NOTES

NLRB CONTROL AND ADMINISTRATION OF REPRESENTATION ELECTIONS

The right given employees under the Labor Management Relations Act[1] to exercise freedom of choice in selecting a union to represent them in the collective bargaining process[2] must be balanced against the need for stability in labor-management relations. In the administration of the representative process the National Labor Relations Board[3] must seek to facilitate bargaining between employer and union. The NLRB has been assigned a difficult task and the methods used to achieve the desired goals should be examined in order to appraise the Board's functioning.

Choice of a Representative

The first step in the approach to collective bargaining is the determination of the representative for the laborers. Where one union is the clear choice of the workers, an employer's refusal to bargain is an unfair labor practice.[4] The Act provides that an employer can demand an election only when a reasonable doubt of the union's majority exists.[5] Before the Board will direct a representation election certain jurisdictional facts must be determined. It must be established that there is a doubt as to the representative, that the employer is engaged in interstate commerce, and that there has not been a prior conclusive determination of an employee representative.[6] The union that is chosen becomes the ". . . exclusive

1. 49 STAT. 449 (1935), 29 U.S.C. § 151 (1946), as amended, 61 STAT. 136 (1947), 29 U.S.C. § 151 (1952). The further reference to sections shall be reference to sections of the Labor Management Relations Act.

2. Section 7 of the Act gives the employees the right to choose a representative. This includes the right to decide against unionization.

3. The National Labor Relations Board will be hereafter referred to as the "Board" or the "NLRB."

4. Wilson & Co., 77 N.L.R.B. 959 (1948).

A union does not have to file an unfair labor practice charge against an employer in order to seek an election after the employer's refusal to recognize a union majority. It has been indicated that: "The Board does not, in representation proceedings, inquire into the bona fides of the employer's doubt as to majority, inasmuch as the union has elected to have its majority status determined in a representation proceeding rather than by filing charges of refusal to bargain." 8 NLRB ANN. REP. 44 n.2 (1943).

5. See Section 9(c)(1)(B) of the Act.

6. The Board will generally not accept a petition from a group of employees or union if the bargaining unit is currently operating under a valid, written contract. This has been designated as a "Contract Bar." A petition filed after the execution of a contract between the employer and union "A," but before the effective date of the contract, is timely since a contract may not be made effective retroactively for contract bar purposes. Stewart & Nuss, Inc., 97 N.L.R.B. 1250 (1952). The Board will accept a petition even if filed just prior to the automatic renewal date of an existing contract. International Harvester Co., 77 N.L.R.B. 242 (1948); DeSoto Creamery & Produce Co., 94 N.L.R.B. 1627 (1951). Contracts terminable at will or of an indefinite duration will bar

representatives of all employees in such unit. . . ."[7] It then becomes the union's duty to act under the guidance of its members for the benefit of all employees, and it is incumbent on the employer to bargain with the certified union.

With a view toward achieving voluntary labor-management relations, the Act provides that those desiring to file a petition for representation must indicate that the ". . . employer declines to recognize their representative. . . ."[8] The NLRB presently refuses to impose this statutory requirement[9] contending that it is not jurisdictional because no union, currently recognized but not certified, could honestly allege in its petition that an employer declined recognition.[10] Such an argument hardly justifies ignoring the statutory provision, and it may be questioned whether this decision enhances voluntary relations between employer and employees. Assuming an employer were willing to recognize the union through voluntary agreement, he would undoubtedly become antagonistic toward a union that by-passed him and filed a petition with the NLRB. This practice of the Board will tend to obstruct voluntary recognition and may be instrumental in forcing the election machinery to go the full distance. The Board has thus refused to follow a statutory procedure which could result in voluntary recognition, or which might, at least, shorten the election procedure possibly through the means of a consent election.[11]

---

an election for a two year period. Rohm & Haas Co., 108 N.L.R.B. No. 185 (June 10, 1954). A contract not reduced to writing will not bar a petition. Elliott Co., 106 N.L.R.B. No. 155 (Aug. 26, 1953). When there is a merger of the employer's operation with another company the contract is not a bar, for the employees in the reconstituted unit should be allowed a voice in determining a representative. L. B. Spear & Co., 106 N.L.R.B. No. 118 (Aug. 11, 1953).

For a good discussion on the contract bar see Lahne, *The Duration of Labor Agreements and the Contract Bar Doctrine of the National Labor Relations Board,* 5 SYRACUSE L. REV. 146 (1954).

7. See Section 9(a) of the Act.

8. The following language is used in Section 9: "(c) (1) 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* as the representative defined in subsection (a) of this section. . . ." (emphasis added).

9. Advance Pattern Co., 80 N.L.R.B. 29 (1948); see J. I. Case, 87 N.L.R.B. 692 (1949).

10. Advance Pattern Co., 80 N.L.R.B. 29, 33 (1948).

Member Murdock pointed out in his dissent from the decision that ". . . unless a request for recognition is made of the employer prior to filing a petition, he has not been given a reasonable opportunity to acquiesce in bargaining on a voluntary basis." *Id.* at 40.

11. A consent election is one in which all phases of recognition have been agreed upon. The parties to the election have agreed on the voter eligibility, the time, place, and date of the election, and the appropriate unit. Therefore, a hearing is waived. See discussion p. 179 *infra.*

The election process must not be initiated by frivolous petitions for recognition since to allow such practice would unnecessarily burden the election machinery. Consequently, to commence the process a petition claiming at least thirty percent employee support must be filed with the Board.[12] Evidence of this support usually consisting of cards which have authorized the union as the employee representative must be filed within forty-eight hours of the petition.[13] Such employee authorization must have been received without misrepresentation.[14] Subsequently, a preliminary investigation is conducted in which the Board's investigator checks the company payroll against the evidence of employee backing.[15] This administrative determination initiates the overall program designed to protect the employees' right to choose their representative. To allow elections under circumstances where there is no interest showing would be greatly unjust to both employers and employees. Once the thirty percent interest has been determined there can be no attack on the evidence at the hearing[16] since this is not a jurisdictional determination.[17] If this

---

The Board has withheld its facilities from unions that fail to comply with the other filing requirements of Section 9 pertaining to union organization, financial statements, and non-communist affidavits. Section 9(f)(g)(h). See also Standard Oil Co., 101 N.L.R.B. 1329 (1952). Noncompliance in these instances appears the same as the union's failure to allege nonrecognition by the employer.

12. Section 9 (c)(1)(A) provides that those seeking representation must allege that a substantial number of employees desire representation. By administrative practice the Board has required a thirty percent interest showing. 29 CODE FED. REGS. § 101.17 (1949).

