In the

Supreme Court of the United States

LINDEN LUMBER DIVISION, SUMMER & CO., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, ET AL., Respondents	)	No. 73-1231
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. TRUCK DRIVERS UNION LOCAL NO. 413 ET AL., Respondents.	)	No. 73-1234

Washington, D. C.
November 18, 1974

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LINDEN LUMBER DIVISION, SUMMER & CO., Petitioner	
v.	No. 73-1231
NATIONAL LABOR RELATIONS BOARD, ET AL; and	
NATIONAL LABOR RELATIONS BOARD, Petitioner	
v.	No. 73-1234
TRUCK DRIVERS UNION LOCAL NO. 413 ET AL	

Washington, D. C.

Monday, November 18, 1974

The above-entitled matter came on for argument at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

NORTON J. COME, ESQ., Deputy Associate General Counsel, Department of Justice, Washington, D. C. 20530
For National Labor Relations Board

[Continued ..]

APPEARANCES, Continued

LAWRENCE M. COHEN, ESQ., Sears Tower, Suite 7916,
233 S. Wacker Drive, Chicago, Illinois 60606
For Linden Lumber Division, Summer & Co.

LAURENCE GOLD, ESQ., 736 Bowen Building, Washington, D.C. 20005
For Respondent unions

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 73-1231 and consolidated with 73-1234, Linden Lumber Division against the Labor Board and the Labor Board against the Truck Drivers Union.

Mr. Come, you may proceed whenever you are ready.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF NATIONAL LABOR RELATIONS BOARD

MR. COME: Mr. Chief Justice and may it please the Court:

These cases are here on writ of certiorari to the District of Columbia Circuit and they present a question which was left open by this Court in the Gissel Packing case in 395 U.S..

In Gissel, the Court sustained the Board's authority to acquire an employer to recognize and bargain with a union that based its claim to represent the status on the possession of the union authorization cards where the employer had engaged in independent unfair labor practices that tended to preclude the holding of a fair election.

The Court found it unnecessary to decide whether a bargaining order based on cards or some other showing of employee support other than a board election is ever appropriate in cases where there is no interference with

the election processes.

QUESTION: You say the Court left that open? There wasn't any occasion for the Court to object to that question at all in Gissel, was there?

MR. COME: Well, the union had urged a broader position, which is the equivalent of the position here.

QUESTION: But it was outside the scope of the case in controversy then presented to the Court, wasn't it?

MR. COME: Yes, that is correct because there, there were unfair labor practices which tended to preclude the holding of a fair election.

QUESTION: And that was the fulcrum of the decision.

MR. COME: That was the fulcrum of the decision. However, we believe that the rationale, the court's reasoning is relevant to the problem that we have here that I will get to in a moment.

There are two broad cases here which were consolidated for purposes of briefing and argument in the Court of Appeals on the Board's petition, that is.

The first involves the Linden Lumber Company, which manufactures prefabricated homes and the second involves Wilder Manufacturing Company, a manufacturer of cooking utensils.

The essential facts of both cases are similar and

I'll briefly sketch them out.

In both cases, the union -- the Teamsters in Linden and the Textile Workers in Wilder -- obtained signed authorization cards from a majority of the companies' employees in a unit later found to be appropriate. There were 11 out of 11 plus the card of one employee who was found to be a supervisor in Linden and 11 out of 18 in Wilder.

The union requested recognition and, in Linden, accompanied the request with a petition to the board for a representation election.

In both cases, the company denied the recognition request. In Linden, the company did so and refused to consent to an election on the union's petition because of its belief that supervisors had assisted in the union's organizational effort.

The card-signers included Shafer and Marsh, whom the company contended were supervisors. A board subsequently found that Marsh was not a supervisor, that Shafer was but that his conduct did not taint the union majority.

In Wilder, the company refused recognition because of its belief the unit was larger than 18. It was ultimately found to be an appropriate unit and thus the union did not have a majority in the larger unit and before the board, there was a contest as to whether seven

technical employees that the company claimed should have been included in the unit were, in fact, in the unit.

The board resolved that against the company.

In Linden, the union withdrew its representation petition and in both cases the employees struck and established picket lines in front of the plant.

In Linden, eight of the 11 card signers participated in this activity, at least at the outset, and in Wilder, all of the 11 original card-signers did.

QUESTION: Mr. Come, may I ask a question? If --

MR. COME: Yes.

QUESTION:--either employer in these circumstances had itself a petition for an election, it would have been entitled to it?

MR. COME: They would have been entitled to petition.

QUESTION: Because I think you took -- as I remember when Gissel was here, the board told us that its view now was that the employer, even in circumstances like these, was entitled to itself, to insist upon an election.

MR. COME: Yes, but the board also took the position that the employer was not required to petition for an election. That if the employer merely rejected the card showing with no comment, it would not -- he would not be guilty of a refusal to bargain, that he could file a petition

if he wanted to. The union likewise could file a petition because in the board's view, an election was the most reliable and the quickest way of resolving the situation.

QUESTION: And what is the difference in these situations?

MR. COME: There is no -- the difference here is whether or not -- at least as I understand the difference between the parties -- the fact that the employer had knowledge independent of the cards that was provided by the picket-line showing, should be enough to make a difference in the bargaining obligation.

QUESTION: And the picketing is sort of a demonstrative election. Is that the idea?

MR. COME: It reinforces the card showing.

QUESTION: Now, has that always been the board's position?

MR. COME: No, your Honor, that has not always been the board's position. As when we were here before in Gissel, we pointed out to the Court that the board's position under the Wagner Act was the Joy Silk position and that was also the position during the early days of Taft-Hartley. The Joy Silk position made the ggod faith

the touchstone of the bargaining obligation.

In other words, the union came forward with a card showing or a card showing plus a picket line showing.

The burden was on the employer, if he rejected the bargaining request, to come forward with the reasons to show why he doubted the union majority.

The board, over the years, had great difficulty in applying the good faith doubt concept because it involved, in many cases, a probe into the employers' subjective motivation.

QUESTION: So that is when the board went to the idea that, if they wanted to refuse the cards and insist on an election, whether they filed their own petition or not, they could do so without committing an unfair labor practices

MR. COME: That is correct.

QUESTION: All right. Now, when this changed that is now -- you are now presenting.

MR. COME: Now, at the time of Gissel we pointed out that the board had abandoned the Joy Silk doctrine and had virtually -- and as the Court said in Gissel, under the board's current practice, an employer's good faith doubt is largely irrelevant and the key is the commission of serious unfair labor practices.

Thus an employer can insist on an election with the no comment.

The Court added, however, that the board had a qualification of the independent knowledge that if the employer knew, through a personal poll, for instance, that

a majority of his employees supported the union, that would make a different result.

Now, what has happened here is that the board, subsequent to Gissel, has concluded that the independent knowledge exception is subject to the same problems in it that led to the abandonment of the good faith doubt principle to begin with because how are you to know whether the employer has independent knowledge?

As the board put it, that would require us to reenter the thicket of good faith doubt that we told the Court that we had abandoned in Gissel.

Now, the union says, however, a picket-line showing is something else.

The board concluded -- and the Court of Appeals agreed with the board -- that a picket line showing should not be entitled to definitive weight because a picket-line showing is very often the result of a bandwagon psychology.

There may be peer pressures that would induce it and to find out whether the employees really meant it or didn't mean it, you are going to have to probe subjective motivation and therefore, the cleanest thing is to adopt a clear-cut principle that, if an employer keeps his hands clean and does not commit unfair labor practices which would interfere with the holding of a fair election, he is entitled to reject a showing less than a board election. Yes.

QUESTION: So the board's position will be he is entitled, in the absence of committing unfair labor practices, he is entitled to an election, if he wants it.

MR. COME: That is correct. There is just one exception to that and that is the Snow and Son situation where the board says that if the employer waives his right to an election and agrees to be bound by some other means, like a poll, he can't renege on that and say that, well, he still wants an election.

