

18/69

## Supreme Court of the United States

October Term, 1968

In the Matter of:

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NATIONAL LABOR RELATIONS BOARD, :  
:  
Petitioner, :  
:  
vs. :  
:  
GISSEL PACKING COMPANY, INC. :  
HECK'S INC. :  
GENERAL STEEL PRODUCTS, INC., AND :  
CROWN FLEX OF NORTH CAROLINA, INC. :  
-----X

Docket No. 573

Office-Supreme Court, U.S.  
FILED

APR 7 1969

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Place Washington, D. C.

Date March 26, 1969

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# C O N T E N T S

## ORAL ARGUMENT OF:

## P A G E

Dominick L. Manoli, Esq. on behalf of Petitioner, National Labor Relations Board . . . . .	3
Albert Gore, Esq. on behalf of Petitioner, Food Store Employees Union, Local 347 . . . . .	28
John E. Jenkins, Jr., Esq. on behalf of Respondent, Gissel Packing Company, Inc. et al. . . . .	44
Lewis P. Hamlin, Jr., Esq. on behalf of General Steel Products, Inc., and Crown Flex of North Carolina, Inc. . . . .	59
Frederick F. Holroyd, Esq. on behalf of Heck's Inc.	

## REBUTTAL ARGUMENT OF:

Albert Gore, Esq. on behalf of Petitioner, Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO . . . . .	83
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

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:  
National Labor Relations Board, :  
:  
Petitioner, :  
:  
v. : No. 573  
:  
Gissel Packing Company, Inc. :  
Heck's, Inc. :  
General Steel Products, Inc., and :  
Crown Flex of North Carolina, Inc. :  
:  
----- x  
:  
Food Store Employees Union, :  
Local 347, Amalgamated Meat :  
Cutters and Butcher Workmen of :  
North America, AFL-CIO, :  
:  
Petitioner, :  
:  
v. :  
:  
Gissel Packing Company, Inc. :  
:  
----- x

Washington, D. C.  
Wednesday, March 26, 1969.

The above-entitled matter came on for argument at  
11:15 a.m.

BEFORE:

EARL WARREN, Chief Justice  
HUGO L. BLACK, Associate  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
ABE FORTAS, Associate Justice  
THURGOOD MARSHALL, Associate Justice

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Counsel for Respondent  
Heck's, Inc.

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1                                    P R O C E E D I N G S

2                    MR. CHIEF JUSTICE WARREN:    No. 573, National Labor  
3 Relations Board, Petitioner, versus Gissel Packing Company, Inc.  
4 et al.

5                    No. 691, Food Store Employees Union, Local 347,  
6 Amalgamated Meat Cutters and Butcher Workmen of North America,  
7 versus Gissel Packing Company.

8                    THE CLERK:    Counsel are present.

9                    MR. CHIEF JUSTICE WARREN:    Mr. Manoli.

10                   ORAL ARGUMENT OF DOMINICK L. MANOLI, ESQ.  
11                                      ON BEHALF OF PETITIONER  
12                                      NATIONAL LABOR RELATIONS BOARD

13                   MR. MANOLI:    Mr. Chief Justice and may it please the  
14 Court.

15                   These cases, No. 573 and 691, are here on writs of  
16 certiorari to the Court of Appeals to the Fourth Circuit.

17                   The Labor Act requires an employer to bargain with a  
18 union or a representative which in the words of the statute  
19 has been designated or selected by a majority of the employees  
20 in an appropriate collective bargaining unit.

21                   For more than 30 years this Court and the Court of  
22 Appeals both under the original Act as well as the present Act  
23 have enforced Board orders which required an employer to bargain  
24 with a union which the employees had designated as their  
25 bargaining representative by means of authorization cards and  
the employer did not have a good faith doubt of the union's

1 majority status.

2         The court below which in the past had accepted  
3 authorization cards as adequate proof of a union's majority  
4 status for purpose of a bargaining obligation under Section  
5 885 of the statute now holds that these authorization cards  
6 are inherently unreliable and that an employer when he is  
7 confronted with a demand for recognition by a union whose  
8 representative status is based solely upon these authorization  
9 cards that the employer may assert a good faith doubt of the  
10 union's majority status, refuse to bargain, insist upon an  
11 election, and all of this irrespective of the fact that con-  
12 currently with his refusal to bargain, to recognize and  
13 bargain with the union as a majority representative concurrently  
14 with that action he is engaging in serious unfair labor  
15 practices which may either belie his reliance upon his good  
16 faith doubt or preclude a fair election.

17         Hence, the central question in these cases, and not  
18 only these two cases that are up here from the Court of Appeals,  
19 but also the Sinclair case which, from the First Circuit, which  
20 will follow these cases, the central question in these cases  
21 is whether the Board may require an employer to bargain with  
22 a union whose representative status is based solely upon  
23 authorization cards from a majority of the employees in a  
24 particular unit.

25         And the employer's concurrent misconduct at the time

1 that he refuses to bargain with the union on the basis of  
2 those cards, the concurrent misconduct, demonstrates that he  
3 is refusing to bargain with the union, not because of any  
4 assertive doubt of the union's majority status, but in order to  
5 gain time, in order to dissipate the union strength and avoid  
6 bargaining at all.

7 Q Is there a question about whether a subsequent  
8 election changes any of this? Do we have to decide that  
9 question?

10 A The Board's -- I think you are getting at what  
11 the Board calls a Bernel Foam rule -- in other words, if a  
12 union comes to an employer, goes to an employer and demands  
13 recognition on the basis of cards and the employer engages in  
14 unfair labor practice at that particular time the Board will  
15 nevertheless permit the union to go to an election.

16 If the union loses that election because of the unfair  
17 labor practice committed by the employer during the pre-election  
18 period the Board will permit the union then to go ahead under  
19 an unfair labor practice charge and on the basis of the cards  
20 demonstrate that it had a majority.

21 Q Do we have to decide that in this case?  
22 These cases?

23 A You don't have to decide that in the Fourth  
24 Circuit cases but that issue is present, however, in the  
25 Sinclair case, the one from the First Circuit -- excuse me for

1 one moment. I take that back.

2 In one of the cases here, in one of the cases here  
3 there was an election which the union ---

4 Q So we do have to decide that here?

5 A That question is here. That is right. And it  
6 is also in the Sinclair case as I recall it.

7 Now obviously in the time that I have at my disposal  
8 I will not be able to go into the details of all these cases  
9 here but I think I can fairly say that the factual framework  
10 in which this question arises in all three cases is not  
11 essentially dissimilar.

12 In each case you have the union which engaged in an  
13 organizing campaign among the employees and in the course of  
14 that organizing campaign it obtained cards authorizing it,  
15 unqualifiedly. There is no question about the cards. There  
16 is no ambiguity about these cards here which are reproduced  
17 in our brief, which unqualifiedly designated the union as their  
18 bargaining representatives.

19 In only one of these cases from the Fourth Circuit  
20 and I believe that is also true in the Sinclair but I don't  
21 want to get into that one, in only one of these cases was  
22 any question raised as to the validity of the cards in the  
23 General Steel case a claim was made that these cards were  
24 obtained by virtue of misrepresentation as to their purposes.

25 The Board on the basis of the entire record, upon

1 the basis of the evidence before it rejected that claim and  
2 found that all of these cards here, all of these cards here  
3 unqualifiedly designated the union as a bargaining repre-  
4 sentative and that there was no impropriety in the procurement  
5 of these cards.

6 Now armed with these cards the union went to each  
7 of the three employers in these particular cases here and asked  
8 for recognition. The employer questioning the validity of  
9 the cards questioned the union's majority status, refused to  
10 bargain with the union and insisted upon an election.

11 Q Upon what ground did he question him?

12 A Oh, I think that it varied from case to case.  
13 In some of them the employers in effect said we don't rely  
14 on cards, we think they are unreliable because the circum-  
15 stances under which they may have been procured.

16 In another case an employer said I don't think I  
17 should recognize you because four years ago there was an  
18 election in which this particular union had participated and it  
19 lost.

20 And still another case an employer said simply no  
21 comment. No comment.

22 And still another case the employer when asked to  
23 recognize the union on the basis of the cards said we think  
24 that you ought to go to an election.

25 And I think there is one case here where the



1 employer really never questioned the cards and his answer was  
2 no comment. And there seems to be some evidence in the record  
3 here that the employer actually knew that a majority of the  
4 employees had selected that particular union.

5 Q What is the Board's view of what the employer  
6 must say, what is the position that he must take before the  
7 Board that will recognize that he may insist on an election  
8 rather than to a card recognition?

9 A Your Honor, if a union goes to an employer and  
10 says to the employer we have cards here from a majority of  
11 your employees which designates us as their bargaining repre-  
12 sentative the employer may say -- the Board has said this --  
13 the employer may say, "I don't like cards. I don't wish to  
14 rely upon cards and I do insist that you go to an election.  
15 I think that that is the proper way to resolve this question,  
16 this representation question."

17 If he does know more than that he may even engage  
18 -- during the pre-election period -- he may engage and make  
19 speeches to his employees.

20 Q That may not get him -- the union may just file  
21 885 charges on him then?

22 A The Board -- the general counsel will not issue  
23 a complaint in that kind of a situation where the employer  
24 says to the union I don't wish to rely upon cards.

25 Q I don't care how many cards you have got, I

1 just don't like them. He can get an election then?

2 A That is right.

3 Q That is what the position of the Board is?

4 A That is right. As long as he does not mis-  
5 behave.

6 Q As long as what?

7 A He does not misbehave, does not engage in  
8 contemporaneously with refusal to accept those cards, that he  
9 does not engage in unfair labor practices, serious unfair  
10 labor practices, because the Board in some cases where the  
11 employer may have engaged in some isolated unfair labor  
12 practice it still will permit him to refuse to bargain with  
13 the union. It is only when he engages in serious unfair  
14 labor practices.

15 Q It certainly doesn't emerge from your briefs  
16 in this case.

17 A I hope they did.

18 Q Has this always been the practice, Mr. Manoli?

19 A No, your Honor, I think the Board has changed  
20 that.

21 Q It has been a long time since I have been at  
22 it.

23 A The Board has changed a little bit in its  
24 approach to these cards, your Honor.

25 Q Quite a bit.

1           A     But it has not been a recent change really,  
2 your Honor. I think that this began back some time in the  
3 early 60's. At one time the Board would take the position  
4 and incidentally I might say that we sold virtually all the  
5 cards with this proposition that an employer when a union came  
6 to him and said we want to be recognize on the basis of these  
7 cards, it was not enough for him to say I don't like the cards.  
8 He had to have -- or not enough for him to say that I have a  
9 good faith doubt in your majority status -- he also had to  
10 have some objective evidence which supported his good faith  
11 doubt.

12           Today the Board does not insist that when an employer  
13 is confronted for demand ---

14           Q     Where is this articulated in the Board's opinion?  
15 Somewhere, could you ---

16           A     I think you have to take the Aaron Brothers case  
17 which is cited in our brief. And that one there has made it  
18 very clear -- and also you might take a look at page 22 of  
19 our brief where we indicated that it is not in every case  
20 even where the employer permits some unfair labor practice --  
21 excuse me I am getting away from this thing.

22           Even where the employer may commit some unfair labor  
23 practice when he refused to accept the cards.

24           Q     Well, is the key, Mr. Manoli, that he has no  
25 right or rather the Board will not recognize that he should

1 not be concluded by cards, except in situations where there is  
2 some kind of unfair labor practice that is connected with  
3 his refusal to ---

4 A Yes, that is right, where it is contemporaneous  
5 with refusal to bargain.

6 Q And even then his right to insist on an election  
7 is lost only, if I understood you, if his unfair labor practices  
8 are of a serious nature?

9 A Yes, sir.

10 Q And is that what this case is all about?

11 A That is what we think is the narrow issue as  
12 we see it as presented in this particular case, because I didn't  
13 get through with my facts.

