UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of Rulemaking Regarding Members-Only Minority- Union Collective Bargaining	)))))))))))))	Petition of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, and other labor organizations, as "interested persons" under 29 U.S.C. §2(1), 29 C.F.R. §102.124, 5 U.S.C. §551(2), and 5 U.S.C. §553(e) Docket No. _____

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TO THE HONORABLE MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD:

The Primary Petitioner herein is the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (Steelworkers Union, USW, or Union), a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (Act or NLRA) and an "interested person" within the meaning of Section 2(1) of the NLRA, Section 553(e) of the Administrative Procedure Act (APA),[1] Section 551(2) of the APA, and Rule 124 of the NLRB Rules and Regulations, Part 102.[2]

The Co-Petitioners herein are the International Brotherhood of Electrical Workers, AFL-CIO, CLC (IBEW); the Communications Workers of America, AFL-CIO, CLC (CWA); the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO-CLC (UAW); the International Association of Machinists and Aerospace Workers, AFL-CIO-CLC (IAM); the California Nurses Association, AFL-CIO (CNA); and the United Electrical, Radio and Machine Workers of America (UE). They are likewise labor organizations and "interested persons" within the meaning of the foregoing provisions.

This petition is submitted pursuant to the foregoing Rule 124 of the NLRB Rules and Regulations, which reads as follows:

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[1] 5 U.S.C. §553(e): "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

[2] 29 C.F.R. §102.124.

> Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original and seven copies of such petition shall be filed with the Board in Washington, D.C., and shall state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

Rule 124 was adopted in conformance with Section 553(e) of the APA to encourage the issuance of notice-and-comment rules that interested persons deem important.[3] Although the importance of the instant petition will be fully demonstrated in the presentation that follows, it is noteworthy as a preliminary matter that issues that may be involved herein are similar to two of the issues recently reviewed by the Supreme Court in *Massachusetts v. Environmental Protection Agency (EPA),*[4] to wit, (1) the procedural posture of an agency's failure to act upon a rulemaking petition submitted by an outside party and (2) the substantive issue posed by an agency's failure to give effect to clear and unambiguous statutory language. The Court's decision confirmed that an agency is required to give full consideration to a proper petition for rulemaking that had been submitted by an interested and affected party when the sole issue involves genuine statutory interpretation. In granting judicial review of the EPA's refusal to institute rulemaking that had been sought by outside interested parties, the Court, citing the District of Columbia Court of Appeals decision in *American Horse Protection Ass'n (AHPA) v. Lyng,*[5] observed that "[i]n contrast to nonenforcement

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[3] The legislative history of the APA referred to this provision as being "of the greatest importance because it is designed to afford every properly interested person statutory authority to petition for the issuance, amendment, or repeal of a rule. *No agency may receive such petitions in a merely proforma manner*." LEGIS. HIST., ADMINISTRATIVE PROCEDURE ACT, 79th Cong. (G.P.O. 1946) 359. Emphasis added.

[4] 2007 U.S. Lexis 3785, 127 S.Ct. 1438 (2007).

[5] 812 F.2d 1, 3-4 (1987).

decisions, agency refusals to initiate substantive rulemaking 'are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.'"[6] Accordingly, the interpretation of broad statutory language, such as was involved in the *EPA* case, was deemed reviewable. Referring to "the broad language"[7] of the statutory provision in issue, the Court noted that "'[t]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"[8] The instant Petition focuses upon both broad language and situations that Congress did anticipate.

This Petition requests the Board to exercise its substantive rulemaking function, such as it did when it issued a rule for bargaining units in the health care industry.[9] Although the choice between using rulemaking or adjudication for promulgation of a new rule ordinarily lies within the Board's discretion, *NLRB v. Bell Aerospace Co.*,[10] for reasons that the grounds for this petition will hereinafter demonstrate, rulemaking is especially appropriate for promulgation of the rule proposed herein. And to ensure adequate consideration of this matter, the Board may wish to precede the giving of final

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[6] 2007 LEXIS 3785 at 52. With reference to the inapplicability of the presumption of unreviewability announced in Heckler v. Chaney, 470 U.S. 821 (1985), the D.C. Court of Appeals explained in the *AHPA* case that in contrast to nonenforcement decisions, "[r]efusals to institute rulemakings…are likely to be relatively infrequent and more likely to turn upon issues of law….Thus, refusals to institute rulemaking proceedings are distinguishable from other sorts of nonenforcement decisions…." 812 F.2d at 4.

[7] *Id.* at 60-61.

[8] *Id.*, quoting from Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 218 (1998).

[9] 29 C.F.R. 103.30. *See* American Hospital Ass'n v. NLRB, 499 U.S. 606 (1991).

[10] 416 U.S. 267 (1974).

notice of its proposed rule with publication of an Advanced Notice of Proposed Rulemaking (ANPR), which would provide an early opportunity for receipt of views and comments from the labor-management community and other interested parties.

STATEMENT OF GROUNDS FOR THIS PETITION

I. Proposed Rule

Petitioners hereby propose that the Board promulgate the follow substantive rule regarding a specific interpretation of the Act and its requirements:

> Pursuant to Sections 7, 8(a)(1), and 8(a)(5) of the Act, in workplaces where employees are not currently represented by a certified or recognized Section 9(a) majority/exclusive collective-bargaining representative in an appropriate bargaining unit, the employer, upon request, has a duty to bargain collectively with a labor organization that represents less than an employee-majority with regard to the employees who are its members, but not for any other employees.

II. Interest of the Petitioners

The Primary Petitioner's interest is of considerable urgency. Seeking substantive rulemaking, however, was not its original chosen course of action. Petitioner Steelworkers Union first sought to obtain Board determination of the issue herein through the normal process of adjudication. On August 12, 2005, it filed an unfair labor practice charge in *Dick's Sporting Goods, Inc.*,[11] which case raised the issue contained in the proposed rule. A year later, the General Counsel dismissed that charge, thereby preventing the Board from carrying out its authority to interpret statutory language with reference to an important issue that had not heretofore been ruled upon by either the

[11] Case No. 6-CA-24821.

Board or the courts. Although it "has always been the policy of the office of the NLRB General Counsel…to place unresolved legal issues before the Board for decision,"[12] the Board was denied that opportunity in the *Dick's* case. Accordingly, the Primary Petitioner has no reasonable alternative now but to request notice-and-comment rulemaking as the appropriate means to seek vindication of its members' statutory right to engage in minority-union collective bargaining in workplaces where there is not currently a Section 9(a) exclusive representative—a right that will ultimately be shared by all employees subject to the Act. The Co-Petitioners herein join with Primary Petitioner in requesting that the Board issue the proposed rule.

Inasmuch as Petitioner and the Co-Petitioners are all labor organizations, they are all interested parties. They and their members, and also their potential members, are parties and persons who are directly affected by the manner in which the NLRA is interpreted, particularly the collective bargaining provisions at issue in the proposed rule.

The urgency of this action is compounded by the chilling effect that the General Counsel's eighteen-page Advice Memorandum (Advice Memorandum)[13] in the *Dick's* case is having on labor unions generally, including all of the Petitioners herein—and thus indirectly on employees who are potential union members—for it is deterring those

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[12] Testimony of former NLRB General Counsel Arthur F. Rosenfeld before Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives, Nov. 14, 2001. http://edworkforce.house.gov/hearings/107th/wp/beck111401/rosenfeld.htm.

[13] The Advice Memorandum (hereinafter Memorandum in footnotes) may be found at http://www.nlrb.gov/shared_files/Advice%Memo/RecentReleases/6-CA-34821(06-22-060).pdf.

unions from helping employees to organize and bargain collectively with their employers pursuant to the newly rediscovered and lawful manner at issue herein.

Although it is not the role of the General Counsel to interpret the Act, his Advice Memorandum in the *Dick's* case gives the appearance of an interpretative NLRB decision in that case. Indeed, the Supreme Court in *NLRB v. Sears, Roebuck & Co*.[14] observed that although

> the General Counsel lacks any authority finally to adjudicate an unfair labor practice claim in favor of the claimant[,] he does possess the authority to adjudicate such a claim against the claimant through his power to decline to file a complaint with the Board. [Accordingly,] Advice…Memoranda which explain decisions…not to file a complaint are "final opinions"….[15]

The *Dick's* Advice Memorandum, therefore, should be countered with a correct statement of the law. It is thus now appropriate for the Board to issue the proposed rule.

III. Reasons for Issuance of the Rule

A. What the Act requires

1. Introduction

Although the filing of this Petition was prompted by the refusal of the General Counsel to issue a complaint in *Dick's Sporting Goods, Inc*., its fundamental purpose is to provide the Board with a means to restore a critical element in the administration and enforcement of the National Labor Relations Act. Issuance of the proposed rule will

[14] 421 U.S. 132, 148 (1975).

[15] *Id.*

facilitate achieving the objective Congress intended in passing the Act, to wit, "encouraging the practice and procedure of collective bargaining,"[16] which the Act declared to be "the policy of the United States."[17] Although that policy may have been forgotten by many labor relations participants, it has never been altered by the Congress. In fact, when Congress enacted the Taft-Hartley amendments in 1947[18] it reemphasized in three different ways its retention of the collective bargaining objective: (1) the conference committee that reported the bill rejected the House version that would have omitted the above policy-declaration,[19] (2) Senator Robert Taft, the bill's chief sponsor, reiterated the policy in his defense of the Act,[20] and (3) an additional statutory declaration was added that now reaffirmed

> That it is the policy of the United States that…sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the process of conference and collective bargaining between employers and the representatives of their employees.[21]

Accordingly, the still current congressional policy is to encourage and favor the establishment of collective bargaining.

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[16] §1 of the Act.

[17] *Id.*

[18] Pub. L. No. 101, 80th Cong., 1st Sess. 1947.

[19] H.R. 3020, 80th Cong., 1st Sess. 1947

[20] 2 LEGIS. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1948), at 1007.

[21] §201(a), 29 U.S.C. §171(a).

That policy will be advanced when the Board confirms what the Act requires with reference to the duty to bargain with less-then-majority unions where there is not presently a majority union. When the original Act was passed it was widely recognized that collective bargaining did not require the presence of a majority union,[22] although *exclusive* union representation of all the employees in an appropriate bargaining unit did require an employee majority.[23] Indeed, such majority/exclusivity bargaining was the ultimate objective of the Act, for it was considered to be the ideal format for effective collective bargaining.[24] However, as unequivocal legislative history demonstrates, the drafters of the Act were careful to protect the preliminary stages of collective bargaining—i.e., less-than-majority bargaining[25]—for such bargaining often served as a steppingstone on the path to majority-based exclusivity bargaining. They recognized that in the normal course of events, most such minority-bargaining unions would grow to become majority unions pursuant to Section 9(a) of the Act.[26]

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[22] National Lock Co., 1 NLB (Part 2) 15 (1934); Bee Line Bus Co., 1 NLB (Part 2) 24 (1934); Eagle Rubber Co., 1 NLB (Part 2) 31 (1934). That was also true prior to passage of the National Industrial Recovery Act of 1933 (*infra* at note 27). *See* discussion at notes 89-9o & 102 *infra*. *See also* Charles J. Morris, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 21 & n. 21 (2005) (hereinafter BLUE EAGLE).

[23] Denver Tramway, 1 NLB 64 (1934); Houde Engineering Corporation,1 NLRB (old) 35 (1934).

[24] *See infra* at notes 58, 105, 111, & 132-135

[25] *See* BLUE EAGLE at 41-48, 56-64, 258, nn. 36 & 40, & 299, n. 19). *See also infra* at notes 97-104.

[26] The automobile industry provided stellar examples of that process. Upon the conclusion of members-only contracts with the UAW executed in the late thirties (*see infra* at notes 31-32), in 1940 the NLRB conducted elections that resulted in certification of the UAW as exclusive bargaining representative for 130,000 employees at General Motors and 50,000 employees at Chrysler. 5 NLRB Ann. Rep. 18-19, 141, 151 (1941).

