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REPRESENTATIONAL RIGHTS OF SECURITY GUARDS UNDER THE NATIONAL LABOR RELATIONS ACT: THE NEED FOR A BALANCING OF INTERESTS

I. Introduction

The private security industry is enjoying a period of great prosperity and growth.¹ Particularly in large urban areas, there is a growing belief that understaffed and overworked municipal police forces cannot adequately respond to and deter crime.² Throughout the United States, uniformed guards³ now patrol many locations, including schools, banks, hospitals and apartment buildings, protecting both life and property.⁴ Residents of some urban areas even have found it necessary to supplement the municipal police force. They have hired private security companies to provide twenty-four hour vehicle patrols of their neighborhoods.⁵ In addition, the large casinos of Atlantic City, New Jersey have created unprecedented job opportunities for

1. In 1976, the *New York Times* reported that private security services had become a \$12 billion industry, growing annually at an average rate of 10 to 15%. Whelton, *In Guards We Trust*, N.Y. Times, Sept. 19, 1976, § 6 (Magazine), at 20 [hereinafter cited as Whelton] (citing a survey conducted by Rand Corp.). On July 24, 1980, the *Business Bulletin* of the *Wall Street Journal* announced that the "[s]ilver lining of the recession is apparent at private security firms." Wall St. J., July 24, 1980, § I, at 1, col. 7. The article quoted officials of private security companies who stated that crime increases during a recession and companies are therefore more security-conscious during economic declines. *Id.* The growth of the private security industry has continued into the 1980's. Wysocki, *Hired Guns*, Wall St. J., Aug. 30, 1983, § I, at 1, col. 6 [hereinafter cited as Wysocki].

2. Whelton, *supra* note 1, at 24; Gumpert, *Civilian Cops*, Wall St. J., May 2, 1977, § I, at 1, col. 1. See Herbers, *Security Services Disarming Guards*, N.Y. Times, Dec. 21, 1981, at A22, col. 3 [hereinafter cited as Herbers].

3. There is a debate within the industry over whether such guards should carry weapons. Herbers, *supra* note 2, at A22, col. 3; Wysocki, *supra* note 1, at 1, col. 6. A commission studied the private security industry in New York State and issued a report in October 1983 recommending several changes in the way the industry is regulated by the Department of State, including institution of mandatory firearms training for all guards and periodic recertification for all pistol licenses. See TEMPORARY COMMISSION OF INVESTIGATION, NEW YORK DEPARTMENT OF STATE, NEW YORK STATE'S PRIVATE SECURITY GUARD INDUSTRY: THE NEED FOR REGULATORY REFORM 4 (1983) [hereinafter cited as COMMISSION REPORT]. A full consideration of the report is beyond the scope of this Note.

4. Cook, *Brother Cunningham and the Guards*, FORBES, Feb. 14, 1983, 107, 109 [hereinafter cited as Cook]; See Whelton, *supra* note 1, at 30.

5. *Private Security Patrols on Rise in City's Middle-Class Areas*, N.Y. Times, Sept. 18, 1983, at A50, col. 3.

security guards.⁶ Accordingly, protective services is the third fastest growing occupation in the United States.⁷ Some studies estimate that over one million people earn their living in the private security industry.⁸ This figure greatly exceeds the total number of public law en-

6. See Cook, *supra* note 4, at 111 (each casino employs approximately 200 guards). Cook's article details the Atlantic City union organizing efforts of Daniel Cunningham, former president of Allied International Union of Security Guards & Special Police (Allied) and its affiliate, the Federation of Special Police & Law Enforcement Officers (Federation). *Id.* Cunningham recently was sentenced to five years in prison for embezzlement, obstruction of justice and attempted bribery. 1982 Lab. Rel. Y.B. (BNA) 232.

In August 1983, the National Labor Relations Board (Board) dismissed a petition for a union representation election at Harrah's Marina Hotel and Casino filed by Casino Police and Security Officers, Local 2, a union set up by Cunningham to organize Atlantic City security guards. Marina Assocs., 267 N.L.R.B. No. 163, 114 L.R.R.M. 1162 (1983). Section 2(5) of the National Labor Relations Act (the Act) defines a labor organization as one "in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (1976). In dismissing the petition, the Board affirmed the finding of its Regional Director that the Federation and its affiliate, the Casino Police and Security Officers, did not qualify as labor organizations within the meaning of the Act because they were not dedicated either in whole or in part to the interests of employees as bona fide collective bargaining representatives. Marina Assocs., 267 N.L.R.B. No. 163, 114 L.R.R.M. at 1163. A consideration of issues involving section 2(5) of the Act is beyond the scope of this Note.

In 1981, the Inspector General of the United States Department of Labor investigated the conduct of two Atlantic City police officers who were subsequently indicted for embezzling \$12,000 in connection with organizing a local of the International Brotherhood of Law Enforcement and Security Officers. 1981 Lab. Rel. Y.B. (BNA) 349.

The State of New Jersey has attempted to control the infiltration of organized crime into Atlantic City under its Casino Control Act. See N.J. STAT. ANN. §§ 5:12-63 to 12-75 (West Supp. 1983). The Casino Control Act provides for disqualification of union officials convicted of certain crimes. *Id.* §§ 5:12-93(a), (b), 5:12-86(e)(4). In *Hotel & Restaurant Employees & Bartenders Int'l Union Local 54 v. Danziger*, 709 F.2d 815, 831 (3d Cir. 1983), *rev'g* 536 F. Supp. 317 (D. N.J. 1982), the court held that federal labor law preempted the application of the Casino Control Act to union officials. The State of New Jersey filed an appeal, and the Supreme Court granted review. *Danziger v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 104 S. Ct. 479 (1983) (*prob. juris. noted*).

7. COMMISSION REPORT, *supra* note 3, at 1. Between 1974 and 1979, the current population survey conducted by the United States Bureau of the Census showed that the number of persons employed as security guards increased by almost 100,000—from 473,000 to 569,000. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 52 (1980) [hereinafter cited as HANDBOOK OF LABOR STATISTICS]. The Census Bureau conducts these surveys on a monthly basis for the United States Department of Labor. *Id.* at 1.

8. Herbers, *supra* note 2, at A22, col. 5 (citing 1976 survey conducted by U.S. Justice Dep't); Wysocki, *supra* note 1, at 1, col. 6 (citing recent survey conducted by Hallcrest Systems, Inc., a McLean, Va., research firm, which found that 1.1 million

forcement employees.⁹ Notwithstanding the availability of job opportunities in the industry, there are numerous problems endemic to employment as a security guard. Wages typically are low¹⁰ and risks can be high, especially if the guard is armed.¹¹ Although union membership among security guards has increased,¹² collective bargaining has been unsuccessful in alleviating the occupation's problems.¹³ This

persons are employed as security officers, a figure which is triple the 1969 total). Some studies estimate that the number of persons employed as security guards is closer to 600,000. See COMMISSION REPORT, *supra* note 3, at 1; HANDBOOK OF LABOR STATISTICS, *supra* note 7, at 52; Whelton, *supra* note 1, at 21 (figures cited by industry sources range from minimum of 500,000 to maximum of 1 million; by 1976, 100,000 persons were employed as watch guards in New York City, 15 times 1966 total).

9. COMMISSION REPORT, *supra* note 3, at 1; Wysocki, *supra* note 1, at 1, col. 6.

10. COMMISSION REPORT, *supra* note 3, at 38-39 (quoting witness who characterized industry's employees as "men and women who are not and cannot be paid much more than the minimum wage"); Wysocki, *supra* note 1, at 1, col. 6 (wage rates are typically four to five dollars per hour). The table reproduced below was prepared by the Bureau of Labor Statistics of the U.S. Department of Labor and compares the wages of guards and janitors in relationship to changes in the cost of living between 1967 and 1974.

Year	Guards		Janitors		Percent Change CPI
	Median Wage Rate	Percent Change	Median Wage Rate	Percent Change	
1967	\$2.05	—	\$2.14	—	4.0
1968	2.05	0	2.20	2.8	4.0
1969	2.08	1.4	2.34	6.4	6.0
1970	2.14	2.9	2.50	6.8	5.5
1971	2.19	2.3	2.70	8.0	4.6
1972	2.18	(.5)	2.78	3.0	3.4
1973	2.31	6.0	2.94	5.8	6.3
1974	2.33	1.0	3.13	6.5	11.1
Change over 8 years		13.7		46.3	48.5

Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, on Senate No. 1883 to Amend the Nat'l Lab. Rel. Act to Strengthen the Remedies and Expedite the Procedures under such Act and Related Bills, 95th Cong., 1st Sess. 574 (1977) (table IV appended to statement of Frank Baum, Exec. Vice-Pres. of Wallace Security Agency, Inc.) [hereinafter cited as Senate Hearings].

11. See Wysocki, *supra* note 1, at 16, col. 3 (discussing risks of improper use of firearms and of "target" syndrome which result when guard is armed).

12. Cox, *The Changing Guards*, 15 LAB. L.J. 391, 391 (1964) (between 1954 and 1964, membership in major independent guard unions doubled). Between 1975 and 1980, membership in Allied and the Federation went from 700 or 800 to 6,000 or 7,000. Cook, *supra* note 4, at 110.

13. See *Senate Hearings, supra* note 10, at 1300 (general organizer for Service Employees International Union stated that competition in industry is "stiff, keeping wages low even in collective bargaining settlements"). Due to high turnover in the

failure of collective bargaining is an unsettling fact, given the staggering damages that could result from a major labor dispute in this industry.¹⁴

This Note explains and analyzes the unique provision of the National Labor Relations Act (the Act)¹⁵ that governs unionization of guards, and proposes a consistent approach for the courts and the National Labor Relations Board (the Board)¹⁶ to follow in cases con-

industry, bargaining over wage rates is often emphasized, while bargaining over benefits is neglected. Cook, *supra* note 4, at 110.

14. See Purolator Courier Corp., 254 N.L.R.B. 599 (1981) (clients of Purolator include all twelve districts of Federal Reserve System, banks, savings and loan institutions and mortgage companies). Interruption of the operations of the large national courier companies such as Wells Fargo, Purolator and Brink's could cripple the country's financial system. In 1975, Pinkerton's and Burns International Security Services, two firms which dominate the private security industry, reported revenues of over \$200 million and \$181 million, respectively. Whelton, *supra* note 1, at 21.

15. The National Labor Relations Act consists of the National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-67 (1976)), the Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-44, 151-67, 171-87 (1976)), and the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. §§ 153, 158-60, 164, 186-87 (1976)). The provision of the Act governing unionization of security guards is section 9(b)(3), which reads:

§ 9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

29 U.S.C. § 159(b)(3) (1976).

16. Section 3 of the Act provides for the appointment of a five-member Board. 29 U.S.C. § 153(a) (1976). The Board is empowered by section 10(a) to remedy unfair labor practices as defined in section 8, *id.* §§ 160(a) and 158, and has further authority to seek enforcement of its orders in the United States Court of Appeals. *Id.* § 160(e). The Board also is vested with broad power to decide whether there is a question concerning the representation of employees affecting interstate commerce. *Id.* § 159(c). Such powers are exercised upon the filing of a representation petition. See generally A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 260-61 (9th Ed. 1981) [hereinafter cited as LABOR CASES] (discussing procedure in representation cases). The Act provides for the delegation of certain of the Board's powers to regional directors, 29 U.S.C. § 153(b) (1976) (representation cases) and to a General Counsel. 29 U.S.C. § 153(d) (1976) (investigation of unfair labor practice charges). The General Counsel supervises the regional directors and their field staffs.

cerning security guards. The adoption of this approach should improve the quality of collective bargaining in the industry by creating greater stability in bargaining relationships.

II. Limits on the Board's Authority Set Forth in Section 9(b)(3) of the Act

Section 9 of the Act grants the Board broad powers in processing representation cases.¹⁷ Section 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit" ¹⁸ In section 9(b), the Board is given broad discretion to determine the appropriate unit for collective bargaining, with a mandate to "assure to employees the fullest freedom in exercising the rights guaranteed by this [Act]" ¹⁹ But security guards are accorded an unusual status under the Act; "guard" is the only specific job classification men-

There are presently 33 regional offices throughout the United States. NLRB RULES & REGULATIONS AND STATEMENTS OF PROCEDURE, SERIES 8, AS AMENDED, § 203 (1982) [hereinafter cited as RULES AND REGULATIONS]; 44 Fed. Reg. 34,215 (1979).

The Act does not provide for direct judicial review of Board decisions in representation cases. An employer who wishes to contest such a decision must refuse to bargain, thus committing an unfair labor practice. The Board's order in the unfair labor practice case is then reviewable in the court of appeals. LABOR CASES, *supra*, at 311.

17. Drivers Local No. 71, International Bhd. of Teamsters v. NLRB (Wells Fargo Armored Servs. Corp.), 553 F.2d 1368, 1375 (D.C. Cir. 1977), *enforcing* 221 N.L.R.B. 1240 (1975) ("[s]ection 9(c) of the Act confers upon the Board a wide degree of discretion in determining whether a petition raises a 'question of representation' warranting the direction of a Board-conducted election") (footnote omitted). Although section 9(c)(1) uses the term "question of representation," *see* 29 U.S.C. § 159(c)(1) (1976), the term "question concerning representation" also is used in the cases and literature. For an example of such usage, see Office of the General Counsel, National Labor Relations Board, An Outline of Law and Procedure in Representation Cases 26 (1974) [hereinafter cited as Outline of Law and Procedure].

18. 29 U.S.C. § 159(a) (1976).

19. *Id.*, § 159(b). Section 1 of the Act states the broad policies which the statutory scheme is intended to promote:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1976).

tioned,²⁰ and it is governed by its own separate rules concerning representation.²¹

In contrast to the broad authority generally granted to the Board in section 9, section 9(b)(3) specifically prevents the Board from finding a unit appropriate if it includes both guards and nonguards.²² The section further states that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."²³ This provision allows the Board to certify only a "pure" guard union as a representative of guards. Guard unions which are affiliated with nonguard unions may not be certified to represent a unit of guards,²⁴ and nonguard unions may not be certified to represent a guard unit.²⁵

20. 29 U.S.C. § 159(b)(3) (1976). The Act also mentions the general category of professional employees in sections 2(12) & 9(b)(1). See 29 U.S.C. §§ 152(12) & 159(b)(1) (1976).

21. The Act defines a guard as "any individual employed . . . to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises . . ." See 29 U.S.C. § 159(b)(3) (1976). The Board decides issues of guard status on a case-by-case basis; an exposition of these cases is beyond the scope of this Note. For a compilation of such cases, see J. FEERICK, H. BAER, & J. ARFA, NLRB REPRESENTATION ELECTIONS—LAW, PRACTICE & PROCEDURE § 9.2.2 (1980) [hereinafter cited as FEERICK]; THE DEVELOPING LABOR LAW 424-26 (C. Morris ed. 1983) [hereinafter cited as LABOR LAW 1983]. For a discussion of the guard status of armored couriers, see *infra* note 52.

22. See 29 U.S.C. § 159(b)(3) (1976).

Section 9(b) of the Act contains three subsections which limit the Board's broad powers in processing representation cases. Section 9(b)(1) concerns professional employees, section 9(b)(2) concerns craft representation and section 9(b)(3) concerns guards. *Id.* §§ 159(b)(1), (2), (3) (1976). Also, section 9(c)(5) directs that the Board's appropriate unit determinations shall not be controlled by the extent to which employees are organized. *Id.* § 159(c)(5). These are the only express statutory limitations on the Board's powers in this area. Outline of Law and Procedure, *supra* note 17, at 130.

