United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 22, 2006

S.A.M.
TO : Gerald Kobell, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Dick's Sporting Goods 530-2050-1200
Case 6-CA-34821 530-3067
530-6017-0100
625-6600-6607

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and/or (5) by refusing to recognize and bargain with the Charging Party as the minority bargaining representative for its members.

We conclude that the Employer did not violate Section 8(a)(1) or (5) because the Employer in these circumstances had no obligation under the Act to recognize the Charging Party in the absence of a Board election establishing that it represented a majority of the Employer's employees. This principle is well-settled and is not an open issue. Our conclusion is based on the statutory language, the legislative history, and Board and Supreme Court decisions interpreting the Act, which underscore that the statutory obligation to bargain is fundamentally grounded on the principle of majority rule.

FACTS

Dick's Employee Council[1] (Charging Party or Council) consists of a number of dues-paying members who are employed at the Employer's Distribution Center in Smithton, Pennsylvania. It is undisputed that the Council does not represent a majority of employees in any appropriate bargaining unit at that location.

The Council was formed as an Associate Chapter of the United Steelworkers.[2] The Council established committees, a

[1] The Council is an affiliate of the United Steelworkers International Union, also the Charging Party herein.

[2] The United Steelworkers Constitution provides an "associate" membership status for persons not eligible for "regular" membership, and authorizes the creation of

dues structure, and began drafting a constitution and by-laws. The draft constitution, membership cards, Council literature, and description of Council meetings establish that the Council was formed for the purpose of bargaining with the Employer immediately on behalf of Council members, while eventually forming a traditional United Steelworkers Local.

On July 28, 2005, the Council requested that the Employer bargain with it over the discharge of one of its members. The Council has also requested bargaining, on behalf of its members only, over health and safety concerns and a grievance procedure. The Council also requested that the Employer provide it with a copy of the Employer's "Log of Work-Related Injuries and Illnesses." The Employer has at all times refused to recognize and bargain with the Council.

The Charging Party alleges that the Employer violated Section 8(a)(1) and/or (5) by refusing to recognize and bargain with the Council as representative for its members, violated Section 8(a)(1) by telling its employees in postings and distributions that it was not obligated to, and therefore would not, bargain with the Union on a members-only basis, and violated Section 8(a)(5) by failing to supply the Council with requested information, and unilaterally disciplining and discharging members.[3] The Charging Party's allegations are based on Professor Charles Morris' (Professor Morris) book, The Blue Eagle at Work,[4] which contends that an employer's refusal to recognize a members-only union violates the Act.

ACTION

We conclude that the Region should dismiss the charge, absent withdrawal, because the Employer in these circumstances had no obligation to recognize and bargain with the Council. Our conclusion is based on the statutory language, the legislative history of the Act, and well-stablished Board and Supreme Court doctrine.

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"associate organization(s) to serve the needs and interests of . . . potential members."

[3] The Charging Party alleges additional Section 8(a)(1) and 8(a)(3) violations which are not submitted for advice.

[4] Charles J. Morris, The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace (2005).

I. The Charging Party's Theory of Violation

The Charging Party's theory that employers have a duty to recognize and bargain with minority, members-only unions is based in large part on two interrelated premises -- the clear and plain language, and the legislative history, of the Act.[5]

A. Statutory construction

First, the Charging Party argues that general principles of statutory construction mandate that the provisions of the Act be read broadly, and that the language of those provisions be given its plain, ordinary meaning.[6] In this regard, the Charging Party argues that Section 7 broadly protects the right of all employees, organized and unorganized, to engage in collective bargaining, as evidenced by the words "shall" and "right" contained in that provision.[7] Therefore, the Charging Party argues that an

[5] In his book, Professor Morris makes several other arguments supporting his theory, including how minority bargaining rights under the Act are impacted by constitutional, administrative, and international law. See generally Professor Morris, The Blue Eagle, at 110-52. The Charging Party has not urged those arguments in support of this unfair labor practice charge.

[6] Citing, New York v. FERC, 535 U.S. 1 (2002); P.G.A. Tour, Inc. v. Martin, 532 U.S. 661 (2001); Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989); Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985); Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Ex parte Collett, 337 U.S. 55 (1949); Caminetti v. United States, 242 U.S. 470 (1917).

