Voluntary Recognition of a Mixed-Guard Union Under Section 9(b)(3) of the National Labor Relations Act--Bargaining at Will: Truck Drivers Local 807 v. NLRB

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VOLUNTARY RECOGNITION OF A MIXED-GUARD UNION UNDER SECTION 9(b)(3) OF THE NATIONAL LABOR RELATIONS ACT—BARGAINING AT WILL: TRUCK DRIVERS LOCAL 807 v. NLRB

Under the National Labor Relations Act of 1935 (the Act),¹ the right of union representation for private security guards was comparable to that of all employees protected by the Act.² However, upon passage of the Taft-Hartley Act in 1947, this right was sharply limited.³ Section 9(b)(3) prohibits the National Labor Re-

² See, e.g., Dravo Corp., 52 N.L.R.B. 322, 326-27 (1943) (guards are employees within meaning of Act); In re Westinghouse Electric & Mfg. Co., 28 N.L.R.B. 799, 801-02 (1940) (plant policemen may be represented by union representing production workers); In re Luckenbach Steamship Co., 2 N.L.R.B. 181, 189 (1936) (watchmen may be represented by union they are otherwise ineligible to join). The National Labor Relations Board (NLRB) required that security guards comprise separate bargaining units from nonguards, but allowed the same union to represent both security guards and production employees within a single plant. See, e.g., In re Chrysler Corp., 44 N.L.R.B. 881, 885 (1942) (union representing production workers could represent plant protection workers in appropriate unit); In re R.C.A. Mfg. Co., 30 N.L.R.B. 668, 670 (1941) (unit of plant watchmen belonging to union representing other plant workers appropriate); see also 3 NLRB ANN. REP. 186-87 (1938) (watchmen usually excluded from unit consisting of ordinary employees). But see In re Sweet Candy Co., 5 N.L.R.B. 541, 544 (1938) (Board allowed unit of production workers and guards).
³ See Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 9(b)(3), 61 Stat. 136, 143 (codified as amended at 29 U.S.C. § 159(b)(3) (1982)). Congress passed the Taft-Hartley Act, in part, as a reaction to the Supreme Court’s decision in NLRB v. Jones & Laughlin Steel, 331 U.S. 416 (1947), which held that guards could be represented by the same union that represented production workers, if the guards were in separate bargaining units, see id. at 424-25; Labor Management Relations Conference Report, 93 CONG. REC. 6444 (daily ed. June 6, 1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1541 (1948) [hereinafter cited as 2 NLRB, LEG. HIST.]; see also infra note 28 and accompanying text (thorough discussion of the Jones & Laughlin decision.)

The House version of the bill sought to remove guards from the protection of the Act,
lations Board (NLRB or Board) from finding appropriate any bargaining unit comprised of both guards and nonguards, and from certifying a guards' union that admits nonguard members or is affiliated with an organization that admits nonguards.\(^4\) Although Section 9(b)(3) prohibits the Board from compelling an employer to recognize a mixed-guard union,\(^5\) an employer may voluntarily recognize a union disqualified from Board certification and may also recognize a bargaining unit comprised of both guards and nonguards.\(^8\) Recently, in *Truck Drivers Local 807 v. NLRB*,\(^7\) the Court of Appeals for the Second Circuit held that under section 9(b)(3) an employer who had voluntarily recognized a mixed-guard union may withdraw recognition upon expiration of its collective bargaining agreement.\(^8\)

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The Board shall decide in each case . . . the unit appropriate for the purposes of collective bargaining . . . Provided, that the Board shall not . . .

(3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.


\(^2\) 29 U.S.C. § 159(b)(3)(1982); see, e.g., *Drivers, Chauffeurs, Warehousemen & Helpers Local 71 v. NLRB*, 553 F.2d 1368, 1372 (D.C. Cir. 1977) (section 9(b)(3) "prevents the Board from certifying the nonguard Union as the representative of the guard-employees"); *NLRB v. White Superior Div., White Motor Corp.*, 404 F.2d 1100, 1103 (6th Cir. 1968) (section 9(b)(3) prohibits Board from certifying mixed guard union); *In re City National Bank & Trust*, 76 N.L.R.B. 213, 214 (1948) (guard union affiliated with nonguard international union cannot compel employer to bargain in first instance).

\(^3\) See, e.g., *NLRB v. White Superior Div., White Motor Corp.*, 404 F.2d 1100, 1103 (6th Cir. 1968) (not unlawful for guards to join mixed-guard union and "employer may, if it wishes, recognize such a union"); Amoco Oil Co., 221 N.L.R.B. 1104, 1105 n.5 (1975) (Bisguyer, A.L.J., separate decision) (voluntary recognition of union representing mixed unit of guards and nonguards does not offend § 9(b)(3)).