Prior to passage of the Act, minority unions commonly engaged in collective bargaining, or sought to engage in such bargaining, and an employer's failure to recognize and bargain with those unions was deemed a violation of Section 7(a) of the National Industrial Recovery Act (NIRA),[27] the applicable New Deal statute that was the precursor to the NLRA. The relevant text of that provision was imported verbatim into Section 7 of the NLRA[28] and thus mandates, through Section 8(a)(1), the same duty to bargain where there is not currently a majority/exclusive union representative of all the employees in an appropriate bargaining unit; Section 8(a)(5) also reinforces that duty,[29] all of which is treated in greater detail in the following sections.

Following passage of the NLRA, members-only minority-union collective-bargaining agreements were as prevalent as majority-exclusivity agreements.[30] Indeed, such contracts were widely recognized as an ordinary organizational practice by many unions.[31] That is how the newly organized USW and UAW unions, two of the Petitioners herein, first bargained with the steel and automobile industries in the late

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See also Sidney Fine, SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936-1937, 266-312, 328 (1969).

[27] Pub. L.. No. 73-67, 48 Stat. 195 (1933).

[28] Such text being: "Employees shall have the right…to bargain collectively through representatives of their own choosing."

[29] *See infra* at notes 78-79.

[30] *See* BLUE EAGLE at 82-85.

[31] At that time, "unions looked upon these membership-based agreements as merely a temporary means to an end, for they were convinced—as had been Senator Wagner and the Congress—that for collective bargaining to achieve maximum effectiveness, exclusive representation, hence majority status, was necessary. Accordingly, during the early Wagner Act years unions sought exclusive recognition by a variety of means….Members-only agreements were one of those means…." BLUE EAGLE at 85.

thirties and early forties;[32] and less-than-majority members-only agreements were also popular in many other industries. During that period the Supreme Court, referring to members-only collective bargaining agreements with an electric utility company, declared in *Consolidated Edison Co. v. NLRB*[33] that "in the absence of …an exclusive agency the employees represented by the [union] even if they were a minority, clearly had the right to make their own choice." The Court confirmed—as it later reiterated in two other cases[34]—that members-only contracts did not violate the Act; indeed, as the Court emphasized, "[t]he Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining."[35] This Board has likewise approved less-than-majority members-only recognition and bargaining and the contracts resulting from such bargaining. See *The Solvay Process Co*.,[36] *The Hoover Co*.,[37] and *Consolidated Builders, Inc*.[38]

Members-only agreements, however, have not been commonly used for many decades because during the early years of the Act unions discovered that NLRB representation procedures usually provided an easier, faster, and less expensive means

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[32] *Id.*; *see also* The Twentieth Century Fund, HOW COLLECTIVE BARGAINING WORKS: A SURVEY OF EXPERIENCE IN LEADING AMERICAN INDUSTRIES 24 (1942).

[33] 305 U.S. 197 (1938).

[34] International Ladies Garment Workers v. NLRB (Bernhard-Altmann Tex. Corp.), 366 U.S. 731, 736, 742-43 (1961); Retail Clerks v. Lion Dry Goods, Inc., 369 U.S. 17, 29 (1962).

[35] 305 U.S. at 236.

[36] 5 NLRB 330 (1938).

[37] 90 NLRB 1614 (1950).

[38] 99 NLRB 972 (1952).

to achieve representation and exclusivity collective bargaining.[39] Consequently, with the passage of time, institutional memory faded and the slower members-only route to bargaining was effectively forgotten. Eventually, the labor-management community came to accept as latter-day conventional wisdom that only Section 9(a) majority unions had a right to bargain—notwithstanding that there is no such requirement in the Act. Meanwhile, however, employers learned to make use of a variety of both legal and illegal anti-union tactics that rendered the establishment of collective bargaining through Section 9 election procedures—the structure of which has tended to favor employers—extremely difficult in most workplaces.

Although latter-day conventional wisdom concerning the misperceived state of the law may appear to be an elephant in the room, it poses no legitimate legal obstacle. A common belief and practice that never received judicial confirmation does not override unambiguous statutory language and consistent legislative history. A position premised only on a long-held popular misunderstanding is no more valid today under the NLRA than was a comparable misunderstanding under the Civil Rights Act of 1866[40] when, more than a century later, that Act's previously misperceived clear and unambiguous statutory language was finally correctly read in *Jones v. Alfred W. Meyer Co.*[41] The Supreme Court there observed that the fact that the "statute lay partially dormant for many years does not diminish its force today."[42] By the same token, the

[39] See BLUE EAGLE at 85-88.

[40] 42 U.S.C. §1982.

[41] 392 U.S. 409 (1968).

[42] *Id.* at 412.

fact that the NLRA has lain partially dormant for many years as to an employer's duty to bargain with its employees through their minority union does not diminish that Act's force today. This is especially true because—just as at the time of the *Meyer* case—in order to benefit the population for whom the statute was passed, there is today a pressing need for the correct application of the statute.

That need is for employees to be permitted to return to the exercise of the right to begin organizing and bargaining through unions that represent their members only—as Congress contemplated and as the statute guarantees—just as employees and their unions organized and bargained during the first decade of the Act. Although confirmation of that right was first documented in a 1936 law review article shortly after passage of the original Act,[43] the concept received no further scholarly attention until 1990, when Professor Clyde Summers (who tragically suffered a severe and debilitating stroke two years ago) published his perceptive "*Black Hole*" article.[44] However, it was not until publication of Professor Charles Morris' *The Blue Eagle at Work*[45] that a number of unions, including the Petitioners herein, became aware of the concept, and they now await administrative and/or judicial confirmation of this rediscovered right to

[43] E. G. Latham, *Legislative Purpose and Administrative Policy under the National Labor Relations Act*, 4 GEO. WASH. L. REV. 433, 453, & 456, n. 65 (1936).

[44] Clyde Summers, *The Kenneth M. Piper Lecture: Unions without Majority—A Black Hole?*, 66 CHI-KENT. L. REV. 531 (1990) (hereinafter Summers).

[45] *Supra* note 25.

organize and bargain. The thesis of the *Blue Eagle at Work,* with its research and analyses, provides the legal underpinnings for the rule that Petitioners seek herein.[46]

It should also be noted that this rule will not only benefit employees who desire to exercise their right to join a union and engage in collective bargaining, it will also benefit nonunion employees who prefer "to refrain from any and all such activities,"[47] for less-than-majority unions will be allowed to bargain only for those employees who become dues-paying union members. Thus, unless or until there is ultimately a Section 9(a) determination that a union has achieved majority/exclusivity status in an appropriate bargaining unit—which might be established by the conduct of an NLRB election—nonunion employees will be free to bargain individually, without union representation.[48]

[46] Accordingly, the BLUE EAGLE (*supra* note 22) is heavily relied upon in this Petition. In addition, small portions of Charles J. Morris, *Back to the Future: Reviving Minority-Union Collective Bargaining Under the National Labor Relations Act*, 57 LAB. L.J. 61 (2006) (hereinafter Morris, *Back to the Future*), have been inserted in the Petition, and substantial excerpts from Charles J. Morris, *The Pemberton Lecture, Collective Rights as Human Rights: Fulfilling Senator Wagner's Promise of Democracy in the Workplace—The Blue Eagle Can Fly Again*, 39 U.S.F. L. Rev. 701 (2005) (hereinafter Morris, *Pemberton*), have likewise been inserted, all with the permission of the copyright holder, Charles J. Morris.

[47] §7 of the Act.

[48] *Cf*. reasoning of the Second Circuit Court of Appeals in NLRB v. Reliable Newspaper Delivery, Inc., 187 F.2d 547 (2nd Cir. 1951), which the Supreme Court summarized in Radio Officers' Union v. NLRB, 347 U.S. 17, 47 (1954) as follows: "[I]f a union bargains only for its own members, it is legal for such union to cause an employer to give, and for such employer to give, special benefits to the members of the union for if nonmembers are aggrieved they are free to bargain for similar benefits themselves."

2. The Statutory Requirement

The primary reason for promulgation of this proposed rule is to provide official confirmation of what the statute clearly requires. *Section 7*, which is the heart of the Act, reads as follows:

> *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 section 8(a)(3).[49]

The Act thus mandates in plain English—in a critical fourteen-word phrase here repeated for emphasis—that "[e]mployees *shall* have the *right…*to bargain collectively through representatives of their own choosing;"[50] and *Section 8(a)(1)* specifies that "it is an unfair labor practice for an employer…to interfere with…employees in the exercise of the rights *guaranteed* in section 7." [51] This is straight-forward language that uses the mandatory word "shall"[52] and the fundamental word "right,"[53] all of which is "guaranteed," thus ensuring, in the strongest statutory terms, that "employees"—i.e., all employees covered by the Act, not just majority-union employees—shall have this "right to bargain collectively." And because collective bargaining is a two-party process—

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[49] Emphasis added.

[50] Emphasis added.

[51] Emphasis added.

[52] *See* Mallard v. U.S. Dist. Ct. for So. Dist. Of Iowa, 490 U.S. 296, 302 (1989).

[53] *Cf*. NLRB v. Gissel, 395 U.S. 575, 617 (1969).

which was widely understood at the time of enactment[54]—the employer's participation as a bargaining party is essential to that process. Thus, an employer's refusal to bargain represents a patent "interference" with this Section 7 right, hence a violation of Section 8(a)(1).[55]

Section 8(a)(5) supplements the broad language of Section 7 with a separate and specific provision that states that it is 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).[56]

This too is unambiguous statutory text. It was inserted as an amendment to the Act late in the enactment process in order to emphasize and reinforce the duty to bargain already contained in Sections 7 and 8(a)(1).[57] Notwithstanding the clear meaning of this language—particularly with its *comma* separating the qualifying phrase—some defenders of the latter-day conventional wisdom have proffered a patently incorrect reading of this subsection. That reading has prompted Petitioners to spell out—in what might otherwise seem excessive detail—the following comprehensive examination of what this concise statutory language actually says.

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[54] *See* BLUE EAGLE at 99-100.

[55] This conclusion was fully recognized and expressed by the Act's sponsors prior to passage. *See infra* at notes 91-92.

[56] Emphasis added.

[57] *See infra* at notes 91-98.

We begin with Section 9(a)—to which Section 8(a)(5) refers—with the original text of the Wagner Act shown in ordinary roman and italic type and the text added by the Taft-Hartley Act shown in **bold** and **bold italic** type:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer **and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.**

Two meanings of Section 9(a) are readily apparent and incontestable: This is a *conditional* clause, and it *does not* limit bargaining to the majority unions described therein. It is, however, a clause that is important to the scheme of the Act, for it defines the nature of majority-exclusivity collective bargaining, which is the ultimate bargaining objective that Congress intended.[58] For present purposes, its significance lies in its relationship to Section 8(a)(5).

The first feature to be noted about Section 8(a)(5) is that it expressly requires an employer to bargain collectively with the representative of its[59] employees. And, because this subsection defines a *specific* unfair labor practice—in contrast to the *broad-coverage* unfair labor practices defined by Sections 7 and 8(a)(1)—it appropriately recognizes and accounts for the Section-9(a) exception to the "right" of all

[58] *See supra* at note 24 and *infra* at notes 105, 111, & 132-135.

[59] "[H]is" employees in the statute.

employees "to bargain collectively through representatives of *their own choosing,*" because when a union achieves majority and exclusive representational status there will usually be some employees, albeit a minority, who will henceforth be represented by a union not-of-their-own-choosing. That is the inevitable consequence of the majority-exclusivity choice that Congress decreed for mature collective bargaining in the interest of achieving stronger and more effective bargaining.[60] It justified this concept by its reliance on the democratic principle of majority rule. Nevertheless, as Congress intended[61] and as the statutory text indicates, neither Section 8(a)(5) nor Section 9(a) confines the employer's bargaining obligation to majority/exclusive representatives only. These subsections govern this exception to the employees' "own" choice by specifying that in workplaces where there is a majority representative in an appropriate bargaining unit within the meaning of Section 9(a), all of the "*provisions*" of that subsection will apply, especially including the *exclusivity* requirement. However, where there is no such majority representative, those provisions are wholly inapplicable, and an unfettered duty-to-bargain applies to those employees, if any, who are represented by a minority union—but only on a *nonexclusive* basis. The referenced *provisions* of Section 9(a), of which there are seven from the original NLRA plus an additional one added by Taft-Hartley, are the following:

(1) The unit must be *appropriate* for collective bargaining,

(2) The representative, i.e., the union, must in fact have been "designated or selected" by a *majority* of the employees in that unit.