23. See 29 U.S.C. § 159(b)(3) (1976). The test for deciding the question of indirect affiliation is contained in *Bally's Park Place, Inc.*, 257 N.L.R.B. 777 (1981), where the Board stated that it would look to whether "'the extent and duration of [the guard union's] dependence upon [the nonguard union], or vice versa, 'indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action.'" *Id.*, at 778 (quoting *Magnavox Co.*, 97 N.L.R.B. 1111, 1113 (1952)). Cases applying this test are cited in *Bally's*, 257 N.L.R.B. at 778 nn. 6 & 7; LABOR LAW 1983, *supra* note 21, at 424; and FEERICK, *supra* note 21, at 376.

24. *Schenley Distilleries, Inc.*, 77 N.L.R.B. 468, 470 (1948) (petition filed by guard union to represent unit of guards dismissed because guard union indirectly affiliated with nonguard union); see also *Mack Mfg.*, 107 N.L.R.B. 209, 212 (1953) (Board revoked guard union's certification to represent unit of guards where affiliation with nonguard union was discovered after issuance of certification).

25. *Purolator Courier Corp.*, 254 N.L.R.B. 599, 600 (1981) (courier/guards found to be guards within meaning of Act; petition filed by nonguard union to

The Wagner Act²⁶ contained no express provision relating to security guards. In the Board's early decisions under the Wagner Act, it refused to include plant guards in the same bargaining unit with production and maintenance employees.²⁷ However, in cases such as *Jones & Laughlin Steel Corp.*,²⁸ the Board allowed guards to select nonqualified unions as their collective bargaining representatives.²⁹ The Board found that Jones & Laughlin's refusal to bargain with a nonqualified union which the Board certified as the representative of a unit of its guards constituted an unfair labor practice.³⁰ The Sixth Circuit refused to enforce the Board's order, reasoning that guards who belong to a union representing plant employees would experience conflicting loyalties in the event of a strike, since their obligation to the employer would be incompatible with their obligation to the striking union.³¹ The Supreme Court agreed with the Board's ap-

represent them dismissed as raising no question concerning representation); *Wackenhut Corp.*, 169 N.L.R.B. 398, 398 (1968) (petition filed by nonguard union for unit of guards does not raise question concerning representation; participation of guard union irrelevant). Both of these types of unions are referred to hereinafter as "nonqualified unions."

26. Pub. L. No. 198, 49 Stat. 449 (1935)(codified at 29 U.S.C. §§ 151-69 (1976)).

27. *Phelps Dodge Copper Prods.*, 29 N.L.R.B. 988, 991 (1941) (parties wished to exclude guards from unit; Board saw no reason to depart from their desires); *Cox*, *supra* note 12, at 392; *cf.*, *Monsanto Chem. Co.*, 63 N.L.R.B. 789, 791 (1945) (parties stipulated to unit including guards and nonguards).

28. 49 N.L.R.B. 390 (1943).

29. *Id.*, at 392. See *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 426-27 (1947), *enforcing* 53 N.L.R.B. 1046 (1943), *reversing* 154 F.2d 932 (6th Cir. 1946) (Board's brief to Court stated that it had certified bargaining representatives for units of guards in more than 105 cases and that in more than 80 of these cases, certified union also represented employees of same employer, albeit in different bargaining unit).

30. *Jones & Laughlin*, 53 N.L.R.B. at 1046.

31. *Jones & Laughlin*, 154 F.2d at 935 (affirming its prior denial of enforcement, 146 F.2d 718 (6th Cir. 1944), after remand from Supreme Court, 325 U.S. 838 (1945)).

Executive Order No. 8972, dated Dec. 12, 1941, authorized the Secretary of War to establish and maintain security at plants important to the war effort. *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 406 (1947). Prior to the Board's original petition for enforcement in *Jones & Laughlin*, the company's guards had been deputized as auxiliary officers of the United States Army, a fact relied upon by the Court in denying enforcement. See *Jones & Laughlin*, 146 F.2d at 722. The guards were demilitarized in 1944. *Atkins*, 331 U.S. at 400-01. On the Board's petition for certiorari, the Supreme Court vacated the Sixth Circuit's judgment and remanded for reconsideration in light of the alleged demilitarization of the guards. See 325 U.S. at 838. On remand, the Sixth Circuit affirmed its prior denial of enforcement, noting that the guards still retained "drastic police powers" over the production employees and hence, it was improper for the Board to permit their organization by the same union that represented the production employees. *Jones & Laughlin*, 154 F.2d at 934-35.

proach and reinstated its order,³² but Congress favored the Sixth Circuit's reasoning.³³ In the Taft-Hartley amendments,³⁴ Congress codified the Sixth Circuit's approach by adding section 9(b)(3) to the Act.³⁵ The Board subsequently was prevented from finding mixed guard/nonguard units appropriate, and nonqualified unions could not be certified as the bargaining representatives of guards.³⁶

III. Questions About the Scope of Section 9(b)(3) and its Place in the Overall Statutory Scheme

A literal reading of section 9(b)(3) reveals that it limits the Board's unit determinations and prevents the Board from certifying certain unions as the collective bargaining representatives for security guards. But section 9(b)(3) is only one part of an overall statutory scheme designed to encourage the practice and procedure of collective bargaining and to assure employees full freedom of association and self-organization.³⁷ Section 7 of the Act guarantees to employees the right to join or refrain from joining labor organizations.³⁸ Section 8 prohibits employers and unions from engaging in certain specified unfair

32. 331 U.S. 416, 431 (1947).

33. See 93 CONG. REC. S6593 (June 5, 1947), reprinted in *Legislative History of the Labor Management Relations Act, 1947*, 1541 (remarks of Senator Taft) [hereinafter cited as *Legislative History*].

34. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified in 29 U.S.C. §§ 151-67) (1976).

35. See 29 U.S.C. § 159(b)(3) (1976). Section 9(b)(3) was the result of a compromise between the House and the Senate. The House bill, as reported, excluded guards from the coverage of the Act by defining them as supervisors. See *Legislative History, supra* note 33, at 41. The Senate amendments to the House bill did not classify them as supervisors. See S. 1126, S. REP. NO. 105, 80th Cong., 1st Sess. 6 (1947); *Legislative History, supra*, at 104. In conference, the Senate refused to accept the House's exclusion of guards from the coverage of the Act, and a compromise emerged whereby guards would be protected by the Act "only if they had a union separate and apart from the union of the general employees." *Legislative History, supra*, at 1544 (remarks of Sen. Taft). The present language of section 9(b)(3) originated in the Conference Report. H. CONF. REP. NO. 510, 80th Cong., 1st Sess. 9 (1947), *Legislative History, supra*, at 513.

36. See *supra* notes 22-25 and accompanying text.

37. See 29 U.S.C. § 151 (1976), quoted *supra* note 19.

38. See 29 U.S.C. § 157 (1976), which provides in 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

Id.

labor practices.³⁹ Section 9 gives the Board broad powers in processing representation cases.⁴⁰

Section 9(b)(3) cannot be applied properly without considering the Act's general policies and Congress' specific intention in passing this section.⁴¹ Viewed in this manner, the provision raises many questions. Most of them arise from the enigmatic language of the section, which narrowly directs the Board to refrain from certifying a nonqualified union as the representative of a guard unit.⁴² The clause does not state to what extent, if any, nonqualified unions are permitted to participate in the Board's election processes.⁴³ Although early Board cases established that a nonqualified union could not file a petition seeking an election,⁴⁴ such unions have been permitted to appear on the election ballot as intervenors if the petition was filed by a qualified union or an individual employee.⁴⁵

Those who support the Board's present practice of allowing electoral participation by nonqualified unions note that it fosters em-

39. Section 8(a) prohibits employer unfair labor practices and section 8(b) prohibits union unfair labor practices. 29 U.S.C. §§ 158(a)(1)-(b)(7) (1976). The Board's powers with regard to unfair labor practices are described in *supra* note 16.

40. 29 U.S.C. § 159 (1976). See *supra* notes 17-21 and accompanying text.

41. See *supra* notes 31-35 and accompanying text.

42. See 29 U.S.C. § 159(b)(3) (1976). It is instructive to compare section 9(b)(3) with the provisions of the repealed sections 9(f),(g) and (h) of the Act, which contained similar language. These repealed sections had obligated labor organizations to file with the Board and the Secretary of Labor various documents assuring that there was no Communist participation in the union, and barred any union which had not filed such documents from access to the Board's representation and unfair labor practice mechanisms. See Pub. L. No. 80-101, 61 Stat. 143, 145-46, 29 U.S.C. §§ 159(f),(g),(h) (Supp. IV 1952), *repealed*, Pub. L. No. 86-257, 73 Stat. 525 (1959). Section 9(h) provided in part: "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization . . . , and no complaint shall be issued pursuant to a charge made by a labor organization . . . , unless [the union has filed the required documents]." *Id.*

In *UMW v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956), the Supreme Court considered how noncompliance with the filing provisions affected the status of a labor organization. The Court read the language of the statute literally and concluded that, while it prevented Board certification of such a union, it did not preclude voluntary recognition of such a union. *Id.* at 73, 75.

43. This ambiguity initially was recognized and addressed in *William J. Burns Int'l Detective Agency, Inc.*, 138 N.L.R.B. 449, 452 (1962). See *infra* notes 88-91 and accompanying text.

44. *Schenley Distilleries, Inc.*, 77 N.L.R.B. 468, 470 (1948) (petition dismissed as raising no question concerning representation).

45. See *Rock-Hill-Uris, Inc. v. McLeod*, 236 F. Supp. 395, 397 (S.D.N.Y. 1964), *aff'd*, 344 F.2d 697 (2d Cir. 1965) (petition filed by individual employee); *Bally's*, 257 N.L.R.B. at 778 (petition filed by qualified union). See *infra* notes 92-100 and accompanying text.

ployee free choice,⁴⁶ a paramount concern of the Act.⁴⁷ They read section 9(b)(3) as limiting only the Board's certification powers and refuse to imply that it limits guards in the exercise of their section 7 rights to select a collective bargaining representative.⁴⁸ The contrary view is that section 9(b)(3) was intended to prevent access to the Board's electoral process by nonqualified unions seeking to represent guards.⁴⁹ In view of the fact that section 9(b)(3) might be construed as curtailing the freedom of choice of a particular class of employees, it has been suggested that the scope of its application should be limited. Proponents of this view would apply the provision only to "plant guards"⁵⁰ employed by a company to protect its own property and

46. *Bally's*, 257 N.L.R.B. at 779. See *infra* notes 107-23 and accompanying text.

47. See 29 U.S.C. § 151, quoted *supra* note 19.

48. *Bally's*, 257 N.L.R.B. at 779. In the debates over passage of the Taft-Hartley Act, Senator Taft emphasized that security guards retained their section 7 rights as employees, notwithstanding section 9(b)(3). *Legislative History*, *supra* note 33, at 1541. The Board has taken note of this congressional intention in its decisions and accordingly applies section 9(b)(3) in a narrow fashion. See *White Superior Div., White Motor Corp.*, 162 N.L.R.B. 1496, 1499 (1967), *remanded*, 404 F.2d 1100 (6th Cir. 1968) (employer violated section 7 rights of its guard employees by discharging them because they joined nonqualified union; court remanded to Board for reconsideration of duration of Board order of reinstatement); *Joseph E. Seagram & Sons, Inc.*, 83 N.L.R.B. 167, 169 (1949) (Board rejected contention that section 9(b)(3) requires application of different rules in deciding whether single or multi-plant unit of guards was appropriate; usual criteria governing such determinations in other types of units applied). Although the Act does not directly limit guards' section 7 rights to choose nonqualified unions to represent them, it does render such rights less meaningful by depriving nonqualified unions of the benefits of a Board certification. *White*, 404 F.2d at 1103, n. 5. For a discussion of the benefits of Board certification, see *infra* note 108. It can be argued that any consequent diminution in guards' rights is not imposed by the Board but rather is freely self-imposed by the guards when they select the nonqualified union to represent them.

49. See *Wackenhut Corp.*, 223 N.L.R.B. at 83 (1976). This view appears to rest on a series of statements and logical inferences about the legislative intention behind section 9(b)(3) and how it should be integrated into the statutory scheme. The argument can be expressed as follows: Congress did not want guards to be represented by nonqualified unions and therefore prohibited the Board from certifying nonqualified unions. Since certification is the end result of the Board's electoral process, Congress also intended to deprive nonqualified unions of access to the electoral process which leads to certification. Proponents of this view conclude that by keeping nonqualified unions off the ballot, the Board is not disregarding employee free choice. Rather, Congress limited this freedom by enacting section 9(b)(3). See, e.g., *Wackenhut*, 223 N.L.R.B. at 83, discussed *infra* in notes 101-06 and accompanying text. See also *Drivers Local Union 639, International Bhd. of Teamsters (Dunbar Armored Express, Inc.)*, 211 N.L.R.B. 687, 689-90 (1974), discussed *infra* at notes 214-18 and accompanying text.

50. The term "plant guard" is used throughout the legislative history. See, e.g., *Legislative History*, *supra* note 33, at 307, 362, 1544 & 1572.

enforce rules against its own employees.⁵¹ They would not apply section 9(b)(3) to armored couriers, who transport property of employers other than their own,⁵² or to guards employed by agencies

51. A principal proponent of this view is former Board member Betty Murphy. In her concurring opinion in *Wells Fargo Guard Servs.*, 236 N.L.R.B. 1196, 1197 (1978), she stated that the word "guard" applied only to an employer's own plant protection employees, so that employees of a guard agency assigned to duty at premises of other businesses could select any union as their representative, and the Board would be permitted to certify it as such. Also see *infra* note 52, which sets forth the concurring view of Chief Judge Bazelon of the District of Columbia Circuit Court of Appeals. In *American Dist. Tel. Co. (Los Angeles)*, 83 N.L.R.B. 517, 520 (1949), the Board held that section 9(b)(3) draws no distinction between plant guards and guards employed by a guard service, and found the employer's operating department employees to be guards. The Board later reversed itself and held that the employer's operating department employees were not guards. *American Dist. Tel. Co.*, 89 N.L.R.B. 1228, 1231-32 (1950). However, in *Armored Motor Serv. Co.*, discussed *infra* at note 52, the Board reinstated the rule applied in *American Dist. Tel. Co. (Los Angeles)*. In *Burns Int'l Detective Agency*, 138 N.L.R.B. 449, 452 (1962), the Board reaffirmed the view that the Act does not distinguish between plant and contract guards.

52. A prominent adherent to this view was Chief Judge Bazelon of the District of Columbia Circuit Court. In *Drivers Local No. 71 v. NLRB (Wells Fargo Armored Serv. Corp.)*, he noted that "[section] 9(b)(3) marks an extremely narrow exception to the . . . Act's general policy of employee free choice." 553 F.2d 1368, 1377 (D.C. Cir. 1977) (Bazelon, C.J., dissenting) (footnote omitted). According to Bazelon's reading of the legislative history, Congress intended to ensure that employers had the undivided loyalty of plant guards who were responsible for keeping order and reporting the misconduct of employees. *Id.* He concluded that application of the provision to armored couriers "goes far beyond that purpose." *Id.*, at 1377-78 (footnote omitted).

Originally, the Board held that section 9(b)(3) did not apply to armored couriers. *Brink's, Inc.*, 77 N.L.R.B. 1182, 1186 (1948). It reversed itself in *Armored Motor Serv. Co.*, 106 N.L.R.B. 1139, 1140 (1953), holding that although the danger of divided loyalty was not as much of a factor with armored couriers as with plant guards, it was nonetheless, present.