\(^4\) Id. at 10. Prior to the Second Circuit's decision, the duty of an employer to continue a voluntarily assumed bargaining relationship with a union that was not qualified under § 9(b)(3) had not been defined. *Compare Supreme Sugar Co.*, 258 N.L.R.B. 243, 246 (1981) (employer voluntarily recognized bargaining unit of guard and nonguards; its refusal to in-
In *Truck Drivers Local 807*, the collective bargaining agreement between the employer, Wells Fargo Armored Car Service (Wells Fargo) and Local 807 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (Local 807 or Union) was to expire on March 16, 1980. Despite vigorous bargaining sessions, Wells Fargo's final offer was rejected by the union's membership and a strike commenced on April 14, 1980. After further negotiations failed, Wells Fargo notified Local 807 that it was withdrawing its voluntary recognition of the union as the collective bargaining representative. In response to Wells Fargo's withdrawal of recognition, Local 807 and one of its members filed unfair labor practice complaints charging Wells Fargo with violating its statutory duty to bargain. The Board issued a

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9 755 F.2d at 6.

10 Id. at 7. Wells Fargo originally recognized Local 820 of the Teamsters in 1948. Id. at 6. Locals 820 and 807 were merged, and, pursuant to a successorship clause in the collective bargaining agreement, Wells Fargo extended recognition to Local 807 in June, 1979. Id. Local 820 had been comprised exclusively of guards, while Local 807 included both guards and nonguards. Id. The court noted, however, that neither Local 820 nor Local 807 were qualified for certification under § 9(b)(3). Id. Section 9(b)(3) prohibits the certification of guard unions that are either directly or indirectly affiliated with nonguard organizations. See 29 U.S.C. § 159(b)(3) (1982). While Local 820 had been comprised exclusively of guards, it was affiliated on the national level with the Teamsters, which admits nonguards. See 755 F.2d at 6. Although Local 807 admitted both guards and nonguards, id., the bargaining unit was comprised solely of guards, and, unlike the union, was not in violation of the first proviso of § 9(b)(3), see id. at 10.

11 755 F.2d at 7. Wells Fargo attributed its impasse with Local 807 to the union's failure to compromise. Id. In a letter to the union dated April 17, 1980, Wells Fargo asserted that concessions by the employees were necessitated by economic losses incurred as the result of increased competition by non-union armored guard services. See Wells Fargo Armored Serv. Corp., 270 N.L.R.B. 787, 795 (1984) (tkin, A.L.J., separate decision), petition for review dismissed sub nom. Truck Drivers Local Union No. 807 v. NLRB, 106 S. Ct. 225 (1985).

12 755 F.2d at 7. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representative of his employees." See 29 U.S.C. § 158(a)(5) (1982). Section 9(a) of the Act, however, qualifies an employer's duty to bargain by requiring collective bargaining only if the representative is either "designated or selected . . . by the majority of the employees" and if the bargaining unit is "appropriate." See id. § 159(a).

Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the Act]." See id. § 158 (a)(1). Section 7 states in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor
complaint and an Administrative Law Judge (ALJ) determined that Wells Fargo’s actions were unfair labor practices in violation of sections 8(a)(5) and 8(a)(1) of the Act. A divided NLRB reversed the ALJ’s decision and held that the employer was privileged under section 9(b)(3) to withdraw its voluntary recognition of Local 807.

organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Id. § 157 (1982).

12 755 F.2d at 7. Section 10(b) of the Act empowers the Board to issue a complaint and to require the parties to participate in an administrative hearing. See 29 U.S.C. § 160(b) (1982). The office of the Board’s General Counsel has the discretion to issue a complaint upon a determination of merit, and such an issuance is not reviewable by the Board or any court. See Vaca v. Sipes, 386 U.S. 171, 182 (1967); see also C. Morris, The Developing Labor Law 1618, 1697 (1983) (General Counsel of NLRB has absolute authority to issue complaints).


14 270 N.L.R.B. at 800 (Itkin, A.L.J., separate opinion). The ALJ handling the Truck Driver’s Local 807 case asserted that § 9(b)(3) of the Act merely precluded Board certification, and disagreed with Wells Fargo’s contention that the lack of such certification justified a withdrawal of voluntary recognition of the union. Id. at 799-800. The ALJ also determined that Wells Fargo’s decision to withdraw recognition was motivated by purely economic considerations and not by any concerns regarding conflicts of loyalty that might arise from the mixed character of the union. Id. at 800. The ALJ held that Wells Fargo’s initial voluntary recognition of the union estopped it from withdrawing recognition, and issued a bargaining order requiring the parties to resume their collective bargaining relationship. Id.; see also supra note 12 (unfair labor practices under § 8(a)(1), (5) defined).

15 270 N.L.R.B. at 787 (decision of NLRB). Board Chairman Dotson and Members Hunter and Dennis voted to reverse the ALJ’s findings of law, while Member Zimmerman dissented in a separate opinion, id. at 790 (Zimmerman, dissenting). The Board concluded that the ALJ’s opinion “gives the Union indirectly—by a bargaining order—what it could not obtain directly—by certification—i.e., it compels [Wells Fargo] to bargain with the Union.” Id. at 787. The Board found that the distinction drawn by the ALJ between “establishing a bargaining relationship by certification and compelling continuation of an earlier voluntary relationship” overlooked the “purpose for which section 9(b)(3) was enacted.” Id. at 788. The Board asserted that the underlying purpose of § 9(b)(3) was to “shield employers of guards from the potential conflict of loyalties” between the guard’s duty to protect his employer’s property and his allegiance to nonguard employees represented by the same union. Id. at 789. The Board stated that the potential for divided loyalty existed whether or not the mixed-guard union was certified. Id. Thus, the Board concluded, the employer must be free to sever the voluntary bargaining relationship to effectuate the Congressional purpose behind § 9(b)(3). Id.

