MUCH ADO ABOUT NOTHING: NLRB REGULATION OF UNION AFFILIATION ELECTIONS

KENNETH A. SPRANG*

PROLOGUE

For nearly forty years, since the late 1940s, the News Employees Association of Dayton (NEAD), a small, independent union, represented the editorial

* Assistant Professor of Law, Widener University. B.S., 1969, The Ohio State University; M.A., 1973, University of Michigan; J.D., 1978, Case Western Reserve University. The Author gratefully acknowledges the insightful comments of Professors Alan E. Garfield, John L. Gedid, Michael J. Goldberg, Robert Hayman, and Martin A. Kotler of the Widener University School of Law, and Professor Laurence J. Wohl of the University of Dayton School of Law, and the research assistance of Jeffrey M. Carbino, Carl N. Kunz, III, Daniel P. Hartstein, and Thomas Shea.

employees of Dayton Newspapers, Inc. (DNI), publisher of the *Dayton Daily News*. Over the years, NEAD occasionally threatened to affiliate with The Newspaper Guild (the Guild), primarily as a negotiating tactic, although no serious effort to affiliate was ever undertaken.[1] In the fall of 1985, NEAD began negotiating a new collective bargaining agreement. DNI brought in a particularly aggressive negotiator, who precipitated some of the most heated negotiations in NEAD's history. Over the course of several months, DNI engaged in numerous tactics which led to an extraordinary level of disenchantment among all members of the bargaining unit.[2]

In August 1986, after nearly a year of failed negotiations and amidst increasing frustration among the union membership, NEAD decided to explore affiliation with the Guild. After hearing a presentation by a Guild representative, the members voted overwhelmingly to schedule an affiliation election as soon as legally possible.[3] Concerned that every care be taken to assure the orderliness and fairness of the affiliation vote, NEAD hired a law professor to advise it on the conduct of the election.[4] Shortly thereafter, union negotiators reached a tentative contract settlement with DNI.

Notices of the meeting to vote on both affiliation with the Guild and contract ratification were posted in accordance with NEAD's constitution.[5] At the meeting on September 12, 1986, a representative of the Guild and the president of a nearby, formerly independent union which had recently affiliated with the Guild, were present to answer questions. The president of NEAD then allowed extensive discussion of both the contract and the affiliation is-

1. The Guild is an international union representing editorial employees in the journalism industry throughout the United States and Canada.

Historically, NEAD had been a very docile union. For example, in its forty-year history there had never been a single grievance taken to arbitration. Union dues were used more for social events than labor matters. In the early years, managers had even maintained membership in the union.

2. For example, in April 1986, while the parties were still negotiating, DNI insisted that the union vote on a proposed health care package separately from any other terms or conditions of the contract. Over the course of several months, the union turned down proposed contracts three times, before narrowly ratifying a contract in September 1986. During the final days of negotiations, DNI persuaded the union to go to mediation by lobbying individual union members with the promise of "substantial new money." However, the employer's opening offer in mediation was substantially the same as its preceding offer at the negotiating table.

3. The vote at the meeting was 59 to 3. Post-Hearing Brief of Charging Party News Employees Assoc. of Dayton, Dayton Newspapers, Inc., at 6 (No. 9-CA-23554-2) (NLRB Complaint issued, April 17, 1987) [hereinafter NEAD Brief].

4. I was the professor. Subsequent to the affiliation vote, NEAD retained me as its regular counsel, leading to my representation of the union in the subsequent proceedings before the National Labor Relations Board (NLRB).

5. The notices were posted on September 5, 1986, seven days in advance of the election. Out-of-town members were contacted by certified mail. The employer later spent substantial time in the unfair labor practice hearing trying to prove that the notice was posted less than 168 hours, *i.e.*, seven 24-hour days, before the election, and that the posted notices were smaller and less colorful than notices of past elections. The notices were apparently effective, however, as attendance was the highest in the history of NEAD.

sue.[6] Approximately one hundred persons attended the meeting, including five or six nonmembers.[7]

The union had a history of informal elections. A tremendous amount of camaraderie and mutual trust existed among the editorial employees, and there was no concern that anyone would attempt to sabotage the election. Nevertheless, NEAD made every effort to make the September 12th election as structured and orderly as possible, requiring persons to sign in when they arrived at the meeting, choosing a balanced panel to count the ballots,[8] and making an extraordinary effort to assure absolute fairness in the election.

The vote to ratify the contract was 57 to 49. About an hour later, affiliation with the Guild was approved by a vote of 56 to 49. Although some editorial employees were unhappy with the result, at no time did any member of NEAD suggest that there was anything irregular or unfair about the election itself.

Shortly after the election, the union informally advised the managing editor of DNI of the vote. In addition, notice of the results was posted on the union bulletin board. About a week later, NEAD formally notified DNI by letter of the affiliation and assured the employer that there would be no change in the day-to-day relationship between the parties. The letter also stated that NEAD, through its local officers, would continue to administer and abide by the newly ratified collective bargaining agreement.

Notwithstanding these assurancess, DNI promptly repudiated the newly ratified agreement, and refused to execute it. In addition, the employer withdrew recognition of NEAD, insisting that it no longer knew which union was the true representative. DNI complained that it was not sure whether it should negotiate with the pre-affiliation NEAD or the post-affiliation NEAD.

Despite DNI's purported rejection of the entire agreement, it unilaterally implemented the wage and benefit package which was contained in the newly ratified collective bargaining agreement. However, it expressly repudiated the recognition clause, dues checkoff clause, union security clause, and the arbi-

6. One hour was alloted for discussion of both issues, and one hour each to the respective issues. Effectively, the debate on the affiliation issue lasted over two hours. Everyone spoke who wanted to do so, including Guild opponents and nonmember editorial employees.

7. NEAD permitted the nonmembers to speak during the discussion periods, but they were not allowed to vote. In the past, the nonmembers, who were required under the collective bargaining agreement to pay a service fee equivalent to union dues, had been allowed to attend union meetings, but not to vote. At the time of the election, there were approximately 120 employees in the bargaining unit, of whom six or seven were not union members.

The nonmembers later complained that they were not allowed to vote in the affiliation election. However, there was no legal significance to their complaint in light of the Supreme Court's decision in NLRB v. Financial Inst. Employees of Am., Local 1182, 475 U.S. 192 (1986) (decided with Seattle-First Nat. Bank v. Financial Inst. Employees of Am.) [hereinafter Seattle-First National], issued just seven months earlier, which held that the Board cannot require nonmembers to vote in affiliation elections. *See infra* notes 180-212 and accompanying text.

8. Ballots were counted by two persons, one an outspoken proponent of the Guild, the other an outspoken opponent.

tration clause.[9]

The union promptly filed unfair labor practice charges against DNI.[10] In its defense, DNI asserted that it had received a letter signed by twenty-seven members of the bargaining unit indicating their opposition to NEAD's affiliation with the Guild.[11] The employer also steadfastly insisted that the affiliation had raised a question concerning representation, which could only be resolved by a Board supervised representation election.[12] Over the next twelve months, the employer pursued every possible procedural maneuver to fight the affiliation.[13]

The Board finally issued a complaint in April 1987, and the case was scheduled for hearing in August 1987. The hearing consumed nine days, held over a period of a month to accommodate all of the personal schedules involved. The trial produced over 2,000 pages of testimony plus numerous exhibits. Lengthy post-hearing briefs were filed by all parties. The final one was filed with the administrative law judge in December 1987. Over the course of fifteen months of litigation, the union incurred legal costs in the tens of

9. One critical effect of DNI's action was that NEAD could no longer collect dues and fees from editorial employees in accordance with the dues checkoff and union security clauses of the collective bargaining agreement. Consequently, it was forced to engage in Herculean efforts to collect dues from its current membership. In addition, the union was left with no effective avenue of redress for grievances with DNI. For example, DNI, just a few months after the election, unilaterally announced its intent to implement a drug testing program. Having no means of arbitration available, NEAD's only avenue of redress was to seek the protection of the National Labor Relations Board. Fortunately, the employer ultimately withdrew its drug testing proposal. At that time, the Board had not yet definitively decided whether drug testing was a mandatory subject of bargaining.

10. Several charges were filed. The most significant was a section 8(a)(5) charge alleging that DNI had refused to bargain by repudiating and refusing to execute the newly ratified contract and by refusing to recognize the legitimate collective bargaining representative of the employees. *See* 29 U.S.C. § 158(a)(5) (1988).

11. Interestingly, several persons signing the letter were not members of the union, and therefore had no right to vote in the election. One signer was in the bargaining unit, but did not belong to NEAD, nor did he pay the service fee required of nonmembers.

12. DNI charged that the affiliation election was conducted without adequate due process, alleging, *inter alia*, that members had inadequate notice of the election. *But see supra* note 5 and accompanying text. The employer also claimed that there was inadequate continuity between the pre-affiliation and post-affiliation NEAD. For a general explanation of the National Labor Relations Board's continuity and due process criteria, see generally *infra* notes 50-77 and accompanying text.

13. DNI first filed a petition requesting that the NLRB regional director order a representation election to resolve the alleged question concerning representation. When the regional director dismissed the petition, citing the Board's "blocking charge rule," which prohibits conducting a representation election when an unfair labor practice is pending, *see* NLRB CASE-HANDLING MANUAL (CCH) § 11730 (¶ 17,301) (1990) [hereinafter NLRB MANUAL], DNI promptly filed a request for review with the Board. While the request for review was pending, the employer filed a motion for summary judgment. DNI asserted that there was no question of material fact in dispute, and therefore the case was ripe for summary judgment. *But see* Brief for the National Labor Relations Board at 17 n.10, NLRB v. Financial Inst. Employees of Am., Local 1182, 457 U.S. 192 (1986) (No. 84-1493) [hereinafter NLRB Brief] (whether continuity of representation exists is a question of fact for the Board to decide). The motion for summary judgment was denied as was the request for review.

thousands of dollars.[14]

Following affiliation, as NEAD had announced, there were no changes in the day-to-day relationship between NEAD and its membership or between NEAD and DNI. Life went on just as it had before. The only difference was that NEAD now had a "big brother" to provide advice and assistance in collective bargaining. All of DNI's protests, the protracted litigation, and the expanded resources of time and money were much ado about nothing.[15]

INTRODUCTION

Although the overall work force in the United States has grown since 1985, the number of union members has remained relatively constant at seventeen million. Consequently, the proportion of American workers who belong to unions has fallen. Overall union membership in the United States has dropped from a high of 34.7% of all workers in 1954 to 16.1% in 1990.[16]

Falling membership, of course, reduces the strength of unions.[17] Although there are various reasons for the decline in union membership, "a substantial share of the responsibility must be attributed to the increasingly

14. The employer had anywhere from three to six attorneys, plus a paralegal, working on the matter, and its costs were doubtless even greater. A single attorney represented the union. Fortunately for NEAD, the Guild funded its legal and related expenses. Needless to say, the small 120 member independent union could never have begun to afford the substantial litigation costs by itself. The employer's economic wherewithal would have proved too much.

15. The epilogue of the story is almost humorous. The union waited for over a year for a decision from the administrative law judge. Apparently, the opinion was lost when the judge's computer "crashed," and no opinion was ever issued. Support for the affiliation within the union ranks continued to grow, however. Finally, in 1989, the union filed a representation petition with the Board asking for an election and withdrawing its unfair labor practice charge. The post-affiliation NEAD won the election, and finally, in 1989, the employer began to bargain with the affiliated union and accord it the rights and protection guaranteed by the National Labor Relations Act (NLRA).

16. Daily Lab. Rep. (BNA) No. 26, at B-8 (Feb. 7, 1991). The statistics reflect union membership of both part-time and full-time employees. Approximately 20.5% of all full-time workers and 18.3% of combined full-time and part-time workers were actually represented by unions in 1990, representing a slight decrease from 1989. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS 228 (Jan. 1991).

The decline has been going on for some time. Troy and Sheflin found that the total membership of American unions, excluding Canadian members, declined from 22.2 million members in 1975 to 18.3 million members in 1984, a drop of almost 18%. LEO TROY & NED SHEFLIN, UNION SOURCEBOOK: MEMBERSHIP, STRUCTURE, FINANCE, DIRECTORY 3-1 (1985). Union density, the percentage of the civilian labor force organized by unions, also declined from its peak of 25.4% in 1970 to 16.1% in 1984. *Id.* at 3-10; *see also* Linda Carlisle, *Union Mergers and the Amendment Certification Procedure*, 28 CATH. U. L. REV. 587, 587 (1979); Alan Kistler, *Trends in Union Growth*, 28 LAB. L. J. 539, 539-40 (1977). Between 1988 and 1989 alone, union membership in the nation's manufacturing sector fell 3.2%. Daily Lab. Rep. (BNA) No. 137, at A-6 (July 17, 1990). The success rate of unions in representation elections has also declined from 74% in 1950, *see* Jerome P. Coleman, *Problems Arising from Union Changes in Affiliation*, in PROCEEDINGS OF NEW YORK UNIVERSITY 39TH ANNUAL CONFERENCE ON LABOR § 7.01, at 7-2 (Richard Adelman ed., 1986) (citing Charles Craver, *The Current and Future Status of Labor Organizations*, 36 LAB. L.J. 210 (1985)), to 47.6% in 1990. Daily Lab. Rep. (BNA) No. 69, at A-1 (Apr. 10, 1991).

17. GARY N. CHAISON, WHEN UNIONS MERGE 3-4 (1986).

no-holds barred resistance exhibited by American business toward unions, a level of opposition that tends to be facilitated rather than foiled by the present [National Labor Relations Act]."[18] American employers have repeatedly demonstrated their willingness to go to great lengths to keep themselves non-union or to rid themselves of incumbent unions.[19]

One way that unions have responded to this loss of membership is to affiliate or merge with other unions.[20] Unions may also affiliate or merge in order to bolster declining finances[21] or reduce the adverse impact of technological change on members' continued employment.[22] Such organizational changes are intended to increase the union's bargaining power and success in dealing with employers.[23]

Union mergers and affiliations have increased significantly during the last decade. As a result, the overall number of unions have decreased by approximately one third.[24] The activity included both mergers and affiliations by

---

18. PAUL C. WEILER, GOVERNING THE WORKPLACE 114 (1990).

19. *See id.* at 109.

20. Union mergers can take various forms. Janus has identified three types of mergers: (1) the uniting of two or more unions to form a new union; (2) the absorption of one union by another; and (3) the affiliation of two organizations with each retaining its own identity. Charles J. Janus, *Union Mergers in the 1970's: A Look at the Reasons and Results*, 101 MONTHLY LAB. REV. 13, 13 (Oct. 1978); *see also* Garlock Equip. Co., 288 N.L.R.B. 247, 252 (1988) (Ries, ALJ) (possible modifications include "the affiliation or merger of two independent unions, the affiliation of an independent union with a national union, the affiliation or merger of two national unions, and the change of affiliation by a local union from one national union to another"); CHAISON, *supra* note 17, at 2; Edward J. O'Connell, *Union Affiliations and the Rights of Nonunion Employees*, 53 FORDHAM L. REV. 1443, 1443 (1985). This Article will generally not make a distinction between affiliations and mergers, as the applicable law is the same for both types of reorganization. *See* United Retail Workers Union Local 881 v. NLRB, 797 F.2d 421, 423 (7th Cir. 1986); May Dept. Stores, 289 N.L.R.B. 661, 661 n.4 (1988). *But see* Carlisle, *supra* note 16 at 588-90 (suggesting that continuity-of-representation and due process criteria may be easier to satisfy in "local-local consolidations than in instances of independent-international affiliations."). *Contra* Gulf Oil Corp., 135 N.L.R.B. 184 (1962).

21. CHAISON, *supra* note 17, at 43-47.

22. *Id.* at 47-49.

23. *Id.* at 51-52; *see also* Robert M. Hale, *Union Affiliations: Examination of the Governing NLRA Standards*, 3 DET. C.L. REV. 709, 709 (1983); Carlisle, *supra* note 16, at 587. Unions may also seek bargaining expertise, or they may seek to compensate for a lack of leadership in the local union. Seattle First National, 475 U.S. 192, 199 n.5 (1986). Other motivations include economies of scale and a desire to increase lobbying power, to obtain protection from raiding, and to gain access to research and other services. Coleman, *supra* note 16, § 7.01, at 7-2.

For example, in 1989, the 3,500 member National Brotherhood of Packinghouse and Industrial Workers (NBPIW) voted to affiliate with the 1.3 million member United Food and Commercial Workers. At one time, the NBPIW had 50,000 to 60,000 members, but membership had dropped dramatically in the preceding 20 years due to restructuring and automation in the packinghouse industry as well as changes in consumer eating habits. The NBPIW publicly stated that affiliation with a larger union was necessary to combat company mergers and the "anti-union atmosphere" that it perceived as prevalent in business today. The merger facilitated continued servicing of members and enhanced power at the bargaining table. Daily Lab. Rep. (BNA) No. 140, at A-5 (July 24, 1989).

24. Daily Lab. Rep. (BNA) No. 223, at C-1 (November 19, 1990). In 1980, there were 225 unions based in the United States. By 1990, the number had decreased to 155. *Id.*

smaller independent unions with larger organizations, as well as mergers among the larger organizations themselves.[25]

Under current law, a merger or affiliation may affect the union's status as the exclusive bargaining representative of employees and its relationship with the employer. The National Labor Relations Board reviews the status of post-affiliation unions under the theory that a merger or affiliation may raise a representational issue which lies within the Board's exclusive jurisdiction.[26] Current Board law applies a two-part test. The Board inquires, first, whether the post-affiliation union enjoys a "continuity of representation" with the pre-affiliation union[27] and, second, whether the affiliation procedure provided "adequate due process."[28]

This Article argues that the Board's current approach to the review of union affiliation elections is fundamentally flawed in three ways. First, a substantial question exists as to whether the Board has the statutory authority to review affiliation elections at all. Such elections are internal union affairs.[29] Federal labor policy rejects outside interference in internal union matters[30] and supports the principles of majority rule[31] and the free choice of employees in choosing their union.[32] Under its current due process and continuity of representation analyses, the Board regularly intrudes upon internal union affairs and disregards the principles of free choice and majority rule by allowing

25. Between 1955 and 1986, there were 86 mergers between larger or national unions, 35% of which occurred between 1979 and 1984. Within the large unions, mergers among locals have numbered in the thousands. Coleman, *supra* note 16, § 7.01, at 7-3 (citing Janet Kleeman, *Implications of the National Labor Relations Board's New Standard for Union Affiliation Elections*, 37 LAB. L. J. 75 (1986)); *see also* Carlisle, *supra* note 16, at 587.

Notable mergers and affiliations between 1980 and 1990 included the recent affiliation by the 2,000 member California Interns and Residents Association with the 925,000 member Service Employees International Union; the affiliation of the 12,000 member Industrial Union of Marine and Shipbuilding Workers with the 517,000 member International Association of Machinists; and the merger of the 32,000 member Molders and Allied Workers with the 86,000 member Glass, Pottery, Plastics and Allied Workers. Daily Lab. Rep. (BNA) No. 223, at C-1 (November 19, 1990).

26. A representational issue is one that needs to be resolved by a Board conducted election. *See infra* note 38.

27. *See infra* notes 51-53, 56-68 and accompanying text.

28. Amoco Prod. Co., 262 N.L.R.B. 1240, 1241 (1982) (Amoco IV); ROBERT E. WILLIAMS, NLRB REGULATION OF UNION BARGAINING RIGHTS WHEN AFFILIATION CHANGES 14 (1982) [hereinafter REGULATION OF BARGAINING RIGHTS]; *see infra* notes 69-77 and accompanying text.

29. *See, e.g.*, Aurelia Osborn Fox Memorial Hosp., 247 N.L.R.B. 356, 359 (1980); Seattle-First Nat'l Bank, 245 N.L.R.B. 700, 700 (1979), *rev'd*, 265 N.L.R.B. 426 (1982); Amoco Prod. Co., 239 N.L.R.B. 1195, 1195 (1979) (Amoco III), *rev'd*, 262 N.L.R.B. 1240 (1982) (Amoco IV); Ohio Hoist & Mfg. Co., 108 N.L.R.B. 561, 576 (1954); American Range Lines, 13 N.L.R.B. 139, 154 (1939); *see generally* Seattle-First National, 475 U.S. 192 (1986).

30. *Seattle First National*, 475 U.S. at 204.

31. Financial Inst. Employees of Am., Local 1182 v. NLRB, 752 F.2d 356, 363 (9th Cir. 1984), *aff'd*, 475 U.S. 192 (1986).

32. *See id.*; *see also* NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946) (citations omitted) (Board entrusted by Congress "to insure the fair and free choice of bargaining representatives by employees.").

challenges to mergers or affiliations even when the change is clearly supported by a majority of the affected employees. This intrusion exceeds the Board's statutory authority under the NLRA.

Second, the Board's current rule for reviewing affiliation elections conflicts with federal labor policy and the fundamental goals and purposes of the National Labor Relations Act. The primary purpose of the NLRA is "to preserve industrial peace."[33] This goal is supported by a strong federal policy of preserving stability in the employees' collective bargaining representative.[34] The Board's rule undermines the desired stability by creating uncertainty in the status and authority of the employees' chosen representative following every merger or affiliation.