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[60] *See supra* at note 58.

[61] *See infra* at notes 99-104.

(3) Such designation or selection shall be *for the "purposes of collective bargaining."*

(4) The representative that meets the aforesaid qualifications shall be the "*exclusive*" representative of all the employees in the unit.

(5) Such *representation shall be "for the purposes of collective bargaining*."

(6) Such *collective bargaining shall be "in respect to rates of pay, wages, hours of employment, or other conditions of employment*,"

(7) A*ny individual employee or group of employees shall have the right at any time to present grievances* to their employer," and

(8) (As added by Taft-Hartley) such grievances shall be *adjusted* in accordance with the remaining text of Section 9(a).

The aforesaid provisions are matters which the Act properly addresses with regard to the employer's duty to bargain under Section 8(a)(5), hence the requirement that such bargaining be "subject to the provisions of Section 9(a)." It is clear from that reference to "*provisions*" that *all* of the seven or eight provisions were intended, not just the two regarding majority status and appropriate unit. With or without the comma, this is the only intelligible reading possible, because *majority* and *unit* status are but two of the several provisions—which particularly include the critical exclusivity provision—that define the employer's duty to bargain if and when Section 9(a) is activated.

By inclusion of the *comma*, Congress made it doubly clear that any other reading is impossible. This is so because the defined unfair labor practice is not the employer's refusal to bargain collectively with the *representatives of his employees subject to the*

provisions of section 9(a); rather—in the actual punctuated language of the provision—it is an unfair labor practice for the employer "to *refuse to bargain collectively* with the representatives of his employees, *subject to the provisions of section 9(a)*." The comma emphasizes and absolutely indicates that it is the *bargaining process* that is qualified by the requirements of section 9(a) not the *representatives*.[62] Accordingly, Section 8(a)(5) cannot be read—as some conventional wisdom defenders attempt to read it—as a limitation that would confine the duty to bargain to representatives "*chosen as provided in section 9(a)."* In fact, Congress consciously rejected that limitation in the legislative drafting process.[63]

The foregoing passages in Sections 7, 8(a))(1), 8(a)(5), and 9(a), are the only statutory provisions in issue. They are short, simple, and unambiguous clauses that

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[62] *See* Ron Pair Enterprises, Inc., 489 U.S. 235, 241-42, n. 4, and its reliance on Best Repair Co., v. United States, 789 F.2d 1080 (4th Cir. 1986), for the significance of comma placement in comparable statutory language. The inclusion of the comma in §8(a)(5) may be contrasted with the appropriate absence of a comma in the two references to §9(a) in §§8(b)(3) and 8(d) of the NLRA that were added by Taft-Hartley amendments in 1947: The *first*, *§8(b)(3)*, obviously requires no comma because "it," i.e. "a labor organization or its agents" to which it refers, is clearly the only entity qualified by the phrase "subject to the provisions of section 9(a)." This is consistent with an implied intent of Congress not to require minority unions to bargain, for although such bargaining was the "right" of their members, Congress had no reason to require minority unions to exercise that right before they had sufficient members ready for bargaining, a requirement that would also have been counterproductive for both employers and unions. Likewise, the *second,* the reference in *§8(d)* to "a labor organization or individual" being superseded or ceasing "to be the representative of the employees subject to the provisions of section 9(a)" does not—and has no reason to—refer to minority unions; inclusion of a comma would have been awkward and unnecessary. The provision applies only "upon an intervening certification of the Board," hence only to a §9(a) majority union designated pursuant to an election under §9(c). Accordingly, in neither of the two compared provisions—unlike the meaning in the clearly broader coverage of §8(a)(5)—would the inclusion of a minority union have been appropriate or necessary; a comma was thus not needed.

[63] *See infra* at notes 99-101.

speak for themselves; and their meaning, as expressed in the proposed rule, is totally confirmed by their legislative history, as the section that follows will demonstrate.

The only other relevant language in the Act that bears on the minority-union bargaining issue is contained in *Section 8(a)(3)*. That provision further evidences congressional recognition and expectation of the existence of minority-union bargaining, for it expressly denies minority unions the right to enter into compulsory union agreements, specifying that such agreements are permitted only "if such labor organization is the representative of the employees as provided in section 9(a)," a requirement that Congress first stipulated with regard to *closed shop* agreements in the original 1935 Act and reconfirmed with reference to *union shop* agreements in the 1947 Taft-Hartley amendments. Section 8(a)(3) thus represents additional statutory recognition of the presence of nonmajority unions and their right to bargain collectively concerning subjects of bargaining, other than the subject of compulsory union membership.

The bottom line to this statutory analysis is that in workplaces where the majority/unit condition in Section 9(a) is not activated, the text of the Act *guarantees* that employees *shall* have the *right to bargain collectively* through a minority-union of their choice on a nonexclusive, i.e., members-only, basis; and an employer who refuses to bargain collectively with that union commits an unfair labor practice in violation of Sections 8(a)(1) and 8(a)(5). This statutory text is not Humpty-Dumpty language that naysayers might say means whatever they "choose it to mean."[64] Rather, it is plain, unambiguous language that means exactly what it says—the same kind of broad and

[64] Lewis Carroll, ALICE THROUGH THE LOOKING GLASS, Ch. 6.

sweeping language that Chief Justice John Roberts referred to when, as a judge on the District of Columbia Circuit Court of Appeals, he accurately observed in two separate decisions that "[t]he Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application."[65] Although the cases are legion that declare such plain language to be a paramount factor in statutory construction,[66] one case on which Judge Roberts particularly relied, *New York v. Federal Energy Regulatory Commission [FERC],*[67] is especially relevant here because the facts and the Court's statutory construction in that case parallel the rediscovered reading of the NLRA statutory language being construed herein.

The statutory language in issue in *New York v. FERC*, like the NLRA language here under review, was broad language that Congress had enacted in the Federal Power Act (FPA) as part of President Roosevelt's "New Deal" legislation in 1935. Sixty

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[65] In re England, Secretary of the Navy, 375 F.3d 1159, 1179 (D.C. Cir. 2004); Consumers Electronics Ass'n v. Federal Communications Commission, 347 F.3d 291, 298 (D.C. Cir. 2003). *See also* discussion of the recent Supreme Court decision in *Massachusetts v. EPA* at notes 4-8 *supra*.

[66] New York v. Federal Energy Regulatory Commission, 535 U.S. 1 (2002) (discussed *infra* at notes 67-72); Ron Pair Enterprises, Inc., *supra* note 62; Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) ("One would be hard pressed to find a statutory provision whose terms were any plainer than those in [this] statute." *Id.* at 173); Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206 (1998) (applying ordinary dictionary definition to word of common meaning); PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (the fact that a statute "has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* at 689); Sedima, S.P.R.I. v. Imrex Co., 473 U.S. 479, 499 (1985) (*id.*); Ex parte Collett, 337 U.S. 55, 61 (when confronted with a statute that is plain and unambiguous on its face, it is ordinarily not necessary to look to legislative history); Caminetti v. United States, 242 U.S. 470, 485 (1917) (where the statute's language is plain "the sole function of the courts is to enforce it according to its terms").

[67] *Supra* note 66.

years later, FERC, the agency currently charged with enforcement of the FPA, issued a regulatory order that affected the "unbundling" of electric power transmission,[68] which it based on original language in the FPA.[69] Notwithstanding the Court's recognition that "the landscape of the electric industry has changed since the enactment of the FPA,"[70] it ruled that the "statutory text…unambiguously authorizes"[71] the regulation in issue. It therefore rejected New York's effort to "discredit this straightforward analysis of the statutory language,"[72] That same type of straightforward analysis of NLRA statutory language supports the issuance of the proposed rule herein.

3. Legislative History

Senator Robert F. Wagner, the creator and chief sponsor of the Act that bears his name, conceived of the NLRA as the means by which industrial democracy—to be achieved through the medium of collective bargaining—would become a reality in America. He considered this "democratic method" to be the preferred method for coordinating industry, for "it places the primary responsibility where it belongs and asks industry and labor to solve their mutual problems through self-government." It was his view that the "right to bargain collectively is at the bottom of social justice for the worker,

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[68] Separating transmission costs from energy costs in retail billing.

[69] To wit, , "the *transmission* of electric energy in interstate commerce…." §201(b) of the FPA, 16 U.S.C. §824(b) (emphasis added), on which its jurisdiction was based. 535 U.S. at 7.

[70] 535 U.S. at 16.

[71] *Id.* at 19.

[72] *Id.* at 20.

as well as the sensible conduct of business affairs."[73] Wagner thus deemed collective bargaining to be a partnership that presupposes "some equality of bargaining power,"[74] hence the ideal format for democracy in the workplace.

The foregoing remarks by Senator Wagner tell us what he intended his bill to produce, and that intent was the intent of Congress, for unlike most other major legislation, this statute was the product of a single legislator. Although Wagner received assistance from various sources, he was fully in control of the bill's contents from introduction to final passage.[75] The Wagner Act was assuredly his Act. The core provisions of that Act, including all of the provisions in issue herein, are still in the law, not having been altered by the subsequent Taft-Hartley[76] and Landrum-Griffin[77] amendments.

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[73] Address at National Democratic Club Forum, May 8, 1937, *quoted in* Leon H. Keyserling, *Why the Wagner Act?,* in THE WAGNER ACT: AFTER TEN YEARS 13 (Louis G. Silverberg, ed, 1945).

[74] *Id.*

[75] Although Leon H. Keyserling was the primary draftsman of both the legislative bill and all of Wagner's public statements and materials—including his speeches and key committee reports—Wagner was kept fully advised at all stages of the work and was in total agreement with the final product. Kenneth M. Casebeer *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act, 42* U. MIAMI L. REV. 295, 302-03, 341-43, 361 (1987) (hereinafter Casebeer, *Holder of the Pen*); Kenneth M. Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act* , 11 INDUS. REL. L. J. 73, 76 (1989) (hereinafter Casebeer, *Keyserling Drafts*); Irving Bernstein, TURBULENT YEARS, A History of the American Worker 1933-1941 at 340; *see also* Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 215 (1960).

[76] 29 U.S.C. §§ 141-187 (1947).

[77] *Id.* §§ 401-531 (1959).

In order to better understand the genesis of these provisions of the Act that protect the right of non-majority employees to engage in members-only bargaining, the place to begin is with the previously noted fourteen-word statutory phrase, for its text had been contained in Section 7(a) of the NIRA,[78] the flagship statute in President Franklin Roosevelt's "New Deal" administration. That text was based on similar language in the Norris-LaGuardia Act.[79] Section 7(a) of the NIRA contained the essence of what was later to emerge as the substantive law of the Wagner Act. Employers who conformed to the *codes of fair competition* referenced in Section 7(a) were entitled to display a "Blue Eagle" poster or banner signifying their compliance.[80] That specific text is thus important here because its wording is the same as the current language in Section 7 of the NLRA. Having knowingly borrowed this text verbatim, Congress thereby reenacted the same basic substantive labor law that had previously

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[78] *Supra* note 27. The text of §7(a) read as follows:

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That ***employees shall have the right to*** *organize and* ***bargain collectively through representatives of their own choosing,*** *and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purposes of collective bargaining or other mutual aid or protection*; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employees shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

Ch. 90, §7(a), 48 Stat. 195 (1933). Emphasis added for comparison with §7 of the Wagner Act, with the basic fourteen-word phrase highlighted in bold face.

[79] *Compare* §7(a) of the NIRA with 29 U.S.C. § 102.