13. 29 CODE FED. REGS. § 101.16 (1949). Other evidence of interest may consist of membership or application for membership in the union, Cudahy Packing Co., 65 N.L.R.B. 10 (1945); and of dues receipts by the union. Simmons Co., 65 N.L.R.B. 984 (1946).

14. American Potash & Chemical Corp., NLRB Administrative Decision. Case N. 21-RC-3010. July 20, 1953. Here, at the time the signatures of employees supporting the union were solicited, a leaflet was also distributed stating that the only purpose was to find out the number who wished unionization and not how many employees wanted to accept membership in this particular union. The Board declared that this was misrepresentation and no indication that the union was authorized by a substantial number of employees.

15. The regulation provides that the examiner ". . . conducts an investigation to ascertain (1) whether the employer's operations affect commerce . . . (2) the appropriateness of the unit . . . and the existence of a . . . question concerning representation . . . (3) whether the election would effectuate the policies of the act . . . [and] (4) [if] . . . there is . . . evidence . . . employees have selected [the union] to represent them." 29 CODE FED. REGS. § 101.17 (1949). As the rules further indicate: "The evidence of representation . . . is checked to determine the number or proportion of employees who have designated the petitioner. . . ." *Ibid.*

16. Liberty Cork Co., 96 N.L.R.B. 372 (1951). "We have repeatedly pointed out that such reports are administrative expedients only, adopted to enable the Board to determine *for itself* whether or not further proceedings are warranted, and to avoid needless dissipation of the Government's time, effort, and funds." O. D. Jennings & Co., 68 N.L.R.B. 516, 518 (1946).

17. "When the preliminary inquiry which the Board makes discloses that the union's interest is substantial, it is the practice of the Board to proceed with its representation

proof could be challenged at the hearing, the selection of a labor representative might be delayed with a consequent obstruction of the bargaining process. Furthermore, there would be disclosure of the employees' choice of a representative prior to the election and the desired secret ballot would be negated.[18]

A necessary factor in establishing adequate administration of elections is the elimination of spurious recognition requests on the employer. If a union claims recognition from the employer, and the employer later contracts with a second union, this contract will become a bar to an election unless the first union has filed its petition within ten days of its request.[19] This procedure not only renders harmless the unfounded requests but also provides against an employer who wishes to contract with a union other than the first one seeking recognition. If the first union is diligent and files within ten days, the employer's attempt will be unsuccessful.

The Board in the development of its policy regarding the effect of pending unfair labor practice charges on an election must consider two factors: the need for prompt elections and in an atmosphere conducive to free choice. The NLRB has declared that it will not conduct a representation election while unresolved charges are pending against the employer since such charges tend to create an atmosphere preventive of free elections.[20] However, to postpone the election until the charges have been resolved will, in some cases, unduly delay the process of bargaining. Thus, in cases where the circumstances warrant, the Board will allow the union to waive the unfair labor practice charges as a basis for setting aside the election and conduct an election while the charges are still pending.[21] Such a waiver will in no way effect the claims filed but will merely permit a more prompt election. Even with this waiver, conditions are not con-

---

investigation without permitting formal challenge at the hearing to this preliminary determination." NLRB v. J. I. Case Co., 201 F.2d 597, 599 (9th Cir. 1953); *cf.* Kearney & Trecker Corp. v. NLRB, 209 F.2d 782 (7th Cir. 1953).

18. "But we agree with the Board that no statutory purpose would be served by requiring formal proof at the hearing of the substantiality of the Union's claim to representation or by permitting the contending parties to litigate such issues at the hearing. Among other undesirable consequences, a trial of that nature would bring about disclosure of the individual employees' desires . . . and would violate the long-established policy of secrecy of the employees' choice in such matters." NLRB v. J. I. Case Co., *supra* note 17 at 600.

19. Grand Leader Dry Goods Co., 106 N.L.R.B. No. 183 (Sept. 18, 1953); General Electric X-Ray Corp., 67 N.L.R.B. 997 (1946).

20. "[T]he continuing effects of . . . unfair labor practices tend to vitiate employees' free choice . . . and, if it were feasible, we would never conduct an election among employees of an employer charged with violaltion of the Act. . . ." May Department Stores Co., 61 N.L.R.B. 258, 275 n.35 (1945); *cf.* Edward J. Schlachter Meat Co., 100 N.L.R.B. 1171 (1952).

21. May Department Stores Co., 61 N.L.R.B. 258 (1945).

ducive to free choice. The unfair labor charges should be allowed to be waived only when an immediate election is necessary to attain the purposes of the Act.[22]

Unfounded unfair labor practice charges might be filed by either party for the purpose of delaying an election. In such cases the Board's agents are instructed to dismiss them unless the charging party, within seventy-two hours of the original filing, produces evidence to establish a prima facie case. This administrative decision facilitates the bargaining process by dispensing with unnecessary delays.[23]

The election may be of two types: consent[24] or Board ordered.[25] In the Board ordered election a hearing is held by the Regional Director to determine if a question of representation exists, to establish the payroll period for voter eligibility, to set the date, hour, and place of election, and to determine the unit of employees that will be polled. The Director's order is subject to review if prejudicial to either party.[26] In a consent election the existence of a question of representation is determined in the preliminary investigation,[27] while the other elements are agreed upon by the parties and the hearing is waived.

An employer does not have to agree to a consent election and it is not necessary for him to give reasons for this refusal.[28] However, the consent election agreement is the most frequently used method of settling a representation question. In the fiscal year 1953 approximately seventy percent of all representation elections conducted by the Board were consent elections.[29] There are two kinds of consent elections: agreement for

22. In cases where the employer has been found guilty of the charges and the Board's order remains to be enforced by the court, the NLRB will again refuse an election in the absence of a waiver. *Ibid.* A union is estopped from asserting unfair labor practices as a basis for setting aside an election if it should have petitioned with knowledge that the employer may have engaged in unfair labor practices. E. I. DuPont de Nemours & Co., 81 N.L.R.B. 238 (1949). The employer cannot have the Board dismiss the union's recognition petition if the unfair labor charges were filed by another union. Morrison Turning Co., 83 N.L.R.B. 687 (1949). Since the unfair labor charges had not been filed by the union seeking the election, the employer could not rely on these charges in order to gain a delay in the election.

23. 2 CCH LAB. LAW REP. § 5540.24 (1954). This is a ruling of the NLRB General Counsel.

24. See Section 9(c) of the Act; 29 CODE FED. REGS. § 102.54(a) (1949).

25. See Section 9(c) of the Act; 29 CODE FED. REGS. § 102.55 (1949).

26. Manchester Knitted Fashions, Inc., 108 N.L.R.B. No. 203 (June 18, 1954). If the parties have not agreed to the time and place of the election, such determination is left to the Regional Director. If the election facilities are inadequate, the election may be invalidated. Gary Enterprises, Inc., 86 N.L.R.B. 431 (1949).

