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Halima Woodhead

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HALIMA WOODHEAD*

I. INTRODUCTION

When President Barack Obama nominated Service Employees International Union ("SEIU") Associate General Counsel Craig Becker to serve on the National Labor Relations Board ("NLRB" or "Board"), some commentators argued that he would impose a controversial method of recognizing unions, known as card-check or majority sign-up, through the administrative process.[1] This method of recognizing unions was stalled in

* J.D. Candidate, May 2011, American University, Washington College of Law; M.A. Candidate, *International Development,* December 2011, American University, School of International Service. A special thanks to Gwen and Bill Nutting for supporting my education over the years.

1. *See* Editorial, *Back Door Card Check*, WALL ST. J., Sept. 14, 2010, at A20, *available at* http://online.wsj.com/article/SB10001424052748703597204575483882585485368.html (last visited Nov. 10, 2010) (suggesting Becker will push the NLRB to implement the

Congress in the Employee Free Choice Act ("EFCA").[2] The current Board practice, in general, is to recognize an employer's collective bargaining obligation only if the union has won an NLRB-certified secret ballot election.[3] Although the Supreme Court has affirmed this interpretation of the National Labor Relations Act ("NLRA" or "Act"),[4] the Board retains the discretion to change its interpretation under the *Chevron* doctrine.[5]

The NLRB could expand the methods by which a union may be recognized as the representative of a bargaining unit with approval by a majority of employees.[6] It would be well within the scope of the Board's power to impose this change using its adjudication process, although it is unlikely that the Board will move in this direction.[7] Additionally, the nature of the Board is such that its membership undergoes a complete turnover during the course of a presidential term, and thus there is no guarantee that the new rule would remain on the books for long.

Currently, the Employee Free Choice Act is pending in Congress, but its

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card check since the EFCA failed to pass in Congress); Ryan O'Donnell, *Craig Becker: Big Labor's Big Ally*, THE FOUNDRY (Mar. 26, 2010, 2:00 PM), http://blog.heritage.org/2010/03/26/craig-becker-big-labor%E2%80%99s-big-ally/ (last visited Nov. 10, 2010) (denouncing recess appointment of Becker because his past reflects a bias against employers and support for the card check); Brad Peck, *Craig Becker–Card Check's Inside Man*, THE CHAMBER POST (Jul. 25, 2009, 8:48 AM), http://www.chamberpost.com/2009/07/craig-becker-card-checks-inside-man.html (last visited Nov. 10, 2010) (seeking further scrutiny of Becker's pro union past because it may lead Becker to eliminate the secret ballot through a position on the NLRB).

2. *See* Employee Free Choice Act (EFCA) of 2009, S. 560, 111th Cong. (1st Sess. 2009); Employee Free Choice Act (EFCA) of 2009, H.R. 1409, 111th Cong. (1st Sess. 2009) (providing an amendment to the National Labor Relations Act, 29 U.S.C. § 159(c) (2006), to enable the Board to designate a labor organization as the exclusive bargaining representative on the presentation of "valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative").

3. *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 310 (1974) (holding, absent evidence of unfair labor practices on the part of an employer, a union in possession of authorization cards must commence to an NLRB-certified election).

4. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006).

5. *See, e.g.*, Holly Farms Corp. v. NLRB, 517 U.S. 392, 398–99, 402–03 (1996) (applying deference to NLRB's interpretation of secondary farming and focusing on the reasonableness of the interpretation given the ambiguity of the statutory language (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984))); *see generally* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (declaring that an agency's reasonable interpretation of a statute should be given deference where Congress's intent is not free from ambiguity).

6. *See* Mark Schoeff Jr., *NLRB Decisions Could Make Card Check a Reality,* WORKFORCE MGMT. (Jul. 2009), *available at* http://www.workforce.com/section/03/feature/26/5/2/97/265299_printer.html (last visited Nov. 10, 2010) (observing, as former NLRB Chairman William Gould, IV stated, that the NLRB frequently reverses its interpretation of labor law).

7. *See id.* (noting that the NLRB has other methods of ordering union recognition through card-check short of reversing long-standing Board precedent).

future is uncertain at best.[8] This legislation would provide card-check recognition during union organization campaigns, rather than allowing employers to demand a NLRB-certified secret-ballot election.[9] The measure is supported by labor because it will increase union membership.[10] However, those who oppose this legislation cite its undemocratic nature and the possibility that unions may use coercion to obtain signed cards.[11]

President Obama came under fire for ignoring labor issues during his first year in office and his inability to navigate around Republican efforts to block new labor legislation.[12] A policy shift within the NLRB itself may be one of labor's best hopes for organized labor reform, since the balance of the Board's membership is ideologically pro-labor.[13] The controversy over the EFCA makes it unlikely for the Board to wait for a statutory amendment to implement card-check method.[14]

This Article will examine whether the NLRB has the power to make the card-check method law through the administrative process. Part II explains and defines card-check recognition.[15] Part III discusses the statutory

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8. *See* Daniel Malloy, *Labor-Business Class Shifts from Congress*, PITTSBURGH POST-GAZETTE, Jan. 17, 2011, A-1, *available at* http://www.post-gazette.com/pg/11017/1118574-84.stm (observing, given backers of the EFCA were unable to obtain sixty votes in the Senate, the current divided Congress renders "little chance of EFCA's resuscitation.").

