7th Cir. 1983), and NLRB v. Thill, Inc., 980 F.2d 1137 (7th Cir. 1992), Judge Posner has cited these long delays as one reason for refusing to issue a bargaining order. In *Village IX*, he ruled that "[i]t would be reckless to assume that a union that got a 60 percent card majority in 1980 . . . will be the choice of Shenanigan's employees . . . in 1984." *Id.* at 1372. In the *Thill* case, the NLRB inexplicably had kept the case under consideration for seven years before issuing its decision. In the meantime, of the 70 to 80 workers in the bargaining unit, all but 10 had left. *Id.* at 1142. Although not every court has followed Judge Posner's lead, these cases indicate an additional way in which justice delayed can become justice denied for workers desiring union representation.

One union response to the perceived failures of NLRB procedures has been the corporate campaign, which seeks to put "pressure on management in ways that are *external* to the workplace."[55] Corporate campaigns take many forms: they may focus on a company's links to other businesses, on regulatory agencies or on community groups. The goal of a corporate campaign is generally to convince the employer to drop its opposition to unionization. An example of such a tactic was the Hotel Employees and Restaurant Employees' appeal to the San Francisco Redevelopment Agency not to use the Marriott Corporation, which it perceived as anti-union, to develop a hotel on publicly owned property.[56] This led to a recognition agreement under which Marriott agreed not to express an opinion to its workers on whether they should unionize. Instead of demanding an election, Marriott also agreed to conduct what is known as a card-check, whereby union authorization cards are compared to an employee list in order to determine whether the union has a majority. In return, the union agreed to drop its opposition to Marriott, and Marriott was awarded the project.[57]

II
MAJESTIC WEAVING: THE NEED FOR REFORM

Because recognition by itself is virtually meaningless, some unions have attempted to combine the recognition and negotiation processes. Under current law, if an employer operates at more than one location, and the union already represents workers at one facility, then the union can negotiate for an "additional store" clause which provides that the union's contract will be extended to the new location as soon as a majority of workers there indicate their support for the union.[58] But if the union does not yet represent any company employees, then *Majestic Weaving* prevents the parties from engaging in preliminary negotiations prior to recognition.[59] The Board's disparate treatment of these two situations is untenable. The proper solution would be for the Board to reexamine *Majestic Weaving*, replacing its *per se* prohibition against negotiations with minority unions with an approach that instead examines whether, in fact, the company gives unlawful assistance to the union.

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55. Lawrence Mishel, *Strengths and Limits of Non-Workplace Strategies*, 7 LAB. RES. REV. 69, 70 (1985).

56. Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp., 961 F.2d 1464, 1465 (9th Cir. 1992).

57. *Id.* at 1465-66. For additional discussion of this case, *see infra* part III.A.

58. *See, e.g.*, Houston Div. of Kroger, 219 N.L.R.B. 388 (1975) (agreement to extend union representation to new sites does not violate NLRA where majority of workers at new site indicates support for union).

59. Majestic Weaving Co. of N.Y., 147 N.L.R.B. 859, 860 n.3 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966).

Majestic Weaving overturned a longstanding rule adopted in *Julius Resnick, Inc.*,[60] that it was legal for an employer to bargain with a union before it obtained a majority, so long as the parties did not execute their agreement until after the union had reached majority status.[61] *Majestic Weaving* is a classic example of the adage "bad facts make bad law." The Textile Workers union signed up thirty-four of the forty-five workers, and requested recognition. The company responded that it already had signed a contract with Teamsters Local 815.[62] The Board found that Local 815 had received unlawful assistance from a foreman and the personnel supervisor, and that the company had negotiated with Local 815 before it obtained support from a majority of the employees.[63] Even though at the time the company negotiated with Local 815 the Textile Workers had not yet arrived on the scene, the Board found that by negotiating with a minority union, the company had given that union unlawful support.

The Board initially claimed that its holding was compelled by *International Ladies Garment Workers v. NLRB (Bernhard-Altman Tex. Corp.)*,[64] in which the Supreme Court held that it was an unfair labor practice for an employer to grant exclusive bargaining status to a union that did not represent a majority. On review before the Second Circuit, the Board acknowledged that its position was not required by *Bernhard-Altman*. Nevertheless, the Board maintained that "'the premature grant of *exclusive* bargaining status to a union,' even if conditioned on attainment of a majority before execution of a contract, is similar to formal recognition 'with respect to the deleterious effect upon employee rights.'"[65]

In making its argument to the Second Circuit, the Board created a straw man by referring to a grant of "exclusive" bargaining status. It would have been illegal for the company to declare that it would not bargain with another union that was the chosen representative of its employees. But this is not what happened in the case. In discussing contract terms with Local 815, the company made no promise that it would not conduct similar negotiations with other unions. The ALJ who heard *Majestic Weaving* at the trial stage found no unfair labor practice, concluding, "[I] am unable to see how the Respondent's mere willingness to discuss tentative contract proposals with Local 815 under these particular circumstances, destroyed any exercise of employees' rights to choose their own bargaining agent, nor am I able to see how the Company thereby unlawfully assisted."[66]

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60. 86 N.L.R.B. 38 (1949).

61. *Majestic Weaving*, 147 N.L.R.B. at 860 n.3.

62. *Id.* at 869.

63. *Id.* at 859, 860.

64. 366 U.S. 731 (1961).

65. *Majestic Weaving*, 355 F.2d at 859 (quoting 29 NLRB Ann. Rep. 69 (1964)) (emphasis added).

66. *Majestic Weaving*, 147 N.L.R.B. at 873.

The holding in *Majestic Weaving*, that it is a violation of section 8(a)(2) of the NLRA[67] for an employer to bargain with a union before it attains majority status, has no support in the provision's legislative history. The relevant portion of section 8(a)(2) provides that "[i]t shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."[68] An examination of the legislative history demonstrates that section 8(a)(2) was intended to address the "so-called company union problem."[69] As Senator Robert F. Wagner, the author of the Act explained, "[t]he only prohibition is against the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules or regulations without his consent, and which cannot live except by the grace of the employer's whims."[70] The fact that the employer agrees to bargain with a union in no way suggests that the employer dominates it.

The Board has applied the *Majestic Weaving* rule in cases where one union attempts to organize the workers, and the employer then negotiates a "sweetheart" contract with a second union. For example, in *American Standard Cargo Container Co.*,[71] a representative of the Millmen's union wrote to the employer seeking recognition.[72] The employer refused to recognize the Millmen. Then the company vice president called a meeting where he introduced the workers to the president of a Sheet Metal Workers local. The same day workers were called into a supervisor's office and, in the presence of the supervisor, they were asked to sign Sheet Metal Workers authorization cards. The Board found that the Sheet Metal Workers and the company had entered into contract negotiations before the union had contacted any workers. The Board further found that the contract "secured no substantive benefits for the employees," and that the contract actually provided for a *decrease* in wage rates.[73]

Similarly, in *Sturgeon Electric Co.*,[74] the Machinists Union represented a majority of workers and requested recognition.[75] Two days later the company vice president met with a business agent from the International Brotherhood of Electrical Workers (IBEW) and negotiated contract terms.

67. 29 U.S.C.A. § 158(a)(2). If the Board finds that the company has violated section 8(a)(2) by giving illegal assistance to a union, then it almost certainly will find that the union has violated section 8(b)(1)(A) by restraining or coercing employees in the exercise of their rights under the Act. 29 U.S.C.A. § 158(b)(1)(A).

68. 29 U.S.C.A. § 158(a)(2).

69. S. REP. No. 573, 74th Cong., 1st Sess. (1935).

70. 79 CONG. REC. 2372 (1935), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, at 1313 (1949).

71. 151 N.L.R.B. 1399 (1965).

72. *Id.* at 1404.

73. *Id.* at 1409.

74. 166 N.L.R.B. 210 (1967), *enforced*, 419 F.2d 51 (10th Cir. 1969).

75. *Id.* at 213-14.

Later that day a supervisor walked around with IBEW authorization cards for workers to sign.[76]

In cases like *American Standard* and *Sturgeon Electric* where two rival unions are trying to organize workers at the same workplace, there is a danger that a company may give one union an unfair advantage by choosing to negotiate with it. In *American Standard*, the Board observed, "[a]t a time when the rival organizations [are] still in a formative state, . . . the employees are sensitive to weight thrown by their employer in favor of one organization as against another, even though the suggestion of preference be subtle or slight."[77] The problem with *Majestic Weaving* is that it goes far beyond this, establishing a blanket rule that applies even where only one union is on the scene, and even when the two sides engage in legitimate bargaining.

