The Effect of a Petition for Decertification on the Bargaining Process: The Reversal of Dresser Industries

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The Effect Of A Petition For Decertification On The Bargaining Process: The Reversal Of *Dresser Industries*

In *Dresser Industries*, the National Labor Relations Board held that an employee-filed petition for decertification does not permit an employer to refuse to bargain with the incumbent union. This Comment submits that the National Labor Relations Board should return to the rule that *Dresser Industries* expressly overruled. This Comment argues that the Telautograph Corporation rule requiring an employer to refuse to bargain, is the more workable and practical of the two conflicting rules and is more likely to achieve the legislative goals of the National Labor Relations Act.

**INTRODUCTION**

Since 1982, the National Labor Relations Board (NLRB) has given effect to a confusing and chaotic rule regarding the effect decertification petitions have on the bargaining process. *Dresser Industries* held that the mere filing of a decertification petition would no longer require or permit an employer to cease bargaining or executing a contract with an incumbent union. For the prior ten years, the NLRB had adhered to the rule, set forth in *Telautograph Cor-

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3. *Id.* at 1089.
that an employer presented with a decertification petition, could refuse to bargain with a union concerning a new contract pending the NLRB’s resolution of the question concerning representation.

This Comment asserts that the application of the *Dresser* holding is both unworkable and impractical. The decision has failed to attain its desired goal of giving due weight to the incumbent union’s continuing presumption of majority status, in order to best achieve employer neutrality in the upcoming decertification election. Indeed, *Dresser* has transformed the period of time between the employer’s discovery of the filing of the decertification petition and the actual election into a period of chaos. As a result, relations between management and labor are more strained and bargaining is even more strident than ever.

This Comment will compare and contrast *Telautograph* with *Dresser* in order to illustrate the effects *Dresser* has on the bargaining process once a petition for decertification has been filed. Ultimately, this Comment will demonstrate that *Telautograph* provides the better rule because it effectuates the national policy as set forth in the National Labor Relations Act. Consequently, the NLRB should reconsider its present policy, reverse *Dresser*, and reinstate its prior *Telautograph* holding.

**BACKGROUND**

The National Labor Relations Act (NLRA) has declared rules and policy designed to specifically and efficiently regulate collective bargaining and to stimulate the national economy by promoting industrial stabilization and eliminating industrial strife. Further, the goal of the NLRA is to ensure that employers and their employees

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5. Id. at 892.
   It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
9. See 29 U.S.C. § 151 (1982); see, e.g., United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); T. Kheel, Labor Law § 1.01 (1987). Any labor-management disruption is seen as making the vindication of these policies impossible. Id. at 1-1.
can interact together in the absence of substantive governmental regulation to establish mutually satisfactory working and contractual conditions.\textsuperscript{10} Moreover, the NLRA is designed to channel the passions, arguments, and struggles of prior years into constructive open discussions leading to a mutually satisfactory agreement between the employer and the employees,\textsuperscript{11} the maintenance of full production of goods in the national economy, and a normal free flow of commerce.\textsuperscript{12}

As a matter of public policy, workers have a statutory right to join unions and bargain collectively.\textsuperscript{13} This right is protected by providing a governmentally supervised election procedure through which they can select a representing union.\textsuperscript{14} Furthermore, certain “unfair labor practices,”\textsuperscript{15} which serve to undermine the basic objectives of the NLRA,\textsuperscript{16} are forbidden.

It is the sole function of the NLRB to give effect to the declared purpose of Congress in enacting the NLRA.\textsuperscript{17} More specifically, the NLRB supervises representation elections, and investigates and adjudicates charges of unfair labor practices.\textsuperscript{18} Further, since the NLRB has a special understanding of the realities of industrial relations, its primary function and responsibility is to carefully appraise the inter-

\begin{itemize}
\item 10. See 29 U.S.C. § 151 (1982); see also N.L.R.B. v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943) stating that the duty to bargain in good faith is an “obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . . .” This implies both “an open mind and a sincere desire to reach an agreement” as well as a “sincere effort . . . to reach common ground.” \textit{Id.} at 686; Rhodes-Holland Chevrolet Co., 146 N.L.R.B. 1304, 1304-05 (1964). The totality of the circumstances is considered to determine if bargaining was conducted in good faith.
\item 12. T. KHEEL, LABOR LAW § 5.02(3), at 5-112 (1987).
\item 15. R. FLANAGAN, LABOR RELATIONS AND THE LITIGATION EXPLOSION 1 (1987). The unfair labor practices are enumerated in § 8(a)(5) of the NLRA.
\item 16. The basic objectives of the NLRA are stated in 29 U.S.C. § 151 (1982) (it is within the public interest to discourage and prevent unfair labor practices). \textit{See also} National Licorice Co. v. N.L.R.B., 309 U.S. 350, 362-63 (1940); N.L.R.B. v. Great W. Coca-Cola Bottling Co., 740 F.2d 398, 406 (5th Cir. 1984).
\item 18. R. FLANAGAN, \textit{supra} note 15, at 1. See F.W. Woolworth Co., 90 N.L.R.B. 289 (1950). “The public interest in discouraging obstacles to industrial peace requires that [the NLRB] seek to bring about in unfair labor practice cases, ‘a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.’” \textit{Id.} at 292-93.
\end{itemize}
ests of both sides of a labor-management controversy in the diverse circumstances of individual cases, and to apply the provisions of the NLRA.\footnote{19} 

The NLRA makes it an unfair labor practice for an employer to refuse to bargain collectively in good faith with a union supported by the majority of the employees in the appropriate bargaining unit.\footnote{20} If a union possesses the requisite support, it is certified by the NLRB as the official bargaining representative of the workers.\footnote{21}

Once a union is certified, an employer is strictly prohibited from refusing to bargain in two major instances: 1) for one year following the date of certification\footnote{22}; and 2) during the period that a collective bargaining agreement is in effect.\footnote{23} At these times, the union's ma-

\footnote{19. N.L.R.B. v. Steelworkers, 357 U.S. 357, 362-63 (1958); see also East Bay Union of Machinists v. N.L.R.B., 322 F.2d 411, 414 (D.C. Cir. 1963) (Burger, J.) ("The use of this language was a reflection of the congressional awareness that the [NLRA] covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without a precise delineation of what subjects were covered so that the [NLRA] could be administered to meet changing conditions.")], aff'd sub. nom. Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964); Ford Motor Co. v. N.L.R.B., 441 U.S. 468 (1979). It is a conscious decision by Congress that the NLRB mark "out the scope of the statutory language [of the NLRA] and of the statutory duty to bargain." \textit{Id.} at 496.

\footnote{20. 29 U.S.C. § 158(a) (1982). Section 8(a)(1) of the NLRA states that "it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(2) states that if an employer "dominate[s] or interfere[s] with the formation or administration of any labor organization or contribute[s] financial or other support to it" then it is an unfair labor practice. Section 8(a)(5) states that "it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." (29 U.S.C. § 159(a)). Section 8(d) defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d). Section 9(a) provides that "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . ." 29 U.S.C. § 159(a) (1982).

\footnote{21. 29 U.S.C. § 159(c) (1982).}

\footnote{22. Celanese Corp. of America, 95 N.L.R.B. 664, 672 (1951). The NLRB noted the practical effects of this as: 1) that the fact of the union's majority during the certification year is established by the certificate, without more, and can be rebutted only by a showing of unusual circumstances; and 2) that during the certification year an employer cannot, absent unusual circumstances, lawfully predicate a refusal to bargain upon a doubt as to the union's majority even though that doubt is raised in good faith. \textit{Id.} at 672.