9. *See* Employee Free Choice Act (EFCA) of 2009, S. 560, 111th Cong. (1st Sess. 2009); Employee Free Choice Act (EFCA) of 2009, H.R. 1409, 111th Cong. (1st Sess. 2009) (mandating, upon passage, the NLRB to determine the substance and procedure of adjudicating authorization card validity).

10. *See* Sam Hananel, ABC NEWS, *Organized Labor's Agenda Hits Roadblock; What Now?* (Feb. 27, 2010), http://abcnews.go.com/Business/wireStory?id=9963922 (last visited Nov. 22, 2010) (discussing the labor movement's frustration with its inability to get its goals through the Democratic-controlled Congress).

11. *See* Letter from R. Bruce Josten, Exec. Vice President, Gov't Affairs, Chamber of Commerce to S. Comm. on Health, Educ., Labor & Pensions (Jul. 24, 2009) *available at* http://www.uschamber.com/sites/default/files/hill-letters/090724_becker.pdf (expressing concern that Becker's pro-labor views incline him to implement portions of EFCA absent congressional passage—most notably policies that utilize "questionable pressure tactics . . . [on] employers and workers" and "the effective elimination of secret ballots in organizing campaigns.").

12. *See* Hananel, *supra* note 10 (discussing the AFL-CIO's frustration with President Obama's push for health care reform to take precedence before EFCA during the first year of his administration).

13. *See* Melanie Trottman & Kris Maher, *Labor Board's Recent Decisions Tilt in Favor of Unions*, WALL ST. J., Nov. 11, 2010, at A5, *available at* http://online.wsj.com/article/SB10001424052748704804504575606872095817474.html (last visited Nov. 22, 2010) (observing that Republican gains in Congress after the November 2010 election effectively killed EFCA).

14. *See id.* (reviewing the Obama-era Board's quick reversal of several Bush-era NLRB decisions).

15. *See infra* Part II (defining card-check and its significance in relation to the EFCA).

framework for recognition of union representatives.[16] Part IV provides a historical overview of the development of the law surrounding the union recognition process.[17] Part V of this Article discusses whether and how the administrative process could be used to make card-check the law despite Congressional inaction.[18] Additionally, Part V argues that although it is possible under current administrative and labor law to do so, such a policy would be short-lived.[19] Part VI concludes that it in the best interest of organized labor to pursue passage of the Employee Free Choice Act rather than to encourage the NLRB to act on its own.[20]

II. WHAT IS THE CARD-CHECK METHOD?

Put simply, card-check is a way to document majority support for a union through signed cards rather than going through a certification election.[21] Card-check is not an alien concept in American labor law, because an employer may choose to recognize a union based on cards and opt to never raise a challenge to whether the union's authorization cards actually support the organizational will of employees.[22] Once recognized, the employer has many of the same legal obligations with respect to that union as though the union had won certification after a secret ballot election.[23] If the employer refuses to recognize the union voluntarily, then

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16. *See infra* Part III (indentifying and explaining Sections 8(a)(5) and 9(c) in relation to an employer's obligation to collectively bargain under the NLRA).

17. *See infra* Part IV (tracing the circumstances surrounding the Board's shift from accepting a card-check method to a secret ballot election).

18. *See infra* Part V.A (exploring the possibility that the Board could adopt card-check through adjudication under a *Chevron* two-step process).

19. *See infra* Part V.B (discussing the problems with and administrative adjudication accepting card-check).

20. *See infra* Part VI (stating that an adoption through the EFCA is favored over an adjudication by the Board due to the potential political costs and negative implications).

21. *See* Hananel, *supra* note 10 (noting that opponents fear Becker may try to impose a policy that subverts majority-rule election with majority-rule authorization cards carte blanche—without Congressional endorsement for such a complete shift).

22. *See* Mark Schoeff, Jr., *NLRB Decisions Could Make Card Check a Reality,* WORKFORCE MGMT., Jul. 2009, *available at* http://www.workforce.com/section/03/feature/26/5/2/97/265299_printer.html (last visited Nov. 10, 2010) (stating the policy regarding card-check authorization for union representation is currently in the hands of the employer, who may request a NLRB-supervised and certified election prior to recognizing a union as the exclusive bargaining representative for employees).

