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the purchase was at a considerable discount because of the many risks involved. The Court of Appeals for the Third Circuit ignored the fact that the discount element was a product of the risks inherent in such a purchase and remanded to the Tax Court to determine what portion of the gain was attributable to interest income in the nature of "issue discount."[29] The Tax Court determined that the purchaser had received a six percent interest discount that would be taxable as ordinary income. The result gives the commissioner authority for asserting that in all discount purchases there is an imputed interest element which will not qualify for capital gains treatment. Such a theory would appear to be erroneous because it transposes the imputed interest factor from the deferred payment sales context[30] into the entirely distinct discount purchase context. Further, it results in the denial of capital gain treatment to the normal appreciation of an admitted capital asset due to market factors, and ignores the fact that the condemnation in *Midland-Ross* resulted because that discount was the economic equivalent of interest.

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Labor Law—Effect of 9(c)3 on Duty to Bargain

The Labor Management Relations Act, section 9(c)3, prohibits holding a representation election in a bargaining unit "within which in the preceding twelve-month period, a valid election shall have been held."[1] The issue in *Conren, Inc. v. NLRB*[2] was whether this prohibition prevents enforcement of an order to bargain issued because of the employer's refusal, nine and one-half months after the union had lost an election, to grant recognition on the basis of authorization cards signed by a majority of his employees.

The Court of Appeals for the Seventh Circuit enforced the NLRB's order to bargain, with Circuit Judge Kiley dissenting. The majority reasoned that the affirmative reference to "election" in 9(c)3 should not be construed to preclude representation based

[29] Jones v. Commissioner, 330 F.2d 302 (3d Cir. 1964).
[30] Int. Rev. Code of 1954, § 483.

[1] 61 Stat. 143 (1947), 29 U.S.C. § 159(c)3 (1964).
[2] 368 F.2d 173 (7th Cir. 1966), *cert. denied*, 35 U.S.L. Week 3330 (U.S. Mar. 21, 1967).

upon a majority showing achieved by means less formal than an election. The absence, in 9(c)3, of any reference to less formal means, such as authorization cards, was construed as an express exclusion of such means. The court asserted that to hold otherwise would "usurp a legislative prerogative."[3]

The legislative history of 9(c)3 can hardly be construed to support the majority view. Before enactment of the Labor Management Relations Act, the NLRB had evolved a "reasonable time rule" that protected a union's certified status, usually for one year, after it had won an election.[4] Even while the NLRB was following this "reasonable time rule" one authority[5] argued that the policy of the act, to encourage "the practice and procedure of collective bargaining and . . . [to protect] the exercise by workers of full freedom of association,"[6] could best be achieved through a period of stability following an election. He analogized a representation election to any election in our society in which the results are final:

> Similar considerations would seem to require that once a bargaining representative has been duly designated, that designation, except in extraordinary circumstances, must, in the interest of stability, remain operative for a reasonable period of time and cannot be revoked at every whimsy of the electorate. . . . *The price of freedom to bargain collectively is responsibility in the exercise of the freedom of choice.*[7]

In 9(c)3 Congress codified the administratively evolved doctrine of the "reasonable time rule" and applied it also to situations in which a union had lost an election. The majority report of the bill explained the change this "election bar" would make:

> This amendment [9(c)3] prevents the board from holding elections more often than once a year . . . . At present, if the union loses, it may on the presentation of additional membership cards

[3] *Id.* at 174.

[4] See Brooks v. NLRB, 348 U.S. 96, 98 (1954), in which Justice Frankfurter discusses Board practice before enactment of the Taft-Hartley Act.

[5] Bernard Cushman was serving as Chief of the Legislative and Bureau Services Section of the Solicitor's Office, Department of Labor, when he wrote the article cited.

[6] National Labor Relations Act (Wagner Act) § 1, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1964).

[7] Cushman, *The Duration of Certifications by the NLRB and the Doctrine of Administrative Stability,* 45 MICH. L. REV. 1, 8 (1946). (Emphasis added.)

secure another election within a short time, but if it wins its majority cannot be challenged for a year.[8]

In the absence of any clarifying debate, the inference that Congress intended this "election bar" to include less formal means of gaining recognition after an election had been lost seems at least as justified as the majority's inference that Congress intended to exclude such means.[9] The "industrial stability" which Congress sought to insure by enactment of 9(c)3[10] is considerably weakened if the "election bar" is interpreted as not precluding less formal means of achieving representation rights.