QUESTION: Well, I take it you are also forced, along that line, to say that not only is the employer entitled to an election, but he needn't file the petition.

If you made him file the petition, you'd be immediately back in trying to find out when it is he has to file the petition.

MR. COME: That is correct, and that is the difference between the board and the Court of Appeals.

The Court of Appeals goes with the board in cutting loose from the independent knowledge vestige of the Joy Silk history.

But the Court of Appeals says that if you are going to do that, you have got to put something else in its place.

QUESTION: To show good faith, yes.

MR. COME: To show good faith.

QUESTION: By filing a petition.

MR. COME: By having the employer file his own petition or express a willingness to consent to a petition--

QUESTION: But that would mean getting back again to figuring out when it is he has to file a petition.

MR. COME: That is right, your Honor and it is for that reason that the board believes that the Court of Appeals exceeded its reviewing authority here in mandating that the board had to adopt that -- well, they put the board on the horns of a dilemma.

They either had to go back to the independent knowledge concept which the Court recognized was unreliable and had problems. Or go to the other extreme of requiring that the employer file a petition if he wants to get out from under a bargaining obligation.

QUESTION: Well, Mr. Come, there really isn't much trouble in determining when there is a card majority on the face of things, anyway.

MR. COME: No --

QUESTION: And if you said, well, there is a card majority, the employer ought to at least file the petition rather than sit and wait.

Now, what is so difficult about that?

MR. COME: Well, we believe that the statute doesn't require it. I mean, conceivably the board could

go to that position, but we believe that this is an area that Congress left to the board to determine what is going to be the proper accommodation here. Nine C --

QUESTION: But what about on the merits of the issue, though? Is it just a litigation avoidance rationale or what?

MR. COME: Well, I think that --

QUESTION: I mean, it doesn't appear on the face of it to be a whole lot of merit in saying that an employer who is faced with a card majority plus a picket line by a majority of the bargaining unit can just shrug it off and not even file a petition.

There must be some reason the board has for saying he can sit and wait.

MR. COME: Well, I think the reason is that the -- first of all, the -- in adding Section 9C 1(b) to the statute in '47, which is the provision that gives the employer the right to file a petition, there is no indication that Congress even intended that the employer would have to file a petition to resolve his doubts.

The sole purpose for adding that provision was to cure what was the discrimination that existed against the employer under the board's Wagner Act rules; under the rules that the board worked out under the Wagner Act, a union could file a petition but an employer could only file a

petition if he was presented by rival claims and so that, in a one-union situation such as we have here, he couldn't have filed one even if he wanted to and the legislative history indicates that that was the sole reason that the employer was given the privilege of filing a petition.

It doesn't say that he has to file one and that if he doesn't, that he would be subject to a bargaining obligation under 8A(5). Now --

QUESTION: Well, you are suggesting, nevertheless, that the board might not, for reasons dealing with the general administration of the act, conclude that no, he must file one. Merely because the statute doesn't say so in so many words doesn't mean that the board is powerless to declare it, does it?

MR. COME: I do not think that the board would be precluded from doing so. However --

QUESTION: It did. He already -- you have gone farther than that in the past.

MR. COME: Well, I think -- I think that the board was reasonable and --

QUESTION: In the bargain, there was an unfair labor practice.

MR. COME: Well --

QUESTION: If he didn't bargain, he was guilty of an unfair labor practice under Joy Silk, if there was a

card majority or independent knowledge.

MR. COME: That was under the Joy Silk rule. But having eliminated the Joy Silk rule, we submit that it is reasonable for the board to go the whole hog and say that we are not going to get into the question of good faith or lack of good faith.

The filing of the petition does bear on good faith. I mean, the union is perfectly free to file a petition if it wants an election, no less than the employer.

If the union were to file the petition, the union would have to define the unit and it would also have to make a 30 percent showing. If the employer --

QUESTION: Mr. Come, is that the mechanical difference between the employer filing the petition and the union doing so?

MR. COME: I believe that it is, your Honor.

QUESTION: Is that the only difference?

MR. COME: I believe that is so. It also accounts for the timing of the election and the length or period of time in which the employer may have the right to exercise his power under 8(c) of the statute to indicate why he believes the employees may not want a union, which has become a very important element that was added to the statute in 1947 when Congress amended section VII of the act to give employees the right to refrain from union

activity no less than the right to engage in union activity.

QUESTION: What was the board doctrine in 1947? Weren't you requiring bargaining by employers without an election? I thought that was --

MR. COME: Yes. Yes, we still had the --

QUESTION: What Congress was -- they legislated against that background, didn't they?

MR. COME: They did legislate against that background. However --

QUESTION: What year was Joy Silk?

MR. COME: Joy Silk was -- I believe it was after Taft-Hartley.

QUESTION: But it didn't make new doctrine? Joy Silk?

MR. COME: What's that?

QUESTION: Did Joy Silk make new doctrine? Or was it --

MR. COME: No.

QUESTION: -- reflective of prior -- of stated law, existing law?

MR. COME: That is correct.

QUESTION: Under what circumstances, Mr. Come, is the union -- or the employees ever compelled to file petition for an action?

MR. COME: Under what circumstances is the union

ever compelled?

QUESTION: Yes.

MR. COME: I think that --

QUESTION: Have the right to --

MR. COME: They have the right -- there is no compunction to file. The only sense in which there might be compulsion is that in 1959 Congress added 8(b)7(c) to the statute which regulates picketing for recognition and that says that you can picket for recognition for 30 days unless a petition for an election is filed within that period of time and if the union is picketing for recognition, if it wants to continue its picketing beyond 30 days, that might furnish some compulsion to file a petition, but there isn't any other --

QUESTION: Another way of saying this is that they can't continue the picketing for more than 30 days, if they do not file a petition.

MR. COME: That is --

QUESTION: Isn't that the thrust of the act?

MR COME: That is correct, your Honor.

Now, the board -- yes?

QUESTION: Let me put it another way. Why does the union always want the employer to petition? What does it gain by having the employer petition in contrast to itself? Just the designation of the unit?

MR. COME: I think that that is so. They also believe that if the employer petitions, it is going to be faster because it is much -- there is much less likelihood of litigation.

Now, we submit that that is not entirely valid because even if the employer were to petition, unless he were willing to consent to a hearing, that would not speed things up any because an employer petition would not preclude the employer from litigating unit questions.

For example, in the Wilder case, there was a question of whether the seven technicals were included in the unit or not.

Now, even if the employer were forced to file a petition, it is most unlikely that he would have waived his right to go to a hearing on that question because that could well make a difference in the union's majority.

Similarly, in Linden, there was a question of supervisory assistance in the union's organizational drive. An employer petition would not have cut out litigation of that point.

So we submit that the assumption of the Court of Appeals, that an employer petition would invariably speed things up, would not, we submit, preclude an employer who has either a legitimate or an illegitimate basis for seeking to litigate issues still continuing to litigate.

So with that in mind, the board concluded that there is no warrant for distorting the scheme of the statute and then requiring an employer petition.

QUESTION: You indicated earlier that the board tends to discount the pressures of picketing for recognition because of the bandwagon aspect. Do you think there is any less or more bandwagon aspect to card signing?

MR. COME: I would say that there is certainly likely to be as much.

QUESTION: At least as much, would it not?

MR. COME: At least as much.

QUESTION: The documentary aspect of it is very, very forceful psychologically, isn't it?

Had the board ever indicated that in any affirmative way?

MR. COME: Well, I think I -- I think they have indicated it in their statements that an election is a more reliable means of ascertaining, yes.

QUESTION: Because it is a secret ballot.

MR. COME: That is correct, your Honor.

QUESTION: And the bandwagon aspect of either crowding people into a picket line or pressing cards on them isn't present in the balloting.