23. *But cf.* NLRB v. Gissel Packing Co., 395 U.S. 575, 598–99 & n.14 (1969) (allowing employers who have voluntarily recognized a union on the basis of authorization cards to call for a vote to within twelve months of the union's recognition to ascertain whether the union still retains a majority of employee support (citing Brooks v. NLRB, 348 U.S. 96, 75 (1954))).

the question of representation must be resolved through a secret ballot election, and the cards become moot.[24] The card-check measure included in the EFCA would make recognition mandatory if a majority of employees pronounce their support of the union by signing cards.[25] This Article analyzes the significance of the NLRB's authority to require an automatic obligation to bargain through the use of card-check absent the statutory amendments proposed in the EFCA.

III. THE STATUTORY BASIS OF AN EMPLOYER'S OBLIGATION TO ENGAGE IN COLLECTIVE BARGAINING

The NLRA contains two provisions that are key to the discussion at hand: Sections 9(c) and 8(a)(5).[26] Currently, under Section 9(c), whenever a "question of representation" is raised, only the certified results of a secret ballot election are determinative of a union's status.[27] The Board possesses arguably wide discretion to interpret "question of representation" under Section 9(c)[28] and "representative" under Section 8(a)(5).[29] Hence, the Board could potentially expand the applicability of card-check by adopting a narrow definition of what constitutes a "question of representation."[30]

Sometimes a secret ballot election is impractical.[31] Under Section 8(a)(5), an employer's failure to bargain with the certified Section 9(a)

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24. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 513–14 (1993) (observing that employee signed authorization cards do not create a statutory duty to bargain with a union on the part of the employer and an employer's refusal to bargain with a union on the basis of the union's authorization cards—in the absence of an NLRB secret ballot election—is not an unfair labor practice within the meaning of Section 8(a)(5) of the NLRA).

25. Employee Free Choice Act (EFCA) of 2009, S. 560, 111th Cong. (1st Sess. 2009) (proposing an amendment to 29 U.S.C. § 159(c) (2006) to require certification when "a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative . . .").

26. *See* National Labor Relations Act, 29 U.S.C. § 158(a)(5) (2006) (making an employer's "refus[al] to bargain collectively with the *representatives* of his employees, subject to [29 U.S.C. § 159]" an unfair labor practice (emphasis added)); § 159 (requiring the Board to investigate a petition presented by a union to the NLRB to certify that union as the collective bargaining representative for the employer's employees and "if [the Board] has reasonable cause to believe that a question of representation . . . exists [sic] shall provide for an appropriate hearing upon due notice . . . [and] if [the Board] finds that such a question of representation exists, it shall direct an election by *secret ballot* and shall certify the results thereof." (emphasis added)).

27. § 159(c)(1)(B).

28. *Id.*

29. § 158(a)(5).

30. § 159(c)(1)(B).

31. *See* Becker, *supra* note 24, at 515–18 (noting the difficulties with trying to apply the political election process to the workplace environment).

representative of its employees is an unfair labor practice.[32] Section 8(a)(5) has been used to establish a collective bargaining obligation where an untainted secret ballot election is impossible and majority support can be established on an alternative basis.[33]

IV. EVOLUTION OF BOARD PRACTICE

After the NLRA's passage in 1935, the NLRB initially allowed unions to become certified based on a variety of evidence demonstrating majority support.[34] Due to political pressure, the Board shifted away from card-check and other evidence in favor of secret ballot elections,[35] a move that was codified in the Taft-Hartley Act of 1947.[36]

The original language of the National Labor Relations Act allowed representation to be determined either by "a secret ballot of employees, or [the use of] any other suitable method to ascertain [sic] such representatives."[37] The initial Board membership looked to "signed authorization cards, membership applications, petitions, affidavits of membership, signatures of employees receiving strike benefits from a union, participation in a strike called by a union, and employee testimony" to resolve questions of representation.[38]

In 1939, the Board—under pressure from various actors on all sides of the political spectrum—abandoned its practice of certifying unions without a Board-supervised secret ballot election.[39] The Taft-Hartley Act codified

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32. § 158(a)(5).

33. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 579 (1969) (stating that a union may use an "alternate route to majority status" when "a fair election [is] an unlikely possibility" due to unfair labor practices on the part of the employer).

34. *See* Becker, *supra* note 24, at 508 (recounting that, of the available "diverse forms of evidence" that the Board originally used to determine when a union had majority support, signed authorization cards were primarily relied upon).

35. *See* Cudahy Packing Co., 13 N.L.R.B. 526, 531-32 (1939) (endorsing secret elections as the best way to effectuate the National Labor Relations Act). *See also* Aaron Bros., 158 N.L.R.B. 1077, 1078 (1966) (stating that secret elections are "normally a more satisfactory means of determining employees' wishes" and that employers may insist "on election as proof of a union's majority," as long as the employer has a "good-faith doubt of the union's majority").