27. See note 15 *supra.*

28. There is no statutory enforcement of the consent election. It is a purely voluntary procedure entered into by the parties. See Tower, *A Guide to NLRB Election Procedure,* 25 PERSONNEL 55 (1948).

29. 18 NLRB ANN. REP. 103 (1953).

consent and stipulation for certification upon consent.[30] They differ only with respect to post election procedure. In the former the Regional Director rules on challenges and objections to the election and his decisions are conclusive unless arbitrary and capricious[31] while in the latter all post election determinations are made by the Board. The consent election with Board determination has been termed a compromise between the formal hearing procedure and the agreement for a consent election.[32] The parties will more often agree to a consent election with Board rather than with Regional Director determination because of the more complete process of review,[33] and, consequently, fewer hearings will be necessitated.

The NLRB's role in a consent election consists merely of providing an investigator to approve the agreement. Since the parties have agreed to all the detailed mechanics of the election there is no need for a costly and lengthy hearing. This marks a definite step forward in labor-management relations in enabling the prompt settlement of many election disputes. In the fiscal year 1953 the average time lapse in a consent election from the time of filing the petition to the election was twenty-four days compared to sixty-four days in cases of Board ordered elections.[34]

---

30. Agreement for consent elections are provided for in 29 CODE FED. REGS. § 101.18(a)(1) (1949); the stipulation for certification upon consent election in 29 CODE FED. REGS. § 101.18(b) (1949). Consent elections are held by agreement of all concerned.

31. NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238, 240 (1st Cir. 1953). In a case in which a run-off election was necessary following a consent election, it was not considered arbitrary for the Regional Director to withdraw his approval of the consent election where it appeared that an increase in employment might result in disenfranchisement of the newly hired employees. Riviera Mines Co., 108 N.L.R.B. No. 21 (Mar. 30, 1954). It was also not arbitrary to allow the withdrawal of the union from a consent election without invalidating subsequent proceedings if the election were held on an employer's petition. Henry L. Peirone, et al., d.b.a. Alloy Manufacturing Co., 107 N.L.R.B. No. 257 (Feb. 19, 1954).

32. This was the view of Robert Volger, Officer in Charge, 35th Sub-Region, National Labor Relations Board expressed in a communication to INDIANA LAW JOURNAL, Oct. 25, 1954.

33. One writer indicates that: "With the stipulation, the Board rather than the regional director rules on objections and challenges. Generally the same ruling would be obtained from either source; there are some lawyers, however, who feel that in the past regional directors have been more prone to find company interference than the Board would have with the same facts." Tower, *A Guide to NLRB Election Procedure*, 25 PERSONNEL 55, 56 (1948).

In describing the stipulation consent election an NLRB official indicated: "Where the parties agree to a [stipulation agreement] they are foregoing a formal hearing prior to the election and are securing a . . . quick election, but . . . they receive complete and full process of law . . . by the Board whether there is a formal hearing or not." Robert Volger, Officer in Charge, 35th Sub-Region, National Labor Relations Board. (Communication to INDIANA LAW JOURNAL, Oct. 25, 1954).

34. 18 NLRB ANN. REP. 2 (1953).

Where the parties fail to agree on the voting unit, the Board is given power to determine it for bargaining purposes.[35] Similarity of interests among the employees is of utmost importance in establishing these units. Those employees with the same hours, wages, and conditions of employment are grouped together for their mutual benefit.[36] Since wishes of the employees are important in the establishing of units, the Board may in its discretion delegate to the employees this determination.[37] Thus, when the factors involved in unit determination are in balance the Board will place each unit on the ballot. If union "A" desires a plant wide unit and union "B" smaller craft units, the employees of the craft will be given an opportunity to express their preference.[38]

The individual employee must be given a voice in the selection of the representative, and it becomes imperative that voter eligibility be determined in a fair and reasonable manner. The franchise is limited to those employed in the unit as indicated by the payroll period immediately preceding the date of the election order. This includes employees who are not working during the period due to illness, vacation, or temporary lay off.[39] It also includes employees on leave in the United States military service who appear in person at the polls.[40] After the eligibility period and before the date of the election, employees who are permanently transferred out of the voting unit lose their vote, yet any employees who are transferred into the unit do not gain the right to vote.[41] Employees who have either quit or have been discharged for cause and who have not been

35. Section 9(b) gives the Board power to determine the unit for election and bargaining purposes.

36. Engineering Research Associates, Inc., 77 N.L.R.B. 207 (1948).

37. "The Board's determination, [of the unit] based upon the expression of the employees' . . . preference, cannot be said to be improper and invalid." NLRB v. Underwood Machinery Co., 179 F.2d 118, 121 (1st Cir. 1949); *cf.* NLRB v. Local 404, 205 F.2d 99, 103 (1st Cir. 1953).

These are called self determination or "Globe" elections and were originally allowed for in Globe Machine & Stamping Co., 3 N.L.R.B. 294 (1937).

38. A self determination election is usually held when one union seeks an industrial unit that includes certain craft employees. The craft ballots are segregated to determine if they want separate representation or inclusion in the larger unit. See Wheland Co., 96 N.L.R.B. 662, 664 (1951); J. I. Case Co., 87 N.L.R.B. 692, 696 (1949).

Craft units in a highly integrated production process have the right to separate representation even though the pattern of bargaining has been industrial. American Potash & Chemical Corp., 107 N.L.R.B. No. 290 (Mar. 1, 1954). This could result in loss of efficient production due to the number of smaller bargaining units in which disputes could arise.

Even in cases where the group of employees did not constitute an appropriate unit and had not been represented they are given an opportunity to express a preference. Zia Co., 108 N.L.R.B. No. 140 (May 27, 1954).

39. Whiting Corp., 99 N.L.R.B. 117 (1952).

40. Atlantic Refining Co., 106 N.L.R.B. No. 226 (Oct. 20, 1953).

41. The Board has established a procedure for voter eligibility, and therefore denies a vote to any employee who becomes a member of the unit after the date of eligibility. 9 NLRB ANN. REP. 29 (1944).

reinstated prior to the date of the election are not eligible to vote.[42] The NLRB has also ruled that when the employment turnover of a specific category of employees is so great as to indicate lack of interest, these workers are not to be included in the voting unit.[43] The Board has established these standards to give voice to the greatest number of employees with as little administrative action as possible.

