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# EMPLOYER PARTICIPATION IN THE DECERTIFICATION PROCESS: HOW BIG A HELPING HAND?

ELLEN RUST PEIRCE\*

## INTRODUCTION

Prior to enactment of the Taft-Hartley amendments<sup>1</sup> to the National Labor Relations Act<sup>2</sup> in 1947, there was no procedure whereby employees could decertify their union as bargaining representative.<sup>3</sup> The focus of the Act when signed into law in 1933 was on protecting the right of employees to organize for the purpose of bargaining collectively with their employer.<sup>4</sup> Not only did the Act grant this protection to employees, but it further set forth specific limitations on employer conduct with respect to the employees' organizational rights.<sup>5</sup>

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1. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 101, 80th Cong., 61 Stat. 136 (codified at 29 U.S.C. §§ 141-87 (1976)) [hereinafter cited as the Act].

2. National Labor Relations (Wagner) Act of 1935, Ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (1976)).

3. Section 9 of the Act, 29 U.S.C. § 159 (1976), governs the procedure for electing a union representative. In 1947 § 9(c)(1)(A) was added to the Act to provide for the filing of a decertification petition to request an election by:

an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection [9](a).

29 U.S.C. § 159(c)(1)(A) (1976). Such petitions are known to the Board as "RD" petitions.

4. Section 7 of the Act protects employees from employer interference, restraint or coercion in connection with certain employee activities and provides in pertinent part: Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . .

29 U.S.C. § 157 (1976).

5. Section 8 of the Act provides in pertinent part: "(a) It shall be an unfair labor practice for an employer—

Recently the process of decertifying unions has received increased attention<sup>6</sup> and statistics generated by the National Labor Relations Board<sup>7</sup> suggest that it is an ever increasing phenomenon.<sup>8</sup> Although to date no comprehensive research has been done as to why there is an increase in the number of decertification elections, it has been suggested that employees no longer see unions as the answer to their problems with management, and that in an inflationary period, employees are seeking to cut costs, including the payment of union dues.<sup>9</sup> It has recently been proposed that employee interest in being protected by a union has waned because big government and big business currently offer respectively the protections unions once afforded its members and benefits "beyond anything that a union would be able to negotiate."<sup>10</sup> This author further submits the proposition that unions have become an impediment to positive employer-employee relations because of the adversarial role they are forced to play by the current labor-management statutory structure. Furthermore, due to statutory and judicial erosion of the employment-at-will doctrine,<sup>11</sup> employees have achieved a greater measure of job security and no longer have the crucial need of a union to ensure that dismissals of em-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a)." 29 U.S.C. § 158(a)(1), (5) (1976).

6. See, e.g., Anderson, O'Reilly & Busman, *Union Decertification in the U.S.: 1947-1977*, 19 INDUS. REL. J. 100 (1980); Bellace, *Union Decertification Under the NLRA*, 57 CHI.-KENT L. REV. 643 (1981); Fulmer, *When Employees Want to Oust Their Union*, HARV. BUS. REV., Mar.-Apr. 1978, at 163; Krupman & Rasin, *Decertification: Removing the Shroud*, 30 LAB. L. J. 231 (1979).

7. Hereinafter referred to as the NLRB or the Board.

8. An analysis of NLRB statistics shows a significant increase in the number of decertification elections held. In 1948 there were only 97 such elections, 62 (or 63 percent) of which resulted in decertification. In 1980, there were 902 such elections, 656 (or 73 percent) of which resulted in decertification. In particular, the period since 1956 has seen a dramatic increase in the number of RD petitions filed. In 1967, 624 decertification petitions were filed resulting in 234 Board conducted elections. In 1977, 1,867 decertification petitions were filed resulting in 849 Board conducted elections. These statistics were obtained from the N.L.R.B. Annual Reports for the years 1948 through 1980. 13-45 NLRB ANN. REP. (1948-1980).

9. Krupman & Rasin, *supra* note 6, at 232.

10. Seligman, *Who Needs Unions?*, FORTUNE, July 12, 1982, at 54, 66 (statement of Professor Fred K. Faulkes, Boston Univ. School of Management).

11. For a survey on the employment-at-will doctrine and recent developments, see Peirce, Mann & Roberts, *Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1 (1983).

ployees are effected only for "proper cause."

During a certification campaign by a union the employer has the right to speak out against the union and to explain to employees disadvantages of unionization.<sup>12</sup> However, once a union has become the bargaining representative of the employees, the employer is limited in its ability to suggest that the employees would be better off without a union. This results from the employer's statutory obligation under section 8(a)(5) of the Act to deal with the union concerning all matters of employment, and the employer's statutory duty under section 8(a)(1) of the Act not to coerce employees in the exercise of their section 7 rights.<sup>13</sup> To initiate a discussion with employees on the procedure for decertification constitutes a breach of the employer's duty toward the union representing its employees.<sup>14</sup> Moreover, the NLRB has generally taken the position that not only is it unlawful for an employer to instigate a decertification proceeding, but also to promote or participate in such a proceeding as well as to induce employees to sign any other form of union-repudiating document.<sup>15</sup>

Because of the Board decisions in this area employers have been reluctant to become involved at all with a decertification drive. A close analysis of Board decisions, however, reveals that certain employer involvement at some stages of the decertification process is not violative of the Act. These Board decisions may be analyzed to identify employer behavior at three separate stages in the decertification process, at the initiation stage, at the petition stage and at the pre-election stage. While the Board has held that

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12. Section 8(c) of the Act states that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefits." 29 U.S.C. § 158(c) (1976). *But see infra* notes 105-41 and accompanying text for limitation on this right.

13. Pursuant to § 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1976), the employer is under a continuing obligation to bargain with the employees' chosen representative unless he has a reasonably based, good faith doubt of the union's majority status. *See infra* notes 221-79 and accompanying text.

14. *See infra* notes 39-58 and accompanying text.

15. Holly Manor Nursing Home, 235 N.L.R.B. 426 (1978); Quality Transp. Inc., 211 N.L.R.B. 198 (1974); Allou Distrib., Inc., 201 N.L.R.B. 47 (1973); Consolidated Rebuilders, Inc., 171 N.L.R.B. 1415 (1968). *See also* NLRB v. Birmingham Publishing Co., 262 F.2d 2 (5th Cir. 1958); NLRB v. Parma Water Lifter Co., 211 F.2d 258 (9th Cir. 1954), *cert. denied*, 348 U.S. 829 (1954).

it is a per se violation of the Act for an employer to initiate the process of decertification,<sup>16</sup> the Board has allowed certain employer assistance at both the petition stage<sup>17</sup> and during the pre-election period.<sup>18</sup> At each stage the NLRB examines the employer's conduct in light of the protections afforded such conduct pursuant to the free speech section of the Act<sup>19</sup> and the prohibitions set forth in section 8<sup>20</sup> of the Act.

Confusion as to the employer's obligations to the union during the decertification campaign and subsequent to the election is evidenced by conflicting analyses of Board decisions in this area.<sup>21</sup> This Article will first describe the procedure for securing a Board decertification election and then will analyze Board decisions in the three aforementioned stages of the decertification process to ascertain the permissive bounds of employer involvement. In examining the limits of employer participation in the decertification process, particular attention will also be devoted to the acts of supervisors and agents which are attributable to the employer. Finally, this Article will explore the employer's duty to bargain with a union during the period subsequent to the filing of a petition to decertify the union but prior to actual Board decertification. Although there appear to be inconsistencies in Board decisions at the various stages of the process, it is the author's contention that employers may safely become involved in the decertification process at all but the initial stage. This Article attempts to clarify for employers the degree to which they are allowed to participate in each of the aforementioned stages of the decertification process.

## I. DECERTIFICATION PROCEDURE

Section 9(c) of the Act, which governs decertification election procedure, provides that an election shall be held upon the finding that a question has arisen concerning the union's continuing repre-

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16. See *infra* notes 39-58 and accompanying text.

17. See *infra* notes 59-102 and accompanying text.

18. See *infra* notes 103-41 and accompanying text.

19. 29 U.S.C. § 158(c) (1976). See *supra* note 12.

20. 29 U.S.C. § 158(a) (1976). See *supra* note 5.

21. Compare *Telautograph Corp.*, 199 N.L.R.B. 892 (1972) (election will not be delayed unless employer committed other unfair labor practice in addition to refusing to bargain during pendency of decertification election) with *Bellace*, *supra* note 6, at 685; *Krupman & Rasin*, *supra* note 6, at 238 (employer's obligation to continue bargaining subsequent to the filing of a decertification petition). See also *infra* notes 221-79 and accompanying text.

sentation.<sup>22</sup> Several factors need to be examined to determine if the requisite question concerning representation does in fact exist.<sup>23</sup> Key among these factors are the following: 1) the petition emanated from a proper source; 2) the petition was supported by at least thirty percent of the unit employees;<sup>24</sup> 3) the petition was timely filed; and 4) there were no pending unfair labor practice charges which serve to block the petition.

As to the first requirement, the Act specifies that the decertification petition may be filed only by union employees or by an organization other than the union which currently represents the employees.<sup>25</sup> The employer is not an appropriate party to file a decertification petition.<sup>26</sup>

The timing of the filing of a decertification petition is critical. If it is not timely filed, then the Board will dismiss the petition regardless of how many employees supported it. First, a decertification petition is not timely filed if a valid election has been conducted by the NLRB within the last twelve months for that particular unit of employees.<sup>27</sup> Thus, even if employees become disenchanted with their union during the first twelve months of its tenure, the employees may not oust the union prior to the expiration of the twelve month period because of the Board's election bar rule.<sup>28</sup> The purpose of this rule is to promote stability in the bargaining relationship by giving the parties a year free from election

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22. Section 9(c) of the Act provides that the Board will investigate a petition requesting an election to determine the union's continuing status as majority representative of the employees only if it determines that "a question of representation affecting commerce exists. . . ." 29 U.S.C. § 159(c)(1) (1976).

23. For a full discussion of the factors determining whether a question concerning representation exists, see Bellace, *supra* note 6, at 648-59.

24. 29 C.F.R. § 101.18(a) (1982).

25. 29 U.S.C. § 159(c)(1)(A) (1976). *See supra* note 3. It is interesting to note that Board decisions have upheld union expulsion of employees who initiated or were involved with a decertification campaign. *See, e.g.,* Tawas Tube Prods., Inc., 151 N.L.R.B. 46, 48 (1965). *See also infra* notes 191-220 (discussion of supervisors' right to file petitions as members of a bargaining unit).

26. Section 9(c)(1)(B) of the Act gives the employer the right to file a petition requesting an election only in circumstances where "one or more individuals or labor organizations have presented to him a claim to be recognized as the representation defined in subsection [9](a)." 29 U.S.C. § 159(c)(1)(B) (1976).

27. 29 U.S.C. § 159(c)(3) (1976).

28. Under § 9(c)(3) of the Act, the twelve month period runs from the date the election was held. However, if the union wins the representation election, the Board has held that the twelve month period barring another election runs from the date of certification of the union. *See Brooks v. NLRB*, 348 U.S. 96 (1954) (discusses "certification bar").

campaign upheavals in which to bargain. The union is therefore entitled to a year during which it has an irrebuttable presumption of representation. A decertification petition is deemed timely filed after the passage of a year from the date the bargaining representative was certified or after a "reasonable period of time"<sup>29</sup> subsequent to the bargaining representative's recognition by the employer. If, however, the employer and the duly certified bargaining representative of the employees have entered into a collective bargaining agreement, then the employees may only file a decertification petition during the period between the ninetieth and sixtieth day before expiration of the agreement<sup>30</sup> or upon expiration of the agreement. For policy reasons based on the need to encourage stability in labor relations, the Board has long held that the collective bargaining contract should serve as a bar to an election<sup>31</sup> and that a petition for a decertification election filed during the contract is untimely. However, the contract will not serve as a bar to an election after the first three years of the contract if its term exceeds three years,<sup>32</sup> if it contains unlawful provisions, or if circumstances have changed substantially during the term of the agreement.<sup>33</sup> If the contract is for an unspecified period of time, the Board in general has held that it shall not serve as a bar to the filing of a petition for an election.<sup>34</sup>

Finally, pursuant to the discretionary power granted to it under the Act, the Board has taken the position that a decertification election may not be held if there are pending against the employer charges of unfair labor practices that would interfere with the employees' free choice in the election.<sup>35</sup> Even if a decertification petition has been timely filed by the proper parties, the Board will generally apply this blocking charge rule to either set aside the question of representation or hold it in abeyance until the unfair labor practice allegations have been heard. The rationale here

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29. Keller Plastics E. Inc., 157 N.L.R.B. 583, 587 (1966). The period is determined on a case-by-case basis and has sometimes been held to be less than the twelve month period. See, e.g., Ruffalo's Trucking Serv., Inc., 114 N.L.R.B. 1549 (1955) ("recognition bar rule").

30. Leonard Wholesale Meats Co., 136 N.L.R.B. 1000 (1962).

31. See, e.g., Paragon Prod. Corp., 134 N.L.R.B. 662 (1961).

32. General Cable Corp., 139 N.L.R.B. 1123 (1962).

33. For a discussion of the Board's contract bar policy, see Bellace, *supra* note 6, at 659-72.

34. See, e.g., Pacific Coast Ass'n of Pulp & Paper Mfrs., 121 N.L.R.B. 990 (1958).

35. See, e.g., Suprenant Mfg. Co. v. Albert, 318 F.2d 396 (1st Cir. 1963).

again is concern for protecting the right of employees to vote in an atmosphere free of employer interference. It is highly probable that the employer's unfair labor practices could influence employees in their choice in the election.<sup>36</sup> The Board, however, has developed a policy not to apply the blocking charge rule under limited circumstances. If an employer has refused to bargain with the union subsequent to the termination of the collective bargaining agreement and in the face of the filing of a timely decertification petition supported by a majority of employees, the Board will not delay the election unless the employer committed other unfair labor practices.<sup>37</sup> The Board has carved out this exception to the blocking charge rule because it deems that the filing of a decertification petition supported by a majority of employees raises a question concerning representation.<sup>38</sup>

## II. EMPLOYER PARTICIPATION IN INITIATION OF THE DECERTIFICATION PETITION

The Board has repeatedly held that an employer may not intervene in matters concerning the self-organization of his employees and must refrain from all interference.<sup>39</sup> The NLRB's rationale for adopting an absolute rule concerning initiation of a decertification petition by an employer is that such activity would be incompatible with the employer's continuing statutory obligation to recognize and bargain with the union as representative of his employees.<sup>40</sup> In cases where an employer has assisted, whether by suggestions or acts, in initiating the decertification petition, the Board has generally held that the employer committed an unfair labor practice sufficient in some cases to command a bargaining order and, at the least, to necessitate setting aside an election if one has taken place.<sup>41</sup> As the following cases illustrate, the concept

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36. See, e.g., *Bishop v. NLRB*, 502 F.2d 1024 (5th Cir. 1974). For a full discussion of the Board's blocking charge rule, see Bellace, *supra* note 6, at 686-91.

37. *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974).

38. *Id.* See also *infra* notes 221-79 and accompanying text.

39. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945); *Harrison Sheet Metal Co. v. NLRB*, 194 F.2d 407, 410 (7th Cir. 1952).

40. 29 U.S.C. § 158(a)(5) (1976). See *supra* note 5. While the employer owes both a statutory and contractual duty to the bargaining representative chosen by its employees, the Board allows the employer to abandon this duty in certain respects once the employees have initiated the decertification process. See *infra* notes 221-79 and accompanying text.

41. *National Cash Register Co.*, 201 N.L.R.B. 1034 (1973), *enforcement denied in mate-*



of employer initiation, unlike the two succeeding stages to be discussed, has well-defined parameters.

The clearest examples of what the Board defines as unlawful employer initiation of decertification are presented in instances where the employer recommends such activity and initiates it independently of any pretense of employee instigation. In *Allou Distributors, Inc.*,<sup>42</sup> the principals of the company, when faced with renegotiation of the terms of an expired collective bargaining agreement, prepared, circulated, and caused to be filed a decertification petition. One of the principals of the company and a supervisor engaged in discussions with employees about what the company would do for them if the employees decertified the union. Assurances were made that employees would be granted medical and hospitalization coverage and would be better off without the union. A supervisor, with permission from the secretary-treasurer of the company, called the regional office of the Board, had the petition typed, asked one of the employees to deliver it, and arranged his transportation. The petition was executed by employees upon request by the secretary-treasurer. Not surprisingly, the Board concluded that the conduct of the company's principals "constituted an aggravated intrusion upon the self-organizational rights of the employees guaranteed in section 7 and thereby violated section 8(a)(1) of the Act."<sup>43</sup>

In another case where the Board found the employer guilty of initiating the union's decertification, a manager suggested to an employee that he was interested in having a petition circulated to get rid of the union. The employee agreed to circulate the petition; the manager thereupon wrote out the language on company stationery and handed it to the employee for typing. The manager contacted the company attorney to find out when the petition needed to be filed and relayed such information to the employee

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*rial part*, 494 F.2d 189 (8th Cir. 1974).

42. 201 N.L.R.B. 47 (1973).