[7] Section 7 states that:

> 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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [S]ection 8(a)(3).

employer's refusal to recognize and bargain with a minority union on a members-only basis constitutes interference with that right in violation of Section 8(a)(1). Furthermore, the Act's only limitation of the broad bargaining right guaranteed by Section 7 is Section 9(a) which, the Charging Party contends, is applicable only after a union attains exclusive majority status.[8] Thus, minority bargaining rights are mandated under Sections 7 and 8(a)(1) and operate independently of Section 9(a).[9]

The Charging Party further contends that Section 8(a)(5) also is not limited by Section 9(a), for Section 8(a)(5) only makes it unlawful for an employer to:

> [R]efuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).[10]

According to the Charging Party, the "subject to" clause of Section 8(a)(5) merely reinforces the duty to bargain contained in Sections 7 and 8(a)(1), rather than limiting those rights to majority unions under Section 9(a).[11] Furthermore, the Charging Party contends that the presence of the comma in Section 8(a)(5) is evidence that the drafters of the Act intended that Section 9(a) restrict only the process of bargaining, not the bargaining representatives. Thus, when there is a Section 9(a) representative, the "provisions" of Section 9(a) apply to the parties' bargaining relationship so that the employer must, for example, bargain with that union as the exclusive representative of a majority of employees in an appropriate unit. The absence of a Section 9(a) representative relieves

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[8] Section 9(a) reads as follows:

> 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 for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

[9] See Professor Morris, The Blue Eagle, at 107-108. The Charging Party states that this issue has not yet been decided by the Board. Id. at 107.

[10] Id. at 103-104 (emphasis added).

[11] Id. at 104.

the employer of having to abide by those provisions of Section 9(a), but does not relieve the employer of its bargaining obligation to a minority union. The Charging Party maintains, therefore, that exclusive status under Section 9(a) is not required for a Section 8(a)(5) bargaining violation.[12]

B. Legislative history

Next, the Charging Party argues that the legislative history of the Act supports minority union bargaining. It claims that historically, members-only minority bargaining was commonplace and even mandated under the National Industrial Recovery Act (NIRA), the precursor to the Act.[13] It further argues that the drafters of the Act, aware of this history, deliberately sought to retain that status quo when drafting the Act. For example, comparing a rejected draft of Section 8(a)(5) with the version that appears in the Act, the Charging Party contends that the drafters intentionally rejected a version of Section 8(a)(5) that, in the Charging Party's view, would have explicitly excluded minority unions from Section 8(a)(5) protection. The rejected language would have made it unlawful for an employer only to:

> [R]efuse to bargain collectively with employees through their representatives, chosen as provided in Section 9(a)."[14]

The Charging Party argues that because the drafters rejected this version of Section 8(a)(5), which explicitly required Section 9(a) status as a prerequisite for Section 8(a)(5) protection, they intended that minority bargaining rights be protected under the Act until a union attains exclusive Section 9(a) status.[15] Specifically, the Charging

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[12] Id. at 103-106.

[13] See id. at 26-31, 38. Professor Morris cites three NIRA cases in support of his view that the National Labor Board (NLB), the precursor to the NLRB, found that employers had a duty to bargain with minority unions. See id. at 38, citing National Lock Co., 1 NLB (Part 2) 15 (1934); Bee Line Bus Co., 1 NLB (Part 2) 24 (1934); Eagle Rubber Co., 1 NLB (Part 2) 31 (1934).

[14] Professor Morris, The Blue Eagle, at 105-106 (emphasis in the original).

[15] See id. at 62-63, 105-106.

Party argues that Section 9(a) is merely a codification of the old NLRB's 1934 decision in Houde Engineering Corporation.[16] In Houde, the employer refused to recognize the UAW, which had been elected by a majority of the unit employees, as the exclusive collective bargaining representative of the entire unit because it had an obligation to also recognize the minority-supported, company union at the plant.[17] The old NLRB held that Section 7(a) of the NIRA required the employer to cease recognition of the minority union and recognize the majority union as the exclusive representative of all unit employees.[18] The Charging Party argues that the drafters' emphasis on the necessity of majority rule in the Act was made with the facts of the Houde decision in mind, that is, that a majority union must have exclusive bargaining rights against competing unions.[19] Thus, the Charging Party argues, an employer must bargain with minority unions until such time as a particular union attains exclusive majority status under Section 9(a).