In response to the General Counsel’s argument that § 9(b)(3) only prohibits Board certification, the majority noted that the Board had never confined the application of the section to its literal meaning. Id. The Board cited its decision in Armored Motor Serv. Corp., 106 N.L.R.B. 1139 (1953), as an example of the expansive manner in which § 9(b)(3) has
On appeal, a divided Second Circuit panel affirmed the NLRB's ruling. Writing for the court, Judge Metzner noted that the Board was justified in holding that Congress had "knowingly decreased the stability of [guards'] bargaining relationships in order" to protect employers. The court examined the legislative history of the second proviso to section 9(b)(3), which expressly precludes Board certification of a mixed-guard union and concluded that Congress disfavored such relationships. Furthermore, the court inferred that the second proviso "portends more than merely a simple check on the Board's power to certify the results of an election"—it gives an employer the right to rely on the strictures of 9(b)(3) to withdraw its voluntary recognition of a mixed-guard union. Distinguishing the voluntary recognition of certifiable unions from the voluntary recognition of uncertifiable unions, been applied. 270 N.L.R.B. at 789. In Armored Motor, the Board expanded the definition of "guard" to include contract guards (encompassing armored car guards) as well as plant security guards. 106 N.L.R.B. at 1140. The Board reasoned, therefore, that Wells Fargo was among the class of employers intended to benefit from the protections under the Act, and stated that Wells Fargo's previous recognition of the union did not "estop" it from subsequently withdrawing that recognition. 270 N.L.R.B. at 789-90.

In dissent, Member Zimmerman would have limited the second proviso of § 9(b)(3) to a prohibition of Board certification of a mixed-guard union, and would not have allowed § 9(b)(3) to be the basis for withdrawal of voluntary recognition. See id. at 791-92 (Zimmerman, dissenting). The dissent noted that the plain language of § 9(b)(3) merely prohibits the Board from certifying a mixed-guard union seeking to represent a unit of guards, and reflects Congress' intention not to prohibit voluntary recognition of such a union. Id. at 791 (Zimmerman, dissenting).

16 *Truck Drivers Local 807*, 755 F.2d at 6.

17 Id. at 10.

18 Id. at 8-9. The *Truck Drivers Local 807* court noted that the enactment of § 9(b)(3) was an attempt by Congress to codify the result of the Sixth Circuit's opinion in NLRB v. Jones & Laughlin Steel Corp., 154 F.2d 932 (6th Cir. 1946), rev'd, 331 U.S. 416 (1947). See 755 F.2d at 8. In *Jones & Laughlin*, the Court of Appeals for the Sixth Circuit voiced its concern over the divided loyalty of plant guards and refused to enforce a bargaining order of the NLRB which had allowed a union representing production and maintenance workers to represent plant guards as well. 154 F.2d at 935. The Supreme Court overturned the decision of the Sixth Circuit and held that the same union could represent guards and nonguards. See NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 431 (1947). For a more detailed discussion of the *Jones & Laughlin* decision, see infra note 28 and accompanying text.

The majority in *Truck Drivers Local 807* determined that, in enacting § 9(b)(3), Congress incorporated language significantly broader than necessary to deal with the factual situation addressed by the Sixth Circuit in *Jones & Laughlin*. 755 F.2d at 9. The court concluded that this breadth reflected Congress' concern with the more basic issue of the divided loyalty of guard employees generally—thereby supporting the Board's interpretation that § 9(b)(3) proscribed voluntarily initiated bargaining relationships. Id.

19 *See* 755 F.2d at 9.

20 Id. at 10 (citing Teamsters Local No. 71 v. NLRB, 553 F.2d 1368, 1376 (D.C. Cir. 1977)) (mixed-guard union denied use and protection of board's processes).
the court held that judicial approval of the former should not be extended to uncertifiable unions.\textsuperscript{21}

In dissent, Judge Mansfield distinguished the prohibited compulsory recognition of a mixed-guard union from Board maintenance of a bargaining relationship voluntarily initiated by the parties.\textsuperscript{22} The dissent asserted that an employer who has voluntarily recognized an unqualified union should be required to maintain that relationship.\textsuperscript{23} Judge Mansfield argued that preventing arbitrary withdrawal of voluntary recognition of any union helps achieve stability in collective bargaining agreements, thereby furthering the preeminent purpose of the National Labor Relations Act.\textsuperscript{24} Judge Mansfield concluded that the majority’s opinion would seriously destabilize collective bargaining agreements between employers and voluntarily recognized mixed-guard unions.\textsuperscript{25}

In \textit{Truck Drivers Local 807}, the Court of Appeals for the Second Circuit construed section 9(b)(3) to allow an employer to sever