Finally, the Board's current rule permits employers to interfere with the employees' choice of their collective bargaining representative by raising often meritless challenges to union mergers or affiliations to justify the employer's withdrawal of recognition of the post-affiliation union. Thus the employer may use Board procedures to interfere with internal union organization, an action which arguably violates the express language of the NLRA.[35] The impact of such action is often to deprive employees of their legitimate collective bargaining representative for months or even years, "a deprivation for which there is no remedy."[36] To allow employers to manipulate Board procedures so as to deprive employees of their statutory rights is anathema to federal labor policy.

Part I of this Article examines the current criteria used by the Board to review union affiliations and mergers and traces the historical development of the current rule. Part II discusses problems inherent in the Board's rule, including the rule's conflict with both the applicable legislative history and the overall federal scheme for regulating labor relations. Finally, Part III proposes that the Board abandon its current two-prong standard for reviewing union affiliation elections in favor of a test which asks one simple question: whether a majority of the employees in the bargaining unit support the post-affiliation representative. Under the proposed rule, the Board would be permitted to review such elections only at the instigation of employees affected by the affiliation and not, absent unusual circumstances, at the behest of the employer.

---

33. *Seattle-First National*, 475 U.S. at 208.

34. Financial Inst. Employees of Am., Local 1182 v. NLRB, 752 F.2d at 364.

35. *See* 29 U.S.C. § 158(a)(2) (1988) (prohibiting an employer from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization").

36. Joan Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 WIS. L. REV. 653, 681 (addressing employer withdrawal of recognition for reasons other than union merger or affiliation). The fundamental principles that govern employer withdrawal of recognition are the same in all cases. *See infra* notes 316-19 and accompanying text.

I.
DEVELOPMENT OF THE CURRENT BOARD RULE

A. Procedural Basis for Board Review

Under the National Labor Relations Act, the Board has exclusive jurisdiction over representation elections[37] in which employees elect their collective bargaining representative.[38] The Board lacks jurisdiction, however, over internal union elections held for the purpose of merger or affiliation.[39] Congress has expressly declined to prescribe any procedures for such internal union decisionmaking matters as affiliation, or to delegate authority for reviewing these decisions.[40] Despite the lack of express authority, the Board has undertaken to "regulate" affiliation and merger elections through either of two established procedures.[41] First, if a union has been previously certified by the Board as the representative of the employee bargaining unit,[42] and there is no "question concerning representation,"[43] the union or the employer[44] may file a

37. *See* 29 U.S.C. § 159 (1988); West Point-Pepperell v. Textile Workers of Am., 559 F.2d 304, 307 (5th Cir. 1977); *In re* American Buslines, 151 F. Supp. 877, 883-84 (D. Neb. 1957).

38. Employees who desire a Board conducted representation election must file a petition for an election with the Board, accompanied by evidence of support for the proposed union by at least 30% of the employees to be represented. 29 U.S.C. § 159(c)(1) (1988); 29 C.F.R. § 101.18(a) (1990). The Board then promptly investigates the petition to determine whether a "question of representation" exists, *i.e.*, whether there is an issue that needs to be resolved by a Board conducted election. NLRB MANUAL, *supra* note 13, § 11010.5 (¶ 10,106). If the Board finds that a question concerning representation does exist, it conducts a formal, secret ballot election. *See* REGULATION OF BARGAINING RIGHTS, *supra* note 28, at 10. The employer and the union are allowed to campaign prior to the election, but they are required to maintain an environment of "laboratory conditions" in doing so. *See* General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). For a more thorough discussion of the election process, see ROBERT E. WILLIAMS, NLRB REGULATION OF ELECTION CONDUCT 5-15 (Rev. ed. 1985) [hereinafter REGULATION OF ELECTION CONDUCT].

39. *See Seattle-First National*, 475 U.S. at 204. The Supreme Court has long held that the Board has no statutory authority to interfere in internal union affairs unless the union action "invades or frustrates an overriding policy" of federal labor law. Scofield v. NLRB, 394 U.S. 423, 429 (1969); *see also* NLRB v. Boeing Co., 412 U.S. 67, 74-75 (1973) (Board's statutory power does not allow it to determine reasonableness of union discipline, unless the exercise of the discipline thwarts federal labor policy); Carlisle, *supra* note 16, at 602 n.94.

40. *Seattle-First National*, 475 U.S. at 204 n.11. *See generally infra* notes 220-44 and accompanying text. Congress has, however, given union members statutory protection from abuse of internal election procedures. *See* Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-541 (1988).

41. There is no requirement that the Board review or approve every affiliation by one union with another. If the employer does not raise an objection to the election and the union does not seek an amendment to its certification, the matter may never reach the Board.

42. A union which was voluntarily recognized by the employer will have no certification. Certification represents an official recognition of a union granted by the Board only following a Board representation election. *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION, AND COLLECTIVE BARGAINING 40 (1976).

43. A question concerning representation exists "when a union seeks recognition as bargaining agent for a unit of employees and the employer declines to recognize it." REGULATION OF ELECTION CONDUCT, *supra* note 38, at 8. For a general discussion of the issue, see THE DEVELOPING LABOR LAW 1493-1502 (Charles J. Morris ed., 2d ed. 1983).

If a question concerning representation exists, the Board must conduct a formal election

petition with the Board requesting that the union's certification be amended to reflect its new name and/or relationships.[45] This amendment to certification petition invokes the Board's nonadversarial representation procedure.[46] If the employer opposes the union's affiliation, it may express its position as a participant in the amendment to certification proceeding. The Board's regional director initially decides whether to grant or deny the petition. While a limited right of appeal lies directly to the Board, there is no opportunity for appellate court review.[47]

Second, current Board law permits an employer who opposes an affiliation to withdraw recognition of and refuse to bargain with the newly merged or affiliated union.[48] In response, the union may file an unfair labor practice charge against the employer.[49]

---

under section 9(c) of the National Labor Relations Act. 29 U.S.C. § 159(c)(1) (1988); *see* REGULATION OF BARGAINING RIGHTS, *supra* note 28, at 7.

44. The regulations also allow the petition to be filed by "an employee or group of employees." 29 C.F.R. § 102.60(b) (1990).

45. *Id.*; *see also id.* § 101.17 ("If there is a unit covered by a certification and there is no question concerning representation, any party may file a petition for amendment to reflect changed circumstances, such as changes in the name or affiliation of the [union] involved . . . ."); Seattle-First National, 475 U.S. 192, 199 (1986). For a discussion of the mechanics of the amendment-to-certification procedure and comments on the procedure, see REGULATION OF BARGAINING RIGHTS, *supra* note 28, at 6-8. For examples of amendment-to-certification cases, see Hammond Publishers, 286 N.L.R.B. 49 (1987); Duquesne Light Co., 248 N.L.R.B. 1271 (1980).

46. See GORMAN, *supra* note 42, at 42; REGULATION OF BARGAINING RIGHTS *supra* note 28, at 9. This procedure also tends to be quicker than the adversarial unfair labor practice proceeding. In fiscal year 1989, for example, the median time elapsed between the filing of a representation petition and the issuance of a decision by the regional director was 45 days. The time for a case to move from the filing of a petition to a Board decision was 268 days. In contrast, the median time to process an unfair labor practice charge from the filing of the charge to the issuance of a Board decision was 736 days. 54TH ANNUAL REPORT OF THE NLRB 249, Table 23 (1989).

47. A party who seeks to challenge a regional director's decision must file a request for review with the Board. 29 C.F.R. § 101.20 (1990). The scope of review of the director's decision is, however, very limited. *See id.* § 102.71. There is no right to direct appellate court review of a Board decision in any representation matter, including an amendment-to-certification case. Rather, an employer who desires judicial review of a Board order amending certification must commit a "technical" unfair labor practice by refusing to bargain with the union. To gain "enforcement" of the amendment to certification, the union must then file an unfair labor practice charge against the employer for its refusal to bargain. The Board's decision on the unfair labor practice charge may ultimately be appealed to the federal appellate court, which has authority to review the original representation issue. *See* GORMAN *supra* note 42, at 49, 59-61; REGULATION OF ELECTION CONDUCT, *supra* note 38, at 20-23.

A union may dispense with the amendment-to-certification procedure, either because the union was recognized voluntarily by the employer and has never been certified (in which case, there is no certification to amend), or because the union hopes that the employer will simply recognize the affiliation and continue business as usual. The amendment-to-certification procedure might also be inappropriate if there is strong employee opposition to the affiliation. *See* REGULATION OF BARGAINING RIGHTS, *supra* note 28, at 7-8.

48. *See, e.g.*, J.W. Fergusson & Sons, 299 N.L.R.B. No. 132, slip op. (Sept. 27, 1990); Insulfab Plastics, 274 N.L.R.B. 817 (1985), *enforced*, 789 F.2d 961 (1st Cir. 1986).

49. The charge arises under section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1988), which makes it an unfair labor practice for an employer "to refuse to bargain with the representatives

B. The Current Board Rule

In reviewing a union affiliation or merger, whether in the context of an amendment to certification petition or an unfair labor practice charge, the Board conducts a two-part inquiry.[50] First, the Board makes a "continuity determination,"[51] in which it inquires whether the post-affiliation union is a continuation of the old union under a new name or a substantially different organization.[52] The nature of the post-affiliation union is a question of fact to be resolved by the Board.[53] Second, the Board determines whether the union members were provided an adequate opportunity to vote on the affiliation issue with sufficient "due process."[54] So long as sufficient continuity exists between the pre-affiliation union and the post-affiliation union and due process is satisfied, an affiliation by one union with another does not affect the union's status as exclusive representative.[55]

---

of his employees." *See* REGULATION OF BARGAINING RIGHTS, *supra* note 28, at 8-10. An unfair labor practice charge may be asserted even by a union which has never been certified. *Id.* at 9. For examples of unfair labor practice cases arising from merger or affiliation elections, see *Insulfab Plastics*, 274 N.L.R.B. 817 (1985), *enforced*, 789 F.2d 961 (1st Cir. 1986); *Ferguson*, 299 N.L.R.B. No. 132, slip op. (Sept. 27, 1990).

A third alternative for resolving questions raised by a union's affiliation is for the party opposing the affiliation or otherwise seeking resolution of issues raised by the affiliation to petition the Board for a representation election under section 9(c)(1) of the Act. 29 U.S.C. § 159(c)(1) (1988); *see also* REGULATION OF BARGAINING RIGHTS, *supra* note 28, at 10-12. Under its "blocking charge" policy, however, the Board generally will hold such an election in abeyance if there are unfair labor practice charges pending which allege "conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election, were one to be conducted on the petition." NLRB CASEHANDLING MANUAL *supra* note 13, at § 11730 (¶ 17,301) (1990); REGULATION OF BARGAINING RIGHTS, *supra* note 28, at 13.

Likewise, under its "contract bar" rules, the Board will not conduct a representation election if a collective bargaining agreement is in effect between the parties. *Id.* One exception to the contract bar rules arises when a remnant of the predecessor union remains in existence after the affiliation or merger and opposes the change, thereby creating a "schism" within the union. *Id.* at 14. *See generally*, GORMAN, *supra* note 42, at 54-59.

The Board will order a representation election if it finds that a question concerning representation exists following a union affiliation or merger. In the context of representation elections, the Board does not, however, apply the continuity and due process criteria used to review merger and affiliation elections. This procedure is, therefore, beyond the scope of this Article.

50. Seattle-First National, 475 U.S. 192, 200 n.8 (1986); Hale, *supra* note 23, at 710. The procedure used to bring the matter to the Board does not seem to affect either the nature or the outcome of the inquiry. Today the unfair labor practice proceeding is the more commonly used, although in the early years of the Act affiliation issues were most often raised in amendment-to-certification proceedings. *See* Cochran Co., 112 N.L.R.B. 1400, 1408 (1955).

51. *See Seattle-First National*, 475 U.S. at 199; NLRB v. Insulfab Plastics, Inc., 789 F.2d 961, 965 (1st Cir. 1986); OFFICE OF THE GENERAL COUNSEL (NLRB), MEMORANDUM GC 86-8, at 1 (Aug. 14, 1986) [hereinafter GC MEMORANDUM].

52. *See, e.g.*, J. Ray McDermott & Co. v. NLRB, 571 F.2d 850, 857 (5th Cir. 1978); Carpinteria Lemon Ass'n v. NLRB, 240 F.2d 554, 557 (9th Cir. 1956)

53. NLRB v. Insulfab Plastics, 789 F.2d 961, 966 (1st Cir. 1986); NLRB Brief, *supra* note 13, at 16 n.10.

54. *Seattle-First National*, 475 U.S. at 199; *Insulfab Plastics*, 789 F.2d at 965. *See generally* REGULATION OF BARGAINING RIGHTS *supra* note 28, at 14-16.

55. *Seattle-First National*, 475 U.S. at 200; *Insulfab Plastics*, 789 F.2d at 964 ("organiza-

1. Continuity of Representation

In making the "continuity determination," the Board examines the nature of the post-affiliation organization to determine whether the merger or affiliation raises a "question concerning representation" which requires a Board supervised election.[56] The general test is "whether the affiliation produces a change that is *'sufficiently dramatic* to alter the union's identity.' "[57] A union affiliation that preserves continuity of representation does not materially alter the identity of the union and, therefore, raises no question of representation.[58]

In considering the continuity question, the Board "examines numerous factors and makes its determination based on the 'totality of a situation' rather than the 'presence or absence of certain cited criteria.' "[59] Perhaps the most critical inquiry under the Board's current rule is how much autonomy the post-affiliation organization retains.[60] Closely related are the questions of whether the officers of the pre-affiliation union are retained,[61] and whether there is continuity in the union personnel administering the existing collective bargaining agreement.[62]

Generally, the Board has found the requisite continuity only when the newly merged or affiliated union continues to exercise substantial autonomy in its day-to-day operations without ceding control to the union with which it has united.[63] Hallmarks of such autonomy include control over contract ne-

---

tional changes such as affiliations or mergers do not inevitably raise a question of representation").

56. GC MEMORANDUM, *supra* note 51, at 2.

57. May Dep't Stores Co., 289 N.L.R.B. 661, 665 (1988) (emphasis in original) (quoting Western Commercial Transp., 288 N.L.R.B. 214, 217-18 (1988)); *see Seattle-First National*, 475 U.S. at 206.

58. *Union Affiliations and Collective Bargaining*, 128 U. PA. L. REV. 430, 441 (1979) [hereinafter *Union Affiliations*].

59. Central Washington Hosp., 303 N.L.R.B. No. 64, slip op. at 3 (June 18, 1991) (quoting News/Sun-Sentinel Co., 290 N.L.R.B. 1171, 1177 (1988), *enforced*, 890 F.2d 430 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 3238 (1990)); *see* Yates Indus., 264 N.L.R.B. 1237, 1250 (1982).

60. *See Union Affiliations*, *supra* note 58, at 444-45; GC MEMORANDUM, *supra* note 51, at 6.

61. GC MEMORANDUM, *supra* note 51, at 4; *see, e.g.*, St. Vincent Hosp., 621 F.2d 1054, 1057 (10th Cir. 1980); Canterbury Villa of Waterford, 282 N.L.R.B. 462, 464 (1986); Aurelia Osborn Fox Memorial Hosp., 247 N.L.R.B. 356, 358 (1980); Newspapers, 210 N.L.R.B. 8, 9 (1974), *enforced*, 515 F.2d 334 (5th Cir. 1975).

62. GC MEMORANDUM, *supra* note 51, at 4. *See generally* J. Ray McDermott & Co. v. NLRB, 571 F.2d 850 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978); Retail Store Employees Local 428 v. NLRB, 528 F.2d 1225 (9th Cir. 1975) (per curiam); Good Hope Indus., 239 N.L.R.B. 611 (1978); New Orleans Pub. Serv., 237 N.L.R.B. 919, 921 (1978); Emery Indus., Inc., 148 N.L.R.B. 51, 53 (1964); *Union Affiliations*, *supra* note 58, at 444-45.

63. GC MEMORANDUM, *supra* note 51, at 6. In at least one case, the Board has found the requisite continuity even in the absence of such autonomy. *See* Quemetco, 226 N.L.R.B. 1398, 1399 (1976); *cf.* Canton Sign Co., 174 N.L.R.B. 906 (1969) (although amalgamation of the two unions effected structural changes, including enlargement of the bargaining representative and substitution of officers, continuity still existed), *enforcement denied on other grounds*, 457 F.2d 832 (6th Cir. 1972). For a more complete discussion of *Quemetco*, see *infra* notes 282-85 and accompanying text.

gotiations and grievance processing, power to call strikes and allocate strike benefits, authority to ratify collective bargaining agreements, control over financial and other resources, and freedom to establish dues and fees.[64] Other factors bearing on continuity include whether there have been changes in the post-affiliation union's constitution and/or bylaws,[65] dues structure,[66] or mode of grievance processing,[67] and whether affiliation has substantially changed the rights and obligations of the union's membership or the relationship between the union and the employer.[68]

2. *Due Process*

In its due process inquiry,[69] the Board reviews the internal union decisionmaking process to determine whether the employees were given an adequate opportunity to vote on the affiliation issue and whether the affiliation election was conducted with "adequate due process safeguards."[70] The Board has never developed specific procedures for affiliation elections.[71] Generally, the Board requires nothing more than that (1) the employees receive adequate

64. GC MEMORANDUM, *supra* note 51, at 6. *See generally* Western Commercial Transp., Inc., 288 N.L.R.B. 214, 217 (1988); Insulfab Plastics, 274 N.L.R.B. 817, 818, 823, *enforced*, 789 F.2d 961 (1st Cir. 1986); Aurelia Osborn Fox Memorial Hosp., 247 N.L.R.B. 356, 358 (1980).

65. *See, e.g.*, Fluhrer Bakeries, 232 N.L.R.B. 212 (1977); Pearl Bookbinding Co., 206 N.L.R.B. 834, 836 (1973), *enforced*, 517 F.2d 1108 (1st Cir. 1975); *Union Affiliations*, *supra* note 58, at 445.

66. *See, e.g.*, Aurelia Osborn Fox Memorial Hosp., 247 N.L.R.B. 356, 358 (1980); Fluhrer Bakeries, 232 N.L.R.B. 212 (1977); Ocean Systems, 223 N.L.R.B. 857, 858 (1976), *enforced*, 571 F.2d 859 (5th Cir. 1978).

67. *See, e.g.*, NLRB v. Commercial Letter, 496 F.2d 35, 40 (8th Cir. 1974); Good Hope Indus., Inc., 239 N.L.R.B. 611 (1978).

68. *Insulfab Plastics*, 789 F.2d at 966; *Canterbury Villa*, 282 N.L.R.B. at 464 (1986) (whether the union retained local autonomy and local officers and continued to follow established procedures); Hydrotherm, Inc., 280 N.L.R.B. 167 (1986) (union's structure, officials, and powers and duty *vis-a-vis* employees); Pearl Bookbinding, 206 N.L.R.B. 834, 835-36 (1973), *enforced*, 517 F.2d 1108, 1112 (1st Cir. 1975) (structure, administration, officers, assets, membership, autonomy, bylaws, and size). *See generally* Hale, *supra* note 23, at 715-18; *Union Affiliations*, *supra* note 58, at 445; GC MEMORANDUM, *supra* note 51, at 2-7. The Board recently summarized the various criteria used to determine continuity:

> Factors mentioned in decisions dealing with the question of continuity of representative have included the following: continued leadership responsibilities by the existing union officials; the perpetuation of membership rights and duties, such as eligibility for membership, qualification to hold office, oversight of executive council activity, the dues/fees structure, authority to change provisions in the governing documents, the frequency of membership meetings, the continuation of the manner in which contract negotiations, administration, and grievance processing are effectuated; and the preservation of the certified union's physical facilities, books, and assets.

Western Commercial Transp., 288 N.L.R.B. 214, 217 (1988),

69. The due process which the Board requires is not unlike procedural due process under the United States Constitution. *See, e.g.*, North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975); Fuentes v. Sheirn, 407 U.S. 67 (1972); Sniadach v. Family Furnace Corp., 395 U.S. 337 (1969). The inquiry, however, has no constitutional origin.

70. Seattle-First National, 475 U.S. 192, 199 (1986); May Dep't Stores v. NLRB, 897 F.2d 221, 226 (7th Cir.), *cert. denied*, 111 S. Ct. 245 (1990).

71. NLRB v. Newspapers, Inc., 515 F.2d 334, 339 (5th Cir. 1975).

notice of the election; (2) the employees be provided an opportunity to discuss the pending union affiliation vote; and (3) the vote be taken by secret ballot.[72] The election is not, however, required to measure up to the standards governing Board supervised representation elections.[73] In fact, the Board has generally found adequate due process in affiliation elections so long as the procedures were not "so 'lax' or 'substantially irregular' as to 'negate the validity of the election.' "[74]

The Board's assessment of union "due process" has been notably inconsistent, however. On the one hand, the Board has often tolerated a variety of practices typical in small, informal unions. For example, it has approved elections where the ballot box was left unattended for several hours[75] and where the balloting was not secret.[76] On the other hand, the Board has disapproved an election where there was the mere possibility, though no evidence of employees voting twice.[77]

C. Historical Development of Board Criteria

1. Development of the Continuity of Representation Inquiry

Long before the passage of the NLRA, state courts applied common law in considering the impact of a change of affiliation on a union.[78] These early cases addressed issues such as the claim of a union to its assets following a change in affiliation,[79] and the obligation of an employer to abide by a contract following a change in affiliation of the union signatory.[80] The state courts

72. *See* Newspapers, Inc., 210 N.L.R.B. 8, 9 (1974); Hale, *supra* note 21, at 720.

