

The Vote and Impound Procedure: Not Always a Guardian of Employee Free Choice

INTRODUCTION

In 1975 the Chairman's Task Force¹ on the National Labor Relations Board² was established to evaluate and make recommendations regarding the Board's case handling practices and procedures.³ A major concern of the Task Force was the problem of delay in representation elections.⁴ One of the primary causes of delay was the Board's practice of postponing an election pending review of a pre-election ruling of a regional director.⁵ To prevent delay the Task Force recommended holding the election at its scheduled date, concluding that pending issues should be resolved after the election has been held. The Task Force stated that the ballots cast in the election should be impounded and later counted, after the Board has resolved the issues.⁶

In 1977 a unanimous Board adopted this recommendation,⁷ and the impoundment procedure is now contained in section 102.67(b) of the Board's Rules and Regulations.⁸ The relevant portion of 102.67(b) states that when a review of a regional director's decision is made, the request:

1. The Chairman's Task Force on the National Labor Relations Board [hereinafter Task Force] was comprised of legal scholars and union and management representatives. The Task Force disbanded in 1977. *General Knit of Cal., Inc.*, 239 N.L.R.B. 619, 633 (1978).

2. The National Labor Relations Board [hereinafter Board] is an administrative agency created by the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1986).

3. *General Knit*, 239 N.L.R.B. at 633-34.

4. Interim Report and Recommendations of the Chairman's Task Force on the N.L.R.B. for 1976 6-7 (1976) (unpublished report) [hereinafter Task Force Report].

5. *Id.* at 11. Each of the Board's regional offices is headed by a regional director. One of the primary functions of a regional office is to conduct representational campaigns. J. FEERICK, H. BAER & J. ARFA N.L.R.B. REPRESENTATION ELECTIONS—LAW PRACTICE AND PROCEDURE ¶ 2.2.4 (1979). Once an election petition is filed, a regional director will determine whether a question of representation exists, what the appropriate bargaining unit is, and other election issues. 29 C.F.R. § 102.67(a) (1986).

When the parties agree on the principal issues of the election, two types of consent agreements are reached. In an agreement for a consent election, all rulings and determinations made by the regional director are final; while in a stipulation for consent agreement, the ruling and determinations are subject to review by the Board. J. FEERICK, H. BAER & J. ARFA, *supra*, at ¶ 7.2.6. When no consent agreement can be reached, a hearing will be held before a Board hearing officer. *Id.* at ¶ 7.3. The hearing officer's rulings on election issues are also subject to review by the Board. *Id.* Thus, in both a stipulation for consent agreement and when no consent agreement can be reached, both sides can seek Board review of a regional director's pre-election rulings.

6. Task Force Report, *supra* note 4, at 12.

7. NATIONAL LABOR RELATIONS YEARBOOK 325 (BNA) (1977).

8. 29 C.F.R. § 102.67(b) (1986).

shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the regional director: *Provided, however*, That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.⁹

The Task Force observed that the most troublesome problem of this vote and impound procedure would occur when a party requests a review of the regional director's bargaining unit determination.¹⁰

Two recent court of appeals cases, *Hamilton Test Systems, Inc. v. NLRB*¹¹ and *NLRB v. Lorimar Productions, Inc.*,¹² have concluded that the vote and impound procedure should not be used when the Board on review has the potential to determine after the election, that the appropriate bargaining unit should be significantly smaller than the one which voted in the election.¹³ Under present use of the vote and impound procedure, the Board after the election simply counts the impounded votes from those employees contained in the smaller unit.¹⁴ The courts of appeals in *Hamilton*¹⁵ and *Lorimar*¹⁶ proposed that a multiple-ballot election should be utilized when the Board on review can significantly reduce the size of the bargaining unit after the election.

Two groups of ballots are prepared in a multiple ballot election. The first group of ballots is prepared for the employees in the original unit, as determined by the regional director. The second group is prepared for the

9. *Id.* The impoundment procedure is hereinafter referred to as the vote and impound procedure.

10. Task Force Report, *supra* note 4, at 12. A bargaining unit is a group of employees who may properly be grouped for the purposes of voting in an NLRB election and for collective bargaining. It is the Board's duty to determine if the unit described in the election petition is appropriate for voting in the representation election and engaging in collective bargaining. It is well settled that the Board only has to certify an appropriate bargaining unit. The Board is not required to find the most appropriate unit. J. FEERICK, H. BAER & J. ARFA, *supra* note 5, at ¶ 8.

Despite this broad discretion given the board, the composition of the bargaining unit is one of the most hotly contested issues in the representation election process. *Id.* Employers and unions often contend that the appropriate bargaining unit as determined by the regional director is not an appropriate unit at all. The basic guideline for determining whether a bargaining unit is appropriate is whether the employees share a community of interests. See *infra* notes 86-91 and accompanying text for a discussion of the community of interests doctrine. The argument is often made that the original unit contains some employees who do not share a community of interests with the others. See generally *infra* notes 92-104, and accompanying text.

11. 743 F.2d 136 (2d Cir. 1984).

12. 771 F.2d 1294 (9th Cir. 1985).

13. See *infra* notes 25-40 and accompanying text for a discussion of the facts of *Lorimar* and *Hamilton*.

14. See *infra* text accompanying notes 27-30, 34-36.

15. *Hamilton*, 743 F.2d at 141.

16. *Lorimar*, 771 F.2d at 1301-02.

employees in the smaller unit which is requested on review by one of the parties. Consequently, the employees in the smaller unit will vote twice because they are in both units. When the Board determines on review which unit is appropriate, the relevant group of ballots is opened and counted.

This Note will argue that the multiple-ballot election proposed in *Lorimar* and *Hamilton* is appropriate and justified. The use of the multiple-ballot procedure, when the size of the bargaining unit may be significantly *reduced*¹⁷ on review, is supported by the ideal of employee "free choice," Board precedent, and the Task Force's report. This Note will propose guidelines for implementing the multiple-ballot procedure that will not result in the delay which the vote and impound procedure was intended to prevent, and which will insure that the employees are informed of a potential reduction in the size of the bargaining unit.

I. FACTUAL BACKGROUND

A. *The Problem of Delay*

The concern with delay, which prompted the adoption of the vote and impound procedure, is well founded.¹⁸ Delay was a critical issue to the Task Force because the parties in an election prepare their campaigns in light of the election date and postponing an election produces a great deal of frustration.¹⁹ The Task Force believed that the vote and impound procedure would prevent delay and enable elections to be held when interest and momentum are at their peak.²⁰

The postponement of an election also has a potential adverse impact on a union's chances of victory.²¹ Many employers believe delay is a very effective tactic in preventing union victory, as stalling intentionally is "a widely accepted part of industrial relations folklore."²² A major statistical

17. See *infra* notes 139-44 and accompanying text for a discussion of why a multiple-ballot election cannot be used if the bargaining unit size has the potential to increase after the election. In this situation, the Board refuses to validate the election and always orders that a second election be held. *Id.*

18. The Task Force stated that, "[o]ne of the principal criticisms of the election process is the delay that frequently occurs in the holding of the election." Task Force Report, *supra* note 4, at 11.

19. *Id.*

20. *Id.* at 12.

21. Chiaravalli & Lardaro, *The Impact of Representation Case Hearings on Certification Election Outcomes*, 7 INDUS. REL. L.J. 232 (1985). The authors found that "[d]elay slows or halts the momentum of unions in certification elections, decreasing the probability of union victory." *Id.* at 241.