\textsuperscript{21} 755 F.2d at 10. The union argued that Wells Fargo should be estopped from withdrawing its voluntary recognition. \textit{Id.} The court deemed the union’s estoppel argument “inconsistent with the purpose of the statute,” and noted that an estoppel argument would be viable only when a union was certifiable. \textit{Id.} (citing NLRB v. A. Lasaponara & Sons, Inc., 541 F.2d 992 (2d Cir. 1976), \textit{cert. denied}, 430 U.S. 914 (1977)). Additionally, the union argued that § 9(b)(3), as interpreted, violates its first amendment right of association. \textit{Truck Drivers Local 807}, 755 F.2d at 11. The court summarily dismissed this argument, stating that the public interest to be protected by § 9(b)(3) outweighed the “minimal infringement” of the union’s first amendment rights. \textit{Id.}

\textsuperscript{22} 755 F.2d at 12 (Mansfield, J., dissenting). Judge Mansfield would limit § 9(b)(3) to a prohibition of Board certification of a mixed-guard union. \textit{Id.} at 11-12 (Mansfield, J., dissenting). Under this interpretation, an employer would be free to decide whether or not to recognize an otherwise unqualified union at the beginning of a bargaining relationship. See \textit{id.} (Mansfield, J., dissenting).

\textsuperscript{23} \textit{id.} at 15 (Mansfield, J., dissenting).

\textsuperscript{24} \textit{id.} (Mansfield, J., dissenting). Upon an examination of the legislative history of § 9(b)(3), Judge Mansfield reasoned that Congress explicitly intended not to deny guards “. . . their rights as employees under the National Labor Relations Act.” \textit{Id.} at 11-12 (Mansfield, J., dissenting) (citing 93 Cong. Rec. 6444, reprinted in 2 NLRB, Leg. Hist., supra note 3, at 1541). The dissent asserted that these rights were preserved by the precise language of the § 9(b)(3) proscription against Board certification of a mixed-guard union, 755 F.2d at 14 (Mansfield, J., dissenting), and could not be preserved by allowing employers to terminate bargaining relationships voluntarily established for whatever reasons the employer chose, \textit{id.}

\textsuperscript{25} 755 F.2d at 13 (Mansfield, J., dissenting). The dissent warned that:

The threat of instant withdrawal of recognition . . . like a Sword of Damocles, would pose such a severe penalty that the employees would, despite having established a valid, healthy and long-continued bargaining relationship, be unable to continue it on a fair basis by invoking the protections of the Act to which they are entitled.

\textit{Id.} (Mansfield, J., dissenting).
a voluntarily assumed bargaining relationship with a mixed-guard union. It is suggested that this statutory construction limits the section 7 rights of private security guards in contravention of the Congressional intention to strike a balance between the legitimate needs of both the employer and employee. This Comment will examine the legislative history behind the enactment of section 9(b)(3) and will suggest that the Second Circuit misconstrued the legislative history and, as a result, misapplied the statute. In addition, it will be asserted that the Truck Drivers court gave too little weight to the doctrine of "voluntary recognition" and thereby failed to observe properly the rights and duties which arise as a consequence of the voluntary recognition of a collective bargaining representative.

**Legislative History of Section 9(b)(3)**

The legislative history of section 9(b)(3) has tended to obfuscate legislative intent rather than provide meaningful guidance.\(^{26}\) The second proviso of section 9(b)(3) was enacted by Congress as a direct reaction to the Supreme Court's decision in *NLRB v. Jones & Laughlin Steel Co.*,\(^{27}\) in which it was held that plant guards who were segregated in a separate bargaining unit could be represented by a union that also represented production and maintenance workers.\(^{28}\) Congress was concerned with the divided loyalty a plant

\(^{26}\) Compare *NLRB v. American Dist. Tel. Co.*, 205 F.2d 86, 89-90 (3d Cir. 1953) (section 9(b)(3) not limited to preventing Board from enforcing unit of guards and employer's other workers, but prohibits guards combining with any workers at place they are hired to protect) and *International Harvester Co.*, 145 N.L.R.B. 1747, 1750 (1964) (NLRB rejected argument that statute was intended to address only situation in which non-guard plant employees and plant guards belong to same union) with *NLRB v. White Superior Div., White Motor Corp.*, 404 F.2d 1100, 1103 (6th Cir. 1968) (legislative history reveals that § 9(b)(3) merely prohibits Board from certifying non-guard unions in unit determinations and certification but does not prohibit guards from joining non-guard unions) and *William J. Burns Int'l Detective Agency*, 134 N.L.R.B. 451, 452-53 (1961) (section 9(b)(3) only limits Board's ability to certify). See generally Cox, *The Changing Guards: An Appraisal of Plant Guards and Their Representation Rights*, 15 LAB. L.J. 391, 395 (1964) ("NLRA Section 9(b)(3) policies and decisions are at best vague, contradictory, and in important areas, disrespectful of Congressional intent"). It is submitted that, by limiting § 9(b)(3) to the achievement of the single goal of eliminating the potential for divided loyalty, both the NLRB and the Second Circuit have ignored the Congressional concern for the representational rights of guard employees revealed in the legislative history.