In a situation where there is no rival union, the rationale for the rule diminishes.[78] The Board ought to recognize that bargaining with a union before it attains majority status is analogous to the accepted practice of unions negotiating for additional store clauses, which provide that if an employer acquires an additional facility the contract will extend to the workers in that facility. In *Houston Division of Kroger Co.*,[79] the Board upheld these clauses, provided that before the contract went into effect at the new facility, a majority of workers there signed cards indicating their support for the union. Where a facility is covered by an additional store clause, the workers at the new facility know that the employer is willing to reach an agreement with the union before they indicate their support for the union. This is, presumably, what *Majestic Weaving* was designed to avoid.

In *Eltra Corp.*,[80] an ALJ, in an opinion adopted by the Board, attempted to reconcile the disparate treatment of these two situations, but was unable to do so. In that case, the union and the employer negotiated a national agreement covering a number of the employer's plants in separate bargaining units.[81] The national agreement addressed all of the "cost" items such as wages, bonuses, vacation and holiday pay and insurance; it was supplemented by local agreements addressing seniority, layoff, recall, job classifications and shop rules.[82] During an organizing drive at the company's Visalia, California plant, the union told workers that if they voted

76. *Id.* at 215.

77. American Standard Cargo Container Co., 151 N.L.R.B. 1399, 1405 (1965) (quoting Elastic Stop Nut Corp. v. NLRB, 142 F.2d 371, 375 (8th Cir. 1944)). In Wickes Corp., 197 N.L.R.B. 860, 862 (1972), without citing *Majestic Weaving*, the Board held that when there are competing unions it is a section 8(a)(2) violation for the employer to reach an agreement with one union before its employees designate either union as their bargaining agent.

78. There is perhaps still some danger that the agreement will interfere with *potential* rival unions.

79. 219 N.L.R.B. 388 (1975).

80. 205 N.L.R.B. 1035 (1973).

81. *Id.* at 1035.

82. *Id.* at 1036.

for the union they would be covered by the national agreement.[83] Then, after the workers voted for the union the union demanded that the national agreement be extended to the Visalia plant. When the union brought an unfair labor practice charge against the employer, the employer defended by citing *Majestic Weaving*, arguing that it would be a section 8(a)(2) violation for the union and the employer to agree to contract terms before the workers selected the union as their bargaining agent.[84] The only way that the ALJ could distinguish the two cases was by misinterpreting the holding of *Majestic Weaving*. He wrote, "[i]n my view, the *Majestic Weaving* case is clearly distinguishable from the instant situation. There the employer granted recognition to a minority union. Here, the Respondent recognized the International Union as the representative of the Visalia employees only after the Union had demonstrated its majority status in a Board-conducted election."[85] In fact, in both cases an employer bargained with a union before the workers chose the union as their authorized bargaining representative. The Board went on to hold that it would not violate section 8(a)(2) for

> an employer to agree that a collective-bargaining agreement covering employees of the employer who are already represented by a union shall be applied to a different unit, to other employees not represented by this union, provided those employees designate the union as their bargaining representative in a secret ballot election conducted by the Board.[86]

In a more recent high profile case, General Motors and the United Auto Workers entered into negotiations regarding contract terms, before GM ever opened its Saturn factory.[87] The preliminary agreement set forth a wage scale, holiday schedule, vacation accrual system, hours, a job security provision and a union security clause.[88] In an Advice Memorandum,[89] the NLRB General Counsel upheld the legality of the agreement, noting that in line with the *Kroger* decision, the agreement would not apply unless the UAW obtained "the free support of a majority" of Saturn workers.[90]

There is no justification for treating negotiations with a minority union differently from "additional store" clauses. From the point of view of the workers at the non-union location (the workers that the *Majestic Weaving* rule is designed to protect), the situation is identical. In both cases, at the time the workers must decide whether to lend their support to the union,

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83. *Id.* at 1039.

84. *Id.*

85. *Id.*

86. *Id.* at 1040.

87. David K. Schaffner, Comment, *The Saturn Pact: An Extension of Old Principles or a Creation of New?*, 18 U. TOL. L. REV. 805, 805-06 (1987).

88. *Id.* at 808.

89. Advice Memorandum of the NLRB General Counsel, General Motors Corp., Saturn Corp., and UAW, 122 L.R.R.M. 1187 (1986).

90. *Id.* at 1190-91.

they know that the company is willing to negotiate with that union, and they know the terms and conditions of the contract that will cover them if they authorize the union to represent them. If the workers who are the subject of an "additional stores" clause are allowed to make this decision, there is no reason why giving this information to other workers will prevent them from freely exercising their rights either to support or to reject the union in question.[91]

Pointing out the Board's inconsistency still leaves open the question of which uniform standard the Board should apply. In other words, perhaps *Majestic Weaving* ought to be expanded, rather than overruled. To understand why this would be wrong, it is worthwhile to revisit the *Bernhard-Altmann* decision which inspired *Majestic Weaving*. In *Bernhard-Altmann*,[92] the employer actually recognized a minority union. The Supreme Court held that this interfered with the workers' exercise of their rights in two ways. First, it imposed the union upon a nonconsenting majority. Second, and more relevant for this discussion, it afforded the union "a deceptive cloak of authority with which to persuasively elicit additional employee support."[93] However, when the employer merely sits down with the union and discusses the terms that would govern in the event a majority of workers authorized the union to represent them, it gives no false cloak of authority. This simply tells workers that the employer is willing to reach an agreement with the union. Under current Board law there is nothing to prevent an employer from announcing to its workers that the company supports their right to unionize and that it is willing to negotiate a contract.[94]

Overturning *Majestic Weaving* would not bar the Board from considering pre-recognition negotiations as one factor in determining whether a section 8(a)(2) violation has occurred; it would merely eliminate the *per se* prohibition. The cases in which the Board has applied the rule indicate that where one section 8(a)(2) violation has occurred, there are usually multiple violations.[95] If, in fact, pre-recognition bargaining results in a sweetheart

91. There are several responses to the obvious objection that negotiations that occur prior to recognition are undemocratic. First, the mere fact that the negotiations take place before the union obtains a majority does not mean that workers will not take part in them. Moreover, there is a tradition in the labor movement of seeking to take wages out of competition, so that there will not be a "race to the bottom" with employers trying to push wages down to the lowest common denominator. Where a union has established a standard for workers in a given industry in a particular community, the question becomes whether the employer is willing to pay wages at the union scale. Finally, even if the workers do not directly take part in the negotiations, they still have an opportunity to express their opinion about the contract. If they are unhappy with the proposed contract terms, then they can withhold their support for the union.

92. International Ladies Garment Workers v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 732 (1961).

93. *Id.* at 736.

94. *See* Coamo Knitting Mills, 150 N.L.R.B. 579, 581, 595 (1964) (holding that it was not a section 8(a)(2) violation for a company vice president to tell workers during an organizing drive that the company "will negotiate a contract with the Union which we believe will be mutually beneficial").

95. *See, e.g., supra* notes 71-77 and accompanying text.

contract, or if there is evidence that the employer has coerced employees to support the union, then the Board certainly ought to step in. But, when the parties engage in legitimate arms-length bargaining, a finding of a section 8(a)(2) violation ignores the meaning and intent of the Act.

Apart from the fact that this type of conduct is not what the statute was enacted to prevent, there are positive policy reasons why pre-recognition bargaining should not be discouraged. One benefit is that if the company and the union can agree in advance on contract terms that would take effect if the employees give their support to the union, then a meaningful remedy is available in the event that the company commits unfair labor practices during the campaign. Under *H.K. Porter Co. v. NLRB*,[96] the Board lacks the power to impose a contract upon the parties. Therefore, even in the most egregious case of illegal anti-union conduct by the employer, the only remedy the Board can issue is a bargaining order. But, if the parties have already agreed to terms that would become effective once a majority of workers indicate their support for the union, then the Board can provide the employees with a meaningful make-whole remedy. A recent example of this is *Crown Cork & Seal Co.*,[97] where the Mine Workers had an "additional store" clause in their contract. When the employer refused to recognize the union even though it had a card majority, the Board ordered the company to pay each worker the amount he would have earned under the contract retroactive to the day the union obtained majority status.[98]

Providing such a remedy makes it possible for unions and employers to negotiate recognition agreements beneficial to both sides. The NLRA was designed to limit industrial strife,[99] and courts often have stated that fostering labor peace is the overriding concern of our labor laws.[100] With the *Majestic Weaving* rule in place, unions tend to be wary of settling a dispute merely for the promise of card check recognition or neutrality. Instead, they must keep the pressure on until a contract is in place. Thus, the rule acts to prolong disputes.