Since 1953, the Board has been urged on numerous occasions to overrule *Armored Motor*. With court approval, it has refused to do so. See *Drivers Local Union No. 71 (Wells Fargo)*, 221 N.L.R.B. 1240, 1242 (1975), *enforced*, 553 F.2d 1368 (D.C. Cir. 1977)(driver guards who transported money and other valuables found to be guards within meaning of the Act); *International Bhd. of Teamsters, Local 344 (Purolator Security, Inc.)*, 228 N.L.R.B. 1379, 1381 (1977) *enforced*, 568 F.2d 12 (7th Cir. 1978)(driver guards who transported deposits, money, securities and personal property found to be guards). See also *Purolator Courier Corp.*, 254 N.L.R.B. 599, 600 (1981)(couriers who transported time-sensitive commodities found to be guards); *MDS Courier Serv., Inc.*, 248 N.L.R.B. 1320, 1320-21 (1980)(drivers who transported nonnegotiable instruments, bank deposits, bearer bonds and jewelry found to be guards); *Brink's, Inc.*, 226 N.L.R.B. 1182, 1184 (1976)(couriers who delivered nonnegotiable instruments to customer premises after closing hours found to be guards); *Drivers Local Union 639, International Bhd. of Teamsters (Dunbar Armored Express, Inc.)*, 211 N.L.R.B. 687, 689 (1974)(Board rejected contention that couriers were merely "truckdrivers with guns" and found them to be guards).

which contract with other companies to provide services.⁵³ Some proponents of this view further contend that independent guard unions have provided inferior representation to guards in contrast to the representation provided by nonguard unions.⁵⁴ These concerns have been addressed to Congress on more than one occasion.⁵⁵ If enacted into law, these legislative proposals would end some of the debate over the scope of section 9(b)(3) and allay the concern that its limiting provisions are being applied too broadly.⁵⁶

53. See *Wells Fargo*, 236 N.L.R.B. at 1197 (Murphy, concurring); General Serv. Employees Union Local No. 73 (Andy Frain, Inc.), 230 N.L.R.B. 351, 352 (1977) (Murphy, dissenting). See *supra* note 51 for discussion of *Wells Fargo*.

54. See, e.g., *Senate Hearings*, *supra* note 10, at 578 (statement of Russell Silvers, vice-president of Brink's, that guard unions are inferior because they have fewer members, and these members receive lower wages and benefits than members of nonqualified unions).

Many complex factors affect collective bargaining, including the size and strength of the employer relative to the union, the degree of competition in the particular industry, and the amount of government regulation. See generally LABOR CASES, *supra* note 16, at 303, 484. However, all other factors being equal, it is difficult to refute that there is greater bargaining power in numbers. *Id.* at 303. Thus, an unaffiliated union can be seen as inherently inferior to a union which has forged alliances, either formal or informal, with other unions.

Guard unions have been criticized further as being susceptible to corruption. Cook, *supra* note 4, at 111. See sources cited, *supra* note 6. However, this charge also has been raised against nonqualified labor organizations. 1981 Lab. Rel. Y.B. (BNA) 349 (noting indictments of Teamsters' officials).

55. In 1977 and 1978, Congress considered legislation to amend the Act. See H.R. 8410, 95th Cong., 1st Sess. (1977) and S. 2467, 95th Cong., 2d Sess. (1978). Among other things, the legislation would have narrowed the application of section 9(b)(3) by preventing certification of a union as the representative of a guard unit only if it admitted to membership nonguard employees of the same employer at the same location, or was affiliated directly with a national or international union which represented such employees. *Hearings Before the Subcomm. on Labor-Management Rels. of the Comm. on Educ. and Labor, H. Rep., 95th Cong., 1st Sess., on H.R. 8410, To Amend the Nat'l Lab. Relations Act to Strengthen Remedies and Expedite Procedures 7-8* (1977) [hereinafter cited as *House Hearings*] (emphasis added). Although the House passed its bill, the Senate referred its version back to committee. A compromise could not be reached and the legislation never was enacted. FEERICK, *supra* note 21, at 22-23.

Two bills recently were introduced in Congress to remove armored couriers and contract guards from the coverage of section 9(b)(3) and to narrow its general application. H.R. 2197, 98th Cong., 1st Sess. (March 21, 1983), provides that "employees of employers engaged in the business of protecting and transporting the property of their customers shall not be deemed to be guards." H.R. 2198, 98th Cong., 1st Sess. (March 21, 1983), is identical to the legislation proposed by the House in 1977, cited *supra*. Both bills were referred to the Comm. on Educ. and Labor. CONGRESSIONAL INDEX, (CCH) ¶ 28,272.

56. A full consideration of the merits of this proposed legislation is beyond the scope of this Note. It will be assumed that Congress intended armored couriers and contract guards to be considered "guards" within the meaning of the Act, and hence

However, the Board encounters further problems in guard cases. One such problem arises from section 9(b)(3)'s failure to state how or if it affects bargaining relationships voluntarily commenced by employers and nonqualified unions.⁵⁷ This is a conspicuous omission in view of the longstanding acknowledgement that unions may obtain representational status without the use of the Board's election processes through voluntary recognition.⁵⁸ Historically, the Board embraced the view that Congress did not intend guards to be represented by nonqualified unions at all, either through certification or voluntary recognition.⁵⁹ The Board quickly reversed itself and held that section 9(b)(3) should be read literally as merely a narrow limitation on the Board's powers of certification.⁶⁰ Thus, voluntary recognition enables a nonqualified union to become the bargaining representative of security guards where section 9(b)(3) would not permit it to be certified⁶¹ and also allows for collective bargaining in mixed guard/non-guard units.⁶²

The Board protects voluntary bargaining relationships pursuant to its mandate to promote industrial stability.⁶³ A voluntarily recognized

covered by section 9(b)(3). Clarification from Congress on the scope of this section would, however, be helpful.

57. See *supra* notes 22-23 and accompanying text. For a discussion of voluntary recognition, see generally LABOR LAW 1983, *supra* note 21, at 488-549.

58. See Heider Mfg. Co., 91 N.L.R.B. 1185, 1185-88 (1950) (during midst of negotiations, employer questioned majority status of union it had voluntarily recognized but did not file petition to test union's representative status; doubt of majority status therefore was raised in bad faith); 17 N.L.R.B. ANN. REP. 159-60 (1952) (representative status may be obtained through Board certification or other evidence of majority status); 18 N.L.R.B. ANN. REP. 43 (1953) (majority status of union may be proven by Board certification or authorization cards showing designation by majority of employees). For a discussion of the difference between certification and voluntary recognition based on authorization cards, see *infra* note 65.

59. Columbia-Southern Chem. Corp., 110 N.L.R.B. 1189 (1954). In *Columbia*, a nonqualified union had been voluntarily recognized as the representative of the employer's guards, and a collective bargaining agreement was in effect covering those guards. *Id.* at 1189-90. The Board nonetheless directed that a decertification election be held, rejecting the contention that the current contract barred the proceedings. *Id.* at 1191 and n. 6. For a discussion of the contract bar doctrine, see *infra* notes 159-62 and accompanying text.

60. See Burns Int'l Detective Agency, Inc., 134 N.L.R.B. 451, 453 (1961) (Board held that in future it would not withhold application of normal contract bar rules where contract covering unit of guards had been entered into after voluntary recognition of nonqualified union, overruling *Columbia-Southern*, cited in *supra* note 59).

61. *Burns*, 134 N.L.R.B. at 453.

62. Wallace-Murray Corp., 192 N.L.R.B. 1090, 1090 (1971) (petition to clarify bargaining unit including both guards and nonguards dismissed; processing such petition at mid-term of contract covering unit would disrupt parties' voluntarily established bargaining relationship).

63. See 29 U.S.C. § 151 (1976), quoted in *supra* note 19; Amoco Oil Co., 221 N.L.R.B. 1104, 1105 & 1108 (1975) (employer ordered to cease and desist from

union may apply for these protections by filing an unfair labor practice charge under section 8(a)(5),⁶⁴ which makes it unlawful for an employer to refuse to bargain collectively with the representative of its employees, subject to the provisions of section 9(a).⁶⁵ To date, the case law under section 9(b)(3) has not established the circumstances under which an employer may terminate a voluntary bargaining relationship with a nonqualified union.⁶⁶

refusing to bargain with nonqualified union it had voluntarily recognized for almost 40 years).

64. 29 U.S.C. § 158(a)(5) (1976).

65. *Id.* Section 9(a) specifies that a bargaining obligation accrues only when the representative has been selected by a majority of the employees in an appropriate unit. *See* 29 U.S.C. § 159(a) (1976). A union can obtain representative status in any of three ways:

(1) Generally, the appropriateness of the unit and the majority status of the union is established in a Board representation proceeding, which begins with the filing of a petition and culminates in an election and certification by the Board or its regional director. 16 N.L.R.B. ANN. REP. 188 (1951). For the procedures governing representation elections, see generally NLRB CASE HANDLING MANUAL (Part Two), Representation Proceedings §§ 11300-11350 (March 1980 update) [hereinafter cited as REPRESENTATION MANUAL]; RULES AND REGULATIONS, *supra* note 16, §§ 102.60-102.72.

(2) By providing proof of its majority status directly to the employer, a union may obtain lawful representative status without the use of the Board's procedures. Even if the unit later is found to be inappropriate, such recognition is lawful if the union is the majority representative. *See Wallace-Murray*, 192 N.L.R.B. at 1090. However, the employer takes a risk in according voluntary recognition. If the employer recognizes a minority union, even by mistake, a violation of section 8(a)(2) of the Act is committed. 29 U.S.C. § 158(a)(2) (1976), construed in *Bernhard-Altman Texas Corp.*, 122 N.L.R.B. 1289, 1292 (1959), *enforced sub nom.*, *ILGWU v. NLRB*, 280 F.2d 616 (D.C. Cir. 1960), *aff'd*, 366 U.S. 731 (1961). At the time of the passage of section 9(b)(3), an employer was not permitted to refuse a union's request for recognition unless it doubted the union's majority status in good faith. *See Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1264-65 (1949), *enforced as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). The Board subsequently abandoned this rule and held that the employer was permitted to refuse to voluntarily recognize the union, so long as it did not commit serious contemporaneous unfair labor practices. Thus, the union must petition for an election, if a fair one can be held. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 600, *reh'g denied*, 396 U.S. 869 (1969).

(3) Finally, the union may establish its majority status and the appropriateness of the unit in an unfair labor practice hearing. The Board then will order the employer to bargain with the union. 18 N.L.R.B. ANN. REP. 43 (1953). The Board has held that it has the authority to issue bargaining orders in unfair labor practice proceedings without proof of the union's majority status, where the employer's unfair labor practices erode the union's support and make a fair election impossible. *See, e.g., United Dairy Farmers Coop. Ass'n*, 242 N.L.R.B. 1026, 1027-28, *enforced as modified*, 633 F.2d 1054 (3d Cir. 1980), *modified on remand*, 257 N.L.R.B. 772 (1981). *But cf. Conair Corp.*, 261 N.L.R.B. 1189 (1982), in which former Chairman Van de Water & member Hunter, in separate dissenting opinions, argued that nonmajority bargaining orders violate the principle of majority rule. *Id.* at 1195, 1198.

66. *See infra* notes 192-97 and accompanying text.

Finally, once the Board has considered the limits of section 9(b)(3) in relationship to its mandate to protect the section 7 rights of guards and to encourage the preservation of voluntary bargaining relationships, it has the further task of reconciling these interests with the prohibitions on recognitional picketing, added to the Act by the Landrum-Griffin amendments of 1959.⁶⁷ Strikes and picketing frequently have occurred in the security industry when employers have declined to extend voluntary recognition to nonqualified unions.⁶⁸ In this situation, the union has few lawful options available for pressuring the employer.⁶⁹ Economic weapons such as strikes may be used lawfully by a union that is the recognized or certified collective bargaining representative,⁷⁰ and the Act specifically protects the employees' right to strike.⁷¹ However, section 8(b)(7) prohibits a union which has not obtained Board certification from picketing or threatening to picket an employer with the object of gaining recognition as the employees' representative.⁷² Recognitional picketing, regardless of its duration, is outlawed where the employer lawfully has recognized another union and the Board could not appropriately process a representation petition filed by a rival union,⁷³ or where a valid election has been conducted by the Board within the preceding twelve months.⁷⁴ Such picketing also is unlawful if it is conducted for more than thirty days⁷⁵

67. Labor-Management Reporting & Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified at 29 U.S.C. §§ 153, 158-60, 164, 186-87 (1976)).

68. See *infra* notes 208, 214-41 and accompanying text.

69. *White*, 404 F.2d at 1103. In *White*, the Sixth Circuit noted that an employer has the "unqualified right" to decline to recognize a nonqualified union; when it refuses, "the union may press its case no further." *Id.*

70. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960) ("presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized"); *LABOR LAW* 1983, *supra* note 21, at 995 ("collective bargaining, the keystone of federal labor law, presupposes the availability to the parties of certain economic weapons").

71. Section 13 of the Act provides: "Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (1976).

72. See 29 U.S.C. § 158(b)(7) (1976).

73. See section 8(b)(7)(A) of the Act, 29 U.S.C. § 158(b)(7)(A) (1976).

74. See section 8(b)(7)(B) of the Act, 29 U.S.C. § 158(b)(7)(B) (1976).

75. The statutory language allows such picketing for "a reasonable period of time not to exceed thirty days . . ." 29 U.S.C. § 158(b)(7)(C) (1976). Where the picketing is accompanied by acts of violence it may be found to be of unreasonable duration where it is conducted for less than thirty days. See *District 65, Retail Wholesale & Dep't Store Union (Eastern Camera & Photo Corp.)*, 141 N.L.R.B. 991, 999 (1963); *LABOR LAW* 1983, *supra* note 21, at 1096.

without the filing of a petition for an election, and the Board may direct an expedited election⁷⁶ to determine the employees' sentiment. Although Congress primarily intended this section to prevent recognition picketing by unions representing a small or nonexistent percentage of employees,⁷⁷ the Board has held that the statute's language also proscribes such picketing by majority unions.⁷⁸

Under the Board's present practice of allowing nonqualified unions to participate in its election processes notwithstanding their noncertifiability,⁷⁹ conflicts may arise. If the nonqualified union wins the election, but the employer declines to accord voluntary recognition, an argument can be made that picketing by the union should not be proscribed by section 8(b)(7)(C), since the union has demonstrated its majority status in an election.⁸⁰ It is apparent that the drafters of the Landrum-Griffin amendments did not conceive of such a situation when they framed the language of section 8(b)(7).⁸¹ This issue, and others mentioned in the preceding discussion presently are being considered by the Board.⁸² The Board's well-reasoned treatment of these issues, together with congressional clarification of the scope of section 9(b)(3), would have a salutary effect on collective bargaining in the security industry.⁸³

76. See 29 U.S.C. § 158(b)(7)(C) (1976). The statute provides that such an election may be directed regardless of the Board's showing of interest requirement. *Id.* The showing of interest requirement is discussed *infra* at note 84. For the procedures followed in expedited elections, see RULES AND REGULATIONS, *supra* note 16, §§ 102.73-102.82.

77. See *International Typographical Union, Local 285 (Charlton Press, Inc.)*, 130 N.L.R.B. 727, 733 (1961) (quoting extensively from provision's legislative history).