36. *See* Labor Management Relations (Taft-Hartley) Act § 9, Pub. L. No. 101, 61 Stat. 136, 144 (1947) (codified as amended at 29 U.S.C. § 159 (2006)) (amending the general language of Section 9 of the National Labor Relations Act of 1935 to limit certification to secret ballot elections).

37. *See* National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449, 453 (1935) (codified at 29 U.S.C. §§ 151-53, 157, 159–61, 163, 165-67 (2006)).

38. Becker, *supra* note 24, at 508.

39. *See id.* at 508–10 (lamenting that the first several years of the NLRB resulted in universal criticism for the Board, including the President, Congress, the press, employers, and unions). *See, e.g.*, Cudahy Packing Co., 13 N.L.R.B. at 531–32 (endorsing the use of the secret ballot to select the representative union).

this restriction by changing the language of Section 9(c) to say "[i]f . . . a question of representation exists, [the Board] shall direct an election by secret ballot and shall certify the results thereof."[40] In *Aaron Bros.*, a case decided by the Board in 1966, the Board held that an employer's refusal to bargain would not violate Section 8(a)(5) if the union had been selected in the absence of an election.[41] In 1969, the Supreme Court held, in *NLRB v. Gissel Packing Co.*, that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[42]

Specifically, in regard to authorization cards, the Board has an inconsistent history.[43] In 1949, the Board promulgated the *Joy Silk* doctrine.[44] In that case, the Board held that an employer's good faith doubt that the union's authorization cards did not adequately demonstrate its majority status constituted a proper defense to a Section 8(5)(a) unfair labor practice allegation.[45] Good faith did not apply where, for example, other unfair labor practices occurred or the employer failed to provide a reason for her doubt.[46]

The circumstances surrounding the employer's doubt are very important. For instance, in *Aaron Bros.*, an employer that had no prior bargaining relationship with the union was found not to be acting in bad faith when it demanded an election to prove the union's majority; despite not offering compelling reasons.[47] In that case, the Board held that to find bad faith, the

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40. § 159(c).

41. *See* Aaron Bros., 158 N.L.R.B. 1077, 1080 (1966) (holding that the Employer's refusal to bargain must also be in good faith and without other indicia of misconduct).

42. 395 U.S. 575, 602 (1969).

43. *See id.* at 592 ("[To] trace the evolution of the Board's approach to authorization cards . . . requires viewing the Board's treatment of authorization cards in three separate phases: (1) under the *Joy Silk* doctrine, (2) under the rules of the *Aaron Bros.* case, and (3) under the approach announced at oral argument before this Court.").

44. *See* Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264 (1949) (holding that an employer's bad faith insistence on a Board election as proof of the union's majority status and in conjunction with a refusal to bargain until such an election happens is a violation of Section 8(a)(5)), *enfd. as modified*, 185 F.2d 732 (D.C. Cir. 1980).

45. *See id.* (stating that a violation will occur if the employer is motivated by "a rejection of the collective barraging principle or by desire to gain time within which to undermine the union." (internal quotation marks omitted)); *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 592 (1969) ("Under [the *Joy Silk* doctrine], an employer could lawfully refuse to bargain with a union claiming representative status through possession of authorization cards if he had a 'good faith doubt' as to the union's majority status . . . ."). .

46. *See Gissel Packing*, 395 U.S. at 592–93 (observing that the *Joy Silk* doctrine did not apply where the employer committed independent unfair labor practices indicative of bad faith).

47. *See* Aaron Bros., 158 N.L.R.B. 1077, 1078–80 (1966) (holding the employer's inability to prove good faith did not satisfy the General Counsel's burden of

unfair labor practice must have been "calculated to dissipate union support" among workers.[48] The Board elaborated that a failure to state a reason when questioning a majority status is not evidence of bad faith, unless the facts and circumstances of the case support that conclusion.[49]

In *NLRB v. Gissel Packing Co.*, several unions filed unfair labor practice charges against employers although, in some cases, secret ballot elections had not taken place.[50] The unions argued that employers had violated Section 8(a)(5) when a majority of employees, in an appropriate unit, signed authorization cards and the employers had committed other unfair labor practices that eliminated the possibility of a fair secret ballot election.[51] The employers argued that their refusal to bargain was legitimate, because the authorization cards did not settle the question of representation.[52] The NLRB issued bargaining orders and reasoned that the authorization cards were sufficient to establish that a majority of employees in the bargaining unit supported the union as their representative and that the employers had ulterior motives rather than good faith doubt in regard to the union's majority status.[53] Additionally, the NLRB determined that the employers had committed unfair labor practices in violation of Sections 8(a)(1) and (3).[54] The Fourth Circuit, however, reversed the Board's decision and bargaining orders with respect to the Section 8(a)(5) claim, but upheld the Board's decision regarding the Section 8(a)(1) and (3) claims.[55] The First Circuit upheld the Board's interpretation of Section

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demonstrating the employer's bad faith).