\(^{27}\) 331 U.S. 416 (1947); see Labor Management Relations Conference Report, 93 CONG. REC. 6444 (daily ed. June 5, 1947), reprinted in 2 NLRB, LEG. HIST., supra note 3, at 1541; see also supra note 3 and accompanying text.

\(^{28}\) See 331 U.S. at 424-25. The original issue in *Jones & Laughlin* arose during World
guard might experience if called upon to enforce an employer's rules against fellow union members during a strike. To alleviate this problem, the House first proposed to exclude guards completely from the protection of the Act. The compromise demanded by the Senate, however, guaranteed guards their rights as employees under the Act, but prohibited the Board from certifying an unqualified union to represent guards. Section 9(b)(3), as en-
acted, protects the employer from compulsory recognition of a mixed-guard union. As the plain language of the statute and the legislative history reveal this was a threshold protection afforded the employer, rather than a continuing protection invocable after an employer has voluntarily recognized a mixed-guard union.

**THE EXPANDED COVERAGE OF SECTION 9(b)(3): Armored Motor Service Misapplied**

In the *Armored Motor Service* decision in 1953, the NLRB extended the scope of section 9(b)(3) to include armored car guards protecting a customer's property. The Board in *Armored Motor Service* membership." *Id.* The first proviso of § 9(b)(3), which makes bargaining units of guards and nonguards inherently inappropriate, was merely a codification of existing Board procedure. See Cox, *supra* note 26, at 393. The second proviso of § 9(b)(3), which prohibits the Board from certifying a union affiliated with a nonguard union, was a codification of the Sixth Circuit's opinion in *Jones & Laughlin*. See 93 Cong. Rec. 6444 (daily ed. June 5, 1947) reprinted in 2 NLRB, Leg. Hist., *supra* note 3, at 1541.

32 See *supra* note 5 and accompanying text. The prohibition of Board certification of mixed-guard unions effectively prevents the Board from conducting a representation election or from issuing a bargaining order to compel the employer to negotiate with a mixed-guard union even though the mixed-guard union may represent a majority of the employees in the bargaining unit. See, e.g., *Drivers, Chauffeurs, Warehousemen & Helpers Local No. 71 v. NLRB*, 553 F.2d 1368, 1372 (D.C. Cir. 1977) (section 9(b)(3) "specifically prevents" NLRB from allowing nonguard union to represent guards); NLRB v. White Superior Div., White Motor Corp., 404 F.2d 1100, 1103 (6th Cir. 1968) (Board may not certify or deem appropriate any mixed union or unit, but "employer may . . . for purposes of collective bargaining").

33 See *supra* note 4 (text of § 9(b)(3)); *supra* notes 3 & 26-31 and accompanying text (legislative history).

34 See *Truck Drivers Local 807*, 755 F.2d at 15 (Mansfield, J., dissenting).

35 See 106 N.L.R.B. 1139, 1140 (1953) (armored car guards are statutory guards within meaning of § 9(b)(3)) (overruling *In re Brink's Inc.*, 77 N.L.R.B. 1182 (1948)). Prior to the decision in *Armored Motor Service*, Board precedent had restricted the statutory definition of "guard" to "plant guard." See, e.g., *In re American Dist. Tel. Co.*, 89 N.L.R.B. 1228, 1231 (1950); *In re Brink's Inc.*, 77 N.L.R.B. 1182, 1185-86 (1948) (both cases overruled by *Armored Motor Serv. Co. Inc.*, 106 N.L.R.B. 1139, 1140 (1953)). It can be argued that the expansion of the definition of "guard" for § 9(b)(3) purposes was outside the contemplation of Congress. See, e.g., *Truck Drivers Local 807 v. NLRB*, 755 F.2d 5, 15-16 (2d Cir. 1985) (Mansfield, J., dissenting) (hesitancy with which term "plant guard" extended to armored car guard troublesome); *Drivers, Chauffeurs, Warehousemen & Helpers Local No. 71 v. NLRB*, 553 F.2d 1368, 1377 (D.C. Cir. 1977) (Bazelon, C.J., dissenting) (legislative history "clearly reflects [that] Congress had in mind 'plant policemen and guards' "); Kahn, *The NLRB's Misrepresentation of the Guard Provision*, 35 Lab. L.J. 328 (June, 1984) ("NLRB has stretched . . . definition of guard so far and in such an imprecise manner that it now threatens such diverse nonguard jobs as deliverymen, postal workers, parking garage attendants, and truck drivers"). This interpretation of § 9(b)(3), however, has been consistently upheld, *see Local 851, Int'l Brotherhood of Teamsters v. NLRB*, 732 F.2d 43, 44 (2d Cir. 1984), and has been extended even further, *see, e.g.*, *Wright Memorial Hosp.*, 255 N.L.R.B.
Service had “distilled” section 9(b)(3) into what the Board deemed to be its essential purpose—to address “the danger of divided loyalty”—and applied it to a non-plant guard situation in which the “danger . . . may not be quite so far-reaching.”36 The Second Circuit in Truck Drivers Local 807 based its decision in part on the expanded coverage of section 9(b)(3) as construed by the Armored Motor Service decision.37 The Board in Armored Motor Service, however, had focused on the definition of “guard” under section 9(b)(3) and had not sought to broaden the protection of employers when dealing with a mixed-guard union beyond the bar to certification of an unqualified union.38 It is submitted, therefore, that the Second Circuit’s reliance on Armored Motor Service was misplaced because the decision does not mandate an expansion of the protection afforded an employer under section 9(b)(3).