[80] Lloyd K. Garrison, *The National Labor Boards*, 184 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 145 (1936) (hereinafter Garrison).

existed under the NIRA. The familiar "borrowed statute" rule of construction is therefore applicable. As Professor William Eskridge points out, "when Congress borrows a statute, it adopts by implication interpretation placed on that statute, absent express statement to the contrary."[81]

To oversee the operation of Section 7(a), President Roosevelt created two rudimentary labor boards.[82] Both boards accorded the fourteen-word phrase its literal meaning, including recognition of the right of less-than-majority union employees to engage in collective bargaining and the employers' corresponding duty to bargain with those unions. Even after they had adopted the practice of granting exclusive representation to unions that had won majority status through governmentally supervised elections, those boards continued to hold that employers had a duty to bargain with non-majority unions in workplaces where there had not been a majority determination through an election.[83] However, because there was no effective means to enforce Section 7(a), Senator Wagner and his supporters recognized the need to replace it with a new statute—one that would retain the basic substantive provisions of Section 7(a) and also provide an effective means to require compliance from recalcitrant employers. As the chairman of the former National Labor Relations Board (old NLRB) described the enforcement weakness of Section 7(a),

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[81] William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION, *Appendix 3, The Rehnquist Court's Canons of Statutory Construction, 323, 324,* (1994), *citing* Molzof v. United States, 112 S. Ct. 711, 716 (1992); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987).

[82] National Labor Board (NLB) and the National Labor Relations Board (old NLRB). *See* BLUE EAGLE at 31-40, 46-52.

[83] *See* note 89 *infra* and also 22 *supra*.

> There were only two means of enforcement, and neither was satisfactory. The first was, upon noncompliance by an employer, to refer the case to the NRA[84] for removal of his Blue Eagle….But in most cases it meant nothing, and then the only recourse was to refer the matter to the Department of Justice for prosecution in the courts, which would have been too slow and cumbersome to accomplish anything, and it was not attempted by the Department except in a few ill-starred cases.[85]

Wagner's 1935 bill clarified and slightly strengthened the substantive rights that were contained in the earlier statute and codified, as the new Section 9(a), the majority-exclusivity principle that had been generated by decision and practice under the old boards. It also added an administrative mechanism with remedial authority, the National Labor Relations Board (NLRB). It should therefore be emphasized that the Wagner Act was not intended to create new law but rather to reestablish old law with clarity and teeth.[86] Its legislative history is replete with declarations to that effect. For example, on the very day the bill was introduced, Wagner told his Senate colleagues that "[t]he national labor relations bill which I now propose is novel neither in philosophy nor in content. It creates no new substantive rights."[87]

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[84] This "NRA" reference is to the National Recovery Administration, the agency created by and charged with the enforcement of the NIRA.

[85] Garrison, *supra* note 80 at 145.

[86] This perception is widely recognized and accepted. *See, e.g.,* Melvyn Dubofsky, THE STATE AND LABOR IN MODERN AMERICA 127 (1994) (confirming that the bill was "designed to clarify §7(a) and create a permanent NLRB with enforcement powers.")

[87] 1 LEGISLATIVE HISTORY OF THE NLRA, 1935 (hereinafter 1 LEGIS. HIST.), at 1312 (1949). *See also* Senate Committee testimony of Milton Handler, of the Columbia University Law School faculty and former general counsel of the National Labor Board: "[The bill] codifies the administrative experience of the National Labor and National Labor Relations Boards and succinctly summarizes their many rulings and decisions. In so doing, *it makes no departure from the underlying policy of 7(a)*." *Id.* at 1611, emphasis added.

A review of the status of minority-union bargaining under Section 7(a) of the NIRA sheds revealing light on the intent of Congress. Majority status was not a prerequisite for bargaining, nor was an election. The National Labor Board (NLB), the first board that Roosevelt created to implement that provision, routinely found breaches of the duty to bargain with less-than-majority unions, and it ordered elections for only three reasons: (1) when a dispute existed between two unions claiming representation (one of which was usually a company union[88]), (2) when an employer questioned a union's claim of majority representation, or (3) when a substantial number of employees made the request. In all other cases majority status was deemed irrelevant to the duty to bargain.[89] These practices and interpretations were reconfirmed by the NLB's successor, the 1934 National Labor Relations Board (old NLRB).[90]

It is historically significant—but probably a surprise to most labor-law practictioners—to learn that the original Wagner bill did not contain a separate duty-to-bargain unfair labor practice provision; and when such a provision, Section 8(5),[91] was belatedly added as an after-thought amendment, it never became the subject of separate congressional discussion or debate. Wagner and his legislative assistant,

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[88] *See* Emily Clark Brown, *Selection of Employees' Representatives*, 40 MONTHLY LAB. REV. 1, 4-6, Tables 1-4 (1935).

[89] Illustrative of this construction of §7(a) were National Lock Co., *supra* note 22, *Bee Bus Line Co*., *id.*, and *Eagle Rubber Co*., *id.*—all of which were decided subsequent to Denver Tramway, *supra* note 23, the key decision in which the NLB established the principle of majority-exclusivity applicable to a union that had demonstrated its majority in a Board-ordered election. *See* BLUE EAGLE AT 39.

[90] *See* Houde Engineering Corp., *supra* note 23. *See also* BLUE EAGLE at 48-52.

[91] The present §8(a)(5).

Leon Keyserling, the primary author of the bill, had been of the opinion that such a specific clause was unnecessary because an employer's duty to bargain was adequately covered by the broad collective-bargaining requirement contained in the familiar fourteen-word clause in Section 7. Under that provision, a refusal to bargain represented an *interference* with the employees' right to bargain collectively, hence the employer's duty to bargain was fully enforceable under Section 8(1),[92] just as it had been under Section 7(a). This construction had been emphasized in *Houde Engineering Corporation,*[93] a leading case under the old NLRB that Wagner cited when he testified before the Senate Committee on Education and Labor, stating that

> The right of employees to bargain collectively implies a duty on the part of the employer to bargain with their representatives. [T]he incontestably sound principle is that the employer is obligated by the statute to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable with counter proposals; and to make every reasonable effort to reach an agreement.[94]

The bill's only limitation on that Section 7 bargaining requirement was contained in the conditional text of Section 9(a), the pertinent part of which reads as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining….

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[92] §8(1) [the present §8(a)(1)] declares that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7…." *See supra* at note 51.

[93] *Supra* note 90.

[94] 1 LEGIS. HIST. at 1419. Several weeks later Wagner reaffirmed that position. 2 LEGISLATIVE HISTORY OF THE NLRA, 1935 (hereinafter 2 LEGIS. HIST.) at 2102 (1949). For the same view reconfirmed by Keyserling in an interview in March, 1986, *see* Casebeer, *Holder of the Pen, supra* note 75, at 330.

As that text indicates, Section 9(a) was to be activated only *if, when,* and *after* a majority of the employees in an appropriate bargaining unit designate a single union as their representative, in which event that representative would automatically be granted exclusive bargaining rights; thereafter no other union would be authorized to bargain on behalf any of the employees in that unit. Prior to such designation, however, minority-union representation with the right to bargain would remain available and protected, though on a nonexclusive basis, thus applicable to union members only.

Section 8(5) was not added until the half-way point in the life of the bill—ten weeks after its introduction—and the legislative record is undisputed that it was not intended to change the substantive bargaining requirements of the original bill. Francis Biddle, chairman of the old NLRB, had lobbied long and hard for its inclusion. Although Wagner finally consented to Biddle's proposed amendment, he and the Senate and House committees made it expressly clear that the new Section 8(5), together with the other three subject-specific unfair labor practices, were "*designed not to impose limitations or restrictions upon the general guaranties of the first* [Section 8(1)], but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome."[95] The four separate unfair labor practices were therefore meant to reinforce their respective prohibitions, not to diminish them. There was virtually no discussion of the new Section 8(5) amendment in the Senate committee,[96]

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[95] Senate Committee Report, 2 LEGIS. HIST., at 2309. Emphasis added. *See* comparable Wagner statement and House Committee Report, *id.,* at 2333 and 2971 respectively.

[96] "[T]here was little discussion of the bargaining concept at the committee hearings. Even the suggestion of Chairman Biddle of the old board that an express duty to bargain be inserted in the bill failed to stimulate discussion, though the suggestion was

where the amendment originated,[97] and the Senate and House adopted it pro forma without debate.[98]

Regarding the meaning of the Section 8(5) amendment, its legislative history shows that it was deliberately worded so as not to confine the bargaining obligation to and with majority unions only, thereby also requiring bargaining with minority unions in workplaces where a Section 9(a) majority union had not yet been selected. This historical fact was contained in a post-introduction draft of the Wagner bill that included various proposed amendments.[99] After the original bill had been introduced and

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adopted." Russell A. Smith, *The Evolution of the "Duty to Bargain" Concept in American Labor Law,* 39 MICH. L. REV. 1065, 1085 (1941).

[97] *See infra* at note 99.

[98] 2 LEGIS. HIST. at 2,348 & 3,216.

[99] Casebeer, *Keyserling Drafts*, *supra* note 75, at 62-63 & 241. *See also* BLUE EAGLE at 120. For an explanation of the proper designation of this draft, *see* BLUE EAGLE at 299, n. 19. This draft had been in the possession of Leon Keyserling and was published in 1989 by Professor Kenneth Casebeer. The original of the draft is in the collection of the Leon Keyserling papers in the Lauinger Library of Georgetown University, of which a photocopy was provided to Professor Morris as part of his research for the BLUE EAGLE. (More recently, the Steelworkers Union presented several photocopies to the General Counsel as part of its presentation in the *Dick's* case). This draft shows proposed revisions superimposed on an officially printed version of the original bill that was introduced on February 21, 1935. All of the changes on the document appear either in handwriting or as typed copy on inserted flaps—the latter being how the two versions of §8(5), noted below, appear, with the handwritten identification: "Biddle." There are also other handwritten marginal designations elsewhere in the document which show the sources or sponsors of the various proposed changes, except—presumably—where Keyserling was himself the source or sponsor. *See*, for comparative purposes, the proposed changes inserted in this draft and their identification of sources with the proposed changes and their sources announced by the Senate Committee on March 11, 1935, in its *Comparison of S. 2926 and S.1958,* 1 LEGIS. HIST. at 1319-71, especially at 1331, which shows Biddle's final proposal for §8(a). *See also* the changes that were later incorporated in the final bill as reported by the committee on May 2, 1935, *id*. at 2285, which shows that this draft was a preliminary committee mark-up of Senator Wagner's original bill, i.e., a working draft composed during committee consideration

referred to the Senate Committee on February 21, 1935, Biddle presented for the committee's consideration—as indicated by the typewritten insert onto this draft—alternative texts of his proposed new Section 8(5) unfair-labor-practice amendment. Here are his two versions, verbatim from the insert:

> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).
>
> or, (5) To refuse to bargain collectively with employees through their representatives, *chosen as provided in Section 9(a).* [100]

That dual presentation confirms that the addition of Section 8(5) was not meant to confine an employer's bargaining duty to majority unions only. By adopting the first version—which is the text now found in the statute—Biddle, Keyserling, Wagner, and the Senate committee consciously chose language that would ensure that the duty to bargain with a majority union would not exclude the duty to bargain with a minority union prior to establishment of Section 9(a) majority representation. Patently, had the drafters intended to exclude such minority bargaining they would have selected the second version, for it would have limited the bargaining obligation under Section 8(5) to unions "chosen as provided in Section 9(a)," i.e., only to majority/exclusivity unions in an appropriate unit.[101] Here then was the "smoking gun" that reinforces the plain

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between February 21 and March 11, 1935. Such comparison indicates that most but not all of the inserted changes were incorporated into the final bill as reported, thus demonstrating the preliminary nature of the draft's mark-up status, and—more important for present purposes—that *every change or proposed change included in this draft occurred within the Senate committee and thus received the consideration of that committee.*

[100] Emphasis added.

[101] For further elucidation of this plain-meaning analysis, *see supra* at notes 56-63 and Morris, *Back to the Future*, *supra* note 46, at 65-67.

literal reading of Section 8(a)(5), which conclusively indicates that it contains no such limitation and was not intended to be so limited. Accordingly, as verified by this legislative history, Congress intended that the only limitation on the duty to bargain contained in Section 7 and the combined texts of Sections 8(a)(5) and 9(a) would be the conditional *exclusivity* requirement that would occur *if* and *after* the employees in an appropriate bargaining unit select a majority representative. Congress thus mandated that until that event occurs, nonexclusive—i.e., less-than-majority—members-only collective bargaining would be fully protected for those employees who choose a union to represent them for such purposes.