14 Q Mr. Manoli, just so I can be sure that at this  
15 end of the bench I heard you correctly, the cards are obtained  
16 by the union?

17 A Yes.

18 Q An employer says I won't recognize these cards  
19 and he petitions for an election. No acts of -- no unfair  
20 labor practices. Now, what happens between the time that the  
21 union submits its cards and the time the election is held?  
22 Does the employer have to bargain with the union then?

23 Or does he not?

24 A No, sir.

25 Q You are saying he does not have to bargain?

1 A No, sir. He does not have to bargain.

2 Q I did not get that either.

3 A He can wait for the election and again I want  
4 to emphasize, your Honor, that, of course, this is the case  
5 in which there has been no misbehavior.

6 Q I said that. I said that, remember?

7 A Yes.

8 Q I didn't understand that from your brief, either.

9 A No, there is no obligation of bargaining. The  
10 union confronts with the cards and under the Board's view of  
11 the law the employer can say I want to go to election.

12 Q He can get it any time he asks for it as long  
13 as he doesn't do any more than say I want an election?

14 A Wants an election, that he doesn't wish to rely  
15 on cards.

16 Q Can I ask you just a supplemental question to  
17 that?

18 Assume an employer hears that an organization campaign  
19 is going on and that employees, some employees are interested  
20 and are signing authorization cards.

21 A Yes, sir.

22 Q Does the employer have the same right in that  
23 context to speak or state his views about the union as he does  
24 if an election is ordered?

25 A Yes, he does.



Q He has the same right of free speech?

A He has the same right of free speech.

Q Then he can say just as much but no more than he can during an election?

A That is right.

Q That is the Board's position, too?

A That is the Board's position.

Of course, what is free speech and what isn't free speech you will hear more of that in the Sinclair case.

Q Yes.

A But he is and the Board will permit him to speak his peace to the employers who are trying to dissuade them not to vote for the union, not to support for the union.

Q Or not to sign authorization cards?

A Or not to sign authorization cards, that is right. He can do that.

Q I don't like to keep repeating myself, but this I think is quite important, Mr. Manoli, at least to me.

Now I correctly understand the Board's position to be that the only time that an employer is not bound to a court recognition based upon cards -- in every other situation he is entitled to an election -- is that situation in which he has been guilty of serious unfair labor practice?

A That is correct. May I just add a very small foot onto that kind of a case? It really doesn't -- but in

1 order to be completely accurate, the Board had a case in  
2 which the employer when the union demanded recognition on the  
3 basis of the cards, he did not question the cards, he did not  
4 raise any question about the union's majority, but he refused  
5 to bargain with the union because you see he thought that  
6 he was not subject to the Labor Act.

7 Subsequently as an afterthought you might say he  
8 said, "Well, I don't want to recognize you because I don't  
9 rely on cards." That is really an off-beat kind of a case  
10 but in that particular case the Board would not permit the  
11 employer, after having refused to bargain with the union on  
12 the basis that he did not come under the Act, would not permit  
13 him to resurrect or inject into the picture his good faith  
14 doubt of the union's majority status.

15 But as I say, that is a kind of an off-beat type of  
16 a case.

17 Q But the employer may say I don't believe in  
18 cards and I don't recognize the union until it is certified  
19 and then he may just sit there and then the union will ask  
20 for the election?

21 A Right. Either he or the union under the statute  
22 will ask for the election.

23 Q And the unfair labor practices which would  
24 affect this would apparently not be those committed before the  
25 union asking him to recognize, it would be unfair labor

1 practice afterward?

2 A No, there are unfair labor practices that may  
3 take during the course of the union organizing campaign.

4 Q But even if they didn't, if the first he ever  
5 heard of the campaign was when the union came into him?

6 A Yes.

7 Q And he said I want an election.

8 A Yes.

9 Q And then if he goes and commits an unfair labor  
10 practice why the same rule applies?

11 A The same rule applies.

12 If he commits those serious unfair labor practices  
13 then if the union has a majority of the cards which are other-  
14 wise valid he will be subject to a ---

15 Q Is there any magic in what words he says when  
16 he rejects him?

17 A No, I don't think so, your Honor. The Board  
18 has never had a case in which the Board just said well, when  
19 the union asked him to recognize him and say, "Go away," or  
20 said no more than that, or said, "Go away and I want an  
21 election," usually, of course there are cases where the  
22 employer says I don't trust cards, I don't think they are  
23 reliable, I think we ought to go to an election.

24 But although the Board is not dealt with the first  
25 case I don't think that any meaningful distinction can

1 be drawn between the two.

2 Q Well, in these cases here there is nothing on  
3 the language that was used in rejecting the cards?

4 A Sir?

5 Q There is nothing significant about the language  
6 in these cases that was used in rejecting the cards?

7 Is that right?

8 A Well, I think you would find without spelling  
9 out which particular case in which the employer did say we  
10 don't want to rely upon cards, we want to go to an election.

11 Q That is right.

12 A And another -- I think there were two of those  
13 cases -- there was another case here where the union actually  
14 put the authorization cards in front of the employer and the  
15 employer took a glance at them and said, "I don't want to go  
16 on the basis of the cards. I want to go on an election."

17 So as I say I wouldn't draw any narrow distinction  
18 as to whether the employer would be articulate enough to  
19 say "Well, look I have heard all of these stories about cards  
20 not being very reliable."

21 But if he simply says, "I want to go to an election,"  
22 I think that is the way the union should establish its  
23 majority status is by election, then I think the Board will  
24 permit it. The Board will permit him to refuse to bargain  
25 with that union to recognize him.

1 Q Or even if he said, "Don't waste my time, go  
2 to an election?"

3 A Yes, I think so.

4 Well, I think we have pretty much gotten the facts  
5 of these cases out so I won't spend any more time with that  
6 and I have already indicated what the Fourth Circuit's opinion  
7 is as to the unreliability of the cards.

8 Now, I wanted to go into the two arguments that I  
9 think ought to be brought out in connection with these cards.

10 Our analysis, of course, begins with Section 8(a)(5)  
11 of the Act. Section 885 makes it an unfair labor practice  
12 for an employer to refuse to bargain with a representative  
13 of his employees as defined in Sections 9(a) of the Act.

14 Section 9(a) of the act in turn defines a repre-  
15 sentative as one which has been designated or selected by a  
16 majority of the employees in an appropriate bargaining unit.

17 Section 9(a) does not specify how the employees will  
18 designate or select their employees and both under the  
19 original Wagner Act as well as the present act the Courts  
20 of Appeals have consistently recognized that a union could  
21 establish its majority status not only by means of an election  
22 but also by other means including authorization cards.

23 And this Court, in the Arkansas Oak Flooring case  
24 which was decided some nine years after the Taft-Hartley  
25 Amendments of 1947 and I will come to those amendments in just



1 a moment, the court in that particular case said that a union  
2 may establish its election but that an election was not the  
3 only means for a union to establish its representative status  
4 but that it could do so by other means including authorization  
5 cards.

6 Now the legislative history of the 1947 amendments  
7 on which the court below heavily rely for its contrary view,  
8 we submit, we suggest that it doesn't apply. It does not  
9 bar reliance upon the authorization cards and proof of the  
10 union's majority status.

11 I might say that the court below is the only one  
12 of the Courts of Appeals and practically all of the Courts of  
13 Appeals have had this problem, that the court below is the only  
14 one that interprets the 1947 amendments to bar the use of  
15 cards for the purpose of establishing a union's majority status  
16 as a predicate for a bargaining order under Section 8(a)(5)  
17 and it is the only court that has said that the union must  
18 establish its majority status as a predicate for a bargaining  
19 order only by the election route.

20 Q May I ask you, Mr. Manoli, prior to 1947, prior  
21 to the Taft-Hartley Act there was no provision for an election  
22 at the request of the employer.

23 A That is right.

24 Q Am I right about that?

25 A That is quite right.

1 Q But was there in the old Wagner Act up until  
2 1947 provision for Board supervised elections at the request  
3 of the union?

4 A Under the Wagner Act, the Wagner Act made no  
5 provision as your Honors indicate for an employer to file a  
6 representation petition. It was the Board's practice in those  
7 days to entertain a petition from an employer if two or more  
8 unions were making, demanded recognition, in that case the  
9 Board would entertain the election.

10 Q Although there is no explicit statutory authority?

11 A Sir?

12 Q Although there was no explicit statutory  
13 authority?

14 A No, it made no provision. The 47 amendments  
15 did take care of that particular problem because under the 47  
16 amendments an employer is permitted to file his representation  
17 petition whether it is one or more unions that are in this.

18 Q The predicate for that, however, still there has  
19 to be a demand on the employer by a union?

20 A Yes, that is right.

21 Q By at least one union.

22 A Right.

23 Q And prior to 1947 was there explicit statutory  
24 provision for Board-supervised elections at the request of a  
25 union?

1           A     Under the Wagner Act there was a provision  
2 in Section 9 there which empowered the Board to ascertain  
3 whenever a question concerning a representation arose to  
4 determine that question either by means of an election or  
5 if I can remember the exact language of the Wagner Act or by  
6 other suitable means for ascertaining the employees and the  
7 47th Amendment knocked that part of it out.

8           By other suitable means and the 47th Amendment made  
9 a Board election the sole basis of formal Board certification.  
10 And, of course, a Board bargaining order is to be distinguished  
11 from the Board certification which issues follows.

12          Q     What was the practice prior to 1947? Were there  
13 many elections?

14          A     Yes, there were. There were elections. I  
15 thought your Honor was going to ask me if the Board certify  
16 a union since all the suitable methods were also available to  
17 it that it often certified a union on the basis of something  
18 other than an election.

19          Q     Well, you framed my question better.

20          A     The Board did that until 1939, it would certify  
21 a union on the basis of cards or some other basis, usually  
22 cards, or some other written proof of the union's majority  
23 status.

24          In 1939 the Board abandoned that practice. But the  
25 Board, however, continued to serve by a union on the basis of

1 cards where the employer and the union both agreed to have a  
2 cross-check of the cards against the payroll in order to  
3 determine the authenticity of the cards and in that particular  
4 situation the Board continued after 1939 -- not many of those  
5 I would suspect -- I really don't know how many, probably not  
6 many but nonetheless the Board would continue to issue certi-  
7 fications on the basis of that kind of a cross-check where  
8 both parties agreed the cross-check was correct a certification  
9 was issued.

10 Again, if I may come back quickly to the 1947  
11 amendments, the 47 amendments do longer permit the Board certi-  
12 fication to issue on anything but an election.

13 Q Mr. Manoli, let me just ask you one final  
14 question on that.

15 Assume the union representatives come to an employer  
16 and present some cards to him and say here we have a majority  
17 and the employer looks at him and says well, it certainly  
18 appears you have a majority and I have no question about the  
19 cards and it looks to me like you have a majority of the  
20 workers with you.

21 But I want an election.

22 A The Board will permit him to go to an election  
23 as long as he does not misbehave.

24 Q The test you state in your brief is whether or  
25 not the employer has a good faith doubt about the majority

1 status of the union and that unfair labor practice is only a  
2 material element in judging whether or not he had a good faith  
3 doubt.

4 Now you are stating a considerably different rule  
5 now.

6 Don't you think the rule you are stating is different?

7 A No, I think it is the rule that we have indi-  
8 cated. It is the Board rule in Aaron Brothers.

9 Q But the employer says I have no doubt at all  
10 about your majority status. I have no good faith doubt. But  
11 I just want an election.

12 A Let me put two different type cases in order to  
13 answer your Honor.

14 Q How about that one, just that one? The employer  
15 does no more than that and he says I have no good faith doubt  
16 that you have a majority there but I am not going to recognize  
17 you without an election. I want an election.

18 A Is he saying -- if I can put the question in  
19 return -- is he saying, I have no doubt, I have no doubt that  
20 you have cards here signed by a majority?

21 Q He says I have no good faith doubt.

22 A I have no good faith doubt that these cards  
23 have been signed by a majority of my employees but I still  
24 don't like cards and I want to go to an election.