II. Industrial Democracy is Fundamentally Based on Majority Rule

A. The drafters of the Act intended collective bargaining to be based on majority rule

As discussed above, the Charging Party contends that the drafters of the Act intended that minority bargaining rights be protected by Sections 7 and 8(a)(1) and not limited by Section 9(a), which applies only after a union attains exclusive majority status. However, the statutory language, legislative history, and cases interpreting them, clearly demonstrate that the drafters of the National Labor Relations Act envisioned a policy of "encouraging the practice and procedure of collective bargaining,"[20] firmly based on the principle of majority rule. Contrary to the Charging Party's contention, by enacting Section 9(a) of the Act, which sets forth the majority rule, Congress explicitly rejected other forms of representation, including plural and

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[16] 1 NLRB (old) 35 (1934).

[17] Houde, 1 NLRB (old) at 37-38.

[18] Id. at 40, 44.

[19] Professor Morris, The Blue Eagle, at 70-71.

[20] 29 U.S.C. § 151.

proportional representation, which were permitted under Section 7(a) of the NIRA.[21] Congress considered and rejected a proviso to Section 9(a) which would have protected the status of minority-supported unions. The discarded proviso stated:

> [T]hat any minority group of employees in an appropriate unit shall have the right to bargain collectively through representatives of their own choosing when no representatives have been designated or selected by a majority in such unit. . . .[22]

Congress' failure to include this proviso in the final version of Section 9(a), which had been included in an earlier draft of the Act, shows that it rejected employee representation by minority-supported unions as a requirement under the Act.[23]

One scholar on the legislative history of the Act has noted the drafters' "experiment with, and eventual rejection of the notion of, nonexclusive representation bargaining with a given employer."[24] Moreover, a contemporaneous labor official concluded that the NLRA eliminated the prior ability of unions to represent less than a majority of the employees at a facility. As one commentator stated, "[Secretary of Labor] Frances Perkins was surprised at AFL endorsement of the Wagner bill since many unions had earlier gained bargaining rights when fewer than a majority were enrolled."[25]

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[21] Ruth Weyand, Majority Rule in Collective Bargaining, 45 Colum. L. Rev. 556, 565 & n.35 (1945); James A. Gross, The Making of the National Labor Relations Act, page 101 (1974).

[22] Kenneth Casebeer, Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act, 11 Indus. Rel. L.J. 73, 124 (1989).

[23] INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.").

[24] Kenneth Casebeer, Drafting Wagner's Act, 11 Indus. Rel. L.J. 97.

[25] Irving Bernstein, The New Deal Collective Bargaining Policy, 137 (1950).

Moreover, statements by the Act's sponsors also show that they did not intend to require employee representation by minority-supported unions because it could not lead to a working system of collective bargaining. As one commentator stated, the sponsors:

> [T]ook the view that as a practical matter there could be no bargaining unless all of the employees within any given appropriate unit bargained as one man; that only when the employer is prohibited from dealing with less than the entire group . . . can employees begin to approach the stage where they have sufficient power to bargain.[26]

The Act's principal sponsor, Senator Robert F. Wagner, asserted as much when he stated:

> The reasons for majority rule are very simple. Obviously an employer has to deal with his workers either as individuals, or as a variety of minority groups, or as a consolidated unit. . . . The second alternative, which consists in dealing with various minority groups, gives the unscrupulous employer the opportunity to play one group against another constantly. It foments in the ranks of the workers discord, suspicion and rivalry at all times. In addition, since it is virtually impossible to make more than one agreement covering one set of workers in a single plant, the pretense of negotiating with minorities means that there is to be no real collective bargaining at all. Majority rule is thus the only rule that makes collective bargaining a reality.[27]

In short, the Act's sponsors believed that collective bargaining simply could not work if the system required more than one minority union to represent different parts of the same unit.

Congressional reports on the Act also recognized the impracticality of a system that could result in an employer

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[26] Ruth Weyand, Majority Rule in Collective Bargaining, 45 Colum. L. Rev. at 566-67.

