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THE NIXON BOARD AND RETAIL BARGAINING UNITS

Stephen C. Vladeck†

For more than four years, three Nixon appointees comprised the majority of the National Labor Relations Board. Only a review of all decisions during that period can precisely summarize that Board's activity. However, the Board's response to retail store unit problems indicates a definite pattern. To the extent that this sample of cases offers a fair guide, the Board clearly expressed the essentially anti-labor bias that permeated substantial parts of the Nixon administration.

The Nixon Board members were Chairman Edward Miller, Ralph Kennedy, and John A. Penello. Chairman Miller's term began on June 3, 1970, and was completed on December 31, 1974. Ralph Kennedy's term ran from December 14, 1970, until his resignation effective July 30, 1975. Currently serving as a Board member, John A. Penello began his term February 22, 1970. John Fanning and Howard Jenkins remained Board members throughout the period of the Nixon majority. Fanning was originally appointed in 1957 and Jenkins in 1963.

During the period of the Nixon majority, the National Labor Relations Board demonstrated less concern for statutory intention and judicial precedent than in any other period in its forty year history. This conclusion is drawn from Board decisions affecting bargaining units in retail establishments, the effect of accretion clauses on such bargaining units, and the related question of whether proof of majority through card counts, where such agreements exist, should compel the issuance of a bargaining order. While intentionally narrow, the topics amply portray the views of the Board members and their effect on policy during the Nixon Board years.

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I

BARGAINING UNITS

The National Labor Relations Act (NLRA) provides that collective bargaining representatives are to be designated or selected by the majority of employees in "a unit appropriate for such purposes."¹ Subject to the mandate that it pursue the ultimate purpose of assuring employees the fullest freedom in exercising rights secured by the Act,² the Board possesses almost unlimited power³ in determining the composition of a bargaining unit. To act with necessary discretion and to retain flexibility, the Board has liberally construed the term "appropriate." In *Morand Brothers Beverage Co.*,⁴ the Board found that

[t]here is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate." It *must* be appropriate to ensure the employees, *in each case*, "the fullest freedom in exercising the rights guaranteed by this Act."⁵

Although it bore no relationship to their announced intention, the Board until 1962 regularly held that the appropriate unit in multistore retail operations encompassed all employees of outlets within the employer's administrative division or geographic area.⁶ In adopting an easily identified unit, the Board simplified its own task. Little weight was given to the factors that guided determinations in multiplant industrial enterprises: the geographic separation of plants, the degree of interchange of employees, the degree of autonomy of each unit, and the bargaining history.⁷ *American*

¹ National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970).

² 29 U.S.C. § 159(b) (1970). The statute also requires the Board to give special consideration to professional employees and guards.

³ See *Leedom v. Kyne*, 358 U.S. 184 (1958).

⁴ 91 N.L.R.B. 409 (1950).

⁵ *Id.* at 418.

⁶ See, e.g., *Daw Drug Co.*, 127 N.L.R.B. 1316 (1960) (pharmacists in 16 store division); *Crown Drug Co.*, 108 N.L.R.B. 1126 (1954) (drugstore employees in 31 store division); *Herpolsheimer Co.*, 100 N.L.R.B. 1452 (1952) (department stores, 25 miles apart); *Safeway Stores*, 96 N.L.R.B. 998 (1951) (meat department employees in division); *Kroger Co.*, 88 N.L.R.B. 194 (1950) (butchers); *Westbrook Enterprises, Inc.*, 79 N.L.R.B. 1032 (1948) (dining room and kitchen employees). Although the Board reserved the right to apply different standards in "unusual circumstances," such exceptions were rarely granted. See *Diana Shop, Inc.*, 118 N.L.R.B. 743 (1957); *Liggett Drug Co.*, 110 N.L.R.B. 949 (1954).

⁷ See, e.g., *American Linen Supply Co.*, 129 N.L.R.B. 993 (1960); *General Shoe Corp.*, 113 N.L.R.B. 905 (1955).

*Stores Co.*⁸ exemplifies the absurd results which occasionally followed from the inflexible application of this divisional or geographic area rule of thumb. In *American Stores*, the Board held appropriate a single unit of a retail food chain operation which stretched more than 100 miles from a warehouse in Rahway, New Jersey, to Riverhead, Long Island, with no stores in the intervening distance.

*Sav-On Drugs, Inc.*⁹ marked a landmark modification in the Board's approach. Seeking to represent separate units of professional and nonprofessional employees in a single retail outlet of a nine store chain, petitioner argued that where the employees shared no community of interest, the statutory reference to "a unit" rather than "the" unit justified a deviation from the administrative division or geographic area standard. Petitioner asserted that the employer's organizational structure should have no more influence than the extent of the union's organization.¹⁰ The employer resisted, urging the Board to employ its usual standard and to find the appropriate unit to encompass all like employees of the nine stores in the administrative subdivision of the parent corporation. The Board acknowledged that its past policy toward multistore retail outlets frequently impeded the exercise of employee rights to self-organization under the Act, and found the single store unit appropriate. The Board announced that thereafter it would "apply to retail chain operations the same unit policy which we apply to multiplant enterprises in general."¹¹ The four factors to be considered in determining appropriate bargaining units were: (1) the geographic separation of the store in question from the others; (2) real and substantial managerial authority on the part of the store manager; (3) the degree of employee interchange between the one store and the others; and (4) the absence of a union competing to represent the employees in a differently structured unit.¹²

For several years after the *Sav-On* decision, the National Labor Relations Board found that, where the criteria were satisfied, a single retail unit comprised an appropriate collective bargaining unit.¹³ In *Frisch's Big Boy Ill-Mar, Inc.*,¹⁴ the Board stated that even

⁸ 22-RC-583 (1959). This case was brought in NLRB Region 22 and is unreported.