48. *Id.* at 1079.

49. *See id.* at 1079 ("Whether an employer is acting in good or bad faith in questioning the union's majority is a determination which of necessity must be made in the light of all the relevant facts of the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct."); *see also Gissel Packing*, 395 U.S. at 593 (noting that after *Aaron Bros*., "an employer no longer needed to come forward with reasons for rejecting a bargaining demand.").

50. *See* 395 U.S. at 580 (recounting the various allegations of coercion and intimidation that the employers utilized against the unions and their supporters).

51. *See id.* at 580–82 (observing that elections, subsequent to the signed authorization cards and the alleged unfair labor practices, either never occurred or resulted in victory for the employers).

52. *Id*. at 580.

53. *See id.* at 582–83 (discussing the Board's use of employers' "desire to gain time to dissipate the [union's majority] status . . . [in order to wage] their antiunion campaign efforts" as evidence of their violation of Section 8(a)(5)).

54. *See id.* (mentioning the Board's findings that the employers' had engaged in unlawful interrogations, surveillance, promised benefits, and terminations of union-supporting employees).

55. NLRB v. Gissel Packing Co., 398 F.2d 336, 337 (4th Cir. 1968) (per curiam) *rev'd in part, aff'd in part*, 395 U.S. 575 (1969); NLRB v. Heck's, Inc., 398 F.2d 337, 338–39 (4th Cir. 1968) (per curiam) *rev'd in part, aff'd in part sub nom.* NLRB v.

8(a)(5) and fully enforced the bargaining order[56]—creating a circuit split.[57] In order to resolve the issue, the Supreme Court granted certiorari to all four cases and ultimately upheld the Board's bargaining orders.[58]

At oral argument before the Supreme Court in *Gissel*, the Board abandoned the good faith standard and instead relied upon the existence of other unfair labor practices to establish an Section 8(a)(5) violation.[59] The Supreme Court summarized the Board's new policy in the following manner: "an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union."[60] However, the Court added "that an employer could not refuse to bargain if he knew, through a personal poll for instance, that a majority of his employees supported the union."[61] Because the employers had committed unfair labor practices that prevented a fair election, the Supreme Court noted that their decision did not address "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes."[62] Thus, the scope of the Court's decision in *Gissel Packing* does not include cases where a union collects authorization cards from a majority of employees without employer interference.

The NLRB and the Supreme Court addressed that question in *Linden Lumber Division, Summer & Co. v. NLRB* in 1974.[63] In *Linden Lumber*, the union had obtained authorization cards from a majority of employees, but the employer refused to recognize the union.[64] The union filed for an election pursuant to Section 9(c), to which the employer stated that it would refuse to abide by the result. This prompted the union to withdraw its petition. Linden argued that two of the employees were actually

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Gissel Packing Co, 395 U.S. 575 (1969); Gen. Steel Products, Inc. v. NLRB, 398 F.2d 339, 340 (4th Cir. 1968) (per curiam) *rev'd in part, aff'd in part sub nom.* NLRB v. Gissel Packing Co, 395 U.S. 575 (1969).

56. NLRB v. Sinclair Co., 397 F.2d 157, 161–62 (1st Cir. 1968), *aff'd sub nom.* NLRB v. Gissel Packing Co, 395 U.S. 575 (1969).

57. *See id.* at 585, 589–90 (recounting the conflicting opinions on the NLRB's interpretation of Section 8(a)(5) in the First and Fourth Circuits).

58. *See Gissel Packing,* 395 U.S. at 579.

59. *Id.* at 594.

60. *Id.*

61. *Id.*

62. *Id.* at 595.

63. *See* 419 U.S. 301, 302 (1974) (couching that the question presented in *Linden Lumber* was precisely the question the Court had "expressly reserved" in *Gissel Packing*).

64. *Id.*

supervisors, and their participation in organizing a recognitional strike had compromised the reliability of the authorization cards. The only unfair labor practice that Linden was charged with was failing to bargain with the employees' representative—in violation of Section 8(a)(5).[65] The Board held that Linden's "refusal to accept evidence of majority support other than the results of a Board election" did not constitute an unfair labor practice,[66] and the Supreme Court subsequently upheld this policy as a proper use of the Board's power to interpret the NLRA.[67]

Since *Linden Lumber*, the Board has interpreted the "question of representation" broadly, encompassing virtually all situations in which an employer denies a demand for recognition.[68] It is so broad that Board policy essentially always calls for an election as a prerequisite for recognition, unless the employer recognizes the union voluntarily or commits an unfair labor practice that would taint any election results.[69] The Supreme Court has upheld this policy as a proper use of the Board's discretion.[70]

V. ADMINISTRATIVE PROCESS

The NLRB is composed of five members, appointed by the President and charged with the administration of the NLRA.[71] Typically, the Board announces rules through adjudication rather than rulemaking.[72] As such, if the Board is presented with an ideal set of facts for it to re-examine the

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65. *Id.*

66. Linden Lumber Division, Summer & Co., 190 N.L.R.B. 718, 721 (1971), *enf. denied sub nom.* Truck Drivers Local No. 413 v. NLRB, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd sub nom.* Linden Lumber Division, Summer & Co. v. NLRB, 419 U.S. 301 (1974).