Voluntary Recognition and Board Protection: Equal to Election in All Ways, Save One

In Truck Drivers Local 807, the court acknowledged the legitimacy of voluntary recognition as a means of establishing a repre-
sentative of the employees. Notwithstanding the acknowledgement that voluntary recognition of a union is a viable alternative to a Board election, the court refused to provide Local 807 with the protections ordinarily afforded a voluntarily recognized union. The court asserted that the policy behind section 9(b)(3) and Local 807's status as an uncertifiable, mixed-guard union, precluded Local 807's use of Board processes. This interpretation, it is submitted, would allow employers to dominate bargaining relationships with voluntarily recognized unions by threatening withdrawal of recognition to gain leverage during negotiations. It is further submitted that the Second Circuit's analysis improperly ignored the guidance provided by the Supreme Court in NLRB v. Gissel Packing Co.

In Gissel, the Court forcefully rejected the argument that the

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39 755 F.2d at 8.

40 See NLRB v. Gissel Packing Co., 395 U.S. 575, 596-97 (1969). Although a Board-conducted election is the "preferred and, today, the most widely used method of determining a union's status as bargaining representative," see K. McGuiness, How to Take a Case Before the National Labor Relations Board § 52, at 47 (4th ed. 1976), the Court in Gissel held that other methods are valid routes to establish the majority status of a bargaining representative. 345 U.S. at 596-97. "Almost from the inception of the Act . . . it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation." Id.; see also NLRB v. Tahoe Nugget Inc., 584 F.2d 293, 297 (9th Cir. 1978) (voluntary recognition, equated with certification for purposes of presumption of majority status), cert. denied, 442 U.S. 921 (1979); NLRB v. Lasponara & Sons Inc., 541 F.2d 992, 995 (2d Cir. 1976) ("[o]nce a collective bargaining agent is voluntarily recognized by an employer as the representative of its employees the bargaining relationship must be permitted to continue and recognition may not be withdrawn at will"), cert. denied, 430 U.S. 914 (1977); A Guide to Basic Law and Procedure Under the NLRA, reprinted in J. Getman & J. Blackburn, Labor Relations, Law and Policy 86 (2d ed. 1983) ("Act does not require that . . . [bargaining] representative be selected by any particular procedure"). In addition to Board elections and voluntary recognition, bargaining orders are well-established substitutes to other representative selection processes. See NLRB v. Katz, 389 U.S. 736, 742-43 (1962); see also Affeldt, Bargaining Orders Without an Election: The National Labor Relations Board's "Final Solution", 57 Ky. L.J. 151, 152 (1968-1969) (Board's power to issue bargaining order without election derives from § 10(c) of the Act).

41 755 F.2d at 10 (citing Teamsters Local 71 v. NLRB, 553 F.2d 1368, 1376 (D.C. Cir. 1977)). It is suggested that while certifiability may well be a condition precedent to a union demand for a Board-conducted election, certifiability is not required for the Board to afford the protections of the Act to a voluntarily recognized mixed-guard union. See infra note 54 and accompanying text.

42 755 F.2d at 8. The court addressed an argument by Local 807 which cited NLRB v. Lasponara & Sons Inc., 541 F.2d 992 (2d Cir. 1976), cert. denied, 430 U.S. 914 (1977), as standing for the proposition that Wells Fargo should be estopped from withdrawing its voluntary recognition. 755 F.2d at 10. The court distinguished Lasponara, stating: "[t]hat case applies only to the situation in which a certifiable union is voluntarily recognized . . . . We are dealing here with an uncertifiable union." Id.

Taft-Hartley amendments had eliminated voluntary recognition as an alternative means of determining the majority status of a bargaining representative by "providing for a Board election as the sole basis of a certification." Although the Court noted that certification afforded a union certain "special privileges," it stated clearly "that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation." Unlike the majority in Truck Drivers, the Gissel Court made no distinction between voluntarily recognized certifiable and uncertifiable unions,


45 Gissel, 395 U.S. at 598-99 & n.14. The Gissel Court stated that "[a] certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order. ..." Id. at 598-99. The Court in Gissel summarized these benefits as: the certification bar under § 9(c)(3); protection against picketing by rival unions under § 8(b)(4)(c); freedom from restrictions in work assignment disputes under § 8(b)(4)(d); and freedom to picket for recognitional or organizational purposes under § 8(b)(7). Id. at 599 n.14; see United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62, 70-72 & n.4 (1956); NLRB v. White Superior Div., White Motor Corp., 404 F.2d 1100, 1103 & n.5 (6th Cir. 1968); K. McGuiness, supra note 40, at 204-11.