43. *Id.* at 53. Although the normal remedy for a § 8(a)(5) violation of the type found in this case includes a bargaining order, the Board declined to grant this remedy due to the extensive unfair labor practices perpetrated by the union. Union agents had entered the property upon hearing of the unlawful decertification drive sponsored by the employer, and threatened the employees with economic as well as physical injury should they withdraw from the union. Under these circumstances the Board stated that the proper remedy was an election so that the employees themselves could determine the representation status of the union. *Id.* at 56-58.

circulating the petition. Management further aided in the decertification process by actively procuring signatures on the petition. The Board concluded that this conduct constituted interference with and restraint of the employees' section 7 rights.<sup>44</sup>

In several cases the NLRB has held that the employer initiated the filing of a petition by engaging in a course of conduct which had the intended effect of inspiring a decertification petition. In *National Cash Register Co.*,<sup>45</sup> a union won election in 1970 to represent the company's technical service employees at plants in three locations: New York, Detroit and Duluth. The alleged violations centered upon decertification activities engaged in by the employer at each of the plants and included the following: the convening of a meeting by the employer to urge the employees to accept only a one year contract so that the employees could decertify the union sooner and thus be able to obtain wage increases available to the company's other employees; the dissemination of information concerning the mechanics of decertification, where a petition could be filed, the percentage of employees needed to establish a showing of interest, and the ensuing election process; and the informing of employees during performance appraisal interviews of the raise they would have been entitled to receive on the merit system but which the company would not be able to grant them because they were represented by a union. In reviewing the foregoing facts, the Board found that such a pattern of direct dealing with employees over matters concerning their terms and conditions of employment in the face of the union's certification as the exclusive bargaining agent interfered with the employees' rights to union representation. The Board went on to state that the conduct of the employer "although widely scattered geographically . . . was pursuant to a carefully orchestrated plan to sow dissatisfaction among the employees with union representation for the purpose of inciting the filing of decertification petitions."<sup>46</sup> While the Board conceded that it was presented with no evidence that the company was actually responsible for filing the decertification petition, it held that such an inference could reasonably be drawn and that "the filing of the decertification petition was both the intended

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44. *Quality Transp., Inc.*, 211 N.L.R.B. 198 (1974).

45. 201 N.L.R.B. 1034 (1973), *enforcement denied in material part*, 494 F.2d 189 (8th Cir. 1974).

46. *Id.* at 1034.

and direct product of the [company's] misconduct."<sup>47</sup> The Board ordered the employer to bargain with the union.

Similarly, in *A.W. Thompson, Inc. v. NLRB*, the Board held, in requiring that the employer bargain with the union, that the employer had set out on a course of conduct calculated to discourage adherence to the union cause. Specifically, Thompson engaged in conversation in which he placed the onus for the employees' failure to receive wage increases on the union. He declared that he would not sign another contract with the union, and requested and received the signatures of 125 out of 154 employees on petitions stating that they no longer wanted the union to represent them.<sup>48</sup>

In certain instances the Board will look beyond the circumstances which led to the filing of a decertification petition and examine the totality of the employer's conduct in determining whether there has been coercion on the employer's part in the filing of a decertification petition. For example, in *Wanda Petroleum*<sup>49</sup> the Board looked to conduct of the employer which had occurred more than six months preceding the filing of unfair labor practice charges in connection with a decertification drive (although no complaint could be filed for lack of timeliness)<sup>50</sup> to establish that the employer had implanted within his employees the idea of decertifying the union. The conduct on which the Board relied was two separate confrontations between a manager and two employees. In the first instance the manager told an employee that he would be better off without a union and that if he were the employee he would get the union out. In the second instance the manager told a second employee that the employees would be better off under the employer's salaried plan, without the union. Like-

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47. *Id.* On appeal, however, the Eighth Circuit held that the Board's inference concerning the filing of the decertification petition was impermissible in light of the record. The court was particularly interested in evidence indicating that the employee who had filed the petition had not even been present at the meeting when the employer allegedly outlined decertification procedures. The Eighth Circuit expressed reluctance in finding violations by the employer during the performance appraisals because of major disputes in the testimony. However, the Eighth Circuit did concede that this misconduct amounted to a violation of § 8(a)(1) despite the fact that the court found the Board's conclusion to be "highly speculative." *National Cash Register Co. v. NLRB*, 494 F.2d 189, 193 (8th Cir. 1974).

48. 184 N.L.R.B. 119 (1970), *enforced*, 449 F.2d 1333 (5th Cir. 1971).

49. 217 N.L.R.B. 376 (1975).

50. Section 10(b) of the Act contains a proviso which states in part: "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b) (1976).

wise, in *Holly Manor Nursing Home*<sup>51</sup> it was in the context of the employer's "massive unfair labor practices, including direct dealings with employees over terms and conditions of employment in derogation of the union's status"<sup>52</sup> that the Board found a general meeting called by the employer to have the express and overriding purpose of encouraging and inducing the filing of a decertification petition. The totality of the circumstances which the Board examined in order to determine the illicit nature of the meeting included the employer's previous bad faith bargaining with the union, past direct dealings with employees in derogation of the union's status, past unilateral granting of wage increases, and unilateral changes in working conditions. The Board further based its decision on the fact that the employer did not, as a matter of general practice, hold employee meetings<sup>53</sup> and admitted that he had come prepared to answer questions concerning decertification because he knew that an employee who opposed the union would be present.

In connection with the initiation of a decertification petition, the Board has made it clear that an employer may only respond to employee questions and may not volunteer unsolicited advice;<sup>54</sup> any evidence that an employer's activities extend beyond this function is regarded as unlawful initiation and a per se violation of the employees' rights. Even though the employer in *American Sink Top and Cabinet Co.*<sup>55</sup> called a voluntary meeting of his employees pursuant to complaints from employees concerning their representative, the Board found that the employer had been directly responsible for the filing of a decertification petition by employees. At the initial meeting called by the employer, a labor relations consultant spoke on behalf of management stating that the company understood that the employees were "most dissatisfied with the union" and that "your company is also most unhappy with the union, and believe[s] we would all be better off as a non-union employer."<sup>56</sup> The labor relations specialist then explained

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51. 235 N.L.R.B. 426 (1978).

52. *Id.* at 429.

53. Although the employer's president stated that the purpose of the meeting was to discuss problems relating to the employees' work, the Board discounted this statement in light of evidence that no such meetings had been held prior to the one in question. *Id.*

54. *American Sink Top & Cabinet Co.*, 242 N.L.R.B. 408 (1979).

55. *Id.*

56. *Id.* at 410.

the decertification process and embarked upon a lengthy recital intended to discredit the union. A second meeting was held the next day at which the specialist not only suggested language for a decertification petition, but also exhibited an example of a contract which had been negotiated with other employees after their union had been decertified. Still during this meeting, and prior to execution of a petition, the management representative held out the prospect of extending health and profit sharing coverages and gave assurances that wages would "keep up with the industry"<sup>57</sup> should the union be ousted. The Board cited all these factors in making its decision that "far from being purely informational, the two meetings culminating in the employee petition had the impermissible purpose and effect of encouraging and inducing the employees to register their displeasure with the Union."<sup>58</sup> Again the Board examined the totality of the employer's conduct even though certain individual acts did not constitute unlawful initiation. For example, had the employer held the voluntary meeting to answer questions of the employees without interjecting opinions that both the employees and the employer would be better off without the union, the employer would have satisfied the Board's requirement of limiting its involvement to information dissemination.

In summary, at the initiation stage of the decertification process the Board has made it clear that the employer may under no circumstances initiate the preparation or circulation of a petition. The Board has also made it clear that it will examine the entire pattern of employer conduct, not necessarily isolated instances, to determine whether the employer had embarked on a course of conduct with the intent and effect of inspiring decertification. And finally, the Board in examining the totality of the employer's conduct has indicated that in ascertaining culpability for initiation of a petition an employer's conduct will be given stricter scrutiny in the face of a history of unfair labor practices.

### III. EMPLOYER INVOLVEMENT IN PREPARATION, CIRCULATION AND EXECUTION OF THE PETITION

While the Board has made it clear that employer participation at the initiation level of the decertification process is per se unlaw-

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57. *Id.* at 411.

58. *Id.* at 412.

ful, the parameters of employer participation once the employees have instigated the idea of decertification are not so well defined.<sup>59</sup> Although one author has stated that the standard which the Board utilizes at this stage is whether the employer rendered "more than mere ministerial aid" to employees,<sup>60</sup> the Board has not restricted itself to this standard. Instead, the Board has applied numerous standards such as: "the but for test";<sup>61</sup> whether the employer's involvement "substantially contributed" to the decertification effort;<sup>62</sup> whether the employer furnished "more than minimal support and approval";<sup>63</sup> whether the employer provided more than a "mere response to questions";<sup>64</sup> whether the employer "did more than provide 'information' responsive to questions"<sup>65</sup> or finally, whether the employer "went beyond mere passive observance."<sup>66</sup> To further compound the problem, the number of Board decisions in this area is limited and, because of the nature of the proceedings, guidance may not generally be sought from the Board standards set forth in the numerous cases involving employer assistance to employees in revoking authorization cards.<sup>67</sup> However, a

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59. Cf., e.g., *Vernon Mfg. Co.*, 214 N.L.R.B. 285 (1974), *enforced in supplemental decision*, 219 N.L.R.B. 622 (1975) (company did not taint the decertification process by threatening to interrogate an employee and following through with the threat); *Sky Wolf Sales*, 189 N.L.R.B. 933 (1971), *enforced*, 470 F.2d 827 (9th Cir. 1972) (a single instance of promise of benefit and interrogation was found to sustain general counsel's argument that the decertification process had been tainted).

60. *Krupman & Rasin*, *supra* note 6, at 234. While this standard was enunciated in one case, see *Consolidated Rebuilders, Inc.*, 171 N.L.R.B. 1415, 1417 (1968), the Board has not consistently applied the term in defining lawful employer conduct.

61. *Dayton Blueprint Co.*, 193 N.L.R.B. 1100 (1971).

62. *Id.* at 1108.

63. *Placke Toyota, Inc.*, 215 N.L.R.B. 395, 395 (1974).

64. *Shenango Steel Bldgs., Inc.*, 231 N.L.R.B. 586, 589 (1977).

65. *Royal Himmel Distilling Co.*, 203 N.L.R.B. 370, 376 (1973).

66. *Birmingham Publishing Co.*, 118 N.L.R.B. 1380 (1957), *enforced in material part*, 262 F.2d 2 (5th Cir. 1959).

67. One article has suggested that the guidelines set forth by the Board concerning employer assistance in the revocation of authorization cards may be applied to decertification proceedings. *Krupman & Rasin*, *supra* note 6, at 236. This author does not believe the analogy can be justified. The standard for employer participation in the revocation of authorization cards was clearly set forth in the opinion of the administrative law judge which the Board affirmed in *Aircraft Hydro-Forming, Inc.*, 221 N.L.R.B. 581 (1975). The test is:

Whether an employer violates § 8(a)(1) of the Act by involving itself in employee revocation of union authorization cards depends upon the degree of employer participation in the process. Where the idea of revocation was initiated by employees, the fact that the employer gives information to employees as to, and *actually assists in, the mechanics of revocation* is not violative of the Act if the

careful examination of Board decisions provides, regardless of the professed standard used in a given case, certain guidelines on which employers may rely. Nonetheless, while certain isolated activity engaged in by an employer in aiding or assisting the decertification process may not represent an unfair labor practice, when the same activity is found in conjunction with other section 8(a)(1) violations, it will be held to be unlawful.<sup>68</sup> For example, a management employee, upon request from subordinate employees, drove them after work to the regional office of the NLRB for the purpose of filing a decertification petition. The management employee waited outside for the workers. Although the administrative law judge stated that he would

hesitate to find [the employer] guilty of statutorily forbidden "assistance" merely because the firm's top supervisor has "accommodated" some of his subordinates by providing them with transportation, . . . [his] declared readiness to provide the requested transportation, *coupled with his subsequent [unlawful] conduct*, must be considered . . . part and parcel of [the employer's] statutorily proscribed program or plan.<sup>69</sup>

Most employees are unfamiliar with the process of disenfranchising themselves from a union. Unlike the total involvement of a union's representatives during the certification campaign, an incumbent union is clearly unwilling to provide assistance to dis-

employee has the opportunity to continue or halt the revocation process without the interference or knowledge of the employer.

*Id.* at 583 (emphasis added). The discussion in this section clearly demonstrates that the standard to be applied to decertification cases is not so straightforward. *See supra* text accompanying notes 49-58. The standard in decertification cases appears to suggest that assistance, even when employee-instigated, is in most contexts virtually a per se violation. *See supra* text accompanying notes 59-66. Furthermore, the Board has held in deauthorization cases that the employer may volunteer procedures for withdrawal of authorization cards to his employees. *Brake Parts Co.*, 178 N.L.R.B. 247 (1969), *enforcement denied on other grounds*, 447 F.2d 503 (7th Cir. 1971). *Cf. Schacter & Peterson, Lawful Employer Participation in the Revocation of Union Authorization Cards*, 31 LAB. L.J. 547 (1980) (discussion of the extent of lawful employer involvement in decertification). On the other hand, the imparting of unsolicited information concerning decertification is a per se violation of § 8(a)(1). *See supra* notes 39-58 and accompanying text.

68. *Cf.*, e.g., *KONO-TV-Mission Telecasting Corp.*, 163 N.L.R.B. 1005 (1967) (employer-provided assistance to the decertification effort of his employees, in the form of suggesting language for the petition upon request, and not as a part of a pattern of misconduct, does not violate § 8(a)(1)). *But see Texas Elec. Coop., Inc.*, 197 N.L.R.B. 10 (1972) (employer supplied language to be used in a decertification petition while generally pursuing a course of conduct intended to undermine the union, held unlawful in light of the totality of the employer's behavior).

69. *Royal Himmel Distilling Co.*, 203 N.L.R.B. 370, 377 (1973) (emphasis added).

gruntled employees interested in expelling it. Employees are not generally familiar with the availability of regional offices of the NLRB<sup>70</sup> and typically will seek advice from their employer concerning the removal of an incumbent union. Thus the threshold level of inquiry concerning employer participation involves employer response to employee questions concerning ousting their union. The Board has held that the employer may respond to employee inquiries by directing the employee to the Board and may inform the inquiring employee about the decertification process.

This general rule is best articulated in the case of *KONO-TV-Mission Telecasting Corporation*.<sup>71</sup> Litigation in the case arose when a petition to decertify the union representing certain employees was filed with the regional office of the NLRB.<sup>72</sup> In its complaint the union alleged that the employer had "prepared and caused to be circulated among [its] employees a decertification petition in order to induce employees' to abandon their union affiliation."<sup>73</sup> The president of the company had been approached by a rank and file employee who wanted to know what he and his fellow employees could do to get rid of the union. Based on a telephone call to the company's counsel, the president informed the employee to write to the regional director of the NLRB. In response to further inquiry from the employee concerning the appropriate content of such a letter, the president gave his opinion of what to write, using in his response the technical term "decertification." General Counsel unsuccessfully argued that such assistance went beyond the grounds of permissive conduct. The Board examined the president's conduct in light of the impact it might have had on the free exercise of employee rights under section 7 of the Act<sup>74</sup> and found

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70. The regional offices of the NLRB have available, free of charge, a number of informational pamphlets discussing its processes including decertification. Nevertheless, employees have difficulty obtaining information concerning decertification unless they know to visit or telephone the Board. Krupman & Rasin, *supra* note 6, at 233.

71. 163 N.L.R.B. 1005 (1967).

72. The petition, however, was dismissed within two weeks because it had been filed within the year of certification and, therefore, improperly raised a question of representation according to the rule expressed in *Ray Brooks v. NLRB*, 348 U.S. 96 (1954). The dismissal was not appealed. See also *supra* text accompanying notes 27-34.

73. 163 N.L.R.B. at 1006.

74. In ruling that the employer had not engaged in unlawful assistance to employees in violation of their § 7 rights, the trial examiner, whose opinion the Board affirmed, relied on *American Freightways Co.*, 124 N.L.R.B. 146 (1959), which stated:

It is well settled that the test of interference, restraint and coercion under Sec-



that the employer neither initiated nor participated in either the preparation or circulation of the decertification petition and had not assisted in forwarding the completed petition to the Board.<sup>75</sup> The Board further found that since the information given was in direct response to employee questions, it was lawful. In determining whether the assistance rendered to the employees was sufficient to support a violation of section 8(a)(1), the Board correctly focused on the *effect* such activity had on the employees.<sup>76</sup>

The Board has also held that it is not a violation of employees' rights for an employer to provide a list of employees and their addresses upon request to employees or representatives of employees trying to decertify their union. In one case an attorney who represented employees in a bargaining unit wrote to their employer requesting such a list. The information was supplied by the employer and the union alleged that such conduct was unlawful interference. The Board found that such conduct did not violate employee rights, particularly in light of the absence of employer participation in any other manner with the decertification process.<sup>77</sup> Similarly, in another case the Board found the furnishing of such a list was also appropriate.<sup>78</sup> In this instance the initial decertification petition filed by the employee did not contain the requisite thirty percent showing of interest. The Board notified the employees that they had forty-eight hours in which to correct the deficiency. In order to verify a supplemental petition, the employees checked it

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tion 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

*Id.* at 147. The *American Freightways* reasoning was followed in *Exchange Parts Co.*, 131 N.L.R.B. 806, 812 (1961), *aff'd*, 375 U.S. 405 (1964).

