LABOR RELATIONS—A UNION WITH AUTHORIZATION CARDS PURPORTING TO REPRESENT A MAJORITY OF EMPLOYEES IN AN APPROPRIATE BARGAINING UNIT WHICH IS DENIED RECOGNITION BY THE EMPLOYER HAS THE BURDEN OF INVOKING THE NLRB ELECTION PROCEDURE, UNLESS THE EMPLOYER ENGAGES IN UNFAIR LABOR PRACTICES WHICH TEND TO IMPAIR THE ELECTORAL PROCESS.—*Linden Lumber Division, Summer & Co. v. NLRB* (U.S. Sup. Ct. 1974).

A labor union obtained authorization cards signed by a majority of employees in an appropriate bargaining unit of petitioner, Linden Lumber. Based on these cards the union demanded that Linden recognize it as the exclusive collective bargaining representative of the employees. Linden refused, stating that it doubted the union's claimed majority status and suggested that the union petition the National Labor Relations Board (NLRB) for a representation election. Thereupon, the union filed an unfair labor practice charge with the Board, alleging that Linden had refused to bargain with the authorized representative of its employees, as required by the National Labor Relations Act. The Board held that Linden did not commit an unfair labor practice merely by refusing to accept evidence of a union's claimed majority status other than the results of a Board election.[1] On the union's appeal for review, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that it was possible that Linden had violated section 8(a)(5) of the Act by refusing to bargain and failing to petition for an election. On Linden's appeal to the United States Supreme Court, *held*, reversed, four justices dissenting. Unless an employer commits unfair labor practices which would interfere with a Board conducted representation election, the union has the burden of petitioning for such an election after it has been denied recognition by the employer, even though the union has presented the employer with authorization cards signed by a majority of employees. *Linden Lumber Division, Summer & Co. v. NLRB*, 95 S. Ct. 429 (1974).

Section 9(a) of the National Labor Relations Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives of all the employees."[2] Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."[3]

---

1. Linden Lumber Division, Summer & Co., 190 N.L.R.B. 718 (1971), *rev'd sub nom.* Truck Drivers Local 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973). No charge other than a violation of section 8(a)(5) was presented for review. A companion case, *Textile Workers Union v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), *rev'g* 198 N.L.R.B. No. 123 (1972), referred to as *Wilder Mfg. Co.*, presented a similar situation.
2. 29 U.S.C. § 159(a) (1970).
3. 29 U.S.C. § 158(a)(5) (1970).

These two sections, when read together, impose upon an employer the duty to confer and negotiate with the authorized representatives of its employees.[4] However, neither section specifies the means by which a representative may become "authorized" so as to impose this duty. Nor does the Act further define the terms "designated or selected" as used in section 9(a). This lack of specific means or definitions within the Act raises the question which is fundamental to an understanding of *Linden*—how may a union which claims to be the representative designated or selected by a majority of employees establish the "bargaining obligation" of the employer such that a refusal by the employer to recognize and bargain with the union would constitute a section 8(a)(5) unfair labor practice? *NLRB v. Gissel Packing Co.*[5] purported to answer this and other questions.

Gissel was a consolidation of four cases. In each case, the bargaining representative had obtained authorization cards from a majority of employees in an appropriate bargaining unit. The employers thereafter committed unfair labor practices in varying degrees of severity. The Court dealt with three questions: 1) with whom does the employer have a duty to bargain; 2) how may that duty arise; and 3) what is the remedy for employer interference with the election process?

First, in *Gissel* the Court refused to overturn the line of cases allowing a bargaining representative to establish its majority status, and thus invoke a bargaining obligation, by means other than a Board conducted election. Although such election procedure is commonly employed by a union, "it was early recognized that an employer had a duty to bargain whenever the union representative presented 'convincing evidence of majority support.' "[6] Failure of the employer to fulfill this duty often resulted in the Board ordering the employer to bargain even though no election had ever been conducted.[7] The Court in *Gissel* held "that the 1947 amendments did not restrict an employer's duty to bargain under

4. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44 (1937).