\footnote{23. Pioneer Inn Ass'n. v. N.L.R.B., 578 F.2d 835, 838 (9th Cir. 1978), enforcing 228 N.L.R.B. 1263 (1977); see also Confectionary and Tobacco Drivers v. N.L.R.B., 312 F.2d 108 (2d Cir. 1963); N.L.R.B. v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) (suggesting that the purpose of the contract-bar rule was to protect the bargaining atmosphere regardless of whether a majority of employees withdraw their support).}
majority status is presumed to be irrebuttable.\textsuperscript{24} Therefore, an employer's refusal to bargain for any reason absent unusual circumstances, is a per se violation of the NLRA.\textsuperscript{25}

The presumption of the union's majority status becomes rebuttable once a majority union's certification year has ended or the life of a collective bargaining agreement has expired.\textsuperscript{26} An employer may refuse to bargain with the union if it affirmatively establishes that: 1) it has a reasonable "good-faith doubt" as to the union's continued majority status;\textsuperscript{27} or 2) at the time of its refusal, the union no longer enjoys representative majority status.\textsuperscript{28}

To sustain an employer's claim of a good faith defense for failure to collectively bargain, two prerequisites are required. The asserted good-faith doubt, must be based on objective considerations\textsuperscript{29} that are clear, cogent and convincing.\textsuperscript{30} Further, any challenge must be raised in an atmosphere free of any unfair labor practices.\textsuperscript{31} This criterion sanctions employer conduct aimed at causing disaffection toward the union or indicating that, while raising the majority issue, the employer was merely seeking to gain time in which to undermine the union.\textsuperscript{32}

The recent trend of the NLRB has been to make an employer's burden so heavy that the employer must substantially prove that the union lacks majority status.\textsuperscript{33} To satisfy this high-threshold burden,
an employer typically relies on such objective considerations as declarations by employees that they are dissatisfied with the union, declining percentage of employees authorizing dues checkoffs, a high percentage of employee turnover, abortive strike actions, union refusal to process grievances, and poor attendance at union meetings. Additionally, it is clear that “subjective evidence may also be used to bolster the argument” that doubt concerning the union’s majority status existed at the time of an employer’s refusal to bargain. However, management’s good faith doubt may not be founded only on its subjective state of mind, but rather, must be grounded firmly on objective considerations.

Such a weighty burden in favor of a continued union majority is necessary to fulfill fundamental policies of federal labor law. These policies include the promotion of continuity in bargaining relationships, and the protection of the express statutory right of employees to designate a collective bargaining representative of their own choosing. The purpose of these policies is to form a foundation to support the NLRA’s primary objective of industrial stability.

In determining whether an employer has questioned a union’s majority status in good faith, the NLRB must perform an analysis on a case by case basis, taking into consideration the totality of the circumstances.


34. Krupman & Rasin, Decertification: Removing the Shroud, 30 LAB. L.J. 231, 238 (1979); see, e.g., Automated Business Sys. v. N.L.R.B., 497 F.2d 262 (6th Cir. 1974); Nat’l Cash Register Co. v. N.L.R.B., 494 F.2d 189 (8th Cir. 1974); Roman Iron Works, 282 N.L.R.B. No. 101, slip op. at 14 (Jan. 14, 1987); Cowles Publishing Co., 280 N.L.R.B. No. 105 (June 24, 1986); cf., Star Forge, Inc. v. N.L.R.B., 536 F.2d 1192 (7th Cir. 1976) and Royal Typewriter Co. v. N.L.R.B., 533 F.2d 1030 (8th Cir. 1976) with Teamsters Local 769 v. N.L.R.B., 532 F.2d 1385 (D.C. Cir. 1976) and United Supermarkets, Inc., 214 N.L.R.B. 958 (1974) to illustrate the use of objective considerations to meet management’s burden; see generally, C. MORRIS, THE DEVELOPING LABOR LAW 542-49 (1983 & Supp. 1985) for a survey of which objective considerations are determined to be sufficient and insufficient to withdraw union recognition; see also id. at 655-60 and cases cited therein.


36. N.L.R.B. v. Gulfmont Hotel Co., 362 F.2d 588 (5th Cir. 1966), enforcing, 147 N.L.R.B. 997 (1964); McDermott & Co., 571 F.2d at 859 (“It is insufficient... that the employer merely intuits nonsupport.”).

37. Pennco, 250 N.L.R.B. at 717; N.L.R.B. v. Century Oxford Mfg. Corp., 140 F.2d 541, 542; enforcing, 47 N.L.R.B. 835 (1943). This is because “inherent in any successful administration of such a system is some measure of permanence in the results.” Id. at 542.

38. Pennco, 250 N.L.R.B. at 717.


40. Taylor Hospital, 279 N.L.R.B. No. 6, slip op. at 9-10 (March 31, 1986); Celanese, 95 N.L.R.B. at 673; Ingress-Plastene, Inc. v. N.L.R.B., 430 F.2d 542 (7th Cir. 1970). “Although the Board attacks each of the reasons [objective considerations] ad-
subjective determination by the tribunal, an unavoidable problem that arises in a case by case application of a subjective good faith standard is the uncertainty of what is reasonably expected from an employer. The NLRB and the federal courts have agreed that the obligation to deal in good faith with the union entails sincerity and a desire to reach an agreement. However, it is difficult to translate this standard into a plan of action that an employer can follow to avoid committing any unfair labor practices. Such is the case when the employer is aware that the NLRB has been presented with a petition for decertification filed by the employees.

DECERTIFICATION PETITIONS FILED BY EMPLOYEES

A Question Concerning Representation

The NLRA provides that a decertification petition may be submitted to a Regional Office of the NLRB in an attempt to terminate the incumbent union's status as bargaining representative. Decertification petitions normally are not accepted by the NLRB until: 1) one year from the date of certification (certification year rule); 2) a reasonable period following recognition (recognition rule); 3) 60 days prior to the anniversary of a previous election (twelve month rule); and 4) between 90 and 60 days prior to the termination date of a
contract with a definite expiration date of three years or less; for contracts with a definite expiration date of more than three years, between 90 and 60 days prior to the contract's third year, or after the contract's third year anniversary date ("contract bar" rule). If the NLRB accepts the filed petition and deems that a question concerning representation exists, it directs that a decertification election be held within the bargaining unit. The results of that election are subsequently certified by the NLRB and become official. The union remains the established bargaining representative until the results are certified even if it loses the election. To prevent the interjection of instability and uncertainty into the bargaining relationship, the results of the election are not effective until official NLRB certification. This serves to maintain the status quo while the employee's choice of representation is in doubt.

Traditionally, a valid RD petition for decertification filed by an employee of the incumbent union, with a minimum showing of interest of 30%, has presented an employer with objective criteria which helps to raise a good faith doubt as to a union's continuing majority status. Current law in this area is derived from the line of cases containing representation petitions filed by rival unions. In Midwest Piping, the NLRB first held that an employer, faced with competing claims of which of the two or more rival unions should

46. C. MORRIS, supra note 34. "A question concerning representation (often referred to as a QCR) exists when a labor organization or individual seeks recognition as bargaining agent and the employer declines to recognize it, thus requiring the Board to determine whether the union or the individual represents a majority of the employees in an appropriate bargaining unit." Id. at 341.
47. 29 U.S.C. § 159(c)(1) (1982). The bargaining unit consists of that portion of workers that the union represents. Usually, it is a subset of the entire population at the workplace. See generally, H. HUSBAND, JR., MANAGEMENT FACES UNIONIZATION 77-98 (1969). (Primarily the appropriateness of a unit is determined by the common interests of the group involved, i.e., a "community of interest" which demonstrates a similarity of working conditions and supervision within the context of the company's organizational structure.) The Board determines the "appropriate bargaining unit and which employees will be placed in it, who will therefore vote in the election." Id. at 77; C. MORRIS, supra note 34, at 413-21.
48. Id.
50. Presbyterian Hospitals in the City of New York, 241 N.L.R.B. 996, 998 (1979); Trico Products Corp., 238 N.L.R.B. 1306, 1307 (1978) (election results are not always determinative because of objections and rerun elections).
51. A RD petition is a decertification petition that is filed by an employee, a group of employees, or an individual or organization acting on their behalf.
52. 29 C.F.R. § 101.18 (1982). Since § 9(c)(1)(A) requires that a "substantial number of employees" support the petition, substantial has been defined as 30%.
53. C. MORRIS, supra note 34.
54. 63 N.L.R.B. 1060 (1945); The Midwest Piping doctrine is discussed extensively in Kesselring & Brinker, Contract Difficulties Under § 8(a)(2), 31 LAB. L.J. 139 (1980).
initially represent the employees, must maintain strict neutrality.\textsuperscript{55} It was deemed an unfair labor practice to recognize one of the competing unions after a representation question had been submitted to the NLRB by the filing of a petition.\textsuperscript{56} That two or more prospective unions vied to represent the bargaining unit demonstrated to the NLRB that a question concerning representation existed.\textsuperscript{57} This explicit decree requiring strict neutrality made it an unfair labor practice for an employer to recognize either one of the rival unions after this question concerning representation had been submitted. The NLRB held it was not a violation to refuse to bargain with any of the unions.\textsuperscript{58}