75. 163 N.L.R.B. at 1006.

76. *But see* *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974). The Eighth Circuit overruled a Board decision reached by Chairman Miller with Members Fanning, Jenkins and Penello presiding. The court held that the Board drew an incorrect inference that the filing of decertification petitions resulted from the employer's unlawful conduct, because it failed to properly examine the *effect* the employer's conduct had on the employees. The Eighth Circuit pointed out that those who signed the decertification petition were not present when a supervisor told other employees about the advantages of decertification and no evidence suggested that the employer encouraged those who actually circulated the petition. *Id.* at 193.

77. *Consolidated Rebuilders, Inc.*, 171 N.L.R.B. 1415 (1968).

78. *Montgomery Ward & Co.*, 187 N.L.R.B. 956 (1971).

against an employee list furnished by the employer.<sup>79</sup>

Although the Board decision in *KONO-TV* suggests that informative responses to employee questions concerning procedure for decertification are lawful, this conduct becomes tainted when coupled with other types of assistance which such questions frequently generate. A case which the Board has cited several times in defining unlawful assistance in response to inquiries from employees is *Dayton Blueprint Co.*<sup>80</sup> An employee<sup>81</sup> of the Company, after telephoning the Board's regional office concerning the procedure for decertification, asked the president of the company for appropriate wording and help in preparing the document. The employer not only helped word the document, but had it typed. The Board found this help by the employer coupled with a remark that benefits would remain the same<sup>82</sup> constituted unlawful assistance to the decertification effort in violation of section 8(a)(1). The Board also found that the company had provided unlawful assistance by imputing to it the knowledge that an employee had, during office hours, used the company car to file the document with the regional office.<sup>83</sup> In determining the validity of the decertification petition filed in this case, the Board examined this conduct<sup>84</sup>

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79. *Id.*

80. 193 N.L.R.B. 1100 (1971).

81. Although the employee who initiated the decertification drive and who approached the company president concerning decertification procedures was a supervisor as defined by § 2(11) of the Act, his assistance was found not to be imputable to the company, "since his inclusion in the bargaining unit would cause the employees normally to regard him as not speaking in labor relations matters for management instead of as a fellow member of the bargaining unit." *Id.* at 1110. The Board then concentrated on the assistance the employer rendered separately, and found a violation under § 8(a)(1). For a discussion of the circumstances under which a supervisor's activities may be attributed to an employer in the decertification process, see *infra* notes 190-220 and accompanying text.

82. *But see* *El Cid, Inc.*, 222 N.L.R.B. 1315 (1976) (the Board agreed with the ALJ that employer assurances that the company would maintain the "status quo," absent other unlawful acts, was not an unfair labor practice).

83. The ALJ, whose decision the Board had affirmed, stated:

[T]he inference is that [the supervisor], in giving [the employee] time off for his mission [to the regional office of the Board] had received clearance from [the employer]. It follows that in supplying the transportation used on that mission and in subsidizing [the employee] for the working time he consumed in connection with it, [the employer] did so with full knowledge of [the employee's] mission. [The employer] by this assistance thus invaded the rights protected by employees under Section 7 of the Act in violation of Section 8(a)(1) of the Act.

193 N.L.R.B. at 1108.

84. As in many decertification cases, the issue here is not only whether the employer's assistance violated § 8(a)(1) (the conclusion reached by the ALJ), but also whether the as-

in light of the effect it had on the employees and concluded that without the assistance of the company the decertification petition might not have been filed. An implication of this decision is that an employer may not provide assistance even when asked if such assistance lends the appearance of employer approval to the process. Because the Board will, when appropriate within the context of the facts, impute knowledge of employee activities to the employer,<sup>85</sup> the employer has a further affirmative duty to assure that decertification activity neither takes place on company time nor makes use of company property.<sup>86</sup> To meet this duty, it would appear that an employer must become involved with the decertification process to the extent of apprising employees of the necessity of conducting all such activity on their free time and without any company assistance of a substantial nature.

In *Placke Toyota, Inc.*<sup>87</sup> a Board panel<sup>88</sup> applied the rationale of *Dayton Blueprint* to a case where the employer similarly provided, upon request, more than minimal support to the petition. An employee approached a supervisor and requested advice in getting rid of the union. Initially the supervisor simply referred the employee to the Board, but later, upon a further request to have the petition typed, the supervisor did so and placed it on the desk used to distribute work orders to employees, where it remained for several days. The supervisor then requested an employee to file the document. The Board panel, citing both *KONO-TV* and *Dayton Blueprint*, held that although the employer neither initiated the decertification petition nor urged employees to sign it, the employer violated section 8(a)(1) by permitting the petition to be cir-

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sistance is of such a substantial nature as to taint the filing of the decertification petition. If activity of a substantial nature is found, then the appropriate remedy would be to order the company to bargain with the union upon request, as well as the normal cease and desist order issuing from a simple § 8(a)(1) violation of the Act.

85. For further discussion of the imputation of employee acts to the employer in connection with decertification, see *infra* notes 142-220 and accompanying text.

86. The Board has found illegal assistance and employer interference in situations where a company, on behalf of its employees, mails material repudiating the union, and furnishes envelopes, paper or postage for such purposes. See, e.g., *C.W.F. Corp.*, 188 N.L.R.B. 554 (1971); *KDI Precision Prods., Inc.*, 176 N.L.R.B. 135 (1969).

87. 215 N.L.R.B. 395 (1974).

88. The panel consisted of Board Members Miller, Fanning and Penello. Chairman Miller dissented in part, stating that the activities of the employer relative to the decertification petition were sufficient to constitute a violation of § 8(a)(1). *Id.* at 396 (Miller, Chairman, concurring in part and dissenting in part).

culated as a company document after being typed on company letterhead.<sup>89</sup> The employer lent a clear impression of support by allowing it to remain on a supervisor's desk, and assisted in forwarding the completed petition to the Board.<sup>90</sup> The Board concluded that:

Although an employer does not violate the Act by referring an employee to the Board in response to a request for advice relative to removing a union as the bargaining representative, it is unlawful for him subsequently to involve himself in furthering employee efforts directed toward that very end. Thus an employer's solicitation, support or assistance in the initiating, signing, or filing of an employee decertification petition interferes with the employees' Section 7 rights.<sup>91</sup>

In several cases employer assistance in response to employee questions has been held unlawful even if of a ministerial nature because the Board found that the employer, in each instance, had implicitly been responsible for instigating the decertification. For example, when the employer, in response to questions, told employees the manner in which the petition should be circulated, the number of signatures necessary to make it valid, and the appropriate language to include, the Board found this assistance violative of section 8(a)(1) of the Act because of a meeting conducted by the employer to inform the employees of the impasse in contract negotiations with their union.<sup>92</sup> Similarly, in another case<sup>93</sup> the Board

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89. In its decision, the Board pointed out that there was no indication that the typist had been instructed to use company stationery and assumed this was done inadvertently. *Id.* at 395.

90. *Id.*

91. *Id.* Chairman Murphy dissented from the Board and agreed with the decision of the ALJ that the employer's conduct relative to the decertification petition was merely "an accommodation" to the employee and did not constitute a violation of the Act. He stated: "[I]n my view, the mere typing of a document at an employee's request falls far short of that kind of 'interference, restraint and coercion' which is proscribed by Section 8(a)(1) of the Act." *Id.* at 396.

92. *Texas Elec. Coop., Inc.*, 197 N.L.R.B. 10 (1972). This case posed a particularly interesting issue. The employees had requested that their union representative ask for a raise of seventy-five cents per hour and not accept less than fifty cents. The representative instead offered to settle for a lesser raise of eight percent provided the employer would grant the union a dues checkoff clause. No employees were present at the bargaining session. The employer later convened employees to apprise them of the union's offer and that the employers' counter-proposal was more advantageous to the employees. The employer then urged employees to encourage their representative to accept the employer's offer. *Id.* at 12-13. In response to charges filed by the union, the employer argued that this speech was protected by § 8(c) of the Act, but the Board agreed with the trial examiner's conclusion that this activity amounted to bypassing the union to deal directly with individual employ-

found that the employer's assistance to employees in providing them with transportation upon request to the office of the Board to file the decertification petition after working hours was unlawful because it "assisted [the company's] programmed decertification maneuver."<sup>94</sup>

The Board is also concerned that a decertification drive might be tainted by the *appearance of approval* by the employer.<sup>95</sup> While the preceding cases examined overt assistance during decertification drives which the Board has held violative of section 8(a)(1), tacit assistance is also a violation of the Act. The employer must be careful not to give the appearance of approval by allowing decertification activity to occur in violation, for example, of no-solicitation rules during working hours,<sup>96</sup> or by allowing an employee time off to file the petition.<sup>97</sup> Other examples of such tacit approval by an employer which the Board has held taints the decertification petition include: allowing solicitations of signatures to the petition during working hours;<sup>98</sup> execution of the petition in a supervisor's office;<sup>99</sup> allowing the petition to be circulated bearing

ees. *Id.*

93. Royal Himmel Distilling Co., 203 N.L.R.B. 370 (1973). The Board found the comments of a spokesman for the employer's non-union shop, who was brought in to speak to the unionized employees, to be in violation of § 8(a)(1):

[T]hough proffered, nominally, in response to questions, [the comments] were reasonably calculated to persuade [the employer's] workers that their [e]mployer's currently maintained health insurance and pension programs, which his non-unionized . . . employees likewise enjoyed, would be continued in force, and that their wages, like those at [the non-union shops], might thereafter be raised, should they succeed in ridding themselves of union representation.

*Id.* at 376-377.

94. *Id.* at 377.

95. See, e.g., River Togs, Inc., 160 N.L.R.B. 58 (1966), *enforced in material part*, 382 F.2d 198 (2d Cir. 1967), where the Board stated:

[B]y assisting in the preparation of the petition and by permitting its circulation in part on working time, in the presence of and with the knowledge of supervisors, [the employer] gave employees the impression that the petition was being circulated with its approval and thus restrained and coerced employees in the exercise of their rights under Section 7, in violation of Section 8(a)(1).

*Id.* at 60-61. The court of appeals refused to enforce the Board's decision in this respect because of insufficient evidence, and not on the theory that the Board's principle was wrong. *River Togs, Inc. v. NLRB*, 382 F.2d 198, 206 (2d Cir. 1967).

96. See, e.g., Hermitage Hosp. Prods., 239 N.L.R.B. 216 (1978).

97. Dayton Blueprint Co., 193 N.L.R.B. 1100 (1971).

98. *Id.* See also Hermitage Hosp. Prods., 239 N.L.R.B. 216 (1978); *River Togs, Inc.*, 160 N.L.R.B. 58 (1966), *enforced in material part*, 382 F.2d 198 (2d Cir. 1967).

99. Texas Elec. Coop., Inc., 197 N.L.R.B. 10 (1972).

the statement "this has office approval";<sup>100</sup> or volunteering management opinion concerning the decertification effort.<sup>101</sup>

In summary, it appears that the employer's involvement at this stage of the decertification proceedings is not so restricted as it is at the initiation stage. The employer may, in direct response to questions, provide information concerning the decertification procedure and may render a minimal level of assistance, again only upon request from employees. While the employer may be fairly confident of not violating the Act by merely answering questions, the rendering of assistance presents a more difficult area. The Board has made it clear that the employer may not lend the impression of tacit approval to a petition. Thus, an employer may not endorse a petition by allowing it to be typed on company stationery, by allowing it to be driven to the Board's office on company time, or by allowing solicitation during working hours. The amount of overt assistance the employer may lend the decertification effort is likewise limited. Because of the chilling effect that employer assistance will have on employees, the Board has generally held the employer's lawful conduct is limited to dissemination of a list of employee names and addresses and response to questions. Other forms of assistance at this level will be examined by the Board on a case-by-case basis with particular attention paid to the totality of the employer's conduct toward the union. The more egregious the employer's conduct has been historically toward the union, the more likely its assistance will be found to be violative. Conversely, an employer who has a history of fair dealings with the union shall less likely be found in violation of the Act for similar conduct.<sup>102</sup>

#### IV. EMPLOYER INVOLVEMENT IN THE DECERTIFICATION ELECTION CAMPAIGN

Once the decertification petition has been filed with the Board,<sup>103</sup> the proceedings enter yet another stage: the decertification election campaign itself.<sup>104</sup> Employer involvement at this stage

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100. *Hermitage Hosp. Prods.*, 239 N.L.R.B. 216 (1978).

101. *Royal Himmel Distilling Co.*, 203 N.L.R.B. 370 (1973).

102. *See, e.g., Vernon Mfg. Co.*, 214 N.L.R.B. 285, *enforced in supplemental decision*, 219 N.L.R.B. 622 (1975) (the Board held that interrogation of employees in the absence of other unfair labor practices did not taint the decertification petition).

103. *See supra* notes 22-38 and accompanying text.

104. The decertification election is conducted pursuant to the same rules and regula-

is typically characterized by speeches to employees,<sup>105</sup> meetings during which slides are shown comparing union and non-union employee benefits,<sup>106</sup> and letters to employees explaining why they should vote the union out.<sup>107</sup> The limits on lawful employer involvement in these activities are two-fold. First, as in the two stages previously examined, the employer is limited by his obligations under section 8(a)(1) of the Act not to interfere with the employees' right to freely choose their own representative, or no representative. Second, the employer may not engage in certain misconduct which destroys the "laboratory conditions"<sup>108</sup> necessary to protect the employees' right to a free choice election under section 9 of the Act. However, at this stage, unlike the preceding two stages discussed, the employer is entitled to exercise his freedom of speech right under section 8(c) of the Act.<sup>109</sup> The employer may now express his views on whether his employees should be unionized so long as the employer's remarks contain no threat of

tions as any representation election. See 29 U.S.C. § 159(c) (1976); 29 C.F.R. § 102.69 (1982).

105. See, e.g., *Dow Chem. Co.*, 250 N.L.R.B. 756 (1980); *Lammert Indus.*, 229 N.L.R.B. 895 (1977), *enforced*, 578 F.2d 1223 (7th Cir. 1978); *El Cid, Inc.*, 222 N.L.R.B. 1315 (1976).

106. See, e.g., *Dow Chem. Co.*, 250 N.L.R.B. 748 (1980); *Etna Equip. & Supply Co.*, 243 N.L.R.B. 596 (1979).

107. See, e.g., *Dow Chem. Co.*, 250 N.L.R.B. 748 (1980); *Ranco Inc.*, 241 N.L.R.B. 685 (1979); *Grede Plastics*, 219 N.L.R.B. 592 (1975).

108. In *General Shoe Corp.*, 77 N.L.R.B. 124 (1948), the Board held that employer anti-union speeches to groups of employees both in the president's office and at employees' homes during an election campaign could warrant setting aside an election even though the speeches contained neither threat of reprisal or force. The Board reasoned that the employer's campaign went "so far beyond the presently accepted custom of campaigns directed at employees' reasoning faculties that we are not justified in assuming that the election results represented the employees' own true wishes." *Id.* at 127. The Board determined that the standard for setting aside an election would be different from and broader than that required to find a violation during an election campaign under § 8(a)(1) of the Act. It stated:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. . . . [W]hen . . . the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

*Id.* at 127. See also *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); *Kurz-Kasch, Inc.*, 239 N.L.R.B. 1044 (1978); *Newport News Shipbuilding & Drydock Co.*, 239 N.L.R.B. 82 (1978). For a discussion as to whether this standard may be realistically applied, see Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

109. 29 U.S.C. § 158(a) (1976). See *supra* note 12 for the text of § 8(c).

reprisal, force or promise of benefit.<sup>110</sup> At the initiation stage and at the pre-petition stage the employer was not entitled to exercise this right because a valid question of representation regarding certification did not exist. There was no question at those stages that the union did not in fact represent the employers as their representative.<sup>111</sup> Thus, prior to the filing of the decertification petition, the employer could not encourage the process as such activity would be inappropriate in light of the statutory obligation to bargain with the employees' chosen representative.<sup>112</sup>

Over the last two decades the Board and the courts have developed a strict standard for employer campaign communications. For example, in several decertification cases the Board found that the employer's pre-election communications were not protected under section 8(c) but were coercive under section 8(a)(1) where: within a few days after the employees filed a decertification petition for an election the employer promised a wage increase;<sup>113</sup> the employer advised the employees it would be better to vote against the union because they would receive greater benefits;<sup>114</sup> the employer drew up charts for each employee showing what he or she would earn as a non-union employee.<sup>115</sup> On the other hand, the Board has held that a promise by an employer to maintain a medical plan comparable to what employees received under the union contract did not constitute a promise of a benefit under section 8(c),<sup>116</sup> nor was it a violation for the employer to show employees

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110. *Id.*

111. Until it has been determined that a valid question concerning representation exists, the employer is under an obligation to deal through and bargain with the chosen representative of his employees in regard to all matters concerning their employment. 29 U.S.C. § 158(a)(5) (1976). See *General Elec. Co.*, 150 N.L.R.B. 192 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). See also *supra* notes 22-38 and accompanying text for a discussion of the requirements for raising a valid question concerning representation.