22. Roomkin & Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75, 76-77.

study reveals that a delay as short as ten days can have a significant impact on the outcome of an election.²³

Avoiding delay is a valid concern, and the Board adoption of the vote and impound procedure reflects this concern. Yet the goal of preventing delay does not preclude a multiple-ballot election in special circumstances because the multiple-ballot procedure will not delay an election.²⁴ Furthermore, the use of the vote and impound procedure when the bargaining unit can be significantly reduced on review conflicts with a basic tenet of labor law—employee “free choice.” Both the *Hamilton* and *Lorimar* decisions found that the use of the vote and impound procedure interferes with employee free choice when the size of the bargaining unit is substantially reduced after the election.

B. *The Facts of Hamilton and Lorimar*

An examination of the facts in *Hamilton*²⁵ and *Lorimar*²⁶ provides a useful overview of how the vote and impound procedure can interfere with employee free choice. In *Hamilton*, the regional director determined that the appropriate bargaining unit was a plant-wide unit of five groups of employees, fifteen field service representatives, ten technicians, two customer service representatives, three crib attendants and one truck driver.²⁷ The Board granted the union's request for review and a single-ballot election was held and the ballots were impounded.²⁸ Five months after the election the Board agreed with the union's contention that the appropriate unit consisted only of technicians, crib attendants and the truck driver. The Board found that this unit had a distinct community of interests from the rest of the unit.²⁹

23. *Id.* at 88. The study analyzed 45,115 elections conducted between July 1972 and September 1978. Forty-six percent of these elections resulted in union victories, which took approximately 1.9 months between the petition for election and the election. Employer victories took roughly 2.2 months between petition and election. The authors concluded that the ten day gap between union and employer victories “is significantly related to the outcome of representational elections.” *Id.*

The authors also found that 80% of all elections took place within two months after the election petition was filed and more than 90% occurred within three months. Thus, in more than 90% of all elections the ten-day period is equivalent to at least a 10% increase in the time between petition and election. The authors concluded that “[i]f this ten-day period is placed not in the context of the relatively time consuming adjudicatory process applicable to a decision in an unfair labor practice case, but in the context of the relatively short representation election process, ten days is a significant period of time.” *Id.*

24. See *infra* notes 129-52 and accompanying text for a discussion of how a multiple-ballot procedure can be used without delaying an election.

25. *Hamilton Test Sys., Inc. v. NLRB*, 743 F.2d 136 (2d Cir. 1984).

26. *NLRB v. Lorimar Prods., Inc.*, 771 F.2d 1294 (9th Cir. 1985).

27. *Hamilton*, 743 F.2d at 138.

28. The Board also rejected the employer's request for review. The employer had contended that the only appropriate unit was all four of its facilities in the state of New York. *Id.*

29. *Id.* at 139. See *infra* notes 86-91 and accompanying text for a discussion of the community of interests doctrine.

This reduced the size of the unit approximately fifty-five percent, from thirty-one employees to fourteen. The ballots cast by the smaller unit were opened and the union won the election.³⁰

Despite the Board's contention that the voting procedure was mandated by the Task Force Report and section 102.67(b), the court ordered a second election.³¹ The court concluded that the employees were denied the right to make an "informed choice" because they were not informed that the size of the bargaining unit could be dramatically altered after the election.³² The court stated that a multiple-ballot procedure where the Board could have informed the voters of the two possible bargaining units and had the employees in the smaller unit cast two ballots, one for each unit, would have insured that the employees made an informed choice.³³

In *Lorimar*, a case which the Ninth Circuit found "factually indistinguishable"³⁴ from *Hamilton*, the Board on review reduced the unit size after the election approximately thirty-five percent, from seventeen to eleven employees.³⁵ The Board agreed with the employer's contention that six production coordinators were confidential employees and excluded their votes from the unit tally after they had voted.³⁶ Both the Board³⁷ and the

30. *Id.* at 138-39. A comparison between the voting procedure in *Hamilton* and the procedure in a multiple-ballot election helps illustrate the important difference between the two. In *Hamilton*, all of the employees in the original unit voted. After the election, the ballots of the employees in the smaller unit whom the union contended comprised the appropriate unit were segregated from the ballots of the other employees and all the ballots were impounded. When the Board issued its decision on review, the ballots from the employees in the smaller unit were counted, while the ballots of the other employees were not considered.

In a multiple-ballot election, both the original unit and the smaller unit contended for one review vote. The critical difference between the two procedures stems from the fact that the employees in the smaller unit will vote twice because they are included in both units. This allows the employees to express what effect, if any, the potential reduction of the bargaining unit size will have. The two groups of ballots are segregated from each other and impounded, pending Board review. When the Board issues its decision on review, the appropriate group of ballots will be opened and counted.

31. *Id.* at 140.

32. *Id.* at 142.

33. *Id.* at 141.

34. *Lorimar*, 771 F.2d at 1301.

35. *Id.* at 1297.

36. *Id.* For a discussion of what constitutes a confidential employee, see J. FEERICK, H. BAER & J. ARFA, *supra* note 5, at ¶ 9.3.2.(1).

37. Brief for Petitioner at 26. *Lorimar*, 771 F.2d 1294 [hereinafter Brief for Petitioner]. Given the Board's concern with delay, it made the curious argument in *Lorimar* that if the employer had an objection to the election it should have requested a stay of the election. *Lorimar*, 771 F.2d at 1300. Since the Board took six months to issue its decision on review, a stay would have resulted in a six-month delay. Yet the purpose of the vote and impound procedure is to prevent delay. If the Board had granted a stay, it would have resulted in the delay which the vote and impound procedure was designed to prevent. Assuming, *arguendo*, that the Board determined the production coordinators were *not* confidential employees, then a stay would have resulted in a lengthy delay over an issue which the Board would have later decided had no merit. This scenario would be a perfect example where the vote and impound

dissent in *Lorimar*³⁸ argued that avoiding delay was critical and that the vote and impound procedure accomplished the goal of preventing delay. The majority in *Lorimar* recognized the importance of avoiding delay, but noted "it is at least of equal importance that employees be afforded the opportunity to cast informed votes on the unit certified."³⁹ The court proposed that the multiple-ballot election suggested in *Hamilton* could prevent delay and insure that employees cast informed votes.⁴⁰

II. FREE CHOICE

A. Free Choice Defined

Both the *Hamilton*⁴¹ and *Lorimar*⁴² decisions criticized the use of the vote and impound procedure because it mislead employees about the size of the bargaining unit and denied them an opportunity to make an informed choice. The United States Supreme Court has clearly established that employees must be guaranteed a free choice so that they can make informed decisions in representation elections. As the Court stated in *NLRB v. A.J. Tower Co.*, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."⁴³

The key element in defining free choice is the concept that employees must be provided with all the necessary information regarding an election.⁴⁴ For employees to make a reasoned choice in an election, they must have access to relevant information.⁴⁵ Insuring free choice requires that employees "be free from restrictions which unduly obstruct the flow of relevant information. . . ." ⁴⁶ "Public policy under the National Labor Relations Act has sought to provide individuals with an opportunity to secretly express their

procedure works very well. The problem with the procedure occurs when the unit does change significantly on review and the employees are not given a chance to take this possibility into consideration when voting.

38. *Lorimar*, 771 F.2d at 1301-04 (Pregerson, J., dissenting).

39. *Id.* at 1302. *Accord* *NLRB v. Parsons School of Design*, 793 F.2d 503, 507 (2d Cir. 1986).

40. *Lorimar*, 771 F.2d at 1302. *Accord* *Parsons*, 793 F.2d at 508.

41. *Hamilton Test Sys., Inc. v. NLRB*, 743 F.2d 136, 142 (2d Cir. 1984).