The doctrine of strict neutrality was extended in \textit{Shea Chemical Corp.}\textsuperscript{59} to instances where an incumbent union is present and a rival union filed a decertification petition. The NLRB held that an employer, in the interest of neutrality, may not bargain collectively with the incumbent union until the question of representation had been settled by the NLRB.\textsuperscript{60} The issue arises when at least 30% of the workers in the bargaining unit show an interest in the competing union.\textsuperscript{61} Under the \textit{Shea} rule, not only must an employer refuse to bargain, but he is necessarily prohibited from doing so. To do otherwise, would be a violation of the NLRA.\textsuperscript{62} The employee's right to freedom of choice of representation is thus preserved and protected because the employee is sheltered from unfair employer interference.

Later cases suggested an expansion of this rule from requiring the

\begin{enumerate}
\item[56.] \textit{Id.}
\item[57.] \textit{Midwest Piping}, 63 N.L.R.B. at 1070.
\item[58.] \textit{Id.} at 1070-71.
\item[59.] 121 N.L.R.B. 1027 (1958). \textit{Shea} overruled William D. Gibson, 110 N.L.R.B. 660 (1954), \textit{accord}, William Penn Broadcasting Co., 93 N.L.R.B. 1104 (1951) which narrowed the \textit{Midwest Piping} doctrine proclaiming that an employer was permitted to bargain with the incumbent union while the rival union's petition was pending.
\item[60.] \textit{Shea}, 121 N.L.R.B. at 1029.
\item[61.] \textit{Id.} at 1029; Swift & Co., 128 N.L.R.B. 732 (1960) (a competing union must file a petition and the NLRB must administratively determine there is a showing of interest by taking cognizance of the case for a real question concerning representation to exist). 29 C.F.R. § 101.18 has determined that 30% represents a sufficient showing of support.
\item[62.] \textit{Id.} Specifically, the employer is likely to commit an unfair labor practice under § 8(a) of the NLRA. However, the \textit{Midwest Piping} doctrine does not apply in situations when, because of contract bar or certification year or other established reason, the rival claim does not raise a real representation question. \textit{Shea}, 121 N.L.R.B. at 1027.
\end{enumerate}
30% show of interest to simply requiring that the claim of the rival union not be clearly unsupportable and lacking in substance. Until NLRB resolution, if there was a colorable claim to representation by another union, an employer must refuse to bargain even if no representation petition has been filed. This expansion suggested that the NLRB was willing to find worthy representation questions whenever possible. As long as the issue was genuine and the employer maintained neutrality, the employer was permitted to refuse to bargain.

Telautograph Corporation

In 1972, the NLRB again saw fit to logically expand the Shea doctrine to instances where a real question concerning representation has been raised by the timely filing of a decertification petition by employees of the incumbent union.

In Telautograph, the incumbent union duly notified management two days after the existing agreement ended that it desired to terminate that agreement and begin bargaining for a new agreement. Management's representative responded with a suggested meeting date. In the interim, an employee of the bargaining unit filed an RD decertification petition. The NLRB determined that a question concerning representation existed and directed that an election be held. Management refused to bargain collectively with the challenged union which then filed an unfair labor practice charge, thereby "blocking" the election.

The NLRB, after reviewing the current standard line of applicable cases for good faith and objective considerations, agreed that normally an employer's refusal to bargain must be based on objective evidence in addition to the filing of the decertification petition. However, because there was an absence of unremedied employer unfair labor practices, the NLRB distinguished the present case as falling squarely within special circumstances. Therefore, the NLRB held

63. Playskool, Inc., 195 N.L.R.B. 560 (1972) (the NLRB claimed that it had "never established any numerical percentage as a condition precedent to establishing the existence of a question concerning representation."), enforcement denied, 477 F.2d 66 (7th Cir. 1973), supplemented, 205 N.L.R.B. 1009 (1973); The Boys' Markets Inc., 156 N.L.R.B. 105 (1965), enforced/sub nom, Retail Clerks Local 777 v. N.L.R.B. 370 F.2d 205 (9th Cir. 1966); accord, U & I, Inc., 227 N.L.R.B. 1 (1976); American Can Co., 218 N.L.R.B. 102 (1975), enforced, 535 F.2d 180 (2d Cir. 1976).

64. American Can Co., 218 N.L.R.B. 102 (1975), enforced, 535 F.2d 180 (2d Cir. 1976) (An employer could not recognize or contract with any union until the representation question was settled by the Board).

66. Telautograph, 199 N.L.R.B. at 893.
67. Id.
68. Id.
69. Id.
70. Id. (cases cited therein).
71. Telautograph, 199 N.L.R.B. at 893.
that when a petition for decertification is timely filed by an employee and raises a question concerning representation, an employer need not demonstrate any additional objective considerations of good faith doubt. The employer may refuse to bargain as long as it has not engaged in any anti-union activities that would taint the atmosphere for an upcoming election.

It is crucial that a genuine representation question exist; otherwise, the requirements set forth in the *Telautograph* holding are not met. Consequently, the *Telautograph* rule is not applicable if: the petition was dismissed; the contract bar was in effect; the certification had not expired; there was inadequate showing of interest; the employees signed the petition because they were compelled to do so by the employer’s unlawful acts; the employer is relying on its own decertification petition; or if the employees strike.

The *Telautograph* doctrine is relatively easy to apply. Concrete guidelines on bargaining remove much of the subjective uncertainty encountered by employers when attempting to determine if sufficient objective considerations exist. Employers who in good faith want to abide by the rules and objectives of the NLRA are now able to gauge their actions so that they are consciously and knowingly able

72. Id. at 894.
73. Id. It does not matter if the employees were aware of the unfair labor practices or not, or if they provided the impetus for the filing of the decertification petition. N.L.R.B. v. Carilli, 648 F.2d 1206 (9th Cir. 1981). The existence of unfair labor practices prior to the refusal to bargain interjects an element of uncertainty about whether the employer caused the possible loss of majority. Nat'l Cash v. N.L.R.B., 494 F.2d 189 (8th Cir. 1974).
75. Sahra-Tahoe Corp. v. N.L.R.B., 648 F.2d 553, 556 (9th Cir. 1980); *Telautograph*, 199 N.L.R.B. at 892.
77. N.L.R.B. v. Anderson, 611 F.2d 1225 (8th Cir. 1979); N.L.R.B. v. Top Mfg., 594 F.2d 223 (9th Cir. 1979); N.T. Enloe Memorial Hospital v. N.L.R.B., 682 F.2d 790 (11th Cir. 1982), *enforcing*, 250 N.L.R.B. 583 (1980).
79. N.L.R.B. v. Preston Feed Corp., 309 U.S. 346, 351 (4th Cir. 1962) (there is no question concerning representation when employees strike).
80. In Traub's Mkt., Inc., 205 N.L.R.B. 787, 789-90 (1973), chairman Miller clarified the *Telautograph* doctrine as simplistically as possible. An employer's "privilege — and his duty — as set forth in Shea Chemical — is now clear and unmistakable. He may — and must — discontinue negotiations until the question concerning representation is resolved through orderly election processes."
to avoid violating the NLRA. As the NLRB indicates, it is "this critical factor — i.e., the absence of unremedied unfair labor practices — that distinguishes this case from those [cases]" where additional objective considerations were required to allow the employer to refuse to bargain. Therefore, at the time the decertification petition is filed, if employers have a "bright-line" test to follow, then presumably they will know how to properly act during this sensitive period.