Bargaining prior to an election may also eliminate some employer abuses during the election campaign. One common tactic companies use during union drives is to argue to workers that bargaining may not lead to agreement, and that the union will be forced to go out on strike. Preliminary discussions can demonstrate to the employer that the union's demands

96. 397 U.S. 99 (1970).

97. 308 N.L.R.B. 445 (1992).

98. *Id.* at 445-46.

99. "Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest. . . . " 29 U.S.C.A. § 151.

100. *See, e.g.*, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674 (1981) ("A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace.").

are not unreasonable. The company might then be willing to remain neutral during the organizing drive, avoiding any danger of coercion.

Far from interfering with the rights of workers under the NLRA, allowing pre-recognition bargaining actually would serve the policies underlying the Act. Thus, it is time to relax the *Majestic Weaving* rule.[101]

III
ENFORCEMENT OF RECOGNITION AGREEMENTS

Although the use of written agreements governing the recognition procedure is widespread, there has been relatively little litigation involving these agreements, and as a result there is some question regarding the extent to which such agreements are enforceable. The current state of the law appears to be that federal courts will refuse to enforce such agreements if, in order to do so, they must pass on representational questions.[102] While courts have been unwilling to make initial determinations regarding representation issues, for the most part they have held that such disputes are arbitrable. The cases in which the courts have compelled arbitration of representation disputes are in line with an often enumerated policy of encouraging the arbitration of labor disputes. Section 203(d) of the LMRA provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[103] The landmark Supreme Court cases known as the

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101. It is ironic that at the same time that the Board has applied section 8(a)(2) to a situation that seems so far removed from the evil it was intended to address, there has been a movement to relax its application to workplace committees that actually are employer-dominated. In recent years many employers have established employee involvement plans, where workers and managers meet to discuss working conditions and employee grievances. Although it would seem that these types of arrangements are precisely what section 8(a)(2) was designed to prohibit, courts have upheld such plans. The two key cases in this area are Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975) and NLRB v. Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982). As Paul Weiler has described it:

> In both cases, the judges strove mightily to formulate verbal glosses on the sweeping language of the original Wagner Act, because they perceived the "adversarial model of labor relations" to be an anachronism and wanted to permit employers to develop increasingly "cooperative relations" as part of a more "enlightened personnel policy. . . . "

WEILER, *supra* note 2, at 213 n.34. In the fall of 1992 the Board dealt a small setback to employee involvement plans when it decided Electromation, Inc., 309 N.L.R.B. 990 (1992). The Board found that the company violated section 8(a)(2) when, in response to employee discontent, it created joint worker-management "action committees" to address workers' complaints. *Id.* at 998. Nevertheless, the Board was careful to assert that its decision turned on the particular facts in that case, suggesting that the outcome might have been different if the committees were genuinely designed to improve quality or efficiency, rather than "creat[ing] in employees the impression that their disagreements with management had been resolved bilaterally." *Id.* (emphasis omitted).

102. *See infra* part III.A.

103. 29 U.S.C.A. § 173(d). It may well be that the term "collective bargaining agreement" was meant only to refer to "agreements concerning wages, hours, and conditions of employment concluded in direct negotiations between employers and unions entitled to recognition as exclusive representatives of employees." Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17, 25 (1962) (accepting this

Steelworkers Trilogy[104] hold that in suits to compel arbitration, courts should resolve doubts in favor of arbitration;[105] they should not pass on the merits of the claim;[106] and in suits to enforce arbitration awards, courts should not examine the reasons for the arbitrator's decision.[107] In line with this federal policy of encouraging arbitration, the NLRB has adopted a policy of deferring to grievance arbitration when an unfair labor practice is also arguably a contract violation.[108] Despite this general policy, the Board has adopted a separate policy when the arbitration concerns representational issues. Here the Board refuses to give any weight to the arbitrator's opinion.[109] This policy allows parties on the losing end of arbitrations to relitigate the same question. It is a waste of Board resources and, contrary to the Board's assertions, not necessary to protect the rights of workers. Reexamination of this policy is long overdue.

A. Federal Court Jurisdiction

Section 301 of the LMRA gives federal district courts jurisdiction over "suits for violations of contracts between an employer and a labor organization representing employees. . . ."[110] In *Retail Clerks International Ass'n v. Lion Dry Goods, Inc.*,[111] the Supreme Court held that this section refers not only to traditional collective bargaining agreements, but to all contracts between unions and employers. That case involved a strike settlement agreement, and even though the union acknowledged that it was not entitled to recognition as the exclusive bargaining representative of the employees, the Court ruled that "it is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them."[112] The Court rejected the employer's argument that the phrase "labor organization representing employees" refers only to unions that are exclusive bargaining agents (i.e., unions that have majority support), instead finding that federal court jurisdiction under section 301 does not require determination of the representative status of the labor organization involved.[113]

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definition for the sake of argument). But even if the drafters of this section were not thinking about recognition agreements, the same policies that motivated section 203(d) support arbitration of disputes arising out of recognition agreements.

104. *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

105. *American Mfg. Co.*, 363 U.S. 564.

106. *Warrior & Gulf Navigation*, 363 U.S. 574.

107. *Enterprise Wheel & Car*, 363 U.S. 593.

108. *See infra* part III.C.

109. *See infra* part III.C.

110. 29 U.S.C.A. § 185(a).

111. 369 U.S. 17 (1962).

112. *Id.* at 28.

113. *Id.* at 29.

Although there is no limiting language in section 301 itself, courts often have refused to decide representational issues, holding instead that such matters should be resolved in the first instance by the NLRB. In doing so, courts rely on the concept of "primary jurisdiction," which applies to "claims properly cognizable in court that contain some issue within the special competence of the administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling."[114] The Supreme Court relied on this principle in *South Prairie Construction Co. v. International Union of Operating Engineers, Local 627.*[115] In that case, the union filed a complaint with the NLRB alleging that South Prairie and Peter Kiewit Sons Co. were a single employer, and thus South Prairie committed a section 8(a)(5) unfair labor practice when it refused to comply with the union's contract with Kiewit.[116] The Board found that the two companies were not a single employer. The Court of Appeals reversed the Board's ruling, and went on to find that the employees of the two companies together formed an appropriate bargaining unit.[117] The Supreme Court held that once the court overturned the Board's decision on the single employer question it should have remanded the case to the Board rather than making the initial determination on the unit question. The Court explained:

> In foreclosing the Board from the opportunity to determine the appropriate bargaining unit under § 9 [of the NLRA], the Court of Appeals did not give 'due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution.'[118]

Some circuit courts have interpreted *South Prairie* narrowly, as applying only when courts are sitting to review Board decisions.[119] But others have pointed to language in the opinion, such as "the selection of an appropriate bargaining unit lies largely within the discretion of the Board, . . . "[120] as a requirement that courts refrain from making such determinations. Thus, in *International Woodworkers of America, Local 3-193 v. Ketchikan Pulp,*[121] the Ninth Circuit held that "Congress did not intend by enacting Section 301 to vest in the courts initial authority to consider and pass upon questions of representation and determination of appropriate bargaining units."[122] In deciding whether or not to accept jurisdiction, courts have

114. *Reiter v. Cooper*, 113 S. Ct. 1213, 1220 (1993).

115. 425 U.S. 800 (1976).

116. *Id.* at 801.

117. *Id.* at 802.

118. *Id.* at 806 (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 141 (1940)).

119. *See, e.g.*, Trustees of The Colorado Statewide Iron Workers Fund v. A & P Steel, Inc., 812 F.2d 1518, 1526-27 (10th Cir. 1987).

120. *South Prairie*, 425 U.S. at 805.

121. 611 F.2d 1295 (9th Cir. 1980).

122. *Id.* at 1301.

suggested a difference between "cases which turn on our interpretation of the contract, and those which, stripped to essentials, are representation cases."[123]

Courts tend to refrain from exercising jurisdiction over representational questions where the NLRB already has assumed jurisdiction over a case, or "where the parties have colluded to avoid the NLRB in an attempt to undermine employee self-determination. . . . "[124] The latter cases have come up most frequently in the context of accretions. Typically, a union will represent employees at one facility. Then, the employer will acquire an additional nearby facility, and the union will argue that the contract should extend automatically to the workers at the additional facility. The Board has established an elaborate multi-part test for determining whether an accretion has occurred.[125] Citing a preference for employee self-determination, the Board also has adopted a policy of finding that no accretion has occurred unless the balance of factors clearly supports accretion.