112. 29 U.S.C. § 158(a)(5) (1976).

113. See, e.g., *M.&F. Mfg. Co.*, 222 N.L.R.B. 105 (1976).

114. See, e.g., *Dow Chem. Co.*, 250 N.L.R.B. 748 (1980); *Ranco Inc.*, 241 N.L.R.B. 685 (1979).

115. See, e.g., *Etna Equip. & Supply Co.*, 243 N.L.R.B. 596 (1979).

116. See, e.g., *El Cid, Inc.*, 222 N.L.R.B. 1315 (1976). In *El Cid*, the Board stated: "We do not believe that those cases in which an employer makes promises of future benefits to match a union's promises are pertinent to a decertification election situation . . . where the employer promises only to maintain the status quo if the union loses the election." *Id.* at 1316. See also *Lammert Indus.*, 229 N.L.R.B. 895 (1977), *enforced*, 578 F.2d 1223 (7th Cir. 1978) (an employer's statement that it definitely would not cut wages if the union lost the



specific details of fringe benefit programs under previous and current practice in the event a majority of the employees voted to decertify the union as their representative.<sup>117</sup>

The Board will not set aside an election on the basis of an isolated violation of section 8(a)(1) but looks to the totality of the employer's conduct.<sup>118</sup> Although there are no absolute guidelines, it is possible to generalize to the extent of stating that decertification election communications will be found to be coercive and not protected by section 8(c) when: 1) the employer has committed other unfair labor practices; 2) such communications are rendered immediately prior to the election or 3) such communications convey conclusions as opposed to mere information.<sup>119</sup>

At this stage in the decertification process conduct which violates section 8(a)(1) and is not protected by section 8(c) is viewed not only as an unfair labor practice but also as violative of the Board's election rules under section 9(c) of the Act.<sup>120</sup> Thus,

decertification election was held not to be an unfair labor practice).

117. See, e.g., *Dow Chem. Co.*, 250 N.L.R.B. 756 (1980). The Board, in finding that this type of employer communication did not violate § 8(c) of the Act, affirmed the ALJ's decision which stated:

Section 8(c) of the Act is completely devoid of meaning unless it permits an employer to clearly portray its practices with respect to its unrepresented employees so that they [the represented employees] could decide whether they wanted to secure unrepresented status. It is not unreasonable to presume the Union stressed in its pre-election campaign the protection it provided by contract against lay-off, arbitrary discipline, etc. The Company was not promising to grant the benefits in question. . . . All the Company did was furnish specific details and comparisons so the voters were completely informed of what they would gain in material benefits by abandoning union representation, as surely the Union informed them of what they would gain by continuing representation.

*Id.* at 760.

118. See *NLRB v. Virginia Elec. & Power Co.*, 44 N.L.R.B. 404, *enforced*, 132 F.2d 390 (4th Cir. 1942), *aff'd*, 319 U.S. 533 (1943).

119. R. GORMAN, *BASIC TEXT ON LABOR LAW* 155-56 (1976). See, e.g., *Dow Chem. Co.*, 250 N.L.R.B. 748 (1980) (the employer's communications comparing union and non-union benefits were held violative of the Act in light of supervisor threats and promises of benefit; further, comparison between union and non-union benefits drew conclusions instead of merely providing information). *M.&F. Mfg. Co.*, 222 N.L.R.B. 105 (1976) (employer promise of wage increase immediately prior to the election held to be coercive).

120. In *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962), the Board first announced the nexus among §§ 8(a)(1), 8(c) and the "laboratory conditions" requirement of § 9(c):

Conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election. This is so because the test of conduct which may interfere with the "laboratory conditions" for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).

threatening or coercive remarks may be both grounds for an unfair labor practice charge under section 8 of the Act, subjecting the employer to a possible bargaining order,<sup>121</sup> and the basis for setting aside an election under section 9.<sup>122</sup> However, although a union's charge that the employer violated section 8(a)(1) by his communications to employees may be defeated because of the protection afforded such communication by section 8(c), this protection only extends to the commission of unfair labor practices. Section 8(c) does not protect an employer from violations of the "laboratory conditions" requirement set up by the Board to regulate election conduct under section 9. Thus, even though a statement or communication from an employer during the pre-election campaign may not be found by the Board to be an unfair labor practice because it contains no threat or promise under section 8(c), it may still be grounds for setting aside an election pursuant to the Board's obligation to ensure fair elections under section 9 of the Act.<sup>123</sup>

In accordance with its responsibility to insure fair elections, the Board has imposed certain restrictions on pre-election activities of an employer. Thus, in addition to the unfair labor practice restrictions imposed by section 8 of the Act, the employer is prohibited from engaging in certain "objectionable conduct" which destroys the "laboratory conditions" necessary to protect employees

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*Id.* at 1786-87.

121. In the face of a violation of § 8(a)(1) during an election campaign the Board may, among other things, set the election aside and order a reelection, or issue a bargaining order requiring that the employer bargain with the union despite the fact that the union lost the election. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The latter remedy is only used in conjunction with severe violations of § 8(a)(1) of the Act. *Id.*

122. The Board is limited to the sole remedy of setting aside an election for a § 9 violation and ordering a reelection. Thus, although the Board may order a reelection if the "laboratory conditions" are broken, it may not order the employer to bargain with the union unless, looking at the totality of the employer's conduct, § 8(a)(1) violations were committed.

123. See *General Shoe Corp.*, 77 N.L.R.B. 124 (1948). In justifying its decision to set the election aside in *General Shoe*, despite the fact that no violation of § 8(c) was present, the Board commented that § 8(c) by its language justified the use of threatening or coercive communications only in unfair labor practice proceedings without referring at all to representation cases. Although it has been argued that the Board's remedy of setting aside an election in the face of employer activities which fall short of threats, force, or promises is barred by the first amendment, this argument has been judicially denied. See *Bausch & Lomb, Inc. v. NLRB*, 451 F.2d 873 (2d Cir. 1971). See also R. GORMAN, *supra* note 119.

in the exercise of their right to a fair election.<sup>124</sup> In order to constitute grounds for setting aside an election, the objectionable conduct must have occurred during the interim between the filing of the decertification petition by the employees and the election date.<sup>125</sup> Examples of such "objectionable conduct" which have occurred in a number of recent decertification elections include: the granting of new or additional benefits during the election campaign,<sup>126</sup> the denial of benefits during the campaign,<sup>127</sup> telling employees that reelecting the union will not benefit them because the employer refuses to bargain with that representative anymore,<sup>128</sup> and the making of conclusive statements as opposed to merely confirming information.<sup>129</sup> Thus, pursuant to section 9 of the Act, if the employer destroys the "laboratory conditions" of the election,

124. Activities which the Board has held violate the "laboratory conditions" standard include: electioneering at the polls, *see* Alliance Ware, Inc., 92 N.L.R.B. 55 (1950); making speeches to captive audiences within twenty-four hours of the election, *see* Peerless Plywood Co., 107 N.L.R.B. 427 (1953); and telling employees that selection of a union will not benefit them because the employer simply refuses to bargain with any chosen representative, *see* Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962).

125. Goodyear Tire & Rubber Co., 138 N.L.R.B. 453 (1962). However, an employer's promise of benefits which occurs subsequent to this period may also be proscribed, even though it did not affect the election, because it might affect a second election. *See* Ralph Printing & Lithographing Co., 158 N.L.R.B. 1353, 1354 n.3 (1966). But *see* Vernon Mfg. Co., 214 N.L.R.B. 285 (1974), *supplemented*, 219 N.L.R.B. 622 (1975).

126. *See, e.g.*, Lammert Indus., 229 N.L.R.B. 895 (1977) (employer for first time immediately prior to an election commenced soliciting employees to present their grievances to him); Montgomery Ward & Co., 187 N.L.R.B. 956 (1971) (enforcing of a dormant rule which was advantageous to employees directly prior to decertification election was held to be an unlawful attempt to influence employees). While an employer's promise of a benefit if the union is voted out is clearly coercive, a question may be raised whether the granting of benefits by the employer during an election campaign has a similar effect, particularly when such benefits are granted without inference of withdrawal if the union loses. Indeed, it can be argued that regardless of who wins the decertification election, the conferral of such benefits simply makes the employees better off, and does not therefore impinge upon the exercise of their § 7 rights. Yet, the Supreme Court has rejected both these arguments. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). In *Exchange Parts* the Court held that the conferral of benefits by an employer during an election campaign is unlawful since the employees will read such action as a suggestion of employer power to withdraw any benefits conferred. Specifically, the Court declared that "the danger inherent in well-timed increases in benefits is the suggestion of the fist inside the velvet glove." *Id.* at 409.

127. *Cf., e.g.*, Montgomery Ward & Co., 187 N.L.R.B. 956 (1971) (freezing of wage increases prior to a decertification election held to be an unfair labor practice).

128. Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962).

129. *See, e.g.*, Dow Chem. Co., 250 N.L.R.B. 748, 751 (1980) (The supervisor "did more than point out factual material, he also made the conclusions for the [employees]." For example, the supervisor stated that the lowest paid non-union employee made more than the highest paid union employee).

the Board will simply set the election aside, regardless of whether the employer actually committed an unfair labor practice pursuant to section 8 of the Act.

The criteria for judging employer conduct in election campaign cases differ depending on whether the conduct is being questioned in a representation case or in an unfair labor practice case. If the former, the criteria for judging the lawfulness of such conduct will be compliance with "laboratory conditions." If the latter, then the same conduct shall be judged by the looser standard of section 8(c). Since it is difficult to segregate section 8(c) violations and hence violations of section 8(a)(1) from "laboratory conditions" violations in election conduct cases, application of these dual criteria may arise in the same case with respect to the same conduct.<sup>130</sup> This is typically the situation in decertification election cases where the Board may be asked by the union losing the election to both set aside the election and to obtain a bargaining order<sup>131</sup> if the unfair labor practices are particularly egregious.

Thus at this stage, the employer's communications with its employees are subject to scrutiny by the Board in the context of

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130. In most decertification cases the union is seeking two remedies: the setting aside of the election and the issuance of a bargaining order. Normally the two matters will be consolidated and the ALJ will be confronted with the same conduct in light of two separate standards (§ 8(c) and "laboratory conditions"). For an illustration of the confusion over the application of the dual standard, see *Sinclair Co.*, 164 N.L.R.B. 261 (1967), *enforced*, 397 F.2d 157 (1st Cir. 1968), *aff'd sub nom.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The trial examiner in *Sinclair Co.* found that the employer's comments had violated § 8(a)(1) as well as destroyed the "laboratory conditions." The trial examiner recommended in his order that even assuming the employer's comments were not violative of § 8(a)(1), the election should still be set aside and the employer ordered to bargain due to the impairment of "laboratory conditions." The Board and the First Circuit both affirmed the bargaining order without addressing this point. This is, nonetheless, a difficult area because, to date, the only appropriate remedy for destroying "laboratory conditions" is a reelection while a violation of § 8(a)(1) may be remedied with a bargaining order.

131. The union's present right to pursue the dual remedies has not always existed. In *Aiello Dairy Farms*, 110 N.L.R.B. 1365 (1954), the Board held that the union was required to make a choice between the remedial procedure under which it sought to have the employer's conduct tested. Consequently, the union could not then request a bargaining order if it chose to contest the election based on the employer's breach of "laboratory conditions," nor could it use § 9 to have the election set aside if it contested the employer's conduct under § 8(a)(1). In 1964, however, the Board overruled *Aiello*, calling the union's situation a "Hobson's choice." *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277, 1280 (1964). The Supreme Court approved the *Bernel* rule in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). See also *International Union of Electrical, Radio & Machine Workers v. NLRB*, 352 F.2d 361 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 902 (1965); *Colson Corp. v. NLRB*, 347 F.2d 128 (8th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965).

the protection of section 8(c) and the prohibitions of section 8(a)(1), and pursuant to the requirement of "laboratory conditions" in which the election must be held. This scrutiny is made by the Board in the context of the totality of the employer's conduct.

In a series of recent cases,<sup>132</sup> the Board has delineated fairly clearly between proper and improper employer conduct during the period preceding the decertification election but subsequent to the filing of the petition. The standard which may be derived from these cases is that the employer may furnish details and information pertaining to non-union wages, benefits and insurance plans; however, the employer may not do so in the context of implying receipt of these benefits in return for a negative vote for the union, nor suggest the inability to confer these benefits because of the union's presence.

A pair of cases involving separate elections at the same company and decided by the same panel of the Board<sup>133</sup> serve to illustrate Board thinking on the demarcation of lawful conduct at this stage of the proceedings. In the first decision, *Dow Chemical Company*<sup>134</sup> (*Dow Chemical I*) involving the decertification of the electricians' union, the Board not only set aside the election, but ordered the employer to bargain with the union. In *Dow Chemical Company*<sup>135</sup> (*Dow Chemical II*) the Board certified the election results.

The employer's conduct in both cases was substantially the same in campaigning for the decertification of the two unions. The company scheduled meetings at which it used slides to set forth the details of all fringe benefits enjoyed by the company's unrepresented employees at another plant, set against the schedule of fringe benefits the employees were receiving under the current collective bargaining agreement. In neither complaint filed with the Board did the union allege that the presentation was not completely factual, accurate or truthful. In each campaign the employer followed the slide presentation with letters to the

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132. Dow Chem. Co., 250 N.L.R.B. 756 (1980); Dow Chem. Co., 250 N.L.R.B. 748 (1980); Etna Equip. & Supply Co., 243 N.L.R.B. 596 (1979); Ranco Inc., 241 N.L.R.B. 685 (1979); Hermitage Hosp. Prods., 239 N.L.R.B. 216 (1978); Lammert Indus., 229 N.L.R.B. 895 (1977), *enforced*, 578 F.2d 1223 (7th Cir. 1978).

133. The panel consisted of Board Chairman Fanning and Members Jenkins and Truesdale.

134. 250 N.L.R.B. 748 (1980).

135. 250 N.L.R.B. 756 (1980).

employees.

In *Dow Chemical II* only one letter was sent to employees. It was limited to describing the election process and to reassuring the employees of job security should the union be voted out. The Board adopted the findings of the administrative law judge that the above outlined conduct did not constitute a violation of section 8(a)(1) nor did it interfere with the employees' exercise of free choice in the election. The basis of the Board's decision was the conclusion that the company merely furnished "specific details and comparisons [of union and non-union employee benefits] so the voters were completely informed of what they would gain in material benefits by abandoning union representation, as surely as the Union informed them of what they would gain by continued representation."<sup>136</sup> The Board in particular noted that such conduct did not violate section 8(c) of the Act.<sup>137</sup>

In contrast, the series of three letters sent to employees in *Dow Chemical I* went into a comparison of benefits between hourly and salaried employees including comparison of pay scale, life insurance, medical coverage, time off and holiday pay and included such matters as non-union employees Dow loan scholarship and education refunds, stock benefit and employee stock purchase plans. Each letter contained the admonition that "the law prohibits us from promising these salaried benefits to you if you choose to decertify."<sup>138</sup> Based on the rationale in *Dow Chemical II*, it does

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136. *Id.* at 760.

137. *Id.* It is worth noting that the Board examined this case only with respect to violations of §§ 8(a)(1) and (a)(5) of the Act, and not with respect to interference with "laboratory conditions". Had the union raised the latter argument as justification for setting aside the election, § 8(c) would not have been an appropriate or valid defense.

138. *Dow Chem.*, 250 N.L.R.B. at 749. In commenting on the legality of the employer's letters which were mailed to employees, the ALJ stated that if the letters were viewed in isolation,

[t]here would be a strong argument that the [employer] was correctly detailing the existing facts to employees in order that they could make an informed decision in the election. Carrying this argument further, the mere fact that wages and benefits to salaried workers were in some respects better than that presently given unit employees does not amount to a violation of the Act as a promise of benefits *in light of* the [employer's] disclaimer that it could not promise to give them salaried benefits and in view of the fact it was a factual review of existing salary and hourly wage benefits.