42. *NLRB v. Lorimar Prods. Inc.*, 771 F.2d 1294, 1300 (9th Cir. 1985).

43. 329 U.S. 324, 330 (1946). *See also* *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969); *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1044 (9th Cir. 1978); *NLRB v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712, 715 (10th Cir. 1964).

44. A. Cox, D. Bok & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 114-15 (10th ed. 1986).

45. *Id.* at 115.

46. *Id.*

true sentiments once provided the *necessary* information on which to base a judgment."⁴⁷

The policy reasons for the establishment of the *Excelsior* List⁴⁸ illustrate the Board's recognition of the importance of employees receiving relevant information to insure free choice. In *Avon Products, Inc.*, the Board stated that the *Excelsior* List was established to "enhance the availability of information and arguments to employees so that they might render a more informed judgment at the ballot box. . . ." ⁴⁹ Thus, the critical issue of the vote and impound procedure is whether employees are denied free choice if they do not receive information that the size of the bargaining unit may be substantially reduced after the election. A close examination of this issue clearly demonstrates that information regarding the size of the bargaining unit is a critical element of free choice.⁵⁰

B. Free Choice and the Size of the Bargaining Unit

Information regarding the actual size of the bargaining unit can be a determining factor in how an employee votes in a representation election. A larger bargaining unit gives employees greater bargaining power than a smaller unit.⁵¹ A dramatic reduction in the size of the bargaining unit could affect employee perceptions on how much bargaining strength the union will provide.⁵² The *Hamilton* court recognized this possibility when it stated that if the employees in the eventual unit had been aware of the smaller unit, they would have been more likely to conclude that it would not provide sufficient strength to justify union representation.⁵³ One advantage of a multiple-ballot election is that it allows voters to be informed of a possible unit change and the extent of the change, which could affect perceptions of bargaining power.

The actual composition of the bargaining unit can also affect the employees' perceptions of the expected benefits of unionization. The *Hamilton* court observed that the Board's original unit contained two distinct groups in terms of pay and advancement. The court noted that the final unit

47. Roomkin & Block, *supra* note 22, at 92 (emphasis added).

48. The *Excelsior* list is a rule the Board established in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). The rule states that within seven days after a consent election agreement is reached, the employer must file with the regional director an eligibility list, containing the names and addresses of all the eligible voters. This information then becomes available to the parties involved in the election. *Id.* at 1239-40.

49. 262 N.L.R.B. 46, 48 (1982).

50. See *infra* notes 51-71 and accompanying text.

51. J. FEERICK, H. BAER & J. ARFA, *supra* note 5, at 265.

52. Chiaravalli & Lardaro, *supra* note 21, at 234. "Changes in the scope and composition of the appropriate bargaining unit can adversely affect the expected benefits of unionization, and hence the number of union votes." *Id.*

53. *Hamilton*, 743 F.2d at 141.

determination had a tier of employees, the truck driver and crib attendants who received lower pay and fewer opportunities for advancement than the technicians.⁵⁴ The court stated that the technicians might not have wanted unionization if they were only included with the lower paid crib attendants and truck driver and separated from the higher paid field service representatives.⁵⁵

The court did not make the argument but it is also plausible to hypothesize that the technicians also could have believed that union representation would help them gain wages comparable to what the field service representatives earned. If this were true, they presumably would have wanted the smaller unit so that their interests would not be subordinate to the interests of the field service representatives. Either argument has merit and both arguments illustrate how an employee's choice in an election can be affected by a change in the bargaining unit. A multiple-ballot election gives employees the opportunity to voice any effects of a potential change in the bargaining unit.

An employee's free choice may also be influenced by discussions with other employees about the costs and benefits of unionization. These group discussions often help shape or reshape an individual's opinion on how to vote in an election.⁵⁶ Employees not only respond to the economic incentives of unions, but they are also motivated by the pressures and friendships within the unit.⁵⁷ A reduction in the size of the bargaining unit can have a dramatic effect on these "group dynamics."⁵⁸ If the Board substantially

54. *Id.* See *supra* note 27 and accompanying text for a discussion of who was included in the original unit.

55. *Hamilton*, 743 F.2d at 141. The Board applied the factors cited by the *Hamilton* court in a recent decision. In *Parsons School of Design*, 275 N.L.R.B. No. 18, 1985 NLRB Dec. (CCH) § 17216 (April 19, 1983), the Board on review excluded 20 full-time teachers from a unit of 200 part-time teachers. The Board observed that the *Hamilton* factors were not present. Only ten percent of the unit was disqualified, so no significant diminution of bargaining strength existed, nor was there a grouping of lower and higher paid employees. The Board concluded that *Parsons* was distinguishable from *Hamilton* and did not order a second election. *Id.* at 6-7.

The Board's decision in *Parsons* was reversed by the Second Circuit on the basis of its reasoning in *Hamilton*, 793 F.2d 503 (2d Cir. 1986). For a further discussion of this case, see *infra* note 152.

56. Cooke, *Determinants of the Outcomes of Union Certification Elections*, 36 INDUS. & LABOR. REL. REV. 402, 403 (1983). In each unit there will always be some employees who will not be influenced by the group or the size of the bargaining unit. These individuals will be either pro-union or anti-union regardless of any discussion or change in the bargaining unit. *Id.* at 404. Cooke also states that "[t]he size of the work unit is a central issue in any analysis of the hypothesis that the decision to vote for or against the union is fashioned in part by collective aspirations." *Id.*

57. *Id.* at 404.

58. *Id.* at 410. Cooke postulates that these "group dynamics" only have an effect on an election if the unit size is 65 employees or less. *Id.* However, this figure encompasses a substantial majority of all elections. In the Roomkin and Block study, 78% of all the elections held between July, 1972 and September, 1978 had units of 60 employees or less. Roomkin & Block, *supra* note 22, at 85-88. In fiscal year 1980, 82.7% of all elections were held in units which were

changes the bargaining unit after an election, then a significant portion of the group which may have helped shape and influence the collective aspirations may not be included in the unit.

The *Hamilton* court also recognized that employee interaction within the work force can also affect the way they vote. The court noted that the original unit would have maintained a unified work force because it included all the employees at the employer's facility.⁵⁹ A reduction in the unit might have led the employees to believe "that the representation by a union in only part of the facility could produce divisiveness and provoke undesirable tensions in the work place."⁶⁰ The court also stated that perceptions of leadership within the unit might have been affected by the change in the scope of the unit.⁶¹

The preceding discussion illustrates why the courts of appeals in *Hamilton* and *Lorimar* concluded that the employees might have voted differently had they known the true scope of the unit.⁶² The dramatic consequences of employees potentially voting differently if they are informed of a potential unit change is illustrated by a recent statistical study.⁶³ The study illustrates that the number of employees who constitute a margin of victory in a representation election is extremely small. A switch of six votes would have altered election outcomes in union victories, while a switch of nine to ten votes would have changed the result in employer victories.⁶⁴ On the basis of these statistics, the study concluded that the decision of a few employees to switch their votes can change the result of an election.⁶⁵

The final election results in *Hamilton* and *Lorimar* illustrate how a small percentage of vote switches can change the election. In both *Hamilton*⁶⁶ and *Lorimar*⁶⁷ the final tally was six employees voting for union representation and four against it. A vote switch by one of the employees voting for union

comprised of less than 60 employees. 45 NLRB ANN. REP. 287 (1980). These statistics illustrate that "group dynamics" will have an effect in a majority of representation elections.

59. *Hamilton*, 743 F.2d at 141.