5. 395 U.S. 575 (1969).

6. *Id.* at 596. *See also* NLRB v. Dahlstrom Metallic Door Co., 112 F.2d 756 (2d Cir. 1940). Convincing evidence of majority support could come from many sources. *See* Lebanon Steel Foundry v. NLRB, 130 F.2d 404 (D.C. Cir. 1942). Membership in a labor organization, response of the employees to a strike call, applications for membership in a labor organization, and proxies were a few of the methods held to supply the requisite convincing evidence. NLRB v. Louisville Refining Co., 102 F.2d 678 (6th Cir. 1939); Chicago Casket Co., 21 N.L.R.B. 235 (1940); D. & H. Motor Freight Co., 2 N.L.R.B. 231 (1936); Edward E. Cox, Printer, Inc., 1 N.L.R.B. 594 (1936). By 1950 the employer was held to be relieved of its duty to bargin if it could prove it had a good faith doubt as to the representative's majority status. If the employer committed collateral unfair labor practices, they could be used as evidence of its bad faith in a proceeding brought by the representative charging the employer with an unlawful refusal to bargain. Joy Silk Mills v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *aff'g* 85 N.L.R.B. 1263 (1949). Later, the burden of showing bad faith in the refusal to bargain was placed upon the representative. Further, it was held that bad faith would be inferred from an employer's unfair labor practices only if they tended to dissipate the representative's majority backing such that an election would not be a fair test of employee desires. Aaron Brothers v. NLRB, 158 N.L.R.B. 1077 (1966).

7. NLRB v. Highland Park Mfg. Co., 110 F.2d 632 (4th Cir. 1940).

§ 8(a)(5) solely to those unions whose representative status is certified after a Board election."[8]

Second, the Court in *Gissel* sanctioned the use of authorization cards as a means of establishing majority status and thus a duty to bargain. Authorization cards are cards signed by employees authorizing a particular representative to act for them as a collective bargaining agent. The Board policy, manifested by the *Cumberland Shoe* doctrine, is that if a card states that the signer authorizes the union to represent him for collective bargaining purposes, not merely to obtain an election (that is, the card is unambiguous on its face), then the card will be counted to determine majority strength. However, if it is shown that the employee was told that the card would be used for the *sole* purpose of obtaining an election, then it will not be so counted.[9] Some circuits accepted this policy.[10] Others rejected it on the theory that cards could be an unreliable indicator of employee desires and, thus, they refused to count the cards in determining whether a union had obtained majority strength.[11]

In *Gissel* the Supreme Court approved the *Cumberland Shoe* doctrine and thereby approved of the use of cards which pass muster under that doctrine as a means of proving a union's majority support. The Court felt that "employees

---

8. NLRB v. Gissel Packing Co., 395 U.S. 575, 600 (1969). Section 9(c)(1)(B) of the Taft-Hartley Act of 1947 granted the employer the right to petition for an election. 29 U.S.C. § 159(c)(1)(B) (1970).

9. Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963). This rule does not apply to ambiguous, dual purpose cards which state on their face that the signer authorizes the union to represent him *and* to seek an election. In such a case, the Board must examine the subjective intent of the signers and find that they intended to designate the union as their collective bargaining representative. NLRB v. Peterson Brothers, Inc., 342 F.2d 221 (5th Cir. 1965); NLRB v. Koehler, 328 F.2d 770 (7th Cir. 1964). In *Bauer Welding and Metal Fabricators, Inc. v. NLRB*, 358 F.2d 766 (8th Cir. 1966), the court held that an otherwise unambiguous card was turned into a dual purpose card by a letter accompanying the card stating that it would be used to obtain an election.

10. See *Happach v. NLRB*, 353 F.2d 629 (7th Cir. 1965), holding that the Board had sufficient evidence to find that the union did not represent the sole purpose of the cards to be the obtaining of an election. See also *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967), which denied enforcement of a bargaining order where it was found that the employees were left with the belief that the only purpose of the cards was to obtain an election.