In *Ketchikan Pulp*, at a time when the company operated only a single logging operation in Alaska, the union negotiated a contract that identified it as the collective bargaining agent for various categories of employees of the company "in its logging operations in Southeastern Alaska."[126] The employer later acquired additional logging operations in Southeastern Alaska, but refused to extend the contract. The union brought a breach of contract suit against the company in federal court. Instead of enforcing the contract, the court criticized the union for trying to "avoid self-determination of a bargaining agent by a substantial number of employees," and accused it of "attempting an end-run around Section 9 of the [NLRA]."[127] Although the court professed to lack jurisdiction to interpret the contract,[128] it nevertheless did just that. It held that the employer's agreement to recognize the union as the representative of all of its workers in Southeastern Alaska could be interpreted only as a waiver of its right to demand an election as a method of proving majority support.[129] More recently, the Ninth Circuit recognized that in *Ketchikan Pulp*, the court refused to enforce the agreement, "not because the agreement resolved representational issues, but because it resolved them in a manner contrary to existing federal labor pol-

123. United Ass'n of Journeyman & Apprentices, Local 342 v. Valley Eng'rs, 975 F.2d 611, 614 (9th Cir. 1992).

124. Copps Food Ctr., Inc. v. United Food & Commercial Workers Union, Local No. 73A, 733 F. Supp. 304, 308 (W.D. Wis.), *aff'd*, 940 F.2d 665 (7th Cir. 1991).

125. *See infra* text accompanying note 220.

126. International Woodworkers of America, Local 3-193 v. Ketchikan Pulp, 611 F.2d 1295, 1296 (9th Cir. 1980).

127. *Id.* at 1299-1300.

128. *Id.* at 1301.

129. *Id.*

icy."[130] In other words, although the *Ketchikan Pulp* court framed its discussion in terms of the primary jurisdiction of the NLRB, in effect its holding was that a union and an employer may not create an accretion by contract where the NLRB clearly would have found that an accretion did not occur.

One of the few cases to directly address federal court jurisdiction to resolve disputes arising out of recognition agreements is *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*[131] In that case, the company decided to close a plant where the union recently had won an election.[132] In bargaining over the effects of the plant closing, the union negotiated for a private election among employees at a different company-owned factory. The agreement provided that Facetglas would remain neutral in the election and that it would not discriminate against workers based on their support of the union. The agreement further provided for wages and benefits that would go into effect if the workers voted for the union.[133] The election was held, and there was a dispute over the outcome. The union claimed that it had won by a margin of fifteen to thirteen, while the employer claimed that the vote was seventeen to fifteen against the union. The dispute turned on the eligibility of four truck drivers.[134] After the election, the employer refused to implement the wage agreement and the union responded by filing a breach of contract suit in federal court. The union claimed, first that the company breached the neutrality and non-discrimination agreement, and second that it breached the contract by failing to implement the new wages and benefits.

The district court dismissed the suit, holding that "the pervasiveness of representation issues deprives this court of jurisdiction."[135] The Fourth Circuit held that the district court properly had dismissed the claims regarding the breach of the wage agreement, because in order to decide those claims the court would have had to decide whether the workers chose the union as their representative.[136] In explaining its ruling, the court asserted that

130. Hotel Employees, Restaurant Employees, Local 2 v. Marriott Corp., 961 F.2d 1464, 1468 (9th Cir. 1992).

131. 845 F.2d 1250 (4th Cir. 1988).

132. *Id.* at 1250.

133. Note that *Majestic Weaving* would have precluded such an agreement if not for the fact that the negotiations were over the effects of an announced plant closing at a facility where the union had obtained a majority.

134. *Facetglas*, 845 F.2d at 1251. The union's claim that the drivers' votes should not count was based on the fact that the drivers were not included on a list of employee names and addresses that the company provided the union before the election. Also, the drivers voted separately from the other employees on the morning of the election, outside the presence of either the union observer or the agreed-upon neutral third party. Instead, there was a different "neutral" party present when they voted. Memorandum in Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 3-4, Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc., (E.D.N.C. 1987) (No. 86-83-CIV-7) (on file with author).

135. *Facetglas*, 845 F.2d at 1251.

136. *Id.*

"[t]here is a strong policy in favor of using the procedures vested in the Board for representational determinations in order to promote industrial peace. . . ."[137] The union had argued that there were no representational questions before the court because "[t]he parties disposed of the representational questions when they drew up the Election Agreement."[138] The union asserted that in determining whether to count the truck drivers' votes, the court need not decide "whether the truck drivers *should* correctly be included in the bargaining unit under Board precedent. . . . " Instead, according to the union, the question was whether the parties intended to include the truck drivers in the bargaining unit.[139]

Although the court explained its ruling as an attempt to promote "industrial peace,"[140] it neglected to explain how its decision to prolong the dispute by failing to enforce an otherwise valid contract between the parties would accomplish that end. The court made no attempt to reconcile this holding with the long line of cases, beginning with *Textile Workers Union of America v. Lincoln Mills of Alabama*,[141] that have held that national policy supports the enforcement of labor-management contracts.[142] In *Lincoln Mills*, the Supreme Court quoted with approval from the Senate Report on Section 301: "Statutory recognition of the collective agreement as a valid, binding, and enforceable contract . . . will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."[143]

The district court in *Facetglas* should have done what the Ninth Circuit did when confronted with the same problem in *Hotel Employees, Restaurant Employees, Local 2 v. Marriott Corp.*.[144] In that case, the union and the employer had signed an agreement providing for card check recognition, with Marriott pledging to remain neutral on the question of unionization.[145] When Marriott reneged, the union went to court to enforce the agreement. The district court concluded that it could not enforce the agree-

137. *Id.* at 1252.

138. Brief of Appellant at 17 (on file with author).

139. *Id.* at 17, 18.

140. "There is a strong policy in favor of using the procedures vested in the Board for representational determinations in order to promote industrial peace . . . . " *Facetglas*, 845 F.2d at 1252.

141. 353 U.S. 448 (1957).

142. *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562 (1976) (finding "strong policy favoring judicial enforcement of collective bargaining contracts").

143. *Lincoln Mills*, 353 U.S. at 454. Although the court in *Facetglas* refused to decide whether the union had won the election, the Fourth Circuit did hold that the election agreement was an enforceable contract, and that the district court had the jurisdiction to decide whether the employer breached the agreements regarding neutrality and nondiscrimination. *Facetglas*, 845 F.2d at 1253. The appellate court reasoned that such a ruling was necessary because the NLRB "is not empowered to grant the full range of compensatory relief sought by the Union for breach of contract." *Id.* The lack of remedies available through the Board is another argument in favor of enforcement of these types of agreements.

144. 961 F.2d 1464 (9th Cir. 1992).

145. *Id.* at 1465, 1466.

ment because to do so it would have to resolve a representational issue.[146] The Ninth Circuit reversed, holding that "while the *courts* may not resolve representational issues, the *parties* may resolve these issues contractually."[147] Because the parties already had defined the unit as "the nonmanagement employees," the district court would not have to encroach on the NLRB's primary jurisdiction by determining the appropriate bargaining unit.[148]

Although *Marriott* appears to directly contradict the holding in *Facetglas*, there is some question about its reliability as precedent, because the dispute arose at an earlier stage in the proceedings than in *Facetglas*. Unlike *Facetglas*, the *Marriott* case did not involve a dispute about the union's majority status because the card check had not yet taken place. Thus, there is some doubt about what the court would have done if, after the card check took place, the two sides disputed whether the union had a majority, with the dispute turning on whether certain employees were "nonmanagement." The court certainly might have tried to resolve such a dispute by looking to the intent of the parties, but it is not clear whether the *Marriott* court would have taken that approach or would instead have required the parties to resort to the NLRB.

Marriott illustrates that it is possible to reconcile a respect for the NLRB's primary jurisdiction with the enforcement of a contract concerning representational issues. The Fifth Circuit also has expressed a willingness to decide representational issues, when such questions arise in the context of section 301 suits. In *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*,[149] the union sued various employers in the construction industry, charging them with antitrust violations and violations of the Employee Retirement Income Security Act (ERISA),[150] as well as with breach of contract under section 301.[151] The section 301 claim turned on whether a non-union entity should be bound by a contract with the union, where the union alleged that the non-union entity and a related unionized entity constituted a single employer.[152] In order to resolve the contract dispute, it was necessary to decide first, whether the two entities were in fact a single employer or alter-ego under applicable law, and if so, whether the entities appropriately constituted a single bargaining unit.[153] The defendants argued that the courts were prevented from making a determination of the relevant bargaining unit until the NLRB had done so.[154]

146. *Id.* at 1468.
147. *Id.*
148. *Id.*
149. 690 F.2d 489 (5th Cir. 1982).
150. 29 U.S.C.A. §§ 1001 *et seq.* (West 1985 & Supp. 1993).
151. *Pratt-Farnsworth*, 690 F.2d at 498.
152. *Id.*
153. *Id.* at 505.
154. *Id.* at 513.