⁹ 138 N.L.R.B. 1032 (1962), *injunction denied*, 51 L.R.R.M. 2368 (D.N.J. 1962).

¹⁰ 29 U.S.C. § 159(c)(5) (1970) provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling."

¹¹ 138 N.L.R.B. at 1033.

¹² *Id.* at 1033-35.

¹³ *Shop'n Save Co.*, 174 N.L.R.B. 1113 (1969) (single unit at one of five stores in state);

where a division-wide unit was most appropriate, a union seeking recognition in a single store would be granted that unit determination if the store alone was appropriate. The majority held that *Sav-On* did not stand for the proposition that the administrative division or geographical area was the presumptively appropriate unit absent grounds showing that a smaller unit should be established. The Board stated:

No such presumption exists. Rather, the Board there abandoned the approach that a multistore unit alone could be appropriate and adopted the view that the general unit criteria should apply to retail store units. Under such criteria a single-plant unit is presumptively appropriate unless it be established that the single plant has been effectively merged into a more comprehensive unit so as to have lost its individual identity.¹⁵

The Taft-Hartley Amendment to section 9(c)(5) provides that "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling."¹⁶ The traditional union position was that the extent and nature of the employer's organization should not control the appropriate unit. Indeed, many of the early retail unit determinations by the Board frustrated union organization. Where a common employer is virtually the only community of interest among employees, administrative and geographic units make organizing difficult if not impossible. Such a result contradicts the purpose of the NLRA. Due to the flexibility created by the *Sav-On* decision, the organization of retail stores more closely resembled what the Board had permitted in other industries through its unit decisions.

In *Twenty-First Century Restaurant Corp.*,¹⁷ the Nixon Board first indicated that it would limit those section 7 rights whose exercise

Raymond's Inc., 161 N.L.R.B. 838 (1966) (retail employees of one of seven stores); Wm. H. Block Co., 151 N.L.R.B. 318 (1965) (food service employees at one of five stores); Purity Food Stores, Inc. (Sav-More Food Stores), 150 N.L.R.B. 1523 (1965), *enforcement denied*, 354 F.2d 926 (1st Cir. 1965), *decision on remand*, 160 N.L.R.B. 651 (1966), *set aside*, 376 F.2d 497 (1st Cir.), *cert. denied*, 389 U.S. 959 (1967) (employees at one of seven stores); Sun Drug Co., 147 N.L.R.B. 669 (1964), *enforced*, 389 F.2d 408 (3d Cir. 1966) (single drug store in multistore chain); Mary Carter Paint Co., 148 N.L.R.B. 46 (1964) (all retail employees in 17 stores); Overton Mkts., Inc., 142 N.L.R.B. 615 (1963) (separate grocery and meat units covering all ten stores).

¹⁴ 147 N.L.R.B. 551 (1964), *enforcement denied*, 356 F.2d 895 (7th Cir. 1966).

¹⁵ 147 N.L.R.B. at 551 n.1. *Accord*, Grand Union Co., 176 N.L.R.B. 230 (1969); Kostel Corp., d/b/a Big Ben Shoe Store, 172 N.L.R.B. 1523 (1968); Haag Drug Co., 169 N.L.R.B. 877 (1968).

¹⁶ 29 U.S.C. § 159(c)(5) (1970).

¹⁷ 192 N.L.R.B. 881 (1971). The Board reached a similar result in *Waiakamilo Corp.*, d/b/a McDonald's, 192 N.L.R.B. 878 (1971), which presented virtually identical facts.

the *Sav-On* decision had facilitated. Confronted with facts substantially the same as those in *Frisch's Big Boy*, Board chairman Miller and member Kennedy dismissed a petition for a bargaining unit at a single McDonald's restaurant in Brooklyn. The employer, who owned twenty-two separately incorporated restaurants in the New York-New Jersey area through a single franchise agreement with McDonald's Corporation, contended that the appropriate unit encompassed all of its operations or, alternatively, the seven located in New York, one of its two administrative divisions. Abandoning the presumption favoring the single unit and narrowly construing the criteria enumerated in *Sav-On*, the majority found that the local manager had little autonomy, that labor relations policy emanated from the corporate headquarters, and that geographic proximity was sufficient to require a larger bargaining unit. Without considering the conditions imposed on the chain by the franchise agreement, Miller and Kennedy stressed that

[i]n our opinion it is significant that all of the franchised food outlets of the Employer conduct business under standardized policies and procedures subject to close centralized control. It is clear that the location manager is vested only with minimal discretion with respect to labor relations matters and the method of operation and the exercise of his discretion is carefully monitored by the field supervisor who visits each location daily and the general manager who makes frequent visitations.¹⁸

The request for the single location unit was therefore denied.¹⁹

In dissent, member Fanning argued that the local manager possessed the requisite authority, that the interchanges of employees among the stores were relatively infrequent and insignificant, and that the single store unit was appropriate under the test of *Sav-On* and subsequent cases. Fanning stressed that the record evidenced a close community of interest among the employees in the single store. Most importantly, he condemned the majority's overemphasis of the employer's "internal organization factor at the expense of factors most closely related to employees' relationships with each other."²⁰

The Nixon Board hastened its retreat in *Gray Drug Stores, Inc.*²¹ Except as an alternative, the union in *Gray Drug* did not desire a single store unit. It alleged that there was substantial interchange

¹⁸ 192 N.L.R.B. at 882.