73. Aurelia Osborn Fox Memorial Hosp., 247 N.L.R.B. 356, 359 (1980); Hamilton Tool Co., 190 N.L.R.B. 571, 575 (1971). Board supervised representation elections are conducted in accordance with strict procedures which govern, *inter alia*, the time and place of the election, the type of ballots and ballot box to be used, and the size and arrangement of the polling place. NLRB MANUAL, *supra* note 13, at §§ 11,302-11,308 (¶¶ 13,020-13,080), §§ 11,314-11,336.5 (¶¶ 13,140-13,365). In a Board election, care is taken to assure that all employees receive adequate notice of the election and an opportunity to vote; time is provided for open expression of views, but campaigning is regulated to prevent intimidation, bribes, or other undue influence; and the election is conducted by secret ballot by a representative from the Board's regional office. *See generally id.* §§ 11314, 11302.1 (¶¶ 13,140, 13,021); REGULATION OF BARGAINING RIGHTS, *supra* note 28, at 11-12; REGULATION OF ELECTION CONDUCT, *supra* note 38, at 13-15.

74. Financial Inst. Employees of Am., Local 1182 v. NLRB, 752 F.2d 356, 360 (9th Cir. 1984) (quoting NLRB v. Commercial Letter, 496 F.2d 35, 42 (8th Cir. 1974)); *Hamilton Tool Co.*, 190 N.L.R.B. at 575; *see* Hale, *supra* note 23, at 721.

75. News/Sun-Sentinel Co., 290 N.L.R.B. 1171, 1173, 1176 (1988).

76. *Fox Memorial Hosp.*, 247 N.L.R.B. at 359; U.S. Steel Corp., American Bridge Div., 185 N.L.R.B. 669, 670 (1970) (ballots were marked in the open and members, including officers, saw how others voted).

77. *See, e.g.*, J.H. Day Co., 204 N.L.R.B. 863 (1973).

78. *See, e.g.*, Shipwrights, Joiners & Calkers Ass'n, Local No. 2 v. Mitchell, 60 Wash. 529 (1910).

79. Summers, *Union Schism in Perspective: Flexible Doctrines, Double Standards, and Projected Answers*, 45 VA. L. REV. 261, 262 (1959); *Union Affiliations*, *supra* note 58, at 446; *see, e.g.*, *Shipwrights Local No. 2*, 60 Wash. 529 (1910); Kelso v. Cavanagh, 137 Misc. 653, 244 N.Y.S. 90 (Sup. Ct. 1930).

80. World Trading Corp. v. Kolchin, 166 Misc. 854, 2 N.Y.S.2d 195 (Sup. Ct. 1938).

consistently held that changes in affiliation did not affect the continuing nature and existence of the union.

For example, as early as 1910, the Supreme Court of Washington concluded that a change in a local union's affiliation from one national union to another had no impact on the identity of the local union, notwithstanding several previous changes in affiliation, because the union had at all times "maintained its entity and separate existence."[81] Similarly, a New York court found that a change in affiliation did not create a new entity because such a change by a local union "does not alter the identity or take away the rights and responsibilities of the local."[82]

The earliest decision by the National Labor Relations Board to address the effect of a union affiliation was *M. & M. Wood Working Co.*[83] The case arose as a result of the decision of a local of the Carpenters' Union, which was affiliated with the American Federation of Labor (AFL), to terminate its affiliation with the Carpenters' Union and affiliate with the International Woodworkers of America (IWA), which was connected with the Committee for Industrial Organization.[84] Citing the "closed shop" clause in the collective bargaining agreement,[85] the employer advised the union, now a local of the IWA, that it would not continue to employ anyone who was not a member of the Carpenters Local. The Board, however, sustained the IWA Local's unfair

---

While *World Trading Corp.* was decided after the enactment of the NLRA in 1935, the case makes no mention of federal law, and applies common law only, citing both *Shipwrights Local No. 2* and *Kelso*. *Id.* at *55*; 2 N.Y.S.2d at 195-96.

81. *Shipwrights Local No. 2*, 60 Wash. at 530 (1910). In 1906, the local union had changed its affiliation from the International Union of Shipwrights to the Pacific Coast Maritime Builders Federation. The court observed that:

> [w]hile the membership in the association is continually changing by deaths, withdrawals, and removals, and while its affiliations with other organizations have changed from time to time, the association itself remains, and has at all times maintained its entity and separate existence.

Id.

82. *World Trading Corp.*, 166 Misc. at 855, 2 N.Y.S.2d at 195; *see* EDWIN STACEY OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS 90 (1927). *World Trading Corp.* involved a change in affiliation by the United Wholesale Employees from the American Federation of Labor to the Committee for Industrial Organization. Although the New York court did not purport to carefully examine the characteristics of the newly affiliated union, it did observe in passing, in language that foreshadowed later Board decisions, that:

> [The union's] identity, structure, operation, constitution, by-laws, officers and membership are still the same . . . . The power to disburse funds, to perform and take advantage of contracts, to collect dues, and distribute surplus is still in the same hands and belongs to the same legal entity.

166 Misc. at 855, 2 N.Y.S.2d at 195; *cf.* Pearl Bookbinding Co., 206 N.L.R.B. 834, 835-36 (1973). For a discussion of modern criteria, see *supra* notes 59-68 and accompanying text.

83. 6 N.L.R.B. 372 (1938), *vacated*, 101 F.2d 938 (9th Cir. 1939).

84. *See also* Smith Wood Prod., Inc., 7 N.L.R.B. 950 (1938), which involved different locals of the same unions as in *M. & M. Wood Working*.

85. A "closed shop" clause requires employees to be members of a particular union in order to be hired. Such clauses have been prohibited by law since 1947. 29 U.S.C. § 158(a)(3) (1988). In contrast, "union shop" clauses, which require an employee to join the union after 30 days of employment, are permitted under the Act. *Id.*

labor practice charge, concluding that either the IWA Local succeeded to the rights of the Carpenters Local under the contract,[86] or the Carpenters Local was extinct and the closed shop clause was no longer in force.[87] The Board's decision turned on its conclusion that the local union remained the same entity both before and after affiliation. This conclusion was reached with little analysis of the nature of the post-affiliation union.[88] Rather, the Board seemed to presume that the affiliation did not alter the identity of the local.[89]

Other early Board decisions focused only on whether the post-affiliation union represented a majority of the employees in the bargaining unit.[90] Observations regarding continuity, if any were made at all, were perfunctory, even when a small independent union affiliated with a large international union.[91] Moreover, the Board maintained the position that a union affiliation was "a matter of the internal policy of the labor organization and [had] no probative value concerning the employees' choice of the [union] as their collective bargaining representative."[92] Cases over the next fifteen years or so followed a

86. That is, there was continuity of representation.

87. The Board reasoned in the alternative because it declined to determine the status of a valid contract following a change in affiliation. *See* 6 N.L.R.B. at 381.

88. The only discussion of the elements used to determine continuity under the Board's current test was a passing statement that the membership of the local had remained almost completely the same and the officers were unchanged. *Id.* at 380.

89. The Board quoted *World Trading Corp.* at length, noting that "[a]bundant authority can be marshaled in support of the proposition that severance or change of affiliation of a local union with the parent body does not alter the identity or take away the rights and responsibilities of the local." *Id.* at 381 (quoting *World Trading Corp.*, 166 Misc. at 855, 2 N.Y.S.2d at 195).

In reaching its decision, the Board expressly rejected the view of the United States District Court for the District of Oregon, which in a related proceeding to enjoin picketing had held that employees who joined the IWA Local were not members in good standing of the Carpenters Local, and therefore they could be discharged. 6 N.L.R.B. at 381-82.

90. *See* Newark Rivet Works, 9 N.L.R.B. 498 (1938), in which the Board held that a change in affiliation of a local from the International Association of Machinists to the United Electrical, Radio & Machine Workers, did not affect the union's status as representative of the employees. As in *M. & M. Wood Working*, the Board engaged in no analysis of the impact of the affiliation change on the union's organization. The Board's only reference to the effects of the change in affiliation was the general observation that the union continued to function in the same manner as before, without interruption in the then current strike or in attempts at bargaining. Interestingly, the Board concluded that majority support existed, even though the affiliation had been ratified by a vote of less than a majority of the local union. *Id.* at 511; *cf.* Gulf Oil Corp. 135 N.L.R.B. 184, 185 n.6 (1962) (Chairman McCulloch, concurring).

91. *See* American Range Lines, 13 N.L.R.B. 139 (1939), in which an independent union affiliated with the CIO. The employer refused to bargain with the newly-affiliated union, arguing that it was a new entity. The Board, however, rejected the employer's defense without any continuity analysis or discussion of the structure of the affiliated union. *Id.* at 147.

92. 13 N.L.R.B. at 154; *see also* Financial Inst. Employees of Am., Local 1182 v. NLRB, 752 F.2d 356, 362 n.9 (9th Cir. 1984) ("Even when the affiliation decision results in substantial change in the union, the actual decision to affiliate is internal . . . ."); Aurelia Osborn Fox Memorial Hosp., 247 N.L.R.B. 356, 359 (1980) ("an affiliation vote is basically an internal union matter"); *cf.* Aluminum Co. of Am., 1 N.L.R.B. 530, 537 (1936) (Board declined to exercise jurisdiction in interunion representational disputes because it "should not interfere with the internal affairs of labor organizations").

similar pattern.[93]

The earliest Board decision to suggest the factors utilized today to determine continuity of representation appears to be *Michigan Bell Telephone Co.*, a 1949 case in which the employer sought a new representation election for its employees, claiming that the incumbent union's affiliation so changed the character of the union as to create "substantial doubt" that the union continued to be the chosen representative of the employees.[94] The Board rejected the employer's assertion, noting that it was "aware of no case" in which "a change in affiliation of the parent union, without more" created the question concerning representation urged by the employer.[95] The Board concluded that the affiliation had no effect upon the "structure, functions, or membership" of the union or the "officers, constitution, bylaws and bargaining authority" of the locals involved.[96] The Board did not, however, specify the facts upon which it based its conclusions, nor did it make any reference to "continuity" as a criterion for reviewing affiliations.

Later that same year in *Harris-Woodson Co.*,[97] the Board, purporting to adopt a rule articulated by the Tenth Circuit,[98] announced that "continuity of

93. *See, e.g.*, American-Hawaiian Steamship Co., 10 N.L.R.B. 1355, 1362, 1366 (1939) ("It is plain that nothing more than a change in name and affiliation took place, and we find that the labor organization certified by us did not cease to exist because of its transfer of affiliation. . . . What we certified . . . was not a name but a union."); Continental Oil Co., 12 N.L.R.B. 789, 793 n.2 (1939) (transfer of affiliation from international union affiliated with AFL to one affiliated with CIO was a change only in name; continuity of organization preserved), *enforced*, 113 F.2d 473 (10th Cir. 1940); Walgreen Co., 44 N.L.R.B. 1200, 1212 (1942) (affiliation of union with C.I.O. while representation petition was pending, did not affect election as the Board certified "not a name but a union"); R.C. Williams & Co., 107 N.L.R.B. 933 (1954) (affiliation by one local with another, including transfer of all assets and contracts, did not affect validity of contract, and rival union's petition was therefore barred); *cf.* Metropolitan Life Ins. Co., 91 N.L.R.B. 473, 485 (1950) (change in affiliation without more does not create substantial doubt as to identity of union); Missouri Service Co., 87 N.L.R.B. 1142 (1949).

94. 85 N.L.R.B. 303, 304 (1949). The incumbent union was the Communication Workers of America (CWA), which affiliated with the CIO. The employer's claim that the post-affiliation union was not the chosen representative of the employees was essentially a claim that the new union lacked majority support. *See supra* note 90 and accompanying text. Similarly, in Illinois Bell Telephone Co., 88 N.L.R.B. 1171 (1950), the Board rejected the employer's claim that the local union could no longer amend and pursue an unfair labor practice charge against the employer after a change in its affiliation from the National Federation of Telephone Workers (NFTW) to the CWA, when the CWA succeeded the NFTW. The trial examiner observed that the change in affiliation was not "such a change in the structure or affiliation of [the local] as to create a doubt whether it is the labor organization chosen by the employees to represent them." *Id.* at 1183.

95. The Board observed that in all of the cases relied upon by the employer, there was either a schism in the union, *see supra* note 49, or the "old contracting union abandoned its representative status or was voted out of existence by its members." 85 N.L.R.B. at 304-05.

96. 85 N.L.R.B. at 305.

97. 85 N.L.R.B. 1215 (1949). In *Harris-Woodson Co.*, the United Candy Workers Local Industrial Union, No. 1274, an affiliate of the CIO, affiliated with the Textile Workers Union and became the United Candy Workers of Lynchburg, an affiliate of the Textile Workers Union of America, CIO. *Id.* at 1215.

98. *See* Continental Oil Co. v. NLRB, 113 F.2d 473 (10th Cir. 1940), *enforcing in part* 12 N.L.R.B. 789 (1939). In fact, the court had not expressly announced a rule regarding con-

the employees' own organization" was "the governing test in determining whether one labor organization is identical to another having a different name and affiliation."[99] The employer argued that the local union's change in affiliation constituted a change in the collective bargaining representative, because there was a "new contract of association and new supervision and control in connection with such matters as financial affairs, collective bargaining, and other forms of collective action."[100] The Board, however, concluded that continuity of the union had been preserved because the officers and the "great bulk" of the membership of the union had remained the same.[101]

The watershed in the development of the Board's continuity test came in 1954 when the Sixth Circuit in *Dickey v. NLRB*[102] rejected the Board's rather matter-of-fact approach. Following the merger of the small Blacksmiths' Union[103] into the much larger Boilermakers,[104] the Board amended the certification of the Blacksmiths. The employer, however, refused to bargain with the newly merged union. The Board sustained the union's subsequent unfair labor practice charge and ordered the employer to bargain, observing that the merger was nothing more than "a change in the internal organization" of the

---

tinuity. The case involved, *inter alia*, Local 242 of the Oil Workers International Union, which had represented workers at Continental Oil's Big Muddy Field and Glenrock Refinery since July 1934. Following the passage of the NLRA in 1935, the union continued to represent a majority of the employees in the bargaining unit. When the employees initially elected the union, it was known as the International Association of Oil Field, Gas Well and Refinery Workers of America (Association). In June 1937, it changed its name to the Oil Workers International Union (Oil Workers), following affiliation with the CIO. *See id.* at 477-78. This case arose, *inter alia*, as a result of the employer's refusal to bargain with the union. As a defense to the union's unfair labor practice charge, the employer argued that since the union chosen by the employees was the Association, the employer could not be charged with refusing to bargain with the Oil Workers. *See id.* at 477; 12 N.L.R.B. at 795. The Board found no merit in the employer's argument, and simply stated that the Oil Workers were the "same organization" as the Association. 12 N.L.R.B. at 795.

The court agreed with the Board, making the following observation:

> There was no change in officers or central offices; the change was only in name; and *continuity of organization* was preserved . . . . While it may be said that the change in name included a shift in affiliation from the American Federation of Labor to the Committee for Industrial Organization, there was no such disruption or change of identity as to affect in any manner the validity of the parts of the order requiring [the employer] to bargain collectively with the union.

113 F.2d at 477-78 (emphasis added). The court could scarcely be said to have announced a "continuity of organization" inquiry as the governing test in affiliation cases.

99. 85 N.L.R.B. at 1217.

100. *Id.*

101. *Id.* at 1218. Cases following *Harris-Woodson* did not, however, consistently articulate and apply the announced standard. *See, e.g.*, Missouri Service Co., 87 N.L.R.B. 1142 (1949) (Board approved an amendment-to-certification petition with the simple announcement that "sufficient cause" had not been shown why the petition should not be granted); *see also* University Metal Products Co., 102 N.L.R.B. 1567 (1953).

102. 217 F.2d 652 (6th Cir. 1954), *denying enforcement of* Ohio Hoist & Mfg. Co., 108 N.L.R.B. 561 (1954).

103. International Brotherhood of Blacksmiths, Drop Forgers and Helpers, AFL.

104. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL.

union in which "the Board does not, and the employer may not, have any interest so far as the legality of the change is concerned."[105]

The Sixth Circuit, however, criticizing the Board for treating the merger as a routine matter, refused to enforce the Board's order.[106] The court relied on two grounds. First, the court concluded that the regional director did not have the power to amend a union's certification unless the amendment was related to a Board-conducted representation election.[107] Second, the court was distressed that the former Blacksmiths constituted only a fraction of the membership and a very small number of the leadership of the post-merger Boilermakers. In the view of the court, the Boilermakers constituted an entirely new and different union not chosen by the Blacksmiths' membership.[103]

As a result of the Sixth Circuit's decision in *Dickey*, the Board was compelled to engage in its first truly comprehensive analysis of a union affiliation in *National Carbon Company*,[109] which involved the consolidation of the United Gas Workers[110] and the Oil Workers[111] into the Oil, Chemical and Atomic Workers (OCAW).[112] The Board thoroughly explained the considera-

105. 108 N.L.R.B. at 576.

106. 217 F.2d at 655. The Board did indeed approve the trial examiner's decision without comment or modification, a common practice.

107. *Id.* at 654-55.

108. *Id.* at 655. The Sixth Circuit's position was later espoused by the Third Circuit in a series of frequently cited cases. Sun Oil Co. v. NLRB, 576 F.2d 553 (3d Cir. 1978); NLRB v. Bernard Gloekler North East Co., 540 F.2d 197 (3d Cir. 1976); American Bridge Div., U.S. Steel Corp. v. NLRB, 457 F.2d 660, 664 (3d Cir. 1972). The other circuits, however, have declined to follow. *See, e.g.*, NLRB v. Insulfab Plastics, Inc., 789 F.2d 961, 967-68 (1st Cir. 1986); Carpinteria Lemon Ass'n. v. NLRB, 240 F.2d 554 (9th Cir. 1956).

In *Carpinteria Lemon Ass'n*, for example, the Ninth Circuit affirmed the Board's approval of a merger between the 18,000 member United Fruit and Vegetable Workers and the 150,000 member United Packinghouse Workers, relying upon a factual finding that the there "was merely a change of name and affiliation" which could not be disturbed by the court. 240 F.2d at 557. Judge Fee dissented vigorously, citing the Sixth Circuit's decision in *Dickey*, and concluding that the merger had radically changed the organization of the post-merger union. *Id.* at 558-61 (Fee, J., dissenting). Neither the Board nor the Ninth Circuit majority in *Carpinteria Lemon Ass'n* made any reference to the *Dickey* decision.

109. 116 N.L.R.B. 488 (1956). *National Carbon* arose within the jurisdiction of the Sixth Circuit. Like all other litigants, the Board is bound by a decision of a federal court of appeals with regard to cases arising within the appellate court's jurisdiction. Consequently, the Board could not ignore the *Dickey* decision.

110. United Gas, Coke and Chemical Workers of America, CIO.

111. Oil Workers International Union, CIO.

112. Oil, Chemical and Atomic Workers International Union, AFL-CIO.

The employer, National Carbon Co., had initially refused to bargain with the Gas Workers following that union's certification by the Board, on the grounds that the bargaining unit of employees designated by the Board was not appropriate. See generally *supra* note 47 for an explanation of such "technical" unfair labor practices. While the case was on appeal to the Sixth Circuit for enforcement of the Board's initial order requiring the employer to bargain, the Board learned that the Gas Workers and the Oil Workers had consolidated into OCAW. 116 N.L.R.B. at 488-89. The Board therefore requested that the court remand the proceeding so that the Board might evaluate the effect of the consolidation on its order directing the employer to bargain with the Gas Workers.

The Sixth Circuit granted the Board's request, and the Board then remanded to the regional director specifically requesting that evidence be adduced as to:

tions which led to its finding of continuity of representation, although making clear that not all of the circumstances of the *National Carbon Co.* case would be essential to support a determination that a "consolidated labor organization succeeded to the status of a certified constituent union."[113] The criteria considered by the Board were: (1) whether National Carbon's employees favored the consolidation; (2) whether the consolidation substituted a "different" union for the Gas Workers; and (3) whether the consolidation resulted in a "different" local union.[114]

The Board distinguished *Dickey* in several ways. In assessing the employees' support for the consolidation, the Board first noted that the Gas Workers and Oil Workers had been considering consolidation for several years. The consolidation was discussed at national conventions of the Gas Workers where National Carbon's employees had sent delegates. The entire consolidation procedure was extremely orderly and involved substantial participation by local unions as well as the two national organizations. In contrast, there had been no such showing of participation by local unions in *Dickey*.[115]

After noting that, in contrast to *Dickey*, there was no employee opposition to the consolidation,[116] the Board concluded that OCAW was not a "different" union from its two constituent organizations, the Gas Workers and the Oil Workers. Moreover, unlike in *Dickey*, where the Blacksmiths were absorbed by the much larger Boilermakers and received only three of eighteen offices in the new union, the Gas Workers and Oil Workers were of approximately equal size and the offices of the new union were filled almost equally with former Gas Workers and former Oil Workers. In addition, the Board noted that OCAW had expressly assumed all the debts, liabilities, and duties of the constituent unions, including obligations under all collective bargaining agreements, thereby acting as the "alter ego" of the constituents.[117]

Finally, the Board found that the same officers continued in the local

---

(1) the nature of the organization change undergone by the Gas Workers subsequent to the Board's original bargaining order; (2) the procedure by which the change was effected; (3) whether the new entity [had] succeeded to the Gas Workers' representation claim respecting the [employer's] employees; and (4) the proportion of the membership and officers of the new group derived from the Gas Workers.