[27] Leon H. Keyserling, Why the Wagner Act?, in The Wagner Act: After Ten Years 19-20 (Louis G. Silverberg ed., 1945) (quoting National Labor Relations Bill, NBC radio broadcast by Senator Wagner, May 21, 1935).

having to bargain with several minority-supported unions representing different segments of the same unit of employees. The Senate report stated:

> Since it is [almost] universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remain divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conductive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions.[28]

This same rationale against requiring employee representation by minority-supported unions was repeated in the House report, which stated:

> There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.[29]

The statements in these reports demonstrate that Congress understood that minority union bargaining would

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[28] S. Rep. No. 74-573, at 13 (1935), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 2300, 2313 (1985).

[29] H. R. Rep. No. 74-972, at 18 (1935), reprinted in 2 Leg. Hist. NLRA 2956, 2974.

undermine the potential for meaningful collective bargaining. On one hand, allowing employees who work side-by-side performing the same tasks to be represented by different minority unions, or a minority union as opposed to unrepresented employees, could create tension that would preclude them from "pooling their economic strength" in an effective manner. On the other hand, minority representation could provide employers a ready method of precluding true collective bargaining by playing the different minority representatives off against each other. Accordingly, the Act did not require employee representation by minority-supported unions because it would undermine the very purpose for which the Act was passed.

Indeed, the Supreme Court has repeatedly emphasized the centrality of majority rule to our system of industrial democracy and its importance for maintaining an effective collective bargaining process.[30] The Court has stated:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.[31]

Further highlighting the connection between collective bargaining and majority rule, the Court has suggested that "[t]he conditions for collective bargaining may not exist" where a majority of the employees refuse to designate a bargaining representative.[32] These statements by the Supreme Court recognize a Congressional determination that majority rule was the only means by which to redress inequality of bargaining power between management and labor and foster an effective collective bargaining system for the peaceful and fruitful resolution of labor disputes.

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[30] See, e.g., Emporium Capwell Co. v. Western Addition Cmty. Org., 420 U.S. 50, 62 (1975) ("Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule."); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) ("The majority-rule concept is today unquestionably at the center of our federal labor policy.").

[31] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. at 180.

[32] See J. I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944).

B. The Board and Supreme Court base the duty to bargain on the principle of majority rule

In the early enforcement of the Act, the Board held that an employer may recognize and bargain with a minority, members-only union, as long as the employer does not extend that union exclusive status.[33] However, nothing in the statutory language, legislative history of the Act, or decisions interpreting the Act, establish an employer's duty to do so. To the contrary, it is firmly established under Board and Supreme Court cases that the duty to bargain under the Act is based on the principle of majority representation, to the exclusion of compulsory minority union recognition. It is because of the importance of this fundamental principle, and not merely "conventional wisdom,"[34] that the Board has consistently refused to interpret the Act as according minority unions the same bargaining rights as majority representatives. Indeed, even the NLB, in the cases cited by the Charging Party for the proposition that members-only bargaining was mandatory under the NIRA, did not order the employers to bargain with the minority unions.[35]

1. Section 8(a)(5) is fundamentally premised on Section 9(a)

The Charging Party contends that the plain language of Section 8(a)(5) is not limited by Section 9(a) and therefore, an employer's duty to bargain does not hinge on exclusive majority status. However, contrary to the Charging Party's assertion, the Board has never construed Section 8(a)(5) as operating independently from Section 9(a). The Board will therefore not find a Section 8(a)(5) violation for refusing to bargain, and will not issue a

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[33] Consolidated Edison Co. of New York, 4 NLRB 71, 110 (1937), enfd. 95 F.2d 390 (2d Cir.), modified on other grounds 305 U.S. 197 (1938). However, recently that view has been questioned. See Julius Getman, The National Labor Relations Act: What Went Wrong; Can We Fix It?, 45 B.C. L. Rev. 125, 136-38 (2003).

[34] See Professor Morris, The Blue Eagle, at 81-88.

