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Linden Lumber: The Demise of Authorization Cards as a Means of Establishing Majority Status

In *Linden Lumber Division, Summer & Co. v. NLRB*,¹ the Supreme Court addressed questions reserved in their earlier decision in *NLRB v. Gissel Packing Co.*² The main question left unanswered by *Gissel* is aptly framed as follows: In the absence of the commission of unfair labor practices by an employer that impair the electoral process, may the National Labor Relations Board issue a bargaining order requiring that employer to recognize a union as the representative of its employees, solely on the basis of authorization cards purporting to represent a majority of the members of the bargaining unit? If the answer to this question is in the negative, a second inquiry remains: Which party, employer or union, should have the burden of petitioning the Board for an election under Sections 9(c) (1) (A) and (B) of the National Labor Relations Act?³

1. 419 U.S. 301 (1974). The decision represents the consolidation of two cases by the Supreme Court: *Linden Lumber Division, Summer & Co. v. NLRB* and *NLRB v. Truck Drivers Union Local 413*, on appeal from the United States Court of Appeals for the District of Columbia.

2. 395 U.S. 575, 601 n.18 (1968).

3. 29 U.S.C. Sec. 159(c)(1) (1970) states in part:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative

To fully understand and appreciate the effect of the *Linden* decision, it is essential to examine the scope of the law announced in *Gissel*.⁴ In each of the four cases consolidated in that appeal, the employer refused to bargain with the union and, in addition, committed serious unfair labor practices in violation of the National Labor Relations Act.⁵ The Supreme Court emphasized the validity of the use of authorization cards in lieu of the election procedures under the Act, holding that a card showing is clearly a valid alternative where the "employer has engaged in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election."⁶ The holding of *Gissel* was expressly reaffirmed by *Linden*.⁷

The facts in *Linden* can be briefly summarized.⁸ Upon being presented with authorization cards representing a majority of the union's employees and after the union demanded recognition, the employer suggested that the union petition the Board for an election pursuant to Section 9(c)(1)(A) of the Act.⁹ The union then filed an election petition but withdrew it when the employer, Linden, declined to enter into a consent election agreement.¹⁰ Thereafter,

. . . the Board shall investigate If the Board finds upon the record . . . that such a question of representation exists, it shall direct an election (B) See note 32 *infra*.

4. 395 U.S. at 600.

5. 29 U.S.C. Sec. 158(a)(1) prohibits employer interference with the employees' rights under section 157 of the title; Section 158(a)(3) prohibits discrimination against employees in regard to hire or tenure of employment for the purpose of encouraging or discouraging union membership. Section 158(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.

6. 395 U.S. at 600. See *Toltec Metals Inc. v. NLRB*, 490 F.2d 1122, 1124 (3rd Cir. 1974); See *NLRB v. Crispo Cake Cone Co.*, 464 F.2d 233, 236 (8th Cir. 1972); See *NLRB v. Fashion Fair Inc.*, 399 F.2d 764, 768 (6th Cir. 1968), "The seriousness of the unfair labor practices is relevant . . . to the inquiry whether a fair election can be held." *Accord G.P.D. Inc. v. NLRB*, 406 F.2d 26, 34, *appeal after remand* 430 F.2d 963, *cert. den.* 401 U.S. 974 (6th Cir. 1969).

7. 419 U.S. at 303-304, 306.

8. In the companion case decided along with *Linden* (*supra* note 1), there were eighteen employees in the bargaining unit which the union sought to represent. The union, with eleven signed and two unsigned authorization cards, requested recognition. When the employer did not answer the request, recognitional picketing began. A second request for recognition was made after the two unsigned cards were signed, but the employer still refused to recognize the union. Thereafter, the union filed unfair labor practice charges against the employer.

9. *Supra* note 3.