11. For example, it was felt they could be unreliable in a situation where an employee is presented with a card stating that the signer authorizes the union to represent him for collective bargaining purposes, but is told that one of the purposes of the card is to obtain a secret ballot election. The circuits debated the wisdom of a rule which held that the written words on the cards were nearly conclusive evidence that the employees designated the union to represent them, despite the oral representations. "According to the Board, it would require a statement that the cards were to be used *only* to get an election to constitute misrepresentation. This court has previously shown its impatience with such contentions." Engineers & Fabricators, Inc. v. NLRB, 376 F.2d 482, 486 (5th Cir. 1967). It was feared that some employees might not have signed the cards but for the oral representations. *See* NLRB v. S.E. Nichols Co., 380 F.2d 438 (2d Cir. 1967); *cf.* NLRB v. Southland Paint Co., 394 F.2d 717 (5th Cir. 1968). Perhaps the strongest language opposing authorization cards came from Chief Judge Haynsworth. "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check' . . . ." NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 565 (4th Cir. 1967). He felt they were unreliable because of peer group pressure to sign the cards, the fact that they are often obtained before the employer has a chance to make counter-arguments, and employees are usually given no time to reflect upon the matter. "No thoughtful person has attributed reliability to such card checks." *Id.* In *Gissel* Chief Justice Warren held that cards are reliable, within the limits of the *Cumberland* rule.

should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature."[12] Further, the Court rejected "any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry."[13]

Third, *Gissel* delineated appropriate remedies for a section 8(a)(5) violation where the employer committed other unfair labor practices. The Board demands that representation elections be held under "laboratory conditions", that is, under conditions where the uncoerced wishes of the employees can be expressed.[14] The Court noted three levels of employer unfair labor practices which could interfere with these laboratory conditions. First, if the unfair labor practices were, in an exceptional case, "outrageous" or "pervasive", then an order to bargain would be the appropriate remedy. Dicta in *Gissel* stated that such a remedy was appropriate even where it was not shown that the representative ever enjoyed a card majority.[15] Second, if the unfair labor practices were less pervasive, but still undermined the majority strength and impeded the election process, a bargaining order would also be the appropriate remedy. "If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue . . . ."[16] Note that in the "less pervasive" case the representative must show it once had a card majority, while, as stated above, in dicta the Court said that such a showing is not necessary in the "outrageous" case. Third, if the unfair labor practices were less extensive and had a minimal impact on the election, an order to bargain would be improper. Rather, the Board should use its remedial powers to fashion an appropriate remedy. For example, the Board could order the employer to cease and desist from committing the unfair labor practices[17] or order the employer to take affirmative action to restore the laboratory conditions.[18]

In *Gissel* the Court expressly reserved the question of the duty of the employer where it commits no unfair labor practices after being confronted with a card majority. It was left undecided whether the employer must petition for an election and, if it does not, whether it has a duty to bargain with the card majority if the representative does not petition for an election. Further left undecided was whether the employer was bound by the Board's ultimate determination of the validity of the card results in spite of its showing of its doubts as to the representative's strength where neither employer nor representative

12. NLRB v. Gissel Packing Co., 395 U.S. 575, 606 (1969).
13. *Id.* at 608.
14. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).
15. NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969).
16. *Id.* at 614-15.
17. *Id.* at 610.
18. *Id.* at 611-12.

petitions for an election.[19] In *Linden* the Court squarely faced the questions reserved in *Gissel*.[20]

In *Linden* the Court held that, except where an employer engages in unfair labor practices which impair the electoral process, a union with authorization cards signed by a majority of employees has the burden of taking the next step in invoking the Board's election procedure after it is refused recognition.[21] Such a holding appears contrary to the language in *Gissel* regarding the raising of the employer's duty to bargain and the role authorization cards play in invoking that duty.[22] *Linden* implies that an employer need not take affirmative action when met by a union bearing authorization cards signed by a majority of employees, as long as it commits no collateral unfair labor practices. While *Gissel* did not limit the application of section 8(a)(5) to certified unions, the practical effect of *Linden* is to do just that. Indeed, the Board in *Linden* specifically held that an employer "should not be found guilty of a violation of section 8 (a)(5) solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election."[23] Thus, the effect of *Linden* is to limit the employer's duty to bargain to those unions certified by the NLRB, if the employer does not commit unfair labor practices which tend to upset the laboratory conditions.[24]