[35] See note 13, above. Indeed, in none of these striker reinstatement cases was the employer ordered to bargain with the minority union. See National Lock Co., 1 NLB (Part 2) at 19-20; Bee Line Bus Co., 1 NLB (Part 2) at 24-25; Eagle Rubber Co., 1 NLB (Part 2) at 33.

bargaining order, where a members-only union is not the majority representative. Indeed, in Don Mendenhall,[36] the Board dismissed a Section 8(a)(5) allegation based on the employer's alleged refusal to bargain over subcontracting affecting union members because the union operated as a members-only union, and was not the exclusive bargaining representative.[37]

The Charging Party contends that Don Mendenhall does not answer the question whether an employer is required to recognize a nonmajority, nonexclusive union as the bargaining representative of its members only. Instead, the Charging Party argues that the vice in this type of case is the fact that the employer recognized the union as the majority and exclusive representative in the collective-bargaining agreement when in fact it represented only its own members. Thus, the Charging Party contends that the union there was seeking majority representation when it did not exist.

However, in Don Mendenhall, the Board did not rely on a putative claim of majority representation to find that the employer had no Section 8(a)(5) bargaining obligation. Instead, the Board concluded that, notwithstanding contractual language to the contrary, the parties intended members-only bargaining. Indeed, in that case, the union never claimed to be a majority representative. Thus, the Board refused to find a Section 8(a)(5) violation, not based on the union's attempt to be a nonmajority representative of the entire unit, but based on the union's assertion that the employer had an obligation to bargain about subcontracting

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[36] 194 NLRB 1109, 1110 (1972).

[37] See Don Mendenhall, Inc., 194 NLRB at 1109-10. Accord: Makins Hats, 332 NLRB 19, 20 (2000) (Board refused to find Section 8(a)(5) violation for employer's withdrawal of recognition from union because employer had at all times applied contract on a members-only basis); Arthur Sarnow Candy Co., 306 NLRB 213, 217 (1992), supp. decision 312 NLRB No. 126 (1993), enfd. 40 F.3d 552 (2d Cir. 1994) (Board adopted ALJ's conclusion that bargaining order and bargaining relationship not enforceable under Section 8(a)(5) because members-only group was not appropriate bargaining unit within meaning of Section 9(a)); Manufacturing Woodworkers Ass'n, 194 NLRB 1122, 1123 (1972) (Board dismissed Section 8(a)(5) allegation on basis that it has "traditionally refused to give weight to such a [members-only] bargaining history, or to require its continuance, and [it would] not do so here").

of work performed by union members under a members-only contract. It was in this context that the Board concluded, "in the context of events, the [employer's] actions cannot be held violative of Section 8(a)(5)."[38]

Further, in cases where there was no evidence of majority-based representation, the Board has been consistent in finding no Section 8(a)(5) obligation for members-only bargaining. For example, in Goski Trucking Corporation,[39] the ALJ, affirmed by the Board, refused to find a Section 8(a)(5) violation for the employer's repudiation of the contract, because the unrefuted evidence was that the employer and union had entered into a members-only contract covering only two members of the union.[40]

Thus, the Board has steadfastly held that the language of Section 8(a)(5), "by reference to Section 9(a), requires as a predicate for any finding of violation that the employee representative has been designated or selected as the exclusive representative of the employees."[41] To do otherwise ignores the fundamental importance of majority rule, as codified by Section 9(a), to the success of industrial democracy as envisioned by the drafters of the Act, and as interpreted by the Board.

2. A bargaining obligation under Section 8(a)(1) exists only when the union represents a majority of employees

The Charging Party further argues that even if Section 8(a)(5) does not mandate minority bargaining, such an obligation is found in Sections 7 and 8(a)(1). The Board has held that a bargaining order can be premised on Section 8(a)(1) in addition to Section 8(a)(5). However, as with Section 8(a)(5), the union's majority status is a prerequisite to the issuance of a Section 8(a)(1) bargaining order. Thus, in Steel-Fab, the Board issued a Section 8(a)(1) bargaining order to remedy the employer's

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[38] Don Mendenhall, Inc., 194 NLRB at 1110.

[39] 325 NLRB 1032 (1998).

[40] See generally id. See also Reebie Storage & Moving Co., 313 NLRB 510, 510, 539-40 (1993), enf. denied on other grounds 44 F.3d 605 (7th Cir. 1995) (parties applied contract on a members-only basis; "Board does not issue bargaining orders in 'members only' units").

