

THE EFFECT OF A NARROW APPLICATION  
OF THE *MIDWEST PIPING* DOCTRINE ON  
EMPLOYEES' SECTION 7 RIGHTS: AN  
ANALYSIS OF THE 1995 NATIONAL  
BASKETBALL ASSOCIATION LABOR  
DISPUTE

INTRODUCTION

An employer's ability to exert a strong influence on employee free choice in the collective bargaining process directly conflicts with the objectives of the National Labor Relations Act (NLRA or the Act).<sup>1</sup>

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1. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1994)). For a general discussion of the history and evolution of the NLRA, see WALTER E. OBERER ET AL., *CASES AND MATERIALS ON LABOR LAW* 108-180 (4th ed. 1994). The sections of the NLRA cited in this Note refer to the NLRA in its current form.

One of the fundamental goals of the NLRA is to prevent conduct that has the "effect of burdening or obstructing commerce." 29 U.S.C. § 151. Section 1 of the Act notes:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by *restoring equality of bargaining power between employers and employees.*

*Id.* (emphasis added).

One of the primary goals of the NLRA is to ensure equality of bargaining power between employees and employers.<sup>2</sup> The core of the NLRA is section 7,<sup>3</sup> which protects the freedom of employees to self-organize and select collective bargaining representatives.<sup>4</sup>

In an effort to protect employee section 7 rights, the National Labor Relations Board (NLRB or the Board)<sup>5</sup> held in *Midwest Piping & Supply Co.*<sup>6</sup> that an employer has a duty of strict neutrality in recognitional labor disputes.<sup>7</sup> Recognitional labor disputes involve conflicts over which union should represent employees in a particular bargaining unit.<sup>8</sup> Under the duty of strict neutrality articulated in *Midwest Piping*,<sup>9</sup> an employer had an obligation to refrain from

2. 29 U.S.C. § 151.

3. Section 7 of the Act provides that:

Employees shall have the right to self-organization, to form, join or assist labor 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [§ 8(a)(5)] of this title.

*Id.* § 157.

This Note will refer to employees' § 7 rights and the right of employees to freely choose bargaining representatives interchangeably.

4. There are two main enforcement provisions in § 7. 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]." *Id.* § 158(a)(1). In addition, § 8(a)(2) makes it an unfair labor practice for an employer:

[T]o dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section [6] of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

*Id.* § 158(a)(2).

5. The NLRB is the administrative agency created by the NLRA to enforce employee § 7 rights. *See* 1 PATRICK HARDIN, *THE DEVELOPING LABOR LAW* 28-29 (3d ed. 1992).

6. 63 N.L.R.B. 1060 (1945).

7. *Midwest Piping*, 63 N.L.R.B. at 1070. *See infra* Part I.A (discussing *Midwest Piping*).

8. *See infra* Part I for discussion of various recognitional dispute scenarios.

9. After its decision in *Midwest Piping*, the Board and the courts referred to employers' duty of strict neutrality as the *Midwest Piping* doctrine. *See infra* Part I. This Note will refer to an employer's duty of strict neutrality and the *Midwest Piping* doctrine interchangeably.

negotiating with any union when a “real question concerning representation”<sup>10</sup> of its employees existed.<sup>11</sup> In *RCA Del Caribe, Inc.*,<sup>12</sup> *Bruckner Nursing Home*,<sup>13</sup> and *Dresser Industries, Inc.*,<sup>14</sup> however, the Board narrowed the scope of the *Midwest Piping* doctrine by limiting the employers’ duty to remain neutral when a question arose as to the employees’ choice of bargaining representative.<sup>15</sup>

This Note examines the impact of the Board’s narrowing of the *Midwest Piping* doctrine on the rights of employees to choose bargaining representatives without employer manipulation.<sup>16</sup> In June of

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10. Both the NLRB and the courts have struggled with the formulation of a standard for determining what constituted a real question concerning representation. The Board has fluctuated between a broad and narrow interpretation of the question concerning representation standard while the circuit courts have consistently preferred a narrow approach. See *infra* Part I (discussing the Board and the courts’ approach to the question concerning representation standard). This Note utilizes the terms “real question concerning representation,” “question concerning representation,” and “question of representation” interchangeably.

11. *Midwest Piping*, 63 N.L.R.B. at 1069-70.

12. 262 N.L.R.B. 963 (1982).

13. 262 N.L.R.B. 955 (1982).

14. 264 N.L.R.B. 1088 (1982).

15. All three cases altered an employer’s duty under the *Midwest Piping* doctrine but each case addressed the issue under different scenarios. See *infra* Part I (discussing *RCA Del Caribe*, *Bruckner Nursing Home*, and *Dresser Industries*).

16. When the Board first issued its rulings in *RCA Del Caribe* and *Bruckner Nursing Home*, several commentators criticized the Board’s position. Commentators predicted that the Board’s decisions in *RCA Del Caribe* and *Bruckner Nursing Home* would seriously undermine the right of employees to freely choose bargaining representatives. See, e.g., Beth Z. Margulies, *Employees’ Pipe Dream of Free Choice in Representation: Effectuated or Eradicated? (The Midwest Piping Doctrine Revised)*, 33 DEPAUL L. REV. 75, 88-103 (1983) (arguing that *Bruckner Nursing Home* and *RCA Del Caribe* fail to adequately protect employee free choice); Bruce C. Herron, Comment, *The NLRB Modification of the Midwest Piping Doctrine: Industrial Stability v. Employee Free Choice*, 88 DICK. L. REV. 129, 132 (1983) (stating that *RCA Del Caribe* “infring[es] upon the right of employees to choose their collective bargaining representative unfettered by employer interference”); Arthur J. Laplante, Comment, *The Midwest Piping Doctrine Redefined: A Matter of Policy*, 18 NEW ENG. L. REV. 965, 967 (1983) (noting that the Board’s decision in *RCA Del Caribe* “is no more than another vehicle for enabling employer determination of the employees’ bargaining representative”). See also Timothy Silverman, Comment, *The Effect of a Petition for Decertification on the Bargaining Process: The Reversal of Dresser Industries*, 25 SAN DIEGO L. REV. 581, 608 (1988) (concluding that the Board’s decision in *Dresser Industries* that permits bargaining after the filing of a decertification petition may be a “barrier to the ultimate goal of resolution of the representation question and employee free choice of representation”).

1995, the National Basketball Association (NBA) players, team owners, and the National Basketball Players Association (Players Association)<sup>17</sup> engaged in a complex labor dispute that lasted through September of 1995.<sup>18</sup> The crux of the dispute concerned the negotiation of a new collective bargaining agreement between the team owners and the players, and a movement by the players to decertify<sup>19</sup> their union.<sup>20</sup> The Board's narrow interpretation of the *Midwest Piping* doctrine allowed team owners to control which labor organization represented their employees by manipulating the terms of the parties' collective bargaining agreement.

Part I of the Note examines the history and evolution of the *Midwest Piping* doctrine. Part II presents the facts of the NBA labor dispute and illustrates how the NBA and the team owners manipulated the players' choice of bargaining representative.<sup>21</sup> Finally, Part III proposes that in light of the NBA labor dispute, the Board should

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17. The Players Association was the union that represented the NBA players.

18. See *infra* Part II for an analysis of the NBA labor dispute.

19. To decertify a union, an employee or several employees, represented by at least 30% of the employees in the particular bargaining unit, must present the Board with a decertification petition. See 1 HARDIN, *supra* note 5, at 378. Section 9(e)(1) of the Act allows employees to decertify their union. Section 9(e)(1) of the NLRA states that:

Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to [section 8(a)(3)] . . ., of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

29 U.S.C. § 159(e)(1). See also ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 49-50 (1976) (discussing the decertification procedure). A decertification petition states that the employees in the bargaining unit no longer wish to be represented by their union. See 1 HARDIN, *supra* note 5, at 379-80. If a majority of the employees vote to decertify the union in a decertification election, the union is no longer the bargaining representative of the employees. See OBERER, *supra* note 1, at 228-30. A decertification proceeding is unnecessary, however, if a union admits that it no longer has the majority support of its members. See 1 HARDIN, *supra* note 5, at 386-88.