Further, if an employer does not violate section 8(a)(5) by refusing to bargain with a non-certified union, then authorization cards and other indicia of majority strength would seem to play a limited role in the future. They will be important in determining whether a union has the necessary 30 percent strength in the bargaining unit, a determination which must be made by the Board before it will order an election upon the petition of the union.[25] They will be important when employer unfair labor practices upset laboratory conditions such that an election would be an unfair test of the employees' desires. However, standing alone, they will no longer be valid means of raising a duty to bargain.

---

19. *Id.* at 601 n.18.
20. Linden Lumber Division, Summer & Co. v. NLRB, 95 S. Ct. 429, 430 (1974).
21. *Id.* at 434.
22. *Gissel* appears to remain valid authority for situations where employer unfair labor practices tend to upset laboratory conditions. For example, in *Moro Motors, Ltd.*, 5 CCH LAB. L. REP. ¶ 15,419 (1975), the Board held that a bargaining order was justified, under authority of *Gissel*, where an employer violated sections 8(a)(1) and 8(a)(3) by discharging employees *en masse* after they had joined a union and announced that they wanted the union to represent them. Note that the Board fashioned the remedy for the sections 8(a)(1) and 8(a)(3) violations without making a finding that the employer also violated section 8(a)(5).
23. 190 N.L.R.B. at 721.
24. *Id.* Note, however, *Linden* left undecided the question of whether section 8(a)(5) would be available to a non-certified union where the employer breached an agreement with the union to have a mutually acceptable means other than an election determine majority status, for example, by abiding by the decision of a mutually selected third party. Linden Lumber Division, Summer & Co. v. NLRB, 95 S. Ct. 429, 434 n.9 (1974).
25. 29 C.F.R. § 101.18(a) (1974). The Board requires that when a union petitions for an election, it must show that it has the support of at least 30 percent of the employees in the unit. Otherwise no election will be ordered.

By making section 8(a)(5) available only to certified unions, it also appears that *Linden* has made the *Bernel Foam* rule obsolete. That rule states that a union may elect to petition for an election after the employer has committed unfair labor practices. If it loses the election, the union may still file a section 8(a)(5) charge. That is, the union does not waive a section 8(a)(5) violation by proceeding with an election.[26] In the future, the Board and courts will probably only look to the effect an employer's unfair labor practices had upon the laboratory conditions, rather than determining whether the employer breached a duty to bargain. In one of the four cases in *Gissel* the union successfully pursued a section 8(a)(1) charge, in addition to the section 8(a)(5) charge, against the employer.

Surprisingly little rationale was given by the Supreme Court for an apparent wide departure from past practice. The Court gave three reasons for imposing the burden of petitioning for an election upon the union rather than the employer.

First, the Court pointed out that an employer could draft its petition in such a manner that it would be dismissed. Section 9(c)(1)[27] requires the Board to investigate petitions for election and to hold a hearing "if it has reasonable cause to believe that a question of representation affecting commerce exists . . . ."[28] It has been held that "[a] question of representation may be brought to the Board's attention by the filing of an employer's petition, but the question is raised only by an affirmative claim of a labor organization that it represents a majority of employees in an appropriate unit."[29] If an employer petitions for an election in a unit in which the union has not made a claim that it represents a majority, then no question of representation will have been raised in that unit and the petition will be dismissed by the Board.[30] Alternatively, in such a case, the union itself may wish to move for a dismissal of the petition.[31] Thus, the employer could petition for an election in a unit the union has not sought to represent and thereby satisfy its "duty to petition for an election." The petition would be subsequently dismissed, and the union would be back where it started.