It is specifically provided by the Act that an employee on strike and not entitled to reinstatement is barred from voting.[44] This section of the Statute has been criticized as a weapon for union busting. Under the Act an individual who participates in a strike continues to be an employee.[45] However, a distinction is drawn between economic strikers, who if permanently replaced are not entitled to reinstatement,[46] and unfair labor practices strikers. An economic striker is one who strikes due to failure of negotiations and not because of unfair labor practices committed by the employer. Thus it appears that an employer could permanently replace economic strikers, seek an election, and attempt to vote out a union. This is justified only when there is an unwarranted economic strike. It would appear that since the Act gives an employee a right to strike, it should not upon the exercise of that privilege, deprive him of a right to vote.[47]

Frequently, a second union may seek to get on the ballot. The Board has relaxed the requirements for participation of the intervenor,

---

42. *Ibid.*

43. In one case since the turnover of employees was 25% every thirty days and few workers remained employed for more than three months the Board ruled that there was not sufficient interest to include these employees as voters. Borden Co. (Dixie Dairies Division), 102 N.L.R.B. 460 (1953).

44. Section 9(c)(3) of the Act states: "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

45. Included in the definition of "employee" in section 2(3) is ". . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . ."

46. An economic striker is entitled to reinstatement upon unconditional application unless they have been permanently replaced by the employer. NLRB v. Mackey Radio & Telegraph Co., 304 U.S. 333 (1938).

47. The Board has stated: "Employees who engage in an economic strike retain their status as employees during the course of the strike, absent some affirmative action which severs that relationship. This severance may be accomplished by act of the employee himself, by securing permanent employment in another job, or may be accomplished by the employer through lawful discharge. . . . If this status as an employee . . . has not been ended . . . by the date of the election, the individual is entitled to cast a ballot. . . ." Union Manufacturing Co., 101 N. L. R. B. 1028, 1029 (1952). See also 18 NLRB ANN. REP. 25 (1953); Harris, *The Taft-Hartley Act: Amendments Suggested by the C.I.O.*, 23 TENN. L. REV. 126 (1954); Petro, *On Amending the Taft-Hartley Act*, 4 LABOR L.J. 67 (1953).

which need only show a recent contractual interest.[48] The intervenor lacking such an interest is not required to exhibit the full thirty percent employee support asked of the original petitioner unless it seeks to represent a different unit from the one prescribed in the petition.[49] As an administrative practice the Board has required at least a ten percent showing of employee support by the intervening union in Board ordered elections where no contractual interest is found. A lesser interest may suffice in consent elections if the intervenor accepts all terms.[50]

The amount of employee interest in a union is an administrative determination. Thus when the Board has decided to hold an election it is only just to allow another union with a reasonable interest a place on the ballot. The employees are thus allowed a wider choice at the expense of only one election. It may be difficult for more than one union to receive thirty percent support due to employee indifference to unions, and it appears unwise to exclude an intervenor because of this failing. However, the procedure could lead to abuse and the Board should not allow a union a "free ride."

Pre-election Activity

Once the election has been ordered the parties will begin their campaign. The Board does not attempt a physical surveillance of this pre-election activity, but it does through its decisions indirectly police election conduct by establishing standards of allowable electioneering. There is a definite pattern in the NLRB's decisions invalidating elections. Broadly stated any deprivation of an employees' freedom of selection will serve to nullify an election and free choice is ruled impaired through that conduct which amounts to coercion.

Implied threats by the employer of loss of employment or of certain disadvantages should the union be victorious are coercive and will invalidate an election.[51] Statements of opinion depicting what might result from unionization are privileged so long as there is no indication the

48. See Krueger Sentry Gauge Co., 98 N.L.R.B. 420 (1952); Bethlehem Steel Co., 97 N.L.R.B. 1072 (1952). A recent contractual interest means that the intervenor has had a contract with the employer which has recently terminated.

49. "[A] labor organization seeking to intervene for the purpose of severing a craft unit from an existing industrial unit or intervening for a smaller unit in a representation case involving a larger unit, should make the substantial showing of interest which is required of petitioners." Seaboard Machinery Corp., 98 N.L.R.B. 537, 538 n.4 (1952).

50. 17 NLRB ANN. REP. 31 n.19 (1952). The Board did not specify what would be considered an adequate interest showing in this situation.

51. The employees were threatened that the union would close the plant if it was not victorious, Caroline Poultry Farms, Inc., 104 N.L.R.B. 255 (1953). Threats by a supervisor to lay off employees invalidated the election. Worthington Corp., 106 N.L.R.B. No. 133 (Aug. 19, 1953). Threats of loss of Christmas bonus invalidated the election. Kent Plastic Corp., 107 N.L.R.B. No. 51 (Nov. 24, 1953).

employer will use his economic powers to make such prophecies come true.[52] Such a distinction is necessary to enable an employer to remind employees of past union practices.

Coercion has been found where a benefit is granted or promised just prior to an election, not pursuant to a predetermined schedule, and where the relationship between the election and the benfits was not merely a coincidence.[53] Such conduct tends to mislead employees with thoughts of benefits making them unmindful of other aspects of the election. However, the Board has held that the type of benefit-promise proscribed by the Act does not include an announcement of the possibility that at some indeterminate date the employer might arrive at a new wage earning plan.[54] Further, when a union has openly challenged an employer to give a wage increase, and he does so, the union has no grounds for complaint.[55] The Board has declared that union promises of wage increases fall within the allowable limits of pre-election propaganda.[56] The union itself cannot grant wage increases so its promises may be interpreted as merely a promise to strive for these benefits if selected by the employees.

Threats of bodily harm and individual economic reprisal are clearly coercive tactics.[57] The mere fact that certain groups of employees may be considered as sophisticated and accustomed to certain practices does

52. An employer wrote a letter to the employees depicting the previous conditions of employment under the union. It was held to be permissible pre-election opinion. Morganton Full Fashioned Hosiery Co., 107 N.L.R.B. No. 312 (Mar. 11, 1954). *But cf.* Moksnes Mfg. Co., 106 N.L.R.B. No. 204 (Sept. 30, 1953). An employer's expressed preference of competing unions unaccompanied by coercive statements or conduct does not constitute interference. Heintz Mfg. Co., 103 N.L.R.B. 768 (1953).

An employer is permitted to state his opinion as to his legal position. Esquire Inc., 107 N.L.R.B. No. 260 (Feb. 23, 1954). The employer indicated to the workers his belief that an incorrect unit determination had been made and his only redress was to refuse to bargain. The employer indicated that a number of years would be required for the court to review the Board's order to bargain. The Board viewed this as a statement of the employer's legal position.