20. See *infra* Part II (discussing and analyzing the NBA labor dispute).

21. This Note does not address whether multi-million dollar professional athletes require union representation. For purposes of this Note, athletes are presumed to possess the same rights and protections under the NLRA as do other employees. Furthermore, the objective facts of the NBA labor dispute provide a worthwhile example of the problems that arise when the Board employs a narrow scope the *Midwest Piping* doctrine.

revert back to a broad application of the *Midwest Piping* doctrine to ensure employee free choice in selecting labor representatives.

## I. THE HISTORY AND EVOLUTION OF THE *MIDWEST PIPING* DOCTRINE

### A. *Midwest Piping: The Creation of the Duty of Strict Neutrality*

In *Midwest Piping*, the employer and the International Association of Steam and Gas Fitters (Steamfitters) entered into a “members only”<sup>22</sup> contract.<sup>23</sup> A rival union, the United Steelworkers of America (Steelworkers), petitioned the Board for a representation election.<sup>24</sup> Subsequently, the Steamfitters presented the employer with authorization cards signed by a majority of the employees.<sup>25</sup> The employer then entered into a union shop contract<sup>26</sup> with the

22. A “members only” contract is when the employer and the union agree that the terms of the contract only apply to employees who are members of the union. See *Gardner Mechanical Serv., Inc. v. NLRB*, 89 F.3d 586, 592-93 (9th Cir. 1996). Employees who do not wish to join the union are not governed by the contract. *Id.*

23. *Midwest Piping*, 63 N.L.R.B. at 1065. For a further in-depth discussion and analysis of the seminal cases involved in the following discussion of the evolution of the *Midwest Piping* doctrine, see Margulies, *supra* note 16; Herron, *supra* note 16; Laplante, *supra* note 16. See also 1 HARDIN, *supra* note 5, at 310-17.

24. *Midwest Piping*, 63 N.L.R.B. at 1068-69. The Steamfitters also campaigned for representation. *Id.* at 1070.

25. *Id.* at 1069.

26. *Id.* A union shop contract is an agreement between an employer and a union under which employees may be required to “obtain and maintain membership in a union” and may be discharged for dropping union membership. See 2 HARDIN, *supra* note 5, at 1495-1505; GORMAN, *supra* note 19, at 642.

The NLRA explicitly permits employers and unions to enter into union shop agreements. Section 8(a)(3) specifically exempts union shop agreements from employer conduct that constitutes unfair labor practices:

[N]othing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, which is the later . . .

29 U.S.C. § 158(a)(3).

Likewise, the NLRA provision governing labor organization unfair labor practices exempts union shop agreements by allowing unions to deny or terminate membership based on the “failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or

Steamfitters.<sup>27</sup>

The Board held that the employer violated section 8(a)(2)<sup>28</sup> of the NLRA by recognizing the Steamfitters as the employees' bargaining representative at a time when a real question concerning representation existed.<sup>29</sup> The Board found that the employer's conduct constituted a breach of its duty to remain neutral when confronted with opposing claims of representation by rival unions.<sup>30</sup> Accordingly, the Board held that by entering into an agreement with the Steamfitters, the employer infringed upon the employees' right to choose their bargaining representative without employer interference.<sup>31</sup>

The Board reasoned that Congress delegated the power to resolve representation questions to the NLRB and, in the situation at hand, the employer inappropriately determined the issue on its own.<sup>32</sup> Furthermore, the Board noted that the employer infringed upon the employees' section 7 rights because, by entering into a bargaining agreement with the Steamfitters, the employer signaled to the

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retaining membership." *Id.* § 158(b)(2).

27. *Midwest Piping*, 63 N.L.R.B. at 1069.

28. *See supra* note 4 (discussing § 8(a)(2) of the Act).

29. *Midwest Piping*, 63 N.L.R.B. at 1070. Specifically, the Board stated that its ruling was in response to the fact that the employer's acts "contravene[d] the letter and the spirit of the Act, and le[d] to those very labor disputes affecting commerce which the Board's administrative procedure is designed to prevent." *Id.* at 1070.

30. *Id.*

31. *Id.* at 1071.

32. *Id.* at 1070.

employees that it supported the Steamfitters and not the Steelworkers.<sup>33</sup>

*B. The NLRB Expands the Scope of the Midwest Piping Doctrine and the Courts Respond*

The Board expanded the *Midwest Piping* doctrine in *Shea Chemical Corp.*<sup>34</sup> In *Shea Chemical*, the Board held that the

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33. *Id.* The Board stated that by signing a contract with the Steamfitters when the Steelworkers filed for an election, the employer “indicated its approval of the Steamfitters, accorded it unwarranted prestige, encouraged membership therein, discouraged membership in the Steelworkers, and thereby rendered unlawful assistance to the Steamfitters, which interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.” *Id.* at 1071.

The Board included a third rationale for its decision when it expressed its dislike for “membership” or “authorization” cards. The Board stated that:

Under the circumstances, we do not regard such proof [possession of signed membership cards from a majority of the bargaining unit] as conclusive. Among other things, it is well known that membership cards obtained during the heat of rival organizing campaigns like those of the respondent’s plants, do not necessarily reflect the ultimate choice of a bargaining representative; indeed, the extent of dual membership among the employees during periods of intense organizing activity is an important unknown factor affecting a determination of majority status, which can best be resolved by a secret ballot among the employees.

*Id.* at 1070 n.13.

34. *Shea Chem. Corp.*, 121 N.L.R.B. 1027, 1029 (1958). *Shea Chemical* involved a dispute between the Mine Workers Union (Mine Workers) and the Oil Workers Union (Oil Workers) over which union would represent the employees. *Id.* at 1027-28. After the Mine Workers acquired authorization cards from a majority of the employees, the employer recognized the Mine Workers as the employees’ bargaining representative. *Id.* at 1027. The Oil Workers subsequently informed the employer that a majority of employees supported it as their bargaining representative, but the employer nevertheless refused to bargain with the Oil Workers. *Id.* at 1028. The Oil Workers then filed a representation petition with the NLRB. *Id.* The Oil Workers also filed §§ 8(a)(1) and 8(a)(2) unfair labor practice charges against the employer. *Id.* at 1027.

*Shea Chemical* overruled the Board’s holding in *William D. Gibson Co.*, 110 N.L.R.B. 660 (1954). In *William D. Gibson*, the Board held that an employer was permitted to continue negotiating with an incumbent union until the Board certified the rival union as the employees’ collective bargaining representative. *Id.* at 662-63. The incumbent Steelworkers Union and the employer began negotiating a new collective bargaining agreement. *Id.* at 661-62. The Machinists Union filed a representation petition and requested that the employer recognize it as the bargaining representative for 30 of the employees, but the employer refused. *Id.* In response, the Machinists Union and filed §§ 8(a)(1), 8(a)(2), and 8(a)(3) unfair labor practice charges against the employer. *Id.* at 661-62. The Board dismissed the charges, holding that the *Midwest Piping* doctrine did not apply in situations where an employer contracted with an incumbent union that legitimately represented the employees. *Id.* at 662. The Board reasoned that the policy conformed to the primary objectives of the Act: stability in labor relations and continuity in collective bargaining. *Id.*

employer committed an unfair labor practice<sup>35</sup> by entering into a collective bargaining agreement with a union that it had previously recognized.<sup>36</sup> Additionally, in an attempt to define what constituted a real question concerning representation, the Board in *Shea Chemical* recognized that an employer's duty of strict neutrality did not arise in situations that involved a contract bar,<sup>37</sup> a certification bar,<sup>38</sup> or an inappropriate bargaining unit.<sup>39</sup>

The Board, however, never established exactly how much employee support a rival union needed to raise a question concerning representation and an employer's duty of strict neutrality.<sup>40</sup> Indeed, the

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at 661-62.

The courts agreed with the rationale of the Board in *William D. Gibson*. See, e.g., *NLRB v. Peter Paul, Inc.*, 467 F.2d 700, 702 (9th Cir. 1972) (holding that employer's continued negotiations with long-time incumbent union after competing union filed election petition did not violate the Act); *Modine Mfg. Co. v. NLRB*, 453 F.2d 292, 296 (8th Cir. 1971) (holding that employer's continued bargaining with initial union instead of rival union did not violate the Act where the first union represented a large, uncoerced majority and the rival union adherents rescinded their authorization cards); *American Bread Co. v. NLRB*, 411 F.2d 147, 155-56 (6th Cir. 1969) (holding that employer did not breach its neutrality by recognizing a rival union which manifested a clear majority of employees over competing union); *NLRB v. Indianapolis Newspapers, Inc.*, 210 F.2d 501, 504 (7th Cir. 1954) (holding that employer's recognition of union which demonstrated clear majority support over competing union did not constitute unfair labor practice).