[41] Don Mendenhall, Inc., 194 NLRB at 1110.

unlawful conduct, finding it unnecessary to premise the bargaining order on Section 8(a)(5).[42] Notably, this bargaining order was premised on the finding that the union had established its majority status based on authorization cards from a majority of employees.[43] Indeed, the Supreme Court concluded that this prerequisite was necessary in Gissel Packing Co.:

> The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a [Section] 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.
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> . . . The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.[44]

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[42] Steel-Fab, Inc., 212 NLRB 363, 363-66 (1974), modified in Trading Port, Inc., 219 NLRB 298 (1975).

[43] See Steel-Fab, Inc., 212 NLRB at 378.

[44] NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969) (emphasis added). See also generally Gourmet Foods, 270 NLRB 578 (1984) (overruling Conair Corp., 261 NLRB 1189 (1982), enf. denied in relevant part 721 F.2d 1355 (D.C. Cir. 1983), cert. denied sub nom. Local 222, ILGWU v. NLRB, 467 U.S. 1241 (1984)) (refusing to issue bargaining order in Gissel case absent proof of union's majority status). Indeed, the Board stated in Gourmet Foods, 270 NLRB at 584 (emphasis in the original):

> The principle of majority rule is written into Section 9(a) of the National Labor Relations Act. . . . It is this standard of majority rule that enables the Act's policies of 'protecting the exercise by workers of…designation of representatives of their own choosing' [Section 1] and 'encouraging the practice and procedures of collective bargaining' [Section 1] to be realized. For it is the culmination of choice by a majority of employees that leads to the process of collective bargaining. . . .

This majority prerequisite also underlies the Board's refusal to require an employer to bargain with a minority group of unrepresented employees. Thus, the Board has consistently declined to find Section 8(a)(1) violations when employers refuse to recognize and bargain with unrepresented employees over grievances.[45] The rationale is again premised on the principle of majority rule, as stated by the Board in Charleston Nursing Center[46] in overruling an ALJ determination that the employer violated Section 8(a)(1) by failing to meet with employees to discuss their grievances over pay and working conditions. There, the Board stated:

> While it is clear that Section 8(a)(1) prohibits an employer from retaliating against employees for engaging in protected concerted activities such as the presentation of grievances, it is also clear that generally an employer is under no obligation to meet with employees or entertain their grievances upon request where there is no collective-bargaining agreement with an exclusive bargaining representative requiring it to do so. Swearingen Aviation Corporation, 227 NLRB 228, 236 (1976), enfd. in pertinent part 568 F.2d 458 (5th Cir. 1978). Furthermore, it is not illegal for an employer in such circumstances to refuse to deal with the employees except on an individual basis. Pennypower Shopping News, Inc., 244 NLRB 536, fn.4 (1979).[47]

The Charging Party first attempts to distinguish these cases on the basis that they involve only "ad hoc" groups of employees, rather than formal, organized representatives.[48] We note first that Section 7 does not differentiate between informal, "ad hoc" groups of employees and organized

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[45] See, e.g., Charleston Nursing Center, 257 NLRB 554, 555 (1981) (employer did not violate Section 8(a)(1) by refusing to meet with unrepresented group of employees about pay raise); Pennypower Shopping News, 244 NLRB 536, 537 n.4, 538 (1979), supp. decision 253 NLRB 85 (1980), enfd. 726 F.2d 626 (10th Cir. 1984) (same); Swearingen Aviation Corp., 227 NLRB 228, 236 (1976), enf. in relevant part 568 F.2d 458 (5th Cir. 1978) (same).

[46] 257 NLRB at 555.

[47] Ibid.

[48] See Professor Morris, The Blue Eagle, at 164.

bargaining representatives.[49] Second, the Board has indeed held that an employer has no obligation to discuss grievances with a union, once that union has lost majority support.[50] Next, the Charging Party maintains that these holdings are dicta and that the Board has never seriously considered the issue of minority bargaining. However, the Board has held clearly and directly in these cases, and consistent with the Section 8(a)(5) cases discussed above, that the only bargaining obligation under the Act is with an exclusive representative of employees. This principle cannot be so easily dismissed as mere conventional wisdom never fully considered by the Board. Thus, contrary to the Charging Party's assertion, the Board will only issue a Section 8(a)(1) bargaining order when a union has attained majority status, and will decline to find a bargaining obligation in the absence of a majority.