25 Q He doesn't say I don't like cards. He says I



1 want an election.

2 A I think in that kind of a case the Board will  
3 permit him to go an election.

4 Q Will permit him?

5 A Yes.

6 Q And they will not in that event say that he has  
7 been guilty of 8(a)(5) violation?

8 A That is correct.

9 Q That seems to me a considerably different thing  
10 than you have in the brief but you want us to accept it, though?

11 A Let me put this case ---

12 Q Right? You want us to accept the statement?

13 A Yes, that is right.

14 Let me put this case -- suppose that the employer  
15 when faced with these cards he would say, I have made my own  
16 independent check of the employees and I have discovered from  
17 my own independent check of the employees and independently  
18 of your cards that they do want you as their bargaining  
19 representative.

20 Now in that case there he will be required to bargain  
21 with the union even though he may not engage with any unfair  
22 labor practice. I want to make that clear.

23 Even the Fourth Circuit in that kind of a case would  
24 enforce a bargaining order where the employer has made his own  
25 independent poll of the employees and on the basis of that the

1 employees have told him, "Yes, we want this union," the  
2 majority of them. Then even the Fourth Circuit ---

3 Q You mean if he has a mass meeting of the  
4 employees and said, "Do you fellows want this union?"

5 And unanimously they say, "We sure do."

6 Then he has to recognize?

7 A That is right.

8 Q Well, you draw the line then between him saying  
9 that I have no good faith doubt that these are the signatures  
10 and him saying that I have no doubt that you do represent a  
11 majority. You draw a line between those two?

12 A If he says yes, I think you would draw a line  
13 between those two.

14 Q If he says I have no doubt that these are the  
15 signatures of 51 percent of my employees and I have no doubt  
16 that 51 percent of the employees wants you but I still want  
17 an election?

18 A Put that way he cannot insist upon an election.

19 Q You say he can or cannot?

20 A He cannot insist upon an election.

21 Because there he is not merely saying in the case  
22 Mr. Justice Marshall has put to us he is not merely saying I  
23 know you have got cards here but he is also saying that he  
24 knows, he knows independently of the cards that a majority  
25 of the employees have designated that view.

1 Q But his only evidence of whether he knows or not  
2 is the cards?

3 A Yes.

4 Q He can have the election?

5 A Yes, that is right.

6 Now, to go on with the legislative history, as I  
7 have indicated the courts that uniformly interpret both the  
8 Wagner Act and the Taft-Hartley Act to permit the use of  
9 cards for a union to demonstrate its majority, its majority  
10 status, 47 amendments did not change either Section 8(a)(5)  
11 which was 8(5) in the original Wagner Act or Section 9(a).

12 In fact the legislative history of the 1947 amendment  
13 shows that the Conference Committee specifically rejected the  
14 House-passed amendment which would have relieved the employer  
15 of any obligation to bargain with a union which based its  
16 majority status on cards.

17 Congress specifically rejected that proposal which  
18 would have amended Section 8(a)(5) so as to permit the Board  
19 to issue a bargaining order only where the employer was either  
20 refusing to bargain with a union that he was currently recog-  
21 nizing or a union which had been certified by the Board after  
22 an election.

23 Congress, as I say, rejected that amendment, and  
24 retained the language of Section 8(a)(5) and Section 9(a) which  
25 from the very beginning of this statute had been covered both

1 by the Board and by the Courts as permitting the use of cards  
2 to establish a union majority status.

3 The 1959 amendment when there was discussion, when  
4 there was the legislative consideration of the 1959 amendments,  
5 Congress again took note of the fact that the bargaining  
6 obligation, Section 8(a)(5), that the issuance of a Board  
7 bargaining order was not dependent upon a Board election.

8 It took specific note of Board cases where the Board  
9 had required an employer to bargain with a union whose repre-  
10 sentative status was based on cards and where the employer had  
11 engaged in misconduct which belies good faith doubt,

12 Nonetheless, the 1959 Congress did not amend the  
13 basic language of Section 8(a)(5) or Section 9 which as I  
14 repeatedly have said is the basis for the use of cards as a  
15 means for establishing a majority position of the union.

16 Now it is argued very strongly that cards because of  
17 the circumstances that may attend their procurement are  
18 inherently unreliable and an election is the only proper way  
19 of safeguarding the employers and permitting them to  
20 vote their convictions.

21 I would think that the fact that the Congress must  
22 have discounted this argument when in 1947 it rejected the  
23 House-passed amendment which had relieved the employer of any  
24 obligation to bargain with the union whose representative  
25 status was based on cards.

1 Q What was the Board's practice at that time, at  
2 the time that Congress rejected that?

3 What was the Board's practice with regard to  
4 cards?

5 A The Board has been using cards all along, ever  
6 since the beginning.

7 Q I understand that there has been some shift in  
8 the subtleties?

9 A Yes, there has.

10 Q New officers and the grace notes of all this, I  
11 gather?

12 A Yes. The shift has been I think primarily in  
13 this respect, that the Board originally would say that the  
14 employer had to come forward with some objective and evidence  
15 to support his good faith doubt.

16 Today the Board does not not insist that he come  
17 forward objectively with evidence. In fact the Board puts the  
18 burden of proving the employer's lack of a good faith doubt,  
19 puts that burden upon the general counsel.

20 Q What you are saying then, are you telling me  
21 then that in 1947 and in 1959 when Congress, according to you,  
22 rejected, in fact, on the use of cards, the Board's practice  
23 was at those times was to accept cards and require that the  
24 employer bargain on the basis of cards unless there was  
25 an affirmative showing of bad faith?



1 A Unless he had a good faith doubt based on  
2 objective consideration.

3 I would like to phrase it that way.

4 Q Unless he had a good faith doubt based on  
5 objective consideration. I withdraw bad faith.

6 A All right, sir.

7 I am afraid my time is up. I have to leave the rest  
8 of it to the brief.

9 MR. CHIEF JUSTICE WARREN: Mr. Gore.

10 ORAL ARGUMENT OF ALBERT GORE, ESQ.

11 ON BEHALF OF PETITIONER  
12 FOOD STORE EMPLOYEES UNION, LOCAL 347

13 MR. GORE: Mr. Chief Justice and may it please the  
14 Court.

15 I am in the anomolous position of having come to  
16 this court to argue a case in conjunction with the Board with  
17 some slight differences and now in the position of having to  
18 take the position almost diametrical to that which has been  
19 argued today.

20 The statement of Board counsel in respect to the  
21 responses of respective questions of your Honors do not, in  
22 my view, suggest the rule that the Board is now following,  
23 nor do they suggest the rule that the law lays down.

24 The inherent interpretation that can be predicated  
25 upon counsel's responses to the questions is that cards are

1 unreliable because he argues as we do that there are two ways  
2 to gain recognition, there are two ways to impose a duty to  
3 recognize upon an employer, i.e., the route by way of the  
4 election and second, the route by way of authorization cards.

5 Unambiguous, unequivocal signed by a majority of the  
6 employees, without restraint or coercion, it was this rule that  
7 was approved by Congress in 1947, it was this rule which has  
8 been approved by Congress in 1959, it is this rule which  
9 certain members of Congress have attempted to change un-  
10 successfully.

11 The rule as we see it is that when as in Gissel  
12 Packing the case in which we are the Petitioner, a majority  
13 of the employees signed clear and unambiguous cards saying  
14 I authorize this union to represent me for wages, hours and  
15 conditions of employment.

16 And when this majority of cards are tendered to the  
17 employer in one form or another and in the instant case they  
18 were tendered to the employer himself, not to a third party  
19 and they say here are the cards, we represent a majority.

20 At that point as we view the law, the employer is  
21 under a duty to recognize.

22 Q When they say no, I want an election?

23 A Your Honor, he may not say no, I want an  
24 election. What he may do under the inherent construction of  
25 the Act is to file for an election himself and then if he

1 engages in no conduct which is inconsistent with a free  
2 election, an election can be had.

3 Q You mean he may not insist upon the union  
4 seeking an election.

5 A That is correct.

6 Q But he may himself say, "I won't now write the  
7 board for an election."

8 A That is correct.

9 Q Well, that is sort of twiddle dum and twiddle  
10 dee, isn't it?

11 A Well, no, it is not, because there is in labor  
12 relations the tremendous important factor of time.

13 Q Well, the employer, though, wouldn't necessarily  
14 get the election?

15 A Oh, yes.

16 Q Why would he get it?

17 A If the employer files a petition because the  
18 one amendment in 1947 that has some relevance to this case was  
19 the amendment in Section 9(c)(1)(b), and the way this came up  
20 was that Congress was concerned with the fact that a union  
21 may come to an employer and demand recognition and the employer  
22 was without any resource to do anything unless the union itself  
23 petitioned.

24 That the employer they said had to ride between  
25 Scylla and Charybdis, the Scylla of violating 8(a)(2), that is

1 recognizing the union when indeed it may not represent a  
2 majority and Charybdis of violating 8(a)(5) where they did  
3 represent a majority.

4 Q Mr. Gore ---

5 A If I may complete my answer, your Honor.

6 Q Are you answering my question?

7 A Pardon?

8 Q Are you answering my question?

9 A Yes.

10 To get him off of that, Congress the employer the  
11 right to file the petition and when that petition is filed  
12 that petition is processed by the Board. So he can't have his  
13 own election and he can't have it forthwith.

14 Q In the meantime, as I understand your submission,  
15 he is under a duty to bargain?

16 A Your Honor, at the time he files his petition  
17 he is not under a duty to bargain. Because that is the one  
18 exception that has been constructed into the Act by Congress.

19 Q Well, I come back to what I said to you  
20 earlier. As I understand it, what you are telling us is,  
21 in your view, the union comes in to the employer and although  
22 the employer may have no quarrel with you about the authen-  
23 ticity of signatures, no quarrel with you about the number of  
24 cards as representing a majority of the appropriate bargaining  
25 unit, nevertheless, the employer is not required to bargain if

1 instead he files his own petition with the Board requesting an  
2 election. Is that right?

3 A That is correct.

4 Q Now, I just don't see how much difference there  
5 is between you and what Mr. Manoli told us.

6 A Oh, the difference is vast. Because under the  
7 administrative rules of the Board, when the employer files a  
8 petition delays are not available to him like they are when  
9 the union files a petition.

10 He comes in and he must state with the appropriate  
11 unit is. He must state what his position is with respect to  
12 eligibility. He must state his position on all these matters  
13 and at that point the union can say, "Yes, we agree," and  
14 immediately you have no pass.

15 Whereas, the employer sits on his hands and says,  
16 "You file the petition, whatever you say in your petition we  
17 are going to disagree with, we are going to raise an objection  
18 be it frivolous or not on the appropriateness of the unit,  
19 you say who are the supervisors, we will object to who you  
20 say the supervisors are," and under those circumstances,  
21 under the rules of the Board in a no-issue case, in a no-issue  
22 case, an employer has at least 45 days in a no-issue case to  
23 go an election and in my experience we have had cases with  
24 petitions filed that have gone beyond a year from the time  
25 of the filing of the petition before an election is held.



1 Q Mr. Gore, the difference between your position  
2 and that of Mr. Manoli is that Mr. Manoli -- you say that  
3 after the union presents the authorization cards to the  
4 employer, the employer is under a duty to bargain with the  
5 union unless and until the employer files a claim for a hearing.

6 A Your Honor, that is correct, with one ---

7 Q Now, wait a minute. Is that correct?

8 A Yes.

9 Q Mr. Manoli says that when the union presents  
10 the authorization cards to the employer, if the employer says  
11 I don't believe in cards, and I refuse to accept these cards  
12 and does not engage in unfair labor practice, then the employer  
13 is not, is not under an obligation to bargain with the union.