78. *Id.* at 727. A full consideration of case law under section 8(b)(7)(C) is beyond the scope of this Note. For an excellent overview of the area, see LABOR LAW 1983, *supra* note 21, at 1061-1107 (Chapter 23, *Picketing for Organization and Recognition*).

79. See *infra* text accompanying note 123.

80. See *infra* notes 236 & 240 and accompanying text.

81. See *Drivers Local No. 71, International Bhd. of Teamsters v. NLRB (Wells Fargo Armored Serv. Corp.)*, 553 F.2d 1368, 1374-75 (D.C. Cir. 1977) (noting "puzzling issue" of relationship between sections 9(b)(3) and 8(b)(7)(C), and concluding that it resulted from "conceivable lapse in the draftsmen's attention") (footnote omitted).

82. See *infra* sections IV, V and VI.

83. See generally, *Senate Hearings*, *supra* note 10, at 568-69 (officer of security agency argued that guards' inability to choose collective bargaining representative with freedom they should have creates inequality of competition in security industry; both employees and employers would benefit from better trained, more stable work force that would result from consistent application of section 9(b)(3)).

IV. The Board's Discretion to Allow Electoral Participation by Nonqualified Unions

A union becomes certified by winning a Board-conducted election.⁸⁴ Although section 9(b)(3) prevents certification of nonqualified unions, it does not state whether such unions are allowed to participate in Board-conducted elections. In 1948, the Board established that a petition filed by a nonqualified union for an election in a unit of guards did not raise a question concerning representation and hence, would be dismissed.⁸⁵ The Board has adhered to this rule, reasoning that its resources should not be expended to resolve an alleged question concerning representation raised by a union which cannot be certified under the Act.⁸⁶

However, filing a petition is not the only means of getting on the ballot in a Board-conducted election. In certain circumstances, the Board's procedures allow a union to intervene and "piggyback" onto the ballot once a petition is filed by another labor organization.⁸⁷ In *William J. Burns International Detective Agency, Inc.*,⁸⁸ the em-

84. 29 U.S.C. § 159(c)(1) provides in part:

Wherever a petition shall have been filed . . . by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . wish to be represented for collective bargaining . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice If the Board finds upon the record of such hearing that such a question concerning representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Id. "The Board has adopted the administrative rule that 30 per cent [of the employees] constitutes a 'substantial number.'" Outline of Law and Procedure, *supra* note 17, at 39. The rationale for the showing of interest requirement is that the Board should not expend its time and resources conducting an election where less than a substantial number of the employees are interested in unionization. See *O.D. Jennings & Co.*, 68 N.L.R.B. 516, 518 (1946). The showing of interest does not determine whether a question concerning representation exists. *Sheffield Corp.*, 108 N.L.R.B. 349, 350 (1954).

85. *Schenley Distilleries, Inc.*, 77 N.L.R.B. 468, 470 (1948).

86. See cases cited, *supra* note 25.

87. The procedures for intervention are described in REPRESENTATION MANUAL, *supra* note 65, §§ 11022.1 to 11022.3. A union may be allowed to intervene if "it is the certified or currently recognized bargaining agent of the employees involved," where it has a "currently effective or recently expired" contract covering the employees, or where it has provided the Board with cards signed by employees designating it as their bargaining agent. *Id.* §§ 11022.1(a), (b) & 11022.3. Although the intervening union must submit cards from at least ten per cent of the unit employees in order to participate fully in any representation hearing, it may obtain a place on the ballot by submitting only one card. *Id.*

88. 138 N.L.R.B. 449 (1962).

ployer voluntarily had recognized a nonqualified union as the representative of its guard employees. A qualified labor organization subsequently filed a petition seeking to represent the guards.⁸⁹ The Board permitted the nonqualified union to intervene based on its contract covering the employees⁹⁰ and then faced the question of whether to allow the nonqualified union to appear on the ballot, since it could not be certified. The Board held that where a petition is filed by a qualified union or individual employee, an intervening nonqualified union could appear on the ballot, although a victory by the latter would result in a certification of only the arithmetical results of the election.⁹¹ Since the nonqualified union already was functioning as the unit's bargaining representative, industrial stability and employee free choice favored allowing the union to appear on the ballot.

In *Rock-Hill-Uris, Inc. v. McLeod*,⁹² a district court expanded upon the Board's *Burns* rule. In *Rock-Hill*, the petition was filed by an individual employee seeking to be the bargaining representative of the guards and watchmen employed at New York City's Hilton Hotel.⁹³ Two nonqualified unions were permitted to intervene in the proceeding, although neither was the currently recognized representative of the unit.⁹⁴ The Director of the Board's regional office ordered an election with all three alternatives on the ballot.⁹⁵ The employer attempted to enjoin the election, contending that the Board acted in

89. *Id.* at 450-51.

90. *Id.* at 449, n.3. In a prior case involving the same parties, the Board dismissed a petition filed during the mid-term of the incumbent nonqualified union's contract, holding that the contract barred the processing of the petition. See *Burns*, 134 N.L.R.B. at 453. On the same subject matter, see *supra* note 59. However, a petition may be filed while a contract is in force if it is filed during the "open period," sixty to ninety days prior to the expiration of the contract (ninety to 120 days in the health care industry). See FEERICK, *supra* note 21, at § 6.5.3, 173-75 (explaining in detail the "open period"). In the second *Burns* case, the petition appropriately was filed ninety days before the expiration date of the contract, during the so-called "open period." *Burns*, 138 N.L.R.B. at 451.

91. *Id.* at 452. In *Westinghouse Elec. Corp.*, 78 N.L.R.B. 10 (1948), an individual employee filed a petition to decertify a nonqualified union which had been certified as the representative of the employer's guards in 1945, prior to the enactment of section 9(b)(3). *Id.* at 11. The Board directed an election with certification of only the arithmetical results. *Id.* at 13, n.10. *Westinghouse* was one of the first cases in which the board directed such an election.

92. 236 F. Supp. 395 (S.D.N.Y. 1964), *aff'd*, 344 F.2d 697 (2d Cir. 1965).

93. 236 F. Supp. at 396. Section 9(c)(1) of the Act permits an individual to serve as a collective bargaining representative. See 29 U.S.C. §§ 159(c)(1)(A),(B) (1976).

94. 236 F. Supp. at 397. The employer voluntarily had recognized one of the two intervening unions as the representative of its watchmen, but the recognition agreement did not extend to its guards. *Id.* at 398.

95. *Id.* at 397.

contravention of section 9(b)(3) by allowing the two nonqualified unions to participate.⁹⁶ The district court affirmed the Board's use of its election machinery to obtain only arithmetical results.⁹⁷ The court reasoned that section 9(b)(3) deprived nonqualified unions of the benefits of certification without affecting the employees' freedom to designate nonqualified unions as their representatives.⁹⁸ The court found that the Board properly exercised its discretion in concluding that an all-inclusive balloting was "a more reliable index of electoral will than one limited to the sole qualified candidate."⁹⁹ Thus, the *Burns* rule was applied to a case where the primary policy concern was employee free choice.¹⁰⁰

The Board adhered to the *Rock-Hill* decision until 1976. In *Wackenhut*,¹⁰¹ a three-to-two decision, the Board criticized the reasoning in *Rock-Hill* and held that it would be contrary to the purpose of section 9(b)(3) to allow a nonqualified union to appear on the ballot unless, as in *Burns*, it was the incumbent bargaining representative of the facility's guards.¹⁰² "Unqualified stranger labor organization[s]" were denied a place on the ballot.¹⁰³ The majority expressed concern that *Rock-Hill* allowed any labor organization, including one with no interest in representing the employees, to " 'jump' on the ballot" with a minimum showing of interest.¹⁰⁴ The majority stated that it would allow incumbent nonqualified unions to participate in the Board's

96. *Id.*

97. *Id.* at 398.

98. *Id.* The court compared section 9(b)(3) to the former sections 9(f) and (h) of the Act, quoted in *supra* note 42, and cited *UMW v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 74-75 (1956) in support of its conclusion that section 9(b)(3) did not foreclose all representation by nonqualified unions. *Rock-Hill*, 236 F. Supp. at 398. See discussion of *Arkansas Oak Flooring*, *supra* note 42.

99. See 236 F. Supp. at 398. In *Rock-Hill*, the Board distinguished *Schenley*, where it had held that it would not expend its resources to resolve an alleged question concerning representation raised by a union which could not be certified. *Schenley Distilleries, Inc.*, 77 N.L.R.B. 468, 470 (1948). *Rock-Hill*, 236 F. Supp. at 397, n.4. The petition in *Rock-Hill*, in contrast, was filed by an individual qualified to be certified as the statutory representative, so the Board's resources already would be committed for the processing of the petition, notwithstanding the nonqualified unions' participation. *Id.* The Board represented to the court that "no additional resources need be expended to include on the ballot the names of disqualified candidates." *Id.*

100. Preserving the stability of existing bargaining relationships was not a significant factor in *Rock-Hill*, as it had been in *Burns*. See discussion of *Burns*, *supra* notes 88-91 and accompanying text.

101. 223 N.L.R.B. 83 (1976).

102. *Id.*

103. *Id.* at 84.

104. *Id.* at 83. Only one authorization card is required for intervenor status. The requirements for intervention are set forth in *supra* note 87.

election processes to avoid requiring the employees to "vote 'no' in order to continue what they may believe has been a desirable existing bargaining relationship."¹⁰⁵ The majority cited this potential requirement as the only policy reason for allowing participation by nonqualified unions in the Board's election processes.¹⁰⁶

The dissenting members of the Board identified additional policy issues.¹⁰⁷ They expressed the view that section 9(b)(3) narrowly deprives a nonqualified union of the benefits of certification,¹⁰⁸ but does not deprive guard employees of the right to choose a union to represent them.¹⁰⁹ The dissent criticized the majority for interpreting section 9(b)(3) as a broad limitation on access to the Board's election processes and argued that this broad construction impermissibly infringed on the employees' rights "to express fully their wishes as to a collective-bargaining representative."¹¹⁰ The Board majority eventually adopted the view of the dissent in *Bally's Park Place, Inc.*¹¹¹

105. 223 N.L.R.B. at 84. On a standard Board election ballot, voters are asked: "Do you wish to be represented for purposes of collective bargaining by—[space for name of petitioning union]." Yes and No squares appear on the ballot and the voters are instructed: "mark an 'x' in the square of your choice." A sample of such a ballot is reprinted in FEERICK, *supra* note 21, at 696 (Appendix F, NLRB Forms). Where more than one union appears on the ballot, it states: "This ballot is to determine the collective bargaining representative, if any, for the unit in which you are employed." Instead of Yes and No squares, there is a box under the name of each union that appears on the ballot as well as a box under the word "none," and voters are instructed: "mark an 'x' in the square of your choice." *Id.* at 695.

106. 223 N.L.R.B. at 84.

107. *Id.* (Fanning and Jenkins, members, dissenting).

108. *Id.* The benefits of certification are listed and discussed in FEERICK, *supra* note 21, at 115-18. One of the important advantages granted to certified unions is protection of their bargaining status for one year from the date of certification. *Id.* Under this "one year rule" an employer must bargain with the union in good faith for at least one year, absent unusual circumstances. *Id.* at 115-16. In contrast, an employer who extends voluntary recognition to a union is required to bargain only for a "reasonable time," which may be less than a year. LABOR LAW 1983, *supra* note 21 at 541.

109. 223 N.L.R.B. at 84 (Fanning and Jenkins, members, dissenting). This point was eloquently expressed by the Sixth Circuit:

It is true that the [union] could never be certified as bargaining agent for the guards but this does not change the fact that the guards have a right under § 7 of the Act to be members of the [union]. To hold otherwise would attribute too much to certification. It would, in effect, be saying that no labor organization has rights under the Act save a certified one.

Certification gives an organization which achieves it additional rights not all its rights.

White Superior Div., White Motor Corp., 404 F.2d 1100, 1103 n.5 (6th Cir. 1968).

110. 223 N.L.R.B. at 84. Fanning and Jenkins objected to the majority's pejorative use of the term "'stranger' labor organization" and noted that "an incumbent union that has lost employee support may well be more a 'stranger' to employees than

The *Wackenhut*, *Rock-Hill* and *Burns* holdings were reconciled by the District of Columbia Circuit in *Drivers Local No. 71, International Brotherhood of Teamsters v. NLRB (Wells Fargo Armored Serv. Corp.)*.¹¹² The Teamsters' local filed a petition for an election in a guard unit, but the Board's regional director declined to direct an election because the Teamsters admitted nonguard members. Hence, the local could not be certified as the representative of the guards.¹¹³ The local then picketed the guards' employer.¹¹⁴ The Board found that the picketing was unlawful and issued a cease and desist order against the union.¹¹⁵ The circuit court enforced the Board's order and rejected the union's contention that it had a *right* to a Board-conducted election.¹¹⁶ The court emphasized the Board's broad discretion in processing representation cases and noted that a Board-conducted election is a "costly-occasion."¹¹⁷ Under the circumstances, the Board could conclude that it would not be worthwhile to conduct an election with only one nonqualified union on the ballot.¹¹⁸ The court cited *Burns*, *Rock-Hill* and *Wackenhut* as examples of how the Board's exercise of discretion could lead to differing yet rationally consistent results. Under these cases, the Board could place a nonqualified union on the ballot where it was warranted by preservation of industrial stability or other considerations.¹¹⁹ However, the Board also had discretion to refuse to place such a union on the ballot.¹²⁰ The court thus avoided adopting a general rule either granting or denying access to the Board's election processes to nonqualified unions. Since neither the language nor the legislative history of section 9(b)(3) provide guidance on the question of access,¹²¹ the Board's interpretation of the policies of the Act would decide the outcome in future cases.

an intervenor who, based on a proper showing of interest, seeks to appear on the ballot." *Id.* The majority countered this criticism, noting that guards freely can urge their employer to voluntarily recognize a nonqualified union as their representative. *Id.*

111. 257 N.L.R.B. 777 (1981). See *infra* notes 122-23 and accompanying text.

112. See 553 F.2d 1368 (D.C. Cir. 1977), *enforcing* 221 N.L.R.B. 1240 (1975).

113. 221 N.L.R.B. at 1242.

114. *Id.*

115. *Id.* at 1243. The picketing was found to be recognition in nature and hence violative of section 8(b)(7)(C) of the Act. *Id.* at 1242. See Section VI *infra* for a discussion of section 8(b)(7)(C) of the Act.

116. 553 F.2d at 1376, 1377.

117. *Id.* at 1376.

118. *Id.*

119. *Id.* (citing William J. Burns Int'l Detective Agency, Inc., 138 N.L.R.B. 449 (1962)).

120. 553 F.2d at 1376 n.27 (citing *Wackenhut Corp.*, 223 N.L.R.B. 83 (1976)).

121. 553 F.2d at 1374.