10. See generally, A. COX and D. BOK, *LABOR LAW CASES AND MATERIALS*, 370 (7th ed. 1969). The words "consent election" mean that the company and the union or unions concerned enter into a consent election

the union renewed its demand for collective bargaining and, when Linden again refused to negotiate, struck for recognition and filed an unfair labor practice charge against the company for refusing to bargain.¹¹ There was no charge brought before the Board that Linden had engaged in unfair labor practices apart from its refusal to bargain,¹² thereby presenting the Court with an opportunity to address the unanswered questions raised by *Gissel*. In reversing the holding of the Court of Appeals,¹³ the Supreme Court affirmed the decision of the Board to the effect that Linden should not be found guilty of an unfair labor practice solely on the basis of its refusal to accept evidence of majority status other than the results of a Board election. The Court stated that:

[U]nless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, . . . has the burden of taking the next step in invoking the Board's election procedure.¹⁴

Thus, the rule as established is that a bargaining order will not issue in cases coming within the factual bounds of *Linden*.

In addressing themselves to the primary issue left for determination by *Gissel*, Mr. Justice Douglas, speaking for the majority, emphasized several factors in support of the Board's initial determination in the cases at bar. Great emphasis was placed on the discretionary power of the Board.¹⁵ In reviewing findings of fact, the reviewing court must accept the Board's findings if such are supported by "substantial evidence on the record as a whole."¹⁶

agreement, the principal provisions of which specify the bargaining unit, the eligibility of voters and the date of the election. Under such agreements, final authority to rule on any disputes is vested in the Regional Director. In such cases, there is no dispute as to the propriety of a present determination of representatives nor real doubt concerning the bargaining unit.

11. *Supra* note 5.

12. 419 U.S. at 302.

13. 487 F.2d 1099, 1111 (D.C. Cir. 1973). The Court held:

While we have indicated that cards alone . . . do not necessarily provide such 'convincing evidence' of majority support so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting doubt of majority status to resolve the possibility through a petition for an election if he is to avoid both any duty to bargain and any inquiry into the actuality of his doubt.

14. 419 U.S. at 310.

15. *Id.* at 309-310.

16. 29 U.S.C. 160(e), (f). See *Universal Camera Corp. v. NLRB*, 340

Further, a "law-applying judgment is presumptively within the area of the agency's discretion and thus its conclusion should be sustained."¹⁷ The minority, Mr. Justice Stewart speaking, did not choose to talk in terms of discretion but rather chose to focus on the legislative history of the Act. Where legislative history is concerned, the law is clear that a reviewing court is much "more willing to substitute its judgment for that of the Board on matters that require interpretation of statutory language"¹⁸

The second factor cited by the majority in support of their decision was the policy of encouraging secret ballot elections under the Act.¹⁹ Two major reasons exist for the favored status of elections over other means of establishing majority status. First, "the opportunity for union organizers, including unit employees, to coerce an employee is far greater when an authorization card is used instead of a secret ballot."²⁰ Secondly, "it is more likely that employees will misunderstand the import of signing an authorization card because of misreading, failure to read, or union misrepresentation."²¹ With these factors in mind, it is easy to see why the Board might become suspicious of methods other than a closely scrutinized Board election. However, the romanticized view of Board-conducted elections has not gone without criticism²² and

U.S. 474, 487 (1951); See *NLRB v. Florida Cannery Co-op*, 311 F.2d 541, 544 (1963).

17. L.L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION*, 549-550 (1965). This article presents an interesting discussion of the fact-law dichotomy and its effect on the discretion invested in administrative agencies. See also *NLRB v. Hearst*, 322 U.S. 111, 130 (1943). In that case the Court was called upon to review the Board's determination as to who was an "employee" within the meaning of the statute. The Court stated in part that "[r]esolving that question, like determining whether unfair labor practices have been committed, belongs to the 'usual administrative routine' of the Board." See also *Gray v. Powell*, 314 U.S. 402, 411 (1941).

18. See A. COX AND D. BOK, *supra* note 10 at 143. See also *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 591 (2nd Cir. 1961). In that case, the Court was called upon to decide whether an employer was bound by contract to a particular union. ". . . [c]ases that clearly present questions of law . . . are not governed by statutes such as 10(e) of the Labor Act but raise the different issue of the degree of deference which courts should pay to decisions of administrative agencies interpreting the statutes they apply."