*Id.* at 749-50 (emphasis added). The Board appears, for the most part, to be willing to overlook the inferences which employees might draw from a comparison of union and non-union benefits, *i.e.*, that the more favorable non-union benefits are being promised, so long as the

not seem possible that the Board would find the substantially similar conduct of the employer in *Dow Chemical I* violative of the Act; however, this conduct was found to be a violation of section 8(a)(1)<sup>139</sup> and destroyed the conditions necessary for a fair election *when analyzed in the context of the company's other conduct during this period*. The Board adopted the conclusion of the administrative law judge that the employer, through the actions of several supervisors, had engaged in unlawful interrogation of, and promises of benefit to, the employees and had drawn conclusions presented to the employees concerning the superior status of non-union employees.<sup>140</sup> The administrative law judge in his summary stated:

I have concluded that on the basis of the record as a whole [the company] did more than inform the employees of benefits currently enjoyed by salaried em-

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employer's letters, speeches, or slide productions contain assertions that the comparisons, in fact, promise nothing. *See, e.g., Lammert Indus., 229 N.L.R.B. 895 (1977), enforced, 578 F.2d 1223 (7th Cir. 1978)*. However, the Board does not always find that this language protects employer's statements from the inference of a promise of benefits. *See, e.g., Etna Equip. & Supply Co., 243 N.L.R.B. 596 (1979)*. In *Etna*, despite the employer's caveats, the Board found that the employer had promised a benefit when he prepared a chart for each individual employee describing the pension benefits the employee would earn if he or she were a salaried, non-union employee. The Board reasoned:

After such an elaborate presentation, the employees would logically be justified in assuming this was the pension plan they were being offered or promised if the Union lost. Put differently, it seems very difficult to believe the Employer would go to such effort for each and every employee unless it intended the employees to believe the pension benefits presented no more than a mere possibility.

*Id.* at 597.

139. *Dow Chem.*, 250 N.L.R.B. at 750. The Board held that the same employer conduct which had been found lawful in *Dow Chemical II* was unlawful in this instance:

The direct comparisons between the wages of the nonrepresented carpenters and the represented electricians indicated to employees the benefits of nonrepresentation approximately a week before the decertification election was held. I find the direct comparison constitutes a promise of benefit and an inducement to vote against the Union and such statement is violative of Section 8(a)(1).

*Id.*

140. The ALJ in his analysis stated:

Because of comments made by supervisors in . . . informational meetings and in individual meetings with employees in which employees were told, *inter alia*, that they would receive better wages and fringe benefits, and would fare better as salaried employees . . . and in light of a systematic campaign of interrogation of employees, I find that the dissemination of benefits via slides and individual mailings to employees to be part and parcel of the Company's effort to woo the employees from the Union, and in this context, constitutes a promise of benefits and is violative of Section 8(a)(1) of the Act.

*Id.* at 750.

ployees. It systematically interrogated employees as to their views on the decertification election and made the judgment that their wages and benefits would be better and attempted to "sell" that judgment to employees and thereby induce them to reject their existing union representation.<sup>141</sup>

These two decisions illustrate the parameters the Board has set on employer conduct during the pre-election period. The Board makes it clear that at this stage the employer may point out factual material concerning benefits and wages of non-unionized employees and compare them with the benefits and wages of unionized employees even if such information is not solicited by employees. However, the employer must take care to emphasize such benefits are not being promised and may not venture any opinion concerning the advantages of non-unionization. Otherwise, the employer's conduct will be tainted and subject to sanctions of section 8(a)(1) and constitute objectionable election conduct.

#### V. EMPLOYER INVOLVEMENT IN DECERTIFICATION PROCEEDINGS THROUGH ATTRIBUTION OF UNLAWFUL EMPLOYEE CONDUCT

The Board has developed a fairly consistent set of guidelines in cases involving management participation at the aforementioned three stages of decertification. An area in which the Board has been less consistent, however, is that of identifying the liability of the employer in decertification cases for the unlawful conduct of its supervisors<sup>142</sup> and of certain employees who are "aligned with management."<sup>143</sup> In particular, members of the Board disagree as to the employer's liability when the supervisors in question are also members of the bargaining unit which they are attempting to oust.<sup>144</sup> However, to the extent that these two categories of em-

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141. *Id.* at 754.

142. It is well settled that an employer violates § 8(a)(1) when, through a supervisor, it prepares, sponsors and presents to its employees for their signatures a petition to decertify the union which represents them for purposes of collective bargaining. *See, e.g.,* Nassau Glass Corp., 222 N.L.R.B. 792 (1976); Suburban Homes Corp., 173 N.L.R.B. 497 (1968); Big Ben Dep't Stores, Inc., 160 N.L.R.B. 1925 (1966), *enforced*, 396 F.2d 78 (2d Cir. 1968).

143. If an employee, although not by definition a managerial employee, or a supervisor, is clothed with apparent authority by the employer, then that employee's involvement in the decertification process will be attributed to the employer. *See, e.g.,* Proler Int'l Corp., 635 F.2d 351 (5th Cir. 1981); NLRB v. Birmingham Publishing Co., 262 F.2d 2 (5th Cir. 1959).

144. When the supervisors supporting decertification are part of the bargaining unit, the Board has generally found that the employer must otherwise affirmatively participate in the decertification activity to support a claim of coercion. *See, e.g.,* Powers Regulator Co.,



ployees are deemed to represent management, their anti-union solicitation is generally held to constitute an infringement of employees' section 7 rights which is attributable to the employer<sup>145</sup> and therefore a violation of section 8(a)(1) of the Act. To the extent that such conduct influences employees in the exercise of their rights, the decertification drive is tainted and the petition for an election will be set aside. This is no less true if the supervisor or agent is also a member of the bargaining unit, if the duties which the employer assigns to such employee cause other employees to regard him or her as an arm of management.<sup>146</sup> A review of the Board decisions in this area suggests the difficulty of consistent analysis that these two categories present.

In examining the first category, that of supervisor, a threshold question on which the Board disagrees is the definition of a supervisor.<sup>147</sup> This designation is critical because the Board has established a per se rule under section 9 of the Act that a decertification petition filed by a statutory supervisor is invalid as emanating from an improper source.<sup>148</sup> While section 2(11) of the Act<sup>149</sup> is a

149 N.L.R.B. 1185 (1964), *enforced*, 355 F.2d 506 (7th Cir. 1966); Hy Plains Dressed Beef, Inc., 146 N.L.R.B. 1253, 1256 (1964); Montgomery Ward & Co., 115 N.L.R.B. 645 (1956), *enforced*, 242 F.2d 497 (2d Cir. 1957), *cert. denied*, 355 U.S. 829 (1957).

145. If the employer places employees or supervisors in a position where other employees could *reasonably believe* they represent management, the employer will be liable for their antiunion acts. *International Ass'n of Machinists v. NLRB*, 311 U.S. 72 (1940).

146. *See, e.g.*, *NLRB v. Triumph Curing Center*, 571 F.2d 462 (9th Cir. 1978); *NLRB v. Texas Indep. Oil Co.*, 232 F.2d 447 (9th Cir. 1956).

147. *See, e.g.*, *Hydro Conduit Corp.*, 254 N.L.R.B. 433 (1981) (Member Jenkins dissented from the majority concerning the supervisory status of a foreman on which the employer's liability rested). *See also* *Custom Bronze & Aluminum Corp.*, 197 N.L.R.B. 397 (1972) (then-Chairman Miller dissented from the majority concerning the supervisory status of a lead man).

148. *Modern Hard Chrome Serv. Co.*, 124 N.L.R.B. 1235 (1959); *Morganton Full Fashioned Hosiery Co.*, 102 N.L.R.B. 134 (1953); *Star Brush Mfg. Co.*, 100 N.L.R.B. 679 (1952); *Clyde J. Merris*, 77 N.L.R.B. 1375 (1948). The rationale for this rule is best enunciated in *Suburban Homes Corp.*, 173 N.L.R.B. 497 (1968), a case often cited for the following premise:

Unimpeded access to the Board could not be in the public interest if it served to provide immunity to the employer who filed a decertification petition intended to frustrate and obstruct the collective-bargaining process which the Act seeks to promote. Clearly, the decertification petition filed by Respondent's supervisor was but the final step in an unlawful plan designed to oust the Union as bargaining representative of the employees.

*Id.* at 497. *But see* *Wichita Eagle & Beacon Publishing Co.*, 206 N.L.R.B. 55 (1973) (no unfair labor practice where supervisor filed decertification petition and no evidence suggested that the employer had directed, suggested or encouraged the supervisor).

starting point for Board analysis of who is a supervisor, the gradations of authority "responsibly to direct" the work of others are so infinite as to necessitate a larger measure of discretion on the part of the Board.<sup>150</sup> Typically, members of the Board have disagreed as to the supervisory status of two categories of employees: foremen and lead men. In evaluating the status of such employees, two key criteria used by the Board are the degree of independent judgment the employee exercises and how his co-employees view the employee's position. In one case<sup>151</sup> involving circulation of a decertification petition by a foreman, the majority of a Board panel<sup>152</sup> agreed with the administrative law judge that, "while the evidence does show that [the employee] exercised certain powers that were supervisory,<sup>153</sup> a preponderance of the evidence fails to show that he exercised independent judgment in performing these functions."<sup>154</sup> In a rigorous dissent, Member Jenkins argued that the

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149. 29 U.S.C. § 152(11) (1976). Section 2(11) of the Act states:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

*Id.* An individual need not possess all of these powers to qualify as a supervisor. Rather, possession of any one of them is sufficient to denote supervisory status. *Ohio Power Co., v. NLRB*, 176 F.2d 385 (6th Cir. 1949), *cert. denied*, 338 U.S. 899 (1950); *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), *cert. denied*, 335 U.S. 908 (1949). However, possession of any one of the powers enumerated is not sufficient to confer supervisory status if such power is not coupled with the right to exercise independent judgment on behalf of management. *NLRB v. Security Guard Serv., Inc.*, 384 F.2d 143 (5th Cir. 1967).

150. *NLRB v. Swift & Co.*, 292 F.2d 561 (1st Cir. 1961).

151. *Hydro Conduit Corp.*, 254 N.L.R.B. 433 (1981).

152. Members Fanning and Penello concurred; Member Jenkins dissented.

153. The ALJ relied on evidence of taint from one witness, a fellow foreman, who testified that the employee in question was empowered, *inter alia*, to assign work, give verbal reprimands, grant leave requests, assign overtime, handle employee complaints and grievances, report poor production and infractions of work rules, and provide "input" regarding evaluation of probationary and permanent employees. Among the other evidence of supervisory status considered were the facts that this employee devoted little time to performing production work, earned fifty cents more an hour than production employees, regularly attended production meetings, and wore a supervisor's hardhat. *Hydro Conduit*, 254 N.L.R.B. at 435-41.

154. The ALJ, with whom the majority agreed, found that the employee in question lacked authority to effectively recommend changes in the employees' status or to make any decisions involving the exercise of independent judgment during his performance of the supervisory-type functions. Accordingly, the employee was found only to be a conduit of management. *Id.* at 433. On appeal, the circuit court cannot change the Board's findings of fact

employees reasonably viewed the foreman's position and interests as being more closely aligned with that of management than with that of other employees and that the duties required of him, including verbal reprimands and the signing of disciplinary and discharge notices, suggest the status of a supervisor.<sup>155</sup>

In another example of Board dissension over this question,<sup>156</sup> a majority of the Board panel<sup>157</sup> found that the employee in question was a supervisor and that therefore the decertification petition which he had filed was tainted. The employee in question was the senior employee in a workforce of highly skilled employees which had recently been reduced to three in number from ten. The employee did not attend management meetings nor was he formally designated a foreman by management. In holding that this employee was a supervisor, the Board panel relied on evidence that he scheduled shop work, assigned it to employees (though only in accordance with the employee's job classification) and, according to him, had sole responsibility for the workload.<sup>158</sup> Based on this evidence and the fact that the employee in question had responsibility for time cards, the majority of the Board panel found that he responsibly assigned and directed the work in the shop and exercised independent judgment.<sup>159</sup> Chairman Miller dissented on the basis that the employee's responsibility in directing employees was merely of a routine nature and compatible generally with the attributes of a lead man, not a supervisor or foreman.<sup>160</sup> These two

unless such findings are without merit in the record. Thus, key decisions such as who is a supervisor are left to the Board to determine on a case-by-case basis. *NLRB v. Big Ben Dep't Stores, Inc.*, 396 F.2d 78 (2d Cir. 1968).

155. *Hydro Conduit*, 254 N.L.R.B. at 434-35 (Jenkins, Member, dissenting).

156. *Custom Bronze & Aluminum Corp.*, 197 N.L.R.B. 397 (1972).

157. The Board panel consisted of Chairman Miller and Members Fanning and Penello. Chairman Miller dissented.

158. *Custom Bronze*, 197 N.L.R.B. at 398.

159. *Id.*

160. *Id.* In his dissent, Chairman Miller stated:

The lack of day-to-day immediate supervision alone where there are but three highly skilled and experienced employees following the work plan of the drawings and daily instructions relayed to them from the office does not in my view justify a finding that the most senior and experienced of the three employees exercises responsible direction and is, therefore, a supervisor. In such circumstances, being "in charge" assumes a perfunctory character which has little or nothing to do with responsible direction or the exercise of independent judgment.

*Id.*

cases exemplify the difficulty the Board has in identifying who is a supervisor and suggest the amount of discretion it exercises in a given case.

Because of the responsibility the Act places on the employer for acts of its agents,<sup>161</sup> the employer is found liable even for acts of its employee-supervisors in express derogation of its instructions. The Board has generally taken the position that since the employer has placed the supervisors in a position where the employees could reasonably believe that they spoke and acted for management, the employer must bear responsibility for their actions.<sup>162</sup> The rationale for attributing such unlawful acts to the employer is best explained in a Supreme Court decision<sup>163</sup> where the Court stated: "Slight suggestions as to the employer's choice . . . may have telling effect among men who know the consequences of incurring that employer's strong displeasure."<sup>164</sup> In a number of cases the Board has held that the employer has an affirmative duty to assert a position of neutrality and deny support for actions of supervisors aiding an anti-union drive in derogation of employer instructions.<sup>165</sup> The Board in one case stated that, "[w]hile an employer need not affirmatively act to protect an incumbent union's status among the employees, it may not take affirmative action . . . to undermine that status."<sup>166</sup> The Board has held that an employer violates section 8(a)(1) where anti-union activity was allowed to take place on company time openly and evidently without fear of reprimand.<sup>167</sup>

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161. 29 U.S.C. § 152(13) (1976). This section provides: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." This definition is incompatible with the responsibility of a principal for his agent's acts under the common law of agency. The employer under the Act has a greater responsibility for the acts of his agents than he would under normal agency law principles. See RESTATEMENT (SECOND) OF AGENCY § 15 (1957).

162. See, e.g., *Justrite Mfg. Co.*, 238 N.L.R.B. 57 (1978) (employer found liable for attempting to persuade employees to decertify the union when his foreman, despite explicit instructions to the contrary, aided in promoting the decertification petition).

163. *International Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. NLRB*, 311 U.S. 72 (1940).

164. *Id.* at 78.

165. See, e.g., *Daisy's Originals, Inc. of Miami*, 187 N.L.R.B. 251 (1970), *enforced as modified*, 468 F.2d 493 (5th Cir. 1972). See also *Rexair, Inc.*, 243 N.L.R.B. 876 (1979); *Rennselaer Polytechnic Inst.*, 219 N.L.R.B. 712 (1975).

166. *Daisy's Originals*, 187 N.L.R.B. at 255.

167. *Id.*

While the Board has suggested that the employer may absolve himself from the unlawful acts of his supervisors by denying to his employees that he supports the decertification petition and thereby remove the taint from the decertification process,<sup>168</sup> this redemption only helps those employers who learn of their supervisors' unlawful acts. On the other hand, the Board is in general agreement that actual knowledge of such acts by the employer is not necessary to find it liable.<sup>169</sup> The Board has held that it is appropriate to impute knowledge to the employer of the supervisor's unlawful acts in a decertification drive.<sup>170</sup> Under those circumstances, an employer who has no knowledge of his supervisor's wrongful acts will be found to have violated section 8(a)(1) despite the employer's stance of neutrality.<sup>171</sup>

Not all interference by supervisors in the course of support for a decertification effort invalidates that effort.<sup>172</sup> The Board has generally applied the same standards to supervisors as it has to management to ascertain whether the violations amount to unlawful interference sufficient to enjoin or set aside an election. The key issue that the Board should focus on is whether the supervisor's conduct in the decertification process in fact coerced the employees in the exercise of their section 7 rights.<sup>173</sup>

An employer may also be found liable for coercive activities<sup>174</sup>

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168. *Id.* at 255-56.

169. The responsibility of an employer for the acts of its supervisors has been well established by the often cited case, *International Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. NLRB*, 311 U.S. 72 (1940), where the Court stated:

The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*. We are dealing here not with private rights nor with technical concepts pertinent to an employer's legal responsibility for third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination or influence.

*Id.* at 80 (citation omitted).

170. *Birmingham Publishing Co.*, 118 N.L.R.B. 1380 (1957), *enforced*, 262 F.2d 2 (5th Cir. 1958). Such inferences are not drawn by the Board, however, if the supervisor is also a union member. *See infra* notes 192-220 and accompanying text.

171. *Birmingham Publishing Co.*, 118 N.L.R.B. 1380 (1957), *enforced*, 262 F.2d 2 (5th Cir. 1958).

172. *See, e.g.*, *Freeman Co.*, 194 N.L.R.B. 595 (1971), *enforced as modified*, 471 F.2d 708 (8th Cir. 1972).

173. *See, e.g.*, *National Cash Register Co.*, 201 N.L.R.B. 1034 (1973), *enforcement denied in material part*, 494 F.2d 189 (8th Cir. 1974).