Id. at 489.

On remand, the trial examiner concluded that despite the organizational changes caused by the consolidation, the continuity of the certified union had been sufficiently preserved to warrant amendment of its certification and enforcement of the Board's bargaining order. He also concluded that *National Carbon Co.* was clearly distinguishable from the merger disapproved by the Court of Appeals in *Dickey*. The Board expressly affirmed the trial examiner's decision, but proceeded to set forth in detail its findings. *Id.* at 490-91.

113. *Id.* at 497.

114. *Id.* at 497-501.

115. *Id.* at 498.

116. *Id.* at 498-99. In *Dickey*, one month before the merger of the Blacksmiths and the Boilermakers, the employer was given a letter signed by 11 of 13 employees declaring that they wanted the Blacksmiths to discontinue negotiating for them. *Id.* at 498. That issue was not addressed on appeal. *Dickey*, 217 F.2d at 644.

117. 116 N.L.R.B. at 501.

union so that there was no change in the "structure, purposes, or functioning" of the locals.[118] In fact, the Board concluded that the consolidation appeared to have had "virtually no impact upon the individual employee members of the Gas Workers."[119]

After *National Carbon*, the Board returned to using brief, summary discussions in merger and affiliation cases without citation either to the "continuity of the employees' organization" test of *Harris-Woodson* or to the more detailed factual inquiries of *National Carbon*. However, the opinions frequently did note whether the merger or affiliation had affected the union's structure, functions, membership, or officers. These decisions reflected the factors considered by the Board in *Michigan Bell Telephone* and the question of whether there was "continuity" between the pre-affiliation and post-affiliation unions, the standard announced in *Harris-Woodson*.[120] The inquiry, with some embellishment, has remained substantially the same to the present.[121]

118. *Id*; *cf.* Waterway Terminals Corp., 120 N.L.R.B. 1788, 1789 (1958) (change of affiliation by local which represented employees of six employers from International Longshoremen's and Warehouseman's Union to United Packinghouse Workers of America, AFL-CIO, upheld and employer's petition dismissed where officers remained the same, collective bargaining agreements were assigned to new local, and the "structure, functions [and] membership of the Local Union" remained the same).

119. 116 N.L.R.B. at 501. When the case returned to the Sixth Circuit after remand, the court affirmed the Board's decision in *National Carbon* in a relatively short per curiam opinion. Union Carbide and Carbon Corp. v. NLRB, 244 F.2d 672 (6th Cir. 1957). The court declared that *Dickey* was "distinguishable on several grounds," *id.* at 673, but provided little exposition of the basis of the distinction. Essentially, the court adopted the Board's analysis, focusing on the difference in size and consequent control in the merging unions in *Dickey*, and the absence of change in local officers and day-to-day relationships with the employer in *National Carbon*. *Id.*

120. *See, e.g.*, Emery Indus., 148 N.L.R.B. 51, 52-53 (1964) (amendment to certification granted where independent union affiliated with United Auto Workers, because the newly affiliated union was "but a continuation" of the pre-affiliation union, evidenced by the fact that the "officers and functional leaders" of the local remained the same, day-to-day relationships with the employer were unchanged, and the union would continue to honor contractual commitments with the employer); Climax Molybdenum Co., 146 N.L.R.B. 508, 509 (1964) (request to amend certification to designate one local in the place of another granted, as officers were the same and the amended certification would "insure . . . employees continuity" of the old union); Gulf Oil Corp., 135 N.L.R.B. 184, 184 (1962) (motion to amend certification to reflect merger of two locals of the International Union of Operating Engineers denied because changes were "not simple administrative or structural changes" and the changes would apparently "result in a complete loss of the identity" of the pre-merger local union); Proctor and Gamble Mfg., 130 N.L.R.B. 633, 633 (1961) (certification amended to reflect change in name because union "continued without change in structure or function"); Waterway Terminals Corp., 120 N.L.R.B. 1788, 1789 (1958) (local union's change of affiliation from Longshoremen's Union to Packinghouse Workers approved and certification amended, as the new affiliation "had no effect upon the structure, functions, or membership" of the Local).

121. *See supra* notes 56-68 and accompanying text. The most recent development in the Board's continuity analysis began with its decision in Western Commercial Transp., 288 N.L.R.B. 214 (1988), in which the Board, purporting to follow the guidance of the Supreme Court in Seattle-First National, 475 U.S. 192, 206 (1986), announced a new test of continuity, in which it would inquire whether a change in a union resulting from merger or affiliation is "sufficiently dramatic" to raise a question of representation. *See also* May Dep't Stores Co., 289 N.L.R.B. 661, 665 (1988). In *Western Commercial Transp.*, the Board articulated a long list of

2. Development of the Due Process Inquiry

The historical basis for the Board's due process inquiry is unclear.[122] In fact, early Board cases do not mention any due process requirement.[123] For example, in one of the first affiliation cases after the passage of the NLRA, the employer challenged the local union's transfer of affiliation from the American Federation of Labor to the Congress of Industrial Organizations (CIO) on the basis that the ratification procedure was deficient. The Board approved the affiliation, however, not because it found the ratification procedure proper, but solely because the affiliation appeared not to have affected the majority status of the union.[124] Twenty years later, the Board readily approved a local union's change in affiliation despite the fact that each member did not receive notice of the affiliation meeting as required by the local union's bylaws. Moreover, only twelve of seventy members attended the meeting to vote. The Board stated, however, that "whether or not the membership meeting [was] called in conformity with the Union's constitutional requirements or whether . . . the assignment of contracts or assets [was] proper, [was] no concern of the Board."[125] Despite the alleged irregularities, the Board refused to interfere with an internal union matter.

The first express suggestion that an affiliation election might be required to meet some minimal "due process" standard came in a dissenting opinion in the case of *North Electric Co.*[126] Members Jenkins and Zagoria dissented be-

---

factors used to assess the continuity issue. 288 N.L.R.B. at 217. Later, however, the Board took pains to disavow the application of any particular criteria to the continuity question. *See* Central Washington Hosp., 303 N.L.R.B. No. 64, slip. op. at 3 (June 18, 1991) (quoting News/Sun-Sentinel Co., 290 N.L.R.B. 1171, 1177 (1988)) (quoted *supra* text accompanying note 59).

122. Hale, *supra* note 23, at 732.

123. *See, e.g.*, Emery Indus., 148 N.L.R.B. 51 (1964); Newark Rivet Works, 9 N.L.R.B. 498 (1938).

124. *Newark Rivet*, 9 N.L.R.B. at 511; *see* Hale, *supra* note 23, at 732.

125. Waterway Terminals Corp., 120 N.L.R.B. 1788, 1789 (1958); *see also* Gate City Optical Co., 175 N.L.R.B. 1059, 1060 n.3 (1969) (absent substantial irregularity, Board does not normally concern itself with whether union meeting is held in strict conformity with union constitution).

126. 165 N.L.R.B. 942 (1967); *cf.* Hershey Chocolate Corp., 121 N.L.R.B. 901, 908 (1958) (requiring that employee votes in schism cases should be conducted at "an *open meeting* called, without regard to any constitutional restrictions but with *due notice* to the members in the unit") In Cunningham v. English, 175 F. Supp. 764 (D.D.C. 1958), members of the Teamsters union brought suit against the union and its officers. One of the issues before the court was the legality of a merger between two Teamster locals. The court declared, without citation of authority, that:

> The Courts are in agreement that a vote taken on such an important issue as . . . merger is void where the members have not been sufficiently apprized before hand that anything so far outside the ordinary business of the union is to be presented at the meeting. This is particularly true where the meeting . . . is a special and not a regular meeting. The notice given must be such that it can reasonably be concluded that in the ordinary course of events the membership generally if not entirely would have the opportunity of acquiring knowledge that the meeting was to be held and of the business to be transacted. The notice . . . must give its object and where the meeting is to deal with so important a matter as . . . merger, it is not sufficient to state that the meeting is very important. Notice must be timely as well as specific.

cause employees in the bargaining unit who were not members of the union had not been allowed to vote in the affiliation election.[127] The dissenters concluded that if the Board was going to amend union certifications on the basis of private elections, the agency should be certain that the elections comport with "minimal standards of due process . . . lest the very validity of Board certifications and elections be undermined."[128] Because of the fact that nonmembers were denied the opportunity to vote, the dissenters concluded that the election failed to meet "minimal standards of due process."[129]

Four years later, the "due process" argument reappeared, having been raised by an employer in challenging an amendment-to-certification petition.[130] The employer alleged that the affiliation procedure "did not comply with minimum standards of due process or provide adequate safeguards"[131] because, *inter alia*: (1) there was no opportunity for employees to debate the affiliation resolution before voting upon it; (2) the timing and placement of the election was irregular, thereby minimizing participation; (3) nonmembers were prohibited from voting; and (4) the election procedures were irregular.[132] The Board rejected all of the employer's arguments. With regard to the employer's claim of inadequate debate, the Board concluded that although the union's discussion of the affiliation resolution had not followed *Robert's*

Id. at 770; *see also* Baton Rouge Water Works Co., 163 N.L.R.B. 1070, 1071 (1967) (dismissing employer's allegation that affiliation was ineffective because it did not conform to requirements of the union's constitution).

127. This issue of the right of nonunion employees to vote had been raised previously by Member Rogers in East Ohio Gas Co., 140 N.L.R.B. 1269, 1270-71 (1963) (Member Rogers, dissenting). *See infra* note 154.

128. 165 N.L.R.B. at 944 (Members Jenkins & Zagoria, dissenting). In *North Electric*, the North Electric Independent Union defeated the Allied Industrial Workers of America (AIW) in a Board-conducted representation election in June 1965. The vote was 84 to 80. Approximately 15 months later, however, the Independent voted 52 to 3 to affiliate with the AIW. The Board dissenters were disturbed that the 52 votes cast for the AIW were 28 votes *less* than the AIW had received in the 1965 representation election, with at least 50 employees who were not union members being disenfranchised. *Id.* at 943.

129. *Id.* (Members Jenkins and Zagoria, dissenting). *See generally infra* notes 154-212 and accompanying text.

130. Hamilton Tool Co., 190 N.L.R.B. 571 (1971). *Hamilton Tool* involved the affiliation of an independent union with the United Auto Workers (UAW). In addition to its due process argument, the employer contended that the petition to amend certification should be denied on the grounds that: (1) the requested amendment would result in a change in the employees' representative, *i.e.*, no continuity of representation; (2) the amendment would violate the Board's contract bar rules; (3) the UAW's participation in the independent's affairs constituted a raid; and (4) the original independent Hamilton Tool Employees Independent Federation remained a viable, functioning organization. *Id.* at 571.

The due process requirement had been hinted at by at least one regional director in an earlier case. In Missouri Beef Packers, 175 N.L.R.B. 1100, 1101 (1969), the regional director advised a union which had filed an amendment-to-certification petition that the steps taken to affiliate appeared inadequate. The regional director ordered the observance of "certain minimum requirements, to include a secret ballot vote by employees." *Id.* The petitioner withdrew the petition, held affiliation votes, and refiled.

131. 190 N.L.R.B. at 573-74.

132. *Id.* at 574. The employer also alleged that the result was procured by misrepresentation in that it stated that all officers of the independent union supported affiliation.

Rules of Order, nevertheless "all members were accorded the opportunity to raise any questions they may have had about the proposed affiliation."[133]

As to the allegation that irregular timing and placement reduced employee participation, the Board found that moving the elections from the union's regular meeting place, a bus outside the employer's premises, to the UAW union hall was not improper. Contrary to the employer's suggestion that the move minimized participation, attendance at the election was abnormally high.[134] The Board also found no impropriety in the fact that only union members were allowed to vote, observing that:

> [a]s the subject voted upon involved an internal union matter relating to the affiliation of the incumbent union rather than to the employee selection of a bargaining representative, the preclusion of nonmembers from voting did not affect the regularity of the election. . . . [W]hen "adequate opportunity to vote is provided to all those . . . eligible to vote, the decision of the majority actually voting is binding on all."[135]

Finally, the Board rejected the employer's complaints about alleged irregular procedures in the union election, observing that there was no evidence that any member saw how another voted.[136] Moreover, only the employer had objected to the procedure; there had been no employee complaints at all.[137] Although the Board acknowledged that the procedures used during the union election might not "measure up to the standards the Board demands for its own elections,"[138] it was not willing to find the procedures "so lax or so substantially irregular" as to invalidate the election, especially in the absence of any complaint from the union or any of its members.[139]

---

133. *Id.* Neither did the Board find anything in the record to indicate that any officer opposed the affiliation.

134. *Id.* There were 273 of 474 members at the March 1970 election meeting. Only 105 attended the February meeting, while 60-65 attended the January meeting. Average attendance in the preceding months was 40-45. *Cf.* Dayton Newspapers, Case No. 9-CA-23554-2 (Complaint issued April 17, 1987) (employer tried to prove notice was insufficient but attendance was the highest in the history of the union); *cf. supra* note 5.

135. 190 N.L.R.B. at 574 (quoting East Ohio Gas Co., 140 N.L.R.B. 1269, 1270 (1963)). Only 30 employees, all of whom were probationary employees, were precluded from voting for lack of union membership. The Board noted that even if these employees had been able to vote, the result of the election would have been unchanged. *Id.* Member Jenkins dissented on this issue. *Id.* at 576 (Member Jenkins, dissenting); *see also*, East Dayton Tool & Die Co., 190 N.L.R.B. 577, 580 (1971) (Member Jenkins, dissenting).

136. 190 N.L.R.B. at 574-75.

137. *Id.* at 573. The Board has not consistently included the issue of whether any employee has complained about the merger or affiliation as a criterion in its review. Nevertheless, the issue has been recognized as an important factor to be considered. *See, e.g.*, Newspapers, Inc., 210 N.L.R.B. 8, 10 n.10 ("Whether or not employees involved have complained of or taken any action opposed to a change of representative has been one of the factors considered by the Board in deciding such cases."). *But see infra* note 258 and accompanying text.

138. 190 N.L.R.B. at 575.

139. *Id. See supra* note 137, and *infra* note 306; *see also* East Dayton Tool & Die Co., 190 N.L.R.B. 577, 579 (1971), in which the Board likewise concluded that the "procedures used

It was not until 1973 that the due process requirement finally became integrated in the Board's standard for reviewing affiliation elections. In *J.H. Day Co.*,[140] the employer and an intervenor[141] argued that the affiliation vote did not represent the desires of a majority of the employees, and that the election procedures were so lax as to invalidate the entire election.[142] They contended that: (1) notice of the affiliation meeting was not posted two full days before the election as required by the union's bylaws; (2) the workers drank beer during the election; (3) some ballots were printed with the resolution, while others contained simply "yes" and "no" boxes; and (4) safeguards were not instituted to prevent non-bargaining unit employees from voting or bargaining unit employees from voting twice.

The Board agreed with the employer and the intervening employee, holding that the "procedural flaws" and the lack of "due process" created a question concerning representation.[143] The Board was particularly concerned with the beer drinking, the use of 56 out of 134 ballots with no legend at the top, and the fact that some employees had attended both meetings and might have voted twice.[144] Although earlier Board decisions had recited details of affiliation election procedures, this consideration had never affected the Board's substantive decision.[145] *J.H. Day* represents the first time the Board refused to grant an amendment to certification solely because of a lack of "due process" in an affiliation election.

A year later the Board, citing *North Electric Co.*,[146] reaffirmed the status of the due process criteria, holding that an affiliation vote had complied with

---

were [not] so substantially irregular as to negate the validity of the election." The Board also noted the lack of complaint from any member of the union regarding the vote. *Id.*

140. 204 N.L.R.B. 863 (1973). In *J. H. Day*, the Independent Machinists' Union sought to affiliate with and become a local of the Sheet Metal Workers. For this purpose, a meeting was called and notices posted in accordance with the union's constitution. In order to accommodate employees on each of two shifts, two meetings were held. Out of the 148 employees in attendance, only 134 ballots were cast, however, 75 for affiliation and 58 opposed, with one blank ballot.

141. An employee had been allowed to intervene as an interested party representing other interested employees of J.H. Day. *Id.* at 863. Although a group of 95 employees had signed a petition declaring that they did not want to be represented by the Sheet Metal Workers, it is not clear whether the intervenor's constituency was that group of employees or others. *Id.* at 864.

142. *Id*; *cf.* Hamilton Tool Co., 190 N.L.R.B. 571, 574 (1971) (employer contended election did not comply with due process because: (1) there was no opportunity or debate before the vote; (2) there was a misrepresentation that all officers favored the affiliation; (3) the timing and placement of the election was irregular and minimized participation; (4) nonmembers were barred from participating; and (5) the election procedures were irregular).

143. 204 N.L.R.B. at 864.

144. *Id.* at 863. There was, however, no evidence that anyone voted twice, nor did any union member object to the voting procedure.

145. *See, e.g.*, Universal Tool & Stamping Co., 182 N.L.R.B. 254 (1970); Canton Sign Co., 174 N.L.R.B. 906 (1969); Waterway Terminals Corp., 120 N.L.R.B. 1788 (1958).

146. *See supra* note 126 and accompanying text. Interestingly, *North Electric Co.* do not clearly establish notice or secret ballot requirements for internal union affiliation elections. Nor does any such criteria appear to be set forth in any other case prior to William B. Tanner Co., 212 N.L.R.B. 566 (1974).

"the Board's *established requirements*" by providing adequate notice of the pending election vote and the opportunity for union members to vote by secret ballot on the issue.[147] Later cases included among the "due process" requirements that employees be given ample opportunity to discuss the affiliation issue before voting.[148]

3. *The Right of Nonunion Employees to Vote*

After *J.H. Day*, the question still remained whether "due process" requires that nonunion employees be allowed to vote in an affiliation election.[149] Traditionally, the Board took the position that an affiliation election is an internal union affair,[150] just like an election of officers or a contract ratification, and nonmembers, therefore, had no right to vote under the Act.[151] However,

147. *William B. Tanner*, 212 N.L.R.B. at 566 (emphasis added). A few days after the decision in *J.H. Day*, the Board in Peco, Inc., 204 N.L.R.B. 1036, 1037 (1973), stated that in earlier cases membership action taken to effect an affiliation or merger was required to meet "minimum standards for democratic procedures." However, the cases cited in *Peco* merely discuss the election procedures followed by the union; they do not set out specific procedural requirements.

148. *See* Newspapers Inc., 210 N.L.R.B. 8, 9 (1974); Hamilton Tool Co., 190 N.L.R.B. 571, 574 (1971); *see also* Bear Archery, 223 N.L.R.B. 1169 (1976), *enforcement denied*, 587 F.2d 812 (6th Cir. 1977).

149. The suggestion that this right existed had been raised periodically for more than 10 years. *See, e.g.*, Amoco Prod. Co., 220 N.L.R.B. 861 (1975) (Amoco I) (Member Jenkins, dissenting); Newspapers, Inc., 210 N.L.R.B. 8, 9 n.3 (1974); Hamilton Tool Co., 190 N.L.R.B. 571, 576 (1971) (Member Jenkins, dissenting); East Ohio Gas Co., 140 N.L.R.B. 1269, 1271 (1963) (Member Rogers, dissenting).

Unless a union negotiates a "union shop" clause into its contract, there will be employees in the bargaining unit who are not union members and are not eligible to vote in union elections. *See supra* note 85. Even with a union shop clause, probationary employees may not yet be union members. Similarly, "financial core" members would be ineligible to vote. Although the Act permits a union and an employer to contract for a union security clause obligating all employees to join the union, the obligations imposed by the clause are limited to the financial obligations of membership. Employees who do not wish to participate in the union or be subject to its discipline may elect "financial core" membership, in which they pay dues and fees, but have no other obligation to the union. *See* NLRB v. General Motors Corp., 373 U.S. 734 (1963); GORMAN, *supra* note 42, at 645.

150. *See, e.g.*, Amoco Prod. Co., 239 N.L.R.B. 1195, 1195-96 (1979) (Amoco III) (affiliation is the sort of "internal union matter" into which the Board does not ordinarily intrude); The Hamilton Tool Co., 190 N.L.R.B. 571, 574 (1971) ("As the subject voted upon involved an internal union matter relating to affiliation of the incumbent union rather than to the employee selection of a bargaining representative, the preclusion of nonmembers from voting did not affect the regularity of the election. . . . [W]hen adequate opportunity to vote is provided to all those eligible to vote, the decision of the majority actually voting is binding on all."); East Ohio Gas Co., 140 N.L.R.B. 1269, 1282 (1963) (Member Rogers, dissenting) ("the question of affiliation [is] strictly an internal union affair and of no concern to [the employer]"); American Range Lines, 13 N.L.R.B. 139, 154 (1939) (affiliation relates only to matter of internal policy of labor organization and has no probative value concerning the employees' choice of the union as their collective bargaining representative).