19. 419 U.S. at 307.

20. *Comment, Employer Recognition of Unions on the Basis of Authorization Cards: The Independent Knowledge Standard*, 39 U. CHI. L. REV. 314, 318 (1971-72).

21. *Id.*

22. See Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851, 861-862 (1967), criticizing the romanticized view of Board conducted elections and the "obsession with the infirmities of authorization cards."

the minority urged a contrary decision again based on the legislative history of the NLRA, arguing in part that:

Neither Sec. 9(A) nor Sec. 8(a) (5), which makes it an unfair labor practice for an employer to refuse to bargain with the representative of his employees, specifies how that representative is to be chosen. The language of the Act thus seems purposefully designed to impose a duty on the employer to bargain whenever the union representative presents convincing evidence of majority support, regardless of the method by which the support is demonstrated.²³

Mr. Justice Stewart noted that the 1947 amendments to the Taft-Hartley Act strengthened this interpretation of the NLRA in that "a proposed change which would have eliminated any method requiring employer recognition of a union other than a Board supervised election was rejected in conference."²⁴

The majority, thereafter, addressed the issue of whether an exception to their ruling would exist where the employer refuses recognition of authorization cards in bad faith. In declining to make such subjective inquiries, Mr. Justice Douglas stated that:

His [the employer's] objection to cards may, of course, mask his opposition to unions. On the other hand he may have rational, good-faith grounds for distrusting authorization cards in a given situation. . . . To enter that domain is to reject the approval by *Gissel* of the retreat which the Board took from its 'good faith' inquiries.²⁵

Thus the subjective motivation of the employer for refusing recognition to a union on the basis of a card showing is irrelevant, according to the majority view.²⁶ In contrast, Mr. Justice Stewart rejected the majority's fear of making subjective inquiries into an employer's doubt by attempting to measure "convincing evidence of majority support" with an objective standard.²⁷ In his view, such things as a strike vote, a union strike, or authorization cards signed by a majority of the employees of a given bargaining unit would clearly be objective criteria for determining sufficient support to avoid a Board-conducted election. Further:

23. 419 U.S. at 311.

24. *Id.* at 312.

25. *Id.* at 306.

26. *Id.* at 305-306. See *NLRB v. Drivers Inc.*, 440 F.2d 354, 364 n.18, *cert. den.* *General Drivers and Dairy Emp., Local Union 563 v. NLRB*, 404 U.S. 912 (7th Cir. 1971).

27. 419 U.S. at 314.

. . . the employer's subjective doubts would be adequately safeguarded by Section 9(c)(1)(B)'s assurance of the right to file his own petition for an election. . . . [T]he Act simply does not permit the Board to adopt a rule that avoids *subjective* inquiries by eliminating entirely *all* inquiries into an employer's obligation to bargain with a non-certified union selected by a majority of his employees.²⁸ (Emphasis supplied in original).

By injecting objective criteria into the picture, the minority confuses the exception addressed by the majority with another and clearly distinguishable situation. Subjective motivation, such as bad faith, differs markedly from the situations advanced by the minority's objective standard. In such cases, the employer has actual knowledge independent of the union's majority status, knowledge of a card showing. In cases of "independent knowledge,"²⁹ the law is clear that an employer cannot thereafter refuse to recognize the union's majority status.³⁰ The majority recognized the distinction between the "subjective motivation" and "independent knowledge" tests, expressly reserving comment on the viability of the latter.³¹

Having decided the primary issue in the negative, the majority then addressed their inquiry to who should have the burden of petitioning the Board for an election. Mr. Justice Douglas cited the legislative history behind Section 9(c)(1)(B) of the Act in placing the burden on the union. That section states in part, "Whenever a petition shall have been filed . . . (B) by an employer alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative . . . ,"³² and

28. *Id.* at 315.