¹⁹ The Nixon Board's apparent preference for larger units was reflected in *Consolidated Foods Corp.*, 213 N.L.R.B. No. 60, 87 L.R.R.M. 1170 (1974).

²⁰ 192 N.L.R.B. at 884.

²¹ 197 N.L.R.B. 924 (1972).

of employees among eleven stores in Dade County (Greater Miami). The petitioner argued that the county constituted an appropriate unit because the employees shared a legitimate community of interest. The employer demanded a statewide unit of thirty drugstores extending for almost 300 miles along Florida's eastern seaboard. Two district managers exercised authority over stores located in both Dade and Broward (greater Fort Lauderdale) Counties. Recognizing this administrative division, the majority held that

a grouping of Dade County stores would not be coextensive with the supervision exercised over them and would lack operational autonomy. . . .

. . . A unit encompassing all employees in Broward and Dade counties would consist of employees subject to operational supervision with no other employees in the chain and constitute a geographic cluster suggesting a community of interest distinct from employees at the Employer's remaining stores.²²

Accordingly, the election unit consisted of the employees from both counties. Members Fanning and Jenkins dissented. Each county constituted a "standard metropolitan statistical area" and occupied a distinct geographic area.²³ In the dissent's view, the majority sought to apply the combined factors of both geographic area and administrative division rather than the pre-*Sav-On* standard of either geographic or administrative division.²⁴

Miller, Kennedy, and Penello determined bargaining units by applying standards they deemed more appropriate than those mandated by the NLRA or previously developed by the Board. *Wickes Furniture*²⁵ demonstrates this tendency. The petitioner sought a unit of salesmen at the employer's furniture store. The majority accepted the employer's argument that the only appropriate bargaining unit extended storewide to include sales, display, data processing, clerical, warehouse, and repair shop personnel.

²² *Id.* at 926.

²³ "Standard definitions of metropolitan statistical areas were first issued by the then Bureau of the Budget in 1949. Generally conceived, a 'metropolitan area' is an 'integrated economic and social unit with a large population nucleus.'" *Id.* at 927, quoting BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, at 829, 890 (1971).

²⁴ In *Consolidated Foods Corp.*, 213 N.L.R.B. No. 60, 87 L.R.R.M. 1170 (1974), Miller, Kennedy, and Penello implied that the administrative division and geographical area standards may be applied independently in a unit determination. But compare the application of these tests in the alternative in a decision by Miller, Fanning, and Penello. *Daytex Inc.*, 201 N.L.R.B. 406 (1973).

²⁵ 201 N.L.R.B. 606 (1973). In accord are several companion cases: *Wickes Furniture*, 201 N.L.R.B. 608 (1973); *Wickes Furniture*, 201 N.L.R.B. 610 (1973); *Wickes Furniture*, 201 N.L.R.B. 615 (1973).

Miller, Kennedy, and Penello reasoned that all employees worked in the same building, punched the same time clock, and used the same lounge. Again dissenting, Fanning and Jenkins believed that the statute's standard tests of appropriateness were not satisfied. Salesmen were independently supervised, performed essentially different work, received commissions, and had little contact with some of the other groups of employees. There was no demonstration of any community of interest other than a common employer.

In *Frito-Lay, Inc.*,²⁶ the three Nixon appointees accepted a bargaining unit which included route salesmen from Phoenix and Tucson, Arizona, to Las Vegas, Nevada. Wholly disregarding the geographic gerrymandering which obviously resulted, Miller, Kennedy, and Penello based their rationale entirely on the fact that these territories coincided with the company's regional sales division. The majority emphasized that

implementation of the Employer's sales effort is effectuated at the regional level. . . . The regional sales manager is responsible for determining how these products are allocated within his region. He is also responsible for the profits from his region and for expense planning for the region Although each district has a district sales manager who is concededly a supervisor, the record reveals that the district sales managers have no authority in these matters. Indeed, the record shows that, under the Employer's method of operation, it is not possible to determine expenses at any level below that of the region, and that profits are not broken down by district.²⁷

Since virtually all key administrative decisions were made regionally, the majority dismissed the petitioner's request for a unit comprised only of salesmen operating from the Phoenix office. Fanning and Jenkins responded that the petition filed for Phoenix salesmen identified an appropriate unit. They accused the majority of isolating the only factor which is entirely within the control of the employer, *i.e.*, common supervision, and of ignoring all other criteria—community of interest, lack of interchange, geographic cohesiveness—which could have justified approval of the smaller unit. Fanning and Jenkins contended that the majority position represented a “move from the statutory prohibition of unit control by extent of employee organization to a new administrative theory calculated to insure unit control by employer organization.”²⁸

These decisions in which the Nixon appointees redefined the

²⁶ 202 N.L.R.B. 1011 (1973).

²⁷ *Id.*

²⁸ *Id.* at 1014.

alternative "appropriate unit" tests inevitably limit the right of retail employees to organize. The *Sav-On* announcement of the presumptive appropriateness of a single store unit had removed artificial and unwarranted limitations on section 7 organizational rights. The Nixon majority not only resurrected the earlier barriers, but also created new ones. This new tack was not a total abandonment of *Sav-On* and its progeny since the Nixon Board did heed its criteria when to do otherwise could not be justified.²⁹ Whenever an opportunity was presented, however, the Board found the larger unit—usually conforming to the employer's administrative organization—to be appropriate.