14 A Yes.

15 Q Then there has to be an election presumably  
16 on the petition of the union?

17 A That is his position, yes.

18 Q Now have I stated the difference between the two  
19 of you correctly?

20 A Yes, but the difference as you have stated  
21 seems small. Indeed they are worlds apart.

22 Q I am not arguing whether it is small or not. Is  
23 that the difference?

24 A Yes.

25 Q And you are taking the position that what

1 Mr. Manoli told us is not reflected in the statute or in any  
2 Board decisions?

3 A That is correct.

4 Q That there are no decisions by the National  
5 Labor Relations Board that sets forth what Mr. Manoli has  
6 told us. Is that right?

7 A Yes. I see I have the red light.

8 MR. CHIEF JUSTICE WARREN: You may answer fully  
9 after lunch.

10 (Whereupon, at 12 o'clock noon the Court recessed,  
11 to reconvene at 12:30 p.m. the same day.)  
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1 AFTERNOON SESSION

2 (The oral argument in the above-entitled matter was  
3 resumed at 12:30 p.m.)

4 MR. CHIEF JUSTICE WARREN: Mr. Gore, you may  
5 continue with your argument.

6 ORAL ARGUMENT OF ALBERT GORE, ESQ. (Resumed)

7 ON BEHALF OF PETITIONER  
8 FOOD STORE EMPLOYEES UNION, LOCAL 347

9 MR. GORE: I would like to complete my answer to  
10 Mr. Justice Fortas' question.

11 Perhaps I was a bit presumptuous to suggest what the  
12 Board's position is of today. I have suggested what my views  
13 of the Board's decisions might be and what their position  
14 has been.

15 Unquestionably Mr. Manoli is in a better position to  
16 suggest what the Board's position is as of today than I.

17 Q How about yesterday?

18 A Yes, yesterday's position I thought I understood.

19 Q Are there any cases that you know of which  
20 articulates the view that Mr. Manoli has?

21 A Well, the Aaron Brothers case that Mr. Manoli  
22 suggested articulates a view that an employer may refuse to  
23 recognize under certain circumstances when there are no unfair  
24 labor practices.

25 It also articulates the view that the employer has

1 a duty to bargain imposed upon him.

2 Q Unless he has a good faith doubt?

3 A Even, yes, even when there are no unfair labor  
4 practices.

5 The Aaron Brothers case does not sustain, as I  
6 understand it, does not sustain a view that an employer can  
7 refuse to recognize blatantly, a union which has been desig-  
8 nated by the employees merely because he says he doesn't like  
9 cards.

10 I don't think that that is suggested in the Aaron  
11 Brothers case. Indeed if the Board takes that position it is  
12 my view that this is clearly contrary to the law.

13 Now, I think the mistake that is made is that some-  
14 where along the line the Board has forgotten that we are  
15 talking about employees rights.

16 This court suggested that an employer may have the  
17 duty to bargain imposed upon him by authorization cards in  
18 the Arkansas Oak Flooring case. But it went much farther  
19 actually in the International Ladies Garment Workers Union  
20 against the NLRB which I generally refer to as the Bernard  
21 Altman case.

22 In that case there is a questioned violation of  
23 Section 8(a)(2). There the employer had recognized a union  
24 on the basis of authorization cards without checking the cards  
25 believing that there was a majority.

1           This court -- oh, I should add, and there was no  
2 question in that case, none whatsoever, but that the employer  
3 was in good faith in recognizing the union.

4           This court held that good faith did not satisfy  
5 prohibitive conduct. This court said that the employees  
6 rights were paramount. This court said that the employer has  
7 a duty when cards are submitted to it to countercheck the  
8 cards against payroll.

9           Q     You are arguing that no matter what the position  
10 of the Board is that it is wrong?

11          A     That is quite correct.

12          Q     Well, I should think in view of the ruling in  
13 that case, it would be the employer's alternative duty to ask  
14 for an election.

15          A     That is correct, and if it does not it has  
16 violated the law.

17          Q     No, you told us just now that it could alter-  
18 natively check the cards on its own.

19          A     Yes, oh, yes.

20                It may check the cards.

21          Q     But it doesn't have to?

22          A     And if it checks the cards and finds that there  
23 is a majority it recognizes. If it checks the cards and finds  
24 that there is no majority it is not recognize.

25          Q     Can he ask employees, "Did you sign this card?"



1           A     If there is a question about the authenticity  
2 of the signature. However, I would suggest, your Honor, that  
3 the employer has within his means sufficient basis to check the  
4 authenticity signatures without going to the employees.

5           Q     With a hand-writing expert?

6           A     No, with W-2 forms and many other things that  
7 they have. And then if there still remains a question he has  
8 a right to ask the employee.

9           Q     Mr. Gore, did I understand your position that  
10 when the union comes in and says here are the cards, and the  
11 employer says, "Thanks, I am going to ask for an election."  
12 No more. Then the employer is in good shape?

13          A     The employer is in good shape if he does not  
14 engage in other conduct which is inconsistent with the free  
15 choice of the employees. This was an exception in this  
16 multi-faceted act that was imposed by Mr. Taft.

17          Q     In that respect, Mr. Gore, do I understand you  
18 correctly, the employer doesn't have to do anything when the  
19 union comes with the cards if he wants to say, "No, I am going  
20 to file a petition for an election."

21          A     And does forthwith file.

22          Q     That is right.

23                And if he does that he doesn't have to check the  
24 cards, he doesn't have to do anything. He doesn't have to  
25 make any comment of any kind?

1           A     That is correct.

2           If he goes forward and files for an election and  
3 under those circumstances the representation procedures of  
4 the NLRB are expedited. He does not have within his power to  
5 control delay. Under those circumstances a free choice of  
6 the employees, assuming again he does not engage in inconsistent  
7 conduct.

8           Q     Is there a time limit for the completion of  
9 proceedings on an employer's petition?

10          A     No.

11          Q     Is there a time limit on the completion of  
12 proceedings on a union's petition?

13          A     A fortiori.

14          Q     And I take it you would say that the employer  
15 has the same right of free speech at that time pending the  
16 election?

17          A     Rights under 8(c) are protected at all times,  
18 yes.

19          Q     And he could, I suppose, say to the employees,  
20 well you may have signed these cards but you certainly made  
21 a mistake and we are going to -- and when you have heard the  
22 whole facts you will vote against the union?

23          A     I don't know that I would accept the statement  
24 that you have made a mistake. I think that he would have a  
25 right to tell the employees that you have a right to freely

1 choose in the election and you are not required to vote in  
2 accordance with the way you signed the cards.

3 Q Here is why it would be better to vote against  
4 the union?

5 A Oh, he would have a right to express his views  
6 again so that they do not contain within them veiled threats  
7 or promises of benefit which would affect the employees'  
8 free choice.

9 Q May I ask you a question to see if I clearly  
10 understand it.

11 A Yes.

12 Q As I understand it you take the position that  
13 when the employees give a card to the employer, he has a right  
14 under the law to say all right, I don't want to do this, I  
15 prefer an election.

16 A Yes.

17 Q He can ask for the election. The union doesn't  
18 have to ask for it. But he can ask to have an election and  
19 that after he asks for it you have an election in which you  
20 have the same rights of free speech on both sides as though  
21 the union had asked for the election?

22 A Correct.

23 Now I should add that this has been the view of the  
24 Fourth Circuit before Logan Packing and it was expressed in  
25 the Florence Printing Company case and Overnight Express.

1 Q Now, may I ask about what, if any, difference  
2 there is between you and Mr. Manoli about who must initiate  
3 this election in the circumstances of Mr. Justice Black's  
4 question?

5 As I understood you, you said that it was then the  
6 duty of the employer to request election and I understood that  
7 Mr. Manoli thought it was the employees who should go forward  
8 demanding an election.

9 A I understand that to be the position of the  
10 Board, yes.

11 Q You understand that to be the position of the  
12 Board?

13 A Mr. Manoli, I should say.

14 Q I beg your pardon.

15 A I understand that is Mr. Manoli's position that  
16 there is not a requirement on the employer to file a petition  
17 under Section 9(c)(1)(b) to avoid a refusal to recognize.

18 Q Are there any decisions of the National Labor  
19 Relations Board pro or con on that subject in the past?

20 A This case.

21 Q I beg your pardon?

22 A Gissel Packing Case.

23 The Board accentuated the fact and relied in great  
24 measure upon the fact that the employer did not file a  
25 petition under Section 9(c)(1)(b). I should, however, add

1 that this case presents in addition numerous unfair labor  
2 practices engaged in by the employer, including discharges  
3 which were obviously inconsistent with a desire to give the  
4 employees a free choice.

5 But in this case they specifically talked about the  
6 failure of the employer to file a 9(c)(1)(b) petition.

7 Q Why did they say it was his duty?

8 A Pardon?

9 Q Why did they say it was his duty?

10 A They said his failure to do this showed that he  
11 was not in good faith, is the position that the Board took.

12 Q His failure to file?

13 A Yes, the failure to file a 9(c)(1)(b) petition  
14 was an act of not in good faith. Now here, of course, is  
15 where we differ from the Board again. In that we do not think  
16 that good faith is relevant.

17 Q Well, he has a right to file for an election  
18 doesn't he, which the Board couldn't knock him out of?

19 A He has a right to file for an election. That  
20 is correct.

21 Q Either one of them.

22 A That is correct.

23 Q So why shouldn't he file it if he is not  
24 satisfied with the cards?

25 A I think he should but he does not, your Honor.



1 and he does not because he gains time by not filing. He gains  
2 time to engaged in all kinds of conduct, conduct which can be  
3 viewed as illegal, conduct which we never learn about.

4 Q Do you think it is crucial for us to find in  
5 this case whether the obligation in those circumstances in on  
6 the employer or the union to file for the election?

7 A I think it is crucial to find that when the  
8 employer does not file such a claim on the mere tender of cards,  
9 the majority cards, the employer has violated his duty and has  
10 refused to recognize and thereby has violated the employees  
11 rights in designating their bargaining representative.

12 Q And the only way he can relieve himself of that  
13 is to demand an election?

14 A The filing of a petition on his own, that is  
15 correct.

16 Q Yes. And you and Mr. Manoli are in distinct  
17 disagreement on that, are you?

18 A Apparently.

19 Q Mr. Gore, isn't it possible to dispose of these  
20 two cases without reaching most of the questions you have been  
21 discussing, that is to say, as I understand it, in both of  
22 these cases the Board has found affirmative acts which the  
23 Board says constitute unfair labor practices.

24 A Yes.

25 Q Now, it is conceivable, I suppose, to decide

1 these cases on the basis that where the employer engages in  
2 affirmative, positive acts of unfair labor practices, then the  
3 employer is not justified in refusing to proceed to bargain on  
4 the basis of the authorization cards?

5 A That is correct. Indeed it was that aspect of  
6 the case that I originally intended to address my attention to

7 Q Well, it is that aspect of the case that I got  
8 out of the briefs and then we heard a lot of things that  
9 started other discourse.

10 A Oh, thank you, if you will excuse me, I wish  
11 to save time for rebuttal.

12 MR. CHIEF JUSTICE WARREN: Mr. Jenkins.

13 ORAL ARGUMENT OF JOHN E. JENKINS, JR., ESQ.

14 ON BEHALF OF RESPONDENT  
15 GISSEL PACKING COMPANY, INC. ET. AL.

16 MR. JENKINS: If it please the Court.

17 Perhaps it would be helpful to the court having heard  
18 this general discussion of the principles involved in the issues  
19 in this case if we take Gissel as an example from a factual  
20 standpoint and see how the application of these principles came  
21 up with one little sausage maker back in hills of West Virginia.

22 Back in the early 1960's, about '61, this union  
23 started a massive organization campaign in the retail food  
24 industry there and it attempted to organize the Logan Packing  
25 Company, the Gissel Packing Company and many other companies.

1           Petitions were filed, cards were taken up and the  
2 union claimed it had a majority of the employees and in 1961  
3 the National Labor Relations Board came in and pitched its  
4 tents on these company premises and ordered the employees to  
5 vote without the president of the company hanging over their  
6 shoulder or without the union organizer hanging over their  
7 shoulder in a free expression of their wishes.