151. It is well established that employees who do not join the union may not vote upon collective bargaining agreements, union officers, etc. *See, e.g.*, *Amoco III*, 239 N.L.R.B. at 1195; North Coast Counties District Council of Carpenters, 197 N.L.R.B. 905, 906 (1972); *see also* Seattle-First National, 475 U.S. 192, 205 (1986).

in 1982, following twenty years of internal debate,[152] the Board reversed its longstanding position and held that a denial of nonmembers' right to vote in such elections compromised due process.[153]

The debate began with Member Rogers' dissent in *East Ohio Gas Co.*,[154] in which he argued that union affiliations should not be allowed unless nonmembers were given the right to vote in the election. Members Jenkins and Zagoria asserted the same premise in dissent a few years later, reasoning that any change in the collective bargaining representative required the approval of all employees.[155] Despite these persistent dissents,[156] the majority adhered to its established rule upholding a union's prerogative to deny nonmembers the right to vote in affiliation and merger elections.[157]

In *Jasper Seating Company*,[158] however, the dissenters at last prevailed[159] when Member Walther joined Member Jenkins in a plurality opinion denying a petition to amend certification in a case where nonmembers were not al-

152. *See* Hale, *supra* note 23, at 721.

153. Amoco Prod. Co., 262 N.L.R.B. 1240, 1241 (1982) (Amoco IV).

154. 140 N.L.R.B. 1269, 1271 (1963) (Member Rogers, dissenting). Member Rogers opined that the issue before the Board was not simply whether proper steps had been taken in the affiliation of an independent union with the international, but whether the employer "had good reason to believe that the newly [affiliated union] did not represent a majority of [the employer's] employees." *Id.* Rogers noted that of 2,592 eligible members, only 1,210 voted. The vote was 701 to 509 for affiliation. Hence, only 27% of the membership actually expressed their preference for the affiliation. There were 397 nonmembers who were not allowed to vote. Although acknowledging that the nonmembers' lack of membership might represent their repudiation of the independent union, Member Rogers expressed concern that "when the 701 vote is measured against the total number of employees in the unit — including both members and nonmembers — then we have a bare 24 percent of the employees voting." *Id.* Under those circumstances, Member Rogers thought that the employer had good reason to doubt the majority status of the newly affiliated union. *Id.*

155. North Elec. Co., 165 N.L.R.B. 942, 944 (1967) (Members Jenkins and Zagoria, dissenting); *see Carlisle*, *supra* note 16, at 600.

156. In Hamilton Tool Co., 190 N.L.R.B. 571 (1971), and East Dayton Tool & Die Co., 190 N.L.R.B. 577 (1971), Member Jenkins again raised his dissent. *See also* Providence Med. Ctr., 243 N.L.R.B. 714 (1979) (Member Jenkins, dissenting); Montgomery Ward & Co., 188 N.L.R.B. 551, 553 n.5 (1971) (Member Jenkins joined the majority in approving affiliation, but reiterated his view that whenever there is a substantive change in the bargaining representative, all employees must be allowed to participate.)

157. *See, e.g.*, Amoco I, 220 N.L.R.B. 861 (1975); Hamilton Tool Co., 190 N.L.R.B. 571 (1971); East Dayton Tool & Die Co., 190 N.L.R.B. 577 (1971).

158. 231 N.L.R.B. 1025 (1977). In *Jasper Seating*, there were 86 employees in the bargaining unit, 44 of whom were union members. Nonmembers were given the opportunity to join the union in order to be eligible to vote. On the day of the election, five members chose to do so, raising the total union membership to 49. Of the 49 union members, only 38 voted, with 35 voting for affiliation and three against.

159. *Jasper Seating* was heard by the full Board, consisting of Chairman Fanning and Members Murphy, Jenkins, Penello, and Walther. The only change in the composition of the Board since its 1975 decision in *Amoco I*, in which the Board had approved an affiliation despite the fact that nonmembers had not been allowed to vote, was the addition of Member Walther. (Interestingly, *Jasper Seating* was issued on the last day of Member Walther's tenure.) In *Amoco I*, Member Jenkins and then-Chairman Murphy joined the plurality opinion, while Member Jenkins dissented. The case was decided by a three-member panel, the common Board practice. Had Member Penello participated in *Amoco I*, the result might have been different.

lowed to vote unless they first joined the union.[160] Chairman Fanning and Member Murphy dissented, asserting that limiting voting exclusively to members was consistent with the national labor policy promoting stability in bargaining relationships.[161] The dissenters further insisted that nonmembers in fact did "have an equal opportunity to participate in the affiliation" because they could have joined the union if they desired to vote.[162]

The pendulum, however, continued to swing in the *Amoco* cases. The Board overruled the new[163] *Jasper Seating* rule just two years later, persuaded by the pre-*Jasper Seating* principle that union merger or affiliation votes are "basically internal, organizational matters," as well as the fact that employees could choose to "participate or to refrain from engaging in concerted activity."[164] Three years later, the Board reversed again and resurrected the *Jasper Seating* rule, concluding that participation by all employees, union and nonunion, was necessary "to provide adequate due process safeguards in an affiliation election."[165]

a. The Amoco *Cases*

In 1972, the National Oil Workers[166] conducted two elections to consider affiliation with the Oil, Chemical and Atomic Workers International Union (OCAW). In both elections, the employees rejected affiliation. The following year, however, several officers and members of the union asked that another election be held. An informal poll resulted in a vote of 216 to 60 in favor of affiliation. Subsequently, in a formal, secret ballot election, the union mem-

160. Member Penello concurred based solely on his conclusion that the affiliation raised a question of representation because of the lack of continuity in the post affiliation union. *Jasper Seating*, 231 N.L.R.B. at 1027 (Member Penello, concurring). He embraced the reasoning announced by the Third Circuit in American Bridge Div., U.S. Steel Corp. v. NLRB, 457 F.2d 660 (3d Cir. 1972), concluding that the affiliation of a small independent union with a large international union inherently raises a question concerning representation.

161. *Japser Seating*, 231 N.L.R.B. at 1028 (Members Fanning and Murphy dissenting) ("[S]tability in the bargaining relationship is enhanced by a continuation of the Board policy not to *require*, as a majority view of this Board, nonmember participation in the vote.").

162. *Id.* at 1029.

163. There is some question whether *Jasper Seating* really marked the adoption of a new rule. The Board has dated the new rule from *Jasper Seating*. However, the Supreme Court, noting that only two members actually supported the new rule, dates the new rule from 1982, five years later, when the Board decided Amoco IV, 262 N.L.R.B. 1240 (1982). Seattle-First National, 475 U.S. 192, 200-01 & n.9 (1986).

164. Amoco III, 239 N.L.R.B. 1195, 1195 (1979). Member Murphy joined Chairman Fanning in a plurality opinion. Member Truesdale concurred "solely on the ground that . . . the question of affiliation . . . is a matter of exclusive concern to the union members." *Id.* at 1197. Member Jenkins dissented because nonmembers had not been allowed to vote. *Id.* Member Penello dissented on the grounds that there was no continuity of representation. *Id.* at 1198.

165. Amoco IV, 262 N.L.R.B. 1240, 1241 (1982). In the three years since *Amoco III*, the membership of the Board had changed again. *See infra* note 178.

166. The union was first certified in 1963 as the Independent Oil Workers Union, Local 14. Subsequently, it changed its name to National Oil Workers Union, Local 14. The events of this case arose in 1972 and 1973.

bership voted 214 to 71 to affiliate with OCAW.[167] In the formal election, a total of 382 ballots were mailed to union members. Only union members were allowed to vote, although nonmembers were given an opportunity to join the union prior to the vote.[168] At the time of the election, there were 480 employees in the bargaining unit. Hence, even if the approximately 98 nonunion employees who were precluded from voting[169] had participated, the result would have remained the same.[170]

Despite the fact that neither the union nor any employee challenged the election, the employer repudiated the collective bargaining agreement and withdrew recognition of the union following the affiliation. The union filed unfair labor practice charges, alleging that the employer had refused to bargain in violation of section 8(a)(5) of the Act.[171] The employer argued, *inter alia*, that the election was defective because nonmembers had not been allowed to vote. The Board initially rejected the employer's argument,[172] however, and ordered Amoco to recognize and bargain with the newly affiliated union, now known as Local Union No. 4-14, OCAW.[173]

In 1978, while the case was before the Fifth Circuit for review, the Board sought and was granted leave to withdraw the case. It thereafter sua sponte reconsidered its decision in *Amoco I*.[174] The result was *Amoco III*,[175] in which the Board overruled *Jasper Seating* and affirmed its decision reached in *Amoco I* that nonmembers have no right to vote in union affiliation elections. The Board reasoned that an affiliation election was an internal union affair, similar to contract ratification or the election of officers. Consequently, if employees elected to remain nonmembers and not participate in internal union affairs, they could not vote in affiliation elections.[176]

On appeal, the Fifth Circuit remanded the case to the Board on the grounds that the Board had disregarded its own test by failing to consider whether continuity existed between the old National Oil Workers, Local 14, and the post-affiliation Local 4-14 of OCAW.[177] On remand, the Board still did not reach the continuity issue, but simply reversed *Amoco III*, returning to

167. Amoco I, 220 N.L.R.B. 861, 862-63 (1975).

168. *Id.* at 864.

169. The administrative law judge found the number to be "approximately 97." *Id.*

170. *Id.*; *cf.* Labor-Management Reporting and Disclosure Act § 402, 29 U.S.C. § 482 (1988). Under the Act, an election may not be rerun if the votes in question would make no difference in the result. *See* JANICE R. BELLACE & ALAN D. BERKOWITZ, THE LANDRUM-GRIFFIN ACT: TWENTY YEARS OF FEDERAL PROTECTION OF UNION MEMBERS' RIGHTS 236 (1979).

171. 29 U.S.C. § 158(a)(5) (1988).

172. Amoco I, 220 N.L.R.B. 861 (1975).

173. *Id.* at 865-66.

174. In the interim, the Board had issued a supplemental decision ordering Amoco Production Company to reimburse the union for the dues it failed to withhold and remit to the union following the affiliation. Amoco Prod. Co., 233 N.L.R.B. 158 (1977) (Amoco II).

175. 239 N.L.R.B. 1195; *see supra* text accompanying notes 163-64.

176. *Id.* at 1195.

177. Amoco Prod. Co. v. NLRB, 613 F.2d 107 (5th Cir. 1980).

the *Jasper Seating* rule.[178] The Fifth Circuit affirmed, deferring to the Board's "special expertise."[179]

b. Seattle-First National Bank

A few months after its decision in *Amoco III*, the Board reached a similar result in *Seattle-First National Bank*,[180] a case in which an independent union[181] sought to affiliate with the Retail Clerks International Union. Following a series of informational meetings, union members voted by a substantial majority in favor of affiliation in a secret ballot election conducted by the Washington State Public Employment Relations Commission.[182] Thereafter, the newly affiliated union filed with the Board a petition to amend its certification to reflect the change in name and its status as a Retail Clerks Local.[183]

The employer opposed the petition on several grounds, including the fact that nonmembers were not allowed to vote.[184] The Board initially rejected all of the employer's arguments and ordered the union's certification to be amended.[185] On the issue of nonmember voting, the Board found the case

178. Amoco IV, 262 N.L.R.B. 1240 (1982); *see supra* text accompanying note 165. The shift in the Board's position appears to be the result of a change in its membership. Between the 1979 decision in *Amoco III* and the 1982 decision in *Amoco IV*, Members Penello, Murphy, and Truesdale had left the Board. They were replaced by Member Hunter and Chairman Van de Water, both appointed in 1981, and Member Zimmerman, appointed in 1980. Chairman Van de Water and Member Hunter joined Member Jenkins to form the majority, while Members Fanning and Zimmerman dissented.

The majority reasoned that the refusal to allow nonmembers to vote in the affiliation election violated "fundamental due process standards." *Id.* at 1241. They rejected the argument that such elections were simply internal union matters, suggesting that if such were the case there would be no reason to "look to see if adequate due process has been achieved." *Id.*

The dissent asserted the reasoning of *Amoco III*, and emphasized the freedom of an employee who wishes to vote on internal union matters to join the union. The dissent would find no due process violation arising from prohibiting nonmembers from voting, so long as such persons had the opportunity to become union members and participate in union affairs under normal union rules. *Id.* at 1242 & n.20 (Members Fanning and Zimmerman, dissenting).

179. Local Union No. 4-14, Oil, Chemical & Atomic Workers v. NLRB, 721 F.2d 150, 152 (5th Cir. 1983).

180. Seattle-First Nat'l Bank, 241 N.L.R.B. 751 (1979) (Seattle-First I).

181. The independent union was the Firstbank Independent Employees Association (FIEA), which had represented Seattle-First National Bank employees throughout the state of Washington since its certification by the Board in 1970.

182. At the time of the election there were approximately 4,800 employees in the bargaining unit. Ballots were mailed to 2,624 union members. The final vote was 1,206 to 774 in favor of affiliation. 241 N.L.R.B. at 751.

183. The newly affiliated union was known as the "Financial Institution Employees of America, Local 1182, Chartered by Retail Clerks International Union, AFL-CIO." *Id.*

184. The other grounds were that: (1) a question of representation had been raised because there was lack of continuity between the FIEA and the post-affiliation union; and (2) FIEA had not followed its own constitution in establishing voter eligibility standards. *Id.* at 751-72.

185. Later, when the employer refused to bargain with Local 1182 despite the amendment to certification, the Board found the employer guilty of an unfair labor practice. Seattle-First National Bank, 245 N.L.R.B. 700 (1979) (Seattle-First II).

controlled by *Amoco III*.[186] After the Fifth Circuit in *Amoco III* remanded and directed the Board to address the continuity issue,[187] the Board asked the Ninth Circuit to remand *Seattle-First II* as well,[188] because the two cases were "analytically linked."[189] On reconsideration, the Board, by a 3-2 vote, reversed, dismissing the FIEA's unfair labor practice complaint and revoking the previously granted amendment to certification, solely on the ground that nonunion members had not been permitted to vote.[190] Consequently, the Board concluded, the election "did not meet minimal due-process standards."[191]

On appeal, the Ninth Circuit declined to follow the Fifth Circuit in upholding the Board's new rule. Rather, the court granted the union's petition for review, and remanded the case to the Board.[192] The Supreme Court granted the Board's petition for certiorari to address the conflicting circuit decisions.[193]

The Court unanimously struck down the Board's new rule, holding that the requirement that nonunion employees be allowed to vote in affiliation elections exceeded the Board's statutory authority under the NLRA.[194] The rule, the Court concluded, violated the congressional policy reflected in the Act "against outside interference in union decisionmaking."[195] Although the Act establishes a specific election procedure for representation matters, the statute gives the Board "no authority to require unions to follow other procedures in adopting organizational changes."[196]

Under the Act, the Court observed, the Board cannot withdraw recogni-

186. *Id.* at 700.

187. *See supra* note 177 and accompanying text.

188. Seattle-First Nat'l Bank v. NLRB, Nos. 80-7004, 79-7515, slip op. (9th Cir., June 27, 1980).

189. Financial Inst. Employees of Am., Local 1182 v. NLRB, 752 F.2d 356, 358 (9th Cir. 1984).

190. Seattle-First National Bank, 265 N.L.R.B. 426 (1982) (Seattle-First III).

191. *Id.* Members Fanning and Zimmerman dissented on the ground that "[a]n affiliation election is nothing more than an internal union matter upon which the Board generally will not intrude." *Id.* at 426-27 (Members Fanning and Zimmerman, dissenting). Chairman Van de Water and Members Hunter and Jenkins constituted the majority, just as they had in *Amoco IV*.

192. Financial Inst. Employees of Am., Local 1182 v. NLRB, 752 F.2d 356 (9th Cir. 1984). The court concluded that the new rule was invalid because: (1) it violated the long-standing federal labor policy of avoiding "unnecessary interference in internal union affairs," *id.* at 362; (2) the rule was inconsistent with the federal policy of preserving industrial peace by maintaining stability in the bargaining representative, *id.* at 364; and (3) the Board's rule was irrational. *Id.* at 366. Subsequent to the Ninth Circuit decision, the Seventh Circuit joined the Fifth Circuit and upheld the Board's new rule. United Retail Workers Union, Local 881 v. NLRB, 774 F.2d 752 (7th Cir. 1985).

193. 471 U.S. 1098 (1985).

194. Seattle-First National, 475 U.S. 192, 204 (1986). Chief Justice Burger wrote a brief concurring opinion, in which he noted simply that the Court's action in rejecting the Board's rule was "one of those rare departures" from the Court's "long history of special deference" to the Board in matters concerning the selection of a union by employees. *Id.* at 210.

195. *Id.* at 204.

196. *Id.*

tion of a union following affiliation unless the Board first determines that the affiliation raises a question of representation.[197] Although an affiliation may "substantially change a certified union's relationship with the employees it represents," such a change in circumstances may rise to the level of a question concerning representation *only* if after affiliation "it is unclear whether a majority of employees continue to support the [post-affiliation] union."[198] In such a case, the affiliation will implicate the employees' right to choose their union freely, and the Board may be required to conduct a representation election.[199]

In reviewing union affiliations, the Court warned, the Board must proceed cautiously, because the Act's goal of promoting industrial stability would be undermined were every union organization adjustment to result in displacement of the union-employer relationship.[200] The stable bargaining relationships favored by the Act are best maintained by allowing the post-affiliation union to continue representing the employees in the unit following affiliation unless the Board clearly finds that the affiliation raises a question concerning representation. The Board's rule allowing nonunion members to vote ran directly contrary to this policy by allowing an employer to

> invoke a perceived procedural defect to cease bargaining even though the union succeeds the organization the employees chose, the employees have made no effort to decertify the union, and the employer presents no evidence to challenge the union's majority status.[201]

The Act balances the competing concerns of assuring that a union recognized by the Board is supported by a majority of the employees and maintaining industrial stability. "The Board's new rule," the Court concluded, "upsets the accommodation drawn by the statute by effectively decertifying the reorganized union, even where affiliation does not raise a question of representation."[202] Consequently, the rule ran contrary to the very purpose of the Act,

197. *Id.* at 202. If the Board determines that a question concerning representation exists, it must conduct an election to determine "whether the certified union still is the choice of a majority of the unit." *Id.* at 204.

198. *Id.* at 202.

199. *Id.*

200. One fundamental reason for this destabilizing effect is that "[i]n many cases, a majority of employees will continue to support the union despite any changes precipitated by affiliation." *Id.* at 203.

201. *Id.* at 209.

202. *Id.* The Financial Institution Employees urged the Court to go further and hold that the Board simply has no authority to review due process in affiliation elections. Brief For Respondent Financial Institution Employees of America, Local 1182, at 28-29, Financial Inst. Employees of Am., Local 1182 v. NLRB, 475 U.S. 192 (1986) (No. 84-1493) [hereinafter Brief of FIEA]; 475 U.S. at 199 n.6. However, the Court found it unnecessary to "assess the propriety of the Board's past procedures," and expressed no opinion regarding the union's argument. 475 U.S. at 209. Several unions have raised this argument in subsequent cases before the Board. However, in each case the Board has concluded that there was both continuity and adequate due process, and therefore, did not need to determine whether the due process test is an appro-

which is "to preserve industrial peace."[203]

The Board defended its rule of requiring nonunion members to vote by arguing that affiliation differs from other union organizational changes because it inevitably affects the union's identity. "But," observed the Court, "many organizational or structural changes may operate to alter a union's 'identity.' "[204] Such is the case, for example, "where the union amends its constitution or bylaws, restructures its financial obligations and resources, or alters its jurisdiction."[205] Nevertheless, it is the prerogative of the union alone to determine "whether any administrative or organizational changes are necessary in the affiliating organization."[206] The Court concluded that

> if these changes are sufficiently dramatic to alter the union's identity, affiliation *may* raise a question of representation, and the Board may then conduct a representation election. *Otherwise, the statute gives the Board no authority to interfere in the union's affairs.*[207]

The Court also rejected the Board's argument that nonmembers must have the right to vote because an affiliation election, while not raising a question of union representation, may still affect representation of members of the bargaining unit.[208] The Court observed that internal union decisions such as calling a strike or ratifying a collective bargaining agreement also affect members of the bargaining unit. Nevertheless, declared the Court, "[n]on-union employees have no voice in the affairs of the union."[209] Employee dissatisfaction with union decisions "may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support."[210]

Finally, the Court expressed no opinion on the appropriateness of the Board's continuity-of-representation test, because the Board had failed to make a continuity determination below.[211] The union also asked the Court to consider whether the Board had the right to impose any due process safeguards on affiliation elections. However, the Court declined to consider that issue, finding it unnecessary for a resolution of the case at hand.[212]

---

priate one. *See, e.g.*, News/Sun-Sentinel Co., 290 N.L.R.B. 1171, 1175 (1988); *see also* May Dep't Stores Co., Venture Stores Div., 289 N.L.R.B. 661, 665 n.16 (1988) (Board found it unnecessary to consider whether, in light of *Seattle-First National*, both due process and continuity must be fulfilled in all instances of affiliation); Hammond Publishers, 286 N.L.R.B. 49, 50 n.8 (1987).

203. 475 U.S. at 208.

204. *Id.* at 206.

205. *Id.*

206. *Id.* (quoting Amoco III, 239 N.L.R.B. 1195 (1979)).

207. *Id.* (emphasis added).

208. *Id.* at 205.

209. *Id*; *see supra* note 151.

210. 475 U.S. at 205-06.

211. *Id.* at 200 n.7.

212. *Id.* at 199 n.6; *see supra* note 202.