MR. COME: And the picket line has the added problem, since 8(b)7 has been added to the statute in '59.

If that made the difference, if cards alone were not enough, but a picket line was, you would be encouraging picketing for recognition contrary to the policy of 8(b)(7), which is to restrict such picketing, at least, and to funnel these things into the board's election processes.

I believe I have already trespassed on my brother's time, so --

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Come.

Mr. Cohen.

ORAL ARGUMENT OF LAWRENCE M. COHEN, ESQ.,

ON BEHALF OF LINDEN LUMBER DIVISION

MR. COHEN: Mr. Chief Justice, and may it please the Court:

We agree with the Labor Board that where an employer does not commit unfair labor practices and preclude a fair election, a bargaining order based on either cards or picket lines or both or other secondary indicia of employers' employee support should not issue.

At the heart of this issue, as the Court of Appeals noted, is really a fundamental disagreement as to the direction and policy of our National Labor Act.

Let me try and summarize what I believe the union's position is.

This is thusly.

The unions argue not only to cause or picket

lines should be an interchangeable substitute with election, but actually, they should be preferred to election.

The unions argue that the policy of our Labor Act, at the time of the Wagner Act, has remained unchanged, that it is to promote unionization, that elections, since they take longer, since unions lose more elections than they do in the case of obtaining cards, should not be used unless there is a bonafide dispute as to whether the cards or the picket lines evidence employee support.

Where there is a bona fide dispute, then there should be an election.

Where there is no bona fide dispute, then the cards or the secondary indicia should speak for themselves.

We disagree with this position. We think it is contrary to the intent of the Taft-Hartley Amendments to the act.

We think it is contrary to this Court's reasoning and the logic of its opinion in the Gissel case.

At least since 1947, the board has never -- now, I emphasize never -- held that cards or picket line activity, in and of itself, where there is no unfair labor practices, is the basis for a bargaining order.

Since the Taft-Hartley Amendments were added to the act, the policy of the act has been, not to promote unionization but to promote free, reasoned, informed

employee choice.

That was the entire thrust of the Taft-Hartley Amendments to the act and election, as we thought this Court made clear in Gissel, is the preferred means, not other means. And other means are only to be used where, in the language of the Franks Brothers case, to prevent an employer from profiting by his own wrongdoing, or where an election is not possible because the employer has precluded it by his unfair labor practice.

Where an election is possible, where a free election is possible, then that ought to be the course that is used.

There are many indications, we think, of this Congressional intent and the change in the direction of the act at the time of Taft-Hartley.

First of all -- and the real thrust of the law which now, as this Court stated last term in the Surveyor case, is one of neutrality toward collective bargaining, not promotion of collective bargaining.

QUESTION: Mr. Cohen, this argument suggests that Joy Silk was wrongly decided by the Court.

MR. COHEN: No, I think that Joy -- the question really is, in Joy Silk, there were unfair labor practices.

The question that is really before the Court is a gloss on the Joy Silk doctrine in the sense of whether,

where there are no unfair labor practices, standing alone, the so-called Snow and Sons "independent knowlege question."

In Joy Silk there were unfair labor practices and the board at all times after 1947, with the exception of the renege-type situation that Mr. -- which was actually Snow and Sons that Mr. Come alluded to, except for that kind of renege exception, the board uniformly did never issue bargaining orders where there was no unfair labor practices.

That was Secretary of Labor Wertz' position when he testified during the amendments to the Act. That was the position that the board expressly stated in 1966 in the Aaron Brothers case that this Court referred to in Gissel and has been in, as far as we have been able to research in every other commentator, the uniform position of the board.

In fact, one commentator cited in our brief said no board member has even suggested going as far as the unions would propose at any time since 1947.

So in our opinion, there is no change in direction of the board policy in this case. There is merely a reaffirmation of what has been longstanding board policy required by the Congressional intent manifested in Taft-Hartley.

Taft-Hartley added, for example, Section 9(c)(1)(b) to the act. This provision, as this Court stated in Gissel, fully supports the board's present administration of

the act, for an employer can insist on a secret ballot election unless, in the words of the board, he engages in contemporaneous unfair labor practices likely to destroy the union's majority and impede the election.

So 9(c)(1)(b) does not, as the unions argue here, detract from the board's policy. Nor, as the Court of Appeals argues, should it impose an independent requirement. It supports the board's policy.

The employer has an option. He can let the union file a petition and do nothing or he can, if he wishes, go in and file his own petition.

There was an additional Taft-Hartley Section 8(c) added to the act. It is the purpose of Section 8(c), we submit, is to permit an employer to articulate his views on the reasons why employees should not choose unions.

It was to inform employees and permit them to consider the question in the light of an election with the knowledge of both sides.

There was also the express right added in Taft-Hartley that employees may refrain from unionization, that unions cannot interfere with that policy.

Taft-Hartley, as well as the Lander and Griffin amendments to the act curtailed recognition picketing, secondary boycotts, the use of union power to try and obtain recognition and there was also the requirement added

that certification could only issue in the case of an election and decertifications and so on, as we spelled out in our brief.

The thrust of all these changes was not to promote and continue to promote unionization, but to instead direct the act of the employee free choice.

It was to channel claims for recognition into the election area, unless there was either voluntary recognition or unless the employer precluded the use of the election machinery.

Since Taft-Hartley, as I indicated, the boys repeatedly recognized this principle.

Excuse me.

QUESTION: You mean, as interfering with it?

MR. COHEN: Yes. Yes.

QUESTION: The unfair labor --

MR. COHEN: Two alternatives, that the employer voluntarily recognizes the union and either conditionally says it is subject to a third-party check of your cards or he does it without any petition. Then, of course, there is no election.

If he interferes with the election, as Gissel made clear, by substantial unfair labor practices so that there can be no fair election, then, of course, the election machinery can't be used against him.

QUESTION: But the interference, in that sense, is an affirmative act, is it not?

MR. COHEN: It is an affirmative act of the employer that requires resort to secondary evidence because the primary evidence of the election is not available and I think this points out another anomaly of the union's position.

If, as this Court said in Gissel, where you have minimal interference with an election, no bargaining order should issue, then how can you have a bargaining order in a case such as this where there is no interference whatsoever with the election process.

That is where we think this case and the union's position is, if not required by the express language of Gissel, because the questions reserved there are required by the logic of Gissel.

Let me turn, if I may, to the position of the Court of Appeals and why we think that is really an incorrect compromise, if you will, between the different positions.

Contrary to Mr. Come, we would take the position that the board has no power, even if it wanted to, which it did not, to require an employer to file an election petition.

That would impose an obligation not required by the act, 9C(1)(b) permits but does not require an employer

election petition.

In fact, that idea was suggested at the time of the Taft-Hartley Amendment and rejected. To quote a couple of sentences from a Fourth Circuit decision in Logan Packing, "It was made plain in the Taft-Hartley Committee reports that an employer, after receipt of a demand to bargain from a union claiming to represent a majority of employees need not petition for an election. He had the alternative of waiting for the union to invoke the board's election process, but he was assured of an election on his own petition that the union sought to obtain recognition by a means other than election.

The second defect in the Court of Appeals' position, as Mr. Come has pointed out, is that it resurrects the good faith doubt.

When should an employer have to petition? Well, he should have to petition it evidences good faith, says the Court of Appeals.

That returns one to the whole Joy Silk subjective intent quagmire. There is no way to ascertain subjective good faith. There is no need to obtain subjective good faith.

We think, third, that what the Court of Appeals has done is --

QUESTION: Earlier, Mr. Cohen, I thought you

suggested that the board couldn't return the good faith test.

MR. COHEN: We said that the board -- no, what we have suggested is that the board could not require an employer to file an election petition.

QUESTION: That wasn't what I suggested.

Your earlier argument was that, after the 47 amendments, election period and the absence of unfair labor practice. Right?