Assuming a proper question concerning representation exists as a prerequisite, if an unfair labor practice charge is pending against the employer, then the employer will know that the Telautograph doctrine does not apply, and the employer must continue to bargain with the incumbent union. However, if an employer has no unfair labor practice violations, it can refuse to bargain. Thus, the employer can remain neutral until the NLRB has resolved the issue as to the majority support of the union. Telautograph ostensibly discards the previous balancing test propagated by Midwest Piping and Shea for good faith and objective considerations when there are no unfair labor practices. Telautograph instead, chooses a rule designed to preserve employer neutrality, employee free choice of representation, and industrial stability.

Post-Telautograph Corporation

The period following the NLRB's decision in Telautograph was marked by conflict. Although the NLRB appeared administratively satisfied with the rule, the federal courts of appeal struggled with its enforcement. The federal courts were already hostile to the Mid-

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82. See, e.g., Antonino's Restaurant, 246 N.L.R.B. 833 (1974), enforced sub nom, N.L.R.B. v. Carilli, 648 F.2d 1206 (9th Cir. 1981); N.L.R.B. v. Sky Wolf Sales, 470 F.2d 827 (9th Cir. 1972); N.L.R.B. v. Union Carbide Crique, Inc., 423 F.2d 231 (1st Cir. 1970); N.L.R.B. v. A.W. Thompson, Inc., 449 F.2d 1333 (5th Cir. 1971); but see, N.L.R.B. v. Nu-Southern Dyeing & Finishing, Inc., 444 F.2d 11, 16 (4th Cir. 1971) (where unfair labor practice violations "prior to the refusal to bargain [do] not necessarily mean that an employer's action is in bad faith. An employer may avoid a bargaining order by showing that the unfair labor practices did not significantly contribute to such a loss of majority . . . ."). See also Freemont Newspapers, Inc. v. N.L.R.B., 436 F.2d 665 (8th Cir. 1970).
west Piping doctrine, which provided the basic foundation of the Telautograph rule, and, therefore, were reluctant to recognize its extension. Accordingly, many federal opinions rejected Telautograph as an insufficient basis upon which to refuse to bargain and urged the NLRB to agree. In response, the NLRB either indicated that it would not change until the Supreme Court passed judgment on the issue of when an employer can refuse to bargain, or avoided the Midwest Piping issue altogether, by finding unlawful interference or assistance instead.

In 1982, the NLRB reexamined the law developed by Midwest Piping and Shea. In Bruckner Nursing Home and RCA Del Caribe, the NLRB ruled that the mere filing of a representation petition by an outside challenging union will no longer require or even permit an employer to withdraw from bargaining or executing a contract with an incumbent union. Hence, an employer will not violate section 8(a)(2) of the NLRA by post-petition negotiations or by the execution of a contract with the incumbent union. Further, an

84. This proposition is evidenced most clearly in Suburban Transit Corp., 203 N.L.R.B. 465 (1973), enforced in part, 499 F.2d 78 (3d Cir. 1974); see also, C. MORRIS, supra note 34, at 293 n.144 (cases cited therein). Most circuits have refused to find a violation of § 8(a)(2) of the NLRA when an employer has recognized one of two competing unions which has clearly demonstrated its majority support. Id. at 293.

85. See Lammert, 229 N.L.R.B. 895; Maywood, 628 F.2d 1; Walker, 682 F.2d 592; Rogers, 486 F.2d 644; Allied Industrial, 476 F.2d 868; Retired Person Pharmacy, 519 F.2d 486.

86. Kona Surf Hotel, 201 N.L.R.B. 139 (1973), enforcement denied, 507 F.2d 411 (9th Cir. 1974). This Midwest Piping case expresses the frustration of the NLRB and its conflict with the federal circuit courts over the refusal to bargain issue because a genuine question concerning representation exists. "[W]e respectfully disagree [with federal circuit decisions] and adhere to our view until such time as the U.S. Supreme Court has passed on the matter. Unlike the views expressed in the conflicting court decisions, we do not believe our decision . . . interferes with the stability of lawfully established bargaining relationships. Rather, we believe . . . the purposes and policies of the [NLRA] require that the issue of representation be decided by employees, in a manner attended by the safeguards of the [NLRB's] election machinery." 201 N.L.R.B. at 142 n.12. On appeal, the court mentions that it has the "great weight of authority in the Courts of Appeals" on its side but skirts the issue that a genuine question concerning representation existed which demanded an election. Evidently enough employees were dissatisfied so that a NLRB supervised election should have been mandated to resolve the question. Yet, the court completely foreclosed this route. Kona Surf Hotel, 507 F.2d at 412-13.


89. RCA Del Caribe, Inc., 262 N.L.R.B. 963 (1982).


91. Bruckner, 262 N.L.R.B. 955; RCA Del Caribe, 262 N.L.R.B. at 965.
employer would violate section 8(a)(5) of the NLRA by refusing to bargain solely because a petition had been filed by an outside union. The NLRB concluded that its past efforts to strike an appropriate balance between securing employee free choice and promoting stable collective bargaining relationships had unduly favored the former.

These decisions indicated the NLRB’s movement toward stressing the promotion of bargaining stability to a greater degree. This set the stage for the NLRB to further retreat from its Sheal/Telautograph posture in 1982, when the NLRB decided Dresser Industries.

Dresser Industries

In Dresser Industries, the NLRB, faced with a set of facts that seemingly placed the case within the bounds of the Telautograph doctrine, overruled the 10 year old decision in favor of a holding similar to that found in the federal courts of appeal. In Dresser, management bargained collectively with the union only four times in the first ten months after its certification. Yet, the NLRB ruled that this did not necessarily reflect bad faith bargaining by management. The NLRB noted that efforts were made to meet, but because of difficult travel schedules of each party, mutual meeting times were often impossible to arrange.

An RD decertification petition was filed by the employees two days before the end of the certification year. Approximately a week later, management informed the union of its intent to wait until the representation question was resolved before continuing to bargain. The union subsequently filed an unfair labor practice charge for failure to bargain in good faith.

The NLRB, citing two pre-Telautograph cases, stated that a decertification petition does not provide a reasonable ground for an employer to doubt the majority status of the union, since on its face it represents only 30% of the employees in the bargaining unit. The NLRB, expressly overruling Telautograph, held that the mere

95. 264 N.L.R.B. 1088 (1982).
96. Dresser, 264 N.L.R.B. at 1092.
97. Id.
98. Id. at 1091.
99. Id. at 1092.
100. Id.
101. Id. at 1088 n.5 (quoting Massey Ferguson, Inc., 184 N.L.R.B. 640, 641 (1970)); Wabana, Inc., 146 N.L.R.B. 1162, 1171 (1964)). These cases are distinguished from Telautograph in that each involves an employer who is charged with unfair labor practices.
102. Id. at 1088.
filing of a decertification petition by incumbent union employees would no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union. 103

In the Dresser dissent, NLRB Chairman Van De Water, who also dissented in RCA Del Caribe, 104 admonished the majority for its shortsighted approach in its attempt to fulfill the NLRA policy of ensuring the employee's free choice of representation. 105 The Chairman, a supporter of the established Telautograph doctrine, believed that the majority position in Dresser would frustrate the exercise of the employee's right to free choice of representation 106 — a right that the NLRB has a duty to guarantee in an uninfluenced atmosphere. Currently, the Dresser holding continues to represent the state of the law controlling decertification petitions.

Telautograph Compared and Contrasted With Dresser

There are two basic questions that must be analyzed concerning the bargaining process following the filing of a decertification petition. The initial inquiry focuses on the effect of the filing of a petition for decertification on the bargaining process. This Comment then addresses a more pragmatic question: What should the desired effects of either rule, Telautograph or Dresser, be on the bargaining process in order to remain faithful to the goals and objectives of the NLRA?