174. Typically, such coercive activities include statements made by employees to their

of certain employees even though such employees do not qualify as supervisors under the Act.<sup>175</sup> In making the determination as to employer liability for the acts of its employees in a decertification effort, "the crucial question is whether, under all the circumstances, the employees could reasonably believe that [the non-supervisor] was reflecting company policy, and speaking and acting for management."<sup>176</sup> In making this determination the Board examines the position that the employee in question occupies within the company in conjunction with his words and actions.<sup>177</sup> The Board also examines any steps which the company may have taken which lead its employees reasonably to conclude that those persons were in fact acting on behalf of management.<sup>178</sup> In *Proler International Corp.*<sup>179</sup> the Board found that there was substantial evidence<sup>180</sup> to attribute to the employer certain activities of both a current and a former employee in the promotion of a decertification petition. The current employee invited several other employees to eat lunch at a restaurant away from the plant. During lunch this employee voiced strong anti-union sentiments and urged the other employees to sign a petition to decertify the union which currently represented them. The former employee acted as a translator for those employees who only understood Spanish. The Board found that these two acted as agents of the company and that their promotion of a decertification petition violated the Act based on the following factors: the company paid for the lunches; the company paid the employees for the time spent; the company provided at least one car to transport employees to the restaurant where the luncheon was held; and the current employee gathered several employees in the personnel office of the company to execute a decer-

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co-workers promising better economic benefits if the union is voted out, and threatening co-workers with the loss of their jobs for not supporting the decertification drive. *See, e.g.,* Maywood Plant of Grede Plastics, 235 N.L.R.B. 363 (1978), *modified per curiam*, 628 F.2d 1 (D.C. Cir. 1980).

175. The theory that employee anti-union activities could be attributable to the employer was first enunciated in *International Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. NLRB*, 311 U.S. 72 (1940).

176. *Aircraft Plating Co.*, 213 N.L.R.B. 664 (1974).

177. *Regal Shoe Shops*, 249 N.L.R.B. 1210 (1980).

178. *Helena Laboratory Corp.*, 557 F.2d 1183 (5th Cir. 1977).

179. 242 N.L.R.B. 676 (1979), *enforced in material part*, 635 F.2d 351 (5th Cir. 1981).

180. Under the Act, "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(d) (1976).

tification petition in front of the company's attorney.<sup>181</sup>

While the Board found substantial evidence in the *Proler* case to suggest that the employer was in fact promoting the decertification petition, the Board has held in several cases that the mere perception by other employees that another employee is acting as an agent of management warrants setting aside a decertification petition as tainted.<sup>182</sup> Such was the case in *Columbia Building Materials*<sup>183</sup> where the son of a plant supervisor was responsible for the circulation and filing of a decertification petition. Although the son denied that he had received any assistance from management in circulating and filing the petition, the Board found that his conduct could be attributable to management in light of the fact that employees reasonably considered that he was in charge in his father's absence.<sup>184</sup> Even though the son was not a supervisor, the Board found that his position was superior to those of other employees. He was paid more and did not have to punch a time clock. He additionally conferred with salesmen, initialed time cards in his father's absence and had responsibility for certain inventory.<sup>185</sup> The Board further found that he was used as a conduit for instructions from his father to other employees, all of which lent to his solicitation the appearance of management approval in the eyes of other employees.<sup>186</sup> Because the appearance of management approval would have affected employees in their decision to sign the decertification petition, the petition was tainted as emanating from an improper source. Because a decertification petition may be tainted by the mere perception by employees that management is involved, the Board has found, in particular, that cases where the petition is circulated by relatives of the owner or supervisor,<sup>187</sup> or by employees holding themselves out as aligned with management, either by word or appearance,<sup>188</sup> are violative of the Act. This is so regardless of management's stance of neutrality. Once again, it is difficult for the employer to successfully argue that his position is one of neutrality in the face of these circum-

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181. *Proler Int'l Corp.*, 242 N.L.R.B. 676 (1979).

182. *See, e.g., American Door Co.*, 181 N.L.R.B. 37 (1970).

183. 239 N.L.R.B. 1342 (1979).

184. *Id.* at 1346.

185. *Id.*

186. *Id.*

187. *Id.*

188. *See, e.g., Proler Int'l Corp.*, 242 N.L.R.B. 676 (1979).

stances. The Board then may deny certain petitions which have a legitimate origin.

By far the most difficult cases for the Board to decide are those in which the employee involved in the initiation or circulation of the decertification petition is both a supervisor and a union member. While supervisors are specifically exempt from protection of the Act because of their alignment with management,<sup>189</sup> they are nevertheless allowed to join a union.<sup>190</sup> A supervisor's membership in a union and subsequent involvement in a decertification drive then presents the difficult problem of ascertaining whether his anti-union activities were being performed on behalf of himself as a disgruntled union member, or on behalf of the employer as a management agent.

Although employee coercion may generally be inferred from the fact that supervisors are involved in encouraging a decertification campaign,<sup>191</sup> the Board has carved out an exception to this rule regarding supervisors who are also union members. When the supervisors involved are also part of the bargaining unit, affirmative participation by the employer in the anti-union activity must be found to support a claim of coercion. This exception was first enunciated by the Board in 1956 in *Montgomery Ward & Co.*,<sup>192</sup> where the Board held that an employer could not be found responsible for a supervisor's anti-union statements during an election

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189. Section 2(3) of the Act, which defines those employees who are entitled to protection under the Act, states specifically that the term employee "shall not include . . . any individual employed as a supervisor." 29 U.S.C. § 152(3) (1976).

190. 29 U.S.C. § 164(a) (1976). This section states:

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either material or local, relating to collective bargaining.

Because supervisors are not "employees" under the Act, subject to the protections set forth in § 7, they may not normally invoke the employer unfair labor practice provisions set forth in § 8(a). Specifically, a supervisor may be discharged for engaging in union activities. In certain instances, however, the Board has found that a supervisor's discharge for such activities has a deleterious effect on other employees whose rights are protected and hence is violative of the Act. For a further discussion of this area, see Brod, *The N.L.R.B. in Search of a Standard: When is the Discharge of a Supervisor in Connection with Employees' Union or Other Protected Activities an Unfair Labor Practice?*, 14 IND. L. REV. 727 (1981).

191. See, e.g., *Suburban Homes Corp.*, 173 N.L.R.B. 497 (1968); *Big Ben Dep't Stores, Inc.*, 160 N.L.R.B. 1925 (1966), enforced, 396 F.2d 78 (2d Cir. 1968).

192. 115 N.L.R.B. 645 (1956), enforced, 242 F.2d 497 (2d Cir.), cert. denied, 355 U.S. 829 (1957).



campaign because of the supervisor's membership in the unit and his participation in the election.<sup>193</sup> In enunciating this exception the Board gave the following explanation and set forth a two-pronged test to determine employer culpability:

Statements made by such a [unit member] supervisor are not considered by employees to be the representations of management, but of a fellow employee. Thus they do not tend to intimidate employees. For that reason, the Board has generally refused to hold an employer responsible for the anti-union conduct of a supervisor included in the unit, in the absence of evidence that the employer [1] encouraged, authorized, or ratified the supervisor's activities or [2] acted in such manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management.<sup>194</sup>

One of the Board members<sup>195</sup> voiced a strong dissent that the coercive and threatening conduct of the supervisor in question should be attributed to the employer. The dissenting opinion argued that whether words intimidate or tend to do so should not depend on the accidental classification of names on the voting eligibility list.<sup>196</sup>

The Board decision in *Montgomery Ward* suggests that the subjective views of the supervisor by the employees as "one of them" because of his membership in the union is fundamental in cases of unit member supervisory interference in a decertification election campaign. *Montgomery Ward* is the genesis of a line of cases determining employer liability for the coercive activities of a card-carrying supervisor. In a case arising shortly after the *Montgomery Ward* decision, *Birmingham Publishing Co.*,<sup>197</sup> the Board further defined employer culpability through strict agency law principles.<sup>198</sup> In this case, the Board found the employer liable for

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193. Although the Board found that the supervisor's anti-union activities could not be attributed to his employer because of his participation in the election, the Board did find that such statements could be used in considering whether the discharge of two employees violated § 8(a)(3). In other words, despite the supervisor's eligibility to vote in the election, the Board held that his supervisory status could be considered in determining whether his knowledge and attitude could be imputed to his employer in determining the motivation for the discharges. *Id.*

194. *Id.* at 647.

195. Member Peterson.

196. *Montgomery Ward & Co.*, 115 N.L.R.B. 645, 655 (1956), *enforced*, 242 F.2d 497 (2d Cir.), *cert. denied*, 355 U.S. 829 (1957).

197. 118 N.L.R.B. 1380 (1957), *modified*, 262 F.2d 2 (5th Cir. 1959).

198. The Board stated:

While it is true that agency cannot be established through the statements of an alleged agent alone, a principal's consent with respect to an agency relationship

a unit member supervisor's decertification activities because the employer failed to disavow his activities. The Board concluded that the employer's shop was so small that knowledge of the supervisor's activity in making promises and rewards in return for signatures on decertification petitions must be inferred.<sup>199</sup> To support its decision the Board noted evidence that the supervisor used company time, property and material, and was not remonstrated for so doing, while a pro-union advocate was discharged for similar conduct. Nonetheless, in another case relying on *Montgomery Ward, Breckenridge Gasoline Co.*,<sup>200</sup> the Board found that an employer was not responsible for his supervisor's anti-union activities because of the employer's belief that the employee was not a supervisor and because of the latter's inclusion in the unit. Thus, in this instance the Board said the failure of the employer to disavow the supervisor's conduct could not be considered evidence of authorization or ratification.<sup>201</sup> In its decision the Board made it clear that a supervisor's acts would not be attributed to his employer even though the supervisor held himself out to other employees as an arm of management.<sup>202</sup> Again, a strongly worded dissent by two Board members in the *Breckenridge* case shows the conflict among the Board over this issue. Members Jenkins and Fanning, although acknowledging the validity of *Montgomery Ward* in certain circumstances, stated that the principles of *respondeat superior* should apply<sup>203</sup> and suggested that the presumption is always that supervisors are aligned with management regardless of union affiliation.<sup>204</sup> This presumption is directly opposite to that stated in *Montgomery Ward*.<sup>205</sup> The dissenting members further suggested

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either by way of authorization or ratification may be manifested by conduct and sometimes even by passive acquiescence, as well as by words. And an individual's authority to act as an agent in any given manner will be implied, therefore, whenever the conduct of the principal is such as to demonstrate that he actually intended to confer such authority.

*Id.* at 1381.

199. *Id.* at 1382.

200. 127 N.L.R.B. 1463 (1960).

201. *Id.* at 1464.

202. *Id.* at 1463.

203. *But see supra* note 169 (employee anti-union conduct may be imputed to employer though the *respondeat superior* test for imputing employee conduct may not be strictly met).

204. *Breckenridge*, 127 N.L.R.B. at 1468.

205. *See supra* note 194 and accompanying text.

that a unit member supervisor must indicate to the other employees that he is acting in his individual capacity.<sup>206</sup> *Montgomery Ward* required no such declaration.

In the next case heard by the Board addressing this issue, *Roman Catholic Diocese of Brooklyn*,<sup>207</sup> a Board panel consisting of Members Fanning, Jenkins, and Penello found both the filing of a decertification petition and the solicitation of employee signatures in support of the petition by statutory supervisors who were unit members, attributable to the employer.<sup>208</sup> Although the factual basis of the case when compared to the decision reached therein does raise a serious question concerning the vitality of *Montgomery Ward*, the Board neither specifically overruled *Montgomery Ward* nor addressed the *Montgomery Ward* line of cases in its decision.<sup>209</sup>

The succeeding two cases<sup>210</sup> in the progression each found the employer responsible for the actions of union member supervisors in connection with a decertification campaign. The Board's rationale, in each respectively, was that the employees would have reasonable cause to believe that the supervisor was acting for and on behalf of the company,<sup>211</sup> and that the employee had demonstrated an especially close relationship with management.<sup>212</sup>

Although the exception enunciated by the Board in *Montgomery Ward* appeared to be all but snuffed out, it was emphatically revived by the Board<sup>213</sup> in the recent case of *Times Herald, Inc.*<sup>214</sup> The case presents an unusual application of the *Montgomery*

206. *Breckenridge*, 127 N.L.R.B. at 1467 (Jenkins & Fanning, Members, dissenting).

207. 222 N.L.R.B. 1052 (1976), *reversed in relevant part sub nom.*, *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977).

208. In reaching its conclusion the Board stated that inasmuch as the two employees in question were supervisors, "we find that [the employer] thereby engaged in coercive conduct, interfering with employees' Section 7 rights, in violation of Section 8(a)(1) of the Act. That [the supervisor] was also a union member does not enable him to avoid the proscriptions of the Act." 222 N.L.R.B. at 1054 (footnote omitted).

209. *Id.*

210. *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363 (1978), *modified per curiam*, 628 F.2d 1 (D.C. Cir. 1980); *Triumph Curing Center*, 222 N.L.R.B. 627 (1976), *enforced*, 571 F.2d 462 (9th Cir. 1978).

211. *Triumph Curing Center v. NLRB*, 571 F.2d 462, 471 (9th Cir. 1978).

212. *Maywood Plant of Grede Plastics*, 235 N.L.R.B. 363, 364 (1978), *modified per curiam*, 628 F.2d 1 (D.C. Cir. 1980).

213. Chairman Fanning and Members Jenkins and Zimmerman presiding, Member Jenkins dissenting in material part.

214. 253 N.L.R.B. 524 (1980).

*Ward* doctrine in that the supervisor whose decertification activities were in question was a replacement for a striking predecessor. In analyzing his affiliations, the Board relied on precedent which states that a strike replacement is presumed to support the union as his bargaining representative.<sup>215</sup> The Board applied the *Montgomery Ward* two-prong test when analyzing the issue of employer responsibility for decertification activities of the unit member supervisor. In examining the employer's conduct to determine if it constituted encouragement, authorization or ratification, the Board looked to the standard set forth in *Consolidated Rebuilders, Inc.*:<sup>216</sup> whether the employer's conduct constituted more than ministerial aid.<sup>217</sup> After applying the second prong of the *Montgomery Ward* test, the Board found that "there was absolutely no evidence that any employee reasonably believed [the supervisor] was acting on behalf of management."<sup>218</sup>

The *Times Herald* decision is important for two reasons. First, it reaffirms earlier case interpretation of *Montgomery Ward* that the employee's belief as to the affiliation of the supervisor is crucial in determining the employer's involvement in the decertification process. Second, *Times Herald* has given the employer an interpretation of what activities constitute encouragement, authorization or ratification in this type of case: "more than ministerial aid" as interpreted by the cases discussed above.<sup>219</sup> The *Times Herald* decision and *Montgomery Ward* have been cited in several recent cases where the Board found that a supervisor unit member's

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215. See *id.* at 524 n.2.

216. 171 N.L.R.B. 1415 (1968).

217. *Times Herald, Inc.*, 253 N.L.R.B. 524 (1980). In *Times Herald*, the strike replacement asked a manager how the employees could end the yearlong strike. Although the manager said he could not discuss such matters, he did describe the decertification process to the supervisor replacement and furnished him with the telephone numbers of the Board's regional office. The supervisor thereupon obtained a decertification petition from the Board, solicited employee support and filed the petition with the regional office. *Id.*

218. *Id.*

219. *Id.* However, Member Jenkins argued vigorously in a dissenting opinion that although the employees might have regarded the predecessor supervisor as one of them, there was no evidence that the replacement was so considered. Indeed, Jenkins argued that the evidence of the replacement as a strikebreaker, statutory supervisor and circulator of an antiunion petition "demonstrably identifies his interests as aligned with management rather than with those of rank and file employees." *Id.* at 525 n.7. In considering the employees' perception of the replacement supervisor as one of them, it does seem questionable that the majority based their determination on the fact of the replacement's de jure inclusion in the union.

decertification activities would not be attributable to management.<sup>220</sup>

In summary, a decertification petition may be tainted by acts of supervisors who are unit members or by acts of other employees if the employer encouraged, authorized, or ratified those activities. A decertification petition will likewise be tainted if the employer acted in such a manner as to lead employees reasonably to believe that the supervisor or employee was acting for and on behalf of management.

## VI. EFFECT OF FILING A DECERTIFICATION PETITION UPON THE EMPLOYER'S DUTY TO BARGAIN

While an employer may have successfully charted his course through the "do's and don'ts" of the decertification process up to the time of the filing of a decertification petition, a difficult issue lies ahead: whether the employer may cease bargaining with the incumbent union over the terms of a new contract while a decertification petition is pending. Until very recently the answer to this issue was obscured by conflicting Board and circuit court decisions. Although the Board in its recent decision, *Dresser Industries, Inc.*,<sup>221</sup> appears to have resolved the issue decisively in favor of requiring the employer to continue bargaining with the union, it is instructive to review the history of this decision which overruled longstanding Board precedent.