The subject of minority-union collective bargaining prior to designation of majority representation was not even an issue in the congressional debates. The prevalence of less-than-majority and members-only bargaining was common knowledge at the time,[102] and Wagner and Keyserling were well-aware of the need to protect such bargaining;[103] however, that had already been achieved in the drafting process.[104] Pre-majority bargaining was not viewed as controversial when the bill was being actively considered. There was considerable controversy, however, concerning the ultimate configuration of mature post-majority bargaining. Proponents of the bill explained that *majority/exclusivity* bargaining—the bill's solution to the problems of plural unionism—

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[102] *See* BLUE EAGLE at 26-31.

[103] *See id.* at 26-30, 31 n. 87, 42-46, 56-64, & 69.

[104] The drafts of both the 1934 and 1935 bills show the development of provisions that were tentatively designed to protect minority-union bargaining. *See* BLUE EAGLE at chs. 2 & 3 (at 41-64) and their appendices of pertinent early drafts of the 1934 and 1935 bills (at 231-2420). *See also infra* at note 135.

would mean more effective bargaining, and this was the goal sought by Wagner and his supporters.[105] That concept of majority bargaining, however, was simply the *ultimate* objective of the statute and its framers. It was recognized, and frequently announced by the bill's proponents, that for collective bargaining to have its maximum impact, it should be representative of all the affected employees. It was thus intended that once a majority union had been designated, there would be no recognition of or dealing with any minority union.

On the other side of that debate, the employer lobby opposed majority-exclusivity bargaining as a denial of the rights of minorities, advocated post-majority plurality bargaining, and asserted that the Board's authority to determine a bargaining unit would lead to a closed shop.[106] In that context, employers expressly defended the right of minority-unions to engage in collective bargaining, and they never voiced any objection to minority-union bargaining occurring prior to the designation of a majority representative.[107]

The proponents' view of mature majority-based collective bargaining was the legacy of both the former National Labor Board (NLB) and the pre-Wagner Act National

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[105] *See* 1 LEGIS. HIST. 1419. "It was Wagner's view and that of others who supported his 1935 bill…that if plural representation were allowed following the selection of a majority union an employer could play off one group against the other, thereby reducing substantially the bargaining power of the majority union." BLUE EAGLE at 103. "The history of the majority rule principle shows that its purpose was not to limit the ability of a non-majority union to represent its own members, but to protect a majority union's ability to bargain collectively." Summers, *supra* note 44 at 539.

[106] Irving Bernstein, THE NEW DEAL COLLECTIVE BARGAINING POLICY 109 (1950).

[107] *See* BLUE EAGLE at 69.

Labor Relations Board (old NLRB) under the 1933 NIRA.[108] It should not be confused, however—as it was not confused by Congress—with collective bargaining that minority unions often engaged in during their preliminary stages of organizing and bargaining, i.e., before they or any other unions had attained majority-status. That early stage of minority-union bargaining was deemed a normal and frequently necessary part of a labor union's natural maturation process. And like business enterprises, it was expected that unions would often begin small but eventually grow into larger and more effective economic entities.

That was certainly the expectation when the Act was passed, for a union's bargaining status was commonly based on actual union membership, not on authorization cards or elections.[109] Thus, like its precursor Section 7(a) of the NIRA,[110] the collective bargaining requirements of the NLRA were written broadly so that employees could begin the bargaining process on a limited basis, i.e., through less-than-majority unions on behalf of their employee-members only, but not for other employees—at least not until majority status had been achieved.

Attention during the debates was concentrated on bargaining rights *after* a majority union had been chosen, particularly whether minority unions should have a recognized presence at that stage. Although there was no debate about the subject of minority-union bargaining *prior to* the establishment of majority representation,

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[108] Exemplified by the *Denver Tramway* and *Houde Engineering Corporation* cases, *supra* notes 23, 89, & 90.

[109] *See* BLUE EAGLE at ch. 1.

[110] *See* notes 27-28 & 78 *supra*.

numerous statements by the proponents of the Wagner bill showed full recognition that the majority/exclusivity principle in Section 9(a) —generally referred to simply as "majority rule"—would apply only *after* employees had selected their majority representative.[111] There was never a question voiced about the nonapplicability of that restriction prior to majority selection. And although elections were looked upon as one of the best means to settle disputes over union representation, the elections that were anticipated concerned the *choice* of which union would represent the employees, not *whether* the employees would be represented by a union.[112] Minority-union bargaining prior to the selection of a majority representative was a nonissue. Although the fanfare that surrounded the collective-bargaining process during the congressional debates was focused on the majority-exclusivity rule and on representation elections, members-only minority-union bargaining emerged intact from this same legislative process—though quietly and without fanfare.

4. An Alternative Statutory Requirement

It should be further noted that the Act's protection of minority-union bargaining is based not only on the combination of Sections 8(a)(1) and 8(a)(5), but also on Section 8(a)(1) standing alone. In the event that Section 8(a)(5) and/or Section 9(a) were to be interpreted as requiring bargaining *only* with representatives that achieve majority status under Section 9(a),[113] such a construction would nevertheless have no effect on an

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[111] *See* BLUE EAGLE at 70-79.

[112] *Id.* at 71.

[113] Which should be unlikely in view of the plain meaning of the text and its strong legislative history.

employer's duty to bargain with a minority union in workplaces where there is not currently a designated majority representative. That is so because even if the unfair labor practice defined in Section 8(a)(5) were to be narrowly construed to compel employers to bargain only with unions that satisfy the majority conditions of Section 9(a), an independent right to engage in minority-union bargaining for members only would still be enforceable as *residual coverage* under Sections 7 and 8(a)(1)—a type of coverage that has been applied to other types of protected concerted activity. For example, Section 8(a)(1) standing alone commonly affords protection to employees who are discharged for pre-union concerted activity even though such conduct is not deemed violative of Section 8(a)(3), the specific unfair-labor-practice provision that covers most discharges relating to union activity.[114]

B. *The Refusal to Issue a Complaint in Dick's Sporting Goods, Inc.*

Because the General Counsel's refusal to issue a complaint in *Dick's Sporting Goods, Inc.,* [115] is deemed not subject to judicial review, that refusal provides another strong reason for issuance of the proposed rule. Significantly, the Advice Memorandum and Dismissal Letter in that case contained no refutation of the Union's reading and analysis of applicable statutory text, nor did it directly contest the Union's presentation of legislative history. Accordingly, as the following examination of the General Counsel's proffered reasons for dismissal in the *Dick's* case will demonstrate, it is

[114] For more comprehensive exposition of this separate §8(a)(1) duty to bargain, *see* BLUE EAGLE at 107-108.

[115] *Supra* note 11.

perfectly clear that where union employees are not presently represented by a designated majority-union pursuant to Section 9(a) of the Act, their employer, if requested, has a duty to bargain collectively with their union—albeit a minority-union—for its employee-members, but not for any other employees.

1. The General Counsel's Failure to Dispute Petitioner's Interpretation of Pertinent Statutory Language and Supporting Legislative History

Although the Advice Memorandum asserted and reasserted mantra-like that the dismissal of the unfair labor practice was "based on the statutory language, the legislative history of the Act, and well-established Board and Supreme Court doctrine,"[116] those assertions were never supported.

(a) The General Counsel's Inaccurate View of Statutory Language

The Advice Memorandum begins with the assertion that the employer "had no obligation under the Act to recognize the Charging Party in the absence of a Board election establishing that it represented a majority of the Employer's employees.[117] It then asserts that this conclusion is "*based on the statutory language*"[118] and reiterates that it *"is clearly supported by the statutory language.*"[119] However, notwithstanding those unqualified repetitive assertions, not one sentence or one phrase in either the

[116] Memorandum p. 2. See also pp. 1 & 18.

[117] *Id.* p. 1. Emphasis added.

[118] Memorandum pp. 1, 2, & 6.

[119] *Id.* p. 18. Emphasis added.

Advice Memorandum or the Regional Director's Dismissal Letter (Letter)[120] presents any discussion of statutory language (other than the reiteration of the Union's review and analyses of applicable statutory text). The General Counsel thus provided no refutation whatever of the Union's reading of the statute.

The discussion that follows demonstrates: (1) that the General Counsel failed to identify any provision in the Act that mandates that only majority unions have the right to engage in collective bargaining; (2) that he omitted entirely any critical reference to the key fourteen-word provision in Section 7 that *guarantees* that all "[e]mployees shall have the right to bargain collectively through representatives of their own choosing;" (3) that he did not dispute the fact that Section 9(a), by its unmistakable terms, is a *conditional* provision that applies only *if, when,* and *after* a union achieves majority status in an appropriate bargaining unit, and until that occurs, Section 9(a) is totally inoperable; and (4) that although he asserted that "Section 8(a)(5) is fundamentally premised on Section 9(a),"[121] he provided no textual or historical support for that bald assertion.

Indeed, the General Counsel misread Section 9(a) as if it contained an added phrase, here shown in **bold type,** as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining **and shall be the only**

[120] July 26, 2006, letter of the Regional Director formally dismissing the charge in *Dick's Sporting Goods, Inc*. (hereinafter Letter).

[121] Heading, in Memorandum p. 11.

> **representatives of employees with whom the employer has a duty to bargain collectively**….

However, that added phrase is not contained in the statute. The drafters did not add it, or its equivalent, for the same reason they declined to add the "smoking gun" language to Section 8(a)(5)[122]—because they did not want to confine collective bargaining to majority unions only. Even though majority bargaining was deemed the ideal format for mature bargaining, they recognized that less-than majority bargaining must also be protected, for it would often be a part of a union's process of development. Inasmuch as Section 9(a) must be read without the bold-face addition—as it reads presently—as a conditional clause operable only if and when a union achieves majority status in an appropriate bargaining unit, until that event occurs employees have the right to engage in collective bargaining through a minority union for members only, but not for other employees. Exclusive representation, the recognized goal for mature collective bargaining, is a function of majority status.

The Advice Memorandum recognized that the Union's claim "that employers have a duty to recognize and bargain with minority, members-only unions is based in large part on two interrelated premises—the clear and plain language, and the legislative history of the Act."[123] With regard to that "clear and plain language," the General Counsel acknowledged the Union's position—supported by eight Supreme Court cases that he cited[124] without raising any question as to their relevance—that

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[122] *See supra* at notes 99-101.

[123] Memorandum p. 3.

[124] *Id.* n. 6.

"general principles of statutory construction mandate that the provisions of the Act be read broadly, and that the language of those provisions be given its plain, ordinary meaning."[125]

The Advice Memorandum likewise did not dispute the accuracy of the Union's literal reading of Section 8(a)(5). It also acknowledged and did not question the accuracy of the "smoking-gun" feature of Section 8(a)(5)'s legislative history that confirmed the nonrestrictive meaning of that provision, for it repeated without any dispute the Union's contention

> that the drafters intentionally rejected a version of Section 8(a)(5) that in the Charging Party's view, would have explicitly excluded minority unions from Section 8(a)(5) protection. The rejected language would have made it unlawful for an employer only to:
>
> > [R]efuse to bargain collectively with employees through their representatives, chosen as provided in Section 9(a).[126]

Instead, as the Advice Memorandum concedes, Congress adopted the other proffered version—the existing version—of Section 8(a)(5).

Not only did the General Counsel not refute the obvious conclusion to be drawn from the drafters' selection of the present text of Section 8(a)(5) and their simultaneous discarding of alternative language that would have confined Section 8(a)(5)-bargaining

[125] *Id.* *See* note 66 *supra*.

[126] Memorandum p. 5. Underscoring in Memorandum. *See supra* at notes 99-101.

to majority unions only, he noted Supreme Court authority reinforcing that conclusion,[127] to wit, the Court's statement in *INS v. Cardoza-Fonseca*[128] that

> Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.