103. Dresser, 264 N.L.R.B. at 1089. However, the NLRB explicitly stated that it did not intend to erode "the principle that an employer is privileged to withdraw from bargaining if, on the basis of objective evidence, it has a good-faith doubt as to the union's continued majority status . . . We will test an employer's good-faith doubt . . . by our traditional criteria, regardless of the filing of a decertification petition." Id. at 1089 n.7. In Ray, Industrial Stability and Decertification Elections: Need for Reform, ARIZ. ST. L. J. 237, 273 (1984), Professor Ray proposes that this is in error because there should be no instances where an employer independently and unreliable can withdraw from bargaining. An employer should be required to await the results of the upcoming decertification election, because the election best illustrates the wishes of the employees. This Comment asserts differently. The realities of bargaining demonstrate that if the employer must bargain, especially in all circumstances, there will not be a quick and certain election because unions will seize the opportunity to delay or prevent the election by such tactics as blocking charges. See infra note 138.

104. RCA Del Caribe, 262 N.L.R.B. at 965 (Van De Water, Chairman, dissenting).

105. Dresser, 264 N.L.R.B. at 1090.

106. Id.
The Effect of Filing a Petition for Decertification on the Bargaining Process

As previously discussed, the NLRB had advanced two lines of cases for situations where a decertification petition has been filed by an incumbent union employee. *Telautograph* and its progeny held that the mere filing of a valid decertification petition is sufficient cause for an employer to refuse to bargain further with the incumbent union.107 However, the current state of the law depicted in *Dresser* asserts that mere filing is NOT sufficient. An employer must also show adequate proof of its good faith doubt of the incumbent union's lack of continuing majority status.108

This Comment contends that *Telautograph* provides labor and management with the best and most efficient rule for governing the area of labor relations. The rule in *Telautograph* should be confined to situations where an employer refuses to bargain in light of a genuine question concerning representation, and not when the employer wants to withdraw recognition entirely from the union majority representative.109 Only in cases where an employer desires to withdraw such recognition, should an employer be required to assert additional good faith objective considerations as proof of its doubt.110

Additionally, under the *Telautograph* rule, an employer would still be required to perform all administrative functions of an agreement already in effect.111 If no agreement is currently in effect, the parties can stipulate to a temporary extension of the terms of the previously expired agreement during the period between management's refusal to bargain and the date of election and certification of election results.112 During this time, an employer is prohibited from unilaterally changing the terms of the agreement without first consulting the union,113 so as not to impede the employee's right to free choice and to avoid undermining the union, causing additional disaffection.114 However, the law remains uncertain as to whether an employer may change terms of agreement that do not directly affect the

110. Id.; *Telautograph*, 199 N.L.R.B. at 893-94.
111. Nazareth Literary and Benevolent Inst., 282 N.L.R.B. No. 10, slip op. at 6 (Nov. 7, 1986); St. Louis Cordage Mills, 170 N.L.R.B. 167 (1968); see also Wayne Metal Co., 246 N.L.R.B. 392 (1979); Chevron Oil Co., 168 N.L.R.B. 574 (1967).
113. These actions would be a violation of 29 U.S.C. § 158 (1982), see infra note 20.
union/employee relationship in a way that would in turn have negative consequences on the upcoming election.115

It can be argued that the Telautograph rule heavily favors an employer that can remove itself from the bargaining process. However, in reality, the worker stands to gain the most from such a rule. The NLRA was enacted specifically to protect the worker from inequality of bargaining and, in the process, to ensure industrial stability.116 The NLRB is entrusted to preserve these goals.117 By allowing the employees every opportunity to make a free choice as to representation, stability of the bargaining process and of industry is achieved. Employer neutrality is seen as the main vehicle to attain the goal.118 As this Comment will illustrate, Telautograph best provides the means for conforming to the NLRA’s objectives.

Though labor law is a dynamic area of substantive law, Dresser is a case of disregard for established precedent. The line of cases that leads to Telautograph spanned back some 30 years to Midwest Piping. Such well-accepted and easily applied decisions should not be so readily overruled. Indiscriminate changes in the law lend uncertainty to labor relations where predictability and continuity should prevail. The increased importance attached to a decertification petition in the 1980s, in light of employee free choice, however, justifies a continued adherence to the Telautograph rule. Dresser is concerned with the free choice of representation, but it vastly underestimated how intimately the neutrality guaranteed by Telautograph and this integral goal of NLRA are linked. Without employer neutrality at all phases of the decertification process, employee free choice will not be realized.119 Thus Dresser provides an unneeded and unwarranted change

115. N.L.R.B. v. Katz, 369 U.S. 736, 745 (1962); N.L.R.B. v. Little Rock Downtowner Inc., 414 F.2d 1084, 1092 (8th Cir. 1969); Massey-Ferguson, Inc., 184 N.L.R.B. 640 (1971) all state that is an unfair labor practice. But other cases indicate that unilateral changes can be made if those changes follow a good faith refusal to bargain where necessary to keep the status quo. The granting of wage increases or benefits is not per se unlawful; the test is whether the increases in wages and benefits are calculated to impinge upon the employee’s freedom of choice in the upcoming election; see, e.g., McCormick Longmeadow Stone Co., 158 N.L.R.B. 1237, 1242 (1966); Marine World USA, 236 N.L.R.B. 89 (1978); N.L.R.B. v. Ralph Printing & Lithographing Co., 433 F.2d 1058, 1062 (6th Cir. 1970), cert. denied, 401 U.S. 925 (1971); McGraw-Edison Co. v. N.L.R.B., 419 F.2d 67, 77 (8th Cir. 1969); Champion Pneumatic Mach. Co., 152 N.L.R.B. 300, 306 (1965).


118. See Telautograph, 199 N.L.R.B. 892, which stresses this throughout the opinion. See also, Midwest Piping, 63 N.L.R.B. 1060 (1945).

119. See infra text accompanying notes 143-44.
in labor policy that only worsens an already tenuous situation.

Moreover, the Board should not succumb to the pressures applied by the federal courts of appeal. It is clear that some circuits are hostile to the Midwest Piping and Telautograph line of cases. In considering Board decisions on appeal, the circuit courts have often disagreed explicitly with the NLRB's decisions or have simply not enforced them. But the NLRB was created by the NLRA to adjudicate issues regarding its implementation. Members are selected for their expertise in the field of labor law and are the most qualified to render a decision. The NLRB must not be deterred from performing its function. Indeed, the NLRB is given authority and deference to carve out rules that are calculated to effectuate a policy of the NLRA. However, a NLRB decision, when marked by a quick and radical change in the NLRB application of that policy, as occurred in Dresser, particularly when not accompanied by major changes in NLRB composition, should be viewed critically.

The Practical Effects of the Telautograph Rule Versus the Dresser Rule

Most importantly, the NLRB's new law in Dresser is both impractical and unworkable. It appears counterproductive to all that the NLRB hopes to achieve. If bargaining is forced to take place between management and the union under circumstances as in Telautograph, that bargaining consists only of "fishbowl" negotiations in

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120. See, e.g., Lamment, 578 F.2d 1223; Maywood, 628 F.2d 1; Suburban, 499 F.2d 78.

121. 29 U.S.C. § 151 (1982). Because the NLRB draws on a fund of knowledge all its own in fashioning its remedies under § 10(c) of the NLRA (29 U.S.C. § 160(c)), its decisions should be afforded special respect by reviewing courts. See Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964); Consolo v. FMC, 383 U.S. 607 (1966). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." Id. at 621; see also, Fremont Newspapers, Inc. v. N.L.R.B., 436 F.2d 665 (8th Cir. 1970) (if the remedy carries out the policies of the NLRA, the reviewing court should defer to the NLRB).

122. See Chicago, Burlington & Quincy Ry. Co. v. Babcock, 204 U.S. 585 (1907). The members of the NLRB in their conclusions "express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . . the [NLRB] was created for the purpose of using its judgment and its knowledge." Id. at 598. See also N.L.R.B. v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344 (1953). Justice Frankfurter wrote that "cumulative experience" of the NLRB members begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process . . . . That competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding [as an Article III court is].

Id. at 349.