29. *NLRB v. Bratten Pontiac Corp.*, 406 F.2d 349, 352 (4th Cir. 1969). The "independent knowledge" test stems from the NLRB decision of *Snow and Sons Inc.*, 134 NLRB No. 57, 709-710 (1961). In that case, the employer reneged on a "prior agreement" to submit cards to an impartial third party. The Board found that breach of such prior agreement provided sufficient independent knowledge of the union's majority status. Thereafter in the decision of *Pacific Abrasive Supply Co.*, 182 NLRB No. 48, 329-331 (1970), the Board moved away from the requirement that there be a "prior agreement" before independent knowledge could be found. In that case, in addition to presenting authorization cards representing a majority, the employees also engaged in a strike. Such was found to satisfy the "independent knowledge" requirement. However, the Board apparently retreated from the more liberal view of *Pacific Abrasive* in their decision in *Linden*, *supra* note 14. The Board's view in *Linden* was implicitly adopted by the Supreme Court and currently, an employer will be deemed to have independent knowledge only where he has reneged on a prior agreement that some means other than a Board-conducted election would be sufficient to establish the union's status. See *Linden*, 419 U.S. at 310, n.10.

30. 395 U.S. at 591.

31. 419 U.S. at 310.

32. 29 U.S.C. 159(c)(1)(B).

was construed by the majority in light of legislative history indicating that such section was intended to give the employer the right, rather than the obligation, to go forward and seek an election.³³ Based on such authority and the Board's discretion in such matters, Mr. Justice Douglas stated:

The Board has at least some expertise in these matters and its judgment is that an employer's petition for an election . . . is not the required course. . . . [W]e cannot say that the Board's decision that the union should go forward . . . on the employer's refusal to recognize the authorization cards was arbitrary and capricious or an abuse of discretion.³⁴

On the other hand, the minority engaged in a bit of semantics by refusing to refer to the duty of going forward as a "burden," stating in part that:

When an employer is confronted with 'convincing evidence of majority support,' he has the *option* of petitioning for an election or consenting to an expedited union-petitioned election. . . . Section 9(c)(1)(B) does not require the employer to exercise this option. If he does not, however, and if he does not voluntarily recognize the union, he must take the risk that his conduct will be found . . . [in] violation of Sec. 8(a)(5). . . . In short, petitioning for an election is not an employer obligation; it is a device created by Congress for the employer's self-protection.³⁵ (emphasis supplied in original).

Had the Court ruled otherwise on the issue of the propriety of authorization cards as a viable alternative to the election procedures, the question as to who has the burden of seeking the election would never have been asked in the cases at bar. As it stands, in view of the majority's ruling on the primary issue, election procedures are matters considered to be within the Board's discretion and the Court will not substitute its judgment absent an abuse of discretion.³⁶

More importantly, the majority's ruling on the central issue represents an assault on a union's right to establish itself as the exclusive representative of a bargaining unit by any means showing "convincing support," other than through the election procedure.³⁷ With the destruction of authorization cards as a viable tool in fact

33. 419 U.S. at 307.

34. *Id.* at 309-310.

35. *Id.* at 316.

36. *Supra* note 18.

37. *Supra* note 3.

situations such as *Linden*, a union's options are effectively reduced to one—petitioning the Board for an election under Section 9(c) (1) (A). An employer may ignore a card showing of “convincing support” regardless of his subjective motivation, if he has no independent knowledge of majority status,³⁸ and may delay recognition of a bargaining agent until established through the election procedure. Such result is clearly contrary to the policy of the Act which has as its basic purpose the removing of sources of industrial strife and unrest by encouraging practices fundamental to the friendly adjustment of industrial disputes.³⁹ Perhaps Mr. Lesnick's observations on the *Gissel* decision best sum up the questionable validity of the majority's decision in the instant case. He observes that:

Cards have been used under the Act for thirty years; the Supreme Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley Bill to amend Section 8(a) (5) to require employer recognition of certified unions only, was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drum-beating should be permitted to overcome, without legislation, this history.⁴⁰

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38. *Supra* note 30.

39. 29 U.S.C. Sec. 151. “It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of . . . designation of representatives of their own choosing”

40. *Supra* note 23.