MR. COHEN: That's our position.

QUESTION: That is the way you have to read the statute.

MR. COHEN: That's what we would do.

QUESTION: If that is so, in an instance where there were no unfair labor practices, the board, as a matter of statutory construction, I thought you were suggesting, could not return Joy Silk. Is that right?

MR. COHEN: Yes, that's correct.

QUESTION: To the good faith test.

MR. COHEN: That is correct. I think there is -- all I was trying to point out, Mr. Justice Brennan, was that there were sound policy reasons for the board not doing so.

QUESTION: Yes.

QUESTION: Well, I suppose the policy reasons

would be somewhat similar to the reasons why you would consider that the board had no authority to force the union to demand an election.

MR. COHEN: That's correct. I mean, I don't think the act requires either party to petition for an election. I think that is demonstrated by the 8(b)7 section that Mr. Come alluded to.

8(b)7 permits recognition picketing to go on unless either party files a petition. Now, if the Court of Appeals is right that the employer has to file a petition, that option is lost. The employer can't simply sit back and let the union engage in recognition picketing and do nothing.

He is required to go in and file a petition which automatically removes the time bar, the 30-day period in Section 8(b)7(c). It is inconsistent to say, on one hand, an employer can sit back and let the union picket for 30 days and then it is over if a petition has not been filed.

And, second, then say the employer must go in and file a petition which, in effect, removes the 30-day time bar.

To answer Mr. Justice Blackmun's question, why do union's want employers, let's say, to file a petition?

Well, first of all, it removes the 30 percent interest showing. The employer files a petition. The union

doesn't have to have any interest showing and the result is that, at that point, the election is held. The union could win the election without ever having to establish the 30 percent requirement that it would have to do if it filed its own petition.

It enables, secondly, a union to control the timing and the duration. Unions frequently demand recognition and propose at the peak of their organizational campaign so that if an employer is required to file as soon as the union demands recognition, there is no time hiatus between the filing of the petition and the union's demand for recognition. And any possibility that the employer in that period can engage in campaigning.

Unions traditionally want to speed up the election process because, as soon after they have organized as possible, they would like the election.

Employers traditionally take the opposite point of view. The more time that elapses, the more opportunity employees have to hear the other side, the better the chance of employer's success and the less chance that the unions are going to win the election.

So the thrust of the Court of Appeals argument is that this supposedly would avoid delay.

Well, it doesn't do so because if the employer files a petition, the union can say, we don't want that unit

and the board will then dismiss the petition.

The unions may still say, well, we are willing to take that unit but we have some disagreement over the composition of the voting unit.

Again, what would happen in that case is there is a hearing required and the hearing would be the same kind of hearing with the same four processes as would take place in the case of an employer petition.

So the problem with an employer-required petition is, first, it is not required by the act. Contrary to the committee report it doesn't avoid delay and it is unfair to employers.

And for all these reasons, we get back to the basic principle which we have argued to this Court, that unless there are unfair labor practices, one should look to the primary function of an election, the whole thrust of the act, to resolve the question, do employees want or don't want a union and looking to their primary thrust, it is only when the employer has precluded it that the union should not have to test its claim in the crucible of an election.

QUESTION: Mr. Cohen, along that line, I still am a little unclear as to what your position is with respect to the state of the law at the time of the '47 act.

You say in your brief, "To be sure --" at page 12 - "To be sure, prior to Gissel, where an employer did not

have'a good faith doubt as to the union majority status' or there did not exist a 'bona fide dispute' ..... a bargaining order could issue."

MR. COHEN: I think there were some cases prior to Taft-Hartley, the Dahlstrom case and other cases the union talks about, where they imply that a bargaining order could issue if there were no unfair labor practices.

QUESITON: Well, you said awhile ago that there has never been an instant --

MR. COHEN: Since 1947. Since 1947, was my position that there has been no --

QUESTION: Well, were there before?

MR. COHEN: There was no -- there were cases which had the language but there were no cases in which the board imposed such an order.

QUESTION: But somebody asked -- if someone knowledgeable in labor law was asked could a bargaining order issue, absent a good faith doubt and absent unfair labor practices, you'd say yes.

MR. COHEN: We're talking about the time of Taft-Hartley?

QUESTION: Yes.

MR. COHEN: I think that one would look to cases that say probably yes, but we don't know.

QUESTION: Well, then --

MR. COHEN: I don't think there is any board case that can --

QUESTION: Do you think the Taft-Hartley Act -- that, after Taft-Hartley you would answer no?

MR. COHEN: That is correct.

QUESTION: Then what specific provision do you say changed the law?

MR. COHEN: What provision changed it was all the provisions that I have enumerated, 9(c), 1(b), 8(c), Section VII and so on because the changes in question --

QUESTION: It doesn't sound to me like the board agrees with you. It didn't agree with you then and it doesn't, apparently, agree with you today.

MR. COHEN: The significant fact is, since 1947, the board recognized a change in direction. It never suggested going as far as the union has done. There has been no case that has ever done it and what the unions are asking for here is something that hasn't occurred at any time since the Taft-Hartley Act and may or may not have been permissible prior to Taft-Hartley.

QUESTION: But that isn't the way the board described the Joy Silk to us today.

MR. COHEN: Well, the way the board attempted to describe Joy Silk and Aaron Brothers and the way it clearly described Joy Silk when it got to Gissel. I think there was

some confusion in the board case that was unfortunate.

QUESTION: Really, Mr. Cohen, all that you need to argue here is that the board's present position is a perfectly permissible one under the existing statute.

MR. COHEN: That is correct.

QUESTION: Isn't it?

MR. COHEN: That is correct, sir. I think it is the only permissible one but I don't have to go --

QUESTION: You don't need to argue. It is the only required one.

MR. COHEN: I don't have to argue that.

QUESTION: You just say it is perfectly permissible under the statute and your opponent has to say, no, it is not even permissible. Their position is required.

MR. COHEN: That is correct. I would agree with you.

QUESTION: Mr. Cohen, let me read you just one sentence of the Court of Appeals opinion and see what your reaction is to that.

The statement is, "When an employer petitions for or consents to an election, the election process is expedited. If he declines to exercise this option, he must take the risk that his conduct is a whole in the context of convincing evidence of majority support may be taken as a refusal to bargain."

Would you say that is the heart of the error of the Court of Appeals' opinion?

MR. COHEN: I think the second part of the sentence is the error. I think the first part factually, in most cases, is not correct.

It would not expedite the election process. I think there is no reason, based on the arguments I have given, that it should ever be taken as evidence that we have faith or evidence to support a bargaining order.

MR.CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF RESPONDENT UNIONS

MR. GOLD: Mr. Chief Justice and may it please the Court:

I'd like to pursue the inquiry that it seemed to me that Mr. Justice White opened, which is the question, and that inquiry is, what are the specific statutory materials that are relevant here?

It is our view that, in accord with normal practice, we should start with the language of the act, the language set out, among onter places, on page 2 of our brief and what the language does is make it an unfair labor practice for an employer -- and I quote -- to refuse to bargain collectively with the representative designated or selected by the majority of the employees in an appropriate

unit.

The only open-ended words there are designated or selective and it is perfectly plain that those words are not the equivalent of certified and yet the board, in our view, has, in effect, changed those words -- even though Congress refused to do so in 1947 -- to make them read "certified."

We think that this language says -- and says quite clearly on its face -- that if the union secures the status of majority representatives, which is secured by being designated or selected, the employer has an obligation at that point, a duty to recognize.

The board says no, he has a privilege, the privilege to require the union to petition for and secure a certification.

That privilege is subject to certain conditions subsequent. It can be lost if the employer commits unfair labor practices or it can be lost if he voluntarily agrees to some test of the union's majority. But it is a privilege nonetheless. It is an absolute privilege subject to those conditions. There is no duty --

QUESTION: Mr. Gold, isn't this an argument beyond -- you didn't cross-petition here?