60. *Id.*

61. *Id.* All of the *Hamilton* court's concerns were noted with approval by the court in *Lorimar*. *Lorimar*, 771 F.2d at 1301. *Accord* NLRB v. Parsons School of Design, 793 F.2d 503 (2d Cir. 1986).

62. *Hamilton*, 743 F.2d at 141; *Lorimar*, 771 F.2d at 1302. One former member of the Board also agreed with the courts' conclusion that employees might vote differently if they are aware of a potential change in the bargaining unit. In *Daily Mining Gazette*, then member Hunter concluded that a reduction in the size of the unit from fifteen to five employees denied employees "the right to make an informed choice in the selection or rejection of a bargaining representative." 273 N.L.R.B. 350, 353 (1984) (Hunter, dissenting).

63. Roomkin & Block, *supra* note 22, at 90.

64. *Id.* The authors found that the average size of a bargaining unit when an employer wins an election is 70.4%, the size for union victories is 39.4%. *Id.*

65. *Id.*

66. *Hamilton*, 743 F.2d at 138.

67. *Lorimar*, 771 F.2d at 1297.

representation would have changed the result of both elections because a union must win a majority of the valid votes cast in the election.⁶⁸ One can only hypothesize whether the election results in *Hamilton* and *Lorimar* would have been different if the employees would have been aware of the potential unit change. The advantage of the multiple-ballot election is that it informs the employees of the potential change, which insures that the election result represents the true desires of the employees.

Information regarding the size of the bargaining unit is clearly a critical element of employee free choice because this information can affect how an employee votes in many different ways. Recognition of the important relationship between free choice and information concerning the bargaining unit led the court in *Lorimar* to conclude that the scope of the bargaining unit is "an issue which is central to the voters' ability to cast an intelligent, voluntary ballot."⁶⁹

Despite the compelling arguments of free choice, the Board downplayed its significance in *Lorimar*. The Board contended that the goal of preventing lengthy delay was more important. "While it may be desirable to afford the voters the greatest amount of information possible prior to the voting, the advantages of making more information available must be weighed against the delay that the use of procedures [a multiple-ballot election] . . . proposed by the company would entail."⁷⁰ The Board's argument mischaracterizes the issue. The goal in an election is not to provide employees with the optimal amount of information, as the Board suggests, but rather to provide relevant information to insure free choice. Information regarding the eventual size of the bargaining unit is a critical element of free choice. The Board's observation that it was "highly speculative" that the employees might have voted differently if they were informed of the change in the unit is not supported by the preceding discussion.⁷¹

III. THE BOARD AND FREE CHOICE

A. *The Election Notice Cases*

Despite the Board's arguments in *Lorimar* and *Hamilton*, it has recognized in other contexts the importance of employees receiving accurate information

68. J. FEERICK, H. BAER & J. ARFA, *supra* note 5, at ¶ 7.6.10 n.289.

69. *Lorimar*, 771 F.2d at 1312. *Accord Parsons*, 793 F.2d at 1312.

70. Brief for Petitioner, *supra* note 37, at 26-27. Preventing delay is an important concern. However, it is also important to note that the disagreement between the courts of appeals and the Board has resulted in lengthy delays. *Parsons*, 793 F.2d at 508. For example, in *Parsons* the election was held in May of 1983 and the Second Circuit finally reversed the Board three years later, in June of 1986. *Id.* at 503, 505.

71. Brief for Petitioner, *supra* note 37, at 27. See also *Parsons*, 793 F.2d at 505, where the regional director stated that "the unit determination had no bearing as to whether the voters desired Union representation."

regarding the eventual size of the bargaining unit. In one group of cases the Board had to decide whether an employer's failure to post an election notice⁷² immediately upon receipt violates free choice. A majority of the Board in *Kilgore Corp.* held that the posting of election notices one day before an election destroyed the "laboratory conditions for holding a fair election."⁷³ First enunciated in *General Shoe Corp.*,⁷⁴ the laboratory conditions test compels the Board to conduct an election under conditions as nearly as ideal as possible to determine the "uninhibited desires" of the employees.⁷⁵ In *General Shoe*, the Board stated "an election can serve its true purpose only if the surrounding conditions enable employees to register a *free and untrammelled* choice for or against a bargaining representative."⁷⁶

In *Kilgore*, one reason why the Board ruled the laboratory conditions were destroyed was the Board's recognition that the group dynamics⁷⁷ within the bargaining unit influence how employees vote. The Board stated that the election notice allows employees to, "discuss the election issues with their fellow employees and friends so they might come to a reasoned decision by the date of the election."⁷⁸ One important issue contained in an election notice is the "unit description and [the employees] possible eligibility or ineligibility."⁷⁹ The Board's recognition of the importance of the unit description illustrates why the employees should be informed that the unit description may change after the election.⁸⁰ A multiple-ballot election provides this necessary information and insures that employees register a "free and untrammelled" choice for or against a bargaining representative.

After the *Kilgore* decision, the individual members of the Board adopted different and somewhat confusing standards in evaluating whether a late posting of election notices was sufficient grounds for setting aside an election.⁸¹ Despite the differing standards, a consistent concern of the Board

72. An election notice informs employees of the details of the election and their rights under the National Labor Relations Act. J. FEERICK, H. BAER & J. ARFA, *supra* note 5, at ¶ 7.6.5.

73. 203 N.L.R.B. 118, 119 (1973).

74. 77 N.L.R.B. 124 (1948).

75. *Id.* at 127.

76. *Id.* at 126 (emphasis added).

77. See *supra* notes 56-59 and accompanying text for a discussion of "group dynamics" within a bargaining unit.

78. *Kilgore*, 203 N.L.R.B. at 119. See *infra* text accompanying notes 129-33 for a discussion of how a multiple-ballot election would give employees an adequate opportunity to discuss its procedures.

79. *Id.* See also *Congoleum Indus.*, 227 N.L.R.B. 108 (1976).

80. The election notice does not inform the employees of the potential unit changes. *Parsons*, 703 F.2d at 506.

81. *E.g.*, *Contractors Redi-Mix*, 250 N.L.R.B. 121 (1980); *Earle Indus.*, 246 N.L.R.B. 68; *Kane Industries*, 246 N.L.A.B. 738 (1978); (1979); *Printhouse, Co.*, 246 N.L.R.B. 741 (1979). In *Printhouse*, then Chairman Fanning criticized the Board for not adopting a single rationale for deciding the election notice cases.

was whether employee free choice had been preserved.⁸² In *Earle Industries, Inc.*,⁸³ one Board member stated that in the absence of standard rule, he would evaluate the facts of each case to determine whether the employees had sufficient opportunity to be informed of the details of the election and to discuss the issues of the election.⁸⁴ The Board's reasoning in these cases illustrates that the Board clearly recognizes the importance of providing information about the size of the bargaining unit.⁸⁵

B. *The Community of Interests Doctrine*

Support for a multiple-ballot election can also be found in the factors used by the Board for determining the appropriate bargaining unit. The Board's goal when defining a unit "is to group together only those employees who have substantial mutual interests in wages, hours and other conditions of employment."⁸⁶ Commonly referred to as the community of interests doctrine, these mutual interests are the controlling factors in how the Board determines an appropriate bargaining unit.⁸⁷ If the Board defines a unit where the employees do not have a community of interests, it can lead to unrest, instability and confusion in the collective bargaining process.⁸⁸ The Ninth Circuit observed in *Pacific Southwest Airlines v. NLRB* that if employees in a unit do not have a community of interests, both employee's rights and industrial peace are threatened.⁸⁹ In *Crown Zellerbach Corp.*, the Board stated it would not allow the employees of one plant to be submerged into a multi-plant bargaining unit, when those employees possessed a distinct community of interests from those employees in the other plant.⁹⁰

The preceding paragraph illustrates the importance of the community of interests doctrine and the universal recognition that a bargaining unit which contains employees who do not have the same community of interests will create serious problems. Board approval of the vote and impound procedure when the unit size is reduced because of differing community of interests is

82. E.g., *Earle Indus.*, 248 N.L.R.B. at 68; *Kane Indus.*, 246 N.L.R.B. at 738; *Printhouse Co.*, 246 N.L.R.B. at 742.

83. *Earle Indus.*, 248 N.L.R.B. at 67 (Truesdale, concurring).