II

BARGAINING UNITS AND ACCRETION

When an employer expands an existing enterprise through the acquisition or creation of an additional plant, store, or department, the union representing an existing bargaining unit may demand that he treat new employees as an accretion. Such a demand is based upon recognition of an "after-acquired" plant or store clause in its contract. The employer may resist recognition and counter-demand proof of a card majority. Alternatively, he may seek a representation election on the ground that the new facility constitutes a "separate" unit. The retail industry has obviously experienced more accretion problems than any other enterprise. Food chains have customarily grown by adding stores in new locations. The *Sav-On* decision affected the policy of the NLRB with regard to adding new stores to existing bargaining units. The Board has refused to find accretion when, as in *Sav-On*, the unit for which inclusion is sought would also be appropriate as a separate unit, taking the position that section 7 rights of new employees would be better protected by denying accretion and compelling a demonstration of majority status in the smaller unit.³⁰

The NLRB has not hesitated to find that employer and union commit an unfair labor practice when, pursuant to a contract, they force accretion to the established unit. This approach seeks to preserve the employees' right to select or reject representation by a

²⁹ See, e.g., *Daytex, Inc.*, 201 N.L.R.B. 406 (1973).

³⁰ For a full discussion of these cases, see *Boire v. Teamsters Union*, 479 F.2d 778 (5th Cir. 1973). See also *Super Mkts. General Corp., d/b/a Shop-Rite*, 170 N.L.R.B. 446 (1968), enforced sub nom. *Retail Clerks Local 919 v. NLRB*, 416 F.2d 1118 (D.C. Cir. 1969); *Sunset House*, 167 N.L.R.B. 870 (1967), enforced, 415 F.2d 545 (9th Cir. 1969). Compare *Safeway Stores, Inc.*, 175 N.L.R.B. 875 (1969), with *Melbet Jewelry Co.*, 180 N.L.R.B. 107 (1969).

labor organization in the "new" facility. It is at least equally protective of those rights to hold, in the absence of a contest between unions for representative status,³¹ that independent indicia of the employees' desire to be represented coupled with a contractual agreement to accrete to an appropriate unit warrants enforcement of the agreement. Four cases during the Nixon years indicate an initial move toward the latter position and a subsequent, decisive retreat from it.

In *Melbet Jewelry Co.*,³² the employer opened a third store in a single trading area. Employees at the two older locations were represented as a single unit by a local of the Retail Clerk's International Association. Arguing that the new store belonged to that same unit, the local demanded recognition as the exclusive bargaining agent. Since the collective bargaining agreement provided for the accretion of new stores to the unit, Melbet acceded to the union's demand. The Board majority, McCulloch and Zagoria, found that this accretion constituted unfair labor practices by both the employer and the union. The new store by itself was deemed an appropriate unit even though the multistore unit might also be appropriate. The Board held that employees in the new store should not be represented without their initial consent.

The Board, here, must examine fundamentals and put the Section 7 rights guaranteed the employees and the appropriate unit concept of Section 9(b) into proper perspective. Excessive preoccupation with "appropriate unit" in the circumstances of this case leads to the abrogation of those rights. . . . If the Board were to permit the extension of the contracts covering other stores . . . (thereby very effectively disenfranchising them) . . . it would, in our opinion, do serious violence to the mandate that employees' rights are to be protected and that appropriate unit findings under Section 9(b) must be designed to preserve those rights.

. . . We will not . . . under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them.³³

The majority distinguished an earlier decision, *NLRB v. Apple-*

³¹ See *Spartan Indus., Inc.*, 169 N.L.R.B. 309 (1968), *enforced*, 406 F.2d 1002 (5th Cir. 1969).

³² 180 N.L.R.B. 107 (1969). See also *Super Valu Stores, Inc.*, 177 N.L.R.B. 899 (1969); *Warehouse Mkts., Inc.*, 174 N.L.R.B. 401 (1969).

³³ 180 N.L.R.B. at 109-10.

ton Electric Co.,³⁴ in which the Seventh Circuit rejected a Board determination of unlawful employer assistance. Pursuant to an accretion clause, the employer recognized the existing union as part of the bargaining unit in a newly-acquired plant. The court found that where the unit is appropriate and the employer acts in good faith, a contractual agreement validly extends recognition to the union as agent for employees of after-acquired plants and protects the new employees by guaranteeing representation at a critical period of their employment history. The *Melbet* majority stated that the facts in *Appleton* differed in that a new subsidiary had been integrated into an operation of the existing company. In dissent, member Brown saw *Appleton* as a viable precedent. He agreed with the Seventh Circuit that such cases do not present questions of representation, and that when no other labor organization is present, an employer may lawfully abide by a contract provision to recognize accretion of an appropriate unit and thereby favor an incumbent union.

Only two years after *Melbet*, the NLRB appeared to limit the scope of that decision. In *Retail Clerks Local 870 (White Front)*,³⁵ the Board gave effect to an accretion clause similar to that in *Melbet*. However, the union in *White Front* had obtained authorization cards from a majority of employees in the new store. The employer refused to honor the union's demand for recognition and, when the union picketed, filed unfair labor practice charges against it. Dismissing the complaint, Fanning and Jenkins noted that the parties had agreed that any future store located in the union's jurisdiction would be deemed an accretion to the existing unit. They then distinguished the *Melbet* holding:

Although we have in past cases refused to give controlling weight to such a clause, our only reason for not giving controlling effect to the contractual commitment of the parties has been our concern over protecting the rights of future employees to have a say in the selection of their bargaining representative. No such problem exists here, however, because the employees at White Front, Newark, have already clearly indicated that they wish to be represented by the Respondent.³⁶

Since employee rights had not been jeopardized, full effect was

³⁴ 296 F.2d 202 (7th Cir. 1961). Compare *Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352 (9th Cir. 1970), enforcing 177 N.L.R.B. 25 (1969), with *Boire v. Teamsters Union*, 479 F.2d 778 (5th Cir. 1973), and *Industrial Workers Local 602 v. NLRB*, 375 F.2d 707 (6th Cir. 1967).