The Board's most recent pronouncement may be found in *Bally's Park Place, Inc.*,¹²² which reversed *Wackenhut*. The Board adopted a broad rule allowing all unions, qualified and nonqualified, incumbent and nonincumbent, to appear on the ballot, provided the petition was filed by a qualified union. Employee free choice was cited as the paramount policy to be fostered by this rule.¹²³

The Board recently decided to review the *Bally's* rule. In *Brink's, Inc.*,¹²⁴ the acting director of the Board's regional office in New York City ordered an election in a unit of the employer's guards and armored couriers.¹²⁵ The petition had been filed by a qualified union. Based on an adequate showing of interest, a Teamster local was permitted to intervene and appear on the ballot.¹²⁶ The employer requested the Board's review of the region's decision that the petitioning union was a labor organization within the meaning of the Act.¹²⁷ Although the Board denied the employer's request for review of the issue decided by the region, it *sua sponte* granted review on, and invited the parties to brief, the issue of whether the intervenor should be allowed to appear on the ballot.¹²⁸ Therefore, the Board has the

122. 257 N.L.R.B. 777 (1981). The petition in *Bally's* requested that an election be conducted by the Board in a unit of the employer's Atlantic City casino guards. *Id.* at 780. It was filed by Casino Police and Security Officers, Local 2, an affiliate of the Federation of Special Police and Law Enforcement Officers. *Id.* at 777. After the petition was filed, intervenor status was granted to Local 40-B, International Brotherhood of Law Enforcement and Security Officers, an affiliate of a New Jersey Building Trades Council. *Id.* at 777, 778 n.8. The employer challenged the labor organization status of both unions, but the Board rejected these arguments. The employer also argued that both unions were affiliated with nonguard unions. While the Board rejected this contention with respect to the petitioning union, it found that the intervenor's affiliation with the Building Trades Council precluded it from being certified as the representative of the guards. *Id.* at 777-79. Since the intervenor was not an incumbent union, the Board thus was required to reconsider its decision in *Wackenhut*.

123. *Id.* at 779. In accordance with prior cases, the Board also held that if the nonqualified union won the election, the Board would certify only the arithmetical results of the election. *Id.* at 780.

124. 2-RC-19536 June 14, 1983 (unpublished decision of Regional Director, Region 2, New York City).

125. *Id.*

126. *Id.*

127. Unpublished correspondence from Robert Volger, Deputy Executive Secretary of the Board, dated July 13, 1983 (available in Fordham Univ. School of Law Library) [hereinafter cited as Volger letter]. Section 102.67 of the Board's Rules and Regulations provides for the filing of requests for review. *See* RULES AND REGULATIONS, *supra* note 16, at § 102.67, 29 C.F.R. 102.67 (1983). The Board has discretion to grant review where there are compelling reasons for reconsidering an important Board rule or policy. LABOR CASES, *supra* note 16, at 309.

128. Volger letter, *supra* note 127.

opportunity to reconsider the arguments for and against allowing nonqualified unions to participate in its election processes.¹²⁹

As the District of Columbia Circuit stated in *Drivers Local No. 71 v. NLRB (Wells Fargo Armored Serv. Corp.)*, the Board has discretion to allow nonqualified unions to participate in its election processes.¹³⁰ The language of section 9(b)(3) does not prohibit such access expressly, although an argument can be made that such a restriction is implied.¹³¹ Since there is no direct support in the legislative history for such a restriction,¹³² however, the Board is on unstable ground if it deprives nonqualified unions of access to its election procedures merely by citing "the purpose of section 9(b)(3)," as it did in *Wackenhut*.¹³³ Rather, the Board should consider the various policies and interests in each case carefully and articulate why it is granting or denying a nonqualified union the opportunity to participate in an election.¹³⁴

129. The Board's determination of this issue cannot be predicted, since the only current member who took part in prior decisions in this area is Member Zimmerman. The Board presently is composed of four members: Zimmerman, who was appointed in 1980; Hunter, who was appointed in 1981; Dotson, who was appointed as Chairman in March 1983; and Dennis, who was appointed in May 1983. Greenhouse, *Labor Board Stirs Up a Storm*, N.Y. Times, Feb. 5, 1984, at D12, cols. 2-6. Zimmerman is the only one of the four who participated in *Bally's*, which was decided by members Fanning, Jenkins and Zimmerman on August 14, 1981. *Bally's*, 257 N.L.R.B. at 777. Member Hunter, who was appointed to the Board effective that same day, did not participate in *Bally's*, nor did former Chairman Van de Water, whose appointment was effective as of August 18, 1981. See the listing of members in Board volume 257, at page III.

130. See *supra* notes 116-20 and accompanying text.

131. See *supra* note 49 and accompanying text, which sets forth such an argument.

132. The clearest insight into Congress' intent in passing section 9(b)(3) can be obtained by reading the remarks of Sen. Taft. See *Legislative History, supra* note 33, at 1544. The conferees made it clear that section 9(b)(3) was a limitation on the Board's powers of certification, but did not elaborate on how such a bar affected access to the Board's election procedures. *Id.* at 1541.

133. See *Wackenhut*, 223 N.L.R.B. at 83.

134. See *generally*, *NLRB v. North Shore Univ. Hosp.*, 724 F.2d 269 (2d Cir. 1983). In *North Shore*, the Board certified a union as the representative of the employer's nurses. The employer refused to bargain, arguing that the union should not have been certified because supervisors controlled its affairs. The Board rejected the employer's argument and held that its refusal to bargain was unlawful. The court of appeals denied enforcement of the Board's order, noting that the case presented a conflict between two policies of the Act. The policy of employee free choice conflicted with the policy of ensuring that employer agents do not improperly influence collective bargaining on behalf of employees. The court found that the Board's decision did not adequately address the conflict between these two policies, and remanded to the Board to consider all relevant circumstances in deciding whether to disqualify the union. *Id.* at 273-74.

When a petition for an election is filed, the Board must consider several discrete interests. First, there is the overriding public interest in resolving the question concerning representation and promoting the Act's policies.¹³⁵ The Board is vested with the power to effectuate these policies.¹³⁶ Second, there is the employees' interest in selecting a collective bargaining representative.¹³⁷ Third, there is the union's interest in becoming the employees' representative.¹³⁸ Although the union may obtain representation rights without using the Board's processes,¹³⁹ an election conducted by the Board can be advantageous. Even where the union is nonqualified and hence cannot obtain a certification after the election, the secret ballot conducted by the Board gives it an opportunity to demonstrate its majority status to the employer. A demonstration of such support might prompt the employer to grant voluntary recognition after the certification of arithmetical results. Finally, there is the employer's interest in maintaining the undivided loyalty of its guards.¹⁴⁰ Although the full scope of section 9(b)(3)'s protection of the employer is unclear, it is certain that by preventing Board certification of nonqualified unions, the employer is given the right to refuse such a union's initial request for recognition.¹⁴¹ The Board has the difficult task of exercising its discretion against this panoply of competing and sometimes conflicting interests.

It is obvious that where an incumbent nonqualified union is involved, certain factors favor allowing it to participate in an election.

135. See *supra* note 19.

136. See *Container Corp.*, 61 N.L.R.B. 823 (1945) (in representation proceedings involving contract bar issues, Board weighs two basic interests which the Act was designed to foster and protect: society's interest in stability of industrial relations achieved through collective bargaining and employees' interest in freedom to choose bargaining representatives). *Id.* at 826.

137. The employees' right to select a collective bargaining representative is protected by section 7 of the Act. See *supra* note 38.

138. Once the union becomes the representative of the unit, the employer is under an obligation to bargain with it. 29 U.S.C. § 158(a)(5) (1976). The union and the employer may negotiate a clause in their collective bargaining agreement requiring that employees join the union. *Id.* § 158(a)(3). The union has the right to prescribe its own rules with respect to acquisition or retention of membership. *Id.* § 158(b)(1)(A). However, the union has a fiduciary duty to the employees in the bargaining unit to represent them fairly with regard to grievances and collective bargaining. See generally, *LABOR CASES supra* note 16, at 994-1054 (*The Right to Fair Representation, Part 7, Subdiv. I*).

139. See *supra* note 65, describing the ways in which a union may obtain representation rights.

140. The employer's interest in the loyalty of its guards is protected by section 9(b)(3). See *supra* note 31 and accompanying text.

141. See *supra* note 69.

These include the public interest in maintaining the stability of the bargaining relationship, the employees' membership in and familiarity with the incumbent union, and the union's interest in continuing as the representative. As far as the employer's interest is concerned, the Board safely may assume that the employer would not have recognized the incumbent nonqualified union voluntarily if such representation divided the loyalty of its guards.¹⁴² Thus, allowing the nonqualified union to appear on the ballot advances almost all of the interests the Board considers in applying the Act. This was the Board's approach in *Burns*.¹⁴³

In contrast, allowing a nonincumbent, nonqualified union to appear on the ballot advances fewer interests and policies. The Board is not facilitating the continuation of a stable bargaining relationship, with its concomitant benefits to the parties and the public. However, the Board is advancing other important interests. Allowing the nonqualified union to appear on the ballot benefits the employees by permitting them to choose among all the unions interested in representing them.¹⁴⁴ It also benefits the nonqualified union by giving it the opportunity to demonstrate proof of majority status, which might prompt the employer to grant voluntary recognition.¹⁴⁵ Allowing such access does not significantly affect the employer's interest, since section 9(b)(3) prevents the Board from certifying the union if it wins the numerical vote.¹⁴⁶ Thus, the Board is not depriving the employer of its right to refuse to recognize the union on an initial request for recognition. The only arguable detriment to the employer in the *Bally's* election procedure is that it provides a victorious nonqualified union with support when seeking voluntary recognition.¹⁴⁷ It can be argued that it is improper for the Board to so assist the union in gaining voluntary recognition.¹⁴⁸ However, if Congress considered this assistance improper, it could have placed broader prohibitions on the

142. See *infra* notes 195-97 and accompanying text, which explain the concept of "divided loyalty."

143. See *supra* notes 88-91 and accompanying text.

144. *Bally's Park Place, Inc.*, 257 N.L.R.B. 777, 779 (1981).

145. See *supra* note 65 and accompanying text, which explain that proof of majority status is a prerequisite to the existence of a bargaining obligation.

146. See *supra* notes 23-25 and accompanying text.

147. See *supra* note 65, which explains that majority status is one of the elements that must be proven before the union can obtain lawful voluntary recognition.

148. This argument apparently relies on a broad interpretation of section 9(b)(3) which would prohibit the Board from certifying *or in any way assisting* nonqualified unions in obtaining recognition. Concerning Congress' ambiguity with respect to the Board's election processes, see *supra* note 132.

Board, as it did in sections 9(f) and (h),¹⁴⁹ or precluded voluntary recognition altogether.¹⁵⁰

The only other possible detrimental result of the *Bally's* election procedure is that nonqualified unions can "jump" on the ballot" without providing any substantial evidence of employee support.¹⁵¹ In view of the Board's discretion in this area, it should consider requiring that a nonqualified union which seeks to intervene present a full thirty percent showing of interest. Adoption of such a rule would show true concern for employee freedom of choice while preventing any perceived abuse of the Board's election procedures.¹⁵²

In sum, the Board must consider the interests of the public, the employees, the union and the employer carefully before it permits a nonqualified union to appear on the ballot. If the Board decides to retain the broad *Bally's* rule, it should provide a well reasoned rationale for doing so. However, as the Board noted in *Wackenhut*, the nonqualified union need not rely solely on the Board's procedures to

149. See *supra* note 42.

150. See *supra* notes 57-58 and accompanying text.

151. *Wackenhut*, 223 N.L.R.B. at 83. The rationale for the Board's showing of interest requirement is set forth *supra* at note 84. The requirements for intervention are described *supra* at note 87. It should be noted that these are rules applied to the broad class of cases before the Board and are not peculiar to guard cases.

The majority in *Wackenhut* did not elaborate on why it is more harmful to allow intervenors to "jump" on the ballot" with only one authorization card in elections involving guards than it is in other elections where guards are not involved. Perhaps they were concerned with the possibility of collusion between an employer and a nonqualified union to deprive guard employees of all representation. This could occur where a nonqualified union obtains a place on the ballot by submitting only one card, campaigns on the pretense that it wishes to represent the employees, wins the election, and obtains only a certification of the arithmetical results. If the employer and the nonqualified union have agreed in advance that the employer will refuse to bargain after the certification of results, and the union then walks away from the shop, the guards have been deprived of representation collusively, although the very purpose of allowing the nonqualified union on the ballot was to ensure a full range of choices to the employees. This type of collusion is more likely to occur in guard cases, where the Board election can never result in the certification of the intervening union, than in nonguard cases, where both the employer and the winning union have an obligation to bargain with one another following the certification. See 29 U.S.C. §§ 158(a)(5), (b)(3) (1976).

152. See *supra* notes 101-11, 123. Adoption of this approach would avoid the anomaly that, under the Board's present practices, a nonqualified union with only one authorization card can get on the ballot as an intervenor, while a nonqualified union with cards from thirty percent of the employees cannot get an election unless a petition first is filed by a qualified union. See *supra* notes 85-91 and accompanying text. Opportunity to participate in the Board's election processes should result from employee support, not from the fortuitous filing of a petition by another union. In view of the unique nature of section 9(b)(3), the Board would be justified in making this exception to its general rules regarding intervention.

obtain recognition.¹⁵³ Thus, to fully understand the debate over the *Bally's* rule, it is necessary to understand how section 9(b)(3) operates in the context of a voluntary bargaining relationship between an employer and a nonqualified union.

V. Voluntary Recognition of Nonqualified Unions in the Security Industry: The Balance Between Section 9(b)(3) and Section 8(a)(5)

Voluntary recognition has been a significant factor in the security industry for many years.¹⁵⁴ Yet, section 9(b)(3) does not state how, or if, it affects bargaining relationships voluntarily commenced by employers and nonqualified unions.

The Board protects voluntary bargaining relationships pursuant to its mandate to promote industrial stability.¹⁵⁵ A voluntarily recognized union may apply for these protections by filing an unfair labor practice charge under section 8(a)(5), which makes it unlawful for an employer to refuse to bargain collectively with the representative of its employees,¹⁵⁶ if the representative can prove that it was selected by a majority of the employees in an appropriate bargaining unit.¹⁵⁷ Once a bargaining relationship is established between a union and an employer,¹⁵⁸ various rights accrue from that relationship.

One right that accrues is expressed in the "contract-bar" doctrine. Under this doctrine, the Board will dismiss a petition for an election in a unit that is covered by an existing collective bargaining agree-

153. 223 N.L.R.B. at 84.

154. By 1953, the Teamsters had forty-two separate collective bargaining agreements covering the guards employed by Brink's, Inc., notwithstanding the fact that the union is nonqualified under the Act. *Senate Hearings, supra* note 10, at 586 (prepared statement of Brink's, Inc., an armored courier company). In 1948, the Board held that armored couriers were not covered by section 9(b)(3). In 1953, it reversed this precedent. *See supra* note 52. As of 1977, Brink's had almost 5,000 employees, a large majority of whom were members of the Teamsters. *Senate Hearings, supra* note 10, at 577 (remarks of Silvers). The Service Employees' International Union, a similarly nonqualified union with 600,000 members nationwide, estimates that at least 15,000 of its members are employed as guards. *Id.* at 1287 (prepared statement of SEIU organizer John Geagan).

155. *See* 29 U.S.C. § 151 (1976) (quoted *supra* at note 19). Amoco Oil Co., 221 N.L.R.B. 1104, 1108 (1975) discussed *infra* text accompanying notes 165-71.

156. *See* 29 U.S.C. § 158(a)(5) (1976).

157. *See* 29 U.S.C. § 159(a) (1976).