The Advice Memorandum also acknowledged—without refutation—the Union's reading of the text of Section 8(a)(5), including the conclusion that "the presence of the comma in Section 8(a)(5) is evidence that the drafters of the Act intended that Section 9(a) restrict only the *process of bargaining,* not the *bargaining representative.*[129]

As often noted herein, the language of Section 9(a) provides a *conditional* limitation on the right of employees to bargain "through representatives of their own choosing;" but, as the provision shows on it face, it applies only *after* a union has been "designated or selected" by a majority of the employees in an appropriate unit. The General Counsel never questioned that reading of the unambiguous language of that passage, notwithstanding his repeated assertion that his refusal to issue a complaint was "based on statutory language."

(b). The General Counsel's Inaccurate View of Legislative History

Notwithstanding the truism that legislative history without statutory support is meaningless, the General Counsel attempted to present a legislative-history rationale

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[127] Intending it, however, for use where it was not applicable. *See* Memorandum p. 7, n. 23, and *infra* at notes 151-159.

[128] 480 U.S. 421, 442-43 (1987).

[129] Memorandum p. 4. Emphasis added. *See supra* at note 62.

for not issuing a complaint. All of his historical references, however, prove to be inaccurate, misleading, or irrelevant. The Advice Memorandum's discussion of his historical premise opens with two headings: that "Industrial Democracy is Fundamentally Based on Majority Rule" and that "The Drafters of the Act intended collective bargaining to be based on majority rule."[130] That *majority* theme runs throughout the Advice Memorandum—indeed, it is a "Johnny One-Note"[131]-theme alleging that it was the framers' desire that majority-exclusivity bargaining be the intended form of collective bargaining. That postulate is certainly true but beside the point. Indeed, the Steelworkers Union has not disputed that objective—in fact, it has stressed it.

The Union specifically reminded the General Counsel that Section 9(a) was the provision of the Act

> that was expressly designed to establish what Congress deemed to be the ideal form of mature collective bargaining, to wit: majority and exclusive representation and bargaining covering employees in an appropriate bargaining unit.[132]

That same proposition is noted repeatedly in the BLUE EAGLE [133] and is emphasized in this Petition.[134] That concept of majority bargaining, however, was simply the *ultimate* objective of the statute and its framers. It was recognized and frequently announced by

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[130] *Id*. p. 6.

[131] BABES IN ARMS, music by Richard Rogers, lyrics by Lorenz Hart (1936).

[132] Union's initial Statement of Position in the *Dick's* case at p. 20, quoting from BLUE EAGLE at 102.

[133] *E.g., see* BLUE EAGLE at 10, 11, 57, 61, 65, 69-71,76, 85, & 102.

[134] *See supra* at notes 58, 105, & 111.

the Wagner bill's proponents that for collective bargaining to have its maximum impact, it should be representative of all the affected employees. It was thus intended that once a majority union was designated, there would be no recognition of or dealing with any minority union. However, that statutory goal was not intended to exclude earlier, steppingstone stages of collective bargaining. As previously noted, the framers of the Act took pains to protect such pre-majority bargaining.[135] That is what members-only bargaining is all about. It is not about substituting plurality and proportional representation for majority representation, as the General Counsel attempted to portray. Minority-union bargaining was simply viewed as a means to an end—the end being majority/exclusivity bargaining. The end should not be confused with the means.

The General Counsel devoted most of his discussion of legislative history to the irrelevant issue of *post-election* plurality bargaining, but he failed to note that all of his references were so limited, hence inapplicable to pre-majority bargaining. His examples consisted of statements touting the advantages of *post-majority* exclusivity bargaining contrasted with proportional representation[136] or plurality bargaining, which employer witnesses in the Congressional hearings had been advocating.[137] They preferred plurality bargaining because it would have ensured that after a majority union had been selected in an election, the employer could continue to deal with a minority union—

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[135] *See supra* at note 104. The General Counsel conspicuously ignored available documentation that showed the consistent efforts of the drafters, in both their 1934 and 1935 drafts, to protect preliminary minority-union bargaining that would precede the establishment of majority and exclusivity bargaining.

[136] *Eg., see* statement by Senator Wagner, 2 Legis. Hist. 2491.

[137] *See supra* at note 106.

which was expected to be a union friendly to the company.[138] That was the post-election position that employers had urged in the *Denver Tramway*[139] and *Houde Engineering*[140] cases but was rejected by the NLB and the old NLRB, and now again by Congress when it inserted Section 9(a) in the Wagner Act.[141] As noted above, minority-union bargaining *prior* to the selection of a majority representative was not even an issue in the congressional debates.[142] All of the legislative-history statements to which the General Counsel referred, as indicated by their contents, were directed to the bargaining process *after* a union had been designated by a majority of a unit's employees, not before such designation.[143] Those expressions were simply reiterating the viewpoint that the ideal format for mature and effective collective bargaining was bargaining by an exclusive majority union, with the employer not being permitted to deal with any other union.

The only three statements from the Act's sponsors that were quoted verbatim in the Advice Memorandum show on their face that they were indeed referring to exclusivity-bargaining *after* designation of a union's majority in an appropriate bargaining unit—*not before.*[144] All referred to bargaining within a *unit*, which is a

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[138] *See* BLUE EAGLE at 69.

[139] *Supra note* 23.

[140] *Id.*

[141] BLUE EAGLE at 35-38 & 70-72.

[142] *Id.* at 69.

[143] *Id.* at 74-80.

[144] In fact, the very concept of an appropriate bargaining unit is tied to the need to establish parameters for determining the existence of a union's majority; an appropriate

product only of Section 9(a) and majority representation. The first statement, a quotation from a radio broadcast by Senator Wagner, stressed the advantage of an employer dealing with "a consolidated *unit*" rather than with "various minority groups."[145] The second was from the Senate report that explained the advantages of exclusivity *after* designation of a majority representative in an appropriate unit, noting that it is "[almost] universally recognized that it is practically impossible to apply two or more sets of agreements to one *unit* of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single *unit*…."[146] The third statement was from the House report, which observed that there "cannot be two or more basic agreements applicable to workers in a *given unit*; this is virtually conceded on all sides."[147] Clearly, these statements all referred to conditions *following* designation of a majority representative in an appropriate bargaining unit. In fact, the General Counsel actually conceded such wedding of *majority* and *unit* by his summary statement that "the Act's sponsors believed that collective bargaining simply could not work if the system required more than one minority union to represent different parts of the *same unit.*[148] It is thus undisputed that the sponsors' statements were referring to post-Section 9(a) *unit* and *majority* designations, which are wholly irrelevant to the issue of pre-Section 9(a) bargaining with minority unions.

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unit has no essential reason to exist at earlier informal stages of bargaining with not-yet-mature minority unions.

[145] Memorandum p. 8. Emphasis added.

[146] *Id*. p. 9. Emphasis added.

[147] *Id*. Emphasis added.

[148] *Id*. p. 8. Emphasis added.

The General Counsel also failed to note the undisputed historical fact that Section 8(a)(5) was not a part of the original Wagner bill, that when it was finally added it was only intended to amplify and not limit the requirements of Sections 7 and 8(a)(1).[149] Legislative history is indeed here important—but not the inaccurate history of a Section 8(a)(5) that would confine bargaining to Section 9(a) majority unions only, as the General Counsel's Memorandum contends. It is just the opposite.

Indeed, the most vital piece of legislative history was conspicuous by its absence, to wit, the previously noted[150] "smoking-gun," i.e., the rejected version of Section 8(a)(5) that would have limited such bargaining to unions "chosen as provided in section 9(a)." Although the General Counsel acknowledged the occurrence of this signal event in the drafting process, he opted to ignore it in his presentation of legislative history.

He did cite another "rejected" provision in the drafting process, however—though incorrectly—to wit, a tentative proviso to Section 9(a)[151] that actually supports Petitioners' minority-union bargaining thesis. His reference was to a tentative clause in Keyserling's first draft of Senator Wagner's 1935 bill that would have expressly authorized an oddly-worded version of "minority group*"* collective bargaining. The General Counsel asserted, erroneously, that "Congress considered and rejected" this

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[149] *See supra* at notes 95-98.

[150] *Supra* at notes 99-101.

[151] "[T]hat any minority group of employees in an appropriate unit shall have the right to bargain collectively through representatives of their own choosing when no representatives have been designated or selected by a majority in such unit…." Memorandum p. 7.

provision, whereas—unlike the "smoking gun" version of Section 8(5)[152]—it was never considered by Congress, much less rejected by Congress. Although the proviso in question contained two odd or problematic phrases,[153] the clause was *replaced*—not "rejected"—for a more important reason, prior to the bill's submission to Congress. That reason, which should have been self-evident, was that this clause was but one of a *pair* of related first-draft clauses, both of which were later replaced by their inclusion in a broader, relatively problem-free, provision, to wit, Section 7, which at the time of the first draft had not yet been composed.[154] The other clause in the related pair was a tentative Section 8(5), to wit: "To refuse to bargain collectively with the representatives of his employees."[155] The next draft bill was the one Senator Wagner introduced in the Senate, which now included Section 7. Its all-encompassing duty-to-bargain language made the minority-group bargaining proviso (with its problematic phrases) and the tentative Section 8(5) duty-to-bargain clause both wholly redundant. The comprehensive bargaining language in Section 7—including the broad passage that:

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[152] *See* note 99 *supra*.

[153] Those textual problems, which Keyserling and his colleagues surely would have noted, were the following: (1) It would have allowed collective bargaining—a well-understood process when conducted by and with *unions*—to be conducted by and with any amorphous or ad hoc *group* of employees—an unworkable scenario for both employers and unions. And (2) this process would occur "in an appropriate bargaining unit," a concept that was either *meaningless*, because the only purpose of such a unit is to define the parameters of an aggregation of employees for the designation of an employee-majority, or else *ambiguous and unnecessary*, because unit determination—which is ultimately a function performed by the Board—would have to be made *prior* to such bargaining. This pre-introduction tentative proviso can best be characterized simply as legislative doodling.

[154] "SEC. (7) [Note by Keyserling: to be dictated]," Casebeer, *Keyserling Drafts, supra* note 75, at 123. *See also* BLUE EAGLE at 59-60 & 238-239.

[155] *Id.*

"Employees shall have the right…to bargain collectively through representatives of their own choosing"—was a key part of the successful effort by Wagner and Keyserling to "recast the measure in a simple conceptual pattern,"[156] which was how historian Irving Bernstein described the newly compressed format of the final draft of the bill that Wagner introduced in the Senate. It should also be noted that the pre-introduction draft on which the General Counsel sought to rely when he pointed to the deletion of the tentative minority-group bargaining proviso, did not yet contain the text of Section 8(5)[157] on which he based his "Johnny One-Note" majority-only bargaining thesis.[158] When Keyserling deleted the pair of tentative provisions, he and Senator Wagner left no doubt as to what they intended. And when Wagner and the Senate committee finally agreed to add the revised Section 8(5) duty-to-bargain amendment ten weeks later, they were careful—as previously noted—to reject the version that would have required bargaining only with representatives "chosen as provided in section 9(a)." The full story of the deleted proviso to which the General Counsel sought to call attention thus supplies further confirmation of the drafters' consistent[159] intent to protect minority-union bargaining as an essential preliminary stage in the development of mature collective bargaining.

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[156] Irving Bernstein, THE NEW DEAL COLLECTIVE BARGAINING POLICY 88 (1950)

[157] Designated as §8(5) prior to 1947.

[158] *See* Memorandum, at p. 11, where the General Counsel asserted that "Section 8(a)(5) is fundamentally premised on Section 9(a)" and that "the Board has never construed Section 8(a)(5) as operating independently from Section 9(a)."

[159] *See* drafts of Senator Wagner's 1934 bill (BLUE EAGLE at 231-237), which reveal additional confirmation of intent to protect minority-union collective bargaining. *See also* BLUE EAGLE at 41-46.

The General Counsel also miscited a secondary source of legislative history, an article by Ruth Weyand, for the proposition that

> by enacting Section 9(a) of the Act, which sets forth the majority rule, Congress explicitly rejected other forms of representation, including plural and proportional representation which were permitted under Section 7(a) of the NIRA.