The court conceded that "deference to the expertise of the Board in unit determinations should be encouraged whenever possible."[155] It also observed that if one of the parties initiated Board proceedings, "the wisest course for the district court might well be to stay the action pending the Board's resolution of the unit issue."[156] Nevertheless, the court held that it was appropriate for the district court to decide the representational issues. Finding that section 301 embodied a strong congressional commitment to judicial enforcement of labor contracts,[157] the court concluded that "where [a representational] issue is essential to the disposition of contractual rights in a section 301 action . . . a district court has the power to decide it, at least in the absence of a previous or pending determination by the Board."[158]

The case that raises the greatest doubt about court enforcement of recognition agreements is *Copps Food Center, Inc. v. United Food & Commercial Workers Union, Local No. 73A*.[159] The union had been trying to organize workers in several supermarkets which the company owned. During the course of the organizing campaigns, the union charged that the company had committed a number of unfair labor practices.[160] The two sides met privately to try to settle their disputes and agreed, among other things, that the union would petition only for "wall-to-wall" bargaining units, rather than trying to organize the workers in any given department separately. Following the agreement, the union petitioned for an election among employees in the meat department at one of the company's supermarkets.[161] At the Board hearing, the employer argued that the petition should be dismissed, pointing to the parties' agreement. The Regional Director rejected the employer's argument, finding that while the Board might accept the parties' unit stipulation, "the Employer ha[d] not cited any case holding that the Board must honor or enforce the parties' non-Board unit stipulation."[162] The company responded by bringing suit in federal court to enforce the agreement. After thoroughly reviewing the state of the law regarding federal court jurisdiction over representational issues, the court concluded that "courts do not apply bright-line rules to determine whether their § 301 jurisdiction over contract disputes should override the doctrine that the NLRB has primary jurisdiction over representational issues. Rather, they balance the interests at stake in the case before them."[163] The court proceeded to find that the balance weighed against taking jurisdiction. The rationale for this decision was that because "[t]he parties' purported

155. *Id.* at 515.
156. *Id.*
157. *Id.* at 517.
158. *Id.* at 521.
159. 733 F. Supp. 304 (W.D. Wis. 1990), *aff'd*, 940 F.2d 665 (7th Cir. 1991).
160. *Id.* at 305.
161. *Id.* at 306.
162. *Id.* at 307.
163. *Id.* at 308.

contract was not designed to avert or end a strike, . . . or to avoid divisive territorial battles between unions," it did not sufficiently "contribute to the maintenance of labor peace" such that it warranted interfering with the NLRB's authority.[164] The fact that it would not even have had to rule on the question of whether meat departments were appropriate bargaining units did not influence the court's finding.[165]

The reasoning of the court in *Copps Food Center* is perverse in two respects. First, the court's suggestion that, had it believed there was a significant threat to labor peace it might have enforced the agreement, creates an incentive for unions to cause greater disruptions in order to reach binding agreements. Obviously, this is directly contrary to federal policy.[166] Second, the court lost sight of the fact that NLRB procedures exist to foster collective bargaining, not as ends in themselves. Not only did the court fail to give effect to a voluntary agreement reached by the parties, but it accepted the Board's policy without asking whether the policy furthered the purposes of the Act.

It would be nice to end this discussion with the simple observation that *Facetglas* and *Copps Food Center* were wrongly decided while *Marriott* and *Pratt-Farnsworth* were decided correctly. This is true; but even if courts had followed the latter two holdings, it would not have resolved all doubts about the enforceability of the agreements at issue. The problem is that resolving a dispute concerning a recognition agreement generally will require the court to address representational issues. Although the *Pratt-Farnsworth* court held that a district court *could* properly address such issues, it suggested that the doctrine of primary jurisdiction might "fruitfully be applied."[167] As the court explained, quoting the Supreme Court, "agencies . . . are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to decide certain issues.[168]

When one side is trying to enforce a recognition agreement, it is tempting to tell the court, "we don't care if you lack expertise, we just want to enforce a contract." But, particularly for unions, there are reasons to be cautious about encouraging courts to resolve representational issues. When given a chance, courts often have displayed a fundamental misunderstanding of the realities of industrial relations.[169] Even imperfect enforcement by

164. *Id.* at 309.

165. *Id.*

166. *See* 29 U.S.C.A. § 151 (Findings and declaration of policy).

167. *Pratt-Farnsworth*, 690 F.2d at 515 n.11.

168. *Id.* (quoting *Far E. Conference v. United States*, 342 U.S. 570, 574-75 (1951)).

169. Consider, for example, the Supreme Court's finding in Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 849 (1992), that "signs or advertising" would constitute a "reasonably effective" substitute for personal contact for a union attempting to organize workers in a large metropolitan area. Anyone who ever has experienced first-hand the fears of unorganized workers knows that there is no substitute for face to face meetings. Also, the Court in *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435

the courts would be better than no enforcement, but happily arbitration presents another alternative. The Supreme Court has recognized that arbitrators have special expertise when it comes to resolving labor disputes,[170] and has stated that arbitration is strongly favored as a mechanism for resolving workplace disputes. As a result, courts have been willing to compel the arbitration of disputes, even where the issues involved are primarily representational.

B. Compelling Arbitration of Representational Questions

Starting with the *Steelworkers Trilogy*, the Supreme Court has consistently endorsed arbitration as a mechanism for settling labor disputes. In *Carey v. Westinghouse Electric Corp.*,[171] the Court directly addressed the arbitrability of representational issues. In that case, the International Union of Electrical Workers (IUE) represented production and maintenance workers, while another union represented technical workers.[172] The IUE brought a grievance charging that Westinghouse had improperly assigned IUE bargaining unit work to employees in the other unit. The lower courts had refused to order arbitration on the grounds that the dispute involved a representational issue, that is, Which union should represent the employees in question? The Supreme Court noted that the dispute might be a work assignment dispute rather than a representational one; but it held that the arbitrator and the Board had concurrent jurisdiction, even if the issue was representational.[173] The Court reasoned that arbitration might resolve the dispute, although it also noted that the Board would be free to overrule the arbitrator's decision.[174]

(1984), held that agency fee payers could not be required to pay for the portion of dues money that goes to organizing because "using dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer." *Id.* at 452. Such reasoning ignores what I would have thought was the obvious reality that organizing the employer's competition strengthens the union's hand at the bargaining table. Then there is Justice (then Judge) Ginsburg's partial dissent in *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), where she refused to condone the Board's remedy requiring that a company president, who had engaged in "outrageous and pervasive" unfair labor practices, personally read the Board's notice aloud to assembled workers. In justifying her conclusion that "a forced, public 'confession of sins' even by an owner-president who has acted outrageously is a humiliation . . . 'incompatible with the democratic principles of the dignity of man.'" *Id.* at 1401 (citation omitted). Ginsburg claimed that it might be less effective to require the president to read the notice because he "may demonstrate 'by inflections and facial expressions, his disagreement with the terms of the notice.'" *Id.* at 1401-02 (citation omitted). Of course, the fact that the president disagreed with the terms of the notice is precisely what makes the notice effective. Requiring such a reading gives all the assembled workers an opportunity to witness the government asserting its power on their behalf, demonstrating that at least some "democratic principles" extend to their workplace. Furthermore, Ginsburg's reasoning ignores the fact that the president had shown no regard for the dignity and humanity of the workers.

170. *See Steelworkers Trilogy*, *supra* note 104.

171. 375 U.S. 261 (1964).

172. *Id.* at 262.

173. *Id.* at 269-70.

174. *Id.* at 272.

The Second Circuit recently enforced a recognition agreement containing an arbitration provision in *Hotel & Restaurant Employees Union, Local 217 v. J.P. Morgan Hotel.*[175] It held that "courts do not usurp NLRB authority when enforcing the arbitration clauses of a private contract, even when the matter to be arbitrated is representational."[176] In the agreement at issue in *J.P. Morgan*, in return for the union's forgoing its right to picket the hotel, the hotel promised to remain neutral on the question of unionization and to agree to a card check.[177] The agreement provided that an arbitrator would review the authorization cards and resolve any disputes regarding the application or interpretation of the contract.[178] The hotel challenged the validity of some of the cards, arguing that the union coerced employees into signing.[179] When the arbitrator found in favor of the union, the employer repudiated the agreement.[180] The union then went to court to enforce the arbitration award.