MR. GOLD: No.

QUESTION: Doesn't this go beyond what the Court

of Appeals did?

MR. GOLD: No, your Honor. In fact, we tried --

QUESTION: You are supporting the Court of Appeals judgment, aren't you?

MR. GOLD: We are supporting the Court of Appeals judgment, understanding what the Court of Appeals' judgment is -- or our understanding of what the Court of Appeals judgment is.

Let me digress to try to reach the point of what was the Court of Appeals' judgment.

The Court of Appeals' opinion on page 35 of the NLLB's petition -- the two petitions here -- states the board's view of the law. It says, "The board has adopted a voluntarist view of the duty to bargain which is that, absent unfair labor practices or an agreement to determine majority status through means other than an election, such as a poll, the employer has no duty to recognize the union."

That is the board's absolute privilege position.

Then on pages 36 through 37, the Court of Appeals says, "We reject that absolute privilege position because it is contrary to the statute."

The paragraph on the bottom of page 37 says, "These statutory provisions plainly contemplate employer duty of recognition, even in the absence of election and give a safeguard to the employer who has doubts about

majority status by assuring him the right to file his own petition for an election.

There is no clear-cut answer, however, either in the text of the statute or the legislative history, to the question of when and in what circumstances, an employer must take evidence of the majority support as convincing.

So there are two questions.

One, is the board right in saying that an employer never has a duty to bargain with the union? That he has an absolute privilege.

The Court of Appeals answered that question, no.

The next logical question is, under what circumstances does the employer have a duty?

The Court of Appeals did not answer that question. It did not enter a bargaining order here and from pages 38 through 50 of the petition appended, it discussed the question of possible rules that the board could adopt as long as it recognized the one limitation very clear on the statute, that it couldn't require the union to petition for certification in every case no matter what its showing had been.

QUESTION: You don't think the Court of Appeals said as long as the employer files, he can escape an unfair labor practice charge?

MR. GOLD: I think the Court of Appeals said that

it would validate such a rule if the board adopted it, but it did not say that the board had to adopt it.

QUESTION: Then let's assume that the board did adopt a rule that absent other unfair labor practices, absent agreement, there is no duty to bargain as long as the -- until and unless there is a certification after an employer requested election.

Now, the Court of Appeals would accept that, wouldn't it?

MR. GOLD: Yes.

QUESTION: You would not?

MR. GOLD: Right.

QUESTION: You would not.

MR. GOLD: We would not accept that.

QUESTION: Then, in that sense, you are saying that you are disagreeing with the Court of Appeals.

MR. GOLD: Well, the Court of Appeals said, in part, that it would. But in this -- let me say, in this case there were no employer petitions.

No employer filed a petition, so that question of the effect of an employer petition isn't in this case. It is an intellectual problem that has to be faced, we think, but it isn't in this case.

The order of the Court of Appeals was simply that the board was wrong in saying that an employer never had a

duty and the order was to remand and then it remanded.

QUESTION: I am surprised you didn't cross-petition on this, Mr. Gold.

MR. GOLD: Well, our view on why we -- quite frankly, we did not cross-petition so that we could find out the answer to the underlying question before we got to what we regarded was secondary question, the secondary question being, under what circumstances an employer has a duty?

We thought it best to deal with the board's flat position, never, at this point and leave it to the board to deal with that which it can deal with because it is our view that this question which is here is one that the statute answers, but it is our view that there are options open to the board in answering the secondary question when, if ever -- I mean, when does the employer have the duty to recognize the exact circumstance?

In other words, there are a variety -- even though it isn't clearly acknowledged yet -- there are a variety of ways the union can prove its majority.

One would be through cards.

Another would be, as in this case through cards plus a strike by the card-signers.

Another would be by giving the employer cards and offering to have him check it through a poll conducted

pursuant to safeguards.

We may get different answers to those. We think the board has a degree of leeway in answering the question of what is the specific -- what are the specifics of when the employer's duty arises.

The one thing we do not think the board can do is to say that the employer never has a duty, that no matter what the union does in proving its majority, and no matter how inactive the employer is, if you will, in reacting to that, that it is never an unfair labor practice for him to refuse to bargain.

QUESTION: Well, aren't you converting an option into an obligation by this argument that you are making? An option that has been extended to an employer, as it is extended to the workmen, to call for an election.

Now you are converting that into an obligation. In fact, the Court of Appeals has done so, have they not?

MR. GOLD: Well, first of all, in practical terms, the union doesn't have an option. The whole reason that there is a National Labor Relations Act is that employers have normally not chosen to deal, of their own free volition, with unions.

But the question is, when does the employer have a duty to deal with the union?

QUESTION: I am speaking in terms of the option,

the option to seek an election.

These other alternatives are all a series of things leading up to the same end result. We'd all agree on that.

MR. GOLD: Well, we don't agree with that.

QUESTION: And if they are not exercised, up to now has it not been thought clear that the union has an option at its choice to call for an election and that the employer has an option to call for an election and that neither one is compelled to do so.

Is that not so?

MR. GOLD: Well, I don't think that it has ever been the law that an employer has an option -- it has never been the law,so far as I know, that an employer has an option no matter what the circumstances, to call for an election.

QUESTION: Well, wasn't Gissel, the holding of the court in Gissel, regarded as a departure in the sense that it said that the option of the employer is lost in circumstances where the employer has done something to interfere with the probability of a free choice?

Isn't that the essence of the Gissel holding?

MR. GOLD: Well, that is the essence of the Gissel holding, but it is not a departure, as we understand it, from anything that was the law starting with the day

after the Wagner Act was passed.

QUESTION: You didn't think Gissel -- the Gissel holding startled anyone?

MR. GOLD: Not in terms of the obligations it imposed on employers.

It has been understood since the first day of the Wagner Act, because of the plain language of the Wagner Act, that employers have a duty to bargain and there has never been, as I attempt to show --

QUESTION: Bargain on what? On everything?

MR. GOLD: I'm sorry. It has, as the language of the statute shows, they have a duty to bargain with the representative designated or selected by the majority. That has been the law and from 1935 until 1947, as Mr. Come forthrightly stated, it was perfectly well-settled that the employer had an obligation to bargain with the union when the union presented convincing evidence of majority support, that he could not insist that the union petition for an election and, indeed, it was perfectly well-settled, prior to 1935, that he had no right, the employer had no right under any circumstances, to petition for an election when there is only one union in the picture.

That was the law.

Now, to get back to the language of the statute, the language of the statute imposes a duty on the employer

to bargain with the union which has the status of having been designated or selected by the majority.

Congress did not, in 1935, use the word that the employer only had a duty to bargain with the union which had been certified.

Now, let me talk about the precedents from 1935 to 1947. Early on in the act, Judge Learned Hand, in the REmington-Rand case, which is cited on pages 9 and 10 of our brief, said that the employer was not completely at the mercy of the union. The union could not come in and say, we represent a majority.

The employer would say, show me some evidence of that.

The union would say, we don't choose to show you any evidence. In fact, we represent a majority. We don't choose to show you any evidence. We are going to file an 8(a)(5) charge against you and prove it at the hearing.

Judge Hand said that it is permissible to look at the statute as requiring the union to come up with some evidence and, on the other hand, if he does not, the employer could say that he has a good faith doubt, since the union hasn't shown him anything to back up its claim.

And on the other hand, Judge Hand made it perfectly plain that the employer -- that because of this option for the employer, it does not mean that the employer,

no matter what the facts are, can say, the only thing we will accept is a certification.

He says, it does not follow from that immunity -- the immunity based on good faith -- it does not follow from that immunity that the employer need be satisfied with no evidence except the board certificate.