³⁵ 192 N.L.R.B. 240 (1971). *Accord*, *Smith's Management Corp., d/b/a Fraziers Mkt.*, 197 N.L.R.B. 1156 (1972).

³⁶ 192 N.L.R.B. at 242.

given to the agreement. Chairman Miller, the third member of the panel, concurred in the result, but refused to pass on the accretion issue. In two later cases, however, he rejected both the result and rationale that Fanning and Jenkins had advanced.

With the exception of one component,³⁷ *White Front* completed the setting for the factually similar case of *Kroger Co., Houston Division*.³⁸ Miller, Kennedy, and Penello ruled there that even when an employer had signed an "after-acquired" store contract clause, he need not accept a card count as evidence of the union's majority status in a store which was transferred from one administrative division to another. Thus, the Board narrowly interpreted *Snow & Sons*,³⁹ a decision predating *NLRB v. Gissel Packing Co.*,⁴⁰ to require that before the Board enforces an after-acquired store contract clause, the employer must specifically agree to abide by the results of the card check. The majority did not even mention *White Front*.

Relying on the precedent of *White Front*, dissenters Fanning and Jenkins argued that once the rights of new employees were protected, as by a card check, full effect should be given to the accretion clause. They noted that the majority failed to find such a contract clause illegal, but nevertheless refused to grant its enforcement. The minority contended that the contract expressed the clear intent of the parties not to determine union status through a Board election and that such a clause clearly contemplated that a card check would sufficiently demonstrate a majority.

In *Smith's Management Corp.*,⁴¹ a companion case to *Kroger*, the same majority adopted the opinion of the administrative law judge. Distinguishing *White Front*, he had argued that its controlling facts were the withdrawal of the employer's offer to test majority status by card check and the withdrawal of the employer's election petition. Since *Smith* had rejected a card offer at the outset and had not withdrawn its petition, it was not bound by the accretion clause coupled with the showing of a card majority. The opinion also stated that *Smith's* contract contained no specific procedure for evaluating the union's claim that it represented a majority within the accreted unit. The refusal to bargain complaint was dismissed. By adopting this opinion, the majority ignored the unambiguous holding in *White Front* approving the card check as an appropriate means to protect the rights of new employees.

³⁷ See notes 57-61 and accompanying text *infra*.

³⁸ 208 N.L.R.B. 928 (1974).

³⁹ *Snow & Sons*, 134 N.L.R.B. 709 (1961). See note 61 and accompanying text *infra*.

⁴⁰ 395 U.S. 575 (1969). See notes 52-78 and accompanying text *infra*.

⁴¹ 208 N.L.R.B. 939 (1974).

The Nixon Board's position in *Kroger and Smith* was reversed on appeal in *Retail Clerks Local 455 v. NLRB*.⁴² The circuit court found that the Board had altered its own holdings in *White Front* and in a subsequent case involving *Smith's Store*,⁴³ by requiring a union to provide evidence of an accretion clause and a sufficient showing of majority status in addition to a specific agreement by the employer to waive resort to Board election procedures. The court recited that this latter requirement carried little weight.

[I]f the "additional store clauses" involved in these cases do not constitute a "waiver" of the employer's right to a Board-conducted election, what do they mean? . . .

The answer to the question is that the "additional store clause" can have no purpose other than to waive the employer's right to a Board ordered election.⁴⁴

If the employer could enter into such an agreement and, when presented with a card majority, petition for a Board election, the agreement would be a nullity.

In Judge Bazelon's view, the Board had intimated in its opinion and at oral argument that "authorization cards . . . are insufficiently reliable and inherently coercive of the § 7 rights of employees . . ." ⁴⁵ and that an agreement to recognize majority status in advance is impermissible. Noting that the Supreme Court's recent decision in *Linden Lumber Division, Summer & Co.*⁴⁶ had not addressed this issue,⁴⁷ the court challenged the Board to reverse *White Front* and to hold that rational labor policy renders "additional store clauses" illegal. By the time the Board issued a supplemental decision and order, Chairman Miller had stepped down and the Nixon Board no longer commanded a majority. Joined by the newly-appointed Chairman Murphy, members Fanning and Jenkins declined Judge Bazelon's challenge in *Kroger Co., Houston Division*.⁴⁸ Agreeing that national labor policy favors enforcement of additional store clauses, the Board affirmed its holdings in *White Front* and *Smith*. It thus assured early recognition of a bargaining agent designated by a majority of employees in such units. Members Kennedy and Penello dissented from this

⁴² 510 F.2d 802 (D.C. Cir. 1975).

⁴³ 197 N.L.R.B. 1156 (1972).

⁴⁴ 510 F.2d at 805.

⁴⁵ *Id.* at 806.

⁴⁶ 419 U.S. 301 (1974). See note 60 and accompanying text *infra*.

⁴⁷ 510 F.2d at 807.