123. Seven-Up Bottling Co. of Miami, 344 U.S. at 349 (Frankfurter, J.).
that whatever negotiations take place are in a controlled and heavily scrutinized arena.\(^{124}\)

The Effect on the Union

The union is immediately at a disadvantage. The majority representative is in retreat because it is aware that at least 30% of the workers it represents are dissatisfied with the union due to the decertification petition.\(^ {125}\) This lack of support is critical to the union’s stance in a bargaining session.

Assuming *arguendo* that the lack of union support is due to an unfavorable collective bargaining agreement or to a lack of an agreement, the union is forced to quickly try to make amends before the upcoming election. It knows that the best way to rally support among the employees is to try to meet their demands. In all likelihood, the employees’ demands are much greater than the union itself would normally demand, and certainly far beyond what the employer is willing to agree to. But the union, in order to show the workers that it desires to hold its support, in all probability will make outrageous, hard-line demands of management merely to keep the workers happy and demonstrate its commitment to the concerns of the workers. This is not good faith bargaining because the purpose of the negotiations as far as the union is concerned is NOT to reach an agreement, but rather to exhibit its loyalty to the workers.\(^ {126}\)

Under these conditions, the union’s ability to strike is also affected. If sufficient workers band together and refuse to strike, or to abort a strike in process, this removes from the union an extremely potent economic weapon that management must always reckon with while negotiating.\(^ {127}\) If an employer is aware that this weapon has


\(^{125}\) 29 C.F.R. § 101.18 (1987) states that the minimum showing of interest must be at least 30%.

\(^{126}\) H.K. Porter Co., Inc. v. N.L.R.B., 397 U.S. 99 (1970). The court pointed out that the NLRB acts only to oversee and referee the process of collective bargaining while leaving the results of the contest to the bargaining strengths of the parties. The basis is the NLRB’s adherence to the parties’ freedom of contract. *Id.* at 108; see also N.L.R.B. v. Crockett-Bradley, Inc., 598 F.2d 971, 975-76 (5th Cir. 1979) (stating that a proposal which is “predictably unacceptable” will not justify an inference of bad faith if the proposal does not foreclose future negotiations); N.L.R.B. v. Wright Motors, Inc. 603 F.2d 604, 608 (7th Cir. 1979) (finding that the employer was insisting on an unreasonable position to avoid negotiating on economic issues and to ensure no bargain through the tactics of delay).

\(^{127}\) See American Mfg. Concern, 7 N.L.R.B. 753, 759 (1938). The NLRB stated
been diffused by sufficient support of the decertification petition, then its stance will be much more concrete and its attitude more aloof. Management might be less willing to bargain in any meaningful manner or to compromise, because the union would have no leverage to reinforce its demands.

However, if the union is able to gather enough support to strike, the decertification petition will be defeated. An employer will not be able to rely on the petition because the union will be presumed to have demonstrated majority support if the workers actually strike. Essentially it is viewed as though there was no longer a real question concerning representation. Thus, an employer is again obligated to continue bargaining with the union under either Telautograph or Dresser.

The Effect on Management

Management, on the other hand, takes a position of extraordinary strength to the bargaining table. It is aware that the union is in retreat and lacks at least 30% support while facing a possible decertification. This gives management an unfair bargaining advantage. It might be too much to expect management to remain completely neutral during this turbulent time. Management will probably set aside altruistic notions of foregoing its immense advantage in this adversarial setting in order to negotiate the best deal it can achieve.

However, an employer is put in the unenviable position of having to bargain in good faith while avoiding any possible unlawful exploitation of the union. No doubt any indiscretions by management will be used by the retreating union in filing a blocking charge of an unfair labor practice. A blocking charge delays the election until

that “a strike exists when a group of employees ceases to work in order to secure compliance with a demand for higher wages, shorter hours, or other conditions of employment, the refusal of which by the employer has given rise to a labor dispute”; see generally, C. Morris, supra note 34, at 995-1033. Though a strike is a deliberate infliction of economic harm upon an employer, it is lawful if the strikers are pursuing increased wages, decreased working hours and improved working conditions. Id. at 995. The strike as a powerful economic weapon is used with the intent of the employees to return to work once an agreement is reached. Id. at 995-96.

128. Royal Typewriter Co. v. N.L.R.B., 533 F.2d 1030, 1037 (8th Cir. 1976).
129. N.L.R.B. v. Preston Feed Corp., 309 F.2d 346, 350-51 (4th Cir. 1962); N.L.R.B. v. Harris-Woodson Co., 179 F.2d 720, 723 (4th Cir. 1949) (“it [is] a little short of absurd for an employer to express a doubt as to representative status of a union when the majority of the employees had gone on strike under its guidance”); C. Morris, supra note 34, at 357.
130. See, e.g., Preston, 309 F.2d 346; Harris-Woodson, 179 F.2d 720; C. Morris, supra note 34, at 357.
131. See White v. N.L.R.B., 255 F.2d 564, 567 (5th Cir. 1958); 29 U.S.C. § 158(d) stating that the “obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession.”
132. See infra notes 138, 163; but see, Union Mfg. Co., 76 N.L.R.B. 322 (1948), enforced, 25 L.R.R.M. (BNA) 2303 (5th Cir. 1950) (the mere refusal to accede to a
the violation is investigated and adjudicated by the NLRB\textsuperscript{133} — potentially a long process.

In \textit{Dresser}, the NLRB stated that an employer with sufficient proof in the form of additional objective considerations may refuse to bargain.\textsuperscript{134} This, however, tends to cloud the issue further. When objective factors are needed, the standard by which these objective factors are applied becomes extremely subjective, because it is entirely left up to the NLRB’s discretion whether the employer has relied on a sufficient number of objective considerations to warrant a refusal to bargain.\textsuperscript{135}

An employer making a decision to bargain or not is never quite sure whether or not it was a correct decision, until the NLRB rules on the likely responsive blocking charge filed by the union for the unfair labor practice of refusing to bargain. The NLRB weighs the factors on a case by case basis, viewing the totality of the circumstances, when determining the charge’s validity.\textsuperscript{136} During a delicate and volatile period such as when a petition for decertification is filed, before an election is held, stability and predictability are a necessity.\textsuperscript{137} The rule in \textit{Dresser} gives no semblance of either. An employer seemingly has no choice; it must continue to bargain or else face a charge of an NLRA violation. All of management’s options are removed. Further, an employer might also be in violation of the NLRA if the employer bargains and unduly exploits his great bargaining advantage.

Moreover, once a blocking charge has been filed, the most obvious and important losers are the employees who initiated the proceeding by filing a decertification petition in exercise of their right to choose representation.\textsuperscript{138} The NLRB is obligated to investigate the charge

\begin{itemize}
  \item[133.] Normally no election will take place because if the charge is genuine then the employees would not be able to vote in an atmosphere free of restraint or coercion; \textit{see} Gem Int’l, Inc. v. Hendrix, 80 L.R.R.M. (BNA) 3302 (W.D. Mo. 1972) (blocking charge rule is not an abuse of discretion by the Board); Hausley v. N.L.R.B., 81 L.R.R.M. 2254 (BNA) (E.D. Tenn. 1972) (the blocking charge rule does not violate due process).
  \item[134.] \textit{Dresser}, 264 N.L.R.B. 1088.
  \item[135.] F. BARTOSIC & R. HARTLEY, \textit{supra} note 41, at 284.
  \item[137.] \textit{See} C. MORRIS, \textit{supra} note 34, at 399-405. The importance of conduct during the time period after the petition has been filled and before the election is analogized to election conduct where “laboratory conditions” are considered ideal.
  \item[138.] Employees file the decertification petition as an indicator of at least 30% dis-
to see if it has merit and to determine its effect on the union’s support.\textsuperscript{139} However, the bottom line is that there is no quick election and the workers’ attempt to unseat the union is effectively blocked by the union.