Later on, in Dahlstrom Metallic Door, which is cited at pages 6 and 7 of our brief, a case in which there were no employer unfair labor practices, Judge Charles Clark, also Second Circuit, said the contention that bargaining was not mandatory until the board had accredited Local 307 as bargaining agent, is frivolous.

An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support. We have cited other board cases as well.

I don't know how law could be more clearly settled that an employer does not have -- that prior to 1935, an employer did not have -- prior to 1947 -- an employer did not have the option to say to a union, no matter what evidence you show me, the only thing that will satisfy me is the certificate or, in practical terms to say the same thing by saying I will not bargain with you.

You can go to the Labor Board. You can do whatever you want. I am not going to bargain with you.

I think that that was a thoroughly discredited

view. I know of not a single case prior to 1947 which can be cited to support the proposition that an employer has such an option, and yet that is what the board would give to an employer today.

Then, in 1947, the Taft-Hartley Amendments were passed and Congress specifically addressed itself to the question of whether Section 8(a)(5) and 9(a) should remain as they were.

The House, which by and large took the position which was less favorable to unions and more favorable to employers than the Senate, passed a bill which said that an employer who had failed to bargain with the union currently recognized by the employer or certified as such through an election under Section 9, was the only one who was guilty of a Section 8(a)(5).

The practical effect of that would have been to repeal the law as it had been understood.

The Senate would not accept that provision. The Senate insisted that Section 8(a)(5) and 9(a) stay as they were. The only change was that Section 8, what had previously been Section 8(5) became Section 8(a)(5) because of the addition of the 8(b) section creating union unfair labor practices.

QUESTION: What did you say the proposed amendment was?

MR. GOLD: The proposed amendment is reproduced on page 15 of our brief, the rust-colored brief and the House proposed to amend Section 8(a)(5) and 9(a) which, as I have indicated, together impose a duty to represent the -- I mean, to recognize the representative designated or selected with an obligation imposed on employers who fail to bargain with a union currently recognized by that employer or certified as such through an election under Section 9.

So the employer would have been free of the duty as it had been understood. His only duty would be to recognize a union that had been certified.

QUESTION: Or one already there.

MR. GOLD: Or one that had already been recognized.

In the House Conference report -- and this is the House Conference report I am talking about, now, which, again, is reproduced on page 15 and I emphasize the words "House Conference report" because the printed document which came out of conferences at that time was prepared by the House managers and signed only by them.

Therefore, simply because of human nature and nothing else, it had to be taken with somewhat of a grain of salt where the House receded and there is an indication in the House Conference report that they really had not

given up as much as would appear.

On the other hand, it seems to us to be terribly persuasive when the House says that we have gone along absolutely with the Senate view and this is what the House Conference report says.

The conference agreement follows the provisions of the existing law in the case of Section 8(5), which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees subject to the provisions of Section 9(a).

Now, if that isn't a Congressional ratification of at least the broad outlines of the law as it stood before and, as I said, the law as it stood before was whether or not an employer committed unfair labor practices.

If the union presented him with convincing evidence, he had an obligation, some obligation. The term "what was convincing evidence" wasn't fleshed out.

That is why we say that that question is open to the board on remand but the essence, the objective essence of the good faith standard seems to us to have been quite clearly ratified by Congress.

I would just like to add one citation to what is -

QUESTION: You wouldn't think that would be satisfied by a rule that the employer could always refuse to bargain as long as he sought an election?

MR. GOLD: No, our view, Mr. Justice White, is that, once again, the statute addresses itself directly to that question.

The Senate had inserted a provision, Section 9(c)(1)(b) giving employers an option to file petition and in the Senate report it explained what it was intent upon and we have reproduced the relevant portion of that explanation on page 17 and it said the present board rules which -- and I interject here -- which allow the employers to petition for an election only where two unions were seeking representative status, discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent the employee are really not the choice of the majority.

And our view of what Section 9(c)(1)(b) was intended to do was to deal with the situation that the pre-1947 law didn't really deal with and that situation is the following:

The union appears on the scene. It says we represent a majority of your employees. The employer says, give us some proof and again, the union says, we will not give you some proof but we are going to engage in outsider picketing or minority picketing, which was lawful then.

The employer says, well, I will recognize you if you could prove up your majority.

In that type of a situation, the employer could not get to the door.

And we think Section 9(c)(1)(b) says that if he has a reasonable doubt, if the union hasn't fulfilled its obligation of coming forward with convincing evidence, if the employer has fulfilled his affirmative obligations as the law was prior to 1947 to investigate the situation and determine whether or not the union really had convincing evidence, then the employer could file his petition.

QUESTION: Mr. Gold, you have referred to the law between 1935 and 1947 to the Dahlstrom case which enforced a board order, I believe.

Is it your position that the board couldn't have taken any other position than it did in view of the statute between 1935 and 1947?

MR. GOLD: I don't see how the board could have taken another view. But I do think that if the board had taken another view between 1935 and 1947 and if we had the same sequence of events and a 1947 determination by the Conference Committee to follow the law as it stood, that that might stand up now.

At least you would have a conflict in that situation between the plain language of the act and the legislative history in '47.

What I am arguing for here is a rule which says

that the act states an obligation on the employer that that obligation was understood and given meaning between 1935 and 1947 and the board cannot write that obligation out of the law and substitute for it a privilege.

QUESTION: Do you think Congress froze it then, in 1947?

MR. GOLD: To that extent. To the extent of the outline. We have been careful in our brief to say that we do not think that the '35 to '47 law answers the question what is convincing evidence? What are the circumstances under which an employer must bargain?

That is why we didn't cross-petition. That is why we think that that question is properly for the board in the first instance. They have never addressed it.

QUESTION: Mr. Gold, if the board were to address it and were to say nothing is convincing except the result of an election.

MR. GOLD: That, we think, is the one option which was removed. That was the one thing that was frozen into the law.

QUESTION: Exactly.

MR. GOLD: We don't see how, in light of the '35 to '47 law --

QUESTION: So, whatever the definition of convincing evidence that the board used to suggest a fashion,

they can include that.

MR. GOLD: That's right.

QUESTION: Well, there has got to be some other types of convincing evidence.

MR. GOLD: That is right. We think that -- in other words, if the House had prevailed, it would have made it quite clear that the only type of convincing evidence --

QUESTION: Would be certification.

MR. GOLD: Would be certification. Then Congress' policy would have moved to the point of requiring an election in every case, at least in every case in which you wanted to enforce --

QUESTION: Do you read Gissel as -- do you think that this Court acquiesced in the board's abandonment of the good faith test in Gissel?

MR. GOLD: Your Honor --

QUESTION: And if we did, I take it you think we made a mistake.

MR. GOLD: Well, I am perfectly convinced that you did not acquiesce and therefore I don't have to deal with the possibility of coming here and arguing that a prior decision was mistaken.

First of all, in Gissel, Chief Justice Warren, with what we think was care, stated the question that was before the Court. This is on page 29. And he said, I

think this is the first sentence of the opinion, "These cases involve the extent of an employer's duty under the National Labor Relations Act, to recognize the union that bases its claim to representative status solely on the possession of union authorization cards."

QUESTION: What page was the original opinion?

MR. GOLD: That is 395 U.S. at 579.

That was the issue. The union was arguing that employer had to recognize the union on the basis of cards no matter what the unfair labor - no matter whether or not they were unfair labor practices.

QUESTION: Didn't the opinion or didn't it, clearly indicate that absent unfair labor practices, the board -- that the employer could petition for an election and not have to bargain.

MR. GOLD: I -- I do not --

QUESTION: You don't think so?

MR. GOLD: -- believe that it did. Again, we discussed this at some length in terms of the discussion of Section 9(c)(1)(b), the passage of the Court's opinion is 395 U.S. at 599 to 600 and all the Court said there, as we read it, is that Section 9(c)(1)(b) supports the board insofar as the board precluded an employer from committing unfair labor practices and then saying that the union had to secure a certification, but that does not mean, because the

Court threw out the opinion, put aside the union objection.