67. *See Linden Lumber*, 419 U.S. at 309–10 (holding that the Board's decision was neither "arbitrary and capricious or an abuse of discretion).

68. *See id.* at 310 (placing the burden on unions to follow through with their election petitions before the NLRB prior to claiming authorization cards to resolve questions of representation).

69. *See* OFFICE OF THE GEN. COUNSEL, NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT: GENERAL PRINCIPLES OF LAW UNDER THE STATUTE AND PROCEDURES OF THE NATIONAL LABOR RELATIONS BOARD 9 (1997).

70. *See, e.g.*, John Cueno, Inc. v. NLRB, 459 U.S. 1178, 1183 (1983) (applying *Linden Lumber* to require a union to demonstrate majority status through an NLRB certified election).

71. *See* 29 U.S.C. § 153(a) (2006).

72. *Cf.* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2017 (2009) ("The fact that the NLRB eschews notice-and-comment rulemaking makes it immune to the frequent post-Administrative Procedure Act waves of regulatory reform that have focused on the rationalization and coordination of informal rulemaking.").

question, it can announce a new rule via adjudication.[73] To present an opportunity to change the current rule, a dispute must arise from an employer's refusal to enter collective bargaining with a representative that has demonstrated, through signed authorization cards, that a majority of employees within an appropriate bargaining unit have requested representation. The representative would have to file an unfair labor practice charge against the employer for violating Section 8(a)(5).[74] Then, the Board could rule on the question of what is required to show that a union has been selected as the representative under Section 8(a)(5).

The Board could then announce a new interpretation of Section 8(a)(5)—that the status of "representative" can be achieved through collecting signed authorization cards from a majority of employees in an appropriate bargaining unit, even if there are no other allegations of unfair labor practices and a fair election would be possible. In doing so, the NLRB could change the policy of finding a "question of representation" under Section 9(c) wherever the employer disputes such representation, and implement a more restrictive approach that would require the employer to show cause to question the union's majority status—an allegation that the cards were invalid because they were collected over too long of a time period or some evidence of fraud—rather than just the absence of an election. Representation could exist where a union has demonstrated that a majority of employees have signed union cards, and the union could avoid a secret ballot election.

An employer would probably appeal such a sweeping change in Board policy.[75] Upon ultimate review, the Supreme Court might uphold the policy change as a valid exercise of the Board's adjudicative rulemaking authority. The only insurmountable legal restraints on the Board's rulemaking authority are embodied in statutes enacted by Congress and from rulings of the Supreme Court.[76] Indeed, the traditionally preferred method of rulemaking by the Board—rules made through adjudication—

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73. *See, e.g.*, Toering Elec. Co., 351 N.L.R.B. 225, 225–25 (2007) (changing the Board's interpretation in "salting campaign" Section 8(a)(3) discharge cases—when a union plants a union organizer as an employee at an employer's workplace to spur union support—to require the General Counsel to prove the "salts" have a "genuine interest in securing employment").

74. 29 U.S.C. 158(a)(5) (2006).

75. *See* 29 U.S.C. § 160(f) (2006) (providing that "[a]ny person aggrieved by a final order of the Board . . . may obtain a review of such order in any Unites States court of appeals in the circuit [where personal jurisdiction exists over a party] . . . or, in the Unites States Court of Appeals for the District of Columbia . . . .").

76. *Cf.* Michael C. Harper, *Judicial Control of the NLRB's Lawmaking in the Age of* Chevron *and* Brand X, 80 B.U. L. REV. 189, 191–92 (2009) (arguing that courts can regulate the Board's frequently shifting precedents even outside the Board using its rulemaking power).

are rightly subject to challenge in subsequent adjudications—even if the rules are of general applicability.[77] On the other hand, because the Board has complete turnover every five years and it is not required to rely on principles of *stare decisis,* it is often criticized for the uncertainty surrounding the policies that it promulgates.[78] The next section will discuss whether such a policy change should survive judicial review.