Finally, the Charging Party points to one Board case which seems to suggest a Section 8(a)(1) bargaining obligation absent a majority. In NLRB v. Lundy Manufacturing Corp.,[51] the court affirmed the Board's conclusion that, although the employees were represented by a union with a collective-bargaining agreement, the employer nevertheless violated Section 8(a)(1) by refusing to meet with a group of employees over their grievances.[52] The court noted the unique facts of the case, such as the absence of a functioning union grievance committee, and based its reasoning in part on its reading of the proviso of Section 9(a).[53] However, the Charging Party does recognize

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[49] See note 7, above.

[50] See, e.g., Mooresville Cotton Mills, 2 NLRB 952, 955 (1937), enf. in relevant part 94 F.2d 61 (4th Cir. 1938). Although raised in the context of a Section 8(a)(5) and not a Section 8(a)(1) allegation, the Board in Mooresville stated, ibid:

> It is not an unfair labor practice within the meaning of Section 8, subdivisions (1) and (5), of the Act for an employer to refuse to discuss grievances with employee representatives when such representatives do not represent a majority of his employees. That the [u]nion, on September 21, 1935, represented only a minority of respondent's employees is clear from the record.

[51] 316 F.2d 921 (2d Cir.), cert. denied 375 U.S. 895 (1963).

[52] Lundy, 316 F.2d at 926-27.

that this decision is of questionable validity after the Supreme Court's opinion in Emporium Capwell Co. v. Western Addition Community Organization,[54] in which the Court stated that the proviso to Section 9(a) did not render an employer's refusal to discuss employees' grievances unlawful.[55] Thus, to the extent that Lundy could have been interpreted to establish a duty to bargain under Section 8(a)(1), that interpretation is no longer viable after Emporium Capwell.

3. *Linden Lumber* prevents an employer's duty to recognize and bargain with a minority union

Finally, we conclude that the Supreme Court's decision in Linden Lumber Division v. NLRB[56] further dispels the view that the Act mandates minority bargaining rights. There, the Supreme Court affirmed the Board's conclusion that an

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[53] Id. at 925-27. The first proviso to Section 9(a) states:

> That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect.

[54] 420 U.S. 50 (1975). See Professor Morris, The Blue Eagle, at 163.

[55] Professor Morris, The Blue Eagle, at 163. The Court in Emporium Capwell stated:

> Respondent clearly misapprehends the nature of the 'right' conferred by [the proviso]. The intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of [Section] 8(a)(5)…. The Act nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation, nor can it be read to authorize resort to economic coercion.

Emporium Capwell, 420 U.S. at 61 n.12 (citations omitted).

[56] 419 U.S. 301 (1974).

employer can lawfully refuse to recognize a union which purports to represent a majority of employees based on a showing of authorization cards.[57] Rather, the Court held, the burden is on the union, faced with the employer's refusal, to petition the Board for an election to determine its majority status.[58]

It is evident from the Linden Lumber decision that there is no duty on the part of an employer to recognize a union purporting to represent a majority of employees absent a Board election. In light of Linden Lumber, the Charging Party's view would create the anomaly of granting greater recognitional and bargaining rights to minority unions than those granted to majority representatives. This is further evidence that it is firmly established that collective-bargaining rights and duties are rooted in the long-held tradition of majority representation.

III. Conclusion

The Charging Party weaves an argument that would require an employer to bargain collectively with a members-only union where there is not an exclusive majority representative of employees. The Charging Party contends that the clear and unambiguous language of the statute requires it, the legislative history supports it, and the Board and Court cases suggesting otherwise are distinguishable. Thus, the Charging Party concludes that the Board is provided a blank slate and that these open issues should be put to the Board by the General Counsel. However, we conclude that this issue is not open, but settled. The essence of industrial democracy, as contemplated and enforced by the Act, is fundamentally based on majoritarian principles. As explained above, this conclusion is clearly supported by the statutory language, the legislative history, and Board and Supreme Court decisions interpreting the Act. Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

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[57] Linden Lumber, 419 U.S. at 310.

[58] Ibid.