To say that a section supports the board against the employer doesn't mean that it supports the board's view against later objections which were said not to be treated in the opinion to the board's view and there was not a word in the Court's opinion with the possible exception of that passage on 599-600 which says anything which supports the board's position here, indeed, we think that Gissel stands, is the logical culmination of an evolution.

Starting with Joy Silk Mills, the board took a subjective view to the good faith doubt standard that was in the law prior to 1947.

We read the pre-47 cases as attemptings of painstakingly as it may be but, nevertheless, of attempting to evolve a series of objective criteria to measure good faith doubt.

After that, the board had a standard at times -- after '47 there is a board case for any proposition. But we read the bulk of the cases going from Joy Silk Mills to take quite a subjective view.

There was criticism of the board's position in two respects. One, insofar as the board relied on authorization cards. Authorization cards were attacked as unreliable.

Secondly, there was intellectual criticism,

chiefly from Judge Friendly and from others, interestingly enough, going all the way back to an opinion after '47 by Judge Learned Hand, again, on the board's view that it was logical to impute bad faith in denying recognition from subsequent unfair labor practices.

Judge Friendly puts the point that it is just as logical to believe that an employer could make sure that the union didn't gain a majority by commiting unfair labor practices as that he believed the union already had a majority.

QUESTION: What do you think the Court meant in this Gissel case, page 600, where the Court said, "For an employer can insist on a secret ballot unless -- in the words of the board -- 'he engages in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede a fair election.'"

MR. GOLD: That was the passage I was referring to, Mr. Chief Justice, discussing --

QUESTION: Is that what you meant by that?

MR. GOLD: I say, that is the passage I was discussing a moment ago where the Court was discussing 9(c)(1)(b). I read that to be one, a response to an employer contention and two, a statement of the board law as it stood at the time of Gissel and not an adoption of the board reading that employer can always secure an

election. I think that there is evidence throughout the opinion, one, how the question was stated, two, the citation with the seeming authority of Mine Workers versus Arkansas Oak Flooring.

QUESTION: Well, to save time, I had read only the latter part of it. The language that I just read to you was preceded by the statement by this Court, not quoting anyone, "And we agree that the policies reflected in 9(c)(1)(b) fully support the Court's present administration of the act --"

MR. GOLD: That's right.

QUESTION: "Before an employer can insist on a secret ballot."

Isn't that about as unequivocal a holding of the Court as you could find?

MR. GOLD: I don't think it is a holding. I don't even think it is a dictum, Mr. Chief Justice. At page 599, that paragraph is introduced by the statement, "The employers rely finally on the addition to Section 9(c) of Subparagraph b which allows an employer to petition for an election."

And then the Court says, "That provision was not added, as the employers assert, to give them an absolute right to an election at any time. Rather, it was intended, as the legislative history indicates, to allow them, after

being asked to bargain, to test out their doubts as to a union's majority in a secret election which they then -- which would then presumably not cause to be set aside by a legal union activity."

In other words, the Court started out by quoting the language from the Senate Report upon which we rely.

Then it said that in light of the fact that Congress only intended that section to go in favor -- to run in favor of an employer who had a reasonable doubt, it doesn't run in favor of employers who don't have such doubts and who have impeded an election and to that extent, it was saying that the board was right in issuing bargaining orders against employers who commit unfair labor practices.

But there is nothing in the opinion and, indeed, at the start of the opinion, as I pointed out, the union's positions were put aside.

The union's objections -- the union's objections to the board law were put aside and not treated. We don't see how that case can be considered a decision which freezes the board's present position into the law.

Indeed, the board hadn't gotten this far at the time, Mr. Chief Justice, that Gissel was argued. The board acknowledged that Snow and Sons was good law and that employers would have an obligation if they knew.

The board was taking the strange position that

an employer could close his eyes, had no obligation to look around him. But if, by chance, he opened his eyes and found out something, then he could have an obligation to bargain and that was part of the law, of the board law as it stood.

QUESTION: And there is nothing in Gissel, I take it, suggesting that even if the employer had the right to trial, that he has to or that he can just sit -- that he can just sit and wait for somebody else.

MR. GOLD: That's right.

QUESTION: He might have the right to trial without bargaining.

MR. GOLD: Right. I mean, we would consider it to be an erroneous rule to say that any time an employer files, that frees him from the 8(a)(5) obligation as I stated it.

But even that rule is different from the board's rule or from the rule that Mr. Come wants.

What they want is a rule that the employer can sit there, no matter what the union does, and that there is never an obligation on the employer so long as he is smart enough to keep his eyes closed and so long as he doesn't commit unfair labor practices.

QUESTION: By trial you mean petition?

MR. GOLD: Yes, petition. To file a petition.

QUESTION: Under 9(c)(1)(b).

MR. GOLD: Right. The board does not take the position that an employer ever has to do anything, as long as he has certain negative restraints on him, as someone has said. But he has no affirmative obligations under Section 8(a)(5).

QUESTION: Even if the language from Gissel could be read as literally and as strongly and as much of a holding in that case as has been suggested, the most it would mean is that the board can insist that the employer avail himself of 9(c)(1)(b).

MR. GOLD: That's right.

QUESTION: Not that he wait for the union, I take it.

MR. GOLD: That's right, sir.

QUESTION: The union's petition.

MR. GOLD: I believe that that would be the most and, as I say, that is not the board's position nor is it the position of the employer.

I was discussing the 1947 Amendments and to what I have already said, I simply wish to note a citation, as I have mentioned, the only document recited in our brief is the House Conference report because we take it as a complete acknowledgement by the House that they had receded.

We would also like to call to the Court's

attention that in the two-volume legislative history of the NRLA at page 1539, Senator Taft inserted his explanation of the conference agreement and there he said, "The language of the conference agreement is identical with the corresponding provisions in the Senate Amendment, since the Senate conferees refused to yield to the House with respect to the provisions contained in the House bill amending the provisions in Scetion 8(2) relating to company-dominated unions and subsection 8(5) relating to collective bargaining. This means that the five unfair labor practices contained in the present NLRA remain unchanged."

Now, it is our view that this situation is therefore the same as the Curtis Brothers case in 362 U.S. 274 which is reviewed in our brief at pages 22 to 24 and quoted therein.

There, the board, after '47, attempted to make recognitional picketing by a minority of unfair labor practice.

They did so in the face of a conference report which said there is no intent to make recognitional picketing an unfair labor practice.

Their justification was, we are only making minority recognitional picketing unlawful and in conference all they said was that they were not going to prohibit all recognitional picketing and that leaves us this smaller area

in which to undermine, if I may, the Congressional intent.

And the Court said, absolutely not.

This is the same argument that is being presented here. The argument being presented here is that the conferees only wanted to continue the power of the board to issue bargaining orders where the employer committed unfair labor practices.

There is not a word in the conference report to suggest that, indeed, as we say, when you put all the pieces together, the language of the act which creates a duty and which doesn't relate it to other obligations imposed by the National Labor Relations Act by the law from '35 to '47, by the language of the House Conference Report, the language of Senator Taft.

In the Senate, what they were doing was hewing to the line that had been established in the past. We think the board has to hew to that line.

Not in every particular. Not as to whether cards are enough or something else is enough, but so as not to make what was once a duty into a privilege. That, we think, the board cannot do.

I wanted to say some other things about Gissel, most prominently the fact that Gissel cites with approval Mine Workers versus Arkansas Oak Flooring, a case in this Court, a preemption case but a pre-Gharman preemption case

which is cited and discussed at 25 to 27 of our brief.

There the Court stated the law as it understood it at that time, after 1947. They said, "Under Sections 8(a)(5) and 9(a) and by virtue of the conceded majority designation of the union, the employer is obligated to recognize the designated union."