⁴⁸ 219 N.L.R.B. No. 43, 89 L.R.R.M. 1641 (1975), supplementing 208 N.L.R.B. 928 (1974). See text accompanying notes 38-40 *supra*.

reversal of the Board's previous position in *Kroger*. Kennedy insisted that the clause could be meaningless, or in the alternative, "reasonably" construed to "mean that as the Union acquires the right to represent employees in additional stores in the division such stores will be added to the multistore unit and will be covered by the existing divisionwide bargaining contract."⁴⁹ Citing *Linden Lumber and Wilder Manufacturing Co.*,⁵⁰ member Penello argued that absent an unfair labor practice, the bargaining order was improper. He also argued that the additional stores were not "true accretions" (whatever that is) and that after-acquired store clauses do not waive the employer's right to a representation election.⁵¹

III

CARD CHECKS AND BARGAINING ORDERS

In *NLRB v. Gissel Packing Co.*,⁵² the Supreme Court ruled that authorization cards can adequately reflect employee sentiment. When such cards obtained from a majority of employees reliably establish the union's majority status, the Act⁵³ creates a duty to bargain without an election. If an employer refuses to accept the card majority and at the same time commits independent unfair labor practices that tend to dissipate the majority and undermine the prospect of a fair election, a bargaining order is an appropriate remedy. Such unfair labor practices need not be "'outrageous' and 'pervasive,'"⁵⁴ but must have more than a "minimal impact on the election machinery."⁵⁵ The *Gissel* Court took notice of the Board's position that an employer innocent of misconduct may not refuse to bargain if he knows that a majority of his employees support the union. However, it declined to decide whether a bargaining order is ever appropriate where there is no interference with the election process.⁵⁶

The Board initially adopted a liberal approach in accepting union authorization cards. In *Wilder*,⁵⁷ the Board (Miller, Brown, Fanning, and McCulloch) squarely interpreted *Gissel* so as not to

⁴⁹ *Id.* at 1643.

⁵⁰ 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972).

⁵¹ 89 L.R.R.M. at 1645.

⁵² 395 U.S. 575 (1969).

⁵³ 29 U.S.C. § 158(a)(5) (1970).

⁵⁴ 395 U.S. at 613.

⁵⁵ *Id.* at 615.

⁵⁶ *Id.* at 601 n.18.

⁵⁷ 185 N.L.R.B. 175 (1970), *rev'd*, 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972).

require proof of an independent unfair labor practice to justify issuing a bargaining order when the union had shown a majority. Presented with cards sufficient to indicate majority status, the employer in *Wilder* refused to recognize the union. Eleven of eighteen employees in the proposed unit responded with strike activities, including picketing. From this the Board inferred that the employer knew of the union's status. The employer's failure thereafter to resolve any doubt by filing a petition or to indicate a willingness to resolve the representation issue in any other manner, was deemed sufficient to compel a bargaining order based solely on a section 8(a)(5)⁵⁸ violation. Chairman Miller was the only Nixon appointee among the *Wilder* majority. The Board did not hold that authorization cards provide a freely interchangeable substitute for an election, but recognized that a card check supplemented by other convincing evidence of majority support established a duty to bargain.

Within a few months of the *Wilder* decision, Chairman Miller set out an independent position that resolved inconsistencies in the stance he had appeared to accept in that opinion. As the majority of the three member panel in *United Packing Co.*,⁵⁹ Fanning and Brown held that the Board could order bargaining if an employer committed numerous section 8(a)(1) violations and/or refused to bargain in violation of section 8(a)(5). Chairman Miller, concurring in the *United Packing* order, rejected this theory. He insisted that the Board should carefully distinguish bargaining orders issued to remedy sections 8(a)(1) and 8(a)(3) violations from those required by a bargaining refusal and based solely on section 8(a)(5) without regard to collateral conduct. Arguing that in such cases *Gissel* required the Board to examine sections 8(a)(1) and 8(a)(3), Miller found references to section 8(a)(5) to be mere surplusage. Fanning and Brown understood Miller's position to imply that only serious violations of section 8(a)(5) warranted the bargaining order remedy.

Less than one year after announcing it, the NLRB sub silentio overruled *Wilder* in *Linden Lumber Division, Summer & Co.*⁶⁰

⁵⁸ 29 U.S.C. § 158(a)(5) (1970).

⁵⁹ 187 N.L.R.B. 878 (1971). See also *Mid Missouri Motors*, 194 N.L.R.B. 505 (1971).

⁶⁰ 190 N.L.R.B. 718 (1971), *rev'd sub nom.* *Truck Drivers Local 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd sub nom.* *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974). After the Board's ruling, the Court of Appeals for the District of Columbia remanded *Wilder*, then on appeal, for reconsideration in light of the Board's *Linden Lumber* holding. See 198 N.L.R.B. No. 123, 81 L.R.R.M. 1039 (1972), *rev'g Wilder Mfg. Co.*, 185 N.L.R.B. 175 (1970).

Although the employer in *Linden Lumber* knew, independently of the authorization cards, that a majority of the employees supported the union, the employer refused to participate in or abide by a representation proceeding. Miller and Kennedy, unexpectedly joined by Jenkins, construed *Gissel* to require denial of a bargaining order. They held that that remedy issued only when an employer's unfair labor practice was so serious that a fair election was virtually impossible. The majority followed the holding of *Snow & Sons*,⁶¹ with one exception: when the employer specifically agrees to honor a card check and subsequently fails to do so, then a remedial bargaining order would be issued without the commission of independent unfair labor practices.