53. Knickerbocker Mfg. Co., 107 N.L.R.B. No. 111 (Dec. 23, 1953). Here the announcement of application to WSB for increased wages was ruled enough to invalidate the election. See also Union Sulphur & Oil Corp., 106 N.L.R.B. No. 75 (July 24, 1953); United Screw & Bolt Corp., 91 N.L.R.B. 916 (1950).

54. The vagueness of the announcement eliminates an interpretation of benefit. American Laundry Machinery Co., 107 N.L.R.B. No. 114 (Dec. 23, 1953). Benefits which had previously been announced before the direction of an election will not invalidate the election when re-announced just prior to it. Baird-Ward Printing Co., Inc., 108 N.L.R.B. No. 114 (May 7, 1954).

55. Gong Bell Mfg. Co., 108 N.L.R.B. No. 181 (June 11, 1954).

56. Shirlington Supermarket, Inc., 106 N.L.R.B. No. 109 (Aug. 7, 1953).

57. The Board found all of the events of the campaign were intended to intimidate employees by threats of bodily harm in Bloomingdale Brothers, Inc., 87 N.L.R.B. 1326 (1949). A statement by a union official to a woman employee just before the election to the effect that: "If you don't vote for the Union the girls will refuse to work with you," was ruled to imply a threat of economic reprisal. G. H. Hess, Inc., 82 N.L.R.B. 463, 465 (1949).

not neutralize a campaign characterized by threats of bodily harm.[58] This type of campaign is so inherently coercive that the Board will not even consider whether or not it was effective.[59]

Under certain circumstances the mere speaking of words which would not otherwise amount to an unfair labor practice by employers and labor organizations will result in NLRB invalidation of elections. The Labor Management Relations Act makes it an unfair labor practice for an employer to make a speech containing a ". . . threat of reprisal or force or promise of benefit."[60] In *General Shoe Corporation*[61] although the Board found the language used by the employer not an unfair labor practice, it set aside the election declaring that ". . . conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election. . . ."[62]

Generally, an employer who speaks on company time and premises does not have to afford the union equal speaking time.[63] Only the em-

58. Stern Brothers, 87 N.L.R.B. 16 (1949); *accord,* Bloomingdale Brothers, Inc., 87 N.L.R.B. 1326 (1949).

59. Efforts by the employer to reassure employees of a free election will have no effect on campaigns of sustained coercion. When a campaign becomes so coercive that its effects upon the parties will not even be considered it is inherently coercive. Bloomingdale Brothers, Inc., 87 N.L.R.B. 1326 (1949).

Such conduct should be compared with the continual interrogation of an individual for a period of thirty-six hours by police officials which was involved in a Tennessee case. The Court there said: "We think a situation such as that . . . is so *inherently coercive that its very existence is irreconcilable with the possession of mental freedom.* . . ." Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944). (emphasis added).

60. Section 8(c) states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subsection, if such expression contains no threat of reprisal or force or promise of benefit."

61. 77 N.L.R.B. 124 (1948).

62. *Id.* at 126. The Board added that: "In 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. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When . . . the standard drops too low . . . the requisite laboratory conditions are not present and the experiment must be conducted over again." *Id.* at 127. In this case the employer spoke to groups of employees in the company president's office.

63. Livingston Shirt Corp., 107 N.L.R.B. No. 109 (Dec. 17, 1953). This case has overruled a long line of cases which attempted to reinstate the captive audience doctrine that was repudiated by Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948).

In Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951) the employer, a department store, had a broad no-solicitation rule which prohibited solicitation of workers both during working and nonworking hours. Since the employer made a speech to employees on company time and premises without granting the union's request for an equal opportunity, the election was invalidated. This decision was expanded so that even in the absence of a no-solicitation rule, if an employer spoke on company time and premises the election would be set aside. Biltmore Mfg. Co., 97 N.L.R.B. 905 (1951); Bernardin Bottle Cap Company, 97 N.L.R.B. 1559 (1952); Belknap Hardware & Manufacturing Co., 98 N.L.R.B. 484 (1952); Foreman & Clark, Inc., 101 N.L.R.B. 40 (1952).

ployer who prohibits union solicitation at all times on company premises must grant the union spokesmen an equal opportunity to express their views.[64] It thus appears necessary to allow unions in some way an equal opportunity with employers to disseminate election material. This Board decision assures the employees a chance to hear both sides of the controversy enabling them to make an enlightened choice.

Since last minute talks by either employer or union on company time tend to interfere with free choice, the Board prohibits all speeches to captive audiences given twenty-four hours prior to an election.[65] This rule has been criticized as not serving to restrain the union's activities since the site of the union's last minute speeches would rarely be the employer's premises during company time. The employer, on the other hand, is effectively limited since he would not customarily communicate with employees away from the plant.[66] This contention has some merit but the rule is desirable since it tends to foster the much desired election atmosphere. The employees are election conscious, and the free choice election can be more easily achieved if they are not confronted with partisan declarations immediately prior to an election in the confines of the company premises and on company time.

Formerly, employer's conduct in calling employees into his office individually and delivering an anti-union speech would result in summary invalidation of an election if the management were successful in defeating

---

The court ruling on the Board's decision in Bonwit Teller declared it was too broadly drawn. Bonwit Teller, Inc. v. NLRB 197 F.2d 640 (2d Cir. 1952). But subsequently the Board ignored the Court's decision and declared this type employer speech an unfair labor practice in Metropolitan Auto Parts, Inc., 102 N.L.R.B. 1634 (1953). From the line of cases that evolved from the Board's *Bonwit Teller* decision, a doctrine much divorced from the original rule came into effect and has now been repudiated by the Board.

64. "We rule therefore that, in the absence of either an unlawful broad no-solicitation rule (prohibiting union to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business), an employer does not commit an unfair labor practice if he makes a pre-election speech on company time and premises to his employees and denies the union's request for an opportunity to reply." Livingston Shirt Corp., 107 N.L.R.B. No. 109 (Dec. 17, 1953).

An employer should not be allowed completely to prohibit unions from its premises and still engage in speech activities during working hours. However, the employer should be under no duty to provide working time speech opportunities to a union so long as the union is allowed to communicate with employees during the nonworking hours on company premises.

65. Peerless Plywood Co., 107 N.L.R.B. No. 106 (Dec. 17, 1953).

66. See Rose, *Is the NLRB Tampering With Freedom of Speech?*, 15 U. OF PITT. L. REV. 462 (1954). See also Texas City Chemicals, Inc., 109 N.L.R.B. No. 13 (July 9, 1954).