II.
CRITIQUE OF THE BOARD'S CURRENT RULE

The Board's current two-pronged rule cannot survive scrutiny under the reasoning of *Seattle-First National*. The Board's rule, with its continuity and due process inquiries, is irrational and inconsistent with federal labor policy. The continuity test interferes with industrial stability by destabilizing union-employer relationships and it violates the fundamental policy protecting the right of employees to freely choose their collective bargaining representative.[213] The test is irrational because it penalizes a union for accomplishing precisely what it intended—a change in the internal structure of the union. The due process inquiry runs directly counter to the Supreme Court's admonition against undue interference in internal union affairs. Moreover, neither test has any relevance to the ultimate issue of a post-affiliation union's majority status.

Finally, the current rule allows an employer to assert the rights of union members in defense of the employer's refusal to bargain with the chosen representative of the employees. An employer can seek to "effectively [decertify] the reorganized union," even when the affiliation has raised no question concerning representation.[214] Such a result is inimical to the very purpose of the Act.[215] It violates the express language of the NLRA prohibiting employer interference in union organization[216] and deprives employees of the fundamental right of free choice in selecting their union.

A. Deficiencies in the Due Process Analysis

The Board's examination of an internal union affiliation election for adequate "due process" exceeds its statutory authority and violates well established national labor policy. Congress has consistently embraced the principle that "unions should be left free to operate their own affairs, as far as possible,"[217] and it has "repeatedly condemned outside interference in internal union affairs."[218] Indeed, the legislature has neither prescribed specific procedures for internal union affiliation elections nor granted the Board authority to prescribe such procedures.[219]

---

213. *See* Westen Commercial Transp., 288 N.L.R.B. 214, 219 (1988) (Member Johansen, dissenting).

214. *See* Brooks v. NLRB, 348 U.S. 96, 103 (1954).

215. Seattle-First National, 475 U.S. 192, 203 (1986).

216. 29 U.S.C. § 158(a)(2) (1988).

217. *Seattle-First National*, 475 U.S. at 204-05 n.11; Steelworkers v. Sadlowski, 457 U.S. 102, 117 (1982); *see* S. REP. No. 1684, 85th Cong., 2d Sess. 4-5 (1958); *cf.* NLRB v. Allis-Chalmers Mfg., 388 U.S. 175 (1967) (union's threatening and imposing of fines against members who crossed picket line during strike did not constitute unfair labor practice, as Congress did not intend to invade internal union affairs in adopting section 8(b) of the Act).

218. Financial Inst. Employees of Am., Local 1182 v. NLRB, 752 F.2d 356, 363 (9th Cir 1984); *see Allis-Chalmers*, 388 U.S. at 187-95.

219. *Seattle-First National*, 475 U.S. at 204 & n.11. *But see* Labor-Management Reporting and Disclosure Act, title I, 29 U.S.C. §§ 411-15 (1988).

1. The Board's Inquiry Exceeds Its Statutory Authority

A review of congressional consideration of federal labor legislation reveals that Congress has never authorized the Board's intrusion into the internal decisionmaking process of a union in the area of affiliations and mergers. Congress first addressed regulation of union affairs while considering the Labor-Management Relations Act of 1947 (LMRA).[220] The House passed a "bill of rights" for union members,[221] to be enforced by the Board,[222] which would have regulated union procedures for electing officers, increasing dues, disciplining members, and calling strikes.[223] The bill would not, however, have governed union decisions regarding affiliations, mergers, or any other change in internal organizational structure.[224] Before enacting the LMRA, the conference committee deleted the House's proposed "bill of rights" because, according to Senator Taft, "[t]he Senate conferees . . . felt that it was unwise to authorize [the NLRB] to undertake such elaborate policing of the internal affairs of unions."[225]

Congress again addressed internal union decisionmaking in 1959, in response to union corruption and practices which frequently disenfranchised union members.[226] The Labor-Management Reporting and Disclosure Act (LMRDA),[227] which represented "the first comprehensive regulation by Congress of the conduct of internal union affairs,"[228] regulated internal union procedures for assessing dues, disciplining members, and electing officers.[229] However, as with the Labor-Management Relations Act passed twelve years earlier, Congress declined to expressly regulate internal union affiliation or merger elections, despite the fact that numerous proposals arose in the Senate to regulate other internal union decisions. These Senate proposals included regulating the creation of affiliated organizations or funds,[230] as well as consti-

220. Ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-44, 151-58, 159-67, 171-83, 185-87, 191-97, 557 (1991)).

221. H.R. REP. No. 245, 80th Cong., 1st Sess. 31 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 322 (1985) [hereinafter LMRA LEG. HIST.]; Brief of FIEA, *supra* note 202, at 40.

222. *See* H.R. 3020, 80th Cong., 1st Sess., § 8(c) (1947), *reprinted in* 1 LMRA LEG. HIST., *supra* note 221, at 179-83; Brief of FIEA, *supra* note 202, at 40.

223. Brief of FIEA, *supra* note 202, at 40.

224. *See id.*

225. 93 CONG. REC. 6443 (1947), *reprinted in* 2 LMRA LEG. HIST., *supra* note 221, at 1540; *see* Seattle-First National, 475 U.S. 192, 204 n.11 (1986).

226. *See generally* Archibald Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960).

227. Pub. L. No. 86-257, 73 Stat. 519-41 (codified as amended at 29 U.S.C. §§ 401-02, 411-15, 431-41, 461-66, 481-83, 501-04, 521-31 (1988)). The LMRDA is also known as the Landrum-Griffin Act.

228. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 193 (1967); *see* Brief for FIEA, *supra* note 202, at 41.

229. 29 U.S.C. §§ 411-15, 481 (1988).

230. S. 1137, 86th Cong., 1st Sess. § 102(5) (1959), *reprinted in* NLRB, 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 272-

tutional amendments and recall of officers,[231] waiver of the right to strike,[232] and mergers and transfers between local unions.[233] In the end, Congress refused to include any of these expansive regulatory proposals in the LMRDA on the grounds that "unions should be left free to operate their own affairs, as far as possible,"[234] without control from outsiders.[235]

Ironically, federal labor law does not require that employees have the opportunity to vote on affiliation issues.[236] In fact, if permitted by a union's constitution, the decision may be made by a union's officers alone.[237] The NLRA does not regulate internal union decisionmaking at all. Such procedures are governed only by the LMRDA,[238] and its "bill of rights" for union members.[239] Although the LMRDA requires that all union members be accorded equality under the union constitution, the statute imposes no obligation that union members be enfranchised with regard to merger or affiliation decisions.[240] Congress considered such a proposal by Senator McClellan in its deliberations over the LMRDA. The McClellan bill would have mandated, as a matter of federal law, that every union constitution or other governing char-

73 (1959) [hereinafter LMRDA LEG. HIST.]; *see* Seattle-First National, 475 U.S. 192, 205 n.11 (1986).

231. 104 CONG. REC. 11184 (1958); *see* 475 U.S. at 205 n.11. Senator Knowland's proposed amendment would have required unions to establish an initiative and referendum process using a secret ballot for amending a union's constitution or recalling an officer. 104 CONG. REC. at 11184. The amendment was defeated. As the majority concluded, in the words of Senator Ervin, "[w]e ought not to undertake to dot every 'i' and cross the very last 't' for local unions." *Id.* at 11191; Brief of FIEA, *supra* note 202, at 43.

232. 104 CONG. REC. at 11461; 475 U.S. at 205 n.11.

233. S. 1137, 86th Cong., 1st Sess. § 103(4) (1949), *reprinted in* 1 LMRDA LEG. HIST., *supra* note 230, at 277; 475 U.S. at 205 n.11.

234. 475 U.S. at 205 n.11; Steelworkers v. Sadlowski, 457 U.S. 102, 117 (1982); *see* S. REP. No. 1684, 85th Cong., 2d Sess. 4-5 (1958).

235. 457 U.S. at 116; *cf.* Sargent v. United Transp. Union, 333 F. Supp. 956, 957 (W.D.N.Y. 1971) ("The policy of Congress is one of minimal intervention with union elections."); Schultz v. United Steelworkers of America, 312 F. Supp 1044, 1046 (W.D. Pa. 1970) (LMRDA does not purport to take away from unions' governance over their internal affairs, but strictly limits official interference in internal affairs of unions). Congress' determination to limit intrusions into internal union decisionmaking was again apparent in the late 1950s, when Senator Knowland sought to amend the Kennedy-Ives bill to require that certain collective bargaining agreements be ratified by a majority vote of the union members in the unit covered by the collective bargaining agreement. S. 3974, 85th Cong., 2d Sess., 104 CONG. REC. 11461 (1958). The amendment was defeated because it was inconsistent with the principle of "giving the unions the right to govern themselves," *id.* at 11462, and therefore was "unduly intrusive into union affairs." *Id.* (Sen. Morse); Brief of FIEA, *supra* note 202, at 44 n.24.

236. Hale, *supra* note 23, at 732. Even the LMRDA, which governs internal union elections in general, does not require an election. *Id.* at 732-33 & n.120; *see e.g.*, Kahn v. Hotel and Restaurant Employees' and Bartenders' Int'l Union, 469 F. Supp. 14 (N.D. Cal. 1977), *aff'd*, 597 F.2d 1317 (9th Cir. 1979); *see also* Confederated Indep. Union Local One v. Rockwell-Standard Co., 465 F.2d 1137, 1140 (3d Cir. 1972); BELLACE & BERKOWITZ, *supra* note 170, at 26-28.

237. *See, e.g.*, Kahn v. Hotel and Restaurant Employees' and Bartenders' Int'l Union, 469 F. Supp. 14 (N.D. Cal. 1977), *aff'd*, 597 F.2d 1317 (9th Cir. 1979).

238. 29 U.S.C. §§ 401-531 (1988).

239. *Id.* §§ 411-15.

240. *See infra* note 266 and accompanying text.

ter require a vote of the general union membership on merger or affiliation issues.[241] The Senator later withdrew these proposals from the "bill of rights" which was ultimately adopted by the Senate.[242]

One of the central issues in the debate on the LMRDA was whether to give the Board the responsibility for enforcing the new statute. Congress ultimately declined to give the Board any role, opting instead for judicial enforcement of the statute through private suits[243] or, in the case of Title IV, through suits filed by the Secretary of Labor.[244]

For over thirty years, the Board treated union affiliation elections as internal union affairs and made no attempt to judge or evaluate the procedures used in these elections.[245] Not until Members Jenkins and Zagoria advocated a "due process" standard in their dissent in *North Electric Co.*,[246] did the Board consider the possibility of scrutinizing the internal election procedures. Prior to the Supreme Court's decision in *Seattle-First National*, the Board suggested that if union affiliation elections were truly an internal union affair, there would be no reason to apply a due process test.[247] Since the Court has eliminated any doubt regarding the internal nature of affiliation elections,[248] the time has come for the Board to abandon the due process standard.

---

241. The McClellan bill provided that the "constitution and bylaws or other governing charter" of every labor organization would contain provisions to guarantee members the following rights:

> [sec.102] (5) AFFILIATED ORGANIZATIONS. — No organization or fund . . . shall be created or financed by the funds of a labor organization except by the general vote of the labor organization
>
> . . .
>
> [sec.103] (4) MERGERS OF LOCALS OR TRANSFER OF MEMBERSHIP OR FUNDS. — No merger of a local labor organization with any other local labor organization, and no transfer of membership or funds from one local labor organization to another shall take place except after approval by a general vote of each local labor organization to be merged (in the case of a merger), each local labor organization affected (in the case of a transfer of membership), and the local labor organization from which funds are to be transferred (in the case of a transfer of funds), upon due notice stating in detail the purpose of the merger or transfer.

S. 1137, 86th Cong., 1st Sess. §§ 102(5), 103(4), (1959), *reprinted in* 1 LMRDA LEG. HIST., *supra* note 230, at 272, 277.

242. 105 CONG. REC. 5810 (1959), *reprinted in* 2 LMRDA LEG. HIST., *supra* note 230, at 1102; Brief of FIEA, *supra* note 202, at 46. The "bill of rights" is now codified as Title I of the LMRDA. 29 U.S.C. §§ 411-15 (1988).

243. 29 U.S.C. § 412 (1988).

244. *Id.* § 482.

245. *See, e.g.*, Waterway Terminals Corp., 120 N.L.R.B. 1788, 1789 (1958) ("whether or not the membership meeting is called in conformity with the Union's constitutional requirements or whether or not the assignment of contracts or assets are proper, is no concern of the Board"); Ohio Hoist & Mfg. Co., 108 N.L.R.B. 561, 576 (1954) (merger of two international unions was "nothing more than a change in the internal organization of the certified union in which the Board does not, and the employer may not, have any interest so far as the legality of the change is concerned"); *see also supra* note 150 and accompanying text.

246. 165 N.L.R.B. 942, 943-44 (1967) (Members Jenkins and Zagoria, dissenting).

247. Amoco IV, 262 N.L.R.B. 1240, 1241 (1982).

248. *See generally* Seattle-First National, 475 U.S. 192 (1986).

2. *Violation of the Due Process Standard Does Not Demonstrate a Lack of Majority Support*

The Board justifies its due process test as necessary to assure majority support for the affiliation or merger.[249] The Board's inquiry is misguided, however, because the presence or absence of "due process" is not a reliable indictor of whether a majority of the employees in a bargaining unit favor affiliation.[250] As the Supreme Court has noted, the act of affiliation itself "has no probative value concerning the employees' choice of the union as their collective bargaining representative."[251] The only appropriate inquiry by the Board following an affiliation election is whether the successor labor organization continues to constitute a representative of the employees' "own choosing."[252]

In scrutinizing an internal union election for adequate due process, the Board seeks evidence of continued majority support for a post-affiliation union in the wrong place. Certainly large, mature, sophisticated national unions may conduct their elections with Board-like decorum, and one might argue that such formality is desirable in all elections. However, the reality is that many unions, particularly smaller independents or locals, may legitimately reach a decision on internal matters in an extremely informal manner.[253] But whether the employees vote in a formal, Board-like election, or express their preference by voice vote or by scribbling their choice on paper towels which are passed from hand to hand before being deposited in a shoe box, has absolutely no bearing on the question of whether a majority of the employees in the unit support the incumbent union.

Unions conducting affiliation elections have left ballot boxes unattended,[254] failed to keep an accurate record of voters to assure that no one voted twice,[255] and even failed to preserve absolute secrecy in voting.[256] The

249. *See* Financial Inst. Employees of Am., Local 1182 v. NLRB, 752 F.2d 356, 360 (9th Cir. 1984).

250. The concern with majority support is, of course, appropriate, since the only legal basis for rejecting an internal affiliation is the conclusion that the post-affiliation union is not supported by a majority of the members of the bargaining unit. *See Seattle-First National*, 475 U.S. at 202, 205-06.

251. *Id.* at 203 n.10 (citing American Range Lines, 13 N.L.R.B. 139, 154 (1939)); *see also* Metropolitan Life Ins. Co., 91 N.L.R.B. 473, 485 (1950) ("[M]ere affiliation or change therein does not create a question of representation.").

252. Canton Sign Co., 174 N.L.R.B. 906, 909 (1969).

253. *See, e.g.*, Ventura County Star-Free Press, 279 N.L.R.B. 412 (1986) (members met in an employee's living room and voted by marking blank pieces of paper torn from larger sheets and depositing their ballots in a hat).

254. *See, e.g.*, News/Sun-Sentinel Co., 290 N.L.R.B. 1171, 1176 (1988).

255. *See, e.g., id.*; American Bridge Div., U.S. Steel Corp., 185 N.L.R.B. 669, 670 (1970) (ballots not marked by number nor names checked before distributing ballots).

256. *See, e.g.*, Ventura County Star-Free Press, 279 N.L.R.B. 412, 414, 419 (1986) (ballots marked on blank paper in member's living room and collected in a hat); Aurelia Osborn Fox Memorial Hosp., 247 N.L.R.B. 356, 357, 359 (1980) (vote was a "standing, nonsecretive" vote); *American Bridge*, 185 N.L.R.B. at 670 (ballots were marked in the open and members, including officers, saw how others voted).

Board's response to such lax procedures has been "extremely variable and unpredictable," giving approval to some affiliations despite lax election procedures, while invalidating others conducted under similar circumstances.[257] Practically speaking, the Board finds the requisite due process in the overwhelming majority of affiliation elections. Yet even in those cases where the Board has found inadequate due process, there has been no evidence that any employee objected to the voting procedure or that the vote in any manner failed to represent the will of the majority of employees voting.[258] To the contrary, the attack on procedure has been consistently raised only by the employer.

The Board's examination of every union affiliation election for "due process" exceeds the Board's statutory authority and violates federal labor policy prohibiting unnecessary interference in internal union affairs. The Supreme Court wisely recognized in *Seattle-First National*[259] that an affiliation or merger is an internal union affair in which the Board has no statutory right to intervene. The affiliation or merger process is so much a part of the union's internal operation and so divorced from matters of representation that the Court had no difficulty in concluding that those employees who choose not to join the union have no right to vote in such elections. In light of the Supreme

257. REGULATION OF BARGAINING RIGHTS, *supra* note 28, at 15. *Compare* Samuel P. Katz, 231 N.L.R.B. 1194 (1977) (merger of two locals approved despite lack of completely secret balloting); *American Bridge*, 185 N.L.R.B. 669 (1970) (ballot not completely secret, no eligibility list or other safeguard to prevent members from voting twice); *and* Safeway Steel Scaffolds Co., 173 N.L.R.B. 311 (1968) (merger of two locals approved by membership after it had occurred) *with* J. H. Day Co., 204 N.L.R.B. 863 (1973) (notice not posted in accordance with union bylaws, no safeguards to prevent members from voting twice, some ballots were printed and others not); *and* Fall River House, 198 N.L.R.B. 1123 (1972) (members polled informally).

At least one past Board member advocated strict scrutiny of due process. *See* A. W. Winchester, 226 N.L.R.B. 1006 (1976) (Member Walther, dissenting); Bear Archery, Div. of Victor Comptometer Corp., 223 N.L.R.B. 1169 (1976) (Member Walther, dissenting). Some of the courts of appeals, most notably the Third and Sixth Circuits, seem to have adopted the inflexible due process approach. *See, e.g.*, NLRB v. Bear Archery, 587 F.2d 812 (6th Cir. 1977) (adopting Member Walther's dissent below); NLRB v. Canton Sign Co., 457 F.2d 832 (6th Cir. 1972) (denying enforcement of Board order approving merger of two locals because members of one local did not vote); American Bridge Div., U.S. Steel Corp. v. NLRB, 457 F.2d 660 (3d Cir. 1972) (denying enforcement of Board order, *inter alia*, because union did not call special meeting requested by some members to discuss affiliation and ballot was not secret).

258. *See, e.g.*, Amoco IV, 262 N.L.R.B. 1240 (1982) (Board rejected affiliation because nonmembers did not vote, even though the affiliation was approved by vote of 214 to 71, no employee objected to the election, and voting by nonmembers would not affect the result); J. H. Day Co., 204 N.L.R.B. 863 (1973) (Board rejected affiliation despite vote of 75 to 58 with one blank ballot and no objections to voting procedures).

The argument has occasionally been raised that even a unanimous vote is insufficient to demonstrate majority support where less than a majority of the persons eligible voted. However, it has long been established that a majority vote by those eligible voters voting is sufficient to bind the entire unit, even though the effect is decision by a plurality. *See, e.g.*, United States Gypsum Co., 164 N.L.R.B. 931, 931 (1967) (where adequate opportunity to vote is provided to all employees eligible to vote, "the decision of the majority actually voting is binding on all in the conduct of a democratic election").

259. 475 U.S. 192 (1986).

Court's reasoned analysis, there can be no question that any effort by the Board to examine the mechanics of a union's internal election or to specify requirements for secret ballots, proper notice, adequate discussion, or even compliance with the union's own constitution,[260] is beyond the Board's power.

Even more important, the Board's due process inquiry operates to deprive employees of their right to freely choose their collective bargaining representative.[261] The Board has recognized that "a union 'must remain largely unfettered in its organizational quest for financial stability and aid in the negotiating process.' "[262] In order to pursue its quest for stability and strength, a union must be free to affiliate with any other labor organization it may choose. The means for making such choices is often an affiliation election. Once the employees have exercised this statutory right to free choice, the Board should not be allowed to assert a lack of majority support merely because the affiliation election fails to meet a nebulous standard. The Board's rule effectively gives the Board "the power to veto a . . . union's decision to affiliate, thereby allowing [the Board] to directly interfere with union decisionmaking" and employee free choice.[263]

3. *Superior Alternative Remedies Exist for Employees*

Finally, it is important to note that union members who are truly disenfranchised in an affiliation decision do not lack a source of redress in the absence of a due process standard. Rather, they may utilize either the procedures of the LMRDA[264] or the Board's decertification procedure.[265]

260. Employers have frequently argued that an affiliation election was improper because the union failed to provide the notice of the affiliation election required by its constitution, or because it failed to require a two-thirds vote or meet some other stricture of its constitution. *See, e.g.*, Waterway Terminals Corp., 120 N.L.R.B. 1788 (1958). It is well established, however, that a union has the power to interpret its own constitution, and the Board has no authority to examine compliance. Papianni v. International Assoc. of Bridge, Structural and Ornamental Iron Workers, Local 11, 622 F. Supp. 1559, 1567 (D.N.J. 1985); *see* 29 C.F.R. § 452.3 (1991) ("The interpretation consistently placed on a union's constitution by the responsible union official or governing body will be accepted unless the interpretation is clearly unreasonable."). Any remedy for failure to provide rights set forth in the union's constitution must come from another statutory authority. An aggrieved employee may assert a claim under Title I of the LMRDA if the employee has not been treated equally with fellow employees under the union constitution. Alternatively, the employee may be able to assert a claim under Title V of the LMRDA if a union officer has breached her fiduciary duty by compromising a member's political rights. *See* 29 U.S.C. § 501 (1988); BELLACE & BERKOWITZ, *supra* note 170, at 194-95. Under some circumstances, employees may also sue their union for breach of the union constitution under section 301 of the Act, 29 U.S.C. § 185 (1988). *See infra* note 268.