In holding that the court had jurisdiction, the Second Circuit concluded that the prudential primary jurisdiction concerns did not come into play. It reasoned that "the crucial *initial* representation decision [was] made by the arbitrator as the parties agreed, and the court is presented with the much more narrow and common issue of interpreting a contract arbitration clause."[181] Other circuits have agreed that "[i]f an agreement allows arbitration of contractual disputes that may affect representational issues, the concurrent jurisdiction of the NLRB will not deprive the parties of their bargain."[182] Courts have not, however, uniformly held that all disputes regarding representational issues are arbitrable. The Third Circuit in particular has been reluctant to order arbitration of such disputes. In *Chas. S. Winner, Inc. v. Teamsters, Local 115*,[183] the workers initially were represented by an independent union. When they voted to affiliate with the Teamsters the employer refused to recognize the Teamsters.[184] The union responded by filing a grievance, seeking to arbitrate the question of whether it was a successor according to the contract. The court held that successorship must be decided according to the Board's criteria and that an employer and a union cannot contractually designate a procedure for resolving suc-

175. 996 F.2d 561 (2d Cir. 1993).

176. *Id.* at 567.

177. *Id.* at 563.

178. *Id.*

179. *Id.*

180. *Id.* at 564.

181. *Id.* at 567.

182. International Union, UAW v. Telex Computer Prods., 816 F.2d 519, 525 (10th Cir. 1987). *See also* United Bhd. of Carpenters & Joiners, Local 694 v. Galliher & Bros., 787 F.2d 953 (4th Cir. 1986) (ordering arbitration of "arguably representational dispute").

183. 777 F.2d 861 (3d Cir. 1985), *cert. denied sub nom.*, United Food & Commercial Workers Int'l Union, Local 1357 v. NLRB, 475 U.S. 1085 (1986).

184. *Id.* at 862.

cessorship disputes.[185] Similarly, in *NLRB v. Paper Manufacturers Co.*,[186] the Third Circuit held that "[l]ike successorship, accretion is a representation issue. It cannot be resolved by a contract between [the union] and the employer and thus cannot be resolved by the contractual remedy of arbitration."[187]

The court in *Paper Manufacturers* reasoned that its holding was "consistent with the position of the Board that it will not defer to arbitration on representation issues."[188] This brings us to the crux of the problem: the *Paper Manufacturers* court has a point. If the Board gives no weight to the opinion of an arbitrator regarding representational questions, then what is the point of conducting the arbitration in the first place? Beginning with *Westinghouse*, courts occasionally have spoken of applying the "therapy of arbitration" as a preliminary step.[189] But from the point of view of a party that wants to enforce a contract, arbitration provides little comfort if the losing party simply can relitigate the same question before the Board.

C. *NLRB Deference to Arbitration of Representational Issues*

The NLRB's current practice is to give no deference to arbitration opinions addressing representational questions, but this was not always the case. The Board's policy of non-deferral directly contradicts its approach to arbitration awards that do not address representational issues. In *Spielberg Manufacturing Co.*,[190] the Board announced a policy of deferring to arbitration decisions. There, at the end of a strike the employer indicated that it did not wish to reinstate four strikers, alleging picketline misconduct.[191] The parties agreed to settle the case through arbitration. However, when the arbitrator found in favor of the employer, the union responded by filing an unfair labor practice charge against the employer. The Board concluded that

> the [arbitration] proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the Arbitrator is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award.[192]

185. *Id.* at 863.

186. 786 F.2d 163 (3d Cir. 1986).

187. *Id.* at 167.

188. *Id.*

189. "The superior authority of the Board may be invoked at any time. Meanwhile, the therapy of arbitration is brought to bear in a complicated and troubled area." *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964).

190. 112 N.L.R.B. 1080 (1955).

191. *Id.* at 1084.

192. *Id.* at 1082. In Olin Corp., 268 N.L.R.B. 573, 574 (1984), the Board went even further than it had in *Spielberg*. It held that it would defer to arbitration awards even where the arbitrator did not explicitly refer to the questions raised by the unfair labor practice charges so long as "(1) the contractual

More recently, in *Olin Corp.*, the Board formulated an extremely deferential definition of the "clearly repugnant" standard, holding that "[u]nless the award is 'palpably wrong,' i.e. unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer."[193]

In *Collyer Insulated Wire*,[194] the Board expanded on *Spielberg*, holding that it would not only defer to arbitration awards, but that it would "withhold its processes" where unfair labor practices were also a breach of contract, leaving the aggrieved party no choice but to pursue arbitration. The Board concluded,

> We are not compelling any party to agree to arbitrate disputes arising during a contract term, but are merely giving full effect to their own voluntary agreements to submit all such disputes to arbitration, rather than permitting such agreements to be sidestepped and permitting the substitution of our processes, a forum not contemplated by their own agreement.[195]

In *Raley's Inc.*,[196] the Board applied *Spielberg* in the representation context. There, the Board deferred to an arbitrator's decision that an accretion had occurred. The Board held that its "authority to decide questions concerning representation does not preclude the Board in a proper case from considering an arbitration award in determining whether such a question exists."[197] At the time *Westinghouse* was decided, the Board was still following the *Raley's* decision. Thus, while the *Westinghouse* court held that in the event of disagreement the Board's ruling would override that of the arbitrator, it did so in light of the *Spielberg/Raley's* standard. The court quoted with approval the following language from the *Raley's* decision: "[W]e believe that the same considerations which moved the Board to honor arbitration awards in unfair labor practice cases are equally persuasive to a similar acceptance of the arbitral process in a representation proceeding such as the instant one."[198] However, in the *Carey* case itself, after the arbitrator had rendered a decision, the Board decided that it would not defer to the arbitration award because the arbitrator did not apply the standards used by the Board in making unit determinations.[199]

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issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."

193. Olin Corp., 268 N.L.R.B. 573, 574 (1984) (citation omitted). The *Spielberg/Olin* approach has generated some criticism. Dennis Lynch has argued that "[d]eferring more disputes . . . to private arbitration rather than encouraging their adjudication in a public forum makes the disputes less visible and inhibits public dialogue over both the result and the values reflected in the reasoning as justification for the ruling." Dennis Lynch, *Deferral, Waiver and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237, 335 (1989).

194. 192 N.L.R.B. 837 (1971).

195. *Id.* at 842.

196. 143 N.L.R.B. 256 (1963).

197. *Id.* at 259.

198. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 270 n.7 (1964) (quoting *Raley's*, 143 N.L.R.B. at 258, 259).

199. Westinghouse Elec. Corp., 162 N.L.R.B. 768, 771 (1967).

In *Combustion Engineering, Inc.*,[200] the Board laid out the full implications of its holding in *Westinghouse*. In that case, when the company opened a new plant eight miles from the old one, the union filed a grievance, arguing that the contract should apply to the workers at the new plant.[201] The arbitrator found in favor of the union. Workers at the new plant then brought charges against the employer, arguing that by applying the contract to them the company was interfering with their right to choose their own representatives.[202] In ruling on the unfair labor practice charges, the ALJ (in an opinion adopted by the Board) held that it was inappropriate to defer to the arbitrator's ruling on whether an accretion had occurred, despite the fact that the arbitrator purported to apply Board precedent in reaching his decision.[203] The ALJ had declared that "under *Westinghouse*, findings by arbitrators purportedly based on Board policies in representation cases, are subject to *de novo* review by the Board, unless 'clearly . . . consonant with Board standards.' "[204] In a footnote, the ALJ observed: "It is not apparent how such a rule differs in practical effect from one which gives no weight at all to the arbitration."[205]

The courts have affirmed the Board's non-deferral policy regarding representational questions. The effect has been to give parties "two bites at the apple" whenever they have an agreement that addresses representational questions. For example, in *Chauffeurs, Teamsters, & Helpers, Local 776 v. NLRB (Rite-Aid Corp.)*,[206] the union represented workers at a Rite-Aid distribution center. When Rite-Aid opened a Central Returns Warehouse to process returned goods, taking work away from the distribution center, the union filed a grievance claiming that it should represent the workers at the warehouse.[207] After the arbitrator found in favor of the union, in a move the Third Circuit described as an attempt to "circumvent the arbitration award,"[208] the employer filed a unit clarification petition with the Board. When the Board ruled that the warehouse employees were not an accretion to the distribution center unit, the union filed suit in federal court to enforce the arbitration award. Rite-Aid responded by filing an unfair labor practice charge against the union for seeking enforcement of the arbitration award in the face of a contrary ruling by the Board. The court upheld the unfair labor practice on the grounds that "if an NLRB determination on the definition of

200. 195 N.L.R.B. 909 (1972).

201. *Id.* at 910.

202. Even though the charges were brought by employees, rather than by the company, in cases like this there is always the danger that the workers are merely acting as stand-ins for the company.

203. 195 N.L.R.B. at 912.

204. *Id.* (citation omitted).