An election results in either formal designation of a bargaining agent or formal repudiation of any representation. The issue in *Conren* was whether informal designation of a bargaining agent will be allowed in situations where formal designation by election is not permitted. No other case has considered this question. Decisions of federal courts and the NLRB, however, have ruled that the act prevents informal repudiation of a union majority within a year after formal designation.[11] An election victory for a union compels the employer to bargain with the certified union even after he receives notice that a majority of his employees no longer wish to be represented by the union. The Supreme Court held, in *Brooks v. NLRB*,[12] that this result was necessary because:

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[8] S. REP. No. 105, 80th Cong., 1st Sess. 25 (1947). Senator Taft commented on this provision, 9(c)3, stating: "The bill also provides that elections shall be held only once a year so that there shall not be a constant stirring up of excitement by continual elections." 93 CONG. REC. 3838 (1947). The Senate amendment was adopted by the conference committee in lieu of the House amendment which would have allowed a decertification election inside of a year upon petition by employees. 93 CONG. REC. 6375 (1947) (report of conference committee).

[9] What is today known as the *Joy Silk* doctrine, an order to bargain without election upon showing of majority support, had been judicially recognized by Judge Learned Hand in NLRB v. Federbush Co., 121 F.2d 954, 956 (2d Cir. 1941). It is therefore just as reasonable to assume that Senator Taft knew of this situation and intended to include it as to assume he either did not know of the decision or else intended to exclude it.

[10] See Brooks v. NLRB, 348 U.S. 96, 103 (1954) (underlying purpose of statute is industrial peace); Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 362 (1949) (stability of labor relations was primarily objective of Congress); NLRB v. Holly-General Co., 305 F.2d 670 (9th Cir. 1962).

[11] See Brooks v. NLRB, 348 U.S. 96 (1954); NLRB v. Holly-General Co., 305 F.2d 670 (9th Cir. 1962); Montgomery Ward & Co., 162 N.L.R.B. No. 27 (1966).

[12] 348 U.S. 96 (1954).

> Congress has discarded common-law doctrines of agency. It is contended that since a bargaining agency may be ascertained by methods less formal than a supervised election, informal repudiation should also be sanctioned where decertification by another election is precluded. This is to make situations that are different appear the same.[13]

The Supreme Court, finding in the act a policy of industrial stability, refused to sanction informal procedures, within a year after an election, that were designed to determine a union's representation rights. Thus it would appear that Judge Kiley's contention that "the converse of the holding in *Brooks* ought to control this decision [*Conren*]" is correct.[14]

The most persuasive ground for Judge Kiley's dissent in *Conren* was the "congressional purpose of the act . . . and . . . the spirit of the developing statutory law."[15] Relying on *Brooks,* he pointed out that the concept of industrial stability was the guiding principle behind the one-year spacing of elections enacted by 9(c)3 and that solicitation of cards within a year of the valid election "is as disruptive of industrial peace as a second election."[16]

A second ground for dissent involved consideration of the reliability of informal means in determining a union's majority status. Reviewing several cases, Judge Kiley concluded that the policy of the NLRB and the courts was to accept only the most reliable means "in order to insure the employees' freedom of choice."[17] Since the union has lost a valid election within a year, the less reliable showing of majority status by authorization cards should preclude charging Conren with an 8(a)5[18] violation.

The dissenting opinion implies that recognition of such informal

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[13] *Id.* at 103, 104. The Court also discussed the policy behind the "election bar" including responsibility of the electorate, renunciation of choice by a procedure equally as solemn as the first, and minimization of strife. *Id.* at 99, 100.

[14] Conren, Inc. v. NLRB, 368 F.2d 173, 177 (7th Cir. 1966) (dissenting opinion). In NLRB v. Holly-General Co., 305 F.2d 670, 675 (9th Cir. 1962), the court enumerated three reasons for following *Brooks* when a union had been informally repudiated eleven months after an election: (1) stability in labor-management relations, (2) ease in enforcement by the Board, and (3) clear delineation of the time for good faith bargaining.

[15] 368 F.2d at 175.

[16] *Id.* at 177.

[17] *Id.* at 176.