On appeal, the Supreme Court held in *Linden Lumber* that absent specific agreement to the contrary, a bargaining order could not be sustained solely on the basis of a section 8(a)(5) violation of the duty to bargain. In sustaining the Board's holding that the union must petition for an election upon the employer's refusal of recognition, the Court eliminated the key alternative to election. It departed from its position in *Gissel* that authorization cards are inherently reliable, that its general power to issue bargaining orders required expansion, and that an employer's knowledge of the union's majority without independent unfair practices could warrant an order under section 8(a)(5). Guided by its Nixon appointees and with the prospect of support from a more conservative Supreme Court, the NLRB in *Linden Lumber* defiantly repudiated the approval that the Supreme Court had extended to the use of bargaining orders in *Gissel*.

Three lines of Nixon Board decisions illustrate a shift from the NLRB's earlier position. In each area, the Board severely limited the use of bargaining orders and consequently compelled unions to test their support under conditions clearly tainted by employer misconduct. The Nixon Board applied inordinately strict standards in the first area—testing the degree of employer misconduct required to impair the election machinery and to sustain a bargaining order.

In *Claremont Polychemical Corp.*⁶² the employer threatened through its corporate president to close any unionized plant, offered benefits for withdrawal of support for the union, and promised to promote an employee to foreman if the union failed in

⁶¹ 134 N.L.R.B. 709 (1961). See note 39 and accompanying text *supra*.

⁶² 196 N.L.R.B. 613 (1972). *But see* Milgo Industrial Inc., 203 N.L.R.B. 1196 (1973); Justus Co., 199 N.L.R.B. 426 (1972).

its efforts. Miller and Kennedy found this conduct insufficiently violative of the act to require a bargaining order based on a card majority. Fanning dissented, pointing to the statement in *Gissel* that employees "are particularly sensitive to rumors of plant closings [and] take such hints as coercive threats rather than honest forecasts."⁶³ Even more severe was the failure of Kennedy and Jenkins to find substantial interference in *Green Briar Nursing Home*.⁶⁴ The employer physically assaulted two union organizers in the presence of employees who had attempted to present him with cards proving majority status. In the ensuing strike, a picket line was established. Seeking to scatter the pickets, the employer drove his automobile toward them at a high rate of speed and actually brushed one employee. Such conduct, the majority found, "was not of a type which would have such severe or lingering impact as to preclude the accurate ascertaining of employee desires through our usual election procedures."⁶⁵ Fanning, the lone dissenter in this series of cases, remarked: "I do not interpret *Gissel* as requiring that the employer's unfair labor practices must be the direct cause of death or bloodshed in order to preclude the holding of a fair election and thereby merit a bargaining order."⁶⁶

In *Gissel* and in *Wilder*, the Court and the Board had reaffirmed the traditional position that a union could, as an alternative to petitioning for an election, present "convincing evidence of majority support" that "could not in good faith be ignored."⁶⁷ Indeed, the Supreme Court in *Gissel* noted that "[t]he Board [in its brief] pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union"⁶⁸ The Board restated this position in *Sullivan Electric Co.*,⁶⁹ where the employer had undertaken a poll of the employees in the unit proposed. In this rare instance, the Nixon Board based a bargaining order solely on an 8(a)(5) violation. The Board held that when an employer solicited this independent proof after receiving a demand for recognition based on a card majority, he was bound to the majority status that his poll revealed.

The NLRB soon retreated from the position it took in *Sullivan*.

⁶³ 395 U.S. at 619-20.

⁶⁴ 201 N.L.R.B. 503 (1973).

⁶⁵ *Id.* at 504.

⁶⁶ *Id.* at 505.

⁶⁷ NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756, 757 (2d Cir. 1940).

⁶⁸ 395 U.S. at 594 (emphasis in original).

⁶⁹ 199 N.L.R.B. 809 (1972), *aff'd*, 479 F.2d 1270 (6th Cir. 1973).

In *Tennessee Shell Co.*,⁷⁰ the Nixon appointees agreed that the employer's conduct violated section 8(a)(1) in that it involved interrogation coupled with threats of reprisal for participation in and support of union organizing activity. Finding *Sullivan* inapplicable, the Board reasoned that the employer's direct knowledge of the extent of union support in the twenty-one person unit derived from interrogation of only eight employees; knowledge that three other employees supported the union was gained indirectly, without interrogation. The Board refused to issue a bargaining order because the majority support of the union was "slender," the employer's sources of knowledge were mixed, and the independent violations were insufficiently destructive of the prospect of a fair election. Acutely aware of the implications of the majority's approach and of its disregard of the Supreme Court's ruling in *Gissel*, Fanning and Jenkins insisted that *Sullivan* was controlling:

The consequence of the majority's decision is to permit a violating employer to force a union to an election which will be conducted in the shadow of the employer's own misconduct, after that employer knows because of his own investigation, including the unlawful conduct, that the union represents a majority.⁷¹

In another context, the Nixon Board foreshadowed the *Linden Lumber* decision of the Supreme Court. In *Steel-Fab, Inc.*,⁷² the NLRB adopted the position expressed by Chairman Miller in *United Packing* and *Mid Missouri Motors*,⁷³ that consideration of a section 8(a)(5) violation is neither relevant nor desirable in determining whether to issue a bargaining order, and that only independent unfair labor practices are essential to support it. In *Steel-Fab*, all members agreed that the employer had flagrantly violated sections 8(a)(1) and 8(a)(3), both before and after an election. The employer had dissipated the union's established majority and destroyed the "laboratory conditions" essential to a fair election.⁷⁴ Miller, Kennedy, and Penello, however, refused to find a violation of section 8(a)(5) and held that only sections 8(a)(1) and 8(a)(3) practices may merit a bargaining order. The majority expressly denied that the Board, in its argument before the Supreme Court in *Gissel*, had claimed an implied power to enter a

⁷⁰ 212 N.L.R.B. No. 24, 86 L.R.R.M. 1704 (1974).