A. Argument to Uphold Card-Check Unilaterally Imposed by the NLRB

Under *Chevron*, judicial review of agency decision-making is a two-step process.[79] First, the Court must ask whether the statute in question has a clear meaning.[80] If the relevant statute is ambiguous, then step two requires that the Court determine whether the agency's interpretation is reasonable.[81] From the current language of Section 9(c), there is no ambiguity under *Chevron* step one as to whether a secret ballot is necessary to certify a bargaining representative when there is "a question of representation".[82] However, it is well within the Board's power to interpret ambiguous provisions of the Act either broadly or narrowly.[83] Therefore, what constitutes a question of representation may be validly subject to the Board's interpretation under *Chevron* step one because the NLRA is ambiguous as to what constitutes a question of representation.[84] In *Linden*

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77. *See* Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1118 (2005) (noting that Board will usually overturn its more "controversial decisions after a change in a presidential administration").

78. *See id*. at 1118, 1120 (observing that both employers and unions are sometimes reluctant to comply with Board decisions if the decision is controversial and may be overturn by a later Board).

79. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984).

80. *See id.* at 842–43 (outlining that the "question [is] whether Congress has directly spoken to the precise issue.").

81. *See id.* at 843 (holding that a reviewing court must not supplant its own statutory construction, but—assuming the statutory language is either "silent or ambiguous"—must examine whether the agency's construction is "permissible").

82. *See* 29 U.S.C. § 159(c)(1)(B) (2006).

83. *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 124, 130–32 (1944) (upholding that the Board's interpretation of "employee" to cover a wide range of workers to help effectuate the policies of the NLRA), *superseded by statute*, Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 137 (1947), *as recognized in* NLRB v. United Ins. Co. of Am., 390 U.S. 254 (1968); *see also* Jamison F. Grella, Comment, *From Corporate Express to FedEx Home Delivery: A New Hurdle for Employees Seeking the Protections of the National Labor Relations Act in the D.C.* Circuit, 18 AM. U. J. GENDER SOC. POL'Y & Law 877, 901–02 (2010) (arguing that courts should give the NLRB the most deference when it is interpreting the scope of the NLRA).

84. *See* §159(c)(1)(B) (stating that "if the Board finds upon the record [that a] question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.").

Lumber, the Supreme Court did not determine that the *Gissel Packing* approach—requiring an election in the absence of voluntary recognition or substantial unfair labor practices—was the only acceptable approach.[85] Rather, Justice Douglas explained,

> In light of the statutory scheme [of the NLRA] and the practical administrative procedural questions involved, we cannot say that the Board's decision that the union should go forward and ask for an election on the employer's refusal to recognize the authorization cards was arbitrary and capricious or an abuse of discretion.[86]

This decision occurred before *Chevron*, but the Court understood its role was not to mandate an interpretation, but to oversee the process used to reach that interpretation.[87]

Having satisfied the first step, the next question is whether a narrower interpretation would be reasonable under *Chevron* step two.[88] A narrow construction of what constitutes a question of representation neither need be confined within the statutory language, nor would it be arbitrary and capricious.[89] The current policy is very broad, and allows an employer to question representation without cause.[90] It need not be so extreme—indeed, a policy limiting the reach of this provision to situations in which there is a legitimate question of representation may be more reasonable than its predecessor. By limiting the application of Section 9(c), Section 8(a)(5) would apply only when no "question of representation" exists. The scope of Section 8(a)(5) is not limited to a "certified representative"—unions can obtain the status as the representative independent of their certification through secret ballot election.[91] Congress easily could have changed the language from "representative" to "certified representative" had it desired a

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85. *See* Linden Lumber Division, Summer & Co. v. NLRB, 419 U.S. 301, 309–10 (1974) (explaining the standard of review for the NLRB's interpretation of the Act is whether the Board's determination was either arbitrary and capricious or an abuse of discretion—not a search for the best policy).

86. *Id.*

87. *Id.* at 310.

88. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984).

89. *See, e.g.*, INS v. Jong Ha Wang, 450 U.S. 139, 144–46 (1981) (holding that the Court of Appeals had "improvidently encroached on the authority which the [Immigration and Nationality] Act confers on the Attorney General . . . [to determine] what constitutes 'extreme hardship'" under 8 U.S.C. § 1254(a)(1)).

90. *See Linden Lumber*, 419 U.S. at 310.

91. *See* NLRB v. Gissel Packing Co, 395 U.S. 575, 599–600 (1969) (declaring that Section 9(c)(1)(B) does nothing to relieve the bargaining obligation on employers under Section 8(a)(5) of the Act when the employer has "engaged in unfair labor practices disruptive of the Board's election machinery.").

contrary result. Section 8(a)(5) stands on its own as an unfair labor practice, and nothing in the statutory context implies that it must be accompanied by another unfair labor practice for an uncertified, but majority-supported, union to invoke it.[92] Thus, it is permissible to define these labels—"representative" and "certified representative"—differently, enabling unions to establish representative status through card-check rather than secret ballot elections. Card-check is already a legitimate means to establish majority support where the employer consents, and if the NLRA extended that to situations where the employer does not raise a legitimate "question of representation," it is likely that courts would find that rule to be a reasonable interpretation of the NLRA.