35. Specifically, violations of §§ 8(a)(1) and 8(a)(2). *Shea Chem.*, 121 N.L.R.B. at 1029.

36. *Id.* at 1028-29.

37. *Id.* at 1029. A "contract bar" is when the Board denies an election among employees who are covered by a valid collective bargaining agreement. GORMAN, *supra* note 19, at 54. The collective bargaining agreement must be in writing, properly signed (before the petition of the rival union is filed), and must be for a definite duration of up to three years. *Id.* at 54-55. See *General Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962) (extending the contract bar period from two to three years).

38. *Shea Chem.*, 121 N.L.R.B. at 1029. A "certification bar" is a one-year ban on the filing of representation petitions after the Board certifies a union as the bargaining representative of a group of employees. 1 HARDIN, *supra* note 5, at 390.

39. *Shea Chem.*, 121 N.L.R.B. at 1029. The Board considers several factors in deciding whether a union represents an "appropriate bargaining unit." The Board examines, among other things, the amount and manner in which the employees are paid, the type of benefits the employees receive, the number of hours the employees work, the type of work the employees perform, the employees' skills, training and qualifications, the amount of contact the employees have with each other, and the bargaining history of the employees. *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962).

40. 1 HARDIN, *supra* note 5, at 312.

Board created a broad and ambiguous standard. For example, in *Playskool, Inc.*,<sup>41</sup> the Board held that a rival union's claim that was not "clearly unsupportable and lacking in substance" raised a question concerning representation.<sup>42</sup>

Contrary to the Board's broad standard for determining when a real question of representation existed, the circuit courts held that if any one of a number of unions demonstrated majority support of the employees, a question of representation did not arise.<sup>43</sup> Accordingly, a majority of the circuit courts disagreed with and did not enforce the

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41. 195 N.L.R.B. 560 (1972), *enforcement denied*, 477 F.2d 66 (7th Cir. 1973). In *Playskool*, the Board found that the employer violated §§ 8(a)(1), 8(a)(2), and 8(a)(3) of the Act when the employer recognized and bargained with an incumbent union at a time when a rival union also claimed that it represented the employees. *Id.* at 561.

42. *Id.* at 560. Indeed, the Board gave this standard much leeway. In *American Bread Co.*, 170 N.L.R.B. 85 (1968), *enforcement denied*, 411 F.2d 147 (6th Cir. 1969), the Board held that the employer committed §§ 8(a)(1) and 8(a)(2) unfair labor practices by bargaining with one union when a rival union filed a representation petition with the support of only one (out of 92) authorization card. *Id.* at 88. The Board reasoned that the number of employees signing authorization cards "should be of no concern to an employer when a claim is made." *Id. But see* *Robert Hall Gently Rd. Corp.*, 207 N.L.R.B. 692, 693 (1973) (holding that the union's possession of 24 out of 153 authorization cards in the bargaining unit did not raise a question concerning representation when the union withdrew its representation petition from the NLRB).

43. As stated by the Third Circuit:

[W]here a clear majority of the employees, without subjection to coercion or other unlawful influence, have made manifest their desire to be represented by a particular union, there is no factual basis for a contention that the employer's action thereafter in recognizing the union or contracting with it is an interference with their freedom of choice.

NLRB v. Air Master Corp., 339 F.2d 553, 557 (3d Cir. 1964) (citations omitted). *See also* citations in 1 HARDIN, *supra* note 5, at 314 n.138 (citing NLRB v. Newport Div. of Wintex Knitting Mills, Inc., 610 F.2d 430, 431 (6th Cir. 1979) (holding that no real question of representation existed when one of two rival unions convincingly demonstrated its majority status without any help from the employer by obtaining authorization cards from 96 of the 135 employees); *Buck Knives, Inc. v. NLRB*, 549 F.2d 1319, 1320 (9th Cir. 1977) (holding that employer's recognition of one of two unions vying for sole recognition on basis of a 170 to 108 employee vote for recognized union was not a violation of §§ 8(a)(1) and 8(a)(2)); *NLRB v. Inter-Island Resorts, Ltd.*, 507 F.2d 411, 413 (9th Cir. 1974) (holding that employer's recognition of union was not a violation of Act where recognized union represented employees in six other hotels operated by employer and had clear majority support of new employees); *Suburban Transit Corp. v. NLRB*, 499 F.2d 78, 83 (3d Cir. 1974); *Playskool, Inc. v. NLRB*, 477 F.2d 66, 72-3 (7th Cir. 1973); *NLRB v. Peter Paul, Inc.*, 467 F.2d 700, 702 (9th Cir. 1972); *Modine Mfg. Co. v. NLRB*, 453 F.2d 292, 296 (8th Cir. 1971); *American Bread Co. v. NLRB*, 411 F.2d 147, 156 (6th Cir. 1969); *District 50, United Mine Workers v. NLRB*, 234 F.2d 565, 570 (4th Cir. 1956); *NLRB v. Indianapolis Newspapers, Inc.*, 210 F.2d 501, 504 (7th Cir. 1954).

Board's findings of employer unfair labor practices when the employer recognized and bargained with a union that obtained majority support of the employees in the bargaining unit.<sup>44</sup>

The courts based their theory on the need to further the Act's goal of maintaining continuity in the collective bargaining process between an employer and the incumbent union.<sup>45</sup> Moreover, the courts reasoned that in situations where a union demonstrated majority support, the employer fulfilled its duty to the employees by bargaining with their chosen representative.<sup>46</sup> In addition, the courts believed that an employer's act of bargaining with the union under such circumstances did not interfere with the rights of the rival union.<sup>47</sup> Accordingly, the circuit courts noted that their rule protected the section 7 rights of the employees by permitting the employer and the union to bargain without "undue delay."<sup>48</sup> Also, the courts explained that this policy promoted the Act's goal of labor "peace"<sup>49</sup> and eliminated any interference with that goal by preventing unions from asserting false claims of representation.<sup>50</sup>

### C. *The Board Narrows the Scope of the Midwest Piping Doctrine*

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44. See *supra* note 43. The Fifth Circuit agreed with the Board's approach. See *Oil Transp. Co. v. NLRB*, 440 F.2d 664, 665 (5th Cir. 1971) (holding that "where there are competing unions and 'the situation [has] not crystallized,' [the employer is obligated] not to exert influence thereby tipping the scales and 'depriving the employees of their right to select their representative in a free contest between the rival organizations.'" (quoting *NLRB v. Signal Oil & Gas Co.*, 303 F.2d 785 (5th Cir. 1962))). See 1 HARDIN, *supra* note 5, at 314.

45. See, e.g., *Playskool*, 477 F.2d at 70. Commentators have recognized that *Playskool* presents a good example of the circuit courts position. See, e.g., Herron, *supra* note 16, at 136-37; Laplante, *supra* note 16, at 977-81.

46. See, e.g., *Playskool*, 477 F.2d at 70 (citing *Indianapolis Newspapers*, 210 F.2d at 503).

47. See, e.g., *id.*

48. See, e.g., *id.* In *Playskool*, the court noted the alternate approaches taken by the courts and the Board. The court recognized that whereas the Board looks to whether the minority union's claim is "not clearly unsupported" in determining whether a question concerning representation exists, the courts look to whether the union claiming majority support actually has the uncoerced support of a majority of the employees. *Id.* at 70 n.3.

49. *Id.* at 70. See also *NLRB v. Peter Paul, Inc.*, 467 F.2d at 702; *NLRB v. Indianapolis Newspapers*, 210 F.2d at 503.

50. *Playskool*, 477 F.2d at 70.