158. The Sixth Circuit has found that the purpose of section 9(b)(3) prevents the Board from ordering an employer to bargain with a nonqualified union when the employer refuses to do so. *See White*, 404 F.2d at 1103. This section of the Note deals with issues that arise after an employer has agreed to recognize the nonqualified union and later seeks to terminate the relationship or fails to meet its bargaining obligation in some other way.

ment.¹⁵⁹ The Board justifies the exclusion as stabilizing the relationship between employers and their employees' representatives for the duration of a reasonable contract term.¹⁶⁰ The Board has held that a nonqualified union's collective bargaining agreement covering a guard unit bars the processing of a qualified union's petition to represent the guards.¹⁶¹ The Board noted that the unit was appropriate since it contained only guards and that the collective bargaining agreement was completely lawful. Under these circumstances, the Board did not consider certification to be a prerequisite for applying its contract-bar rule.¹⁶²

Another right which flows from a collective bargaining relationship is the right of both the union and the employer to select their own bargaining representatives.¹⁶³ A corollary to this right requires that, in the absence of exceptional circumstances, both the employer and the union must deal with the representative chosen by the other party.¹⁶⁴

159. LABOR LAW 1983, *supra* note 21, at 167. The doctrine is there described as discretionary and self-imposed by the Board. *Id.*

160. American Dyewood Co., 99 N.L.R.B. 78, 80 (1952), discussed *infra* at note 162.

161. See *Burns*, 134 N.L.R.B. 451, 453 (1961), discussed *supra* at note 60.

162. *Id.* The issue is different in the case of a mixed guard/nonguard unit. In *American Dyewood*, 99 N.L.R.B. at 78, the Board held that a collective bargaining agreement covering a voluntarily established mixed unit of guards and nonguards barred the processing of a petition seeking an election among only nonguards. Where the petition sought to sever the guards from an existing voluntarily established mixed unit, however, the Board did not apply its contract-bar rule. In *Monsanto Chem. Co.*, 108 N.L.R.B. 870 (1954), the Board distinguished *American Dyewood* by reasoning that conducting an election among the guards, who were fewer in number than the nonguards, did not disturb the stability of the bargaining relationship for the bulk of the employees in the mixed unit. *Id.* at 871. In *Fisher-New Center Co.*, 170 N.L.R.B. 909 (1968), a collective bargaining agreement covering a voluntarily established mixed unit was held not to bar a decertification election involving the guard portion of the unit, although the Board's general rule is that a decertification petition must be coexistent with the current contractual bargaining unit. *Id.* at 909-10. The Board reasoned that if it applied its contract-bar rule and dismissed the petition, it would be acknowledging the appropriateness of the mixed unit. *Id.* at 910. Another case involved a mixed unit of guards and nonguards employed by a group of employers who bargained together, also known as a multi-employer unit. In that case, the Board made an exception to its usual rule which gives controlling weight to a history of bargaining on a multi-employer basis and conducted an election limited to the guards of a single employer within that unit. *Los Angeles Bonaventure Hotel*, 235 N.L.R.B. 96, 96 (1978).

163. *General Electric Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969).

164. The court in *General Electric* discussed the type of exceptional circumstances which justify an employer's refusal to deal with a chosen representative, and stated: "There have been exceptions to the general rule that either side can choose its bargaining representative freely, but they have been rare and confined to situations so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical." *Id.* at 517.

In *Amoco Oil Co.*,¹⁶⁵ the Board affirmed its position that the right to select bargaining representatives is incident to a voluntary bargaining relationship as well as to a certified one. In *Amoco*, a nonqualified union represented both guards and nonguards of the employer in separate bargaining units. Notwithstanding the existence of separate units and collective bargaining agreements, the employees elected a guard to a position that involved administration and negotiation of both contracts.¹⁶⁶ The employer refused to deal with the guard as the union's chosen representative, arguing that its action was lawful because section 9(b)(3) required a complete separation of guards from nonguards in collective bargaining.¹⁶⁷ The Board held that the employer's refusal to deal with the representative violated section 8(a)(5).¹⁶⁸ The Board noted that the guards and nonguards were in separate units and further observed that, although they both were represented by the same nonqualified union, the employer voluntarily agreed to extend recognition.¹⁶⁹ A factor which strongly influenced the *Amoco* decision was the parties' bargaining relationship of almost forty years. Once the parties have such a relationship, the Board concluded, the employer cannot refuse to deal with the employees' chosen representative "absent some statutory or legal impediment."¹⁷⁰ Without specifying what types of impediments would justify a refusal to bargain, the Board concluded that none was present in *Amoco*, implying that section 9(b)(3) does not constitute a statutory impediment to the continuation of an established bargaining relationship.¹⁷¹

The Board recently addressed the issue of whether an employer who voluntarily recognizes a nonqualified union in a unit of guards is privileged to withdraw recognition under section 9(b)(3).^{*} Less com-

165. 221 N.L.R.B. 1104 (1975).

166. *Id.* at 1105.

167. *Id.* at 1106.

168. *Id.* at 1104.

169. *Id.*

170. *Id.*

171. *Id.*

*Editor's Note:

On May 18, 1984, after this book first went to press, the Board issued its decision in *Wells Fargo Armored Serv. Corp.*, 270 N.L.R.B. No. 106, 116 L.R.R.M. 1129 (1984). The Administrative Law Judge's decision in *Wells Fargo* is discussed *infra* at notes 174-204 and accompanying text. Contrary to the judge, the Board dismissed the complaint against Wells Fargo and held that it was privileged to withdraw from its voluntary collective bargaining relationship with a mixed guard-nonguard union at the time it chose to do so (after the expiration of its collective bargaining agreement with the union). 116 L.R.R.M. at 1132. On May 23, 1984, the union filed a petition for review in the United States Court of Appeals for the Second Circuit. *Local 807, International Bhd. of Teamsters v. NLRB*, No. 84-4083 (2d Cir. filed May 23, 1984).

plex aspects of this problem have been raised in cases involving mixed and therefore inappropriate guard/nonguard units,¹⁷² as well as erroneously certified, nonqualified unions.¹⁷³ In contrast, *Wells Fargo Armored Service Corp.*,¹⁷⁴ involving a pure guard unit and a forty year history of voluntary recognition, presents the Board with a novel issue. In *Wells Fargo*, the Board has the difficult task of construing the Congressional intent behind section 9(b)(3) in relationship to the Board's established policy of preserving voluntary bargaining relationships.

The charge in *Wells Fargo* arose out of collective bargaining negotiations between the armored courier company and Local 807 of the Teamsters, the representative of its employees.¹⁷⁵ The parties were unable to agree and a strike ensued.¹⁷⁶ Approximately six weeks into the strike, after writing to its employees and unsuccessfully urging them to accept the company's last offer at the bargaining table,¹⁷⁷

172. See *Appleton Elec. Co.*, 93 L.R.R.M. 1329 (1976) (Advice Memorandum of NLRB General Counsel) (section 8(a)(5) charge dismissed where unit was inappropriate); *Barnard College*, 5 N.L.R.B. ADVICE MEM. REP., ¶ 12,084 (1978) (section 8(a)(5) charge dismissed where unit was inappropriate; Division of Advice buttressed this finding by noting that union was nonqualified).

173. See *Mack Mfg.*, 107 N.L.R.B. 209, 212 (1953) (Board refused to issue bargaining order and revoked union's certification to represent unit of guards where affiliation with nonguard union was discovered after issuance of certification).

174. JD-98-82, slip op., New York, N.Y. (March 3, 1982).

175. In 1948, Local 820 of the Teamsters was certified as the collective bargaining representative of the chauffeurs, custodians and guards in Wells Fargo's armored car division in the New York City area. JD-98-82, at 2. The bargaining unit covered employees working out of facilities in the New York metropolitan area, including Westchester, Nassau, Suffolk, Orange, Putnam and Rockland Counties in New York, and Essex, Bergen, Hudson, Passaic, Union and Morris Counties in New Jersey. At the time of the certification, the Board's position was that armored couriers were not guards within the meaning of the Act. See cases cited *supra* at note 52. Wells Fargo and Local 820 subsequently entered into a series of contracts. In 1979, Local 820 merged into Local 807 of the Teamsters. *Wells Fargo*, JD-98-82, at 2. Wells Fargo thereafter dealt with Local 807 as its employees' representative. JD-98-82, at 3.

176. *Id.*

177. *Id.* at 5. The letter to employees stated in part:

Collective bargaining between your Union and your Company began on February 26, 1980, and . . . concluded on April 11, 1980. During the course of these talks, the Company's representatives explained to the Union how, in the past, the condition of the business had so deteriorated that the Company's New York branch had been losing money for several years. These losses were due primarily to the ever-increasing number of non-Union competitors entering the armored car business in New York. Because of this serious condition, it was necessary for the Company to ask the Union and you to agree to changes in the contract . . . We urge you, therefore, to support your Company and your own future. Return to your

Wells Fargo withdrew recognition,¹⁷⁸ Local 807 filed unfair labor practice charges, and a complaint was issued.¹⁷⁹ Wells Fargo stated that it had withdrawn recognition after such a long bargaining history because it believed that Local 807 was not as "security minded" as Local 820.¹⁸⁰ The company argued that its voluntary bargaining relationship with the Teamsters constituted bargaining at will—that it retained the right to end its relationship with the union at any time. The company also argued that the presence of an actual or potential conflict of loyalties in its guard workforce should permit the withdrawal of recognition.¹⁸¹ The administrative law judge (ALJ) rejected these contentions and found a violation of section 8(a)(5), citing the proposition that once an employer voluntarily has recognized a non-qualified union, its refusal to continue to bargain may be in derogation of the employees' section 7 rights.¹⁸² Wells Fargo's "conflict of interest" justification was rejected as pretextual by the ALJ because it had been asserted for the first time at trial.¹⁸³ To support his findings, the judge noted that Wells Fargo had bargained with the union and urged the employees to accept the previous bargaining offer prior to withdrawing recognition. He concluded that recognition had been withdrawn because the employees did not accept the last offer.¹⁸⁴ He added that, by dealing with the union and employees during negotiations, Wells Fargo was estopped from withdrawing recognition.¹⁸⁵

Union officers and tell them you want to . . . [accept] the Company's last offer for a new labor contract.

Id.

178. *Id.* at 3.

179. *Id.* at 1. The complaint alleged that the withdrawal of recognition was unlawful and that the strike was converted into an unfair labor practice strike as a result of the withdrawal. *Id.*

180. *Id.* at 6. The employer witnesses claimed that they reached this conclusion about Local 807 by comparing it to Local 820, whose membership was comprised entirely of guards, whose representatives did not challenge the reasonableness of Wells Fargo's security rules, and whose leaders had expressed a policy that they would cross a picket line—all in contrast to Local 807. *Id.* at 6-8.

181. *Id.* at 2.

182. *Id.* at 12, 15 (citing *White*, 404 F.2d 1100 (6th Cir. 1968) and *Amoco*, 221 N.L.R.B. 1104 (1975)). An employer violation of section 8(a)(5) is not solely in derogation of the union's rights as bargaining representative. A violation of section 8(a)(5) or any other provision of section 8(a) has been held to violate section 8(a)(1) derivatively, because it restrains and coerces employees in their right to be represented by a union of their choice. LABOR LAW 1983, *supra* note 21, at 75.

183. *Wells Fargo*, JD-98-82, at 18.

184. *Id.*

185. *Id.* The judge analogized section 9(b)(3) to section 9(b)(1), which prohibits the Board from finding a mixed unit of professionals and nonprofessionals appropriate without first conducting a self-determination election for the professionals. *Id.* at

Both parties urged the adoption of a broad rule for application to similar cases involving nonqualified unions,¹⁸⁶ but the judge declined to adopt either proposal, carefully limiting his decision to the specific facts of the case.¹⁸⁷

A close analysis of the language of section 9(b)(3) reveals a dual Congressional purpose behind the provision. The first portion of the section deals with appropriate bargaining units; groups of employees the Board finds to share a "community of interest."¹⁸⁸ Congress stated that guards have a loyalty to the employer which is not required of other employees and expressly precluded the Board from placing them in the same unit with other employees.¹⁸⁹ Since proof of the existence of an appropriate unit is a prerequisite to the issuance of a bargaining order,¹⁹⁰ it seems reasonably clear that Congress did not intend to allow the Board to issue bargaining orders in voluntarily established mixed guard/nonguard units.¹⁹¹

15-17. 29 U.S.C. § 159(b)(1)(1976). He cited *ITT Corp. v. NLRB*, 382 F.2d 366 (3d Cir. 1967), which affirmed the Board's finding of a violation where an employer withdrew from a bargaining relationship covering a mixed professional/nonprofessional unit. *Wells Fargo*, JD-98-82, at 16-17. Although the Board had erroneously certified the unit without conducting the requisite election in *ITT*, the employer's continued dealings with the union were found to constitute consent to the mixed unit, and its subsequent refusal to deal with the union was found to be an unjustified disruption of the bargaining process. *ITT Corp.*, 382 F.2d at 370.

186. The employer argued that recognition could be withdrawn at anytime, or at least when circumstances in the bargaining relationship established the potential for conflicting loyalties in the guard unit. *Wells Fargo*, JD-98-82, at 2. In contrast, the union and the Board's general counsel contended that the standard for lawful withdrawal of recognition should be that which is applied in all other cases—good-faith doubt of continued majority status. *Id.* at 19. This test was originated by the Board in *Celanese Corp. of Am.*, 95 N.L.R.B. 664, 671-73 (1951).

187. *Wells Fargo*, JD-98-82, at 19. *Wells Fargo* filed exceptions to the ALJ's decision on April 26, 1982 and the Board presently is considering the case. Unpublished correspondence from Joseph E. Moore, Assoc. Executive Secy. of the Board, March 9, 1984 (available in Fordham Univ. School of Law Library). If the Board reverses the ALJ and holds that an employer lawfully can withdraw recognition under the circumstances presented by *Wells Fargo*, it can be argued that this holding will extend the application of section 9(b)(3) beyond the intent of Congress, disregarding important policies behind the Act. See *infra* notes 203-04 and accompanying text.

188. LABOR LAW 1983, *supra* note 21, at 201 (citing 15 N.L.R.B. ANN. REP. 39 (1950)).

189. See *supra* notes 31-36 and accompanying text.

190. See *supra* note 65.

191. See *supra* notes 172 & 173. The Board's Division of Advice has stated that a mixed guard/nonguard unit is "inappropriate for any purpose." *Barnard College*, 5 N.L.R.B. ADVICE MEM. REP. at ¶ 12,084 (June 1978) (citing, *inter alia*, *Burns Int'l Detective Agency, Inc.*, 134 N.L.R.B. 451 (1961) and *Fisher-New Center Co.*, 170 N.L.R.B. 909 (1968)). This statement is misleading, since a voluntarily established

The second portion of section 9(b)(3) differs from the first in an important way. Congress did not declare a guard unit to be inappropriate where its representative is a nonqualified union.¹⁹² Since such a unit is appropriate, there seems to be no impediment to the issuance of a bargaining order covering it, regardless of the union's identity.¹⁹³ Thus, the two portions of section 9(b)(3) are designed to address two types of conflicting loyalties. The first portion deals with the inherent and direct conflict that occurs where guards and nonguards employed by the same employer are included in the same bargaining unit for purposes of collective bargaining.¹⁹⁴ The second portion addresses the indirect conflict that could occur where a nonqualified union represents guards. In the latter case, if the nonqualified union does not represent the employer's nonguards, divided loyalty may not occur among the employer's guards.¹⁹⁵ The absence of a provision prohibiting voluntary recognition of nonqualified unions appears to reflect

collective bargaining agreement covering a mixed unit may, in certain circumstances, bar an election. See cases cited in *supra* notes 62 & 162.

192. *Burns*, 134 N.L.R.B. at 453.

193. *Amoco*, 221 N.L.R.B. at 1104.