8           Q     On whose petition was that?

9           A     Upon the petition of the union.

10          Q     Of the union.

11          A     And when this occurred and the union having  
12 represented as it must of necessity that it had a majority  
13 because it had demanded recognition before that in these cases,  
14 the employees in all of these companies rejected the union.

15               Three or four years passed, and the union was still  
16 under great pressure from its main clients, A&P, Kroger and  
17 the big chains to organize this industry.

18               This was no spontaneous rising of union interest of  
19 the employees in this company. They started in with the new  
20 technique which the Board had developed for them that is on  
21 trial before this court today, the authorization card technique.

22               And in January of 1965, they contacted Gissel, my  
23 client, and said we represent a majority of your employees.  
24 Bargain with us or we will file unfair labor practices against  
25 you. We got some cards.

1 Now Gissel people had been down this road before.  
2 They knew these cards were unreliable. They knew the pro-  
3 pensities of this union to overstate its claim or its case  
4 of representation.

5 Q Had there been cards back in 1961?

6 A There had been cards submitted by the union to  
7 the Board as a prerequisite to getting the election. There  
8 had not been authorization cards as I understand it submitted  
9 to the company, your Honor.

10 And so the company immediately responded to this  
11 request and they said this: We don't have any confidence in  
12 these cards. Secondly, why not let us get this thing settled  
13 properly by a fair and honest election and wrote the union a  
14 letter and asked them to petition for an election.

15 Now it is an act of complete futility for an employer  
16 in these circumstances to file a petition for election. We  
17 did it in Sehon Stevenson. It was refused. We did it in  
18 Davis Wholesale. It was refused. We did it in the Logan  
19 Packing Company and it was refused. In Gissel the company  
20 wrote a letter to the union and invited them to file the  
21 petition.

22 Q Mr. Manoli says that when the employer asks for  
23 one they will get it. Did you understand him to say that?

24 A I certainly did and it is most enlightening.

25 Q You did ask and you didn't get it.

1 A We asked time and again and we did not get it.

2 Q In this case?

3 A No, sir, in this case we decided to try a  
4 different tact. We thought maybe the union has more persuasive  
5 authority with the Board than we do, let us write the union a  
6 letter and suggest a quick consent election and maybe if they  
7 petition they can get it because this is what we want.

8 Of course, they didn't want an election. They knew  
9 they didn't represent a majority of these people.

10 Q Why didn't you file it anyhow and take a chance?

11 A Well, we thought it was a futile act, your  
12 Honor, and in Logan Packing Company we did file the petition  
13 and it was thrown out and in Davis Wholesale Company currently  
14 in the Court of Appeals for the D. C. Circuit we filed it and  
15 it was thrown out.

16 Q Why was it thrown out?

17 A They said you are going to have to honor those  
18 cards.

19 Q Isn't there anything more behind it than that?

20 A Yes, sir. Yes, sir, there were collateral  
21 unfair labor practices of the company involved of supervisors  
22 of cthe company. Yes, sir.

23 Q That might not make it necessarily a futile  
24 act for you to ask where there were none, would it?

25 A I don't know.



1 Q Had you been guilty of any unfair labor practices  
2 in this case?

3 A Pardon, sir?

4 Q Had you been guilty of any unfair labor practices  
5 in this case?

6 A The Board so found. Yes, sir. Coercive state-  
7 ments of some people, they didn't like the union, expressions  
8 of the opinion, which the Board found were coercive and  
9 unfair labor practice.

10 Q When did they find that?

11 A They found that as part of this case that is  
12 here now in which they found that the company had committed  
13 some other peripheral unfair labor practices and that it had  
14 a duty to bargain with the union on the basis of these cards  
15 alone.

16 Q That was on the cards issue?

17 A Yes, sir.

18 Q Did you ask for an election before that hearing  
19 was held on that unfair labor practice?

20 A The hearing, your Honor, was all combined in  
21 one hearing. The election and card question and the unfair  
22 labor practices were all in one hearing. We did not ask for  
23 an election. In this case we wrote a letter to the union  
24 when the demand was originally made for suggesting that they  
25 petition for an election in this case.

1 Q That was the only way you asked for it?

2 A Yes, sir. You see, your Honor, we felt and we  
3 believe the law provides if you read Section 9 it never says  
4 in there that the employer must petition.

5 Q Well, it doesn't say it must, but it says he  
6 can, if he wants one.

7 A It is a right that he has but certainly his  
8 rights in the matter should not be determinative of whether  
9 he initiates a petition in the union; the union is the one that  
10 is asking for recognition. The Board had uniformly ---

11 Q The company is the one that is declining to  
12 give it to him.

13 A Pardon?

14 Q Yes, but the company is the one that is declining  
15 to give it to them.

16 A This is true. Then if the union then still wants  
17 recognition they have this avenue open to them to go and ask  
18 for an election if they want. We simply suggested to them in  
19 this case that they do this.

20 Q The Board found here did it not that your  
21 company had been guilty of unfair labor practice before any  
22 presentation of these signatures?

23 A Yes, sir, they were on both sides chronologically.

24 Q Pardon?

25 A On both sides chronologically. Most of the

1 alleged unfair labor practices occurred subsequent to the dates  
2 on these authorization cards.

3 Q Well, they were told if they were caught talking  
4 to union men, you blankety blank things will go, didn't they?  
5 Didn't they find that?

6 A It was evidence to that. Yes, your Honor.

7 Q That was before the cards were submitted?

8 A No, your HONOR, the cards were submitted and  
9 then the statements were made. I am not sure in my mind about  
10 the chronology of each of these incidents that you are talking  
11 about. They were all in relatively the same general period of  
12 time.

13 Q Did I understand you correctly to say that your  
14 client wanted an election?

15 A Yes, your Honor.

16 Q But didn't want to ask for it?

17 A No, sir. We wrote a letter to the union asking  
18 them to ask for it.

19 Q But you knew you could have petitioned the  
20 Board, whether or not the Board granted it you had a right to  
21 petition for it.

22 A We had a right to petition the election. We did  
23 it in the companion cases. The Board refused it and so we  
24 decided in Gissel to simply suggest that the union do it.

25 Q And did you also realize that if you petition

1 and you continue these unfair labor practices you would be in  
2 deeper trouble?

3 A I do not think, your Honor, that the two are  
4 related to each other. You see there is a question of who is  
5 going to represent the employees. The whole structure of the  
6 labor law is to preserve the rights of the employees. They  
7 are not a prize over which a union and a company fights.

8 The question of representation of them and their  
9 freedom of choice is one thing to be dealt with by the Board  
10 and there an employer or a union's unfair labor practices are  
11 something separate and distinct from that.

12 Q But I understand that once you ask for the  
13 petition for the election you have all the freedoms of speech  
14 that anybody else has. Right?

15 A This is true.

16 Q But you didn't. You didn't petition for your  
17 election and you did exercise what you thought was freedom of  
18 speech but what was actually unfair labor practice.

19 A We hope, your Honor, that the right of freedom  
20 of speech of any citizen of the country is not contingent upon  
21 him filing a paper with the National Labor Relations Board.  
22 We think he has that right inherently God-given whether he  
23 files a petition or anything else.

24 Q Despite what the law says?

25 A Pardon, sir?

1 Q Despite what the law says?

2 A I do not think the law says ---

3 Q What you really mean is that what you think is  
4 freedom of speech is one thing and what the NLRB thinks is the  
5 freedom of speech is another thing and what the law says is  
6 freedom of speech is a third thing.

7 A We have our differences of what freedom of  
8 speech is.

9 Q So you chose to take the other side instead of  
10 petition.

11 A We did not think that the employer's rights of  
12 freedom of speech were conditioned upon him filing a paper  
13 of any kind with anybody.

14 Q Well, why did you file the paper with the union?

15 A We wrote that to try to see if by this means we  
16 could get this question resolved promptly and fairly.

17 Q Promptly. Would the union petition get faster  
18 action than the employers?

19 A We had tried the employer petition and failed  
20 and so we thought we would try the union side.

21 Q You didn't try it in this case.  
22 You are talking about the other case?

23 A Yes.

24 Q YOU didn't try it here?

25 A No, this is true. But we don't think, your



1 Honor that an employer's rights of what his conduct is are  
2 dependent upon whether he initiates a petition or the union  
3 initiates a petition. Certainly not insofar as rights as  
4 fundamental as free speech.

5 Q Mr. Jenkins, did the union in these other cases  
6 where you did file a petition for an election did the Board  
7 give any reason as to why that was not granted?

8 A It was a matter of Board policy and that is the  
9 only reason. It is a matter of Board policy that they want to  
10 merge unfair labor practices and representation questions  
11 together, confuse the two and not decide representation  
12 questions until unfair questions are determined.

13 Q That something is if that is very likely what  
14 they said to you.

15 A No, your Honor, that is my gloss on what they do.

16 Q Now what I would like to know is did they give  
17 you any reason and if so, what was that reason and then you  
18 may go ahead, of course, if you like with your gloss.

19 A What they said was, they wrote a letter and said  
20 -- let me go back in this case to make it clear again -- of  
21 course, we did not file a petition. In Logan we did. So I  
22 will have to answer you in terms of Logan and Davis and Sehon  
23 and all the others.

24 In those cases we filed the petition promptly. In  
25 each of these cases the union as soon as they got the petition

1 they didn't want an election so they filed the unfair labor  
2 practice charges. They know that by doing this, this auto-  
3 matically by the Board rule blocks the election and then in  
4 the next return of mail the letter from the Board office in  
5 Cincinnati comes back to us in Huntington saying the union has  
6 filed unfair labor practice charges against you; therefore,  
7 we are going to dismiss your petition for the election and  
8 that is all there is to it.

9 It is their policy. They equate the two of these  
10 things you see together.

11 Q Mr. Jenkins, if, as I understand it, the reason  
12 you didn't apply for an election yourself here was because you  
13 felt it would be abortive to do it.

14 Now, if you have the right in this case to file for  
15 the election yourselves, would you feel that that was in  
16 accordance of the law and would protect your rights ade-  
17 quately?

18 A No, your Honor, I do not. I think it is a  
19 matter entirely of employer's discretion. There is nowhere in  
20 the law, No. 1, that says in order to get certain rights or  
21 to get certain protection an employer must file a petition.

22 Section 9 of the labor relations act says nothing  
23 about who has to initiate this. In fact the Solicitor General  
24 here says that it makes no difference who initiates the  
25 petition. Only counsel for the union takes this rather strange

1 view that it makes a difference that the employer under peril  
2 of being found guilty of the unfair labor practices must rush  
3 to Cincinnati and file this petition in order to protect his  
4 right of freedom of speech.

5 Q If you don't think it would make any difference  
6 why would you object so much to initiating the election your-  
7 self? You said you wanted it.

8 A We did not object to it. We simply didn't do it.

9 Q No, I say, why would you now in response to my  
10 question whether your rights could be protected in that manner?  
11 Why would you fight for the other position if it made no  
12 difference?

13 A Well, it seems to me that an employer's rights  
14 in this situation should not be dependent upon his filing a  
15 paper. Either he has an obligation under the law to recognize  
16 this union or he doesn't. And I don't see that his rights in  
17 this matter are dependent upon whether he files a paper or  
18 who files a paper.

19 What we are trying to get to is a speedy resolution  
20 and the problem is how we do it, over what these people really  
21 want.

22 Q But would you think though that the question of  
23 the employer's unfair labor practice before or after the  
24 presentation of the authorization cards, those unfair labor  
25 practices are relevant to deciding whether or not the employer

1 has a duty to bargain?

2 A I don't think that they are, your Honor. They  
3 don't prove a thing. This is the great assumption which goes  
4 without critical analysis in all of this.

5 Q Mr. Manoli says that the Board position is the  
6 employer may say I just don't like cards and therefore the  
7 employer may just refuse to bargain.

8 But I gather the position is that if he commits an  
9 unfair labor practice he does have the duty to bargain  
10 regardless.