## 1. RCA Del Caribe

In light of the courts' opposition to the Board's application of *Midwest Piping*, the Board narrowed the *Midwest Piping* doctrine.<sup>51</sup> In *RCA Del Caribe*, the Board established the policy that an employer may not cease bargaining with an incumbent union in response to a rival union filing a representation petition with the NLRB.<sup>52</sup> The employer and the incumbent union attempted unsuccessfully to renegotiate a collective bargaining agreement.<sup>53</sup> The employees then went on strike to demonstrate their support for the incumbent union's bargaining position.<sup>54</sup> While the employees were on strike, a rival union petitioned the Board for certification.<sup>55</sup> In response, the employer refused to negotiate an agreement with the incumbent union until the union presented the employer with signatures from a majority of the employees that authorized it to negotiate on their behalf.<sup>56</sup> The employer was then charged with section 8(a)(1),<sup>57</sup> 8(a)(2),<sup>58</sup> and 8(a)(3)<sup>59</sup> violations.<sup>60</sup>

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51. In *Bruckner Nursing Home*, the Board stated that "[it had] reviewed the Board's experience with *Midwest Piping* with a desire to accommodate the view of the courts of appeals in light of [its] statutory mandate to protect employees' freedom to select their bargaining representatives and in harmony with [its] statutory mandate to encourage collective bargaining." *Bruckner Nursing Home*, 262 N.L.R.B. at 957.

52. *RCA Del Caribe*, 262 N.L.R.B. at 965. A union files a representation petition with the NLRB when it wishes to be certified as the bargaining representative of the employees in the bargaining unit. *Id.* Under § 9(c)(1)(A) of the NLRA, the union must demonstrate that a "substantial number of employees . . . wish to be represented for collective bargaining." 29 U.S.C. § 159(c)(1)(A). The Board interprets the "substantial number" standard as meaning at least 30% of the employees within the bargaining unit. *See Bruckner Nursing Home*, 262 N.L.R.B. at 957 n.14.

53. *RCA Del Caribe*, 262 N.L.R.B. at 963-64.

54. *Id.* at 964.

55. *Id.*

56. *Id.* IBEW presented the employer with signatures of 157 of the 227 employees in the bargaining unit. The parties stipulated that the signatures were voluntary and not obtained through coercion. *Id.*

57. *See supra* note 4 (discussing § 8(a)(1) of the Act).

58. *See supra* note 4 (discussing § 8(a)(2) of the Act).

59. *See supra* note 26 (discussing § 8(a)(3) of the Act).

60. *RCA Del Caribe*, 262 N.L.R.B. at 963-64.

The Board held that an employer does not commit an unfair labor practice when it bargains with an incumbent union despite a petition for election by a rival union.<sup>61</sup> The Board noted that in such a situation, an employer who refused to negotiate with the incumbent union committed a section 8(a)(5)<sup>62</sup> unfair labor practice.<sup>63</sup> The Board observed, however, that if the rival union eventually won the election, any collective bargaining agreement previously agreed upon by the employees and incumbent union would be “null and void.”<sup>64</sup>

The Board noted that an incumbent union deserved a “presumption of majority status,”<sup>65</sup> and that the mere filing of a petition should not defeat that presumption.<sup>66</sup> The Board reasoned that its new policy advanced the NLRA’s goals of maintaining an efficient collective bargaining process and protecting the rights of employees to choose a bargaining representative without employer interference.<sup>67</sup> Accordingly, the Board held that the employer could not withdraw

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61. *Id.* at 965. The vote in *RCA Del Caribe* was 3-2 with the two dissenting members issuing strong opinions in support of the *Midwest Piping* doctrine. *Id.* at 966-69. *See infra* Part I.D (analyzing Chairman Van de Water’s dissent in *RCA Del Caribe*).

62. Section 8(a)(5) of the NLRA provides 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)] of this title.” 29 U.S.C. § 158(a)(5).

63. *RCA Del Caribe*, 262 N.L.R.B. at 965.

64. *Id.* at 966.

65. *Id.* at 965.

66. *Id.* at 965. The Board stated that “[t]he recognition of the special status of an incumbent union indicates a judgment that, having once achieved the mantle of exclusive bargaining representative, a union ought not to be deterred from its representative functions even though its majority status is under challenge.” *Id.* One of the dissenting members of the Board in *RCA Del Caribe*, Chairman Van de Water, argued that a presumption of majority status provided the incumbent union with an unfair advantage and served as one of the major reasons for the need for a strict neutrality rule. *Id.* at 967. Chairman Van de Water reasoned that “[b]y such employer interference, the selection process of a bargaining representative is no longer reserved to employees, as the Act intended and provided, but instead is tainted by the employer’s choice and ability to influence employees in matters that concern their employment.” *Id.* *See also infra* Part I.D (analyzing Chairman Van de Water’s dissent).

67. *RCA Del Caribe*, 262 N.L.R.B. at 965. The Board further commented that this approach was the best way to ensure employee free choice because if the employer was forced to cease negotiating with an incumbent union when a representation petition was filed, the employees may interpret this withdrawal from the negotiations as either dissatisfaction with the incumbent union or support for the rival union. *Id.*

from recognizing and negotiating with the incumbent union if the employer had a “good-faith” belief that a majority of the employees supported the incumbent union.<sup>68</sup>

## 2. Bruckner Nursing Home

The Board in *Bruckner Nursing Home* held that when two or more unions attempted to organize employees in a particular bargaining unit, an employer’s duty of strict neutrality only surfaced when one of the unions filed a representation petition with the NLRB.<sup>69</sup> Two rival unions, Locals 144 and 1115, began organizing campaigns at the employer’s workplace.<sup>70</sup> Subsequently, Local 144 alerted the employer that it possessed authorization cards that represented a majority of the employees.<sup>71</sup> Meanwhile, Local 1115 notified the employer that it was gathering support from the employees and requested that the employer refrain from recognizing any other union.<sup>72</sup> In addition, Local 1115 filed unfair labor practice charges against the employer and Local 144.<sup>73</sup> After the Board dismissed both charges, the employer verified the cards and negotiated a collective bargaining agreement with Local 144.<sup>74</sup> Local 1115 responded by filing additional unfair labor practice charges against the employer.<sup>75</sup>

The Board, however, refused to find that the employer committed an unfair labor practice.<sup>76</sup> In the absence of a representation petition, the Board held that the employer was free to recognize any union that

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68. *Id.* at 965 n.13.

69. *Bruckner Nursing Home*, 262 N.L.R.B. 955, 957 (1982). *See* 1 HARDIN, *supra* note 5, at 85-107 (discussing union organization and solicitation).

70. *Bruckner Nursing Home*, 262 N.L.R.B. at 955.

71. *Id.*

72. *Id.*

73. *Id.* Local 1115 claimed that the employer and Local 144 violated §§ 8(a)(1) and 8(b)(1)(A) of the Act. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 958.

acquired legitimate support from a majority of its employees.<sup>77</sup> Accordingly, a representation election petition became the “operative event” for an employer’s duty of strict neutrality.<sup>78</sup> Once the duty of strict neutrality arose, however, the employer would have to end all negotiations with either union until the Board certified the appropriate union through an election.<sup>79</sup>

The Board reasoned that the major weakness of the *Midwest Piping* doctrine was its failure to balance the NLRA’s dual purposes of ensuring the right of employees to freely select bargaining representatives and achieving efficiency in the collective bargaining process.<sup>80</sup> The Board noted that a narrow reading of the *Midwest Piping* doctrine satisfied both objectives of the Act but a broad interpretation of the *Midwest Piping* doctrine unnecessarily delayed the bargaining process.<sup>81</sup> Moreover, the Board stated that refusing to allow employers to negotiate with a union that demonstrated majority support interfered with employees’ reasonable expectations.<sup>82</sup>

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77. *Id.* Legitimate support entails acquiring the support of employees without coercion or through other illegal means. See 1 HARDIN, *supra* note 5, at 317-23.

78. *Bruckner Nursing Home*, 262 N.L.R.B. at 957.

79. *Id.*

80. *Id.*

81. *Id.* at 957.