261. *See* NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946) (Board entrusted by Congress "to insure the fair and free choice of bargaining representatives by employees"). *See generally infra* notes 299-302 and accompanying text.

262. 475 U.S. at 199 n.5 (quoting Williamson Co., 244 N.L.R.B. 953, 955 (1979)).

263. *See id.* at 209.

264. *See* 29 U.S.C. §§ 401-12 (1988). An aggrieved union member may bring a civil suit in federal court. *Id.* § 412.

265. *See infra* note 267 and accompanying text (explaining the Board's decertification procedure).

Although the LMRDA does not require that union members be permitted to vote in affiliation elections, it does guarantee them equality in exercising whatever rights are granted by a union's constitution and bylaws.[266]

Since the LMRDA specifically protects only the rights of union members, nonmembers cannot seek protection under that statute. However, both members and nonmembers may turn to the Board's decertification process if they believe that an affiliation vote in favor of a new union was procedurally defective and did not reflect the true sentiments of members of the bargaining unit.[267] If the Board, following an investigation, finds that majority support for the post-affiliation union is in fact uncertain, it will conclude that a question of representation exists and order a representation election which will be conducted with the same formality and due process guarantees as an initial representation election.[268]

---

266. *See* BELLACE & BERKOWITZ, *supra* note 170, at 19-23, 26. The LMRDA specifically grants

> [e]very member of a labor organization . . . equal rights and privileges within such organization . . . to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C. § 411(a)(1) (1988).

267. A decertification election is substantially the same as a representation election, except the result is to decertify rather than certify a union. Any employee or labor organization can file such a petition upon a showing of support from as little as 30% of the affected bargaining unit's members. 29 U.S.C. § 159(c) (1988); NLRB MANUAL, *supra* note 13, at § 11,002.2 (¶ 10,022), § 11,020 (¶ 10,200-10,223); *see Seattle-First National*, 475 U.S. at 198, 204, 205; *cf.* East Ohio Gas Co., 140 N.L.R.B. 1269, 1283 (1963) ("If it should dawn upon [the employees] in the future that they acted unwisely in affiliating . . . they still have a remedy . . . by use of the Board's processes.") (Member Rogers, dissenting). During the term of a collective bargaining agreement, however, the Board's contract bar rules may prohibit such an election. *See supra* note 49.

268. *See supra* notes 38 & 73. Several other alternative remedies exist. Disgruntled employees may resort to self-help measures such as revoking dues checkoff authorization, or electing to assume "financial core" membership rather than full union membership. *See supra* note 149 (explaining "financial core" membership). Employees who believe they have been disenfranchised as a result of violations of their union constitution may also have a remedy for breach of contract under section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1988). The Supreme Court has recently held that an individual union member may sue her union under section 301 for violations of the union constitution, at least when that constitution can be construed as a contract between an international union and a local. Woodell v. International Brotherhood of Elec. Workers, Local 71, 112 S. Ct. 494 (1991).

It is also arguable that employees could file an unfair labor practice charge against the union, alleging a violation of section 8(b)(1) of the NLRA, 29 U.S.C. § 158(b)(1) (1988). That provision prohibits a union from restraining or coercing employees "in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(b)(1)(A) (1988). Since employees have the right under section 7 to bargain collectively through "representatives of their own choosing," 29 U.S.C. § 157 (1988), a union that interferes with the exercise of that right by denying employees a fair internal affiliation election could be deemed to violate section 8(b)(1). *See* International Ass'n of Bridge, Structural & Ornamental Iron Workers (Walker Construction Co.), 285 N.L.R.B. 770 (1987).

B. Adventure Into the Absurd: The Board's Continuity Inquiry

Early Board decisions on affiliations and mergers limited their inquiry into continuity of representation to whether the membership in each organization was substantially the same.[269] This initial criterion had some semblance of rationality, for if the membership in the new union radically differed from that in the old one, there might reasonably be some question as to whether a majority of the employees in the bargaining unit supported the post-affiliation union. In contrast, the current Board inquiry into whether a significant change has taken place in the union's organization, structure, or internal procedures is completely unrelated to the crucial question of whether the post-affiliation union is supported by a majority of the employees in the bargaining unit. Indeed, in making "change" the focus of its inquiry, the Board has adopted an approach that is practically counterproductive and analytically absurd.

The Supreme Court in *Seattle-First National* implicitly recognized the problem with the Board's continuity inquiry when it noted that a union affiliation "*may* substantially change a . . . union's relationship with the employees it represents."[270] Such changes raise a question of representation only "if it is unclear whether a majority of employees continue to support the reorganized union."[271] However, the Court observed that, despite the changes precipitated by affiliation, "[i]n many cases a majority of employees will continue to support the union."[272]

The fundamental problem with the Board's inquiry is that it is tautological. The Board sees significant change as an indicia of a question of representation. Yet it looks for change in a circumstance where change was the *very goal sought by the union*.[273] The Board has recognized that affiliations by un-

269. *See, e.g.*, Harris-Woodson Co., 85 N.L.R.B. 1215 (1949); M. & M. Wood Working Co., 6 N.L.R.B. 372, 380 (1938).

270. 475 U.S. at 202 (emphasis added). The Court was, of course, addressing the question of whether nonmembers have a right to vote, an issue that arose out of the Board's due process inquiry. The Court never reached the continuity issue, however, because it had not been raised below. *See supra* note 211 and accompanying text. However, the principles articulated by the Court apply equally to the continuity and due process inquiries.

271. 475 U.S. at 202.

272. *Id.* at 203; *see* Western Commercial Transp., 288 N.L.R.B. 214, 218-19 (1988) (Member Johansen, dissenting). In *Western Commercial*, a small independent union representing 136 employees of a single employer voted to affiliate with the 8500 member District Lodge 776 of the International Association of Machinists. Applying its traditional continuity criteria, the Board concluded that a question concerning representation was raised by the affiliation and refused to grant the requested amendment to certification. Member Johansen dissented, noting that a question concerning representation is raised only when there is some question whether a "majority of employees continue to support the reorganized union." *Id.* at 218. The facts of the case left no doubt that a majority of the employees did support the post-affiliation union. Therefore, in light of *Seattle-First National*, Member Johansen found no question concerning representation and would have granted the petition.

273. Ellen Jean Dannin, *Union Mergers and Affiliations: Discontinuing the Continuity of Representation Test*, 32 LABOR L. J. 170, 175 (1981).

ions do not generally destroy continuity of representation.[274] Yet most affiliations result in numerous changes. If an independent union affiliates with a large international such as the United Auto Workers, it will be subject to the international's constitution and it will lose some autonomy. The fundamental change wrought, becoming bigger and stronger, is precisely what the union sought.[275] Certainly the affiliation has effected structural changes, including, perhaps an exponential increase in size and a change in officers. Because such organizational changes, without more, fall under the rubric of employee free choice,[276] the changes should not be viewed as "alter[ing] the representative character of the bargaining agent."[277]

Under the Board's current rule, the agency must resort to a legal sleight of hand or even outright fiction to conclude that no change took place following affiliation or merger, and that the newly affiliated union is nothing more than the old union under a new name.[278] Most affiliations result in more than

274. 475 U.S. at 203 n.10; Brief of NLRB, *supra* note 13, at 16 n.10.

275. *See* 475 U.S. at 199 n.5. The suggestion that radical change might raise a question concerning representation seems to have originated with the Sixth Circuit, which suggested that affiliation by a small union with a much larger union *ipso facto* created a question as to whether the membership of the pre-affiliation union supported the post-affiliation union. Dickey v. NLRB, 217 F.2d 652, 655 (6th Cir. 1954); *see supra* text accompanying notes 102-08. The same principle was later adopted by the Third Circuit in American Bridge Div., U.S. Steel Corp. v. NLRB, 457 F.2d 660, 664 (3d Cir. 1972). Other circuits have declined to follow. *See, e.g.*, NLRB v. Insulfab Plastics, 789 F.2d 961, 967-68 (1st Cir. 1986); Carpinteria Lemon Ass'n v. NLRB, 240 F.2d 554 (9th Cir. 1956), *cert. denied*, 354 U.S. 909 (1957).

The Board has never formally adopted the principle espoused by the Third and Sixth Circuits. *See, e.g.*, May Dep't Stores Co., 289 N.L.R.B. 661, 666 (1988) (Board rejected per se rule that affiliation of a local with an international union raises a question concerning representation); Montgomery Ward & Co., 188 N.L.R.B. 551 (1971) (amendment-to-certification petition approved when Retail Clerks Local 886, with 500 members, merged into Local 692 with 11,000 members); American Bridge Div., U.S. Steel Corp., 185 N.L.R.B. 669 (1970) (amendment-to-certification petition approved when 304 member independent union affiliated with and became a local of the 1.12 million member United Steelworkers), *enforcement denied*, 457 F.2d 660, 664 (3d Cir. 1972). Rather, the agency has applied its traditional continuity of representation criteria to inquire whether there has been a change in union officers, dues structure, the union constitution, or other day-to-day operations of the union. Because affiliation by a small independent union with a substantially larger international inevitably affects those elements, the Board has sometimes refused to recognize such an affiliation primarily on the grounds of the difference in size of the two organizations. *See, e.g.*, Western Commercial Transp., 288 N.L.R.B. 214 (1988) (affiliation of 136 member bargaining unit with 8500 member District Lodge of international union disapproved); *cf.* Pacific Southwest Container, 283 N.L.R.B. 79 (1987) (Board set aside representation election when, prior to election, the petitioning union merged with another international union, resulting in a significant increase in size in the post-merger local, despite the fact that a majority of the employees knew of the merger and supported it); Jasper Seating Co., 231 N.L.R.B. 1025 (1977) (Member Penello, concurring) (affiliation of 49 member independent into 30,000 member international created a question concerning representation).

276. Canton Sign Co., 174 N.L.R.B. 906, 909 (1969).

277. *Id.* at 908.

278. *See* Action Automotive, Inc., 284 N.L.R.B. 251, 254 (1987) ("[I]t is difficult to imagine an affiliation or merger that would not expose members to a new set of obligations . . . or result in a loss of autonomy and control . . . ."); Hamilton Tool Co., 190 N.L.R.B. 571, 576 (1971) (Chairman Miller, concurring). In *Hamilton Tool*, the Board approved a petition to

a new name. They often yield significant changes in the organization, strength, and efficiency of the post-affiliation union. However, such changes do not suggest that any question concerning representation has been raised.[279] The fact that the Blacksmiths merge with the Boilermakers,[280] or that a small independent union affiliates with a large international, provides no basis for rebutting the presumption that a majority of the members of the bargaining unit continue to support the new union. The Fourth Circuit in an early affiliation case cautioned against such misguided analysis, opining that:

> Metaphysical arguments as to the nature of the entity with which [the employer is] dealing should not be permitted to obscure the substance of what has been done or to furnish a smoke screen behind which the employer may with impunity repudiate its obligations to bargain under the Act.[281]

Quemetco[282] stands as a lone example of rationality in the Board's development of the continuity test. There, the Board upheld the affiliation of a small independent union with the Teamsters, even though there was little or no continuity in the wake of significant changes in the union. The independent union membership, however, voted unanimously to affiliate with the Teamsters, and no opposition to the affiliation was expressed by any union member. Concluding that continuity of representation is not of "paramount importance in an affiliation case,"[283] the Board observed:

---

amend certification where a small independent union affiliated with the United Auto Workers (UAW). Chairman Miller concurred in the result, but suggested that the finding that the post-affiliation UAW local was the same entity as the pre-affiliation independent might be "no more than a legal fiction." *Id.* He observed that a local of a large international union is "of a quite different character from a totally local, 'home-grown' and autonomous independent union," and "[f]ew realists in the world of industrial relations would assert that a local of the Auto Workers or the Steelworkers is the 'same union' as the autonomous predecessor independent." *Id.* Miller suggested that what the Board was really doing in the affiliation cases was to "permit certification of a new and different bargaining agent." *Id.* However, he found this result "quite a reasonable accommodation between the [Act's] sometimes inconsistent purposes of industrial stability and freedom of choice." *Id.*

279. *See* Garlock Equip. Co., 288 N.L.R.B. 247, 255 (1988). In *Garlock*, the administrative law judge felt constrained to find that the affiliation of an independent union representing 71 employees with a District Lodge of the International Association of Machinists, representing 10,000 to 12,000 employees, raised a question concerning representation. However, the judge expressed concerns about the Board's approach to mergers and affiliations, and quoted extensively from a law review note which criticized the Board's approach. The judge observed, *inter alia*, that the idea that a change in the identity of an existing union raises a question concerning representation " 'finds no support in the statute.' " 288 N.L.R.B. at 255 (quoting *Union Affiliations, supra* note 58, at 442). He further observed that "while affiliations and mergers usually do indeed materially alter a representative's identity, and . . . to say otherwise is to indulge in fiction, the metaphysical approach — assessing the extent to which the new creature resembles the old one — is pointless." *Id.*

280. *See* Ohio Hoist & Mfg. Co., 108 N.L.R.B. 561 (1954).

281. NLRB v. Harris-Woodson Co., 179 F.2d 720, 723 (4th Cir. 1950).

282. 266 N.L.R.B. 1398 (1976), *overruled by* Western Commercial Transp., 288 N.L.R.B. 214 (1988).

283. *Id.* at 1399.

> [W]here, as here, the employees unanimously elect to affiliate with another union, we are much more concerned with giving effect to the employees' free choice of bargaining representative than with the so-called "continuity of representation" which might be disrupted by such election. For it is the employees' freedom to select a bargaining representative of their own choice which is of paramount importance under the Act.[284]

Unfortunately, *Quemetco* seems to be an isolated decision. More unfortunate yet, the Board recently overruled the decision, holding that the continuity test must be applied to every union affiliation election.[285]

Generally, the post-affiliation union, will be the unequivocal successor to the pre-affiliation union,[286] and will assume all of the rights, responsibilities,

---

284. *Id.*

285. Western Commercial Transp., 288 N.L.R.B. 214 (1988). This case arose when a small, financially troubled independent union representing approximately 136 employees of Western Commercial Transport voted to affiliate with District Lodge 776 of the International Association of Machinists, which represented 8500 employees and was signatory to 18 collective bargaining agreements with various employers in a nine-county area. After voting to affiliate by a vote of 71 to 13, the newly affiliated union filed a petition to amend its certification.

The employer opposed the amendment on the ground, *inter alia*, that the affiliation constituted a substantial change in the identity of the independent. The Board agreed, citing the numerous changes that would occur in the independent as a result of the affiliation, including changes in dues, transfer of responsibility for day-to-day contract administration to a District Lodge organizer, and the vacating by the independent's officers of their positions. The Board concluded that as a result of affiliation, the independent would "undergo substantial changes in size, organizational structure, and administration," which would "be reflected in its relationships with its members and the unit it represents." *Id.* at 217. The Board was also particularly concerned with the independent's loss of autonomy and control over the selection of its representatives.

In a most disturbing statement, the Board declared that it was not "directly inquiring into whether there is majority support for the labor organization after the changes at issue." Rather, the agency claimed it was

> seeking to determine whether the changes are so great that a new organization has come into being — one that should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first instance.

Id. at 217.

The Board then discussed the Supreme Court's decision in *Seattle-First National*. Relying on language by the Court which noted that if changes in the post-affiliation union are "sufficiently dramatic," an affiliation "*may* raise a question of representation," 475 U.S. 192, 206 (1986) (emphasis added), the Board overruled *Quemetco* to the extent that it held that "an amendment of certification may be granted notwithstanding evidence showing the absence of continuity of representative." 288 N.L.R.B. at 218 n.13. The Board found that *Quemetco* was inconsistent with the weight of Board precedent in this area.

It is noteworthy that *Western Commercial* was a 3-1 decision, with Member Johansen dissenting on the grounds that the real issue was simply whether District Lodge 776 was supported by a majority of Western Commercial's employees. He found the majority decision contrary to the Act's policies of promoting stable bargaining relationships, prohibiting unnecessary interference in internal union affairs, and protecting the employees' freedom to select the union of their choice. *Id.* at 219 (Member Johansen, dissenting).

286. *See, e.g.*, Dornan v. Sheet Metal Workers' Int'l Ass'n, 905 F.2d 909 (6th Cir. 1990).

and obligations of its predecessor.[287] Usually, the obligations include continued performance under and administration of the current collective bargaining agreement. Consequently, affiliation or merger does not affect the terms and conditions of employment of the union members, nor does it impact in any way the legal or contractual obligations of the employer, the union, or the employees. In the absence of any such change, and in the absence of clear and convincing evidence[288] that the new union lacks majority support, the Board and the employer must maintain the status quo.

An incumbent union enjoys a rebuttable presumption of majority status.[289] Only under unusual circumstances can an employer rebut the presumption and withdraw recognition of the incumbent bargaining representative.[290] Continuity, or lack thereof, however, provides no evidence to rebut this presumption.

The basic purpose of the Act is "to preserve industrial peace."[291] Congress believed that it could reduce labor unrest by "placing an employer under a statutory duty to acknowledge as the legal representative of all his employees any union designated by the majority."[292] Consistent with the goal of industrial tranquility, the Act encourages stable, continuous bargaining relationships.[293] It "assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation."[294]

The Board's continuity-of-representation test contravenes this assump-

287. *See id.* The Sixth Circuit noted the similarities between a union successor which generally preserves the status quo, and a successor employer which often must bargain with the union and succeed to its predecessor's obligations.

288. *See* Destileria Serrales v. NLRB, 882 F.2d 19, 21 (1st Cir. 1989).

289. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38 (1987).

290. For a discussion of when withdrawal of recognition is permitted, see *infra* notes 317-20 and accompanying text. *See also* 29 U.S.C. § 158(a)(5) (1988); Brooks v. NLRB, 348 U.S. 96 (1954).

291. Seattle-First National, 475 U.S. 192, 208 (1986); *see Brooks,* 348 U.S. at 103 (underlying purpose of statute is industrial peace); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-02 (1952) (Act is "designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers"); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937) ("Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace."); *see also* 29 U.S.C. § 151 (1988).

292. Archibald Cox, *The Duty to Bargain in Good Faith,* 71 HARV. L. REV. 1401, 1407 (1958); *see also* Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 HARV. L. REV. 1, 3 (1947).

293. 475 U.S. at 209; *see also Brooks,* 348 U.S. at 103 ("Congress has devised a formal mode for selection and rejection of bargaining agents . . . with a view of furthering industrial stability").

294. 475 U.S. at 209; *see also id.* at 202-03 ("the industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship"); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38 (1987) (presumptions regarding union's majority status are intended to "promote stability in collective-bargaining relationships, without impairing the free choice of employees").

tion and disrupts industrial peace and stability, because it allows an employer to invoke the metaphysical defense of continuity based upon inevitable changes in the structure or organization of the post-affiliation union. This challenge may be raised even though the new or surviving labor organization has succeeded the original union chosen by the employees, no employee has complained about the affiliation nor made any attempt to decertify the post-affiliation organization, and the successor organization is supported by a majority of the employees.[295]

The Board recently suggested that in determining whether a question concerning representation has arisen because of the lack of continuity, the agency does not "directly inquir[e] into whether there is majority support for the labor organization after the changes at issue."[296] Rather it is concerned with whether the changes have resulted in a new organization.[297] This approach, however, contravenes the clear statement of the Supreme Court that organizational and structural change in a union raises a question concerning representation *only* "if it is unclear whether a majority of employees continue to support the reorganized union."[298]

No court or legislator would dream of suggesting that the Act grants the Board the authority to choose the collective bargaining representative for a unit of employees, or to review its officers, its constitution, or its dues structure, or even to make any judgement about such internal matters. Yet under the guise of determining whether a failure of continuity has created a question concerning representation, the Board effectively interferes with these internal matters, exceeding its statutory authority, while causing instability in the bargaining relationship. In addition, the Board allows employers to engage in a debate of absurd metaphysics in an effort to rid themselves of the incumbent union.

C. Employers Have No Right to Scrutinize Internal Union Affairs

One of the central principles embraced by the Act is the right of employees to freely choose their collective bargaining representatives.[299] It is the "de-

295. *See* 475 U.S. at 209.

296. Western Commercial Transp., 288 N.L.R.B. 214, 217 (1988).

297. *Id.*

298. *Seattle-First National*, 475 U.S. at 202. The Court observed that:

> [A]s is the case with any organizational and structural change, a new affiliation may substantially change a certified union's relationship with the employees it represents. These changed circumstances may in turn raise a "question of representation," if it is unclear whether a majority of employees continue to support the reorganized union.

Id. Later the Court reemphasized the importance of the issue of majority support, declaring emphatically that "dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support." *Id.* at 205-06. Such an election is, of course, the remedy when the Board concludes that a question concerning representation exists. *See also Western Commercial*, 288 N.L.R.B. at 218 (Member Johansen, dissenting).