84. *Id.* at 68.

85. In *Lorimar, Parsons and Hamilton*, the Board ignored the reasoning behind its decisions in the election notice cases. See *supra* notes 70-71 and accompanying text.

86. J. FEERICK, H. BAER & J. ARFA, *supra* note 5, ¶ 8.2 (quoting 15 NLRB ANN. REP. 39 (1950)).

87. *Id.* The community of interests doctrine is discussed more fully at ¶¶ 8.2.1-8.2.12.

88. J. ABODEELY, R. HAMMER & A. SANDLER, THE N.L.R.B. AND THE APPROPRIATE BARGAINING UNIT (rev. ed. 1981). See also Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice*, 18 W. RES. L. REV. 479, 482 (1967).

89. 587 F.2d 1032, 1045 (9th Cir. 1978).

90. 246 N.L.R.B. 1407 (1979).

not consistent with the community of interests doctrine. In *Hamilton* over half of the employees in the original unit were excluded from the unit because they did not share a community of interests with the other employees.⁹¹ The Board excluded these employees because it recognized that their inclusion would have lead to unrest and instability in the collective bargaining process. Yet the employees who comprised the final unit voted under the impression that the unit included those employees who were later excluded. The vote and impound procedure does not inform the voters when the potential exists that a group of employees will be excluded from the unit because of differing community of interests.

An examination of Board cases highlights how the vote and impound procedure can operate inconsistently with the community of interests doctrine. In *Associate Milk Producers, Inc.*, the Regional Director determined that the appropriate unit was all the truck drivers at three separate employer locations.⁹² The employer sought review of this determination. The employer argued that the appropriate unit should only consist of its two locations in Stephenville, Texas and that its Comanche, Texas location should be excluded. The Board granted review and the ballots were impounded.

In its decision on review the Board agreed with employer's contention.⁹³ This decision reduced the size of the unit approximately thirty-three percent, from fifty-three employees to thirty-five.⁹⁴ The Board based its decision on its finding that the Stephenville employees had a separate community of interests from those employees at the Comanche location. The Board determined that the Stephenville drivers had frequent contact with each other and shared immediate supervisors. In contrast, the drivers in the Comanche facility had less frequent contact with the Stephenville drivers, a different seniority system and different supervisors.⁹⁵ The owner of the Comanche facility and the dispatcher who handled the day-to-day supervision were not even employed by Associated Milk Producers.⁹⁶

Despite the fact that thirty-three percent of the employees who voted in the election had a distinct community of interests from the eventual unit, the Board ordered that the Stephenville ballots be opened and counted. This decision is a concrete example of the flaws of the vote and impound procedure. In *Associate Milk Producers*, the employees voted under the impression that the bargaining unit would consist of employees from the Comanche facility who were employed under markedly different conditions than those at the Stephenville facility. Yet the Board, which has consistently recognized

91. See *supra* notes 27-29, 53-55 and accompanying text.

92. 251 N.L.R.B. 1407 (1980).

93. *Id.* at 1408.

94. *Id.* at 1407.

95. *Id.* at 1408.

96. *Id.* at 1407.

the importance of the community of interests doctrine, did not even consider this fact. Given the fact that the Board will not allow bargaining units to consist of groups with different community of interests, the Board should utilize the multiple-ballot procedure to inform employees that the unit size may change because of differing community of interests.

Textprint, Inc., is another example of the Board significantly reducing the size of the unit after the election because the employees did not share a community of interests.⁹⁷ In this case, two corporations, TKG and Textprint, shared the same facility. The regional director determined that a single bargaining unit was appropriate because the employees of both corporations possessed similar community of interests.⁹⁸

The Board granted review to evaluate the union's contention that only the Textprint employees should be included in the unit. The election was held and the ballots impounded. On review, the Board agreed with the union as it determined that the Textprint employees should be a separate bargaining unit because they had a distinct community of interests from the TKG employees. On the basis of this decision, the Board ordered that only the ballots of the Textprint employees be opened and counted.⁹⁹ The Board's decision reduced the unit size approximately thirty-five percent.¹⁰⁰

The Board based its decision on the fact the Textprint employees performed dissimilar types of work and had different work classifications. TKG employees generally possessed greater skills than the Textprint employees, twenty-five percent of whom were engaged in manual labor. TKG employees were allowed to go outside the plant at lunch, while that privilege was not given to Textprint employees.¹⁰¹ TKG and Textprint were also run by separate plant managers and there was no common controlling ownership in both firms. Consequently, virtually no interchange of supervisory and non-supervisory employees occurred between TKG and Textprint, and if an employee were transferred, retraining was necessary.¹⁰²

The application of the community of interests doctrine supports the need for the multiple-ballot election. The Board reviews a unit determination carefully if it appears the unit contains employees with different community of interests. Yet the Board is unwilling to consider the problems that arise when employees vote under the impression that a substantial number of employees with whom they do not share a community of interests are included in the unit. In both *Textprint* and *Associated Milk Producers* the employees should have been informed of the potential unit change because the com-

97. 253 N.L.R.B. 1101 (1981).

98. *Id.*

99. *Id.* at 1102-03.

100. *Id.* at 1101.

101. *Id.* at 1102.

102. *Id.* at 1103.

position and size of a bargaining unit can affect how an employee votes.¹⁰³

IV. THE TASK FORCE REPORT AND THE *Globe* Analogue

The preceding analysis of free choice, Board precedent and the community of interests doctrine clearly illustrates the desirability of a multiple-ballot election. An analysis of the Task Force Report demonstrates that the Task Force also foresaw a need for a multiple-ballot election. The Task Force recognized that the most troublesome problem of the vote and impound procedure would occur when the Board agreed to review a unit determination.¹⁰⁴ In response to this concern, the Task Force stated that "the Board could develop a balloting process under which the election could be held, whatever the eventual decision might be on the appropriate unit." The Task Force noted that "an analogue is the *Globe* election procedure which has been used successfully since 1937."¹⁰⁵ The *Globe* analogue refers to an election procedure used by the Board since its decision in *Globe Machine and Stamping Co.*¹⁰⁶

A *Globe* election, often called a self-determination election, gives employees an opportunity to voice their opinion as to which type of bargaining unit they desire. The procedure is most often used when two unions are vying for the same group of employees—but one union seeks to represent them separately in a small craft unit, while the other union seeks to include them with other employees in a more comprehensive unit, usually a plant-wide unit.¹⁰⁷ A self-determination election is also used when there is only one union seeking representation rights but the Board concludes that more than one bargaining unit is equally appropriate. Consequently, in a self-determination election the employees determine by a multiple-ballot procedure which union they desire and the unit in which bargaining will be conducted.¹⁰⁸

103. See *supra* notes 51-71 and accompanying text.

104. Task Force Report, *supra* note 4, at 10. See *infra* notes 145-46 and accompanying text for examples of when a request for review does not concern the unit determination.

105. Task Force Report, *supra* note 4, at 12-13.

106. 3 N.L.R.B. 294 (1937).