⁷¹ *Id.* at 1709.

⁷² 212 N.L.R.B. No. 25, 86 L.R.R.M. 1474 (1974).

⁷³ 194 N.L.R.B. 505, 511 (1971). See note 59 and accompanying text *supra*.

⁷⁴ 86 L.R.R.M. at 1478.

bargaining order based solely on a refusal to bargain, absent other employer unfair labor practices. Although conceding that the *Gissel* Court had affirmed the Board's finding of a section 8(a)(5) violation, the Nixon appointees held that the Court had not required "such a violation as a predicate for entering a remedial bargaining order."⁷⁵ The *Steel-Fab* majority contended that a duty to bargain arose only *after* a valid recognition of the union. Such refusal before that event would impose a "retroactive bargaining order."⁷⁶ The NLRB therefore announced that it would not consider that section of the Act in those future cases where an order is sought on the basis of a card majority and independent unfair labor practices.⁷⁷ In separate but parallel opinions, Fanning and Jenkins concurred in the result, but strongly rejected the majority's rationale eliminating the section 8(a)(5) consideration. Fanning read *Gissel* to permit a bargaining order to remedy a section 8(a)(5) violation where a card majority exists and an election would be a less desirable avenue to recognition. He noted that the Supreme Court had more recently affirmed that a duty to bargain could arise without an election and that a section 8(a)(5) violation may result from the refusal to extend recognition based on a card majority.⁷⁸ Fanning chastized the majority for disregarding *Gissel* and for failing to recognize that the purposes of the Act are effectuated through consideration of alleged section 8(a)(5) violations.

CONCLUSION

Although it is unrealistic to rely on a single case, one may hope that the decision of the Court of Appeals for the District of

⁷⁵ *Id.* at 1477.

⁷⁶ *Id.* at 1476.

⁷⁷ See *Westons Shoppers City, Inc.*, 217 N.L.R.B. No. 52, 89 L.R.R.M. 1057 (1975); *Lafayette Radio Electronics Corp.*, 216 N.L.R.B. No. 167, 88 L.R.R.M. 1633 (1975); *Kelly Transfer, Inc.*, 214 N.L.R.B. No. 52, 88 L.R.R.M. 1255 (1974); *King Arthur Toyota, Inc.*, 212 N.L.R.B. No. 42, 87 L.R.R.M. 1661 (1974); *Diamond Motors, Inc.*, 212 N.L.R.B. No. 119, 87 L.R.R.M. 1014 (1974). In *Trading Port, Inc.*, 219 N.L.R.B. No. 76, 89 L.R.R.M. 1565 (1975), the new Chairman Murphy, together with members Jenkins and Penello and a concurring opinion by member Fanning, modified this position. Noting that one of the holdings in *Steel-Fab* was to make bargaining orders effective only from the date of the Board's decision, leaving unremedied unilateral changes in working conditions after majority status had been established, the Board held that "an employer's obligation under a bargaining order remedy should commence as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the union's majority status." *Id.* at 1569.

⁷⁸ *NLRB v. Savair Mfg.*, 414 U.S. 270, 280 (1973).

Columbia in *Retail Clerks Local 455 v. NLRB*⁷⁹ is prophetic. Perhaps the inequities and inconsistencies created by the Nixon Board's attitude are beginning to end.

In *Kroger Co., Houston Division*,⁸⁰ the majority of the Board paid lip service to *Melbet Jewelry*, but reaffirmed its earlier decisions in *White Front* and *Smith Management*. "[A]dditional store clauses" were deemed valid so long as the affected employees were not denied their right to express their view.⁸¹ Moreover, the majority held that when the union has a valid card majority, "no barrier [exists] to giving full effect to the contractual commitments of the parties."⁸² There is a solid, old-fashioned ring to the majority statement of Board policy that accretion clauses waive the employer's right to demand an election where there is adequate evidence of majority representation: "To permit the Employer to claim the very right which it has foregone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements."⁸³

That is not to say that one can expect the Board to abandon either its opposition to pure accretion clauses or its concern for the preservation of employees' rights in representation proceedings.

*Penn Traffic Co.*⁸⁴ adds little since there was no after-acquired facility or accretion provision in the collective bargaining agreement. The majority there found five grocery stores, recently acquired by a grocery corporation which had thirty additional stores in a neighboring state, not to be accreted to the existing unit.

It remains to be seen how long the new Board will adhere to recent decisions. Will it return to a more rational view of bargaining units in retail stores? The Court of Appeals' decision in *Retail Clerks Local 455* and the change in the Board membership have already substantially altered policies. Hopefully in the future the Board will more closely adhere to its statutory mandates.

⁷⁹ 510 F.2d 802 (D.C. Cir. 1975), *rev'g*, 208 N.L.R.B. 928 (1974) (indicating the trend as in the supplemental decision and order of the NLRB in *Kroger Co., Houston Div.*, 219 N.L.R.B. No. 43, 89 L.R.R.M. 1641 (1975)). See text accompanying notes 48-51 *supra*.

⁸⁰ 219 N.L.R.B. No. 43, 89 L.R.R.M. 1641 (1975). The Court of Appeals in *Retail Clerks Local 455* remanded the case to the Board which then issued a supplemental decision *sub nom.* in *Kroger Co.* See text accompanying notes 48-51 *supra*.

⁸¹ 89 L.R.R.M. at 1641-42.

⁸² *Id.* at 1642.

⁸³ *Id.*

⁸⁴ 219 N.L.R.B. No. 35, 89 L.R.R.M. 1676 (1975).