As the statute indicates, and as the Weyand article confirms, majority rule was intended to apply only *after* a union had achieved majority status, which was the state of the law under the NIRA following the *Denver Tramway*[160] and *Houde Engineering*[161] cases that she cited. Her article neither "explicitly" nor by implication indicated Congressional rejection of "other forms of representation" prior to establishment of a Section 9(a) majority representative.

Likewise, none of the General Counsel's quotations from other labor law scholars[162] are relevant, for they all referred to bargaining *after* selection of a majority representative in an appropriate bargaining unit. They were simply reporting, as the BLUE EAGLE and this Petition also reports, that the drafters of the Act made a conscious choice to reject plurality bargaining as the ultimate goal for mature labor relations. They consciously chose to make exclusive representation by majority labor organizations the standard for fully established collective bargaining. The same is true regarding the Advice Memorandum's quotations from contemporary proponents of the Wagner bill

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[160] *Supra* note 22.

[161] *Supra* note 23.

[162] Memorandum pp. 7-9.

and the congressional committees,[163] which were only expressing the rationale for the majority/exclusivity principle that was expected to prevail in bargaining units *after* a majority of the employees had chosen their representatives.[164]

With reference to another of the Union's contentions,[165] the General Counsel correctly noted that Section 9(a) was "merely a codification of the old NLRB's 1934 decision in *Houde Engineering Corporation,"*[166] but he failed to acknowledge the significance of that fact, which was that enactment of this subsection, like the *Houde* decision, carefully left untouched the employer's duty to bargain with minority unions *prior* to the establishment of majority/exclusive representation.[167]

The bottom line of the General Counsel's treatment of the language in the Act and its legislative history is that he did not question the accuracy of the Union's reading or its recitation of legislative history;[168] and he offered no statutory reading or relevant

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[163] *Id.*

[164] *See supra* at notes 144-148.

[165] Memorandum pp. 5-6.

[166] *Supra* notes 22 & 89.

[167] *See* BLUE EAGLE at 48-52.

[168] His only questioning of the Union's account of legislative history was based on a misconception of the law under the NIRA: Regarding the three cases the Union had cited to demonstrate the requirement of nonmajority bargaining under §7(a) of the NIRA (see footnote 13 of the Memorandum and note 22 *supra*), the Memorandum (in footnote 35) noted that in none of those cases was the employer ordered to bargain with the minority union; however, that observation was irrelevant and misleading, for it was not the function or practice of the NLB to order bargaining, either for minority or majority unions. What was relevant is that *in each case the NLB ruled that the employers were in violation of NIRA §7(a) when they refused to bargain with those unions*. Passage of the NLRA was intended to cure this lack of enforcement authority. *See* BLUE EAGLE at 64-65.

legislative history to counter those well-established conclusions. Having left the Union's statutory conclusions unrefuted, he was apparently compelled to resort to the contention—in effect—that regardless of what the plain language of the Act requires, the Union's minority-bargaining thesis had already been decided and rejected.[169] That erroneous perception is treated in the discussion that follows.

2. The Absence of Applicable NLRB and Supreme Court Cases and the Inapplicability of the Cases Cited by the General Counsel

The General Counsel has attempted to convey the impression that the issue of minority-union bargaining has already been decided by Supreme Court and Board decisions. Nothing could be farther from the truth. With no citation of authority—for there are no cases to cite—he alleged that

> it is *firmly* established under Board and Supreme Court cases that the duty to bargain under the Act is based on the principle of majority representation, to the *exclusion* of compulsory minority union recognition. [T]he Board has *consistently* refused to interpret the Act as according minority unions the same bargaining rights as majority representatives.[170]

That statement is inaccurate on several counts.

In the *first place*, there is no statutory language to that effect and not a single case has ever *excluded* minority union recognition where the union was not claiming, either overtly or covertly, exclusive Section 9(a) recognition. On the other hand, recognition and protection of nonmajority bargaining where there is no exclusive

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[169] "[T]he issue is not an open one…it is well settled." Letter p.3.

[170] Memorandum p. 11. Emphasis added.

majority representative, as previously demonstrated, is protected directly by unambiguous language in the statute. Furthermore, there are several Supreme Court and Board cases[171] which have upheld and approved voluntary nonmajority members-only bargaining, including the previously discussed foundational Supreme Court decision in *Consolidated Edison Co. v. NLRB*,[172] where Chief Justice Hughes declared that the NLRA "contemplated the making of contracts with labor organizations," including contracts for union members "*even if they were a minority*."[173] Although the "principle of majority rule" is protected when it is established under Section 9(a), all collective bargaining—including preliminary nonmajority bargaining—is protected by Section 7 and implemented by both Sections 8(a)(1) and 8(a)(5). There are no cases that have ever "established*"*—"firmly" or otherwise—an exclusion of compulsory minority-union recognition.

In the *second place,* the Board cannot have "consistently*"* refused to interpret the Act to accord minority unions the same rights as majority representatives when it has never been requested to do so except in cases where the minority union was seeking or claiming recognition as an *exclusive* Section 9(a) representative, such as in the *Bernhard-Altmann*[174] and other "false majority cases,"[175] including intentional employee-

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[171] *See* BLUE EAGLE at 93-97.

[172] 305 U.S. 197 (1938). *See supra* at note 33.

[173] *Id.* at 236-37. Emphasis added.

[174] 366 U.S. 731 (1961).

[175] *See* BLUE EAGLE at 159-162 and cases cited in note 184 *infra*.

discrimination cases such as *Don Mendenhall, Inc.,*[176] discussed below, on which the General Counsel relied so heavily.

In the *third place*—directly to the point in issue—the BLUE EAGLE and the Union have never claimed that minority unions are entitled to "the same bargaining rights as majority representatives." Unambiguous language in the Act specifies that they are not entitled to the same rights, nor were the "same" rights sought in the *Dick's* case. Section 9(a) expressly denies nonmajority unions the right of exclusive representation, thus confining them to representation of their members only—which is what the Union in the *Dick's* case was seeking. And another provision in the Act, Section 8(a)(3), expressly denies minority unions the right to enter into compulsory union agreements, specifying that such agreements are permitted only "if such labor organization is the representative of the employees *as provided in section 9(a.)"*[177] Thus, as previously noted, Section 8(a)(3) represents further statutory recognition of the expected presence of nonmajority unions and their right to bargain collectively about other subjects of bargaining.

For those same reasons, the General Counsel's unwarranted observation that "the Charging Party's view would create the anomaly of granting *greater* recognitional and bargaining rights to minority unions than those granted to majority

[176] 194 NLRB 1109 (1972). *See infra* at notes 179-189.

[177] Emphasis added. *See* discussion in the second paragraph following note 63 *supra.*

representatives"[178] is unrelated to the reality of the Act, which, as noted in the preceding paragraph, expressly specifies *lesser* rights for minority unions.

In the absence of any cases actually holding that Section 8(a)(5) cannot operate independently of Section 9(a), the General Counsel's Advice Memorandum presented one paragraph[179] that sums up his effort to explain the refusal to issue a complaint. In that paragraph he (1) presents an inaccurate rendition of the Union's assertion in the *Dick's* case, (2) seeks to make a positive holding out of a negative allegation, and (3) misstates the contents of *Don Mendenhall*, his leading Labor Board case. Here is that entire paragraph with its inaccuracies highlighted:

> The Charging Party contends that the plain language of Section 8(a)(5) is not limited by Section 9(a) and therefore, an employer's duty to bargain does not hinge on exclusive majority status. However, *contrary to the Charging Party's assertion, the Board has never construed Section 8(a)(5) as operating independently from Section 9(a).* The Board will therefore not find a Section 8(a)(5) violation for refusing to bargain, and will not issue a bargaining order, where a members-only union is not the majority representative. Indeed, in Don Mendenhall,[180] the Board dismissed a Section 8(a)(5) allegation based on the employer's alleged refusal to bargain over subcontracting *affecting union members because*

[178] Memorandum p. 18. Emphasis added. Regarding the General Counsel's inaccurate reading of Linden Lumber Div. v. NLRB, 419 U.S. 301 (1974), *id*. pp. 17-18, it should be noted that elections are not essential for Section 9(a) representation. Indeed, the Act does not even permit the holding of an election unless the "employer *declines* to recognize" a union that claims to be a Section 9(a) representative (§9(c)(1)(A), emphasis added). Nor is an election always required by *Linden Lumber,* which held only that an election could be required when an employer refused to acknowledge the accuracy of an authorization-card majority; that decision left untouched an employer's voluntary acceptance of other evidence of a union's majority, and nowhere within the language of Sections 7, 8(a)(1), 8(a)(5), or 9(a) is an election mandated for majority-union bargaining.

[179] Memorandum pp. 11-12.

[180] 194 NLRB 1109, 1110 (1972).

the union operated as a members-only union, and was not the exclusive bargaining representative.

As to the inaccurate rendition of the Union's assertion, it is simply not true that the Union has ever contended that the Board has construed Section 8(a)(5) as operating independently from Section 9(a). Although the Board should—and if it follows the law it will—it has not done so yet.

As to the attempt to turn a negative into a positive, the assertion that "the Board has never construed Section 8(a)(5) as operating independently from Section 9(a)" is not the equivalent of saying the Board has construed Section 8(a)(5) as not being applicable to minority-union bargaining—which would of course be an untrue statement, for the Board has never had occasion to make that determination one way or the other.

As for the cryptic but inaccurate rendition of what occurred in the *Don Mendenhall* case, the quoted statement is simply untrue as to both of its assertions, as the following discussion of that case will demonstrate.

In the *first place*, the subcontracting for which the union in *Don Mendenhall* had sought to bargain was not "subcontracting affecting union members" only; rather, it was intended to affect all employees in the bargaining unit. As the Board's opinion notes, both union and nonunion employees were laid off as a result of the employer's unilateral decision to subcontract traditional bargaining-unit work.[181] When the union sought to bargain about that decision, it believed—as did the General Counsel—that it was a party to an existing contract that named the union in its recognition clause as the

[181] 194 NLRB at 110 ("employees who were not members of the union…were also laid off.")

exclusive "collective-bargaining representative for all work performed by 'tile layers, marble masons and terrazzo workers, whether for interior or exterior purposes, in any public or private buildings' within the Union's jurisdiction." That recognition clause—which had an earlier incarnation in a valid Section 8(f) prehire-agreement— confirms that the union, by its effort to reverse the employer's subcontracting, intended Section 9(a) coverage for all the employees in the unit, not just union members. The employer never questioned the contract's coverage; in fact, as the Board's opinion noted, he "paid the union wage scale to both union and nonunion employees;" however, in accordance with his private understanding with the union, he did not pay health and welfare benefits to the nonunion employees. Such discriminatory conduct by the union—to which the employer acquiesced—was an obvious violation of its duty of fair representation[182] that would certainly not be approved by the Board. Inasmuch as the union and the General Counsel were seeking a Section 9(a) bargaining order applicable to the entire bargaining unit, the Board had no choice but to conclude that "*in the context of events*, the [employer's] action cannot be held violative of Section 8(a)(5)."[183] This was no different from the Board's refusal to find a violation of that section in other *false majority* cases where a union was seeking to act on behalf of all bargaining-unit employees when in fact it did not represent a majority of the employees in the unit.[184]

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[182] However, no charges of Section 8(b)(2) and 8(b)(1)A) violations were pending in the case, although such violations were established by the undisputed evidence. *See generally* John E. Higgins, Jr. (ed.), THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT ch. 25 (5th ed. 2006).

[183] Emphasis added.