205. *Id.* at 912 n.12.

206. 973 F.2d 230 (3rd Cir. 1992), *cert. denied*, 113 S. Ct. 1383 (1993).

207. *Id.* at 231.

208. *Id.*

the proper bargaining unit conflicts with an arbitration award, the NLRB decision will prevail."[209]

The Board's explanation for why it treats arbitrations involving representation issues differently from other arbitrations makes little sense. The Board has stated that "the determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than an arbitrator."[210]

But, in fact, every question of deferral involves application of "statutory policy, standards and criteria." The issue arises only when someone alleges that an unfair labor practice has been committed. For example, in *Collyer Insulated Wire Co.*,[211] the union alleged that the employer had committed an unfair labor practice by making unilateral changes in wages and working conditions. Section 8(d) of the NLRA provides that "the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . "[212] It is true that in *Collyer* the company's defense was that, under the contract it had the authority to make the unilateral changes in pay rates that were at issue.[213] But as Board Member Jenkins indicated in dissent, a breach of a contract term may be sufficient in degree or scope to constitute a refusal to bargain under section 8(a)(5).[214]

The Board has also deferred to arbitration decisions where workers have alleged interference with the right to organize (section 8(a)(1)), or anti-union discrimination (section 8(a)(3)). In *United Technologies Corp.*,[215] the union charged that the employer had committed a section 8(a)(1) violation when a supervisor threatened a worker with disciplinary action if she persisted in pursuing a grievance. The unfair labor practice at issue could be characterized only as a contractual dispute, inasmuch as the collective bargaining agreement contained a clause providing that employees would not be discriminated against in violation of the NLRA.[216] By the same token, any representational issue could be considered a contract dispute, if the relevant agreement provided that questions would be resolved in accordance with the applicable provisions of the NLRA.

In seeking a reexamination of the Board's policy of reviewing *de novo* arbitration awards regarding representational questions, it is probably necessary to further subdivide the category. Representational questions may

209. *Id.* at 234 (citing Eichleay Corp. v. International Ass'n of Iron Workers, 944 F.2d 1047, 1056 (3d Cir. 1991)).

210. Marion Power Shovel Co., 230 N.L.R.B. 576, 577 (1977).

211. 192 N.L.R.B. 837 (1971).

212. 29 U.S.C.A. § 158(d).

213. 192 N.L.R.B. at 839.

214. *Id.* at 855 n.47.

215. 268 N.L.R.B. 557 (1984).

216. *Id.* at 560 n.20.

include accretions, the scope of bargaining units or the validity of union authorization cards. Arguments against deferral do not apply equally to each of these issues. For example, the argument against deferral is probably strongest in the case of accretions. Section 7 of the Act gives employees the right to self-organization through "representatives of their own choosing."[217] When a union and an employer agree that a contract will cover workers at a particular facility without ascertaining whether the workers favor that (or any) union, this is an infringement of the workers' rights. But even this extreme situation is not such a great infringement on the rights of workers. Paul Weiler has pointed out just how far you would have to go to restrict the rights of employees to the same extent that current law limits those rights:

> Suppose, for example, the law were to presume that employees would have union representation and collective bargaining unless the majority freely voted for a union-free environment. Adding a feature from current NLRA law and practice, the choice against union representation would have to be preceded by the organization of the nonunion employees to display sufficient interest in getting rid of the union, followed by a pitched campaign waged by and against the union. Then conduct the non-representation campaign under the watchful eye of *union* officials, who would in our experiment, wield the standard managerial prerogatives of transfer, promotion, demotion, layoff, discipline, and dismissal. The final and crucial counterfact is that the union officials would retain all these managerial powers over the work force after the election, no matter what the employee verdict was.[218]

Weiler argues that "the employees' freedom of choice with respect to this alternative regime would be precisely the same as it is now under the NLRA: only the legal starting line and the party holding managerial power have been changed."[219] Of course, even an accretion does not go this far; it merely places the workers under a union contract. Although the NLRB has vigilantly protected anti-union workers from accretions, the anti-union worker who wants to decertify a union actually has a much easier task than the pro-union worker who wants to organize a union in a non-union facility. Since the Board has never suggested that the rights of pro-union workers are compromised by treating non-union workplaces as the default position, an accretion should hardly be a cause for alarm, unless there is reason to suspect company domination of the union.

Even if the Board is unwilling to concede the above point, there are other strong reasons to defer to arbitration awards in this area. The Board's test for whether or not an accretion has occurred is by no means straightfor-

217. 29 U.S.C.A. § 157.

218. WEILER, *supra* note 2, at 115.

219. *Id.* at 116. After making this observation, Weiler quickly backed away from its implications, stating, "I do not for a moment suggest that all new plants and offices should start out unionized unless otherwise voted in order to expand the scope of union representation in this country." *Id.*

ward. The Board has examined the following factors in determining whether an accretion is appropriate: "integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective bargaining history, and interchange of employees."[220] The Board itself has acknowledged that "in the normal situation some elements militate toward and some against accretion, so that a balancing of them is necessary."[221] In some cases, the Board has criticized arbitrators for failing to apply each of the factors, but even where the arbitrator has tried to adhere to Board precedent the Board has asserted that it has peculiar expertise in balancing the factors.[222] Since such a complex multi-part test inevitably means that different individuals will reach different results, it would appear to be a misplaced use of the Board's limited resources to rehear these cases when they already have been argued before a competent arbitrator.

Just as in the case of the revised *Majestic Weaving* rule I argued for above, adopting a policy of deference would not preclude the Board from finding a genuine section 8(a)(2) violation if the company and the union have brought the workers in under a sweetheart contract. Under the Board's current practice, rather than protecting workers' section 7 interests, the Board actually is giving employers a chance to challenge the validity of agreements which they entered into voluntarily.

If the argument against deferral is strongest in the case of accretions, it loses whatever force it might have when the question is deference to decisions defining bargaining units for the purpose of ascertaining the union's majority status. As long as they proceed through a Board supervised election, the NLRB gives the parties wide latitude to determine an appropriate bargaining unit. The Board has declared a "well established policy of honoring concessions made in the interest of expeditious handling of representation cases, even though there may be some question of the ultimate propriety of including certain employees in the unit were the matter litigated."[223] The D.C. Circuit has explained that where the parties have stipulated a bargaining unit, the Board conducts only a limited review to "ensure that the stipulated terms do not conflict with fundamental labor principles."[224] The same principles ought to apply when the parties reach their agreement in private, rather than in a Board stipulated election. In contrast to cases of accretions, there are only minimal concerns about limiting em-

220. Gould, Inc., 263 N.L.R.B. 442, 445 (1982).

221. *Id.*

222. *See, e.g.*, Hershey Foods Corp., 208 N.L.R.B. 452 (1974) (rejecting the arbitrator's finding that the union could extend its collective bargaining contract with Hershey to Reese plant employees).

223. Stop 127, Inc., 172 N.L.R.B. 289 (1968).

224. Avecor, Inc. v. NLRB, 931 F.2d 924, 932 (D.C. Cir. 1991), *cert. denied sub nom.*, Oil, Chemical & Atomic Workers Int'l Union v. Avecor, Inc., 112 S. Ct. 912 (1992).

ployee self-determination. Where the question is defining the bargaining unit for the purpose of conducting a card check or an election, there is no worry that the employees will be swept into the union without having a chance to express their opinion. Moreover, allowing the parties to turn to an arbitrator to resolve disputes about the appropriate bargaining unit may be the key to creating enforceable recognition agreements. As *Facetglas* demonstrates, unless there is some binding mechanism for resolving the dispute, a recognition agreement can become worthless if there is a disagreement about the scope of the unit. Deferral might also arise in the context of an arbitrator's decision regarding the validity of union authorization cards. Some of the ways employers have challenged authorization cards are by claiming: (1) the union misrepresented that the cards would be used to get an election, rather than to demand recognition;[225] (2) the authorization was canceled by subsequent revocation;[226] (3) the cards have created confusion among workers because they designate the International, rather than the local union;[227] and (4) the cards are too old.[228]

An opportunity to relitigate issues such as appropriate scope of the unit, or validity of authorization cards can arise in one of two ways. First, the company might refuse to bargain, or refuse to abide by a previous agreement, and try to raise the lack of majority status as a defense in an unfair labor practice hearing. Another way the issues might arise is if an anti-union worker files section 8(a)(2) and corresponding section 8(b)(1)(A) charges against the company and the union alleging that the company unlawfully recognized a minority union.[229] When the employer raises these issues, it seems clear that the Board should not allow it to proceed. As the Board explained in *Collyer*, "[w]e believe it to be consistent with the fundamental objectives of Federal law to require the parties here to honor their contractual obligations rather than, by casting this dispute in statutory terms, to ignore their agreed-upon procedures."[230]

When an employer tries to challenge its own agreement, the Board ought to follow the approach it took in *Scott Corp.*.[231] In that case, the union brought unfair labor practice charges against several employers for refusing to execute and give effect to contract terms upon which the parties had orally agreed. The employers defended, claiming that even if the parties had reached an agreement, the Board lacked authority to enforce it because the bargaining units included supervisors. The Board agreed that the

225. Cumberland Shoe Corp., 144 N.L.R.B. 1268, 1269 (1963).

226. Alpha Beta Co., 294 N.L.R.B. 228, 230 (1989).

227. Jerry's United Super, 289 N.L.R.B. 125, 144-45 (1988).

228. *Id.*

229. Since the Board does not impose any requirements for standing, a company can bring the section 8(a)(2) and section 8(b)(1)(A) charges on its own.