46 395 U.S. at 598. As the Supreme Court had previously noted in Arkansas Oak Flooring Co., a union need not "be certified by the Board, or even be eligible for such certification" to seek a bargaining order under § 8(a)(5). 351 U.S. 62, 71-72 (1956). The Arkansas Oak case was cited with approval by the Supreme Court in Gissel, 395 U.S. at 597, and by Judge Mansfield in dissent in Truck Drivers Local 807, 755 F.2d at 12 (Mansfield, J., dissenting). Nowhere in the Act, it is submitted, is it required that a bargaining representative be certified to be the majority representative of the employees in an appropriate bargaining unit or to avail itself of the Board's unfair labor practice machinery.

The court in Truck Drivers Local 807 also noted that, prior to the passage of the Taft-Hartley Act, a proposed amendment to make certification a standing prerequisite to the bringing of a § 8(a)(5) complaint was before Congress. 755 F.2d at 9-10 n.1. In interpreting Congress' failure to pass the amendment, the court stated: "Congress' refusal may mean that uncertified unions which may be eligible for certification have rights under Section 8(a)(5), but it does not necessarily follow that uncertifiable unions have the same rights." Id. (emphasis in original). However, the Supreme Court in Gissel thought otherwise, holding that the failure to enact this very amendment was an affirmative action by Congress not to require certification as a condition precedent to the use of Board processes. See 395 U.S. at 597-98.
but looked instead to the employer’s act of acknowledging the legitimacy of the union’s majority position among the employees as establishing the bargaining relationship.\(^4\) Once a union is recognized, by whatever method, its entitlement to NLRB protection vests\(^5\) and the ensuing bargaining relationship cannot lightly be overturned.\(^6\)

**The Presumption of Continued Majority Status**

To ensure stability in collective bargaining relationships, once the majority status of the representative is established, a judicially created presumption of continued majority status attaches.\(^7\) Thus, with respect to Board certified representatives, a “certification bar” prevents either an employer or a rival union from contesting the majority status of an incumbent union for one year.\(^8\) With regard to voluntarily recognized representatives, this presumption exists for a reasonable time, often following the one year rule for certified unions.\(^9\) The contract bar serves a similar purpose when the parties are operating under an existing collective bargaining agreement.\(^10\) In post contract situations, the distinction between

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\(^4\) 395 U.S. at 597-98 (quoting United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62, 71, 72 n.8 (1956)).

\(^5\) See 395 U.S. at 596-600; see also Seger, The Majority Status of Incumbent Bargaining Representatives, 47 Tul. L. Rev. 961, 961-63 (1973) (voluntary recognition or certification by election immunizes union from being prevented from acting as bargaining representative).

\(^6\) See 495 U.S. at 598-99; NLRB v. Bel-Air Mart, Inc., 497 F.2d 322, 328 (4th Cir. 1974); infra notes 50-54 and accompanying text.


\(^8\) Brooks, 348 U.S. at 104; see also Seger, supra note 48, at 961-66 (certification permits union to be bargaining representative for one year following election).

\(^9\) See NLRB v. Broad St. Hosp. & Med. Center, 452 F.2d 302, 303 (3d Cir. 1971); NLRB v. Montgomery Ward & Co., 399 F.2d 409, 412 (7th Cir. 1968); NLRB v. Universal Gear Serv. Corp., 394 F.2d 396, 397-98 (6th Cir. 1968); Keller Plastics Eastern, Inc., 157 N.L.R.B. 583, 586 (1966); see also C. Morris, supra note 13, at 527; Seger, supra note 48, at 1001-02 (non-certified representative should have reasonable time to bargain).

\(^10\) See, e.g., William J. Burns Int’l Detective Agency, Inc., 134 N.L.R.B. 451, 453 (1961). In *Burns*, the Board held that a union which is uncertifiable under § 9(b)(3) is given the benefit of the contract bar rule. *Id.* The Board expressly overruled Columbia-Southern Chem. Corp., 110 N.L.R.B. 1189 (1954), which denied a mixed-guard union the benefit of the contract bar. *See* 134 N.L.R.B. at 453. The *Burns* Board determined that this exceeded the statutory mandate of § 9(b)(3). *Id.* The Board may return to the rule of *Columbia-Southern*. See *Wells Fargo*, 270 N.L.R.B. at 787 n.4. “In reversing the judge, we find it unnecessary to pass on whether . . . Wells Fargo would have been privileged to withdraw recognition within the contract term.” *Id.* Member Zimmerman, in dissent, deemed this language in clear derogation of the rule in *Burns* and portentous of a return to the rule of
certified and voluntarily recognized bargaining representatives fades and the employer must have a good faith doubt of the union's continued majority status before he may rebut the presumption. The Second Circuit, by allowing Wells Fargo to withdraw voluntary recognition "at will," refused to apply the presumption of continued majority status to Local 807. The court based this refusal on Local 807's status as an uncertifiable mixed-guard union under section 9(b)(3). It is submitted that, as the voluntarily recognized representative of the employees of Wells Fargo, Local 807 was entitled to the benefit of the rebuttable presumption of continued majority status and, as a consequence, Wells Fargo's withdrawal of recognition was a violation of its section 8(a)(5) duty to bargain in good faith.