The second reason relates to the requirement that a representative must show to the Board that it has at least a 30 percent strength in the absence of special factors, in the appropriate unit before the Board will order an election.[32] When an employer files the petition, no such showing need be made.[33] However, the sufficiency of such showing is not a matter which the employer may

26. Bernel Foam Products Co., 146 N.L.R.B. 1277 (1964).
27. 29 U.S.C. § 159(c)(1) (1970).
28. *Id.*
29. Amperex Elec. Corp., 109 N.L.R.B. 353, 354 (1954).
30. Librascope, Inc., 91 N.L.R.B. 178 (1950); Coca-Cola Bottling Co., 80 N.L.R.B. 1063 (1948).
31. Aerojet-General Corp., 185 N.L.R.B. 794 (1970).
32. 29 C.F.R. § 101.18(a) (1974).
33. *Id.*

contest at the hearing on the election petition.[34] Thus, the Supreme Court reasoned, litigation over this point would not be eliminated by requiring the employer to petition since the issue goes uncontested regardless of who files the petition.

Third, the Court said that the Board was not arbitrary and capricious and did not abuse its discretion by imposing the burden upon the union. It is unusual for a court to speak of abuse of discretion in the context of a decision to affirm or reverse an NLRB case. Such language is ordinarily reserved for a decision regarding a Board promulgated rule, rather than a ruling.

The court of appeals in *Linden* would have required the employer to petition for the election to avoid its duty to bargain and to avoid a scrutiny of its good faith doubt of the union's majority status.[35] In *Gissel* the Supreme Court interpreted the then current Board policy to be that an employer would not violate section 8(a)(5) merely by insisting upon an election after being asked to bargain. However, "an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union . . . ."[36] The Board in *Linden* questioned whether an employer's knowledge of a union's majority status had ever, by itself, held the employer in violation of section 8(a)(5). The Board hypothesized that the Supreme Court may have drawn its interpretation from *Snow & Sons*[37] but noted that in that case the employer both had knowledge that the union represented a majority *and* had breached an agreement to abide by the decision of a mutually selected third party who was to determine whether the union had majority strength. Further, the Board pointed out that in its then recent decision, the first supplemental decision of *Wilder Manufacturing Co.*,[38] a finding of a section 8(a)(5) violation was based upon both employer knowledge *and* lack of evidence that the employer was willing to let its doubts as to the union's majority status, if it had such doubts, be tested by an election. In *Linden* the Board said that "[t]he facts of the present case have caused us to reassess the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time he refuses to accede to a union demand for recognition."[39] The Board thereupon eliminated employer knowledge and lack of willingness to petition for an election as possible bases of a section 8(a)(5) violation because it felt them to be too subjective and, thus, unworkable.[40]

The court of appeals concluded that the Board order could not be enforced where both of these bases were eliminated. It rested this conclusion on its in-

34. Brescome Distributors Corp., 197 N.L.R.B. 642 (1972).
35. Truck Drivers Local 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973), *rev'g* Linden Lumber Division, Summer & Co., 190 N.L.R.B. 718 (1971).
36. NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1969).
37. Snow & Sons, 134 N.L.R.B. 709 (1961), *enforced sub nom.* Snow v. NLRB, 308 F.2d 687 (9th Cir. 1962).
38. 185 N.L.R.B. 175 (1970), *vacated*, 198 N.L.R.B. 123 (1972).
39. Linden Lumber Division, Summer & Co., 190 N.L.R.B. 718, 720-21 (1971).
40. *Id.*