82. *Id.* at 957-58. In *Bruckner*, the Board modified its holding in *Midwest Piping* that authorization cards are an unreliable measurement of employee sentiment. *Id.* Rather, the Board stated that an employer could recognize and bargain with a union that possessed authorization cards from a majority of the employees as long as no other union filed a representation petition. *Id.*

### 3. Dresser Industries

Of the three cases that substantially affected the balance of power between employers and employees, *Dresser Industries* had the most direct impact on the 1995 NBA labor dispute. In *Dresser Industries* the Board overruled the policy articulated in *Telautograph*<sup>83</sup> and held that an employer could not cease negotiating or executing a collective bargaining agreement with the incumbent union based solely because the employees commenced the decertification process by filing a petition with the NLRB.<sup>84</sup>

The Board relied on its reasoning in *RCA Del Caribe* when it stated that the mere filing of a decertification petition did not defeat the incumbent union's "presumption of majority status."<sup>85</sup> Indeed, the Board noted that the "preservation of the status quo" was the most successful way to ensure employer neutrality.<sup>86</sup>

#### D. RCA Del Caribe: *The Clairvoyant Dissent*

One of the Board members, Chairman Van de Water, dissented in *RCA Del Caribe* and predicted that the Board's decision would have

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83. *Telautograph Corp.*, 199 N.L.R.B. 892 (1972). In *Telautograph*, the Board held that the filing of a decertification petition by the employees in a bargaining unit constituted a real question concerning representation. *Id.* at 892. Accordingly, the Board reasoned that the filing of the petition triggered the employer's duty of strict neutrality and the employer was prohibited from bargaining with the incumbent union. *Id.* In *Telautograph*, the employer and Local Union No. 3 (Local Union) began negotiating a new collective bargaining agreement. *Id.* at 892-93. At that time, one of the employees filed a decertification petition with the NLRB. *Id.* at 893. Subsequently, the employer refused to continue bargaining with Local Union. *Id.* In response, Local Union filed unfair labor practice charges against the employer, claiming it refused to bargain in violation of § 8(a)(5) of the Act. *Id.* at 893. In rejecting Local Union's argument the Board held that the employer's actions were justified and found that the filing of a valid decertification petition triggered the employer's duty of strict neutrality and prohibited the employer from bargaining with the incumbent union. *Id.*

84. *Dresser Indus., Inc.*, 264 N.L.R.B. 1088, 1089 (1982). Because the employer acted in accordance with NLRB procedures under the rule articulated in *Telautograph*, the Board declined to find the employer's actions unlawful. *Id.*

85. *Id.* (citing *RCA Del Caribe*, 262 N.L.R.B. at 965).

86. *Id.* For a further discussion of *Telautograph* and *Dresser Industries*, see Silverman, *supra* note 16.

serious ramifications on employees' section 7 rights.<sup>87</sup> Chairman Van de Water argued that employees' rights to freely choose bargaining representatives are frustrated if an employer recognizes a union when there is a legitimate question as to whether a majority of the employees support that union.<sup>88</sup> He reasoned that once employees are aware that the employer prefers one union over another, the employees are more likely to support the union favored by the employer.<sup>89</sup>

Chairman Van de Water presented several scenarios to support his argument. In a situation where the employer prefers to maintain a bargaining relationship with the incumbent union, for example, it can offer favorable terms to entice the employees to support the incumbent union.<sup>90</sup> On the other hand, the employer may wish to end its relationship with the incumbent union and decide to bargain with the rival union to signal its preference for the rival union.<sup>91</sup> The Chairman noted that in either situation the rule articulated by the Board in *RCA Del Caribe* places employers in a position where they can influence the selection of the bargaining representative by manipulating employee sentiment.<sup>92</sup> Chairman Van de Water noted that adherence to the *Midwest Piping* doctrine in a broad form eliminated the problem of employer manipulation because the employer cannot support any union.<sup>93</sup>

## II. THE NBA LABOR DISPUTE

### A. *The Facts*

The facts of the 1995 NBA labor dispute provide an illustration of the impact of a restricted *Midwest Piping* doctrine on employees' section 7 rights. Labor unrest surfaced in the NBA after the collective

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87. *RCA Del Caribe*, 262 N.L.R.B. at 967 (Van de Water, member, dissenting).

88. *Id.*

89. *Id.* at 967-68.

90. *Id.* at 968.

91. *Id.* at 967-68.

92. *Id.* at 968.

93. *Id.*

bargaining agreement between the players and owners expired in June of 1994.<sup>94</sup> In October of 1994, both sides agreed to a no-strike, no-lockout arrangement, and continued their relationship without a bargaining agreement.<sup>95</sup> The success of the arrangement, however, was short-lived. In June of 1995, in the middle of the NBA championship finals, the team owners threatened to lockout the players if the sides did not negotiate and execute a new agreement before the end of the championship series.<sup>96</sup> The parties, however, were significantly divided over several issues. Because the parties were deadlocked, both the owners and the players weighed their options. The owners could lockout the players,<sup>97</sup> declare an “impasse”<sup>98</sup> in the negotiations,<sup>99</sup> or

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94. Actually, the seeds of the labor dispute originated in April of 1983 when the NBA players accepted a salary cap and revenue sharing plan. See Mark Heisler, *NBA Lockout Could Run Into Next Season*, FRESNO BEE, July 1, 1995, at E1. A salary cap is a concept that limits the total amount of money each team in the league can spend on its players. John Helyar, *NBA's Longest Game: Owners vs. Players*, WALL ST. J., June 16, 1995, at B10. Revenue sharing is where the teams in the league evenly divide the income generated by the sport. *Id.* The agreement between the team owners and players to implement a salary cap was the first of its kind in professional sports. Mark Asher, *NBA Might Lock Out Players After Final Playoff Series Ends*, WASH. POST, June 13, 1995, at E1.

The agreement to implement a salary cap and revenue sharing plan led to labor problems in the NBA when the league brought a declaratory judgment action against several of its players in *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069 (S.D.N.Y. 1994). In *Williams*, the league sought a declaratory judgment that the salary cap, the college draft, and the “right of first refusal” did not violate federal antitrust laws. *Id.* at 1071. A right of first refusal allows a team to match any offer made by another team to a player who has played fewer than four seasons and who has not played out two contracts. *Id.* at 1073. In response, the players brought counterclaims alleging that the policies directly violated the Sherman Act. *Id.* at 1071. In ruling that the league’s policies did not violate antitrust laws, the court relied on the non-statutory labor exemption that provided antitrust immunity to the NBA as long as a collective bargaining relationship existed between the league and the union. *Id.* at 1078.

95. See Asher, *supra* note 94, at E1. Because the parties did not reach an agreement on the vital issues after the bargaining agreement ended, the league had the option of locking out the players while the players had the option of striking. *Id.* One of the reasons for the parties entering into the no-strike, no-lockout agreement was the fear of suffering the negative fan reaction that the National Hockey League and Major League Baseball received when they canceled part of their respective seasons due to labor disputes. *Id.*

96. Asher, *supra* note 94, at E1.

97. In *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308-11 (1965), the Supreme Court held that a temporary employer lockout of its employees did not constitute an unfair labor practice if the lockout was in support of a “legitimate bargaining position.” *Id.* at 310. Furthermore, the Court held that lockouts were not necessarily inconsistent with an employee’s right to strike or an employee’s right to bargain collectively. *Id.* at 309-10.

In the NBA dispute, a lockout would have led to the cancellation of summer leagues and

accede to the demands of the players.<sup>100</sup> The players, on the other hand, could either accept the proposal offered by the team owners or go on strike.<sup>101</sup> Both sides, however, elected to forego using their economic weapons<sup>102</sup> and continued to negotiate a new collective bargaining agreement.<sup>103</sup>

Nevertheless, problems quickly resurfaced once the NBA championship ended. Some of the players' agents voiced their concerns over the owners' proposed terms for the collective bargaining agreement.<sup>104</sup> As the owners and the Players Association moved closer

teams would have been unable to trade players or sign free agents. See Mike Monroe, *League, Players Meet On Lockout*, DENV. POST, June 13, 1995, at D1.

98. An impasse occurs "after good faith negotiations have exhausted the prospects of concluding an agreement." Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), *enforced*, 442 F.2d 742 (D.C. Cir. 1971); see 1 HARDIN, *supra* note 5, at 696-710 (discussing the effect of impasse on the collective bargaining process). In *Taft*, the Board held that it considers several factors relevant in making the determination whether the parties are at impasse. *Taft*, 163 N.L.R.B. at 478. These factors were "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Id.* See also 1 HARDIN, *supra* note 5, at 693 (recognizing that in declaring an impasse, the Board considers the following factors: (1) whether the employees have gone on strike, (2) the flexibility of the parties' positions, (3) the possibility of the continuation of bargaining, (4) statements or understandings of the parties regarding the impasse, (5) employer animus towards the union, (6) the nature and importance of the issues at hand and the extent of the disagreement between the parties, (7) the parties' bargaining history, (8) the parties' willingness to further discuss the issues, (9) the duration of time between bargaining sessions, (10) the amount and length of the bargaining sessions, and (11) any other actions inconsistent with an impasse).