The twenty-four hour rule was held not limited to working days. Sylvania Electric Products, Inc., 108 N.L.R.B. No. 182 (June 10, 1954); General Motors Corp., 108 N.L.R.B. No. 165 (June 7, 1954). An informal meeting does not come under the rule. National Petro-Chemicals Corp., 107 N.L.R.B. No. 330 (Mar. 16, 1954).

the union.[67] The wrong was in the method rather than the remark. Presently, this employer conduct is viewed in respect to the atmosphere in which the interrogation occurred. Questioning of employees as to union affiliation or union activities no longer automatically invalidates an election for if such interrogation does not effect free choice, it is permissible.[68] The impact on employee choice can best be determined by an intelligent appraisal of all the events, and a consideration of the surrounding circumstances may actually establish the coercive character of seemingly unobjectionable conduct. This recently adopted procedure in interrogation cases[69] would seem an improvement over the former rule since it is wiser to look to the totality of the conduct to determine its ultimate effect.[70]

False propaganda has been held allowable by the NLRB so long as it can be recognized as propaganda.[71] It is when such propaganda results in coercion or confusion that the harm results. If the employee, as any

67. Lakeshore Motors, Inc., 101 N.L.R.B. 89 (1952); General Shoe Corporation, 97 N.L.R.B. 499 (1951).

68. One court has indicated that: ". . . the time, the place, the personnel involved, the information sought, and the employer's conceded preference, all must be considered in determining whether or not the actual or likely effect of the interrogations upon the employees constitutes interference, restraint or coercion." NLRB v. Syracuse Color Press, Inc., 209 F.2d 596, 599 (2d Cir. 1954), *cert. denied,* 347 U.S. 966 (1954).

The Board has declared ". . . the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the act." Blue Flash Express, Inc., 109 N.L.R.B. No. 85 (July 30, 1954).

69. NLRB v. Syracuse Color Press, Inc., *supra* note 68; Blue Flash Express, Inc., *supra* note 68.

70. One court appears to havc considered the totality of conduct where it states, ". . . the Board itself has established the principle that an election can serve its true purposes only if the surrounding conditions enable employees to register a free . . . choice . . . and . . . when a record reveals conduct so glaring that it is almost certain to have impaired employees' freedom of choice, the election should be set aside." NLRB v. Trinity Steel Co., 214 F.2d 120, 123 (5th Cir. 1954).

In this case the employer had informed employees of a request for a wage increase. The union erroneously denied that the employer had made such request. The NLRB would not set aside the election because it considered that the employer had ample opportunity to reply to union claims. Since the employer had not learned of the misrepresentation until after the election, the court ruled that the Board had erred. It was necessary to look to the chain of events leading up to the misrepresentation of the union and consider all factors relating to the employer's announcement of wage increases. See also Kearney & Trecker Corp. v. NLRB, 210 F.2d 852, 859 (7th Cir. 1954); Liberal Market, Inc., 108 N.L.R.B. No. 220 (June 25, 1954). The Board found in one case that two letters sent to employees by the employer when viewed together would invalidate the election even though when viewed separately they would not constitute interference. Boston Mutual Life Insurance Co., 110 N.L.R.B. No. 36 (Oct. 7, 1954).

71. International Smelting & Refining Co., 107 N.L.R.B. No. 16 (Nov. 10, 1953); Unity Manufacturing Co., 107 N.L.R.B. No. 10 (Nov. 10, 1953); Radio Corp. of America (RCA-Victor Division), 106 N.L.R.B. No. 251 (Nov. 2, 1953); Merck & Company, Inc., 104 N.L.R.B. 891 (1953). False statements which could not be recognized as propaganda will not invalidate an election if they are too remote in time from the election. Krambo Food Stores, Inc., 101 N.L.R.B. 742 (1952).

reasonable employee,[72] is unable to recognize something as propaganda and is thus unable to evaluate it, he may be confused and hindered in making his choice. In this connection, sample ballots used for electioneering and bearing the name of the Board's official representative will invalidate an election.[73] It is the Board's policy to void an election where employees may have been misled by an implication of governmental endorsement of any one choice.[74]

The Board has declared that it will not, in the absence of violence, censor pre-election campaign propaganda, but it will set aside an election if the conduct is coercive and so timed as to effect the voting.[75] In one case the management assisted a group of employees who had written an anti-union letter by allowing them the use of his mailing facilities to send the letter to the other workers. The employer had edited the letter which was signed by one of the employees. Since the employer had concealed his part in the operation he created the misleading impression that this was a spontaneous employee response while actually it was a company anti-union campaign. The election was set aside because the coercive conduct ". . . misrepresented to the employees the source of this anti-union propaganda, thereby infringing their right to a fair opportunity to evaluate it."[76]

The NLRB election notice provides for a no-electioneering area to further the attainment of free employee choice. Distribution of handbills outside the area during an election will not result in it being set aside.[77] But when a union passed out handbills in the area, was asked to move but remained, the election was invalidated.[78]

---

72. "An evenhanded application of an objective test is the best protection against arbitrary administrative action." Liberal Market, Inc., 108 N.L.R.B. No. 220 (June 25, 1954).

73. L. Gordon & Son, Inc., 100 N.L.R.B. 438 (1952); Gray Drug Stores, Inc., 95 N.L.R.B. 171 (1951).

74. "No participant in a Board election should be permitted to suggest to the voters that this Government agency, or any of its officials, endorses a particular choice. That was the plain implication of including the Director's name and title directly under a recommendation as to how voters should vote." The Am-O-Krome Company, 92 N.L.R.B. 893, 894 (1950).

75. Maywood Hosiery Mills, Inc., 64 N.L.R.B. 146 (1945).

76. The Timken-Detroit Axle Co., 98 N.L.R.B. 790, 792 (1952). See Stewart-Warner Corporation, 102 N.L.R.B. 1153 (1953).

77. Union Carbide & Carbon Corp., 94 N.L.R.B. 640 (1951).

78. Southwestern Electric Service Co. v. NLRB, 194 F.2d 939 (5th Cir. 1952); Continental Can Co., 80 N.L.R.B. 785 (1948). There is no rule against electioneering prior to the time of the election. South Bend White Swan Laundry, Inc., 106 N.L.R.B. No. 217 (Oct. 12, 1953); Emerson Electric Co., 106 N.L.R.B. No. 28 (July 14, 1953). Mere presence of a union official near the voting area will not invalidate an election. Darling Retail Shops Corp., 102 N.L.R.B. 464 (1953). Actions by strangers to the election will not invalidate an election unless there is evidence that the parties ascribed to the conduct. Clarke Mills, 109 N.L.R.B. No. 103 (Aug. 3, 1954); Poinsett Lumber & Mfg. Co., 107