194. See *supra* note 35.

195. To understand the concept of "divided loyalty" in both its direct and indirect manifestations, a distinction should be made between plant guards and armored couriers. Plant guards physically remain on the employer's premises. Congress primarily was concerned that, if the plant guards belong to the union that represents the employer's nonguards, the guards' loyalty to the employer might be threatened directly by loyalty to the union in the event of a strike. See *supra* note 31 and accompanying text.

Congress also was concerned that, if the guards belong to a union different from that of the production employees, but the two unions are affiliated indirectly, a conflict of loyalties might occur. See *Legislative History*, *supra* note 33, at 539-40. In this case, the international union might have some common control over both the guards and the nonguard employees, which could pressure the guards to honor the picket line set up by the union of the nonguard employees. This type of conflicting loyalty is also prevented by section 9(b)(3).

In contrast to plant guards, armored couriers do not perform their duties at a fixed location. Yet, the Board has held that they are guards with respect to protection of the property on their trucks. See *supra* note 52. If the courier endangers the property on the truck by refusing to cross a picket line, this may be the type of divided loyalty Congress sought to prevent. However, the problem only would be covered by section 9(b)(3) if the guard is a member of a nonqualified union and the picket line is sponsored by a nonqualified union. Section 9(b)(3) fails to address the conflict that occurs when a courier who is assigned to make a delivery to a plant where the guards are on strike refuses to cross the picket line because he belongs to the same union as do the guards at the plant. Yet this section arguably was created to prohibit this type of divided loyalty. See *House Hearings*, *supra* note 55, at 491 (statement by Nat'l Armored Car Ass'n and Indep. Armored Car Operators Ass'n). See also *Bally's Park Place, Inc.*, 257 N.L.R.B. 777, 779 n.12 (Zimmerman, member, concurring) ("[t]he language of section 9(b)(3) is, in part, contrary to the intent of Congress as expressed in its own legislative history").

Congress' judgment that the employer should be left free to decide whether there is potential for divided loyalties at the time a voluntary bargaining relationship is entered into.¹⁹⁶

The *Wells Fargo* case illustrates the problems of integrating section 9(b)(3) into the overall statutory scheme. Congress allowed voluntary recognition, but did not state whether such recognition could be withdrawn if conflicting loyalties later develop during the bargaining relationship.¹⁹⁷ Therefore, in the absence of express statutory or legislative mandate, the Board should consider all the underlying policies of the Act in deciding whether termination of voluntary bargaining relationships between employers and nonqualified unions should be governed by the same rules as are other cases, or whether the purpose of section 9(b)(3) requires the fashioning of a different rule.

In *Wells Fargo*, both the union and the Board's General Counsel argued that an employer who voluntarily recognizes a nonqualified union should be permitted to withdraw recognition only if it has a good-faith doubt of the union's majority status.¹⁹⁸ This approach promotes industrial stability by preserving established bargaining relationships, thus advancing the underlying policies of the Act and protecting the interest of the employees and the union.¹⁹⁹ Under this approach, the employer's interest in the undivided loyalty of its guards is protected to the extent it is never compelled to extend *de novo* recognition to a nonqualified union.²⁰⁰ If the employer voluntarily extends such recognition and a conflict of loyalties arises during the bargaining relationship, the employer can only negotiate with the union to obtain a collective bargaining agreement which minimizes the conflict; it cannot escape from the bargaining obligation altogether.²⁰¹

196. *Burns Int'l Detective Agency, Inc.*, 134 N.L.R.B. at 453.

197. See *supra* notes 57-58 and accompanying text.

198. *Wells Fargo*, JD-98-82, at 19.

199. See generally, *Celanese*, 95 N.L.R.B. at 671-73 (employer had reasonable grounds to believe that union had lost its majority since its certification; no unlawful refusal to bargain found).

200. *Wells Fargo*, JD-98-82, at 15.

201. See *supra* note 185. For example, the employer could negotiate for a broad no-strike clause, or for a requirement that the union provide notice before initiating a strike. The Board refused to adopt this approach in a case of initial recognition. *Local 639 Int'l Bhd. of Teamsters (Dunbar Armored Express, Inc.)*, 211 N.L.R.B. 687 (1974) (Board rejects argument that conflict of loyalty could be resolved at bargaining table). It is interesting to compare how the State of New York has addressed the guard issue in its labor legislation. There is no prohibition on mixed units of guards and nonguards. Employees have the absolute right to decide what

In contrast, Wells Fargo argued that it should be able to withdraw recognition at any time, or in the minimum, when it perceives a potential conflict of loyalties.²⁰² If adopted by the Board, this approach would advance the employer's interest in the undivided loyalty of its guards. However, it also would destabilize bargaining relationships to the detriment of the employees, the union and the public interest. Such a rule would create a species of "at will" bargaining foreign to the Act's general purpose of protecting lawfully obtained, majority-based bargaining relationships.²⁰³ Allowing withdrawal of recognition under the circumstances presented in *Wells Fargo* would penalize guards who exercise their section 7 rights to select a nonqualified union and impose a disability on nonqualified unions without any indication that Congress intended such a result.²⁰⁴

A. Recommendations for Legislative Change and Consistency by the Board

Congress should clarify the statutory rule concerning the withdrawal of voluntary recognition of nonqualified unions. A proviso could be added to section 9(b)(3) stating that it should not be construed to affect bargaining relationships voluntarily commenced by employers and nonqualified unions. Alternatively, Congress could prohibit voluntary recognition totally. If this clarification is not obtained, the Board should consistently continue its present policy of allowing withdrawal of recognition only when the employer has a good-faith doubt of majority status.²⁰⁵ Application of the rule proposed by Wells Fargo would constitute an unwarranted dilution of guards' rights to enjoy the fruits of voluntary bargaining relationships lawfully obtained by their chosen representatives.

union will represent them, and any conflicts are left for resolution by the parties at the bargaining table. *Yonkers Raceway Inc.*, New York State Lab. Rel. Bd., 63 L.R.R.M. 1098 (1966). The Board should consider applying such a test to the withdrawal of voluntary recognition, since application of such a test would not violate section 9(b)(3).

202. See *supra* text accompanying note 181.

203. See *supra* note 65.

204. See *Amoco*, 221 N.L.R.B. at 1104; see also *Wells Fargo*, JD-98-82, at 15 (citing *MRA Assocs., Inc.*, 245 N.L.R.B. 676, 677-78 (1979), where affiliation between guard and nonguard unions ended before withdrawal of voluntary recognition, affiliation did not provide defense to withdrawal; ALJ stated that to allow withdrawal under circumstances would be an "unduly mechanistic" application of law).

205. See *supra* note 186 and accompanying text.

VI. The "Puzzling Issue": The Relationship between Section 9(b)(3) and Section 8(b)(7)

Protection of lawfully obtained bargaining relationships is not the only problem the Board faces in guard cases. The Board frequently has been required to consider the "puzzling relationship"²⁰⁶ between section 9(b)(3) and section 8(b)(7)(C), which outlaws picketing as a means of obtaining recognition.²⁰⁷ To obtain a full understanding of collective bargaining issues in the security industry, it is necessary to consider this body of case law.

In the mid-1970's, the Board and the courts decided a group of cases in which nonqualified unions picketed employers to obtain recognition as the representatives of guard employees.²⁰⁸ The impetus for these cases is found in *Teamsters Local Union No. 115 (Vila-Barr Co.)*.²⁰⁹ Although *Vila-Barr* did not involve guards, it involved a unit composed of only one employee, a so-called "one-man unit." The union in *Vila-Barr* picketed to obtain recognition as the representative of this unit.²¹⁰ Such picketing generally would violate section 8(b)(7)(C) unless the union filed a petition for an election within a reasonable time.²¹¹ Under established law, however, the Board does not direct an election in a "one-man unit."²¹² The Board in *Vila-Barr* thus was presented with the question of whether such picketing violated section 8(b)(7)(C) where it was futile for the union to file a petition for an election, since it never could be certified as the representative of the "one-man unit." The Board held that the union essentially could picket forever to obtain recognition in a "one-man unit," since it was prevented "for reasons beyond its control" from

206. See *supra* note 81.

207. See *supra* notes 67-81 and accompanying text.

208. These cases often involved attempts by the Teamsters to organize the employees of armored courier companies. See *infra* notes 214-25 and accompanying text. In these cases, unions frequently argued that armored couriers were not guards within the meaning of the Act. The argument always was rejected by the Board majority. See cases cited *supra* at notes 51 & 52. The argument eventually was addressed to Congress. See *supra* notes 55-56 and accompanying text. The cases discussed in Section VI of this Note were commented upon in the congressional hearings on the Labor Reform Act of 1977. See *House Hearings, supra* note 55, at 491 (statement by Nat'l Armored Car Ass'n and Indep. Armored Car Operators Ass'n).

209. 157 N.L.R.B. 588 (1966).

210. *Id.* at 588.

211. See 29 U.S.C. § 158(b)(7)(C) (1976).

212. See *Al & Dick's Steak House, Inc.*, 129 N.L.R.B. 1207 (1961) (petition for expedited election in one-man unit dismissed; Board expressed no view as to whether picketing violated section 8(b)(7)(C)).

being certified as the unit representative.²¹³ *Vila-Barr* may be analogized to the situation under section 9(b)(3), where a nonqualified union may not be certified as the representative of a unit of guards.

Several years later, another Teamsters local argued by analogy to *Vila-Barr* when it was charged with picketing to obtain recognition in a unit of guards in *Drivers Local Union 639, International Brotherhood of Teamsters (Dunbar Armored Express Inc.)*.²¹⁴ Before it picketed, the union filed a petition for an election in the guard unit. The union withdrew its petition after being advised by the Board's regional office that the petition would be dismissed.²¹⁵ The Board agreed that the union was unable to obtain certification for a guard unit. However, the Board distinguished the facts in *Dunbar* from those in *Vila-Barr* and found the union's picketing violative of section 8(b)(7)(C). In *Vila-Barr*, the Board noted, the union was prevented from representing the unit because of the Board's policy of not conducting elections in "one-man units," whereas the union in *Dunbar* was prevented from representing guards by its voluntary practice of admitting nonguards to membership.²¹⁶ Also, the employees in *Dunbar* were free to seek certification of a guard union as their representative through the Board's processes, without resort to recognition picketing, whereas the one employee in *Vila-Barr* had no means of obtaining any form of representation if the union was not permitted to picket.²¹⁷ In sum, the Board held that dismissal of a union petition was no defense to the section 8(b)(7)(C) charge.²¹⁸

A year later, the interface between sections 9(b)(3) and 8(b)(7) was considered again in *Drivers Local No. 71 v. NLRB (Wells Fargo Armored Serv. Corp.)*.²¹⁹ The petition there was filed by a nonqualified Teamster local to represent a unit of guards and predictably was dismissed.²²⁰ The union's subsequent picketing was found violative of

213. 157 N.L.R.B. at 590-91.

214. 211 N.L.R.B. 687 (1974).

215. *Id.* at 688. After the union had been enjoined from picketing, it filed a second petition which was dismissed. *Id.* The union argued that it had not violated the Act, because it had filed a petition for an election as required by section 8(b)(7)(C). *Id.* at 689.

216. *Id.* at 690.

217. *Id.*

218. *Id.* The Board noted that sections 8(b)(7)(A) and (B) preclude picketing where a question concerning representation cannot be raised. *Id.* See *supra* notes 73-74 and accompanying text. By analogy, section 8(b)(7)(C) was also considered to prohibit picketing where the petition did not raise a valid question concerning representation. 211 N.L.R.B. at 690.

219. 553 F.2d 1368 (D.C. Cir. 1977), enforcing 221 N.L.R.B. 1240 (1975).

220. 221 N.L.R.B. at 1243. The petition did not raise a question concerning representation since the union could not be certified to represent a unit of guards. See

section 8(b)(7)(C) under *Dunbar*.²²¹ The District of Columbia Circuit enforced the Board's decision after considering the union's contention that, despite the statutory prohibition against the union's certification, the Board should have conducted an election.²²² The fallacy in the union's reasoning, according to the court, was its belief that it had a *right* to a Board-conducted election with a certification of arithmetical results. Under *Burns, Rock-Hill*, and *Wackenhut*, the court reasoned, the Board may exercise its discretion to place a nonqualified union on the ballot where preservation of industrial stability or other considerations warrant its doing so. However, the court concluded the Board also has discretion to refuse to place such a union on the ballot.²²³

In subsequent cases, the Board and the courts have reaffirmed the principle that recognitional picketing by a nonqualified union violates section 8(b)(7)(C).²²⁴ The District of Columbia Circuit considered the

supra notes 24 & 85. Member Fanning dissented. He noted that section 8(b)(7)(C) requires the Board to conduct an expedited election without regard to the provisions of section 9(c)(1). 221 N.L.R.B. at 1240. One of the requirements of section 9(c)(1) is that a question concerning representation must exist. See *supra* note 84 for text of this section. Thus, Fanning argued it was irrelevant that the petition raised no question concerning representation. It was his view that the Board should have conducted the election anyway. 221 N.L.R.B. at 1241 (Fanning, member, dissenting).

221. *Id.*

222. 553 F.2d at 1376-77.

223. *Id.* at 1376. The court expressly rejected the reasoning in Fanning's dissent concerning the provision for expedited elections without regard to section 9(c)(1). See *supra* note 220. The court noted that the language was not intended to deprive the Board of its discretion to decide whether the petition raises a question concerning representation, but was intended to dispense with pre-election hearings in the case of expedited elections. In support of this interpretation, the court cited International Hod Carriers Union of America, Local 840 (Blinne Constr. Co.), 135 N.L.R.B. 1153 (1962). *Driver's Local 71 (Wells Fargo)*, 553 F.2d at 1376 n.30. The court concluded that the Board had discretion to dismiss the petition and that any subsequent picketing by the union was violative of section 8(b)(7)(C). *Id.* at 1377. Otherwise, it reasoned, nonqualified unions would be afforded the unlimited right to picket for recognition, thus achieving greater rights than qualified unions which are capable of being certified as the representative of the employees. *Id.*

224. See Local 282, International Bhd. of Teamsters (General Contractors Ass'n of New York, Inc.), 262 N.L.R.B. 528 (1982) (Teamsters demanded that its members be hired as armed guards at construction site; Board reversed ALJ's finding that individuals were not guards and found that subsequent picketing was recognitional in nature); General Serv. Employees Union Local No. 73 (Mack Leonard), 239 N.L.R.B. 1233 (1979) (also finding, *inter alia*, violation of section 8(b)(7)(A) because employer had recognized another union at time of picketing); International Bhd. of Teamsters, Local 344 (Purolator Security, Inc.), 228 N.L.R.B. 1379 (1977), *enforced*, 568 F.2d 12 (7th Cir. 1978) (Board rejected contention that armored couriers are not guards and found that picketing had unlawful recognitional object); General Serv. Employees Union Local No. 73 (Andy Frain, Inc.), 230 N.L.R.B. 351 (1977)

issue again in *General Service Employees Union Local 73 (A-1 Security Serv. Co.)*,²²⁵ where it expanded on its reasoning in *Drivers Local 71 (Wells Fargo)*. In *A-1*, the union argued that it was entitled to an election and a certification of arithmetical results, although it had not filed a petition.²²⁶ The court addressed this argument by stating: "when the characteristics of a union conclusively preclude it from becoming a certified representative, the Board *in its discretion* may consider an 8(b)(7)(C) petition by such a union a nullity on its face."²²⁷ The court found that section 8(b)(7)(C) appears to contemplate picketing "by way of prelude to an election"²²⁸ and concluded that "where a party is disqualified from winning an election as certified bargaining representative, he cannot make use of the procedures that are intended to lead to that result."²²⁹

Presently, the Board is considering a section 8(b)(7) case that illustrates the ramifications of the *Bally's* election procedure. In *Local Union No. 803, International Brotherhood of Teamsters (St. Luke's-Roosevelt Hospital Center)*,²³⁰ a nonqualified union that easily won a *Bally's* election in a unit of hospital guards threatened to picket after the employer refused to bargain.²³¹ The union argued that section 8(b)(7) was not meant to outlaw picketing by a union that had dem-

(Board rejected contention that contract guards are not covered by section 9(b)(3); picketing for recognition in such unit held unlawful).