CONCLUSION

Section 9(b)(3) was enacted by Congress to remedy the problem of the divided loyalty that a security guard might be susceptible to if called upon to enforce an employer's rules against fellow union members. In Truck Drivers Local 807, however, the Second Circuit construed section 9(b)(3) to allow Wells Fargo to withdraw

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*Columbia-Southern.* Id. at 791 n.1. (Zimmerman, dissenting). The Second Circuit agreed with Member Zimmerman, concluding that a withdrawal during the contract term would be an unfair labor practice. See *Truck Drivers Local 807*, 755 F.2d at 10.

*See, e.g., N.L.R.B. v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297, 304-05 (9th Cir. 1978) (voluntary recognition is equivalent of certification with respect to presumption of majority status); *Hutchison-Hayes Int'l, Inc.*, 264 N.L.R.B. 1300, 1311 (1982) (employer did not rebut presumption of continued majority status of incumbent bargaining representative since it lacked "reasonable doubt of the Union's majority status"); *Bartenders, Hotel, Motel and Restaurant Employee Bargaining Ass'n*, 213 N.L.R.B. 651, 651-53 (1974) (majority status attaches to incumbent bargaining representative even though voluntarily recognized and uncertified).

*See Truck Drivers Local 807*, 755 F.2d at 10. In *International Tel. & Tel.*, 159 N.L.R.B. 1757 (1966), cert. denied, 389 U.S. 1039 (1968), the Board held that the employer is estopped from withdrawing recognition when a thirteen-year history of consensual recognition and six prior collective bargaining agreements existed. See *id.* at 1761-62. The Board in *Wells Fargo* distinguished *International Telephone* on the basis of the long bargaining relationship between the parties and the fact that, in the words of the Board, "here, by contrast, the parties' relationship was less than 1-year old when recognition was withdrawn." *Wells Fargo*, 270 N.L.R.B. at 789. It is submitted that this distinction is fallacious because the same bargaining unit was represented by an unqualified mixed-guard union since 1948, and the "union" contemplated by the Board was the result of a merger of locals which was never contested by Wells Fargo. In fact, Member Dennis disassociated herself from this distinction and found the length of the bargaining relationship to be irrelevant to the issue of voluntary withdrawal. *Id.* at 790 n.20.

*Truck Drivers Local 807*, 755 F.2d at 10.
its voluntary recognition of Local 807 at will. The Second Circuit has thereby elevated section 9(b)(3) to a position which Congress did not intend. The expansion of the class of employees covered by section 9(b)(3) along with the NLRB's denial of the protections of the Act to voluntarily recognized mixed-guard unions, threatens to create a growing class of employees afforded second-rate rights to union representation.  

James P. McCabe

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67 See Brink's Inc., 272 N.L.R.B. 868, 869 (1984); University of Chicago, 272 N.L.R.B. 873, 874 (1984). In these recent cases, the NLRB has embarked on a broad-based retraction of the rights of security guards to choose mixed-guard unions as their bargaining representatives. In University of Chicago, the Board refused to allow a mixed-guard union to intervene in a Board-conducted election. See 272 N.L.R.B. at 871. The Board in University of Chicago overruled Bally's Park Place, 257 N.L.R.B. 777 (1981), and William J. Burns Int'l Detective Agency, Inc., 138 N.L.R.B. 449 (1962), and expressly disavowed the holding of Rock-Hill Uris, Inc. v. McLeod, 236 F. Supp. 395 (S.D.N.Y. 1964), aff'd, 344 F.2d 697 (2d Cir. 1965). See 272 N.L.R.B. at 874 n.8, 876. Rock-Hill had held that an unqualified union could intervene in a Board election, with the Board merely "certifying" the mathematical results. 236 F. Supp. at 398. In University of Chicago, Member Zimmerman asserted that the majority's approval of Columbia-Southern Chem. Corp., 110 N.L.R.B. 1189 (1954), heralded the demise of the Board's policy of extending the contract bar doctrine to mixed-guard unions, see 272 N.L.R.B. at 280 (Zimmerman, dissenting). In Brink's Inc., the Board refused to allow a clarification of a unit of guards who were represented by a mixed-guard union. See Brink's Inc., 272 N.L.R.B. at 864-70. The Board's rationale in Wells Fargo, University of Chicago, and Brink's Inc. has been that the legislative purpose of § 9(b)(3) necessitated an abandonment of a literal reading of the proscription on Board certification and mandated the affirmative denial of all Board processes to mixed-guard unions. See University of Chicago, 272 N.L.R.B. at 877 (Zimmerman, dissenting). As Member Zimmerman stated in University of Chicago: "In all three cases, [the NLRB based] these conclusions on what they perceive to be the purpose and intent of Section 9(b)(3) . . . [this] view is premised on a flawed interpretation of the language and history of Section 9(b)(3)." Id. (Zimmerman, dissenting).