When a sound truck is used during an election two factors are critical: whether the broadcast is electioneering[79] and the immediacy of the broadcaster's voice to the voters.[80] When the broadcast of electioneering material can be heard in the voting area the employee may be distracted during the voting and hindered in selecting a representative. This use of a sound truck may be held a violation of the twenty-four hour restriction if the electioneering reaches the employees at the employer's plant on company time within the twenty-four hour period.[81]

In certain cases the Board should be allowed discretion to invalidate an election in which the actions of the parties indicate lack of responsibility. Conduct that is so reprehensible that it manifests an unworthiness of those parties involved to represent employees must not be allowed during the election campaign. Reproof of these activities amounts to a policing of campaigns since other parties profit by mistakes invalidating elections. In one election a false telegram which tended to discredit a rival union and which bore the forged signature of the president of that union was distributed to the employees. The real ground for the Board's invalidation of the election seems to have been a recognition that such conduct would detract from the dignity of the election process.[82]

Conduct of Elections

The Board takes every precaution to create the proper election atmosphere. A few days prior to the election a notice is prominently displayed informing the employees of the election and their voting rights.[83] An

N.L.R.B. No. 64 (Nov. 27, 1953); Diamond State Poultry Co., 107 N.L.R.B. No. 19 (Nov. 9, 1953).

79. Southern Fruit Distributors, Inc., 104 N.L.R.B. 261 (1953). In this case the union had announced by loudspeaker that it would return on Monday following the election to solicit membership and that all were invited to come over to the sound truck and await the final election returns. The Board declared that such an announcement does not constitute electioneering. *Id.* at 262. Use of sound truck for mere announcements or playing of music is not electioneering.

80. When a union broadcasts electioneering material during the voting hours from a sound truck the actual distance of the sound truck from the voters is immaterial. Higgins, Inc., 106 N.L.R.B. No. 145 (Aug. 21, 1953); Alliance Ware, Inc., 92 N.L.R.B. 55 (1950).

81. Recently the Board refused to set aside an election in which a sound truck was used within the twenty-four hour restricted time because the employees were subjected to the electioneering as they left the plant and were thus not on company time. Repcal Brass Mfg. Co., 110 N.L.R.B. No. 24 (Oct. 4, 1954); Underwood Corp., 108 N.L.R.B. No. 199 (June 18, 1954).

82. United Aircraft Corp., 103 N.L.R.B. 102 (1953). The Board appeared to place the decision on the existence of deliberate deception as to the telegram's source thus hindering the employee's evaluation of it as propaganda. Actually the Board went beyond that in applying its corrective authority. *Id.* at 105.

83. The election notice informs an employee of his right to choose a representative as well as his right to refrain from such activities. It outlines the purpose of the election and that it will be conducted by a secret ballot. The notice also outlines the voting

employee cannot make a free choice unless he is adequately appraised of the alternatives and his rights.

The voters and election observers must be made to realize the seriousness of the election,[84] the outcome of which will affect each employee in his daily work and living habits. Instructions are given each election observer which specify certain duties and tend to impress upon him a sense of responsibility in assisting to conduct an impartial election where each eligible voter can freely make his selection in secret.[85] Because an employee can be greatly influenced by an observer's conduct, each organization[86] should make a conscious effort to appoint observers whose qualifications are above reproach.

Election agents are representatives of the NLRB.[87] It is their duty to conduct fair elections, eliminate confusion at the voting booths, and establish conditions for secret balloting. The agent supervises the observers who assist him in all phases of the election. The agent and the observer together check the eligibility of each voter. If there are no irregularities in identification, the agent gives the voter a ballot[88] and assigns him to a booth. If a voter's eligibility is challenged, his vote is put in a separate sealed envelope which is then placed within a large envelope on which is written information relative to the challenge. This is deposited in the ballot box. The challenged ballot will be passed on only if it becomes necessary in order to determine the results of the election.

---

procedure and displays a copy of the official ballot. See National Labor Relations Board Notice of Election, Form No. NLRB 707 (5-51).

84. "[T]he basic problem is to hold the election observers and voters to the business of the moment. . . ." Robert Volger, Officer in Charge, 35th Sub-Region, National Labor Relations Board in a Communication to INDIANA LAW JOURNAL, October 4, 1954.

85. The Board distributes instructions to the observers which specify their duties in detail. See National Labor Relations Board Instructions to Election Obesrvers, Form No. NLRB 722 (4-27-48) for these instructions.

86. "An employer does not have an absolute right to appoint observers in a Board conducted election. Board Rules permit parties to be represented at an election by observers of their own selection, but subject to such limitations as the Regional Director may prescribe. It is established Board policy that supervisors may not act as observers for an employer." Burrows & Sanborn, Inc., 84 N.L.R.B. 304, 305 (1949).

87. "Our elections are conducted by Field Examiners who are regular full time employees of the various Regional offices. (In rare instances, such as particularly large elections, temporary employees are occasionally hired to assist the regular regional office staff.) . . . The NLRB Manual, available only for agency use, is a guide to field personnel in elections as well as other procedural aspects of the agencies' work. The individual Board Agent is guided by this manual, the statute, and by decisional principles. These rules are basically the same regardless of the type of industry and/or union." Robert Volger, Officer in Charge, 35th Sub-Region, National Labor Relations Board. (Communication to INDIANA LAW JOURNAL. October 4, 1954).

88. The ballot used is a standard form and supplied by the Board. When only one union seeks recognition, the ballot contains a place for an affirmative or negative vote. If there is more than one union, the choice is one of the unions or no union. See 1 CCH LAB. LAW REP. ¶¶ 1210, 1211, 2725.80 (1954).

If the challenged vote is valid it is taken from the large envelope and commingled with other ballots so as to maintain the secrecy of the vote.[89]

If the agent must give assistance to a voter, it should be done in the presence of an observer from each party. The agent also has the duty of ascertaining that the ballot boxes are empty prior to voting and of sealing them in the presence of the observers after completion of voting. It is important that the agent be highly skilled in his dealings with the voters, for he too is instrumental in achieving proper election conditions.[90]

As in all secret elections, it is necessary to establish some standard for ruling on mutilated ballots. Though previously an erasure automatically mutilated the ballot,[91] now so long as the intention of the voter can be determined with reasonable certainty, such a ballot will not be voided.[92] Every ballot with a reasonably clear indication of the voter's intent should be counted to determine the true wishes of the employees.

The elections are based on majority rule. The majority rule requirement has undergone three distinct phases.[93] Presently, to have a conclusive election there must be a designation by a majority of the employees who participated in the election. At the same time, the voters must constitute a substantial number of all eligible employees although they may be less than a majority.[94] The question then becomes: What is a substantial number of eligible voters? The basic test is that the number of voters must be representative of those eligible.[95] One factor in determining the representative character of an election is the ratio of the total vote cast to the eligible employees. Emphasis should also be placed on whether or not the employees had adequate notice of the election and an opportunity to participate.[96] The presumption is that employees

89. It would seem that the ballot would not be secret if only one voter was challenged and his vote was necessary to break the tie vote. However, in all other instances the secrecy of the ballot would be maintained.