terpretation of the Act. It said that in 1947 Congress rejected an amendment to the Act which would have made section 8(a)(5) applicable only to certified unions. Thus, the court reasoned, section 8(a)(5) does not apply only to certified unions, but rather is available to all unions. If the section is available to non-certified unions, then a duty to bargain can be raised by means other than a Board election. If a duty to bargain can be raised by means other than an election, then it would not be consistent with the Act to allow employers to breach their section 8(a)(5) duty by disregarding authorization cards for no reason whatsoever. Relying upon *Gissel*'s recognition that "an employer [has] a duty to bargain whenever the union representative present[s] 'convincing evidence of majority support,' "[41] the court of appeals felt that if the employer's knowledge of a union's majority status was not to be a basis for a violation of section 8(a)(5), then the employer "must be put to some other kind of test to evidence good faith."[42] The court suggested that such evidence would be supplied by the employer's petition for an election. "If he declines to exercise this option, he must take the risk that his conduct as a whole, in the context of 'convincing evidence of majority support,' may be taken as a refusal to bargain."[43] The court of appeals relied on its interpretation of the Act's legislative history, stating, "[i]ndeed it was the premise of the Taft-Hartley Amendment to § 9(c)(B) that employers could 'test out their doubts as to a union's majority status' by petitioning for an election. In ignoring that opportunity, the Board ignores the very intent behind the statutory provision."[44] Thus, an employer's failure to petition for an election was held by the District of Columbia Circuit to make the employer vulnerable to a finding that it violated section 8(a)(5).

The Supreme Court dissenters agreed with the court of appeal's statutory construction. "The language and history of the Act clearly indicate that Congress intended to impose upon an employer the duty to bargain with a union that has presented convincing evidence of majority support, even though the union has not petitioned and won a Board-supervised election."[45] They rea-

41. NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969).

42. Truck Drivers Local 413 v. NLRB, 487 F.2d 1099, 1113 (D.C. Cir. 1973). Note that the court of appeals placed the burden of showing good faith doubt upon the employer. By so doing, the court seemed not only to resurrect the concept of good faith doubt, but further to place the burden of proving it upon the employer, a throwback to the *Joy Silk* doctrine, and contrary to *Aaron Brothers*. *See* note 9 *supra*.

43. Truck Drivers Local 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973).

44. *Id.* at 1111.

45. Linden Lumber Division, Summer & Co. v. NLRB, 95 S. Ct. 429, 437 (1974). The dissenters felt that "[t]he Act in no way [required] the Board to define 'convincing evidence' in a manner that [reintroduced] a subjective test of the employer's good faith in refusing to bargain with the union." *Id.* at 436. However, they felt that "the Act simply [did] not permit the Board to adopt a rule that avoids *subjective* inquiries by eliminating entirely *all* inquiries into an employer's obligation to bargain with a non-certified union selected by a majority of his employees." *Id.* at 437. Rather, they suggested that the Board "define 'convincing evidence of majority support' solely by reference to objective criteria—for example, by reference to 'a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees . . . .' " *Id.* at 436. Quere whether the dissenter's "solution" is merely a restatement of the problem.

soned that section 9(c)(1)(B) gave employers the option to petition for an election. Failing to exercise this option, the employer either had to bargain or risk a section 8(a)(5) violation.[46]

Despite the lack of rationale strictly interpretive of the Act, the *Linden* decision appears to be sound. Employers are protected from orders to bargain when their knowledge of the representative's majority status is later subjectively found to have been sufficient to have raised a bargaining obligation. Employees are also protected from interference with their right to organize by other sections of the Act. For example, if an employer threatens employees or discharges them as a response to a request to bargain, the employer could be held to have violated sections 8(a)(1)[47] or 8(a)(3)[48] respectively. Then the Board would consider the degree to which the violations interfered with the employee's right to organize and, using *Gissel* as a guideline, would fashion an appropriate remedy.

Further, by imposing the burden upon the representative, the Court has not deprived either the employer or the union of any tactical advantage which may accrue from filing the petition at a particular time. For example, even though not required to do so, the employer may wish to petition for an election if it feels that the representative's strength has waned such that the union would lose the election. No election could be held in that bargaining unit for twelve months following the election.[49]

In summary, the *Linden* doctrine is that when an employer is confronted by authorization cards signed by a majority of employees, it may refuse to collectively bargain as long as it does not commit any collateral unfair labor practices. The burden is then upon the union to file for an election and no section 8(a)(5) violation charge will lie against the employer. However, if the employer commits acts which tend to upset the laboratory conditions after it has been asked to bargain, then an appropriate remedy will be issued by the Board to counteract those actions. Such a remedy may be an order to bargain, an order to cease and desist, or an order to take whatever affirmative action is necessary to restore the laboratory conditions, depending upon the severity of the employer's interference with the employees' right to organize.