For management, this period between the filing of the petition and the election is the epitome of “at your risk” bargaining.\textsuperscript{140} A decertification petition presents a real question concerning representation, by indicating dissatisfaction for the majority union.\textsuperscript{141} Yet the present rule allows the union to camouflage this purpose by thrusting the employer and its actions into the spotlight, to be scrutinized by the NLRB due to the blocking charge. This is the wrong focus. In an RD petition, the focus must necessarily be on the employee-union relationship. The only relevant actions by the employer should be those prior to the filing of the petition to determine if they affected the reason for the union’s disaffection. To force the employer to bargain after the petition is filed is to create a chaotic situation resulting in an ineffective method of assessing the validity of the petition itself, since the employer’s continued actions greatly facilitate the union’s attempt to block the employee’s election. This directly conflicts with NLRA stated policy of ensuring employees free choice of representation.\textsuperscript{142}

One can reason that any bargaining that takes place as a result of the rule in \textit{Dresser} is a waste of time and resources. The air is much

\begin{itemize}
\item The blocking charge which enjoys increased usage in present day labor law takes such an extended period of time to settle that the employee’s original representation question gets lost in the shuffle. \textit{See, e.g.}, Rosenthal, \textit{Issues in Decertification Proceedings}, \textsc{Proc. of NYU 34th Ann’l Nat’l Conf. on Labor} 149 (1982). It is not uncommon for an incumbent union to allege misconduct or improper employer assistance to block or postpone the decertification election thus presenting another obstacle to the employees’ exercising their right to freely choose their representation. \textit{Id.} at 158-59.
\item Irrespective of the outcome of the case, when an employer withdraws recognition, costs are imposed on employees, the union, and even the employer. Employees lose because they are deprived of a representative during the years that litigation may consume. Even if employees oppose the current representative, operation of the [NLRB’s] blocking charge doctrine deprives them of the right to select another representative or to decertify their representative where the employer has been charged with unlawfully withdrawing recognition. \textit{Ray, supra} note 103, at 272. This Comment asserts that the effect of a blocking charge is just as devastating to the employees, should an employer not refuse to bargain but must nevertheless face allegations of unlawful conduct by a union attempting to block the upcoming election. \textit{See also} S. Schloessber \& J. Scott, \textit{Organizing and the Law} 126 (1983) (“This additional period [of time while the ‘blocking’ charge is being investigated] can give the union precious organizing time.”).
\item Under \textit{Dresser}, an employer refuses to bargain at his own risk because the validity of this refusal is not confirmed until the NLRB investigates and adjudicates the unfair labor practice charge (a § 8(a)(5) refusal to bargain) which the union will surely file. Certainly, this discourages the employer from refusing to bargain except in only the most definite circumstances, thus limiting the employer’s options in collective bargaining.
\end{itemize}
too thick with tension and politics to accomplish anything productive. Additionally, the NLRB has stated that any collective bargaining agreement that is reached during this time becomes null and void if the union is decertified.\textsuperscript{143} Therefore, the NLRB’s decision in \textit{Dresser} forces all parties to engage in a potential exercise in futility.

Theoretically, \textit{Dresser} was workable. An employer acting in absolute good faith, making all the correct policy and value decisions, can bargain in neutrality. However, in practice, the bargaining table pits two adversarial parties against one another. Neither side wants to give in to the demands of the other. Each wants to strike the best deal for its party. There often is a winner and a loser. Neutrality is a contradictory term that cannot be accurately used to describe management’s or the union’s posture.

Most importantly, the employee’s right to free choice of representation is not vindicated. After the decertification petition is filed, the matter is effectively taken from the workers’ hands. It becomes a battle between management and the union. The worker is forced to take the back seat to unrealistic bargaining, blocking charges, attempts to rally support to strike, and, in all probability, a prolonged delay of the determination of the original petition’s merits. It is highly unlikely that employee free choice is given anything more than a passing glance under the \textit{Dresser} standard.

Because of the potentially disruptive effects of \textit{Dresser}, the NLRA’s ultimate objective of industrial stability,\textsuperscript{144} has the slimmest of chances of being served. Unrest and disturbances in the labor industry certainly will affect production and the free flow of commerce on a national level. Dissatisfied employees remain dissatisfied. Unions attempt to take whatever actions are necessary to block the decertification petition, while management is unable to determine how it should act. This is a futile and chaotic situation.

The \textit{Dresser} rule is counterproductive to good faith labor management relations. The instability created by such a rule taints negotiations to such an extent that the possibility for unethical behavior is greatly increased, and the representation question might not be decided. Practically, the \textit{Dresser} rule itself is unsound, and in application is completely unworkable.

\textsuperscript{143} \textit{RCA del Caribe}, 262 N.L.R.B. 963; see, e.g., Modine Mfg. Co. v. Grand Lodge Int’l Assn. of Machinists, 216 F.2d 326 (6th Cir. 1954); Retail Clerks Int’l Ass’n. v. Montgomery Ward & Co., 316 F.2d 754 (7th Cir. 1963) (an unexpired contract is unenforceable after decertification).

\textsuperscript{144} 29 U.S.C. § 151 (1982).
The Solution

Conceding that Telautograph is not without its flaws, its methodology is the best solution for regulating the period of time immediately following the filing of a decertification petition. In application, Telautograph provides a bright line test. If the petition meets all the NLRB requirements of validity, then the presumption is that there is a genuine question concerning representation and the employer is required to refuse to bargain.\textsuperscript{146}

The Telautograph decision best fulfills the NLRA's policies of protecting the employees' free choice of representation, overseeing the collective bargaining process, and ensuring industrial stability.\textsuperscript{146} The employer is prohibited from bargaining and is thus forced to remain neutral.\textsuperscript{147} All unnecessary allegations of unfair labor practices or blocking charges based on post-filing actions can be avoided. The union is not allowed to construe the employer's acts after the filing of the petition as attempts to undermine the union's majority, so that it can file a blocking charge. By utilizing the Telautograph rule, the focus is on the union and its majority representation. Appropriately, the focus is diverted from the employer's actions.\textsuperscript{148}

The Telautograph rule also provides workers with the best opportunity to make a free choice regarding representation. All sides can concentrate on the upcoming election to determine this important question. Thus, the employees are able to avoid having their attention drawn away from what the real issue which is — whether they want the union to continue to represent them in light of their dissatisfaction. The workers are not distracted by union tactics to delay or avoid an election. The issue becomes more complicated when an employer must bargain. Many wheels are set in motion. Uncertainty abounds. The union is able to divert the attention of the employees to the management and away from the representation issue. The bargaining itself is useless since the chances are great that an agreement will not be reached; even if one is reached, it might become null and void.\textsuperscript{149}

The break in bargaining while the NLRB resolves the question presented by the petition is a small price to pay for the attainment of

\textsuperscript{145} Telautograph, 199 N.L.R.B. at 893-94.
\textsuperscript{146} 29 U.S.C. § 151 (1982).
\textsuperscript{147} Telautograph, 199 N.L.R.B. 892. See also, Traub's Mkt., 205 N.L.R.B. at 790. Chairman Miller (concurring) stated that under Telautograph, an employer "need fear no harassment through any 8(a)(5) proceeding, nor will prompt action on the election petition be delayed by any such charge, because we have now made clear that our Regional Offices should promptly dismiss, as unmeritorious, any such charge and proceed promptly to process the election petition." Id.
\textsuperscript{148} Telautograph, 199 N.L.R.B. 892; Traub's Mkt., 205 N.L.R.B. 787.
\textsuperscript{149} See RCA del Caribe, 262 N.L.R.B. 963; Modine, 216 F.2d 326; Retail Clerks, 316 F.2d 754.
more stable bargaining relationships and the avoidance of industrial strife. The importance of settling the crucial question of representation far outweighs the limited suspension of bargaining activity. Further, the waiting period between the filing of the petition, and the hearing/election is sufficiently short to ensure that any break in bargaining will only represent a minor inconvenience, if the incumbent union wins the election. If the union loses, then the employees' rights would be vindicated. The union would be ousted and the employees free to represent themselves or to elect a new representative. To not allow the petition to be resolved only highlights the employees' helplessness and inequality of bargaining.