11 A That is what he says. This is what the Board  
12 is saying apparently. But the two are two different animals.  
13 They are different things. Let me give you a for instance.

14 Q How could you ever have -- I suppose you would  
15 agree though that the unfair labor practices are a decent  
16 basis for avoiding an election.

17 A Yes, sir. But this presumes ---

18 Q Well, if you start permitting unfair labor prac-  
19 tices prior to an election, or if you continue to commit them  
20 there isn't any way of getting a fair election?

21 A If the election, if the Board ---

22 Q So you take the next best thing, cards.

23 A No, your Honor. Cards even by the Board  
24 apparently now it is inherent in the Board's argument this  
25 morning that the cards are inherently suspect and unreliable.

1 Otherwise they couldn't justify an employer in rejecting them  
2 out of hand.

3 Q Well, yes, but if you haven't got any better  
4 way of doing it because the employer forecloses a better way  
5 what are you going to do then?

6 A Well, let us take the shoe on the other foot.

7 Q How about that question?

8 A Yes, sir.

9 The employer refuses to recognize the union and then  
10 there are some -- and the Board says on the basis of cards  
11 alone you could assume, we could assume that you feel only  
12 49 percent of the employees really want the union and, there-  
13 fore, you are justified in refusing recognition.

14 Then let a supervisor of the company go out and make  
15 and make some coercive statements or let there be some other  
16 unfair labor practice and the Board says, oh, oh, something  
17 has changed.

18 Now you have added this other ingredient and this  
19 proves to us that you didn't really feel that there was only 49  
20 percent, we now realize you thought there was 51 percent.

21 Q Well, I take it you are willing to confine your  
22 statements to the 49 percent case?

23 A Either one.

24 Q All right, let us say the 60 percent case where  
25 the employer says, yes you have 60 percent of the cards and I



1 have checked all of the signatures on these cards and they  
2 are perfectly valid. It looks like you have got it. But I  
3 still don't like cards. I want an election.

4 Mr. Manoli says the employer can have his election.  
5 Then if he goes and commits any unfair labor practices, what  
6 then about being ordered to bargain on the basis of the cards?

7 A Well, your Honor, what kind of unfair labor  
8 practices? Are they unfair labor practices ---

9 Q They are the kind that would void an election.

10 A But the problem is that in the Gissel case there  
11 is no finding of fact.

12 Q What about the unfair labor practices that would  
13 void an election?

14 A If they are unfair labor practices then they  
15 should order the election. If the union is not satisfied with  
16 the outcome of the election there is a procedure that where  
17 they can get to the very question that your Honor raises. That  
18 is, things the employer did made it an unfair election and  
19 therefore the Board can set it aside.

20 Suppose, on the other hand, the union commits unfair  
21 labor practices when they are seeking recognition. What  
22 happens then? Does the Board say we are not going to let you  
23 in for a year because you have made an election unfair or  
24 impossible because of your 8(b)(1) coercive acts? Oh, no,  
25 when the shoe is on the other foot, what does the Board do?

1 The Board says to the Union, you post a little  
2 notice and say for 60 days you won't do it any more and then  
3 at the end of 60 days they go and hold the elction. You see  
4 it depends on whose ox is being gored.

5 I see that my time has expired.

6 MR. CHIEF JUSTICE WARREN: Mr. Hamlin.

7 ORAL ARGUMENT OF LEWIS P. HAMLIN, JR., ESQ.

8 ON BEHALF OF GENERAL STEEL PRODUCTS, INC., AND  
9 CROWN FLEX OF NORTH CAROLINA, INC.

10 MR. HAMLIN: Mr. Chief Justice, if the Court please.

11 If I may I will first state the three or four things  
12 which are different about the General Steel case in the context  
13 of this combined hearing.

14 In General Steel the union lost an election. The  
15 result of the election was later set aside and the entire  
16 election proceeding dismissed.

17 Even though the Board had previously found and recorded  
18 in its order that a question concerning representation existed,  
19 a finding which would squarely place the case within Section  
20 8(c) under which the Board concedes that it must hold an  
21 election in order to resolve questions of representation.

22 No new election has ever been held.

23 In this case the union was installed as in the other  
24 cases. But in this case it was installed after having lost  
25 a secret ballot election. In this case there were no 8(a)(3)

1 charges. No one was alleged or found. No individual was  
2 alleged or found to have been improperly discriminated against.

3 The Board installed the union based entirely upon  
4 alleged coercion by the employer and alleged failure in good  
5 faith to recognize the union upon demand. This much more is  
6 perhaps different.

7 In General Steel there was a demand by the union for  
8 recognition. But the union made no offer of proof whatever.  
9 I do not want to be taken as conceding that that makes a  
10 difference in this case but I want the court to be aware of it.

11 I think it makes this much difference. Where the  
12 union fails to make any offer of proof of its position it  
13 indicates a lack of security on the part of the union in making  
14 its demand and is certainly something upon which the employer  
15 can rely in deciding whether he believes the union really  
16 represents his people.

17 Q Mr. Hamlin, may I be clear on one thing.

18 A Yes, sir.

19 Q There was a finding of unfair labor practice  
20 here by the Board wasn't there?

21 A Yes, sir, there were indeed and certain ones of  
22 them, isolated instances by low echelon supervisors were not  
23 denied.

24 Q Well, however that may be, I take it that your  
25 statement a few moments ago indicates nothing more than that

1 this particular type of unfair labor practices did not occur,  
2 nobody was actually discharged but the Board did find that there  
3 were other types of unfair labor practices?

4 A That is right.

5 The impact of that factor as I see it, goes to the  
6 extent of the unfair labor practice and if one is speaking of  
7 remedy goes to the question of whether or not a severe remedy  
8 can be justified in such a case which not only destroys the  
9 right of the employer to an election but destroys the right of  
10 the employee to an election.

11 Q Let me see if I understand the issue that you  
12 are tendering.

13 No. 1, and I suppose you are arguing that the com-  
14 pelling of an employer to bargain with the union on the basis  
15 of authorization cards is not justified by the statute in  
16 any event. Are you arguing that?

17 A I am arguing that the statute, I think I would  
18 agree with you as you have stated it.

19 Q No, you are not agreeing with me. I am trying  
20 to find out what your position is.

21 A I think I would agree with the formulation you  
22 made. I wish to qualify it to this extent.

23 I would not assert that there is never a case where  
24 the Board has no authority as a matter of remedy to order an  
25 employer to bargain. I do assert and I think the literature

1 is abundant to support it that authorization cards are far too  
2 unreliable a basis on which to go.

3 In destroying these rights which the Act was pri-  
4 marily set up to create ---

5 Q Forgive me for taking more of your time but I  
6 must endeavor to get a little sharper understanding of your  
7 position.

8 Do I now understand you to say that there are now  
9 some limited circumstances in which in your belief the Board  
10 may properly require bargaining with the union solely on the  
11 basis of authorization cards?

12 A No, sir.

13 Q All right, now, what is your position?

14 A I think there may be limited circumstances  
15 where the Board may properly order bargaining without an  
16 election. I think the evidence upon which the Board satisfies  
17 itself of union support by the employees ought to be much more  
18 than merely authorization cards, if it ever comes to that  
19 remedy.

20 Q For example?

21 A For example? Say on Stevenson which was one of  
22 the Fourth Circuit cases where the employer has satisfied  
23 himself independently that the union has a majority. I think  
24 I should agree.

25 The Fourth Circuit has suggested that where employer



1 unfair labor practices are sufficiently aggravated that a  
2 rerun election with an expected fair result could not be held  
3 even applying the remedies which are available to the Board,  
4 that only in those circumstances should the Board impose  
5 bargaining without giving the employees an opportunity to  
6 express themselves.

7 Q Now, do you agree with that proposition or  
8 are you challenging it before this court? That is to say, that  
9 there are circumstances in which the unfair labor practices  
10 of such a character and are so pervasive as to justify the  
11 Board in requiring the employer to recognize the union and to  
12 bargain with it even though there is no election and even  
13 though, let us say, the basic evidence of union representation  
14 is the authorization cards.

15 Do you agree with that or disagree with it?

16 A I do not agree that the Board should be per-  
17 mitted to require this solely on the basis of cards in any case.

18 Q Even where there are unfair labor practices that  
19 are so gross and so pervasive as in the judgment of the Board  
20 and the Court to make the holding of a fair election impossible?

21 A I go along with the fair election impossible  
22 task. I am insisting, however, that the cards alone are not ---

23 Q I understand that. I am not trying to compli-  
24 cate this thing. I am trying to clarify it.

25 What I am suggesting to you is that your position

1 really comes down to urging this court to adopt a standard  
2 based upon differentiation, a qualitative differentiation, as  
3 to the type and the fact of unfair labor practices.

4 That is to say, that some kinds of unfair labor  
5 practices which will make it all right in your submission to  
6 rely on the cards or other type of labor practices such as the  
7 ones involved in your case that you suggest do not provide a  
8 basis for justifying the use of the authorization cards.

9 A If I may expand on that, sir, I think I can  
10 state my position.

11 I had decided in my own mind that I did not wish to  
12 attempt to defend the hardest case if there is one where the  
13 Board and the courts would be justified in concluding that the  
14 employer had engaged in such outrageous practices that you could  
15 never within the reasonably foreseeable future reassure the  
16 employer and hold a fair election.

17 In that case I would be willing to concede that after  
18 the application of the Board's remedies to attempt to control  
19 this situation, if it is necessarily concluded that you still  
20 cannot reassure these people, perhaps there is a basis for  
21 further ---

22 Q Mr. Hamlin, as I understood here throughout the  
23 union's six months organizational campaign both before and  
24 after its demand for recognition the company's foremen and  
25 supervisors engage in extensive acts of coercion and

1 intimidation. Did the Board find that?

2 A The trial examiner generalized to that extent,  
3 if you count up the instances in which he makes any specific  
4 finding of fact, you will find, of course, this is rough, I  
5 think about 13 employees involved out of a plant of 200, except  
6 for the anti-union speech which was made by this employer in  
7 which on the testimony of four men out of 200 denied by the  
8 employer he is said to have said, "If the union comes in I  
9 will negotiate and negotiate but I do not have to reach a  
10 contract with them."

11 And if you go out on strike I can, on his testimony,  
12 I can replace you. On the testimony of three or four employees  
13 said, "If you go out on strike, I have a right to end your  
14 job."

15 That is the end of it. A very close line.

16 The speeches were based upon letters written to  
17 people, all of which passed muster with the trial examiner.  
18 The specific unfair labor practices involved a very limited  
19 group and only three or four of those were undenied.

20 Q Were some of them threatened with discharge  
21 for engaging in union activities?

22 A They were alleged to have been.

23 Q It was the satisfaction of the Board wasn't it?

24 A That is true. In four cases, I believe, and  
25 again there was some concession that one or two of those may

1 have been in jest. They were all by lower echelon supervisor.  
2 One of whom by the time the election came had been demoted  
3 to rank and file status. Not for this reason. For lack of  
4 competence. We didn't even know about it until this came along.

5 There isn't time here to review the legislative  
6 history of this Act, of course. There hasn't been time on  
7 the other side. We feel that the legislative history supports  
8 the view that Congress intended to make an election the only  
9 means for a selection of a representative.

10 I think Congress intended probably more than I am  
11 here contending. The statement in the House report on Taft-  
12 Hartley recited a long list of what Congress regarded as  
13 deprivation of employee rights, to make their own selection.

14 Throughout the debate there are references to the  
15 desirability of an election and no one disputed that even the  
16 Senators who ultimately voted against the Taft-Hartley  
17 amendments were, as far as the record shows, agreeable to  
18 the election principle.

19 Section 8(c) was elaborately rewritten to provide  
20 for an election. The Board's authority to do otherwise was  
21 removed from 8(c). The Board's authority to determine a  
22 representative in an unfair labor practice proceeding was  
23 stricken out of 8(c) specifically so.