Pursuant to section 8(a)(5) of the Act,<sup>222</sup> the employer is bound to a continuing obligation to recognize and bargain with the contracting union. This duty exists both before and during the negotiation of a collective agreement, throughout the administration of the agreement, and upon expiration thereof unless the employer believes the union has lost its majority status.<sup>223</sup> The Board and the courts have consistently held that the incumbent union enjoys a rebuttable presumption that it represents a majority of the employees during the life of the collective agreement.<sup>224</sup> This pre-

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220. See, e.g., *Arcadia Foods, Inc.*, 254 N.L.R.B. 1012 (1981); *Hydro Conduit Corp.*, 254 N.L.R.B. 433 (1981).

221. 5 LAB. L. REP. (CCH) ¶ 15,274 (Sept. 30, 1982).

222. 29 U.S.C. § 158(a)(5) (1976). See *supra* note 5 and accompanying text.

223. R. GORMAN, *supra* note 119, at 380, 381.

224. *Terrell Mach. Co.*, 173 N.L.R.B. 1480 (1969), *enforced*, 427 F.2d 1088 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970).

sumption continues beyond the expiration of the collective bargaining agreement but may be rebutted by evidence that either the union no longer enjoys majority support, or that the employer entertains a reasonably based, good faith doubt concerning the union's continued majority status.<sup>225</sup> If the employer can establish a good faith doubt based on *objective considerations*,<sup>226</sup> it may refuse to bargain with the union over the terms of a new contract without violating section 8(a)(5) of the Act.<sup>227</sup> The Board currently holds the view that if an employer has established a reasonably based, good faith doubt of the union's majority status, the union's actual majority status is irrelevant.<sup>228</sup> However, an employer may not refuse to bargain with the union if the employer's own unlaw-

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225. *In Terrell Mach. Co.*, the Board stated:

It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees. Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The *prima facie* case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status. As to the second of those, i.e., "good-faith doubt," two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations and it must not have been advanced for the purpose of gaining time in which to undermine the union. This second point means, in effect, the assertion of doubt must be raised "in a context free of unfair labor practices."

*Id.* at 1480-81 (footnotes omitted).

226. The Board has held that none of the following alone provides an adequate basis for good faith doubt as to majority status: decrease in the number of noncompulsory union check-off authorizations, *NLRB v. Gulfmont Hotel Co.*, 362 F.2d 588 (5th Cir. 1966); employee turnover, *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084 (8th Cir. 1969); decline in union membership, *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944). However, the Board has held that collectively such reasons could establish a basis for good faith doubt of the union's majority status. *Ingress-Plastene, Inc., v. NLRB*, 430 F.2d 542 (7th Cir. 1970). Furthermore, until recently, the Board held that the filing of a decertification petition alone was sufficient grounds on which the employer might base his good faith doubt concerning the union's continued majority status. See *Telautograph Corp.*, 199 N.L.R.B. 892 (1972), *overruled*, *Dresser Indus., Inc.*, 5 LAB. L. REP. (CCH) ¶ 15,274 (Sept. 30, 1982). See also Krupman, *Withdrawal of Recognition Based On Objective Evidence—Reckoning By Starlight*, 1 DEL. J. OF CORP. L. 288 (1976) for an analysis of objective evidence and its use in withdrawing recognition of a union.

227. *Brooks v. NLRB*, 348 U.S. 96 (1954); *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084 (8th Cir. 1969).

228. *Arkay Packaging Corp.*, 227 N.L.R.B. 397 (1976).

ful acts<sup>229</sup> contributed to the union's loss of majority support.<sup>230</sup>

Members of the Board<sup>231</sup> and the courts<sup>232</sup> have been in disagreement as to the effect that the filing of a timely decertification petition has on the employer's duty to continue bargaining with the incumbent union. Since the filing of a decertification petition for an election only requires a thirty percent showing of interest by the employees,<sup>233</sup> it is not conclusive of the union's loss of majority support. Some Board members have consistently argued that it then should not be used as raising a genuine question concerning representation on which an employer relies in discontinuing his bargaining obligation. These Board members argue that the employer has a duty to continue bargaining until the union is in fact decertified.<sup>234</sup> Despite this irrefutable logic, a majority of the

229. See, e.g., *Daisy's Originals, Inc. of Miami*, 187 N.L.R.B. 251 (1970), *enforced as amended*, 468 F.2d 493 (5th Cir. 1972); *Freemont Newspapers, Inc.*, 179 N.L.R.B. 390 (1969), *enforced as modified*, 436 F.2d 665 (8th Cir. 1970); *Boren Clay Prod. Co.*, 174 N.L.R.B. 895 (1969), *enforced*, 419 F.2d 385 (4th Cir. 1970).

230. In the often-cited case of *Celanese Corp. of America*, 95 N.L.R.B. 664 (1951), the Board stated that "the majority issue must *not* have been raised by the employer in a context of illegal antiunion activities . . . aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." *Id.* at 673 (emphasis in original).

231. Members Fanning and Jenkins disagreed with the majority (Chairman Miller and Members Kennedy and Penello) holding in *Telautograph* that a decertification petition filed by employees is sufficient evidence of loss of majority support by the union so as to allow the employer to cease bargaining until the question of representation is resolved. See *Telautograph Corp.*, 199 N.L.R.B. 892 (1972) (Fanning & Jenkins, Members, concurring). Former Chairman Van de Water disagreed with the Board's majority (Members Fanning, Jenkins, Zimmerman and Hunter) holding in *Dresser Industries* which overruled *Telautograph*. *Dresser Indus., Inc.*, 5 LAB. L. REP. (CCH) ¶ 15,274 (Sept. 30, 1982) (Van de Water, Chairman, dissenting).

232. The Eighth Circuit is in accord with the majority of the Board. See *Royal Type-writer Co. v. NLRB*, 533 F.2d 1030 (8th Cir. 1976); *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974). The Second, Sixth and District of Columbia Circuits disagree that the filing of a decertification petition is a sufficient basis on which the employer may rely to cease bargaining with the union. *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486 (2d Cir. 1975); *Rogers Mfg. Co. v. NLRB*, 486 F.2d 644 (6th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); *Allied Industrial Workers v. NLRB*, 476 F.2d 868 (D.C. Cir. 1973).

233. Section 9(e)(1) of the Act provides:

Upon the filing with the Board by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board will take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employee.

29 U.S.C. § 159(e)(1) (1976).

234. Members Fanning and Jenkins. See, e.g., *Michigan Prod., Inc.*, 236 N.L.R.B. 1143,

Board<sup>235</sup> held until September 1982 that the timely filing of a decertification petition alone, in the absence of any employer unfair labor practices, could be used by the employer to evidence good faith doubt of the union's majority status and therefore justify a refusal to bargain.<sup>236</sup> Although the majority opinion in the *Dresser* case makes it clear that an employer may not now base his good faith doubt of the union's loss of majority support solely on the fact of a decertification petition filing (and hence cease bargaining with the incumbent), the Board had previously reversed itself twice on this issue.<sup>237</sup> It is therefore important to analyze the history of this most recent decision in examining the import of the Board's current stance on this issue as reflected in *Dresser Industries*.

The progenitor for the line of cases which established the employer's right to refuse to bargain on a new contract once a decertification petition had been filed was the 1972 Board decision in *Telautograph Corp.*<sup>238</sup> In *Telautograph*, the union and the employer had worked under a collective bargaining agreement for many years. During the term of the then current agreement, an employee filed a petition for decertification. After a hearing, the regional director issued a decision in which he denied the union's objection that its current contract barred the election. The union had requested that the company meet with it to negotiate a new contract; however, subsequent to the Decision and Direction of Election, the company refused to meet with the union because of the question concerning representation raised by the decertifica-

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1143 n.6 (1978) (Fanning, Member, disavowing the ALJ's application of *Telautograph*); Warehouse Mkt., Inc., 216 N.L.R.B. 216, 217 n.3 (1975) (Fanning, Chairman & Jenkins, Member, disavowing the use of *Telautograph*).

235. Chairman Miller and Members Kennedy and Penello. Although the composition of the Board in *Dresser* had changed substantially since the *Telautograph* decision in 1972, only Members Fanning and Jenkins disavowed *Telautograph*. With two recent changes in Board appointees during the last two years, Fanning and Jenkins were able to overrule *Telautograph* with the help of new Members Zimmerman and Hunter. *Dresser Indus., Inc.*, 5 LAB. L. REP. (CCH) ¶ 15,274 (Sept. 30, 1982). Chairman Van de Water dissented vigorously.

236. *Telautograph Corp.*, 199 N.L.R.B. 892 (1972).

237. See *William D. Gibson Co.*, 110 N.L.R.B. 660 (1954) (the continued negotiation of a contract after the filing of a representation petition was not a violation of § 8(a)(2)). But see *Shea Chem. Corp.*, 121 N.L.R.B. 1027 (1958) (employer may not bargain with the incumbent union when an outside union had filed an election petition until one or the other had been certified pursuant to Board election).

238. 199 N.L.R.B. 892 (1972).



tion filing. The union subsequently filed an unfair labor practice charge alleging the company had refused to bargain with it in violation of section 8(a)(5), and that such conduct should block the election which the regional director had directed be held. The trial examiner, in holding that the company was entitled to rely on the filing of the petition in refusing to negotiate with the union, emphasized certain special circumstances present in this case. First, that the employer's refusal to bargain came after the representation hearing and after the regional director had already decided to conduct an election to determine the union's representative status.<sup>239</sup> This factor was considered conclusive of the issue whether a question concerning representation did in fact exist. Second, and key to subsequent concurring Board decisions, there was

no evidence, nor even claim, that the [employer] here had engaged in any unfair labor practices or antiunion activity to render improper or in any way taint the atmosphere for such election. It in no way assisted or participated in the filing of the decertification petition or otherwise sought to dissipate the union's majority status.<sup>240</sup>

In pursuing this line of reasoning, the trial examiner distinguished this case from *Massey-Ferguson*,<sup>241</sup> a case often relied on for the principle that a decertification petition, standing alone, does not raise a real question concerning representation.<sup>242</sup> In *Massey-Ferguson*, the claim of loss of majority support arose after the employer had engaged in numerous unfair labor practices and after the regional director had already dismissed the decertification petition. In *Telautograph*, on the other hand, the petition was still pending and there were no other unfair labor practices. The trial examiner emphasized these facts in his decision.<sup>243</sup> A majority of

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239. *Id.* at 893.

240. *Id.* at 894.

241. 184 N.L.R.B. 640 (1970).

242. For a discussion of *Massey-Ferguson*, see Bellace, *supra* note 6, at 680-82.

243. In his decision the trial examiner stated:

Accordingly, under the special circumstances in this case—including the Regional Director's Decision and Direction of Election still outstanding at the time of Respondent's alleged . . . refusal to bargain, the complete absence of any evidence (or even claim) of Company misconduct tainting the atmosphere for a Board-conducted election, and the continuing pendency of the Regional Director's order for an election—I find that the question of the Union's representative status can and should be determined by means of an election ordered by the Regional Director.

199 N.L.R.B. at 894.

the Board,<sup>244</sup> however, expanded the trial examiner's rationale to hold that a decertification petition itself, supported by an adequate showing of interest,<sup>245</sup> raised a question concerning representation on which the employer could rely in refusing to bargain with the union. In stating its position on this issue, the Board paralleled the situation to that of the employer's obligation to cease bargaining with an incumbent union when a rival union files a petition for election which raises a real question concerning representation:

In *Shea Chemical Corp.*, 121 NLRB 1027 (1958), the Board established the rule that when a real question concerning representation has been raised by the filing of a petition by a rival union that "an employer may not go so far as to bargain collectively with an incumbent (or any other) union until the question concerning representation has been settled by the Board." The same rule should be applied where a real question concerning representation has been raised by the timely filing of a decertification petition. As in the case of a petition filed by a rival union, the incumbent union may still continue to administer its contract and process grievances, and the rule does not apply in situations where, because of contract bar, certification year, inadequate showing of interest, or any other established reason, the decertification petition does not raise a real representation question.

We wish to clarify this matter, since a clear statement of that principle may obviate the necessity for lengthy delays in the processing of properly supported decertification petitions under like circumstances in the future. Such processing need not be delayed by an 8(a)(5) charge, since such charge could be promptly dismissed as nonmeritorious unless, of course, the charge contains allegations that the Respondent has committed some act (other than its mere refusal to bargain) which may be a proper basis for finding a violation of our Act.<sup>246</sup>

It was in fact the overruling of the *Shea Chemical* decision in 1982 which led to the demise of the *Telautograph* holding.

A series of cases following the *Telautograph* decision indicate the dissension among Board members and established a split among the circuit courts as to whether the filing of a decertification petition alone was sufficient evidence of the union's loss of majority support such that the employer should cease bargaining

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244. Chairman Miller, Members Kennedy and Penello (Fanning & Jenkins, members, concurring with the trial examiner's recommendation).

245. An adequate showing of interest is found to exist if thirty percent of the employees have either by petition or cards, requested an election by the Board. NLRB Rules and Regulations and Statements of Procedure, 29 C.F.R. § 101.18 (1982).

246. *Telautograph Corp.*, 199 N.L.R.B. 892 (1972). The overruling of *Shea Chemical* in *RCA Del Caribe, Inc.*, 262 N.L.R.B. No. 116, 1981-82 NLRB Dec. (CCH) ¶ 19,103 (1982) precipitated the overruling of *Telautograph*.

with the incumbent union. The Board<sup>247</sup> in *National Cash Register Co.*,<sup>248</sup> applied *Massey-Ferguson* and held that where the employer's unlawful conduct contributed to the filing of the decertification petition, the employer may not rely on the filing as evidence of loss of majority support by the union to justify a refusal to bargain.<sup>249</sup> Subsequent to the unfair labor practice charge, but prior to a decision by the regional director, the employees filed a timely decertification petition. The regional director subsequently issued a complaint based on the union's charge and dismissed the decertification petitions pursuant to the Board's blocking charge rule. In holding that the union had not lost its majority status, nor had the employer supported his allegation of good faith doubt, the Board stated that "the [employer] may not rely on the decertification petitions it unlawfully inspired; nor may it invoke the filing of such petitions as a defense under the Board's recent *Telautograph* decision."<sup>250</sup>

Although *National Cash Register* may be distinguished from *Telautograph* on the basis that in the former the employer had committed other unfair labor practices, the Board still appeared to retreat from the pronouncement in *Telautograph*. The Board held that a decertification petition and the showing of interest attached to it alone, without other objective evidence that employees who wished to be represented by the union were in the minority, was insufficient to justify the company's claim of a good faith doubt of the union's majority status.<sup>251</sup> The Board further adopted the ad-

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247. Chairman Miller and Members Fanning, Jenkins and Penello.

248. 201 N.L.R.B. 1034 (1973), *enforcement denied in material part*, 494 F.2d 189 (8th Cir. 1974).

249. *National Cash Register Co.*, 201 N.L.R.B. 1034, 1035 (1973). *See supra* notes 45-47 and accompanying text.

250. *Id.* *National Cash Register Co.*, 201 N.L.R.B. 1034, 1035 (1973).

251. *Id.* at 1041. *See also* *Lammert Indus.* 229 N.L.R.B. 895, 932 (1977) where a majority of the Board adopted the ALJ's findings which stated in part: "[I]t is well established that the mere filing of a decertification petition does not destroy the presumption that a recognized union enjoys of continued majority status. Thus, the mere filing of the decertification petition did not destroy that presumption." *Id.* at 932. The opinion of members Penello and Walther cited *Telautograph* and dissented as follows:

[W]e would not adopt the Administrative Law Judge's finding that Respondent violated Section 8(a)(5) by refusing to bargain with the union since November 27, 1974. For on that very day, at a time when Respondent had not engaged in any unfair labor practices, a decertification petition was filed with the Board accompanied by a statement showing almost unanimous employee support which raised a question concerning representation of those employees.

ministrative law judge's statement that only if the petition had been supported by an uncoerced majority of the employees in the union would it "unquestionably have constituted a sound basis for the Company's doubt of the Union's representative status."<sup>252</sup> The Board still holds today that a decertification petition executed by a majority of the employees does indeed raise a question concerning representation on which an employer may rely to cease bargaining with the incumbent.

On appeal, the Eighth Circuit<sup>253</sup> took issue with the Board's findings and decision in *National Cash Register* concerning the inference to be drawn from the decertification petitions filed by the employees. The Eighth Circuit, citing *Telautograph*, held that the filing of a decertification petition did raise a permissible inference of loss of majority support and stated that "[t]hat fact alone would justify an employer in declining to bargain further with the bargaining representative pending disposition of the decertification request, provided the loss of majority status was not attributable to the employer's own unfair practices."<sup>254</sup> The court further stated that although the existence of an unfair labor practice prior to the refusal to bargain "interjects an element of uncertainty" as to whether the employer caused the possible loss of majority, if it can be shown that the unfair labor practice did not "significantly contribute" to the loss of status, the employer will not be subjected to an obligation to bargain.<sup>255</sup> Contrary to the Board, the court found that there was no substantial evidence to suggest that the unfair labor practices of the employer induced the filing of the decertification petition nor that the unfair labor practices contributed generally to the possible loss of majority status by the union. The court flatly stated that "[s]ince the decertification petitions were supported by a showing of interest by the requisite 30 percent of employee signatures, [the employer] could properly base a good faith doubt of majority status upon the filing of these decertification petitions."<sup>256</sup>

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*Id.* at 895-96.