107. R. GORMAN, BASIC TEXT ON LABOR LAW 72 (1976).

108. *Id.* The mechanics of a self-determination election are somewhat complicated. In a two-union election, the employees in the prospective smaller unit can choose between the smaller craft unit and the union seeking the more comprehensive plant-wide unit; these employees generally are not given the option to vote "no-agent." The other employees in the prospective larger unit can choose between the union seeking to represent the plant-wide unit and "no-agent." At the same time the employees vote for a particular union they are also voting whether they desire the union to be their exclusive bargaining representative.

If the craft union secures a majority of votes in the smaller craft unit, that union will represent those employees in that separate unit; the votes of the remaining employees will be tallied as a separate group to determine whether the other union has been selected by a majority

The interpretation of the relationship between developing an appropriate balloting process and the *Globe* analogue was a source of disagreement between the Board and the courts of appeals in *Lorimar* and *Hamilton*. The Board in *Lorimar* cited the *Globe* election procedure to support its contention that the vote and impound procedure was proper even if the bargaining unit size could be substantially reduced after the election.¹⁰⁹ The Board stated that it has long followed the general procedure prescribed by Section 102.67(b)—conducting an election before making a final determination as to the scope of the appropriate unit. The Board emphasized that in both a *Globe* self-determination election and a single-ballot election using the vote and impound procedure, the employees do not know what the eventual bargaining unit will be when they vote.¹¹⁰

The Board also cited section 9(b)(1) of the National Labor Relations Act as another example of a self-determination election where the employees at the time balloting do not know what the ultimate boundaries of the unit will be.¹¹¹ Section 9(b)(1) of the Act prohibits professional and non-professional employees from being included in the same bargaining unit unless a majority of the professional employees vote to be included in the unit in the representation election.¹¹² In the Board's view, the use of a *Globe* self-determination election legitimizes the use of the vote and impound procedure in single-ballot elections because in both situations the final unit determination is made after the election.

The *Hamilton* court also recognized the established use of self-determination elections. However, the court focused on the Task Force's suggestion to develop an appropriate balloting process, whatever the eventual decision might be on the appropriate unit.¹¹³ The court criticized the Board for not developing a balloting process where two groups of ballots could have been prepared, one for each possible unit.¹¹⁴ This process, according to the court, would have informed the voters of the possible alternatives in the selection of the bargaining unit and would have permitted them to vote accordingly.¹¹⁵

The court in *Lorimar* interpreted the *Globe* analogue as evidence that the Task Force foresaw the need for a multiple-ballot election. The court reasoned that the reference to the *Globe* analogue illustrated that the Task

of the remaining employees or whether those employees will go unrepresented. If, on the other hand, employees in the smaller craft unit do not give the craft union a majority vote, then the votes of all employees in both the large and small units will be pooled. The union will be certified if it is selected by a majority of employees in that pooled group. *Id.*

109. Brief for Petitioner, *supra* note 37, at 24.

110. *Id.*

111. *Id.* at 25.

112. 29 U.S.C. § 159(b)(1) (1986).

113. *Hamilton Test Sys., Inc. v. NLRB*, 743 F.2d 136, 140-41 (2d Cir. 1984).

114. *Id.* at 141.

115. *Id.*

Force envisioned the procedure suggested by the *Hamilton* court.¹¹⁶ The court, unlike the Board, construed the *Globe* analogue to refer to a multiple-ballot election.

A. Factual Differences Between a Self-Determination Election and the Vote and Impound Procedure

The *Lorimar* court's reasoning is most persuasive because many crucial differences exist between a self-determination election and an election using the vote and impound procedure. When the employees vote in a self-determination election, they do not know what the final bargaining unit will be. However, the employees are aware that more than one possible unit exists. In *Hamilton*¹¹⁷ and *Lorimar*¹¹⁸ the Board did not inform the voters that the bargaining unit size could be drastically reduced after the election.¹¹⁹ A self-determination election also differs from an election using the vote and impound procedure because in a self-determination election the employees chose the appropriate unit. They do not know what the eventual unit(s) will be when they vote, but it is *their* decision that decides the final unit(s). When the vote and impound procedure is utilized the employees do not have any voice in determining the appropriate bargaining unit. The use of the vote and impound procedure therefore denies employees two important aspects of a self-determination election—the knowledge that the final unit determination has not been made and an opportunity to decide the scope of the bargaining unit.

The self-determination election for professional employees also differs from the vote and impound procedure. The number of professional employees is usually extremely small in comparison with the number of non-professionals. Whether the professionals are or are not included in the unit will not substantially affect the eventual size of the unit.¹²⁰ Even if it is assumed that the inclusion or exclusion of the professional employees will affect the votes of non-professionals, the non-professionals at least have the knowledge that the professionals may or may not be included.

The Board also cited the example of employees who vote subject to challenge as another example where the employees vote before the eventual scope of the unit is determined.¹²¹ The challenge procedure, however, is

116. *NLRB v. Lorimar Prods. Inc.*, 771 F.2d 1295, 1301 (9th Cir. 1985).

117. *Hamilton*, 743 F.2d at 138.

118. *Lorimar*, 771 F.2d at 1300.

119. In *NLRB v. Parsons School of Design*, the Board prepared separate ballot boxes for the full and part-time teachers. 793 F.2d 503, 505 (2d Cir. 1986). The Board's representative did not explain why separate ballots were being used unless the representative was specifically asked. See also *supra* note 55.

120. H.R. REP. NO. 105, 80th Cong., 1st Sess. 11 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 407, 417 (1948).

121. Brief for Petitioner, *supra* note 37, at 25.

different from a review of a unit determination because it is not concerned with what the appropriate bargaining unit is, but rather with individual voter eligibility. The parties to the election determine who is eligible to vote, "[o]nce the proper parameters of an appropriate bargaining unit have been established."¹²² Thus, the challenge procedure involves only individual questions of eligibility within the agreed upon bargaining unit. The court in *Hamilton* recognized the distinction between the two procedures when it noted that questions of voter eligibility frequently involve only a few voters whose exclusion or inclusion will not significantly change the scope of the unit.¹²³ The Task Force Report also did not equate the challenge procedure with what it perceived as the most troublesome problem of the vote and impound procedure—a review of a unit determination.¹²⁴ The Task Force stated that questions of voter eligibility "could be dealt with by the usual method of challenging ballots."¹²⁵ The Board's argument that the use of the vote and impound procedure is sanctioned by the use of self-determination elections or the challenge procedure is not persuasive.

B. *The Task Force Language Regarding a Self-Determination Election*

The substantial differences between a self-determination election and the vote and impound procedure support the *Lorimar* court's conclusion that the *Globe* analogue refers to a multiple-ballot election. An analysis of the Task Force's language also supports this conclusion. If the *Globe* analogue were only cited as evidence that elections are held before the final unit determination is made, then there would have been no reason for the Task Force to recommend that the Board "develop a balloting process under which the election could be held, whatever the eventual decision might be on the appropriate unit."¹²⁶ The vote and impound procedure also allows for the election to be held whatever the outcome of the appropriate unit decision. Clearly, the Task Force was citing the *Globe* analogue as an example of a multiple-ballot election when it urged the Board to "develop a balloting process." The Task Force language is therefore further evidence that a multiple-ballot election should be used in conjunction with the vote and impound procedure.¹²⁷ The reference to the *Globe* analogue illustrates that

122. J. FEERICK, H. BAER & J. ARFA, *supra* note 5, at 358.

123. *Hamilton*, 743 F.2d at 140.