24 They had that authority before. It was taken out  
25 of the Taft-Hartley amendment. As far as I know the Board has

1 never reconciled that with its subsequent practice. The Board  
2 was already before Taft-Hartley, engaged in conducting elec-  
3 tions. The Board had already decided that in most cases it  
4 would hold elections because it regarded elections as the  
5 reliable way.

6 The Board had already invented its good faith test,  
7 for determining whether it was going to give an employer an  
8 election. There is nothing in Taft-Hartley, nothing in the  
9 debates that shows any intention on the part of Congress to  
10 confirm the Board's existing practice of counting authorization  
11 cards or to continue, nor to confirm the Board's existing  
12 doctrine of good faith doubt.

13 There is a complete absense of anything to support  
14 the Board's present position. It seems to me in summary it  
15 is perfectly clear from the Congressional history that the  
16 intention was to make a change.

17 Basically the Board is here defending the course  
18 of action which it was already pursuing. At that time it is  
19 contending that no change occurred in Taft-Hartley and the only  
20 piece of legislative history it hangs it on is the failure  
21 of the House bill amending 8(a)(5) to emerge from committee.

22 That, however, I think is readily explained.  
23 Incidentally this legislative history is very well summarized  
24 in a brand new pamphlet issued by the Warden School of the  
25 University of Pennsylvania by MacFarland and Bishop. It just



1 came out in February or January.

2 The House bill, I was referring to the effort to  
3 amend 8(a)(5). The House bill had gone too far. Not only  
4 would the House bill have amended 8(a)(5) to require an employer  
5 to bargain only where there was an election, it destroyed the  
6 existing relationships based upon voluntary recognition and  
7 the minority protested against that.

8 The House report said this: "If an employer is satis-  
9 fied that a union represents the majority and wishes to recog-  
10 nize it without it being certified under Section 9 he is free  
11 to do so as long as he wishes but as long as he recognizes  
12 it or when it has been certified he must bargain with it. If  
13 he wishes not to recognize the union or having recognized it  
14 stops doing so, stops doing so, the union may ask for an  
15 election."

16 Well that gave him a right to recognize today and  
17 withdraw tomorrow.

18 And I think Congress rightly agreed there is no  
19 legislative history to show just what thoughts went into this,  
20 when it emerged from the committee, rightly agreed not to go  
21 that far.

22 I believe my time is getting close.

23 Let me suggest this: There are tremendous dis-  
24 advantages in a reliance upon cards. There is lack of  
25 anonymity for the employees. There is lack of chance for

1 reflection. They have no chance to think it over and change  
2 their mind. There is a lack of chance to hear the other side.  
3 It is totally inconsistent with the Board's Excelsior Doctrine  
4 in which the Board is insisting that the employees be given a  
5 chance to hear both sides.

6 And consider this, when you do have an election and  
7 later set it aside under the Excelsior Doctrine the employer  
8 has been forced to supply the union with all this information  
9 about how to contact employees, where to reach them, giving the  
10 union every opportunity for coercing them if it can get to them,  
11 the Board has never adopted any system for policing these  
12 card solicitations.

13 Never.

14 Q There is no time limitation on the period over  
15 which these cards can be gathered?

16 A None whatsoever.

17 In the General Steel case one of the union solicitors  
18 admitted on cross-examination that he had personally dated  
19 over 50 of these cards before presenting them. That is at the  
20 very tail end of this record, in the final pages. He dated  
21 them.

22 Even though he was not the person who solicited  
23 them anyway.

24 Q Are cards generally, as a matter of fact, dated?

25 A They must be dated before presented as I

1 understand it. But customarily unions don't date them. A  
2 stale card is no good. The union does not want a card to  
3 look stale.

4 Q Who says a stale card is no good?

5 A In this proceeding there was very little  
6 evidence of cards being dated at the time they were signed.

7 Q Who was it that says a stale card is no good?

8 A Sir?

9 Q Why is a stale card no good, under what provision  
10 of law?

11 A I don't recall where the Board has drawn the  
12 line. The idea, of course, is that they are too stale ---

13 Q I understand the idea.

14 My question, is there any under Board decision or  
15 practice, is there any time limitation before which a card  
16 is ---

17 A Yes, I can't cite it to you. I think it is  
18 either six months or a year if the Board knows. But if the  
19 Solicitor is the one who gathers the cards, how would the  
20 Board ever know. The solicitor is the one who dates the cards.

21 Q Do you agree with the gentleman that preceded  
22 you that the practice of the Board is to dismiss an employer  
23 petition for an election of the union has filed an unfair labor  
24 practice charge?

25 A The practice of the Board is to refuse to hold

1 any election if there is an unfair labor practice charge  
2 pending by any party.

3 Q Until ---

4 A Until it is resolved.

5 Q Until it is resolved?

6 A Yes, sir.

7 Q And what if it is resolved against the employer?

8 A If it is one of the 8(a)(5) card check cases  
9 and they order him to bargain based upon the 8(a)(5) charge  
10 they will then dismiss the election petition and say he is not  
11 entitled to an election.

12 Q If he has committed unfair labor practices in  
13 the course of checking out these cards the court automatically  
14 says there will be no election, you must bargain?

15 A That is right. And they will dismiss the elec-  
16 tion petition at that point.

17 Q But if the union asks for an election they will  
18 hold it?

19 A If the union asks for an election they will hold  
20 an election.

21 Q And if they lose it, the employer will bargain  
22 anyway?

23 A If the union asks for an election the Board will  
24 hold an election. As I understand the rule, will not hold the  
25 election in face of an unfair labor practice charge then  
pending.

1 Q Oh, I see.

2 But they will decide the unfair labor practice?

3 A They will decide the unfair labor practice  
4 charge first.

5 Q Well, if they do that they don't, they just  
6 order him to bargain if the charge is sustained.

7 A If the charge is sustained the customary  
8 practice is to, assume it is an 8(a)(5) charge, a failure to  
9 bargain charge, the customary practice is to order bargaining  
10 and to take the position that there is no more question of  
11 representation.

12 Q How does it come about that the union sometimes  
13 asks for an election ---

14 A Loses it and then comes back? They do not  
15 file their charges although they know about them.

16 Q Oh, until after the election is over.

17 A They do not file its charges until after the  
18 election is over. That is what happened here. There were no  
19 charges pending when the election was held.

20 Q Well, of course, there is a six-month's statute  
21 of limitations on that.

22 A That is right. The Aiello doctrine which  
23 formerly existed up until 1964 for a period of ten years, under  
24 that doctrine the union, if it knew about unfair labor  
25 practices had to make up its mind whether or not those practices



1 were sufficient to interfere with an election. The union was  
2 not allowed to go through a futile election knowing about  
3 unfair labor practice charges.

4 Q If there is a pending request for election but  
5 there are unfair labor practices pending, does it make any  
6 difference what kind of a charge the unfair labor practice  
7 charges as to whether or not they will go forward with an  
8 election? Does it have to be an 8(a)(5)?

9 A No, sir.

10 Q Just any kind?

11 A Any kind of an unfair labor practice charge  
12 brought by the union against the employer pending the election  
13 will result in the elections being held up unless the union  
14 also files a waiver saying we won't use these charges to set  
15 aside the election. We would like to go on and hold it.

16 Q Let us assume they resolve the unfair labor  
17 practice against the employer and then will they order him to  
18 bargain automatically no matter what kind of an unfair labor  
19 practice charge it was or does it depend on whether the unfair  
20 labor practice charge might have tainted the election?

21 A If the election is held and the union loses,  
22 the election must be set aside before the Board will entertain  
23 an 8(5) charge.

24 Q Suppose there is a petition for an election.  
25 The union files an unfair labor practice charge. Accept the

1 hypothesis that the charge does not necessarily bear upon the  
2 fairness of the election. As I understand the practice, the  
3 Board hears the charge holding any action on the election.  
4 Suppose it is found that the charge is sustained but that it  
5 is not conduct on the part of the employer that will interfere  
6 with the conduct of a fair election.

7 What does the board do then?

8 A It goes ahead after there has been a chance to  
9 dissipate the effect of these unfair labor practices, it goes  
10 ahead and holds an election and that is what I am saying the  
11 Board ought to do in almost all of these cases.

12 Q I am just thinking of a situation that could  
13 happen some time.

14 You have competing unions in a plant and the employer  
15 commits an unfair labor practice by let us say demoting one  
16 of those opponents of one of the unions. But the union that  
17 gets the card is the other union and it is the one that  
18 then seeks recognition and the employer says no, I will have  
19 an election. And he does.

20 Then there is an unfair labor practice charge in  
21 connection with the demotion of the employee active for the  
22 union that lost out with the employee. You mean if they find  
23 in that situation that the unfair labor practice charge is  
24 sustained there will not be an election involving the other  
25 union?

1           A     The election will only be thrown out where it  
2 is an 8(5) charge under which the Board ordered bargaining. If  
3 it is any other sort of charge, if it is an 8(1), 8(3) charge  
4 the Board will resolve that. It will require corrective  
5 action and will wait whatever length of time is necessary.

6           Q     Even in the situation that I hypothesized?

7           A     Yes, I think so.

8           Q     Then they will hold the election?

9           A     Yes, sir.

10          Q     They won't order him to bargain?

11          A     No, sir, not merely on an 8(1), 8(3) charge,  
12 and should not, I say.

13                I think the Board's remedies are ample to control  
14 these situations. The Board has the contempt power of the  
15 court at its disposal. It has a 10-J injunction built into  
16 the Act, at its disposal.

17                It need not destroy the employee's right to an  
18 election, or the employer's right to an election, in order to  
19 control unfair labor practice.

20                I believe my time has expired.

21                MR. CHIEF JUSTICE WARREN: Mr. Holroyd.

22                ORAL ARGUMENT OF FREDERICK F. HOLROYD, ESQ.

23                ON BEHALF OF HECK'S, INC.

24                MR. HOLROYD: Thank you, sir. Gentlemen.

25                You have heard all of the confusion here about the

1 state of the law. In the minds of the experts here I think  
2 there is little wonder that my client when approached by a  
3 union in light of all this will say I have no comment.

4 And this is what he said.

5 Q What did he say, I have no what?

6 A No comment.

7 The union presents to a company and I think we have  
8 to be realistic about this, gentlemen. We can get up on the  
9 level that we like to speak and say that this is the way the  
10 law is and this is the way it ought to be but I think we have  
11 got to get down and put ourselves on the level of the employer  
12 standing there when the union official comes out of the blue  
13 and presents cards to him as to what should he do and what can  
14 he do.

15 And I think we also have to put a more -- more  
16 importantly I think we have to put ourselves in the position  
17 of the employee when a union official comes to his home and says  
18 I would like for you to sign a union card.

19 The employee says, for example, "Well, what is this  
20 all about?"

21 The union official says, "Well, we are trying to get  
22 in over the company."

23 Well, the employee says, "Has everybody else signed?"

24 "Yeah, most everybody else has signed."

25 So he signs his name. Or a friend next door comes

1 over and says, Jim, how about signing this for me. So he  
2 signs his name. The employee not fully understanding and in  
3 many instances not understanding at all what it is that he is  
4 doing, the Board through its rules have limited the evidence  
5 which can be presented in the appellate court in this regard  
6 because the trial examiners will not even accept evidence as  
7 to the motive behind the signing of a union card.

8 In most instances, absent that is, threats or  
9 coercion on the part of the solicitor of the card. So this  
10 is the basis of what we have, gentlemen. We have these cards  
11 that are signed under virtually any circumstances.

12 Q What objections would you have to Mr. Manoli's  
13 version of what the Board's position is? Where he says that  
14 the employer says no comment, I want an election. He needn't  
15 bargain, he can get an election when and as the union asks  
16 for it.

17 A Well, I am going to ask for a printing of the  
18 record in that regard from his remarks in presenting that to  
19 the next trial examiner that I have because that is certainly  
20 news to me.