Any challenge to voter eligibility must occur prior to the time the ballot is deposited in the ballot box. This maintains the secret ballot for otherwise undue attacks on voter eligibility may be attempted. NLRB v. A. J. Tower Co., 329 U.S. 324 (1946).

90. For a full discussion see National Labor Relations Board Instructions to Election Agents, Form No. NLRB 721 (5-1-45).

91. Whitinsville Spinning Ring Co., 97 N.L.R.B. 801 (1951).

92. NLRB v. Whitinsville Spinning Ring Co., 199 F.2d 585 (1st Cir. 1952); Crowell Carton Co., 106 N.L.R.B. No. 103 (Sept. 29, 1953); Denver & Ephrata Telephone & Telegraph Co., 106 N.L.R.B. No. 182 (Sept. 17, 1953).

93. The statute was originally interpreted to mean designation by a majority of eligible voters. A minority not voting could defeat the election. Chrysler Corp., 1 N.L.R.B. 164 (1936). Later a majority of eligible voters had to participate with a majority of these voters desiring representation. Associated Press, 1 N.L.R.B. 686 (1936). The present rule is discussed in the text.

94. R.C.A. Mfg. Co., 2 N.L.R.B. 159 (1936).

95. NLRB v. Central Dispensary & Emergency Hospital, 145 F.2d 852 (D.C. Cir. 1944), *cert. denied* 324 U.S. 847 (1945).

96. *Ibid.*

who did not vote have acquiesced in the choice designated by the voting majority.[97] It would seem unreasonable to declare that the process of collective bargaining should be delayed simply because a majority of eligible voters neglected to vote.[98] The purpose of the election—to select a bargaining representative through peaceful means—would have been attained and should bind all fully apprised of their rights.

The automatic[99] run-off election is necessary when no one selection receives a majority of the votes.[100] The ballot in a run-off election includes the two choices receiving the highest number of votes.[101] In any labor election the voters must determine if they desire representation, and if so, by whom.[102] When there are three choices on the ballot (union A, union B, and no-union) a question arises as to whether the no-union selection should be allowed on the run-off ballot if it receives less votes than union A, more than union B, but less than the combined total of the two unions? This has been answered affirmatively.[103] It might be argued that this method gives an advantage to the non-union minority at the expense of the divided majority who voted for a representative. However, the Board's solution gives ample opportunity for voters to choose between union organization or no-union.

The NLRB has established specific rules and regulations for voter eligibility in run-off elections.[104] Only employees eligible in the original election and still employed in the unit at the date of the run-off election are eligible to vote.[105] The NLRB deviates from this rule only when there is a substantial increase in employment in the original unit. A new eligibility list will then be established.[106]

---

97. NLRB v. Standard Lime & Stone Co., 149 F.2d 435 (4th Cir. 1945).

98. *Ibid.*

99. The automatic run-off election is provided for in Section 9(c)(3) which states: "In an election where none of the choices on the ballot receives a majority, a run-off shall be conducted. . . ." See 29 CODE FED. REGS. § 102.62 (Cum. Supp. 1954).

100. "[A run-off] election eliminates the possibility that an insignificant minority of employees, which happen to hold the balance between two or more competing organizations, can indefinitely forestall the selection of a collective bargaining agent." Coos Bay Lumber Co., 16 N.L.R.B. 476, 478 (1939).

101. Section 9(c)(3) states: "[The run-off ballot provides] for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election."

102. MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 520 (1950).

103. See note 100 *supra;* W. Shanhouse Sons, Inc., 100 N.L.R.B. 604 (1952).

104. 29 CODE FED. REGS. § 102.62 (Cum. Supp. 1954).

105. *Ibid.* See Standard Coil Products Co., 101 N.L.R.B. 261 (1952). An employer discharged prior to the date of the run-off election is not eligible to vote in that election. Cone Mills Corp., 107 N.L.R.B. No. 159 (Jan. 14, 1954).

106. When there was a thirty-six percent increase in the unit, the eligibility list for the run-off election was revised in order not to disfranchise a substantial number of employees. United Aircraft Corp., 103 N.L.R.B. 878 (1953).

When there is considerable delay between the original election and the run-off so

When two unions equally divide the eligible votes the Board does not direct a run-off election.[107] Such an election would be futile since the vote would probably be the same unless a number of eligible employees had failed to vote. If the latter is the case a run-off election will be conducted.[108]

Once an election has resulted in a valid determination of the employee choice for representative the stage is set for collective bargaining since one union assumes the responsibility exclusively to represent the employees and the employer is under a duty to recognize that union. The proper atmosphere for the bargaining procedure is dependent upon the union being free from interference from others seeking representation for a definite period. Following statutory authority, the NLRB has long declared that a union certification becomes a one year bar to any representation determination in that voting unit.[109] This tends to achieve the requisite stability.[110]

The Board's function in conducting labor representative elections is to attain as nearly as possible free choice for employees. It can *directly* supervise the actual voting process through its agents and the election observers. The total campaign activity and conduct can only be supervised through the Board's decisions. To attempt otherwise would be an impossible task. The Board's program is calculated to produce an adequately informed and interested electorate which is the greatest assurance of an intelligent selection and ultimately of successful collective bargaining.

---

that substantial turnover of employees becomes inevitable, a new eligibility list is necessitated to assure a representative vote.

107. "In the event two or more choices receive the same number of ballots and another choice receives no ballots and there are no challenged ballots that would affect the results of the election, and if all eligible voters have cast valid ballots, there shall be no run-off election. . . ." 29 CODE FED. REGS. § 102.62(d) (Cum. Supp. 1954).

This situation would arise infrequently since it depends upon all eligible voters participating. This would only preclude an election until the parties had petitioned for another election and started the election machinery again.

108. *Ibid.*

109. Section 9(c)(3) states: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." See Ludlow Typograph Co., 108 N.L.R.B. No. 209 (June 25, 1954); Coastal Drydock & Repair Corp., 107 N.L.R.B. No. 194 (Jan. 29, 1954).

110. The Board has ruled that it will grant a union's request to withdraw from a run-off election only on the condition that no petition for a new election be filed for one year. See United States Steel Corp., 106 N.L.R.B. No. 213 (Oct. 9, 1953). This is certainly a reasonable limitation, and it tends to enforce the integrity of the election process.