99. Under NLRB rule, if an impasse actually existed, the owners could unilaterally impose a salary cap on the players. See *Taft*, 163 N.L.R.B. at 478. NLRB policy indicates that after the employer and union become deadlocked on an issue, the employer is permitted to make "unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Id.* (footnote omitted). See GORMAN, *supra* note 19, at 445-50 for an in-depth look at the role of the impasse in labor disputes.

100. See Asher, *supra* note 94, at E1.

101. See *id.*

102. Economic weapons, such as strikes and lockouts, are legal methods by which one party may attempt to persuade the opposing party to agree to various demands. See 1 HARDIN, *supra* note 5, at 685-91.

103. In response to the parties' agreement to continue negotiating in good faith, the league extended the no-lockout agreement with the players. See Mark Heisler, *NBA, Union Agreement Close, According to Stern Announcement*, L.A. TIMES, June 15, 1995, at C6.

104. The agents' concerns rested on the Players Association's willingness to accept a hard salary cap. See Helyar, *supra* note 94, at B10. The agents believed that such a cap restricted player

to a new deal, the agents and some of the players (dissidents or dissident players) threatened to block the agreement.<sup>105</sup> The dissidents claimed that the union was not representing the players' best interests.<sup>106</sup> Shortly thereafter, several of the NBA's marquee players began to sign and circulate decertification notices.<sup>107</sup> After gathering the support of other players, a faction of players petitioned the NLRB for a decertification vote.<sup>108</sup> Meanwhile, the owners and the Players Association reached an agreement on a tentative six-year collective bargaining agreement (C.B.A. I).<sup>109</sup>

The events surrounding C.B.A. I resulted in the creation of two factions of players with opposing agendas.<sup>110</sup> While the dissident players actively solicited players to sign decertification slips,<sup>111</sup> the

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movement between teams and decreased the earning capacity of the players. *Id.* Although the owners agreed to raise the salary cap while throwing in licensing fee money, the agents believed that such concessions were "cosmetic." *Id.*

105. *See Players, Agents Want Negotiation Details; Group Reportedly Threatening to Block New Labor Deal*, S.F. EXAMINER, June 19, 1995, at D9. The agents and players claimed that the union's executive director, Simon Gourdine, breached his obligation to the players by failing to release the details of the negotiations. *Id.*

106. *Id.*

107. *See* Mark Asher, *Big-Name NBA Players Seek Fast Break from Union*, WASH. POST, June 20, 1995, at C1. The players included Michael Jordan, Patrick Ewing, Scottie Pippen, Alonzo Mourning and Horace Grant. *Id.* As of June 19, the players reported that they possessed signed decertification slips from 32 players, one-third of the 30% needed to petition the NLRB for a decertification election. *See* Mark Heisler, *NBA Union Director Draws Fire*, L.A. TIMES, June 20, 1995, at C7.

108. Seventeen players petitioned the NLRB for decertification. They claimed to have decertification notices from 61 of the 324 players in the union. *See* Mark Asher, *NBA Deal Draws Near as Players Press Union; Agents Reportedly Still Pushing for Decertification*, WASH. POST, June 21, 1995, at C1.

109. *See* Mark Asher, *NBA, Union, Reach Six-Year Agreement; But Players Petition NLRB for Decertification*, WASH. POST, June 22, 1995, at D1. A key element of the deal that angered the dissident players was a luxury tax that forced teams to pay a fine to the league if teams signed veteran players at more than a 10% raise. *Id.* Other terms of the bargaining agreement included an increase in the salary cap, a rookie salary cap, clauses that prohibited players from becoming free agents before the end of their contracts, a limit on the length of contracts for veteran players, and a reduction in the number of rounds in the college draft. *Id.* The dissident players and the agents disliked the agreement because they claimed its terms restricted player freedom to move from team to team and also decreased the potential earnings of individual players. *Id.*

110. *See id.*

111. At this time, the number of dissident players had grown from 17 to 98. *See* Michael Wilbon, *Trouble from Within*, WASH. POST, June 23, 1995, at D1. This also marked the beginning

union supporters endorsed the ratification of C.B.A. I.<sup>112</sup> In response to the increasing number of dissident players, the player representatives postponed the ratification vote.<sup>113</sup> Once the player representatives postponed the vote, the dissident players delivered decertification slips from 180 players (fifty percent of the total number of players in the bargaining unit) to the team owners and the Players Association.<sup>114</sup> At the same time, after unsuccessful attempts to negotiate a new deal with the Players Association, the owners imposed a lockout on the players.<sup>115</sup>

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of a heated internal war between the players who supported the union and those who did not. *Id.*

112. See Mark Asher, *NBA Players Step Up Effort to Nix Deal; Papers Filed Seeking Dissolution of Union; Labor Leadership to Vote on Agreement Today*, WASH. POST, June 23, 1995, at D1. In order to ratify the agreement, 21 of the 27 team representatives and a majority of the 29 league board of governors needed to approve the deal. *Id.*

113. The agents claimed that on June 23, 1995, they collected signed decertification sheets from over 50% of the players. See Murray Chass, *Deal Dead; Hoop Dreams Now Nightmare*, VANCOUVER SUN, June 24, 1995, at A15. At a meeting of 40 players that same day, however, some players emerged from the meeting proclaiming the end of the decertification movement. *Id.* Despite all the decertification talk, the league's board of governors voted unanimously to approve the deal. See Mark Asher, *NBA Labor Accord Put On Hold; Players Postpone Vote After Owners Ratify Deal*, WASH. POST, June 24, 1995, at C1.

114. See John Helyar, *NBA Players Enlist Legal Team in Contract Battle*, WALL ST. J., June 29, 1995, at B2. On this same day, seven players led by Michael Jordan and Patrick Ewing filed a class action antitrust suit against the NBA. See *7 Players Sue NBA, Calling Salary Cap and Draft Illegal*, COURIER J. (Louisville, Ky.), June 29, 1995, at 1D. The players claimed that the absence of a collective bargaining agreement removed the antitrust exemption from the NBA. *Id.* Accordingly, the players claimed that the court could hear their claim that the salary cap and the college draft violated the Sherman Act. *Id.*

115. See Mark Heisler, *NBA Doesn't Hold Its Peace with Lockout*, L.A. TIMES, July 1, 1995, at C1. The lockout signaled the first work stoppage in the history of the NBA. See Peter May, *NBA Calls a Lockout; Signings, Camps Affected in First Work Stoppage*, BOSTON GLOBE, July 1, 1995, at 61. Following the lockout, on July 11, 1995, a group of NBA players sought an injunction against the lockout, claiming it violated antitrust laws. See *NBA Players Group Asks Court to End Lockout by League*, WALL ST. J., July 12, 1995, at B2. In addition, the Players Association and the dissident players began to campaign vigorously to gain support for their respective side's agenda. See John Helyar, *NBA Players Union, Dissidents Trade Charges in Decertification Campaign*, WALL ST. J., July 14, 1995, at B6. The dissidents claimed that the Players Association and the NBA acted jointly against the players. *Id.* The Players Association claimed that the dissidents engaged in a "campaign of disinformation." *Id.*

The Players Association's version of the situation lost credibility, however, when the union's financial consultant resigned on July 25, 1995. See *NBA Players' Consultant Resigns over Analysis*, WALL ST. J., July 25, 1995, at B8. The financial consultant claimed that the union misrepresented certain financial figures in an effort to bolster the credibility of the collective bargaining agreement. *Id.* Meanwhile, the decertification movement claimed to possess

Despite the decertification petition and the lockout, the team owners and the union continued to negotiate a new agreement until bargaining sessions broke down in August of 1995.<sup>116</sup> In response to another failed attempt to negotiate a new deal, the Players Association agreed to dissolve itself if it could not work out an agreement with the owners by August 8, 1995.<sup>117</sup> However, on August 8, 1995, the sides reached another tentative collective bargaining agreement (C.B.A. II).<sup>118</sup>

Although C.B.A. II contained terms more favorable to the players than C.B.A. I,<sup>119</sup> the dissidents still pushed for decertification of the

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approximately 200 signatures supporting decertification of the union. See Hal Bock, *Players Challenge Lockout Disgruntled; Ranks Swell*, DAYTON DAILY NEWS, July 12, 1995, at 5D.