124. Task Force Report, *supra* note 4, at 12.

125. *Id.*

126. *Id.*

127. Although he dissented in *Lorimar*, Judge Pregerson also interpreted the *Globe* analogue to apply to a multiple ballot election. "[T]he Task Force . . . did not require the Board to implement a *Globe*-type multiple-ballot election." *Lorimar*, 771 F.2d at 1304 (Pregerson, J.,

the Task Force foresaw potential problems with a strict use of the vote and impound procedure in all situations, problems which are evident in the *Lorimar* and *Hamilton* decisions. This Note's proposal for a multiple-ballot election is consistent with the Task Force's concerns.

V. A PROPOSAL FOR A MULTIPLE-BALLOT ELECTION

The preceding analysis presents a convincing argument for the implementation of a multiple-ballot election when the size of the bargaining unit can be significantly reduced on review. The following proposal for instituting a multiple-ballot election can eliminate the problems of the vote and impound procedure without causing the delay which the procedure was designed to prevent. This proposal also protects free choice because the employees will have adequate notice to understand the purpose and procedures of a multiple-ballot election.

A. *The Issue of Notice*

The first issue raised by the multiple-ballot proposal is how far in advance of an election should the employees, the employer and the union be notified that the procedure will be used? This Note proposes that the parties be notified at least five working days before the election that a multiple-ballot election will be utilized. This five day notice period will be sufficient for both the union and the employer. Neither party will have to follow any additional procedures, such as filing an election petition¹²⁸ or compiling an *Excelsior* list.¹²⁹ When a request for review of a unit determination is filed with the Board, the other party must receive a copy of such request.¹³⁰ Consequently, both parties know well in advance of the five day period that the multiple-ballot procedure could be used. This allows both parties ample time to prepare any campaign strategy that may be utilized if a multiple-ballot election is ordered.¹³¹

dissenting). While Judge Pregerson correctly noted that as an advisory committee, the Task Force did not require the Board to adopt a multiple-ballot procedure, his statement also provides further evidence that the Task Force did not equate a self-determination election with the vote and impound procedure. The Board cannot cite the Task Force Report as evidence that the Task Force mandated or approved of the use of the vote and impound procedure in all situations.

128. See *infra* note 150 and accompanying text.

129. See *supra* note 48 and accompanying text. Since the unit can only decrease in size when a multiple-ballot election is used, no *Excelsior* list is required because no new employees will be added. See also *infra* notes 139-44 and accompanying text.

130. 29 C.F.R. § 102.67(K)(2) (1986).

131. For example, if the employer had requested review, the union could explain to the employees that the request is just another example of the employer doing anything to confuse the election issues and hurt the union's chances of victory. The union could emphasize that no matter what the decision is on the eventual unit, the employees should vote union. If the

Although the parties should be given notice that the multiple-ballot procedure will be used, insuring employee free choice is the primary goal of a multiple-ballot election. The five working days notice will guarantee that the goals of free choice are met. The multiple-ballot procedure does not raise any new election issues that have to be addressed by the employer or union or understood by the employees. Rather, its sole purpose is to inform the employees that the bargaining unit could change after the election.

Since the election campaign has been in progress for some time, the employees will have presumably formed their basic opinions about union representation from the campaign and will have had the opportunity to discuss their views with other employees. Five days will be sufficient to allow the employees to determine if the potential unit change will affect those perceptions and how the employees will vote. One other reason why the five day period provides sufficient notice stems from the fact that most bargaining units are comprised of less than sixty employees.¹³² Thus, the practical problems of informing the employees about the multiple-ballot election are minimal. More importantly, the smaller number of employees in most units will allow employees to assess rather quickly the implications of the potential unit change and discuss them with other employees.

The Board should also adopt an official statement that will be posted in areas where it can be read by all employees. The statement must clearly explain that the purpose of the multiple-ballot election is to insure that the employees vote with the knowledge that the bargaining unit could change after the election. A critical factor which must be stressed is that the employees should not make any assumptions about the Board's decision to grant review. The employees should be advised that the decision to review the unit determination does not mean the unit will necessarily change on review. The employees should only be advised that the potential for a change in unit size does exist.

This statement must clearly address both potential bargaining units. For those employees only voting in one unit, it should be emphasized that their vote is not worthless, as the unit they are in could very well be the eventual unit. For the employees voting in both units, it should be stressed that they should carefully consider their vote in both units because it is an open question which unit will be deemed appropriate. The basic voting procedure of a multiple-ballot election should also be explained. The conclusion of the

union requested review the employer could focus on the employees that the union seeks to exclude and explain how the union does not want them. Both these tactics could be very effective. While the purpose of the multiple-ballot election is to insure free choice and not to provide additional election strategy, to think both sides would not try such tactics would be naive. One way to counteract such tactics is a Board statement explaining the procedure. See *infra* text accompanying notes 132-33.

132. See *supra* note 58.

statement should again emphasize that the purpose of the multiple-ballot procedure is to provide employees with the important information of a potential unit change. This statement will also further the goals of preserving employee free choice.

B. How Can the Board Meet the Five-Day Deadline?

In order for this proposal to work, the Board must have the capability to meet the five-day deadline. Thus, the Board must be able to issue its decision to grant review of a unit determination at least five working days before the election date. An examination of Board cases illustrates that simply implementing the proposal for a multiple-ballot election does not guarantee the Board will be able to meet the five-day deadline. In many cases the Board has granted review of a unit determination the day before or the day of the election.¹³³ The Board in other cases has granted review three,¹³⁴ four,¹³⁵ and five¹³⁶ working days before the election. Therefore, while it does not seem impracticable for the Board to meet the deadline, additional procedures must be instituted to guarantee that the deadline will be met.

The Board can meet the requirements of the five-day deadline if it adopts a procedure similar to the procedure authorized by section 10(L) of the National Labor Relations Act.¹³⁷ Under section 10(L), whenever a complaint has been filed that a violation of sections 8(b)(4) or 8(b)(7) of the Act has occurred, the complaint is given priority over all other complaints, except those of like character.¹³⁸ The Board should adopt a similar procedure when a request for review has the potential to substantially reduce the size of the bargaining unit. All requests of this nature should be given priority to enable the Board to meet the five-day deadline. One important reason why the expedited review will be especially applicable to the multiple-ballot procedure stems from the fact that many requests for review do not involve a potential reduction in size of the bargaining unit.

133. In *Hamilton and Lorimar*, the Board did not grant review until the day before the election. *Hamilton Test Systems, Inc. v. NLRB*, 136, 138 (2d Cir. 1984); *NLRB v. Lorimar Prod.*, 771 F.2d 1294, 1300 (1985). See also *Eastman Interiors*, 273 N.L.R.B. 610 (1984) (Board granted review the day of the election); *Daily Mining Gazette*, 273 N.L.R.B. 350 (1984) (Board granted review the day before the election); *Avon Products, Inc.*, 262 N.L.R.B. 42 (1982) (Board granted review the day before the election); *United Parcel Service, Inc.*, 258 N.L.R.B. 223 (1981) (Board granted review the day of the election).

134. *Charrette Drafting Supplies Corp.*, 275 N.L.R.B. No. 177, 1985 N.L.R.B. Dec.(CCH) § 19,674 (July 31, 1985).

135. *Monroe Auto Equipment*, 273 N.L.R.B. 103 (1984).

136. *Tio Pepe, Inc.*, 237 N.L.R.B. 537 (1978).

137. 29 U.S.C. § 160(l) (1986).

138. *Id.* Sections 8(b)(4) and 8(b)(7) prohibit, in some cases, picketing and other forms of conduct which a union is utilizing for recognitional or organizational purposes. For a more detailed discussion of these concepts, see R. GORMAN, *supra* note 107, at 220-35.