"Conceded" there was used in the term of uncontroverted, as we indicate.

How Gissel can be thought to close the door on us here, in light of its discussion and citation of Mine Workers, we don't understand.

Nor do we think there is any logical implication from the fact that Gissel says that where there are serious unfair labor practices, there shall be a bargaining order and where there are not serious unfair labor practices, there shall not be.

The Court, in Gissel, was discussing the remedial power of the board to remedy a Section 8(a)(1).

As I started to say, the evolution has been to criticise the board's good faith test insofar as that test made the existence of other unfair labor practices a basis for finding of good faith and what Gissel did and what the board did about the time of Gissel was to clean up this area and to say that logically what we are doing is entering an order to remedy the other unfair labor practice.

We are really not making a finding of fact as to whether the employer had good faith doubt in refusing recognition in the first place and at pages 32 and 33 of our brief, we cite and discuss a case called Steel Fab. Inc., a very recent board decision, which the board says precisely what I am trying to say here, that what Gissel did was talk about the board's power under Section 10(c), its power to remedy illegal discharges, illegal interrogation and so on, but it didn't say what 8(a)(5) means.

And what the board is really trying to do here is to say that 8(a)(5) means nothing. There is no obligation on an employer, strictly by 8(a)(5), no obligation to recognize the unions selected or designated, only an obligation to recognize the union's certified, and not only certified, but a union that has gone and gotten certification.

And why do we care? I think that is really the last question.

I think that everything I have said thus far indicates that we are right on the law.

But why do we care? And the reason we care is that the law that the board has adopted and that the employers want here, creates employer free choice.

The employer has the free choice to decide whether or not there will be an election. If he wants an election,

there will be an election. If he wants to recognize the union, he can.

That isn't employee free choice. There are times when people have manifested their desire so clearly that there is no longer a real question.

QUESTION: Well, you say employer free choice, but the union can petition for an election.

MR. GOLD: Well, it is employer free choice -- sure, the union can petition for an election. If it wants to go through the more time-consuming route, it can.

The only question is whether Congress said that it had to.

QUESTION: Well, but when you say employer free choice, you give the impression that the petition is solely in the hands of the employer, but the union, if it petitions for an election, takes the play away from the employer.

MR. GOLD: Yes, but the employer has everything to gain by that play. As Mr. Come quite candidly said, what the employer wants is to wait as long as possible.

I don't know of any union which has ever petitioned for an election when the employer has come to him and said please, please don't petition for an election. We will recognize you now.

The union wants the recognition. Normally, the employer does not. If they both want the recognition, there

is never an election at all.

What we are dealing with here is the case where the employer says it won't recognize you.

QUESTION: Well, then, why can the unions petition for an election? Why doesn't that solve their problem?

MR. GOLD: It doesn't solve their problem, as I am starting to say, in that it takes a long time and it gives the employer all sorts of options to delay bargaining and --

QUESTION: Your real criticism isn't that it gives the employer free choice, but that you don't like elections.

MR. GOLD: No. Our real objection is that the employer can play it either way.

If the employer doesn't like elections and he wants to recognize, there is nothing that stops him.

On the other hand, Congress said that, in this statute, that the employer is supposed to have a duty, a duty to recognize and the question is, what is the pre-condition?

And what the board is saying here is that the employer has the option. He can either have an election or not, if the union is knocking at the door and he doesn't want to accord them recognition.

We don't think that Congress has said there has to be an election every case. The logic of the situation is

that that clogs the machinery. It gives the employer a chance to dissipate the majority. There has been much talk in the employer's brief about the Franks Brothers case.

It was a case in which unfair labor practices were committed, but this is what Mr. Justice Black said, "The unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees morale, deters their organizational activities and discourages their membership in unions."

We think that is true. There are cases in which employees are willing to manifest their desire to be represented in a way in which the employer can check.

Where that is the case, we think that Congress is determined, by keeping the word "selected" or "designated," by ratifying the pre-1935 law, to let them do so.

That hasn't gone to the proposition -- its policy has not yet moved to the point of requiring election, no matter how strong the union's proof is.

I want to say one word in my few remaining sections on Section 8(b)(7).

This is the second case this term where Section 8(b)(7) has been dragged in by its heels by counsel on a post hoc basis.

The first was the Emporium case which was argued a month or so ago. In that case, the board relied somewhat

on 8(b)(7) even though the board decision had not touched 8(b)(7) and even though the union argued that there was no picketing there but only handbills.

Here, there was an explicit board holding at page 171 of the NLRB petition Appendix that 8(b)(7) is irrelevant here because 8(b)(7) does not relate to situations in which the employers illegally refuse to bargain.

Nevertheless, both Mr. Cohen and Mr. Come stood up here and argued that Section 8(b)(7) supports their view of the statute. We think that is completely impermissible.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gold.

Do you have anything further? You have about four minutes left.

REBUTTAL ARGUMENT OF

NORTON J. COME, ESQ.

MR. COME: Just two points.

With respect to Gissel, of course, the Court is in the best position to know what it held in Gissel. However --

QUESTION: Well, some of us are.

MR. COME: At page 591 of the Court's opinion in Gissel, the Court describes the board's current practice as follows:

"When confronted by a recognition demand based on the possession of cards allegedly signed by a majority of its employees, an employer need not grant recognition immediately

but may, unless he has knowledge independently of the cards that the union has a majority, decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself, under Section 9(c)(1)(b)."

Now, it is that description of the board's current practice that the Court later on in Gissel found to be in accord with the policies of Section 9(c)(1)(b) and, furthermore, later on in the Gissel opinion, in meeting the employer's argument that he is between Scylla and Charybdis when faced with a card check because, if he accepts it and the union doesn't have a majority, he is guilty of a violation under Bernhard-Altmann, but if he attempts to question to find out whether there is, in fact, a majority of employees support it, he would be guilty of an 8(a)(1) violation.

The Court, again, states that under the board's current practice, the employer is not obligated to investigate. He can simply decline the recognition request but that insofar as what the board's policy was at the time of Gissel, that was it.

The board made it perfectly clear that the employer was not obligated to file a petition under 9(c)(1), but could invite the union to do so.

Now, secondly --

QUESTION: Well, that didn't reach independent knowledge, did it?

MR. COME: No, it did not reach independent knowledge.

QUESTION: I just wanted to --

MR. COME: However, the Court, in Gissel, recognized -- we submit -- that the board could reject the good faith doubt test and the board, on reflection, after Gissel, concluded -- and we submit reasonably so, that the independent knowledge element would plunge the board into the same good faith doubt thicket that it was in under Joy Silk.

Now, with respect to the legislative history, the board's position does not ignore the fact that Congress, in 1947, decided not to adopt the House proposal that would have made a board certification the only basis on which you could predicate a bargaining obligation.

The one situation where that is not so is in the case of voluntary recognition.

The second exception, which is the principal situation, because that is where most of the card-based bargaining orders are found, are in a situation where the employer's unfair labor practices have precluded the holding of a fair election.

If the House amendment had been adopted, you

couldn't sustain a Gissel bargaining order. You would have needed a certification notwithstanding the fact that the employer had engaged in all kinds of unfair labor practices, they would have precluded the holding of an election.

The third situation where a bargaining order can be predicated on a showing less than a board election is the Snow & Sons situation where the employer agrees to a means other than a board election and then doesn't like the results and reneges on it.

Now, therefore, we are in -- not in an area like Cortes or Insurance Agents where Congress has said, this is as far as you can go and the board is going further, but we are in the area where, and the Court of Appeals agrees on that point, where Congress did leave room for board discretion, namely, what sort of -- what situations are you going to permit a showing less than a board election?

And the board, we submit, is reasonable in concluding that, short of the three situations that I have just outlined, an election is a means that is most likely to effectuate the overall policies of the act.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Come.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:38 o'clock a.m., the case was submitted.]