299. *See, e.g.*, International Ass'n of Machinists v. NLRB, 362 U.S. 411, 428 (1960) ("the interest in employee freedom of choice is one of those given large recognition by the Act");

clared policy of the Act to protect the full freedom of employees to designate bargaining representatives *of their own* choosing."[300] In furtherance of the principle of free choice, the NLRA makes it an unfair labor practice for an employer to dominate a union or interfere with its organization or affairs.[301] The mere suggestion that an employer has a right to interfere with the employees' choice of their collective bargaining representative is anathema to the Act. Nevertheless, under the current Board's regulation of union affiliation elections, such interference is not only encouraged, it has become the norm.[302]

Since it is now settled that a union affiliation election is an internal union affair,[303] "the Board does not, and the employer may not, have any interest as far as the legality" of the merger or affiliation is concerned.[304] To conclude otherwise would "be indicative of interference with and domination of the

---

Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 541 (1943) (Act demands unfettered freedom of choice); Lane Wells Co., 79 N.L.R.B. 252, 253 (declared policy of the Act is "to protect the full freedom of employees to designate bargaining representatives of their own choosing"); *see also* Richard Litvin, *Fearful Asymmetry: Employee Free Choice and Employer Profitability in* First National Maintenance, 58 IND. L. J. 433, 476 (1983) (Congress deemed that such free choice was necessary to commerce).

300. Lane Wells Co., 79 N.L.R.B. 252, 253 (1948) (emphasis in original); *see also* Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 283 (1978) ("The Act was intended to protect the free choice of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining."). This principle of employee freedom of association has sometimes been deemed "a fundamental right that pre-existed enactment of the Act." *Id.* at 283; *see* Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

301. 29 U.S.C. § 158 (a)(2) (1988); *see* ARCHIBALD COX, DEREK C. BOK, RICHARD A. GORMAN, & MATHEW W. FINKIN, LABOR LAW: CASES AND MATERIALS 198-99 (11th ed. 1990); *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1666-67 (1983); *see also* Coppus Engineering Corp. v. NLRB, 240 F.2d 564, 573 (1st Cir. 1957) (Magruder, C.J., concurring).

302. *See, e.g.*, Universal Tool & Stamping Co., 182 N.L.R.B. 254, 254 (1970) (Chairman McCulloch, dissenting) ("The effect of [the Board's] decision is to make the selection of the *employees'* representative a matter of employer free choice."). In *Universal Tool*, 202 of 250 members of the independent UEU attended the affiliation meeting, where they voted 125 to 77 in favor of affiliation with the UAW. After the affiliation, the successor union, UAW Local 1510, retained possession of all assets, records, and files of the UEU, and four former UEU officers became officers in the new UAW Local. However, a group of dissident members attempted to revive the pre-affiliation UEU, and were aided in their efforts by the employer, who paid previously checked-off union dues to the dissident group. Applying the Board's continuity of representation rule, the administrative law judge and the Board found no continuity and held that the employer had no duty to recognize and bargain with Local 1510. Chairman McCulloch was particularly disturbed that the employer delayed recognizing the post-affiliation Local, and then hastily turned over the checked-off dues.

This decision, reached under the umbrella of a continuity analysis, also violates the fundamental principle of majority rule. It is well established that internal union elections (and even Board representation elections) are decided by a majority of the persons actually voting. *See, e.g.*, Hamilton Tool Co., 190 N.L.R.B. 571, 574 (1971) ("when adequate opportunity to vote is provided to all those eligible to vote, the decision of the majority actually voting is binding on all"). The statute makes no provision for dissident voters to negate the results after the election by forming a new union.

303. *See* Seattle-First National, 475 U.S. 192, 204 (1986).

304. Ohio Hoist & Mfg. Co., 108 N.L.R.B. 561, 576 (1954).

internal affairs of a labor organization that borders on the activities prohibited by Section 8(a)(2) of the Act."[305] Yet under the Board's current rule, it is the employer who inevitably causes the affiliation issue to be litigated at length before the Board, by either opposing an amendment-to-certification petition or refusing to bargain and therefore precipitating an unfair labor practice charge. In most affiliation cases, even those employees who may have initially opposed affiliation ultimately acquiesce to the will of the union majority. The Board nevertheless permits employers to unilaterally oppose affiliation and withdraw recognition of the post-affiliation union, even in the absence of a single employee complaint. This procedure may create uncertainty and instability in the collective bargaining relationship for months or even years after the initial affiliation election.[306]

An employer's withdrawal of recognition based upon affiliation or merger alone does nothing more than serve the employer's desire to rid itself of the union entirely.[307] Under current Board law, the employer's superior economic power, which will allow it to endlessly litigate and engage in procedural maneuvers, may keep the union in a state of instability for years. Employees are denied their statutory right to representation "simply because they saw fit to exercise a statutory right of voting to affiliate."[308] This de facto prerogative of employers to interfere in an internal union election and to dictate the employees' choice of their collective bargaining representative, is antithetical to the fundamental policies of the Act.

The case of *Seattle-First National* aptly illustrates the problem. The Firstbank Independent Employees Association first voted to affiliate with the Retail Clerks International Union in February 1978 by a vote of 1206 to 774.[309] In June 1978, the newly affiliated union filed a petition with the Board for an amendment to its certification.[310] In April 1979, the Board granted the petition and amended FIEA's certification.[311] The employer refused to recog-

305. East Ohio Gas Co., 140 N.L.R.B. 1269, 1282 (1963).

306. *See, e.g.*, Hamilton Tool Co., 190 N.L.R.B. 571 (1971).

307. Even if the employer ultimately loses before the Board and is required to bargain with the post-affiliation union, in the meantime, the employer-instigated litigation destabilizes the bargaining relationship for months or even years. Such litigation may undermine and erode support for the union. *See, e.g.*, Chas. S. Winner, 289 N.L.R.B. 62 (1988) (Member Johansen, dissenting).

The only actual circumstance that might support an employer's conclusion that the majority status of a union is questionable is a case where a group of employees attempt to preserve the pre-affiliation union in its original form. Such cases give rise to a "schism," and have generally appropriately been held to raise a question concerning representation. *See, e.g.*, Weatherhead Co. of Antwerp, 106 N.L.R.B. 1266 (1953); *see also* Missouri Beef Packers, 175 N.L.R.B. 1100, 1101 (1969) ("amendments [to certification] are not permitted where the certified representative remains in existence and opposes the amendment"); *cf.* Sewell-Allen Big Star, 294 N.L.R.B. No. 6, slip op. at 6 n.8 (1989).

308. Amoco I, 220 N.L.R.B. 861, 865 (1975).

309. Seattle-First I, 241 N.L.R.B. 751, 751 (1979). The employee vote occurred in February. The actual charter was granted on April 1, 1978. *Id.*

310. *Id.*

311. *Id.* Subsequent to the 1978 affiliation election, the Retail Clerks merged with the

nize and bargain with the newly affiliated union. Subsequent litigation between the union and the employer continued for twelve years on issues of due process and continuity of representation.[312]

This protracted litigation is not uncommon. In the *Amoco* case, a pre-*Seattle-First National* affiliation case, ligitation lasted for seven years.[313] Employer challenges to affiliation elections also lead to absurd evidentiary disputes. For example, in *Dayton Newspapers*,[314] the employer asserted that NEAD had not provided adequate notice to its members of the affiliation meeting, and therefore it failed to provide adequate due process. There was no dispute as to whether a notice was posted, and there was no dispute that the attendance was the highest at any union meeting in memory. Yet hours of testimony were devoted to determining whether the notice was posted 168 hours, *i.e.*, seven, twenty-four-hour days prior to the meeting, or merely 162 hours before the meeting. There was also extensive testimony regarding the

---

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, to create the United Food and Commercial Workers. Therefore, the amended certification was granted to Local 1182 of the United Food and Commercial Workers (UFCW). *Id.*

312. In September 1979, the Board held that the employer had violated section 8(a)(5) of the Act by refusing to bargain with Local 1182. Seattle-First II, 245 N.L.R.B. 700 (1979). The Board sought enforcement of its order in the Ninth Circuit. Subsequently, however, the Board asked the appellate court to remand the case for reconsideration. On remand, the Board reversed its earlier decisions, vacating the amendment of certification and holding that the employer had not violated the Act by refusing to bargain with the union. Seattle-First III, 265 N.L.R.B. 426 (1982).

The union appealed again to the Ninth Circuit, which reversed in December 1984. Financial Inst. Employees of Am., Local No. 1182 v. NLRB, 752 F.2d 356 (9th Cir. 1984). After a petition for rehearing en banc was denied, the Supreme Court granted the petitions of the Board and Seattle-First National Bank for certiorari. In February 1986, the Court affirmed and remanded. Seattle-First National, 475 U.S. 192 (1986).

On remand, the Board addressed the question unanswered in the earlier decisions, concluding that there was continuity of representation between the pre-affiliation independent and the new Local 1182, and, in July 1988, held that Seattle-First National Bank had committed an unfair labor practice. Seattle-First IV, 290 N.L.R.B. 571 (1988). In December 1989, the Ninth Circuit affirmed. Seattle-First Nat'l Bank v. NLRB, 892 F.2d 792 (9th Cir. 1989).

Following the Ninth Circuit decision, Seattle-First National Bank, in January 1990, finally agreed to begin bargaining with Local 1182. Daily Lab. Rep. (BNA) No. 18, at A-4 (Jan. 26, 1990). However, the Bank reserved the right to seek certiorari in the Supreme Court. The petition was denied on June 11, 1990. Seattle-First Nat'l Bank v. NLRB, 110 S. Ct. 2618 (1990). Thus, almost twelve years to the day after the initial affiliation election, the case came to an end and the future of the post-affiliation Local 1182 was secure.

313. The members of an independent union, the Independent Oil Workers Union, Local 14, voted 214 to 71 in May 1974 to affiliate with the Oil, Chemical & Atomic Workers. The employer refused to bargain claiming lack of due process, again because nonmembers did not vote. Not a single employee complained about the results of the election or the voting procedure. Had the union allowed the 97 nonmembers to vote, the result would have been unchanged. Yet the litigation raged from September 1975 until July 1982 — seven years of industrial instability caused solely by the employer. Amoco I, 220 N.L.R.B. 861 (1975); Amoco II, 233 N.L.R.B. 158 (1977); Amoco III, 239 N.L.R.B. 1195 (1979), *remanded*, 613 F.2d 107 (5th Cir. 1980), *rev'd*, 262 N.L.R.B. 1240 (1982) (Amoco IV), *aff'd*, 721 F.2d 150 (5th Cir. 1983).

314. Dayton Newspapers, Case No. 9-CA-23554-2 (NLRB, Complaint issued April 17, 1987); *see supra* notes 1-15 and accompanying text.

size of the notice and whether it was as large as past notices of meetings.[315] The *Dayton Newspapers* case is not atypical. Under the Board's current rule, affiliation cases are often a study in minutia, as employers introduce evidence regarding the size, shape, and color of the ballots, the nature of the notice posted, and similar evidence.

The circumstances under which an employer may legitimately question the status of the union representing its employees are well settled. During the first year following certification by the Board, the incumbent union enjoys an irrebuttable presumption of majority status.[316] An employer is therefore obligated to bargain with the incumbent union unless and until the employer has evidence to rebut the presumption. The employer may not withdraw recognition of the union unless the employer can prove either that the union is in fact no longer supported by a majority of the employees in the bargaining unit, or that the employer has a "reasonable good faith doubt," based upon objective evidence, that the union lacks majority support.[317] The employer may not withdraw recognition merely because the employer suspects that the majority of the employees in the bargaining unit no longer support the union. Rather that supposition must be supported by objective evidence.[318] Indeed, the employer must show "several indicia of loss of majority support."[319]

In stark contrast to this rigorous standard which normally applies to employer withdrawal of recognition, the Board, relying on nothing more than the employer's unfounded conjecture that an affiliation was not supported by a majority of the members of the bargaining unit, routinely allows such withdrawal of recognition following affiliation elections. The mere fact that an affiliation has resulted in change — whether minimal or substantial — in the size, structure, organization, or administration of the post-affiliation union, or that the affiliation election did not observe the decorum of "due process," would not pass muster under the general standard measuring withdrawal of recognition. An affiliation or merger, without more, does not constitute the "objective evidence" necessary to sustain the required "good faith doubt," and therefore provides no basis for the employer's withdrawal of recognition. Absent some evidence other than the affiliation or merger, the law must presume the union's majority status.

---

315. NEAD Brief, *supra* note 3, at 53-57.

316. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 37-38 (1987). A union which is not certified by the Board, but rather is voluntarily recognized by the employer, has an irrebuttable presumption of majority status for a "reasonable time." Royal Coach Lines v. NLRB, 838 F.2d 47, 51 (2d Cir. 1988). That period of time can be as little as a few months, or as much as one year. *Id.*

317. Destileria Serrales v. NLRB, 882 F.2d 19, 20-21 (1st Cir. 1989); *see also* Seattle-First National, 475 U.S. 192, 198 (1986); United States Gypsum Co., 157 N.L.R.B. 652, 656 (1966).

318. GORMAN, *supra* note 42, at 110; *see* NLRB v. Gulfmont Hotel Co., 362 F.2d 588 (5th Cir. 1966).

319. *Destileria Serrales*, 882 F.2d at 21. The employer also bears a heavy burden of proof, as the employer must present "clear, cogent and convincing evidence which indicates that a union's support has declined to a minority." *Id.*

III.
RECOMMENDATION FOR A NEW RULE

When one union affiliates or merges with another, whether the change occurs at the national or local level or both, the only legitimate inquiry to be made by the Board is whether the post-affiliation or post-merger union is supported by a majority of the employees in the bargaining unit. Only in the rare case of a complete schism, in which an employer is faced with a demand for recognition and bargaining both by the post-affiliation union and a splinter segment of the pre-affiliation union, or when the post-affiliation union is unwilling to abide by and administer the current collective bargaining agreement, should an employer have the right to withdraw recognition or oppose an amendment-to-certification petition. Absent those two unusual circumstances, no one other than the members of the affected bargaining unit or their collective bargaining representative should be able to challenge the affiliation.

The most appropriate vehicle for challenging affiliation or merger when such a potential question concerning representation exists is a decertification petition.[320] Under current law, however, the Board's contract bar rules require the dismissal of any election petition filed, if a valid collective bargaining agreement is in effect.[321]

In order to promote national labor policy and preserve the fundamental rights of workers, the Board should completely abandon its current continuity of representation and due process test in favor of a new approach to union affiliation elections. The Board should adopt the following rule:

> 1. A union affiliation or merger without more should, as a matter of law, be insufficient evidence to support an employer's withdrawal of recognition of the post-affiliation union.[322] The employer's

320. *See generally supra* note 267 and accompanying text. Employees could also oppose the amendment-to-certification petition and achieve the same end.

321. *See generally* GORMAN, *supra* note 42, at 54-59. The Act itself prohibits the conduct of an election more than once in any 12 month period. 29 U.S.C. § 159(c)(3) (1988). The Board, however, has adopted its own rules in which a contract will also serve as a bar to an election for a period of up to three years. Generally, if there is a schism, the contract bar rules are not applicable. GORMAN, *supra* note 42, at 57. Thus, in schism cases, a decertification petition can be filed regardless of the term of the collective bargaining agreement. If, however, the successor union refuses to comply with the current, valid collective bargaining agreement, the employer should be able to file a decertification petition. This would require a modification of the Board's rules.

322. There is already some precedent for such an approach. Under the current law, the Board allows an employer to voluntarily recognize a union based solely upon a showing of support for the union through authorization cards. Similarly, the Board has long been willing to issue "*Gissel* bargaining orders" in order to effect the bargaining rights of employees. Such orders can be issued when the union has lost the election, or even when no election has been held, if the employer has so tainted the environment with its unfair labor practices that the "laboratory conditions" necessary for a Board election can never be achieved. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). *See generally* CHARLES J. MORRIS, 1 THE DEVELOPING LABOR LAW 497-503 (2d ed. 1983); CHARLES J. MORRIS, THE DEVELOPING LABOR LAW: FIFTH SUPPLEMENT, 1982-88, at 265-66 (1989).

The Board may issue a *Gissel* bargaining order so long as the union can demonstrate that at

withdrawal of recognition following an affiliation or merger should be a per se unfair labor practice, unless there is clear and convincing evidence of either (i) a genuine schism, in which the pre-affiliation or pre-merger union continues to survive in some identifiable and active form and demands recognition by the employer, or (ii) where the post-affiliation union has refused to succeed to all of the obligations of the pre-affiliation union under the existent collective bargaining agreement and to abide by and administer the agreement.

Where either of these two events has occurred, the employer may file a representation petition, without regard to the Board's contract bar rules.[323] Under no other circumstances should an employer be permitted to oppose, challenge, or interfere with a union affiliation or merger.

2. Except for the foregoing exception, no person or organization should be able to challenge a union affiliation or merger other than a member of the pre-affiliation bargaining unit. If such an employee or group of employees asserts that the post-affiliation union does not represent a majority of the employees in the unit, the proper procedure would be to file a decertification petition[324] or to intervene to oppose an amendment-to-certification petition. The Board should allow such intervention by employees as a matter of right.

In any decertification election held under the proposed rule, the employees should be provided a ballot with three choices: (i) the post-affiliation union; (ii) the pre-affiliation union; and (iii) no

---

some time prior to the issuing of the bargaining order, it was supported by a majority of the employees in the bargaining unit. *See* Gourmet Foods, 270 N.L.R.B. 578 (1984). This majority support is usually shown by signed union authorization cards. The Board accepts the cards as a reliable indicator of employee preference, though it conducts no in-depth investigation to be certain they were gathered without coercion and that they reflect the true desires of the employees. Yet one study found that only 72% of those employees who sign the authorization cards actually vote for the union. JULIUS GETMAN, STEVEN G. GOLDBERG & JEANNE B. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 71 (1976). Hence, under the current Board application of the *Gissel* rule, a union which collects cards from 51% of the members of the bargaining unit may in fact enjoy the unwavering support of substantially less than a majority. Nevertheless, in order to preserve a labor policy favoring free choice and opposing employer interference with that choice, the Board issues *Gissel* orders.

Likewise, in order to preserve the important federal labor policies which advocate industrial peace, stability in the bargaining unit, and free choice, and oppose Board and employer interference in internal union affairs, the Board should accept the results of an affiliation election as evidence of majority support for the post-affiliation union without further inquiry. Any complaints regarding the validity of the election should come from the employees.

323. The rules are Board-made and can be freely modified. Such modification would be an excellent opportunity for the Board to utilize its little used rule-making authority. 29 U.S.C. § 156 (1988); *see* American Hosp. Ass'n v. NLRB, 111 S. Ct. 1539 (1991) (approving the Board's adoption through its rule-making authority of rules concerning the structure of appropriate bargaining units in acute care hospital facilities).

324. The contract bar rules should be amended to permit the filing of a decertification petition following an affiliation election without regard to the expiration date of the current contract.

union. Issues of continuity and due process should be considered irrelevant in the hearing on the decertification petition unless they can be shown to have a clear nexus to the issue of majority support. Under no circumstances should the employer have standing to participate in either an amendment-to-certification or a decertification proceeding.

3. If any employee in the bargaining unit asserts that the election was improper or that the affiliation vote was tainted in some fashion so as not to truly reflect the will of the voting employees, the employee may institute an appropriate action under the LMRDA. If the employee has sufficient evidence that as a result of the alleged improprieties in the election the post-affiliation union is not supported by a majority of the members of the unit, the employee can seek a decertification election as well.[325]

The proposed revisions are all within the authority granted by the Act to the Board. The new rules could be adopted through adjudicatory decisions, as the Board has historically done, or they could be implemented through its rule-making authority.[326]

The proposed new rules would accomplish several important goals. First, they would, consistent with federal labor policy, eliminate employer and Board interference in internal union affairs. Second, they would further the stability in the collective bargaining arrangement sought by the Act by allowing unions to exercise the right to control their own internal affairs, without facing years of litigation and an uncertain relationship with the employer as a result. Finally, the rules would promote efficiency in the Board's processes by eliminating meaningless litigation and reducing the opportunity for employers to use their greater economic clout to engage in protracted litigation in this area.

CONCLUSION

After *Seattle-First National*, there can be no doubt that unless a union affiliation or merger results in a loss of majority support for the post-affiliation union, the affiliation or merger is nothing more than an internal union affair and it raises no question concerning representation. Thus, the only proper inquiry for the Board is whether the post-affiliation union enjoys majority support.

The current two-part test analyzing continuity of representation and due process is unrelated to the issue of majority support. Absence of continuity or due process is not probative of whether the post-affiliation union is supported by a majority of the members of the bargaining unit. Yet the Board continues

325. *See supra* note 267 and accompanying text for an explanation of the decertification procedure.

326. *See supra* note 323.

to adhere to this ineffectual test, with the result that employers are able to turn a simple union affiliation into protracted litigation that may last for years. The Board's approach contradicts federal labor policy and deprives employees of statutorily guaranteed rights, rather than protecting those rights.

In light of the foregoing, the Board should adopt a new rule under which the agency seeks only to determine whether the post-affiliation union is supported by a majority of the employees in the bargaining unit. The act of affiliation or merger alone should not be enough to rebut the continuing presumption of majority support. To protect employees from employer abuses, challenges to affiliations should come only from the affected employees. Federal labor policy, amplified by the Supreme Court's decision in *Seattle-First National*, demands no less.