230. Collyer Insulated Wire, 192 N.L.R.B. 837, 843 (1971).

231. 296 N.L.R.B. 918 (1989).

units did include supervisors, and as such they would have been inappropriate in the first instance, but nevertheless held that the employers were bound by their agreement.[232] On appeal to the Ninth Circuit, the Board argued that "in the absence of extraordinary circumstances or a clear denial of employees' rights, once an employer has recognized a union . . . the employer may not . . . repudiate the bargaining relationship on the ground that the Board might have found a different unit appropriate had the matter been brought before it initially."[233] The only difference between the *Scott* case and the hypothetical cases I have suggested is that in *Scott* the employers had recognized and bargained with the union, whereas in my hypotheticals the employer agrees only that it would recognize and bargain with the union once the union obtains majority support. This is a highly formal distinction. In both cases the employer has made an agreement and later wishes to renege. The only difference is the timing of the repudiation.

Even when it is an employee, rather than the employer, who wishes to challenge the union's majority status as determined by an arbitrator, there are reasons for the Board to proceed with caution. The Board should acknowledge that there is a strong risk that the employer is merely using an anti-union worker as its proxy in attempting to avoid its contractual obligations. But even if the anti-union worker acts genuinely, the Board still should hesitate to invalidate the parties' chosen method of dispute resolution, absent some independent evidence of illegal collusion between the company and the union. At first glance, this may appear to present the type of case where the Board ordinarily refuses to practice deferral, because the interests of the union are at odds with the interests of the employee.[234] But so long as the arbitration proceedings were "fair and regular," it should not matter that it was the company rather than the union that raised the arguments on behalf of the employee.

Although in cases like *Combustion Engineering* the NLRB has expressed grave concerns about workers being swept into unions against their wishes, the Board has not voiced similar fears where unions have reached agreements with employers that limit the rights of workers to join unions. The Board has held that it will enforce an agreement by a union not to try to organize certain groups of employees.[235] This rule grew out of a case where the United Auto Workers had a contract with Briggs Indiana which provided in part that the UAW would not seek to represent certain groups of employees, including plant protection employees (before the Act was

232. *Scott Corp.*, 296 N.L.R.B. at 918.

233. E.G. & H. v. NLRB, 949 F.2d 276, 278 (9th Cir. 1991).

234. *See* Shopmen's Local 539 (Zurn Indus.), 278 N.L.R.B. 149 (1986) (discussing the Board's refusal to defer when charges had been filed by an individual and the interests of the individual were adverse to those of the employer and/or union).

235. *See* Briggs-Indiana, 63 N.L.R.B. 1270 (1945).

amended to exclude them from unions that represent other workers). The Board explained its ruling as follows:

> The question is not whether we should enforce the agreement so as to deny an individual Briggs plant-protection employee the right to select a UAW affiliate as his representative or so as to deny the protection of Section 8(a)(3) of the Act to such an employee. It is merely whether it is the proper function of the National Labor Relations Board to expend its energies and public funds to confirm a result which the Union agreed it would refrain, temporarily, from seeking to achieve.[236]

This seems to me precisely the approach the Board should take to recognition agreements. If the parties agree to a certain bargaining unit, or if the parties agree to a certain mechanism for resolving their disputes, then the Board should not "expend its energies and public funds" to allow one party to challenge the validity of its agreement. The Board can hardly argue that the *Briggs Indiana* rule does not infringe upon the statutory rights of workers: section 7 gives workers the right to "representatives of their own choosing."[237] It is hard to imagine a more direct infringement on this right than a contract between an employer and a union which prevents workers from choosing that union as their representative.

There is certainly some reason to be wary of an agreement made between a union and an employer affecting workers that have not yet chosen that union as their representative. But, if the agreement merely establishes a procedure to facilitate free choice among the workers (such as a card check agreement, or an agreement for a private election), then the Board's fears are misplaced.

This entire discussion must be framed in the context of Board rules and procedures which serve to frustrate the desires of workers wishing to organize. If the parties know that arbitration awards will be binding, then they can confidently proceed to settle these issues through arbitration, rather than wading through cumbersome Board procedures. Proceeding through arbitration rather than the Board thus furthers national labor policy because it hastens the settlement of disputes. Cases that can take up to seven years when litigated through the Board[238] can be settled in a matter of months by an arbitrator.

The Board has argued that these kinds of issues are outside the particular expertise of arbitrators, but this is simply not the case. Although the bulk of arbitration cases deal with allegations of discharge without just cause, arbitrators often have previously worked as labor lawyers or even as

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236. *Id.* at 1273.

237. 29 U.S.C.A. § 157.

238. *See, e.g.*, Alpha Beta Co., 294 N.L.R.B. 228 (1989), where the union demanded recognition on January 8, 1982 and the Board did not issue its decision until May 25, 1989. The Board has taken steps to improve its case handling in the last few years, but even delays of three years are too long.

NLRB agents, and as a result are familiar with representational law.[239] To the extent that there is any truth to the charge, with additional practice arbitrators will surely become more adept at addressing such questions as appropriate bargaining units, or validity of authorization cards. Federal courts have recognized that these issues are often highly factual in nature and therefore appropriate for resolution through arbitration.[240]

Federal courts correctly have concluded that, while the courts themselves ought to exercise restraint when it comes to making initial determinations regarding representational issues, the parties ought to be able to bind each other to an agreement to resolve such disputes through arbitration. Currently, the NLRB's non-deferral policy stands as an obstacle to such agreements. The NLRB has failed in its mission to protect the right of workers to "form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining."[241] Rather than jealously guarding its turf, the Board should acknowledge that private resolution of recognition disputes might help further the goals of the Act.

IV
CONCLUSION

Although it is easy to lose sight of this point, the declared policy of the United States as articulated in the National Labor Relations Act is to "encourag[e] the practice and procedure of collective bargaining."[242] The NLRA, as currently interpreted by the Board, has failed to achieve this aim. The Board has allowed employers to utilize anti-union tactics which, combined with procedural delays and inadequate remedies, serve to frustrate the attempts of workers to form unions and reach collective bargaining agreements. One way unions have responded to this challenge is by conducting corporate campaigns designed to convince employers to sign recognition agreements, rather than engage in lengthy procedural battles before the NLRB. The NLRB has created two obstacles to reaching effective recognition agreements: the *Majestic Weaving* rule prevents unions and employers from discussing substantive contract terms before the union reaches majority status, and the Board's refusal to defer to arbitration awards concerning representational issues creates doubts about the enforceability of these

239. *See* BNA, LABOR ARBITRATION CUMULATIVE DIGEST AND INDEX 773 (1988-91) (Directory of Arbitrators).

240. *See* International Union, UAW v. Telex Computer Prods., 816 F.2d 519, 526 (10th Cir. 1987) ("Each of these issues . . . presents questions of fact and contractual interpretation. . . . [N]o prejudice will result for allowing an arbitrator to clear up the factual and contractual underbrush.").

241. 29 U.S.C.A. § 157. While the Act does not state explicitly that the mission of the Board is to protect the section 7 rights of workers, the NLRB is supposed to implement the Act. *See* 29 U.S.C.A. § 160.

242. 29 U.S.C.A. § 151 (Findings and declaration of policy).

agreements. I have suggested that the Board should reexamine both of these policies. Instead of the *Majestic Weaving* prohibition on negotiations with a minority union, the Board should adopt a case-by-case approach that asks whether there was collusion between the union and the employer. With regard to deferral, the Board should treat representation cases the way it treats other arbitration awards. It should defer so long as the proceedings are "fair and regular," and the award is not "palpably" inconsistent with the policies and purposes of the Act. These proposals are no substitute for comprehensive labor law reform, but they would help further the purposes of the NLRA by encouraging collective bargaining.