116. This time, negotiation talks ended when the Players Association refused to accept any concessions in exchange for the league abandoning its desire to implement a luxury tax. See Mark Asher, *Labor Talks Cease; NBA Says Union Limits Negotiations*, WASH. POST, Aug. 4, 1995, at F1. The luxury tax would have forced teams to pay a tax to the league whenever they re-signed a free agent at a pay raise of more than 10%. *Id.* See also *NBA: Tax, Salary-Cap Dispute Hangs over Renewed Talks*, OTTAWA CITIZEN, July 26, 1995, at C2. The NLRB decided that the decertification vote would be held by secret ballot in either August or September. See *NLRB Orders NBA Union to Vote by Secret Ballot*, WALL ST. J., July 27, 1995, at A3. The NLRB further requested that the Minneapolis district court delay the players' lawsuit to enjoin the lockout until the Board conducted the decertification vote. See *NLRB Asks for Delay in Antitrust Suit Against NBA*, STAR-LEDGER (Newark, N.J.), Aug. 1, 1995. The NLRB believed that the results of the vote would aid the court in its decision because the key elements of the antitrust claim revolved around the representative status of the Players Association. *Id.*

117. See Mark Asher, *NBA, Union Beat Deadlines with New Deal*, WASH. POST, Aug. 9, 1995, at C1. The effect of the union decertifying itself meant that the players could bring their antitrust claim against the league because the exemption that protected the league from antitrust claims would be removed. See *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994).

118. See Asher, *supra* note 117, at C1. The key element to the agreement was that the league would not implement the luxury tax. *Id.* Other terms of the deal included an increase in the salary cap, an increase in the average salary of players, a rookie salary cap, a reduction in the number of rounds in the college draft, an allowance for teams to use half of an injured player's salary to sign another player, an allowance for teams to sign a player who completed two years with the same team at double his salary, and a clause which allowed owners to renegotiate the agreement after three years if salaries exceeded a certain percentage of the league's revenue. See Scott Howard-Cooper, *NBA Makes Labor Deal at 11th Hour; Pro Basketball: Last-Minute Agreement Doesn't Include Luxury Tax. It Still Has to be Ratified by the Players*, L.A. TIMES, Aug. 9, 1995, at C1.

119. The most important difference to the players between the two bargaining agreements was the absence of a luxury tax in C.B.A. II. The dissident players and their agents felt the luxury tax would have significantly reduced the players' earning potential. See *supra* note 109 (noting the terms of C.B.A. I).

union.<sup>120</sup> In addition, one player filed unfair labor practice charges against the league.<sup>121</sup> The player claimed that the league tried to coerce the players into voting against decertification by threatening to cancel the 1995-96 basketball season.<sup>122</sup> As a result, a movement commenced to establish a new union for players who opposed both C.B.A. II and the incumbent union.<sup>123</sup>

Most of the players voted at the decertification election.<sup>124</sup> At the ballot box, the NLRB presented the players with two options: The players could vote "yes" if they wanted the Players Association to continue to represent their interests at the bargaining table or "no" if they wished to decertify the union.<sup>125</sup> Under NLRB rule, if the players voted to decertify the union, they would also be voting to reject C.B.A. II.<sup>126</sup> Likewise, by voting yes, the players would be indirectly voting to ratify the bargaining agreement.<sup>127</sup> In the end, the players voted 226-134 against decertification<sup>128</sup> and both the player representatives and

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120. See Asher, *supra* note 117, at C1.

121. See Murray Chass, *NBA Players Head to Polls Today for Key Vote on Union Contract*, SEATTLE POST-INTELLIGENCER, Aug. 30, 1995, at E3.

122. *Id.*

123. See Mark Asher, *A New Hat in the NBA's Labor Ring; With Today's Final Vote, King's Richmond Offers Another Option*, WASH. POST, Sept. 7, 1995, at B2. Mitch Richmond was the player who filed the unfair labor practice claim and who jump-started the movement for a new union. *Id.* The problem with the movement was that C.B.A. II included several terms favorable to the players. See Chass, *supra* note 121, at E3. As a result, the players were unlikely to support the establishment of a new union or the decertification of the old union and risk losing favorable bargaining terms. *Id.*

124. See Richard Justice, *Players Conclude Voting on NBA Labor Contract; League 'Cautiously Optimistic' Agreement Will Pass*, WASH. POST, Sept. 8, 1995, at C7.

125. *Id.*

126. See *id.* If the players voted to decertify the Players Association, any agreement reached between the league and the union would be void. See *supra* note 64 and accompanying text.

127. It is important to note that the players were actually only voting yes or no to decertify. See Murray Chass, *NBA Owners Brace for Vote Results*, PATRIOT LEDGER (Quincy, Ma.), Sept. 12, 1995, at 21. There was no express question whether the players wanted to ratify the negotiated collective bargaining agreement. *Id.* Indeed, several players voiced their concern over the fact that the NLRB did not hold a separate vote to ratify the collective bargaining agreement. *Id.* The players could not vote to reject the union and at the same time keep the collective bargaining agreement (C.B.A. II). *Id.*

128. See John Helyar, *NBA Players Reject Bid to Scrap Union as Faction Led by Jordan is Defeated*, WALL ST. J., Sept. 13, 1995, at A4.

the team owners ratified C.B.A. II.<sup>129</sup>

### B. Analysis

The facts of the NBA labor dispute exemplify precisely what Chairman Van de Water<sup>130</sup> and several legal commentators<sup>131</sup> feared: the ability of employers to manipulate and control employees' choice of bargaining representatives.<sup>132</sup> In the NBA dispute, the players ended up with a collective bargaining agreement with which they were satisfied but that satisfaction came at the expense of their section 7 rights.<sup>133</sup> The Board's decision in *Dresser Industries* allowed the owners to negotiate with the union after the players filed a decertification petition.<sup>134</sup> Yet, the same type of situation could occur in initial organizing situations<sup>135</sup> and scenarios where an outside union challenges the incumbent union.<sup>136</sup>

In the absence of the *Dresser Industries* decision, under the Board's policy articulated in *Telautograph*, the team owners and the league would have been required to assume a duty of strict neutrality when the players filed a decertification petition.<sup>137</sup> Accordingly, under

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129. See Richard Justice and Mark Asher, *Owners Approve Agreement*, WASH. POST, Sept. 16, 1995, at H8. The dissidents accepted the results of the vote and vowed to "reform" the current union instead of challenging it. See Mark Asher, *Labor Dispute Ends with No Objections*, WASH. POST, Sept. 20, 1995, at D2.

130. See *supra* Part I.D for analysis of Chairman Van de Water's dissent in *RCA Del Caribe*.

131. See *supra* note 16 for discussion of the criticism expressed by legal commentators of the *RCA Del Caribe*, *Bruckner Nursing Home*, and *Dresser Industries* decisions.

132. The author's analysis of the NBA labor dispute is one interpretation of the events. There are certainly other possibilities as to what the team owners and players were thinking at the time.

133. One of the main purposes of the NLRA is to maintain employee free choice in selecting their bargaining representatives. See *supra* note 3 (quoting § 7 of the Act).

134. See *supra* note 84 and accompanying text.

135. See, e.g., *Bruckner Nursing Home*, 262 N.L.R.B. 955 (1982). See *supra* Part I.C.2 for discussion of *Bruckner Nursing Home*.