The Board if often asked to grant review to consider whether the unit is *larger* than the one determined by the regional director.¹³⁹ In this situation the employer often contends that a multi-plant unit rather than a single-plant unit is appropriate, or that a plant-wide unit is appropriate rather than a unit comprising only a portion of a unit.¹⁴⁰ If the Board on review finds the larger unit is the appropriate unit, then it always vacates the election.¹⁴¹ The obvious reason why the Board vacates the election in this situation is that the employees who were not included in the original smaller unit did not vote in the election.¹⁴²

It would be impractical for the multiple-ballot procedure to be utilized when the unit contended for on review is larger than the original unit. The union must file a new election petition and the employer must compile a new *Excelsior* list because of the potential addition of new employees into the unit.¹⁴³ More importantly, the employees who would be included in the larger unit would not be involved in the election campaign until the Board decided to grant review. Since this would not occur until the end of the election, they would have been excluded from most of the election campaign.

Another example of when a request for review does not involve a potential reduction in the size of the bargaining unit occurs when an employer claims that an election should not be held at all.¹⁴⁴ The Board uses the vote and impound procedure in this situation despite the possibility that it may decide that no election should be held.¹⁴⁵ Yet if the Board decides that the election

139. *Abdow Corp.*, 271 N.L.R.B. 1269 (1984); *Charrette Drafting*, 275 N.L.R.B. No. 177; *Genuine Parts Co.*, 269 N.L.R.B. 1052 (1984); *Continental Trailways*, 232 N.L.R.B. 628 (1977).

140. The reason why a union often seeks the smaller unit and the employer the larger is that conventional wisdom holds that the larger the unit and the more facilities that the bargaining unit covers, the more difficult it is for the union to win the election. See J. FEERICK, H. BAER & J. ARFA, *supra* note 5, at 265-66; Sebris & McDonald, *Bargaining Unit Determination Case Trends of the N.L.R.B.*, 37 LAB. L.J. 378, 378-79 (1986). See also *supra* note 64.

141. See *Abdow*, 271 N.L.R.B. 1269; *Charlotte Drafting*, 275 N.L.R.B. No. 177; *Genuine Parts*, 269 N.L.R.B. 1052; *Continental Trailways*, 232 N.L.R.B. 628. It is important to recognize that if the Board does agree with the regional director's unit determination then the vote and impound procedure serves its purpose without interfering with free choice.

142. See cases cited *supra* note 141.

143. See cases cited *supra* note 141.

144. *E.g.*, *Teledyne Economic Dev. Co.*, 265 N.L.R.B. 1216 (1981); *Management and Training Corp.*, 265 N.L.R.B. 1152 (1982) (in both cases the Board rejected employer arguments that the Department of Labor, not the employers, was the true employer); *Bayshore Transit Management, Inc.*, 252 N.L.R.B. 969 (1980) (the Board on review denied the employer's contention that it did not have sufficient control over labor relations to engage in collective bargaining); *Bob's Big Boy Family Restaurant*, 238 N.L.R.B. 700 (1978) (the Board denied on review the employer's assertion that a collective bargaining agreement barred the election).

145. The Task Force recognized the problem that a decision on review could result in the election being a nullity. It concluded, however, that this would only happen in a small minority of cases. Task Force Report, *supra* note 4, at 13. The cases cited in *supra* note 144 support that conclusion.

should have been held, which it does in many cases,¹⁴⁶ the vote and impound procedure serves its purpose of not delaying an election.

Board statistics also indicate that the Board does not grant a majority of the requests for review of pre-election rulings of the regional directors. For example, in fiscal year 1980 the Board only granted 101 requests for review out of 687 requests,¹⁴⁷ and in fiscal year 1976 the Board ruled upon 599 requests for review and granted review of only 101 requests.¹⁴⁸ These statistics illustrate that in a majority of cases the requests for review have very little merit. If they had some merit, then the Board would presumably grant review.¹⁴⁹ Consequently, when the Board utilizes the expedited election procedure it will only have to focus on those few cases which involve a substantial reduction in the size of the bargaining unit which appear to have some merit. Determining what constitutes a substantial reduction leads to the final issue of the multiple-ballot election—what criteria should the Board consider when deciding whether to grant an expedited review?

A Board decision to grant the expedited review process is critical because it insures that if the Board does grant review, the multiple-ballot election procedure can be utilized without delaying the election. An important factor for the Board to consider is the potential reduction in unit size. The Board should automatically grant an expedited review when the bargaining unit size can be reduced at least thirty percent on review. When a union petitions for an election, it must establish that thirty percent of the employees in the petitioned for unit support the union named in the petition.¹⁵⁰ An expedited review should be granted when the bargaining unit can be reduced by the percentage needed to initiate the election in the first place.

One other potential factor the Board may consider is the size of the initial unit. Since group dynamics have more of an effect in smaller units, percentage changes of less than thirty percent will have a greater effect in smaller units.¹⁵¹ A twenty percent reduction in an original unit of thirty employees will probably be a better candidate for a multiple-ballot election

146. See cases cited *supra* note 144.

147. 45 NLRB ANN. REP. 245 (1980).

148. 41 NLRB ANN. REP. 211 (1976). Unfortunately, Board statistics do not break down the requests for review on the basis of issues. Consequently, exactly how many of these requests involve a potential reduction in the bargaining unit size cannot be determined.

149. This especially makes sense in a review of a bargaining unit determination. A request for review that essentially asks that the Board find a more appropriate unit will be denied, because the Board only has to find an appropriate unit, not the most appropriate one. See *supra* note 10.

150. See J. FEERICK, H. BAER & J. ARFA, *supra* note 5 at § 6.3.1; see also *Hamilton*, 743 F.2d at 137-38; *Lorimar*, 771 F.2d at 1297; *Textprint, Inc.*, 253 N.L.R.B. 1101, 1101-02 (1981); *Associated Milk Producers, Inc.*, 251 N.L.R.B. 1407, 1407-08 (1980) (all involving reductions of 30 percent or more).

151. See *supra* note 58.

than a twenty percent reduction in an original unit of sixty.¹⁵² Other factors may be germane to a particular request, but certainly the size of the original unit and the potential percentage reduction of the original unit will be the most important factors. The implementation of the expedited election procedure will insure that the multiple-ballot procedure will not delay an election.

CONCLUSION

The previous discussion of the proposal for a multiple-ballot election illustrates that it is a practical solution to the problems of the vote and impound procedure. The Board's concern with delay is understandable and in many cases the vote and impound procedure does prevent unnecessary delay. However, when the bargaining unit can be reduced on review, present use of the vote and impound procedure ignores the importance of employee free choice and the community of interests doctrine. The implementation of a multiple-ballot election will not delay the election and it will preserve free choice because the employees are informed of the possibility that the bargaining unit size may change after the election.

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152. In *NLRB v. Parsons School of Design*, 793 F.2d 503, 504 (2d Cir. 1986) the Second Circuit ordered a new election despite the fact that the exclusion of 20 full-time teachers from the unit of 200 part-time teachers only resulted in a 10% reduction in the unit size. See also *supra* note 55. The court stated that the part-time teachers may have intended to rely on the full-time faculty members to assume most of the responsibility for the union work because the full-time faculty would have had more of a stake in improving the terms and conditions of employment. *Parsons*, 793 F.2d at 508. While the court's argument has some merit, a strong counter-argument exists that the sheer numerical strength of the part-time teachers would dictate that they would control the union. The best solution to the *Parsons* case would be a multiple-ballot election. However, if the Board is not capable of expediting all reviews regarding unit reductions, the facts of *Parsons* would not make it a prime candidate for expedited review.