THOMAS READ

46. *Id.* at 436.
47. 29 U.S.C. § 158(a)(1) (1970).
48. 29 U.S.C. § 158(a)(3) (1970).
49. 29 U.S.C. § 159(c)(3) (1970). Note that before an election can be held, and thus the twelve month bar invoked, the Board must find that a "question of representation" exists. Thus, no frivolous petitions can be filed by employers to simply gain twelve months of peace.

PATENTS—THE AVAILABILITY OF THE EXPERIMENTAL USE EXCEPTION AS A STAY OF THE ON SALE OR PUBLIC USE BAR IN 102(b) DEPENDS IN PART ON THE INTENT OF THE INVENTOR.—*In re Yarn Processing Patent Validity Litigation* (5th Cir. 1974).

In the mid-1930's two co-inventors began experiments leading toward the invention of the single heater false twister. The co-inventors first converted an uptwister to their single heater false twisters in July of 1950. On December 15, 1952 the co-inventors granted a license to Synfoam to use their false twist process. More than a year later on January 4, 1954, the inventors filed applications for the three patents in issue.[1] Defendant Leesona acquired the patent applications in December of that year and the patents issued on August 20, 1957. Actions were filed by several plaintiffs against Leesona to declare invalid the three patents whose teachings laid the technological foundation for the development of the double-knit fabrics. Granting a partial summary judgment for plaintiffs in a consolidated proceeding the trial court held the patents invalid on the basis of their being non-experimentally on sale and in public use more than one year prior to the application. On appeal the Fifth Circuit, *held*, reversed and remanded, the question of whether use more than one year before the application for a patent is experimental depends in part upon a factual determination of the intent of the inventor. *In re Yarn Processing Patent Validity Litigation*, 498 F.2d 271 (5th Cir. 1974).

To obtain a patent an inventor must show that his invention is useful,[2] novel,[3] and a nonobvious development over the prior art.[4] The *United States Code* provides that an inventor shall not be entitled to a patent if "the invention was . . . in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States . . . ."[5] A finding of "on sale" or in "public use" under Section 102(b) negates the inventions novelty, and will, in addition to precluding the issuance of a patent, invalidate a previously issued patent.[6] Public use has been interpreted broadly by the courts.[7] The concept of public use has been applied to a single use,[8]

1. For a description of the patented inventions see *In re Yarn Processing Patent Validity Litigation*, 360 F. Supp. 74, 91-99 (S.D. Fla. 1973), *rev'd*, 498 F.2d 271 (5th Cir. 1974). For a general discussion of patent law see Voorhees, *A Summary of Patent Law for the General Practitioner*, 20 DRAKE L. REV. 227 (1971).
2. 35 U.S.C. § 101 (1970).
3. 35 U.S.C. § 102 (1970).
4. 35 U.S.C. § 103 (1970).
5. 35 U.S.C. § 102(b) (1970). The original patent statutes provided no grace period for public use. The Act of March 3, 1839, ch. 88, § 7, 2 Stat. 353 introduced a two-year grace period. This two-year period remained in force until the Act of Aug. 5, 1939, ch. 450, 53 Stat. 1212 reduced the period to the present one year.
6. *See, e.g.*, Consolidated Fruit-Jar Co. v. Wright, 94 U.S. 92 (1876); Shaw v. Cooper, 32 U.S. (7 Pet.) 292 (1833).
7. Kardulas v. Florida Mach. Prod. Co., 438 F.2d 1118, 1123 (5th Cir. 1971); Vassil, *Public Use: The Inventor's Dilemma*, 26 GEO. WASH. L. REV. 297 (1958).
8. *See, e.g.*, Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5 (1939); Minnesota Mining & Mfg. Co. v. Kent Indus., Inc., 409 F.2d 99 (6th Cir. 1969).