136. See, e.g., *RCA Del Caribe*, 262 N.L.R.B. 963 (1982). See *supra* Part I.C.1 for analysis of *RCA Del Caribe*.

137. See *Telautograph Corp.*, 199 N.L.R.B. 892 (1972). See *supra* note 83 for discussion of *Telautograph*.

the NBA labor dispute time frame, C.B.A. II<sup>138</sup> could not have been executed. However, the owners were able to induce the players into voting against decertification by altering the terms of the collective bargaining agreements. Once the players realized that C.B.A. II was much more favorable to them than C.B.A. I, the decertification vote reflected that they had no intention of losing such a favorable agreement.<sup>139</sup>

Furthermore, by continuing to negotiate with the Players Association, the owners apparently utilized a divide and conquer approach. Because the dispute separated the players into two factions, one side that endorsed the union while the other side supported decertification,<sup>140</sup> the owners maintained division among the players by manipulating the terms of the bargaining agreements. Indeed, by offering favorable terms to the Players Association in C.B.A. II, the owners satisfied the union supporters while angering the decertification supporters.<sup>141</sup> Consequently, the players were distracted by internal squabbling instead of uniting against the team owners. Furthermore, the owners probably realized that most players cared more about the bargaining agreement itself than about which union negotiated the agreement. Thus, the owners eliminated the terms the players would never agree upon and added a few favorable terms to C.B.A. II to satisfy the players. The owners surely anticipated that this strategy would result in a majority of the players voting against decertification.

In the end, the owners achieved exactly what they wanted most: player support for the Players Association. In addition, the owners managed to retain a union that exerted little bargaining pressure on them. So, although the players obtained a collective bargaining agreement with which they were satisfied, it was achieved at the

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138. *See supra* note 118 (discussing C.B.A. II).

139. *See supra* notes 124-29 and accompanying text (noting the results of the decertification vote).

140. *See supra* notes 110-14 and accompanying text (recognizing the internal war that developed among the players).

141. *See supra* notes 119-29 and accompanying text.

expense of their section 7 rights.<sup>142</sup>

### III. WHAT ABOUT EMPLOYEE'S SECTION 7 RIGHTS? A PROPOSAL FOR THE RE-ESTABLISHMENT OF A BROAD STRICT NEUTRALITY RULE

More than fourteen years after the Board re-evaluated the *Midwest Piping* doctrine, the 1995 NBA labor dispute presents a clear-cut example of the need to revert back to a broad strict neutrality rule. Prior to narrowing the scope of the *Midwest Piping* doctrine, the Board broadly interpreted the question concerning representation standard to prevent employer interference, coercion, and manipulation of employees' section 7 rights.<sup>143</sup> In reconsidering the question concerning representation standard, however, the Board and the courts decided that there was a need to emphasize the NLRA's goal of efficiency in collective bargaining.<sup>144</sup> The problem is that the Board has given the goal of efficiency priority over employees' right to freely choose bargaining representatives.<sup>145</sup>

To resolve the imbalance created by the Board's current policy, there must be a return to a broad interpretation of the *Midwest Piping* doctrine.<sup>146</sup> The following four section proposal cures the shortcomings of *RCA Del Caribe*, *Bruckner Nursing Home*, and *Dresser Industries* and ensures the protection of employees' section 7

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142. The conclusion that the players would probably have voted to decertify the Players Association in the absence of the favorable C.B.A. II is strengthened by the fact that the player representatives voted out Simon Gourdine, the executive director of the Players Association, in January of 1996. See John Helyar, *The Hoop Players' Dream: A Leader to Rebuild Union*, WALL ST. J., Feb. 9, 1996, at B9. The action by the player representatives to vote out Simon Gourdine exemplified the players' overall dissatisfaction with the union leadership. *Id.*

143. See *supra* notes 32-33 and accompanying text (noting the rationale behind the Board's decision in *Midwest Piping*).

144. See *supra* Part I (analyzing the courts' approach to the *Midwest Piping* doctrine and the Board's approach in *RCA Del Caribe*, *Bruckner Nursing Home*, and *Dresser Industries*).

145. See Margulies, *supra* note 16, at 88-89.

146. Although the 1995 NBA labor dispute is an excellent example of the need for a broad strict neutrality rule, commentators have advocated this change since the Board narrowed the *Midwest Piping* doctrine. See, e.g., Margulies, *supra* note 16, at 103; Laplante, *supra* note 16, at 985-86.

rights in recognition dispute situations.<sup>147</sup>

I. In an initial organizing situation, where there is no incumbent union, an employer's duty of strict neutrality arises upon notice that one or more unions are attempting to organize its employees.<sup>148</sup> In such a scenario, an employer's right to negotiate with any union arises only after the NLRB certifies one of the unions as the employees' bargaining representative.

II. In an incumbent union situation, an employer's duty of strict neutrality arises upon a rival union petitioning the Board for an election, even where the incumbent union demonstrates majority support of the employees.<sup>149</sup> An employer's right to negotiate with any union in an incumbent union situation does not arise until after the Board certifies one of the unions as the employees' bargaining representative.

III. The filing of a decertification petition automatically triggers an employer's duty of strict neutrality.<sup>150</sup> Until the decertification vote is held, the employer cannot negotiate a collective bargaining agreement with any union.

IV. A rival union's claim to representation or its filing of a representation petition does not trigger an employer's duty of strict neutrality in situations where there is a contract bar, a certification bar, or where an inappropriate bargaining unit is involved.<sup>151</sup>

This proposal can be implemented in two ways. First, Congress could amend the NLRA and include the four sections following section 7 of the Act.<sup>152</sup> Second, the Board, with the support of the courts,

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147. The proposal is listed in the manner in which it could appear if added to the NLRA.

148. Section I of the proposal would overrule *Bruckner Nursing Home*.

149. Section II of the proposal would overrule *RCA Del Caribe*.

150. Section III of the proposal would reinstate the rule articulated in *Telautograph* and overrule *Dresser Industries*.

151. Section IV of the proposal merely reiterates the Board's rule stated in *Shea Chemical*. See *supra* notes 34-39 and accompanying text for discussion of *Shea Chemical*.

152. An appropriate caption immediately after § 7 would read: "To ensure absolute protection of the rights of employees to self-organize and freely choose their bargaining representative, the following provisions apply to employers' conduct in recognition labor disputes." The four-part proposal would then follow. See *supra* note 3 for § 7 of the Act.

could implement such a strict neutrality rule through its decisions.<sup>153</sup> Either way, the proposal completely insulates employees' section 7 rights. The Board should recognize that employees must internally resolve concerns about the status of their bargaining representative amongst themselves. Allowing employers to become involved creates the potential for manipulation and coercion of employee free choice.<sup>154</sup>

If the strict neutrality rule outlined above was in place during the NBA labor dispute, section III would have triggered the owners' duty of strict neutrality once the players filed a decertification petition. Accordingly, the owners and the Players Association would not have been able to negotiate the new collective bargaining agreement. Thus, the players would have held the decertification vote without the risk of losing a popular collective bargaining agreement.<sup>155</sup>

Although the effect of the proposal may cause some delay in the collective bargaining process,<sup>156</sup> the NBA labor dispute illustrates that a delay may be necessary to ensure the protection of employees' section 7 rights. It is not necessary to speed up the bargaining process to achieve the Act's goal of maintaining efficient collective bargaining. Indeed, efficient and effective collective bargaining cannot occur when an employer negotiates with a union chosen by employees under coercive circumstances.

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153. This route may be slightly more complicated because the Board and the courts would have to overrule current case law piece by piece. In other words, to address each section of the proposal, the Board and the courts would have to wait until cases with the appropriate fact patterns reached them before they could rule.

154. See *supra* Part II.B for discussion of the employer coercion of employee free choice in the 1995 NBA labor dispute.

155. It is, of course, impossible to predict what the outcome would have been in this scenario. The author believes that the players would have voted to decertify the union. This theory is based on the notion that the players were becoming increasingly dissatisfied with the union until the emergence of C.B.A. II. See *supra* notes 111-14.

156. There will always be a constant conflict between the need to protect employees' § 7 rights and the desire to prevent delay in collective bargaining. Because there are situations where the results of a representation election are predetermined (this is the case because only 30% of the employees are needed to petition the Board for an election but over 50% are needed to elect the union), it may be unfair to proscribe employers from negotiating a collective bargaining agreement with a union destined to win the election. The 1995 NBA labor dispute, however, illustrates that the delay may be inevitable to protect employee § 7 rights.

### CONCLUSION

Under the NLRB's current analysis of the *Midwest Piping* doctrine, employers have the power to legally infringe upon employees' section 7 rights. Without the adoption of a broad strict neutrality rule, situations like the 1995 NBA labor dispute will continue to occur. Accordingly, to protect the rights of employees to freely choose their bargaining representative, it is time to revert back to the good old days, a time when employers could not use their bargaining leverage to violate employee section 7 rights.

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