252. *National Cash Register Co.*, 201 N.L.R.B. 1034, 1041 (1973), *enforcement denied in material part*, 494 F.2d 189 (8th Cir. 1974). *See also* *GAF Corp.*, 195 N.L.R.B. 169 (1972).

253. 494 F.2d 189 (8th Cir. 1971).

254. *Id.* at 194 (citation omitted).

255. *Id.* at 195.

256. *Id.* at 192. The court actually based its decision on the entire record which also included other evidence of the union's loss of majority support: decline in dues check-off

Former Board disagreement over the effect of the filing of a decertification petition on the employer's obligation to bargain was further evidenced in a case decided shortly after *Telautograph*. In *Cantor Bros., Inc.*,<sup>257</sup> the administrative law judge, in examining the employer's refusal to bargain with the incumbent union, found that the employer had both failed to establish that it had based its good faith doubt of majority status of the union on objective considerations, and that it had engaged in a course of conduct to undermine the union. The administrative law judge, relying on several pre-*Telautograph* cases, emphatically stated that "the filing of a decertification petition is insufficient to give an employer a basis for withdrawing recognition."<sup>258</sup> Although the three member panel of the Board<sup>259</sup> adopted the recommended order, Members Kennedy and Penello, citing *Telautograph*, specifically rejected the administrative law judge's rationale insofar as it relied on the above statement.<sup>260</sup> Member Jenkins in a note to the opinion criticized Members Kennedy and Penello for the exception they took to the administrative law judge's recommendation.<sup>261</sup>

In *Morse Electro Products Corp.*,<sup>262</sup> the next case decided by the Board addressing this issue, a Board panel<sup>263</sup> reaffirmed the majority position stated in *Telautograph*. In *Morse Electro*, the employer refused to bargain with the union subsequent to the expiration of the collective agreement on the basis that the union had lost its majority status. Although the employer in its brief before the administrative law judge enumerated several reasons<sup>264</sup>

authorizations, high employee turnover, and decline in union membership. It is curious to note that while the court acknowledged that none of these factors alone provided an adequate basis for good faith doubt of the majority status of the union, the mere filing of a decertification petition did. *Id.* at 193.

257. 203 N.L.R.B. 774 (1973).

258. *Id.* at 778.

259. Members Jenkins, Kennedy and Penello presiding.

260. *Cantor Bros., Inc.*, 203 N.L.R.B. 774, 774 n.4 (1973).

261. *Id.*

262. 210 N.L.R.B. 1075 (1974).

263. Chairman Miller and Members Fanning and Penello.

264. The employer based its refusal to bargain on the following evidence of loss of majority support by the union:

- 1) Office employees voted by more than two to one against renewal of a union shop agreement;
- 2) Following this election more than 70% of the office employees canceled their dues authorizations and presumably resigned from the union;
- 3) An office employee filed a decertification petition and the employer was

for its belief that the union no longer represented the employees, the administrative law judge, citing *Telautograph*, and finding no other unfair labor practices by the employer, based his decision only on the fact that a decertification petition had been filed, stating: "It is the Board's view that an employer, once it learns its employees have filed a Decertification Petition with the required 30 percent showing of interest, may properly decline to bargain further with the bargaining representative pending disposition of the decertification request."<sup>265</sup> Indeed, the Board went so far as to hold that the employer who had not inspired or participated in any way in the circulation and subsequent filing of the decertification petition, had a right to grant a unilateral wage increase since it was not acting in derogation of the union's majority status.<sup>266</sup> Although the wage increase and the employer's concurrent refusal to bargain took place subsequent to the expiration of the collective bargaining agreement, it occurred prior to a determination by the regional director that a question of representation did exist.

The polarity of opinion among Board members as to the application of *Telautograph* appeared in yet another case which was decided by a Board panel of acting Chairman Fanning and Members Jenkins and Penello. In *Warehouse Market, Inc.*,<sup>267</sup> the Board unanimously agreed that the employer had violated his bargaining obligation to the union, despite the filing of a decertification petition, where there was evidence of unfair labor practices committed by the employer before or shortly after the drafting and circulation of the petition. However, in a footnote to the opinion, it was noted that Fanning, Jenkins and Penello did not rely on *Telautograph* which was cited in the Board's opinion.<sup>268</sup> The Board affirmed the administrative law judge's decision which stated:

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advised that at least 50% of the office employees supported this action;

4) A substantial number of employees had voluntarily informed the employer that they want to get out of the union and wished that the union no longer represented them.

*Id.* at 1076.

265. *Id.*

266. *Id.*

267. 216 N.L.R.B. 216 (1975).

268. *Id.* at 217 n.3. The Board's decision contains the following statement: "Cf. *Telautograph Corporation* . . . a case holding that only the filing of a decertification petition which raises a *genuine* question concerning representation relieves an employer of his obligation to bargain pending resolution of the representation issue." *Id.*

Respondent's . . . contentions fly in the face of well-established Board and Court-honored precedents which hold that: (1) we will not conduct a decertification election where, as here, there are unremedied unfair labor practices committed by an employer for the purpose of causing employee disaffection from a validly established union bargaining representative; and (2) we will presume that a validly established union representative continues to enjoy majority support where, as here, its status is questioned by an employer's refusal to bargain, unless the *employer* is able to prove that he relied on valid, objective considerations in questioning the union's continued majority support. Plainly, Respondent could not validly meet that employer burden by reliance on the decertification petition's filing to support its claim of disaffection by a majority of the employees where, as here, the Respondent's unlawful conduct in large measure created or contributed to the situation which led to such disaffection, and it submitted no evidence to support such a claim.<sup>269</sup>

Confusingly, however, a Board panel<sup>270</sup> later achieved unanimity in a decision which totally encompassed the Board decision in *Telautograph*. In *Essex International, Inc.*,<sup>271</sup> *Telautograph* was extended to apply to a situation where a decertification petition had been dismissed before a hearing could be held to address a union's complaint which alleged unfair labor practices and that the employer refused to bargain.<sup>272</sup> Despite the fact that the alleged unfair labor practices were not sustained,<sup>273</sup> the Board held that the employer was justified in claiming that it had a reasonably based, good faith doubt of the union's majority status given the timely filing of a decertification petition by employees.

In a decision and several advice memoranda by the Board<sup>274</sup> in the late 1970s, *Telautograph* was interpreted to allow an employer the right to refrain from negotiating a new contract once a decertification petition had been filed, but denied him the right to withdraw recognition of the union. In a fact situation similar to *Telautograph*, where there was no evidence that the employer had instigated the decertification petition or committed any other unfair labor practices, the employer was found not to have violated the Act by refusing to execute an agreement with the union, even

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269. *Id.* at 217.

270. Chairman Murphy and Members Penello and Walther.

271. 222 N.L.R.B. 121 (1976).

272. *Id.* at 132.

273. *Id.*

274. See *Michigan Prod., Inc.*, 236 N.L.R.B. 1143 (1978). See also Advice Memorandum, *Napko Corp.*, 247 N.L.R.B. 250 (1980); Advice Memorandum, *Gates Rubber Co.*, 1980 NLRB (CCH) ¶ 20,254 (1980); Advice Memorandum, *General Radiator Div. Chromalloy Am. Corp.*, 1978-79 NLRB Dec. (CCH) ¶ 20,221 (1979).

after the union had accepted the employer's offer, where the existence of a valid decertification petition raised a question concerning representation.<sup>275</sup> The opinion suggests that an employer's refusal to execute a contract was permissible, based upon the filing of the decertification petition. The decision in part stated:

It is well settled that an employer does not violate section 8(a)(5) of the Act by refusing to bargain with an incumbent union during the pendency of a valid decertification petition. This is not to say that the employer may go further and completely withdraw recognition merely because an RD petition has been filed. Such withdrawal requires a reasonable doubt of the Union's presumed majority status based upon objective considerations showing a loss of majority support. A valid RD petition, standing alone, only shows that 30% of the employees want a determination of a question of representation through a Board election.<sup>276</sup>

In reviewing the Board decisions leading up to the *Dresser* decision, it is clear that *Telautograph* and its progeny set forth a policy providing that the filing of a timely decertification petition, supported by an adequate showing of interest, raised a real question concerning representation. An employer, absent any unlawful conduct, could lawfully decline to bargain over a new contract with the incumbent union, unless and until that union won the decertification election. Such policy required neither proof of loss of majority status nor evidence sufficient to overcome the presumption of majority status. However, the Board at this point had also made it clear that even where the decertification petition has been filed, the employer must continue to *recognize* the union for purposes other than bargaining over a new contract until the union is in fact decertified.<sup>277</sup>

Both the Sixth Circuit Court of Appeals and the District of Columbia Circuit Court took issue with the majority of the Board's ruling in *Telautograph* that the filing of a decertification petition by employees is sufficient to establish a good faith and reasonably grounded doubt of the union's continued majority status. In a recent case<sup>278</sup> prior to *Dresser*, in which the District of Columbia Circuit Court affirmed a Board order requiring an employer to bargain

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275. Advice Memorandum, General Radiator Div. Chromalloy Am. Corp., 1978-79 NLRB Dec. (CCH) ¶ 20,221 (1979).

276. *Id.* (footnotes omitted).

277. *Id.*

278. Maywood Plant of Grede Plastics, 235 N.L.R.B. 363 (1978), *modified*, 628 F.2d 1 (D.C. Cir. 1980).



with an incumbent union despite the pendency of a decertification petition, the court quoted from a previous decision:

The naked showing that a decertification petition has been filed, with no indication of the number of signatories or other related matters, is an insufficient basis in fact for refusing to bargain since it establishes no more than that the petition was supported by the requisite 30 percent "showing of interest."<sup>279</sup>

The Second and Sixth Circuit Courts are in accord with this opinion.<sup>280</sup> In a footnote to its opinion, the District of Columbia Circuit Court criticized the Eighth Circuit's per se rule that the mere filing of a decertification petition, in the absence of employer unfair labor practices, and without objective evidence of loss of majority status, was sufficient grounds for an employer to refuse to bargain with an incumbent union.<sup>281</sup> Although the court referred to only one Board member<sup>282</sup> as also entertaining this view, the Board decisions examined herein suggest that a majority of the Board until very recently still entertained this view.

In light of the split among Board members in opinion over *Telautograph* as evidenced by the cases analyzed, and the varied opinions of the circuit courts, it was with confusion that the employer confronted the issue of whether it must bargain and perhaps execute an agreement with the incumbent union in the face of a pending decertification election, or whether it must refrain from any negotiations until the election results. Recognizing the controversy in this area, the Board has attempted to resolve it with a pronounced reversal of past policy rendered in two opinions last year. The earlier decision, *RCA Del Caribe, Inc.*,<sup>283</sup> affects the *Telautograph* holding and its progeny. In this case the Board reassessed its holding in *Shea Chemical, Inc.*,<sup>284</sup> and determined that it had failed to accord appropriate weight to an incumbent union's presumption of majority status in providing that the employer should cease bargaining with the incumbent upon the filing of a petition for election by a rival union. The Board further concluded

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279. *Id.* (quoting *Allied Indus. Workers v. NLRB*, 476 F.2d 868, 881 (D.C. Cir. 1973)).

280. *See, e.g., Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 490-91 (2d Cir. 1975); *Rogers Mfg. Co. v. NLRB*, 486 F.2d 644, 647 (6th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974).

281. *NLRB v. Maywood Plant of Grede Plastics*, 628 F.2d 1, 4 n.1 (D.C. Cir. 1980).

282. *Id.* at n.3 (Member Penello).

283. 262 N.L.R.B. No. 116, 1981-82 NLRB Dec. (CCH) ¶ 19,103 (1982).

284. 121 N.L.R.B. 1027 (1958).

that requiring an employer to cease bargaining with the incumbent subsequent to the filing of a petition was not the best way to assure employer neutrality, the true objective behind the cease-bargaining requirement. Reversing its former position, the Board held that "the mere filing of a prepresentation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union."<sup>285</sup> With the overruling of *Shea Chemical*, the rationale for the Board's decision in *Telautograph* was destroyed, and it was simply a matter of waiting for the appropriate case to come along for the Board to overrule *Telautograph*. On September 30, 1982, the Board<sup>286</sup> heard *Dresser Industries, Inc.*<sup>287</sup> and resolved with its decision the confusion and conflict which had been generated by the *Telautograph* ruling. The Board pronounced its new policy by stating:

[T]he same considerations which led to our overruling of the *Shea Chemical* rule also mandate overruling the *Telautograph* rule. A rule permitting an employer to withdraw from bargaining solely because a decertification petition has been filed does not give due weight to the incumbent union's continuing presumption of majority status and is not the best way to achieve employer neutrality in the election. For these reasons, we hold that the mere filing of a decertification petition will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union.<sup>288</sup>

The Board emphasized in a footnote to its decision, however, that an employer may still withdraw from bargaining with an incumbent union once a decertification petition has been filed on the basis of objective evidence of loss of majority support. A petition signed by a *majority* of the unit employees represents such objective evidence.<sup>289</sup> Short of execution of a decertification petition by a majority of employees, the Board now holds that an employer must bargain with the incumbent union and enter into a contract with that union even though a decertification election is pending.

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285. 262 N.L.R.B. No. 116, 1981-82 NLRB Dec. (CCH) ¶ 19,103 (1982).

286. Members Fanning, Jenkins, Zimmerman and Hunter concurring; Chairman Van de Water dissenting.

287. *Dresser Indus., Inc.*, 5 LAB. L. REP. (CCH) ¶ 15,274 (Sept. 30, 1982).

288. *Id.*

289. *Id.* at n.6.

## CONCLUSION

Despite the necessity for Board refinement of standards for employer participation at certain stages of the decertification process,<sup>290</sup> current Board decisions are clear that employers may participate to a significant extent in the decertification process. There is an obvious progression in the degree of participation an employer is allowed by the Board from the initiation of a petition through the pre-election stage. At the earliest stage, initiation of the petition, the employer is forbidden to participate at all.<sup>291</sup> At the next stage, preparation, circulation and execution of the petition, it may only render ministerial assistance.<sup>292</sup> What is meant by "ministerial" assistance at this stage is not clearly defined. It is, however, clear that the Board frowns on employer involvement beyond a response to questions,<sup>293</sup> or the giving of information, such as a list of employees' names and addresses<sup>294</sup> which the employees would not have access to on their own. At this stage an employer may, in response to a question, clearly direct the employees to the NLRB regional office. An employer would be ill-advised, however, to offer assistance such as the telephone number and address of the Board, or volunteer to call them on behalf of the employees. While the Board allows the employer to render ministerial assistance, the Board has also made clear that it will set aside a decertification petition if the employer lent to it the appearance of approval.<sup>295</sup> What constitutes the appearance of approval is ambiguous.<sup>296</sup> An employer, under current Board law, would therefore be ill-advised to render assistance beyond that mentioned above.

Once the decertification process reaches the pre-election stage, the degree of allowable employer involvement is greater. So long as the employer does not violate the Act by threats, reprisal, or promises of benefit for decertifying the union, it may openly com-

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290. This is particularly true at the preparation, circulation and petition stage, but the limitation on assistance other than ministerial aid is also enforced at the stage when the decertification petition has been filed and the employer is confronted with the decision whether to continue bargaining.

291. *Allou Distrib., Inc.*, 201 N.L.R.B. 47 (1973).

292. *Consolidated Rebuilders, Inc.*, 171 N.L.R.B. 1415 (1968).

293. *KONO-TV-Mission Telecasting Corp.*, 163 N.L.R.B. 1005 (1967).

294. *Consolidated Rebuilders, Inc.*, 171 N.L.R.B. 1415 (1968).

295. *Dayton Blueprint Co.*, 193 N.L.R.B. 1100 (1971).

296. *Id.*

pare the union employee benefits with those of non-union employees.<sup>297</sup>

At each of these stages the petition is subject to possible "taint" by the acts of the employer's supervisors who are union members or other employer-agents. The taint exists if the employer, by word or deed, encouraged, authorized or ratified the employee-agent activities or acted in such a manner to lead employees reasonably to believe that the card-carrying supervisor or employee was acting on behalf of management.<sup>298</sup> The Board decisions in this area quite clearly delineate circumstances under which the employee's activities will be attributed to the employer.<sup>299</sup>

Finally, once the petition has been filed, the employer must, according to current Board law,<sup>300</sup> continue bargaining with the incumbent union and execute a contract if agreement is reached even though a decertification election is pending. If the incumbent union loses the election, then the contract is void and the employer must engage in negotiations with the newly elected representative.

While Board law does define employer participation at each of the above-discussed stages of the decertification process, these definitions vary in clarity. It is therefore impossible for an employer to be completely aware of the limits of its participation. It is hoped that this Article has served to clarify for employers the extent and degree to which they may participate in the decertification process without violating any of their obligations under the Act.

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297. Dow Chem. Co., 250 N.L.R.B. 756 (1980).

298. Times-Herald Co., 253 N.L.R.B. 524 (1980).

299. See *supra* notes 141-220 and accompanying text.

300. Dresser Indus. Inc., LAB. L. REP. (CCH) ¶ 15,274 (Sept. 30, 1982).