225. 578 F.2d 361 (D.C. Cir. 1978), *enforcing* 224 N.L.R.B. 434 (1976).

226. 578 F.2d at 371.

227. *Id.* (emphasis added).

228. *Id.* (quoting its earlier opinion in *Drivers Local 71 (Wells Fargo)*, 553 F.2d at 1377).

229. 578 F.2d at 371. In *A-1*, no picketing ever occurred. *Id.* at 365. However, the language of section 8(b)(7) also prohibits threats to picket. See 29 U.S.C. § 158(b)(7) (1976). The court held that where a nonqualified union threatens to picket, it violates section 8(b)(7)(C) immediately; since it can never be certified as the representative, it cannot take advantage of the reasonable time grace period (up to thirty days) provided for recognitional picketing in section 8(b)(7)(C). *A-1*, 578 F.2d at 370.

230. JD-115-83, slip op., New York, N.Y. (Sept. 29, 1983).

231. *Id.* at 3-4. The petition in *St. Luke's* was filed by a guard union, and the Teamsters local was permitted on the ballot pursuant to the *Bally's* rule, although it was not an incumbent labor organization. Another guard union was also permitted to intervene and appear on the ballot. The results of the election were: of 33 eligible voters, 22 votes were cast for the Teamsters, 7 votes were cast for "no union," and no votes were cast for either of the two guard unions. *Id.* at 3. The lack of election support for the petitioning guard union is curious, since a petitioner must demonstrate at least a thirty percent showing of interest in support of its petition. See *supra* note 84.

The union's threat to picket was enjoined while unfair labor practice charges were pending. *Silverman v. Local No. 803, International Bhd. of Teamsters, No. 83-2095*, slip op. (S.D.N.Y. Apr. 11, 1983).

onstrated its majority status in an election.²³² The ALJ rejected this argument, finding a violation of section 8(b)(7)(B) under the clear language of the statute, since a valid election had been held in the past twelve months.²³³ The judge concluded that it was immaterial that the union had won the election. Since the union could not be certified, either a threat to picket or picketing of any duration violated section 8(b)(7)(C).²³⁴

The union filed exceptions to the judge's decision in *St. Luke's*, and the Board presently is considering the case.²³⁵ The union's argument has superficial appeal. It won a Board election, and the employer refused to bargain. Since section 9(b)(3) prevents the union from being certified, why should it be precluded from picketing to achieve voluntary recognition? Arguably, this case should not be governed by section 8(b)(7), which places predominant emphasis on picketing in derogation of employee free choice.²³⁶ However, the contrary view is that the statute's clear language prohibits recognition picketing conducted within a year of a Board election regardless of whether the picketing union has won or lost the election.²³⁷

The application of section 8(b)(7)(C) to the facts of *St. Luke's* is not as clear. This section prohibits picketing conducted without the filing

232. *Silverman v. Local No. 803*, No. 83-2095, slip op. at 6. Since the statute does not distinguish among elections on the basis of whether they are won or lost, the union's argument would have required the ALJ to ignore the clear language of the statute to find that picketing was only prohibited where the union lost the election. *St. Luke's*, JD-115-83, at 3-4.

233. *St. Luke's*, JD-115-83, at 3-4. See *supra* note 74 and accompanying text.

234. *Id.* at 7. The ALJ cited *Dunbar* and *A-1* in support of his decision. *Id.* at 6.

235. Correspondence from Joseph E. Moore, Assoc. Executive Secretary of the Board, March 9, 1984 (available in Fordham Law School Library).

236. Section 8(b)(7)(A) prohibits picketing where another union lawfully has been recognized as the employees' representative. 29 U.S.C. § 158(b)(7)(C) (1976). Section 8(b)(7)(B) prohibits picketing where a valid election has been conducted in the past year. 29 U.S.C. § 158(b)(7)(B) (1976). A certifiable union has no need to picket after winning a Board election, since the employer is obligated to recognize it. See *supra* note 65. If the union is rejected by the employees in the election and it pickets to obtain recognition, section 8(b)(7)(B) applies. LABOR LAW 1983, *supra* note 21, at 1091.

Finally, section 8(b)(7)(C) is directed at picketing that occurs without the filing of a petition and provides for an expedited election to determine employee sentiment. 29 U.S.C. § 158(b)(7)(C) (1976). As the Board stated in *Blinne*, "[b]y this device machinery can quickly be set in motion to resolve by a free and fair election the underlying question concerning representation out of which the picketing arises. This is the normal situation, and the situation which the statute is basically designed to serve." 135 N.L.R.B. at 1165. But the Board went on to hold that picketing for recognition by a union that had demonstrated its majority status in an appropriate unit was nonetheless unlawful under section 8(b)(7)(C) where the union had not filed a timely petition. *Id.* at 1167.

237. See 29 U.S.C. § 158(b)(7)(B) (1976); *St. Luke's*, JD-115-83 at 5.

of a petition and provides for an expedited election to resolve the question of whether the employees wish to be represented by the union.²³⁸ Until now, cases involving nonqualified unions have held that, since the Board has discretion to refuse to conduct an election, picketing by the union violates section 8(b)(7)(C), regardless of either the duration of the picketing or whether a petition has been filed.²³⁹ However, in no case before *St. Luke's* was the picketing preceded by a Board election which was won by a nonqualified union.²⁴⁰ Thus, *St. Luke's* does not seem to fit under prior section 8(b)(7)(C) case law. The picketing was not conducted *without the filing of a petition*, as in *A-1*, or in the face of the Board's refusal to conduct an election, as in *Dunbar*. It is apparent that the drafters of section 8(b)(7) did not consider how its provisions should be applied to noncertifiable unions,²⁴¹ and it is even more apparent that they did not contemplate the possible effect of a *Bally's* election.²⁴²

The Board does not need to look further than the clear language of section 8(b)(7)(B) to support affirmance of the judge's decision in *St. Luke's*.²⁴³ The case is significant because it illustrates the various policies and interests that are involved in a *Bally's* election. In deciding *St. Luke's*, *Wells Fargo* and *Brink's*, it is essential for the Board to consider these policies and interests carefully and attempt to resolve them within the language and intent of sections 9(b)(3), 8(a)(5) and 8(b)(7). Whatever results the Board reaches, it should provide a well supported balancing of those interests.

VII. Analysis of Problems in Reconciling Section 9(b)(3) With the Overall Policies of the Act

To obtain a consistent and proper rule for the application of section 9(b)(3), the Board must consider the overall policies of the Act. Specifically, it must attempt to promote employee free choice and industrial stability while adhering to the dictates of section 9(b)(3). The first problem in applying the section arises from the fact that it uses the

238. 29 U.S.C. § 158(b)(7)(C) (1976). See *supra* note 236.

239. *A-1*, 224 N.L.R.B. at 436.

240. In the proceeding to enjoin the threatened picketing at *St. Luke's*, the district court judge acknowledged that the case presented "unusual facts." *Silverman v. Local No. 803*, No. 83-2095, at 6.

241. *Dunbar*, 211 N.L.R.B. at 690, states: "it is quite possible that this rare instance was one that was not foreseen by Congress."

242. The Board did not confront the question of allowing noncertifiable unions to intervene and appear on the ballot until 1962 in *Burns*, 138 N.L.R.B. 449, three years after the enactment of section 8(b)(7). See *supra* note 67.

243. See *supra* note 237 and accompanying text.

term "guard" in a general manner, whereas the legislative history primarily refers to "plant guards."²⁴⁴ The argument has been made that if Congress only intended to cover plant guards, application of the provisions of section 9(b)(3) to contract guards, including armored couriers, unlawfully limits their freedom to choose a union.²⁴⁵

The second problem arises from the enigmatic language of section 9(b)(3), which fails to answer the question of whether a nonqualified union's electoral participation is proper under any circumstances.²⁴⁶ The arguments for and against the *Bally's* rule must be considered in light of the realities of collective bargaining in the security industry. The industry is highly competitive and non-union companies are a major factor.²⁴⁷ Collective bargaining in such a business climate is difficult for any union. Some of the witnesses in the 1977 congressional hearings on amending the Act argued that the independent security guard unions are not equal to this challenge and that large national unions such as the Teamsters are more effective in bargaining for security guards.²⁴⁸ Although it would be difficult to prove that guard unions are generally inferior to nonguard unions, it cannot be disputed that a union with more members generally has more "clout" at the bargaining table than does a union with a small membership.²⁴⁹ In consideration of this fact, guards should not be prevented from voting for nonqualified unions where Congress merely intended to prevent the Board from certifying nonqualified unions.

The major argument against the *Bally's* rule was expressed in *Wackenhut* where the Board speculated that its election process could be disrupted by allowing a nonqualified union to "jump" on the ballot" with only one authorization card.²⁵⁰ *Wackenhut* however, incorrectly resolved this problem by limiting participation in the Board's electoral process to an incumbent union.²⁵¹ *Wackenhut's* ap-

244. See *supra* notes 50-56 and accompanying text.

245. See *supra* notes 50-53 and accompanying text. Although many cases have addressed this issue, its resolution is beyond the scope of this Note, and it is only one of many factors which arguably create labor relations problems in the security industry.

246. See *supra* Section IV.

247. *Senate Hearings, supra* note 10, at 577 (remarks of Silvers).

248. See *supra* note 54, concerning testimony of Russell Silvers, President of Brink's; see also *Senate Hearings, supra* note 10, at 569 (testimony of Executive Vice-President of Wallace Security Agency, Inc., that guards should not be denied right to be represented by "responsible union").

249. See *supra* note 54.

250. See *supra* notes 104-06 and accompanying text.

251. See *supra* notes 102-03 and accompanying text.

proach does not consider the possibility of substantial employee support for a nonqualified, nonincumbent union. The logical solution is to find a middle ground between *Bally's* and *Wackenhut* by requiring a greater showing of interest where a nonqualified union seeks to get on the ballot in a Board election.²⁵² Such a union should be required to produce the thirty percent showing of interest expected of the petitioning union. This requirement would reduce the possibility that an intervening union's showing of interest was collusively obtained in an effort to totally deny employees their statutory right to union representation.²⁵³

Another issue raised by the language of section 9(b)(3) is whether the statute turns voluntary recognition of a nonqualified union into "bargaining at will."²⁵⁴ Presently, there is no question that Congress intended to allow voluntary recognition notwithstanding section 9(b)(3).²⁵⁵ When a bargaining order is issued under such circumstances, it does not violate section 9(b)(3), because the Board is not certifying the union that has obtained the voluntary recognition.²⁵⁶ It merely is noting that the parties voluntarily entered into a bargaining relationship in an appropriate unit and acknowledging that the relationship should be preserved. Any other procedure would make the employees' rights to meaningful representation by a nonqualified union contingent on the employer's consent and should not be allowed by the Board.

The easiest issue to resolve is that of recognitional picketing. As *Dunbar* notes, picketing for a one-man unit is distinguishable from picketing by a nonqualified union seeking to represent guards.²⁵⁷ The clear intent of section 8(b)(7) is to limit picketing that attempts to subvert the Board's election processes, and Congress made no exception for guards under section 9(b)(3).²⁵⁸ By picketing for a guard unit, a nonqualified union attempts to force the Board to conduct an election in such a unit, depriving the Board of its discretion under the *Bally's* rule and giving nonqualified unions greater rights than quali-

252. See *supra* note 152 and accompanying text.

253. See *supra* note 151.

254. See *supra* text accompanying note 203.

255. See *MRA Assocs., Inc.*, 245 N.L.R.B. 676 (1979). Also see *supra* notes 60-62 and accompanying text for a discussion of cases where voluntary recognition had been extended.

256. See *supra* notes 69 & 141 and accompanying text.

257. See *supra* notes 216-18 and accompanying text.

258. See *supra* note 236 and accompanying text.

fied ones.²⁵⁹ The case law proscribes recognitional picketing notwithstanding section 9(b)(3).²⁶⁰ The Board should continue to follow this approach.

VIII. Recommendations for a More Coherent Future Approach

The Board should modify the *Bally's* rule slightly by requiring a thirty percent showing of interest by nonqualified unions which seek to intervene.²⁶¹ This modification would assure proper use of the Board's election machinery while leaving that machinery available to vindicate employee free choice.

The Board should affirm the ALJ's *Wells Fargo* decision.²⁶² It would be inconsistent to continue to hold voluntary recognition of nonqualified unions permissible while allowing employers to end the bargaining relationship unilaterally. Such a concept is foreign to the Act, and its possible expansion into other areas would confuse Board precedent, which presently requires an employer to continue to bargain in the absence of a good-faith doubt of the union's majority status.²⁶³ If Congress intends to proscribe voluntary recognition, it should do so through legislation. In the absence of congressional action, the Board should continue to enforce bargaining relationships that are entered into voluntarily by unions and employers.

Finally, the Board should not create a section 8(b)(7) exception for guards.²⁶⁴ Allowing recognitional picketing by a nonqualified union that wins a *Bally's* election gives it a weapon more powerful than a Board certification.²⁶⁵ Unions that win *Bally's* elections should be limited to using lawful means of economic pressure against employers.

IX. Conclusion

Section 9(b)(3) was intended by Congress to narrowly limit the Board's certification powers.²⁶⁶ It was not intended to deprive guards of the opportunity to vote for nonqualified unions²⁶⁷ and it makes no

259. See *supra* note 223.

260. See *supra* Section VI.

261. See *supra* notes 152 & 252 and accompanying text.

262. See discussion of decision, *supra* at notes 172-205 and accompanying text.

263. See discussion of the Board's present practice in this regard, *supra* at notes 186 & 203 and accompanying text.

264. See *supra* notes 257-60 and accompanying text.

265. See *supra* note 223.

266. See *supra* note 48 and accompanying text.

267. See discussion, *supra* at Section IV.

exception for recognitional picketing by nonqualified unions.²⁶⁸ While it allows voluntary recognition of nonqualified unions, it does not prescribe any special rules concerning withdrawal of such recognition.²⁶⁹ The Board must, therefore, carefully balance the interests of the employees, the union, the employer and the public and arrive at a consistent rationale to apply to guard cases.²⁷⁰

The proposed approach²⁷¹ is consistent with congressional intent because it considers industrial stability and employee free choice while staying within the limits Congress mandated in section 9(b)(3). The employees can express their preference for a nonqualified union in a *Bally's* election. The employer can refuse to voluntarily recognize a nonqualified union, subject to the employees' right to strike. However, once voluntary recognition is extended, the employer must possess a good-faith doubt of the union's majority status to end the relationship. Finally, a nonqualified union does not obtain greater rights than other unions to engage in recognitional picketing in cases where the Board is prohibited from certifying the nonqualified union, or refuses to conduct an election. The Board should adopt this proposed approach.

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268. See discussion, *supra* at Section VI.

269. See discussion, *supra* at Section V.

270. See analysis, *supra* at Section VII.

271. See recommendations, *supra* at Section VIII.