[18] "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . . 49 Stat. 452 (1935), 29 U.S.C. § 158(a)5 (1964).

means would be an unwarranted extension of the *Joy Silk*—"no good faith doubt"—rule. The NLRB applies this rule when issuing an order to bargain[19] after a union has acquired a majority of authorization cards and made a demand to bargain upon an employer who refuses to bargain but has no good faith doubt that the union represents a majority of his employees.[20] Judge Kiley felt that an employer, regardless of the prohibition in 9(c)3, could indeed have a good faith doubt about a union's majority status within a year after a formal election. Judge Kiley might also have related this policy of accepting only the most reliable determination of a union's status to his argument for industrial stability, the purpose the courts have found in the act.

Congress in 9(c)3 barred any election for a period of one year after a valid election. Since this most formal means of establishing a bargaining relationship has been precluded by affirmative Congressional action, it would seem illogical to assert that a less formal and less reliable[21] means of establishing a bargaining relationship should be allowed to subvert the policy of industrial stability fostered by the act. This seems to be the gist of the Supreme Court's opinion in *Brooks*. Such reasoning is implicit, though not articulated, in Judge Kiley's dissent.

Since common-law doctrines of agency have been abolished,[22] and Congress has clearly made labor-management relations a matter

[19] The Labor Management Relation Act (Taft-Hartley Act) § 9(c)1, 61 Stat. 144 (1947), 29 U.S.C. § 159(c)1 (1964), provides the only means for certification, an election. An order to bargain is not certification and the period of time that an employer must bargain in good faith after such an order is in the Board's discretion. See NLRB v. Pool Mfg. Co., 339 U.S. 577 (1950); NLRB v. Mexia Textile Mills, 339 U.S. 563 (1950).

[20] In Snow & Sons, 134 N.L.R.B. 709, 710 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962), the NLRB stated that "the right of an Employer to insist upon a Board-directed election is not absolute." Furthermore, "where the employer's unfair labor practices are clearly established . . . the good faith of his doubts of the union majority may properly be regarded with some suspicion." NLRB v. Cumberland Shoe Corp., 351 F.2d 917, 921 (6th Cir. 1965).

[21] See Comment, *Union Authorization Cards*, 75 YALE L.J. 805 (1966). "Authorization cards are an unreliable index of employee choice. Compared with the secret ballot they replace, their solicitation is a woefully defective process . . . ." *Id.* at 818. See also NLRB v. Johnnie's Poultry Co., 344 F.2d 617 (8th Cir. 1965), in which a union received twenty-seven votes after acquiring fifty-five cards. More than a year later when the union again sought to bargain with the employer, the Court of Appeals for the Eighth Circuit reversed a NLRB order to bargain holding that employer had a good faith doubt as to the union's majority status.

[22] See note 13 *supra* and accompanying text.

of federal policy, an analogy to elections in a political context is valid. Employees' freedom of choice exercised in a formal election should be binding, short of an unusual circumstance, until another election is possible. Congress has sought to establish a period of stability after an election. This formality of an election is meaningless if the NLRB can, within one year after an election, disrupt the stability by issuing orders to bargain, based upon showings of majority status attained through informal means. Stability in labor-management relations can best be achieved within a context of certainty. Decisions such as *Brooks* make this certainty mandatory when an election results in victory for a bargaining agent. To apply a different rule when a certified election results in defeat of a union is arbitrary and unfair.

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Labor Law—'Outsiders' As Agents of the Employer

Any coercive, antiunion activities by persons acting as agents of an employer covered by the Labor Management Relations Act[1] will be imputed to him and the union concerned will have a remedy before the National Labor Relations Board.[2] However, those persons found not to be agents are beyond the reach of the law and consequently are free to continue at will their antiunion activities. Thus, an important aspect of labor legislation is the concept of agency, as it will often determine employer responsibilities.

Under the original provision of the Wagner Act of 1935,[3] the term "employer" included "any person acting in the interests of an employer, directly or indirectly. . . ."[4] Using this language of the act, the NLRB imputed to employers the actions of third parties, even those only remotely connected with the employer.[5] This was

[1] Labor Management Relations Act (Taft-Hartley Act) § 2(2), 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1965).

[2] Hereinafter referred to as NLRB.

[3] Act of July 5, 1935, § 2(2), 49 Stat. 450.

[4] Act of July 5, 1935, § 2(2), 49 Stat. 450.

[5] H.R. REP. No. 244, 80th Cong., 1st Sess., 18 (1947). The committee report said:

> The Board frequently "imputed" to employers anything that anyone connected with an employer, no matter how remotely, said or did, notwithstanding that the employer had not authorized the action and in many cases had even prohibited it.

Ibid.