According to recent trends, each year the number of decertification petitions filed which result in an election is increasing; as is the percentage of those elections lost by the unions. This presents a unique situation. For the last five years, unions have lost approximately 75% of all decertification elections. This indicates 1) a trend toward deunionization; and 2) a growing feeling of dissatisfaction with union representation. It is then clear, that a valid decer-

150. A matter of weeks is substantially less than a two year period possibly required to resolve an unfair labor practice charge which "will surely be filed by the union" in the face of any refusal to bargain not supported by a rule such as Telautograph. F. Coleman, supra note 45, at 133.

151. See M. Sandver, Labor Relations: Process and Outcomes (1987). These 878 elections represented 19% of all NLRB supervised elections for the year. By way of contrast, during the 1960s there was an average of about 250 decertifications per year; during the 1970s there was an average of 560 decertifications per year. During the 1980s the average will probably be around 880 or 900 per year. Of even greater significance, however, is the fact that in the 1960s and 1970s decertification elections amounted to a small percentage of the NLRB's election volume — always less than 10 percent. Today the percentage of decertification elections is 19 percent of the NLRB's caseload and the 31,210 workers in the decertified units represent a sizable number of lost potential members. No longer can unions view decertification elections as a minor burden. (emphasis added). Id. at 236.


152. See M. Sandver, supra note 151, at 236 (1987). See also F. Coleman, supra note 45, at 9-10.

153. M. Sandver, supra note 151, at 110.

154. See Freeman, Why Are Unions Fairing Poorly in NLRB Representation Elections?, in T. Kochan, Challenges and Choices Facing American Labor (1985); see also F. Coleman, supra note 45.

An employee might want to deunionize to:
- Represent himself directly with management without 3rd party intervention.
- Obtain greater opportunity for advancement by eliminating restrictive seniority rules.
- Free himself from union discipline and sanctions, such as fines.
tification petition filed by union employees, even though only a minimum showing of 30% interest is required, does present a real question concerning representation, not merely that only 30% of the unit employees are dissatisfied. Indeed, to put it into proper perspective, in all cases involving unblocked petitions that a union reasonably believes it might win, elections have been held; and, in an overwhelmingly 75% of those elections, the employees voted that the union discontinue its representation.

Moreover, the figures for the percentage of lost elections could even be higher than reported. Most recent figures demonstrate that of 1,904 filed petitions, only 922 went to an actual election. Many elections do not even take place; if the union feels it will lose, it will withdraw from the unit. Also many elections are blocked by charges of unfair labor practices which may or may not turn out to be meritorious, but which, if investigated, serve to delay an elec-

--- Eliminate the expense of union dues, initiation fees, special assessments, and other periodic levies.
--- Avoid the favoritism, political infighting, and factionalism that often marks local, regional, and national bureaucratic union structure.
--- Enhance job security by improving the employer's competitive position.
--- Put an end to strikes and other work disruptions caused by a union.

Id. at 11.

155. The Dresser decision is thus incorrect in its assertion that "[O]n its face, the [decertification] petition indicates nothing more than the disaffection of a minority of unit employees . . . [and] in no way reflects . . . the sentiment of the unit majority," Dresser, 264 N.L.R.B. at 1088. Recent data indicates that the decertification petition is merely evidence of the tip of the iceberg. That unions lose 75% of the decertification petitions that go to election demonstrates that many more unit employees support the petition than the 30% minimum filing requirement of the NLRB. In modern age, it is to ignore reality and the entire deunionization trend to not treat simply the filing of a decertification petition by employees (an RD petition) as a genuine question concerning representation deserving of investigation by the NLRB and an election by the employees as soon as possible. This Comment asserts that the Telautograph rule provides the speed and atmosphere that is a necessity to achieve the goals and policies under the NLRA.

156. See supra notes 151-53.

157. This would occur assuming that unions were restricted in their blocking charge usage and stayed at the workplace for the election even in futile situations where it would certainly lose. Unions will usually voluntarily withdraw to save time and expense if it is sure it will lose the election. The actual percentage could be as high as 80-85% assuming these losses are factored in. See generally, R. Lewis & W. Krupman, Winning NLRB Elections: Management's Strategy and Preventive Programs 127-29 (1979). See also infra note 159.

158. 48 NLRB Ann. Rep. (1986) (this report published by the NLRB reveals data for fiscal year ending September 30, 1983). See also Krupman & Rasin, supra note 34, at 231. Figures from 1977 indicate that of 1,867 filed petitions, only 849 went to an actual election.

159. Krupman & Rasin, supra note 34, at 231-32.

160. Id. Filing a charge of unfair labor practice against an employer is said to block the petition because it is the policy of the NLRB to withhold processing of RD petitions when a charge has been levied, since there is a possibility that employees' section 7 rights were interfered with. This is a very effective device. Id. at 232. However, the union must allege unlawful acts other than mere refusal to bargain in order to stay the petition. The NLRB then addresses the unfair labor practice charge thereby blocking the
tion. Therefore, it is even more urgent for the election to take place since employee dissatisfaction with union representation might be more widespread than raw figures actually indicate.\(^1\) This illustrates a great trend among employees to deunionize.

Thus, it is imperative that employees, now more than at any time in the past, have an unbridled opportunity to exercise their free choice in deciding not only which union they want to represent them, but even more basically, whether they desire to be represented at all. Ultimately, this employee free choice will lead to industrial stability. For the NLRB to force bargaining during this time prevents the employees from making this choice.

Clearly, a present day employee-filed decertification petition raises serious doubts as to the union’s continued majority status, and should be given substantially more deference and weight in situations where no pre-filing unfair labor charges have been levied. The employees have taken the initiative and organized themselves in a show of dissatisfaction for the incumbent union.\(^2\) The data illustrate that elections, to be accurate, must be held in the most neutral and sterile atmosphere possible. This neutral atmosphere is best effectuated by application of the Telautograph rule. Maintaining the status quo should be of crucial importance. During this status quo period, energy can be spent by both management and the union in rallying support for their sides, as a means to the end of a concrete resolution to the paramount representation question.

**CONCLUSION**

The Telautograph rule, which states that when a petition for decertification is timely filed by an employee or his or her representative, an employer may refuse to bargain with the challenged union, provides the best means for resolving a question concerning representation from a decertification petition. It is doubtful that in most cases the representation question will even be addressed under the Dresser rule, permitting continued bargaining even while the representative issue is outstanding.

In supporting and implementing NLRA policies of neutrality, em-
ployee free choice, and industrial stability, it is important that an appropriate rule maintain the status quo, so that no action after the filing of the decertification petition can change the events that originally led to the petition being filed by the employees. Bargaining collectively during this period may serve to be an artificial and impenetrable barrier to the ultimate goal of resolution of the representation question and employee free choice of representation.

This Comment submits that the NLRB should reverse Dresser and change back to its previous rule in Telautograph. The NLRB should also structure its decertification election procedure in order to ensure that the petition is handled as quickly and efficiently as possible. In order to prevent bargaining discontinuity and management or union interference, a hearing and election must take place soon after the filing of the decertification petition. Additionally, the NLRB must make all efforts to certify the election results without delay. The decertification petition has taken on increased importance in the labor force in the last five years. To adjust to this trend, the NLRB must shed its unrealistic rule in Dresser and opt for a standard that is pragmatic and time-proven. This Comment asserts that the best manner to effectuate the NLRB policies is to return to the Telautograph rule, thus creating a necessary exception to the usual bargaining obligations created when an employee-initiated decertification petition is filed with the NLRB. The rule in Telautograph should be limited to situations where an employer refuses to bargain in the face of a genuine question concerning representation, and not when the employer wants to withdraw recognition entirely from the union majority representation.

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164. Dresser, 264 N.R.L.B. at 1089 states that the status quo should be “continued bargaining” yet this Comment illustrates that any bargaining subsequent to the filing of a decertification petition by employees causes a deterioration of the bargaining relationship, industrial instability, and a chilling of the employees’ right to a free choice of representation.
166. 199 N.L.R.B. 892 (1972).
168. See supra text accompanying notes 109-10.