21 Q Well, yes, I know but let us assume that were  
22 the Board's position.

23 A It is not the Board's position but assuming  
24 that it is ---

25 Q That is exactly what the Board would do in every  
case



1           A     All right. Assuming that it is the position of  
2 the Board that if the employer is presented with a demand on  
3 behalf of the union and the employer says, "I don't think you  
4 represent a majority, I am going to file an election petition."  
5 I think this is perfectly proper.

6           Q     Well, he doesn't even need to do that. He can  
7 say I am just not going to bargain with you and wait for the  
8 union to file.

9           A     This is correct. This is what has been said  
10 that he can do.

11          Q     Would this solve your problem?

12          A     Sir?

13          Q     Would this solve your problems? The kind you  
14 are talking about there?

15          A     If the employer says I am not going to do any-  
16 thing. I think this would solve the problem to an extent. I  
17 think this is not the answer, though.

18                I would like the court to give us some guidance as  
19 to what to do here rather than come up with negative ex-  
20 pressions because we are out on the firing line here. And we  
21 don't know what really to do.

22                The union doesn't know what to do and the company  
23 counsels do not know what to do in this regard.

24                A client says a union man is sitting in my outer room.  
25 What do I do?

1 Q Well, doesn't company counsel know that the  
2 employer can ask for an election petition if he wants?

3 A Yes, sir, he should know. He should know that  
4 the employer has a right to ask for an election. But like  
5 Mr. Jenkins said, time and time and time again we have asked  
6 for these elections. The Board almost administratively rejects  
7 our petition. The union files an unfair labor practice  
8 charge so where are we? We have no right to appeal this  
9 administrative rejection on the part of the Board.

10 Q Wouldn't you be in better shape if you did?

11 A Would we be in better shape if we did?

12 Q Right now.

13 If you had petition, would you be in better shape?

14 A Would I be in better shape?

15 Q Yes, sir.

16 A I think not. No, sir.

17 Q You think it is that hopeless?

18 A I think that there is no question in my mind  
19 in these cases if we had filed a petition for an election that  
20 the Board would have rejected the petition based on the unfair  
21 labor practice of the union which was filed shortly after the  
22 company conducted its investigations in the case to determine  
23 whether or not the union had a majority.

24 You have got to remember, gentlemen, in this one  
25 case, in the Heck's case, in the warehouse case, the union

1 came to the company, they had 13 cards and there were 26  
2 employees in the bargaining unit said we represent a majority.  
3 They did not represent a majority and the Board so held.

4 Now the next day they came up and got another card  
5 and then sent a letter to the union without relating the fact  
6 that they had secured additional cards, sent a letter to the  
7 union or to the company said, confirming our conversation of  
8 yesterday or last week we demand recognition and bargaining  
9 rights.

10 Well nothing has come to the mind of the company  
11 which would indicate that the union had later secured its  
12 bargaining rights.

13 Now, one more point that I think is very significant,  
14 gentlemen.

15 And that is this matter of good faith. The mere  
16 fact that a company commits unfair labor practice before,  
17 during or after a demand for recognition in my judgment has  
18 absolutely nothing to do with his state of mind in declining  
19 to recognize a union on his doubt that the union represents  
20 a majority.

21 The union says and the Board says that if unfair  
22 labor practices occur after the demand he could not have had  
23 good faith when he denied it.

24 This doesn't make sense. Now if you want to punish  
25 the company for this, then this is all right. This is a

1 punishment. But if you want to say that because he committed  
2 unfair labor practices he did not have good faith doubt, then  
3 gentlemen this is not sound reasoning.

4 Q How about if he immediately fires or discharges  
5 all of those who were active in the union?

6 A He could still have a good faith doubt that the  
7 union represents a majority and fire them, yes, sir.

8 Q In this case the day after the company was  
9 notified they fired the principal union worker, didn't they?

10 A They fired a man that the company was under the  
11 impression he was a supervisor. It turned out that the Board  
12 held he was not.

13 Q They also told other employees, did they not,  
14 that they would lose their bonuses and various other things if  
15 they persisted and they did take away at least one signature  
16 didn't they?

17 A Yes, sir.

18 Q Now you don't think those things bear on whether  
19 it is good faith or not?

20 A This is a good point, your Honor, because ---

21 Q I thought so.

22 A Well, when the union in this case made its  
23 oral demand for recognition it did not present a majority and  
24 the Board so held. So the good faith is bound to have been  
25 there because the fact was there. And nothing came to the

1 company as I say which would indicate that the union later  
2 mustered up another card to get it that one over one-half.

3 But now, if you want to punish the company because  
4 of their subsequent unfair labor practice by throwing this  
5 plumb to the union, that is the employees and these are whose  
6 rights the National Labor Relations Board is supposed to be  
7 protecting, if you want to throw this plumb to the union as  
8 a punishment to the company, then, of course, this is one thing.

9 But merely to say that their subsequent unfair labor  
10 practices negate the possibility of good faith in the first  
11 instance to me is not sound reasoning at all.

12 Q Well, I suppose that the way you come out on  
13 this may depend in part on which proposition you stack with.

14 On the one hand it is possible to look at this problem  
15 on the assumption that the cards are valid and that they are  
16 operative and effective to require the employer to recognize  
17 the union unless the employer in good faith doubts that they are  
18 authentic.

19 Now that seems to be the position of the Board. In  
20 other words, they start with the proposition that the cards,  
21 authorization cards, are valid and effective unless there is  
22 some reason to challenge them.

23 The other way to look at it has been expressed on  
24 the other side is that the cards, you start with the proposition  
25 that cards are not affective and that it is only if the



1 employer does something that may make an election, the holding  
2 of a fair election in fact impossible. That the employer,  
3 only if the employer does something to make the election  
4 impossible will the cards then be given some vitality and life.

5 But as I understand it, the Board's position as  
6 expressed Mr. Manoli here is that the cards are effective to  
7 require their acceptance and recognition by the employer  
8 unless he in good faith doubts, unless he has some basis for  
9 doubting in good faith their validity.

10 And it is not just the effect of the unfair labor  
11 practice on the possibility of holding a fair election.

12 A Well, it would be my brief view and I see my  
13 time is up, that cards are valid for the purpose of nomination  
14 but they are not valid for the purpose of election.

15 Q That is what makes this particular ballgame  
16 because the Board disagrees with you.

17 A Yes, sir.

18 Thank you, gentlemen.

19 REBUTTAL ORAL ARGUMENT OF ALBERT GORE, ESQ.

20 ON BEHALF OF PETITIONER  
21 FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT  
22 CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

23 MR. GORE: Yes, I have just a few brief comments, I  
24 hope.

25 Q Mr. Gore, is there any legislation pending on  
this?

1           A     Yes, I think there are at least one if not two  
2 bills.

3           Q     On authorization cards?

4           A     Yes.

5           Q     Which would what, disallow them?

6           A     No, no. In one case the Fannon bill would  
7 disallow them entirely. The Javits bill would not disallow  
8 them.

9           Q     What would it do?

10          A     I will give you a rundown ---

11          Q     Well, you don't need but ---

12          A     It would honor authorization cards.

13          Q     Provided?

14          A     And it would provide for an immediate election,  
15 a forthwith election if the employer filed a petition, and  
16 did not engage in unfair labor practice.

17          Q     Is that what is at stake in this case?

18          A     No, oh, I should hope not.

19          Q     Would you distinguish between the kind of unfair  
20 labor practice that would vitiate the employer's request for an  
21 election and authorize an immediate order to bargain based on  
22 authorization cards?

23          A     I think first that that is a difficult thing to  
24 do in an abstract way. Unquestionably in our case, taking the  
25 Gissel Packing Case where you had men discharged for union

1 activities that vitiates the right for a free election.

2 Where you have threats of discharge that vitiates  
3 the right for free election. Where you have threats of plant  
4 shutdown or abandonment if the union comes in, that vitiates  
5 the right to a free election.

6 These are all things that we have in the Gissel  
7 Case so that as far as our situation is concerned I have no  
8 question that under any rule, be it the rule adopted by the  
9 Board or suggested by the Board ---

10 Q You would say that it is, that it would be  
11 the rare unfair labor practice that wouldn't vitiate the  
12 possibility of a fair election?

13 A That is quite right. As a matter of fact in  
14 our brief we suggest to the court that there are many activi-  
15 ties engaged in by employers that are not unfair labor practices  
16 that still affect and vitiate a free election.

17 Unfortunately the law cannot be written which will  
18 be able to take care of all of these things because of the  
19 position of the employee vis a vis the employer, the life and  
20 death aspect of the employee.

21 Q Is this the rationale that you use to justify  
22 the order to bargain the vitiation of the election and the  
23 petition of the employer and the order to bargain with the  
24 employer in the face of unfair labor practice, namely that  
25 the possibility of having a fair election is gone or do you

1 say you should go back and say this bears on whether or not  
2 there was a good faith doubt about the cards?

3 A Your Honor, I suggest that the law is that  
4 good faith doubt has nothing to do with it. That the obliga-  
5 tion to bargain is written into the law by Congress arises  
6 from a presentation of a majority of the cards and a refusal  
7 to recognize, thereby brings in the obligation to bargain.

8 Q You say that automatically that duty can be  
9 suspended by the employer filing a petition?

10 A That is right.

11 Q Let us assume he does file it then.

12 A Under those circumstances it is when the  
13 employer engages in unfair labor practices which make a free  
14 election improbable.

15 Now, I would want to direct my attention very  
16 briefly to the comments of Mr. Jenkins. There was some argument  
17 as regards the record with respect to certain other cases  
18 with respect to what happens to petitions.

19 I would like to read to the court from a decision  
20 of the Fourth Circuit in the Sehon Stevenson case which was  
21 called to your attention and it relates to the petition.

22 It says as follows:

23 MR. CHIEF JUSTICE WARREN: You may have three minutes  
24 more. Your time was taken up by questions.

25 MR. GORE: The employer's petition for an election

1 was denied because of the pendency of the unfair labor practice  
2 charges. A hearing held on those charges resulted in findings  
3 of violation of Section 8(a)(1), (3) and (5).

4 This is indeed what the fact is. The Board will set  
5 aside a petition be it a union petition or an employer petition  
6 if the charges are valid. On the other hand, if the charges  
7 are not valid, the charges are dismissed and the Board goes  
8 forward with the election.

9 It is simple as that.

10 Q So the petition is really held in suspense, are  
11 you saying?

12 A As a matter of fact, the petition under Board  
13 rule is in some 90 to 95 percent of the cases held in suspension.  
14 There are a few unusual cases. Pandit Terminals is one,  
15 Marston Corporation is another where the Board has gone forward  
16 in spite of the existence of unfair labor practices.

17 Q And have the election anyway?

18 A Yes.

19 Q And this is without first deciding the unfair  
20 labor practice?

21 A They have gone forward, to make it clear, they  
22 have gone forward with the processing of the representation  
23 case, which they normally hold up and I do not recall the case  
24 where they actually held the election. I think they wait  
25 until the charges are resolved one way or the other before



1 the election is held.

2 But let me point out, in 90 to 95 percent of the  
3 cases the processing of the petitions is held up pending the  
4 processing of the charges.

5 Now, I think that we ought to note that in Gissel  
6 Packing and I think in Heck's -- I know less about General  
7 Steel Products -- the cases involve serious unfair labor  
8 practices, engaged in simultaneously, the request to bargain  
9 and the tender of cards.

10 In Gissel Packing several months before the union  
11 tendered the cards but when the company knew the union was on  
12 the scene the company threatened the employees with discharge  
13 if it found they had talked to the union agents.

14 This threat of discharge continued from before the  
15 organizational activity began and continued from its inception  
16 to beyond the point when the demand was made.

17 There was a crescendo which followed the demand of  
18 the union.

19 I would like to end by saying one thing. It is clear  
20 that the purpose of the law cannot be to restore the wrong  
21 doing to as good a position as he would have occupied before  
22 he engaged in such serious violations.

23 (Whereupon, at 1:55 p.m. the oral argument in the  
24 above-entitled matter was concluded.)