B. Argument to Reverse Card-Check Unilaterally Imposed by the NLRB

Proponents of reversal could first argue that the statute is not ambiguous under step one of *Chevron*.[93] If a statute is not ambiguous, and the Supreme Court has affirmed an agency's interpretation, then there is no room for agency discretion in changing the rule.[94] Since the Supreme Court has already ruled on Section 8(a)(5)'s interpretation—specifically where unions, supported by authorization cards where no other unfair labor practices occurred that prevent a fair election, cannot claim there is a Section 8(a)(5) bargaining obligation—the Board's ability to change course is curtailed.[95]

If the Court, however, finds that the statute is ambiguous, then it will proceed to step two of *Chevron*.[96] Here, opponents can argue that the proposed new interpretation is unreasonable in light of congressional intent. For instance, they could argue that the Taft-Hartley amendments to the NLRA intentionally excluded the card-check as a means to become a "certified representative." The text of the statute prior to its amendment by the Taft-Hartley Act allowed "the NLRB to resolve questions of representation *either* through a 'secret ballot of the employees' *or* through 'any other suitable method to ascertain [sic] such representatives.'"[97] The

92. *See id.* at 597–98 (stating that unions may establish their majority status, for purposes of Section 8(a)(5), through either "union-called strike or a strike vote[,]" in addition to possession of authorization cards).

93. *Chevron*, 467 U.S. at 842–43.

94. *See id*. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

95. *See Linden Lumber*, 419 U.S. at 309–10.

96. *Chevron*, 467 U.S. at 842–43.

97. *See* Becker, *supra* note 24, at 505–06 & n.39 (alteration in original) (quoting National Labor Relations (Wagner) Act § 9(c), Pub. L. No. 198, 29 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. § 9(c) (2006))).

Taft-Hartley Act amended this language and omitted the language permitting other suitable methods in favor of secret ballot elections.[98] In light of the statutory revisions, no permissible interpretation of the statute allows using authorization cards to determine a question of representation. The fact that a representative is not certified or voluntarily recognized is sufficient to raise a question of representation, and it would be counter to congressional intent if the Board promulgated such a rule through a back channel—such as adjudication.

Congress' decision to not change the language in Section 8(a)(5) from "representative" to a representative "currently recognized by the employer or certified as such [(*through an election*)] under [Section 9(a)]"[99] was intended to extend protection to representatives whose majority support could not be determined in a fair election as a result of unfair labor practices.[100] It was not meant to provide to unions—where the only proof of their majority support is authorization cards signed by employees—the statutory right to bargain with employers mandated by Section 8(a)(5).

VI. CONCLUSION

Both sides have strong legal arguments in their favor. As a legal matter, if the NLRB maneuvered the card-check method into the regulatory scheme regulating labor relations, that decision would likely survive judicial review. Congress intended that the NLRB determine what raises a question of representation, who is the employees' chosen representative, and how majority support can be demonstrated where no question of representation exists.[101] The NLRB is supposed to interpret the Act, including Sections 8(a)(5) and 9(c), even if the issue has previously been decided.[102] Allowing the card-check method to suffice as evidence that an employer has an obligation to enter into collective bargaining is a reasonable reading of Section 8(a)(5), and limiting the scope of questions of representation that have legitimate bases in fact is a reasonable reading of Section 9(c).

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98. *See* 29 U.S.C. § 159(c) (2006).

99. *See* H.R. 3020, at 21 (1947), *reprinted* in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 31, 51 (1959, 1985 prtg.) (emphasis added). But *cf.* Labor Management Relations (Taft-Hartley) Act § 8(a)(5), Pub. L. No. 101, 61 Stat. 136, 141 (1947) (codified as amended at 29 U.S.C. § 158(a)(5) (2006)) (stating, for purposes of Section 8(a)(5), that employers must bargain with representatives "subject to the provisions of section 159(a) of this title.").

100. *See* NLRB v. Gissel Packing Co, 395 U.S. 575, 599–600 (1969).

101. § 159(c)(1)(B).

102. *See* § 156 (giving the Board the power to engage in any rule or decision-making activities permitted by the Administrative Procedures Act in order to effectuate the NLRA).

While legally sound, such a policy shift may have too many political costs and long-run negative implications for the Board and the labor movement. These implications may be far-reaching. For one, the debate over the EFCA has been abandoned, thus preventing card-check from becoming part of the Board's statutory framework, and subject to the whims of subsequent Boards. Additionally, if commentators who opposed Becker's nomination out of fear that card-check would be approved by the Board are able to say "I told you so," then future appointees to the Board may have an even more difficult and prolonged confirmation process than Becker, who was ultimately given a recess appointment. Memories of a short-lived card-check measure may compel a future more-conservative Congress to pass legislation further restricting the Board's discretion. The Board should not pursue this measure through the administrative process despite their legal ability to do so, because the long-term outcome may be less desirable than the status quo.