[184] See BLUE EAGLE at 159-62 and the eight *false majority* cases there discussed, to wit, Segall-Maigen, Inc.,1 NLRB 749 (1936); Mooresville Cotton Mills, 2 NLRB 952 (1937),

In the *second place*, the contract that the union in *Don Mendenhall* had signed, and to which the employer had agreed, *expressly* recognized the union as exclusive representative of all the employees in the bargaining unit. The fact that the union never achieved a majority in that unit following its first contract simply meant, as the Trial Examiner observed, that pursuant to Section 8(f) it was thereafter no longer entitled to bargain as a Section 9(a) representative. By its unwavering adherence to the Section 9(a) recognition clause in that contract—which both the union and the General Counsel claimed to be still in effect—the union was clearly seeking to bargain about subcontracting that would have affected all employees in the unit described in the recognition clause. It is thus no surprise that the Board dismissed the charge, for the union did not represent the employee-majority for whom it was purporting to bargain.[185]

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enforced as modified, 94 F.2d 61 (4th Cir. 1938) (modification unrelated to issue); Wallace Mfg. Co., 2 NLRB 1081 (1937); Brashear Freight Lines, Inc., 13 NLRB 191 (1939), *enforced*, 119 F.2d 359 (8th Cir. 1941); National Linen Service Corp., 48 NLRB 171 (1943); Olin Industries, Inc., 86 NLRB 203 (1949), *enforced*, 191 F.2d 613 (5th Cir. 1951), *cert. denied,* 343 U.S. 970 (1952); Agar Packing & Provision Corp., 81 NLRB 1262 (1949); International Ladies' Garment Workers. v. NLRB (Bernhard-Altmann Texas Corp.), *supra* note 34.

[185] Some of the Board's careless language and inaccurate assertions about existing law in *Don Mendenhall* may have contributed to the misunderstanding of that decision. For example, the opinion stated without citation of authority that "It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms." 194 NLRB at 1110. Considering the facts in *Don Mendenhall*, this awkward syntax could only mean that when a minority union represents its members only, granting *exclusive* recognition to that union does not satisfy the statutory norm of §9(a), which is the only meaning that makes sense, for that was the only relevant legal conclusion that had been "settled since the early days of the Act." *See* cases cited in note 294 *supra.* The opinion compounded its unfounded rendition of the law by stating that: "Although the Board has never ruled squarely on the legality per se of a members-only contract, the insufficiency under the Act of such recognition has been well established." That statement is patently inaccurate, for the Board and the Supreme Court had both ruled squarely on that concept and approved it, and the General Counsel even acknowledged the legality of such contracts. *See infra* at notes 305-306.

Another inaccuracy in the General Counsel's rendition of *Don Mendenhall* is his assertion (through the Regional Director) that in that case "the Board refused to find 8(a)(5) violation *where the union asserted that the employer had an obligation to bargain under a members only contract*."[186] That is untrue. No such assertion by the union is recorded or even implied in either the Board's opinion or the Trial Examiner's decision. At no time did the union ever request the employer to bargain for or sign a contract *for its members only*, and the Board never ruled on such a request that had never been made.

It was also inaccurate for the General Counsel to have concluded that in *Don Mendenhall* "the Board did not rely on a putative claim of majority representation,"[187] for the Board expressly noted that its refusal to find the employer guilty of refusing to bargain about subcontracting was made "*in the context of events*," which included the union's claim to be the representative of all the employees described in the contractual bargaining unit. The union was not claiming that the employer had refused to bargain for a contract applicable to its members only, and that was not what the General Counsel was charging in his allegation of a Section 8(a)(5) refusal to bargain.

Furthermore, the cited authority for the *Don Mendenhall* Board's supposition of "insufficiency," Golden Turkey Mining Co., 34 NLRB 760 (1941), actually recognized the legal reality of members-only bargaining by its reliance on McQuay-Norris Mfg. Co. v. NLRB, 116 F.2d 748 (7th Cir.), *enforcing* 21 NLRB 709 (1940), *cert. denied*, 313 U.S. 565 (1941), where a minority members-only union had grown into a majority union, for which the Board and the Seventh Circuit Court of Appeals held that it was entitled to §9(a) exclusivity recognition.

[186] Letter p. 3, n. 5. Emphasis added.

[187] Memorandum p. 12.

Accordingly, *Don Mendenhall* cannot be distorted to represent a holding that the Board never made and had no occasion to make.

In fact, every Board decision that the General Counsel cited in connection with *Don Mendenhall*[188] that involved an alleged refusal to bargain under Section 8(a)(5)[189] concerned situations where there was either a current or an expired *Section 9(a) collective bargaining contract that spelled out a precise appropriate bargaining unit.* In each of those cases, both the union—which did not represent a bargaining-unit employee majority—and the employer discriminated against nonunion employees by agreeing and providing that certain contractual benefits would be given only to union members. Like *Don Mendenhall*, these cases describe a violation of a union's duty of fair representation under Section 8(b)(1)(A) and an employer's violation of Sections 8(a)(1) and 8(a)(2) by recognizing a minority union as a Section 9(a) representative of an entire bargaining unit. All of these cases involved purported representation of employees in *bargaining units*, whereas the members-only bargaining at issue in the *Dick's* case was unrelated to the bargaining-unit concept. None of these cases cited in the Advice Memorandum involved a union that was openly seeking to bargain for and sign an agreement for its members only, or an employer that was recognizing or contracting with such a union for its members only or was refusing to so recognize and bargain with such a union for its members only.

The General Counsel's apparent confusion as to the role of bargaining units in relation to members-only bargaining was illustrated by his citation of *Manufacturing*

[188] *Id.* pp. 11-13.

[189] Memorandum p. 12, n. 37.

Woodworkers Ass'n[190] and *Reebie Storage & Moving Co*.[191] *Manufacturing Woodworkers*, like several other unit definition cases,[192] simply held that a history of members-only bargaining is not controlling as to the make-up of an appropriate bargaining unit, which is a sensible conclusion inasmuch as members-only bargaining is not dependent on the appropriateness of a bargaining unit, notwithstanding—as the Board has acknowledged—that it "has sometimes accepted a members-only contract as indicative of the feasibility of the scope of the unit."[193] Furthermore, the General Counsel's quotation from *Reebie Storage* for the proposition that the "Board does not issue bargaining orders in 'members only' units,"[194] referenced an oxymoron, for by definition members-only bargaining is not based on Section 9(a) units. That emphasis on units, however, underscores what the Board was asserting in the *Don Mendenhall*-type cases. It was simply insisting that if a union seeks to bargain with reference to a Section 9(a) *unit*— whatever its discriminatory purpose might be—it must first represent a majority of the employees in that unit. Petitioners do not disagree with that proposition.

To his credit, the General Counsel did acknowledge that "the Act permits employers to recognize and bargain with minority unions on a members-only basis

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[190] Memorandum p. 12, 194 NLRB 1122 (1972).

[191] Memorandum p. 13, 313 NLRB 510 (1993), *enforcement denied on other grounds*, 44 F.3d 605 (7th Cir. 1995).

[192] *E.g*., Greyhound Lines, Inc., 235 NLRB 1100 (1978); Crucible Steel Castings Co., 90 NLRB 1843 (1950); Kansas Power & Light Co., 64 NLRB 915 (1945).

[193] Crucible Steel Castings Co., *Id.*, at 1843 (citing Tennessee Coal, Iron & Railroad Co., 39 NLRB 617 (1942)).

[194] 313 NLRB at 510.

where there is no majority representative,"[195] thereby agreeing with the basic Supreme Court and Board decisions[196] that establish that such bargaining and resulting members-only contracts do not unlawfully discriminate against nonunion employees under Sections 8(a)(1), 8(a)(3), and 8(b)(1)(A), or violate Section 8(a)(2), the company-union provision of the Act. However, he failed to explain how such minority-union bargaining, which was commonly practiced during the early years of the Act,[197] can be affirmatively permitted—in fact encouraged[198]—if the Act is based on majority bargaining only, as he repeatedly contends, such as when he professed to read the

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[195] Letter p. 3. *See also* Memorandum p. 11 where the General Counsel so concedes, but grudgingly. It is noteworthy that the employer in the *Dick's case* also agrees that such minority-union bargaining is lawful under the Act. In its leaflet to employees dated July 28, 2005, the employer asked: "Can the union actually negotiate just for a minority of associates?" To which it replied: "The answer is "yes…." if Dick's *wanted to*, it could voluntarily recognize the Steelworkers and negotiate a contract just for those associates who are members of this [union] 'council.' Under the law, the concept is called a 'minority union.'"

[196] *See* Consolidated Edison Co. v. NLRB, *supra* note 33; International Ladies Garment Workers v. NLRB (Bernhard-Altmann Texas Corp.), *supra* note 34; Retail Clerks v. Lion Dry Goods, Inc., *Id.*; Solvay Process Co., *supra* note 36; The Hoover Co., *supra* note 37; and Consolidated Builders, Inc., *supra* note 38.

[197] *See supra* at notes 30-37.

[198] Supreme Court cases: Consolidated Edison Co. v. NLRB, *supra* note 33 at 236 ("The Act contemplates the making of contracts with labor organizations…and in the absence of…an exclusive agency, the employees represented by the [union], even if they were a minority, clearly had the right to make their own choice."); International Ladies Garment Workers v. NLRB (Bernhard-Altmann Texas Corp.), *supra* note 34; *Retail Clerks v. Lion Dry Goods, Inc*., *id*. NLRB cases: The Board pointed out in *Consolidated Builders, Inc*., *supra* note 38, that since "an employer may grant recognition to each of two rival unions on a members-only basis [citing The Hoover Co.*, supra* note 37] *a fortiori*, [it] may grant recognition on a nonexclusive basis to a minority union, where as here, there is no rival union claim." 99 NLRB at 975, n. 5. *See also The Solvay Process Company, supra* note 36. In NLRB v. Lundy Mfg. Corp., 316 F.2d 921 (2d Cir. 1963), *cert. denied,* 375 U.S. 895 (1963), *enforcing* 136 NLRB 1230 (1962), the Board held that a group of unorganized employees had a right to deal with their employer as a group regarding their grievances.

mind of Congress by asserting that "Congress *understood* that minority union bargaining would *undermine* the very purpose for which the Act was passed."[199]

He also misstated the Union's position when he asserted that the "Charging Party argues that Section 7 of the Act establishes the right of all employees, organized and *unorganized* to engage in collective bargaining."[200] The Union did not so contend and Section 7 does not so provide. It only grants collective bargaining rights to those employees who choose to be represented for purposes of collective bargaining, i.e., in labor organizations, which was the clear intent of the Act and what the text plainly states.[201]

The General Counsel also misstated the position of the Union when he referred to *NLRB v. Lundy Mfg. Corp.*[202] as no longer being a viable basis "to establish a duty to bargain under Section 8(a)(1)." It has never been the Union's position that a minority union's right to bargain is based on the second part of Section 7, i.e., protected concerted activity for "mutual aid or protection," which was the basis for support of the ad hoc group-employee negotiations in the *Lundy* decision. The Union's position in *Dick's* was, as it is in this Petition, that the protection of union-based collective bargaining is premised on the first part of Section 7, i.e., the "bargain collectively" part, as well as on Section 8(a)(5).

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[199] Memorandum p. 10. Emphasis added.

[200] Letter p. 2. Emphasis added.

[201] *See* BLUE EAGLE at 155-59.

[202] *Supra* note 198.

Another inaccuracy in the Advice Memorandum is the assertion that "the Board has consistently declined to find Section 8(a)(1) violations when employers refuse to recognize and bargain with unrepresented employees over grievances,"[203] which is untrue because the Board found such a violation in the *Lundy* case*,* and the Board has never overruled or disavowed that finding. And regarding the three cases[204] that are relied on to support the "consistently declined" assertion, the Board had no occasion in any of those cases either to find or not to find a Section 8(a)(1) violation, which in any event would have been based on the "mutual aid or protection" language of Section 7, not on the affirmative duty-to-bargain-collectively language in the first part of that Section or on Section 8(a)(5). The three cases cited contain only tiny bits of pure dicta that casually repeat latter-day conventional wisdom without any legal support.[205] The Board has heard no cases on any issue relevant to the *Dick's* case and has made no holding as the Memorandum claimed. Regardless, however, the BLUE EAGLE'S thesis and the Petitioners' position herein are based primarily on the mandatory Section 8(a)(1) "guaranteed" "right" "to bargain collectively" contained in the first part of Section 7, plus the text of Section 8(a)(5), and not on the *discretionary* "mutual aid or protection" language of Section 7.[206]

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[203] Memorandum p. 15.

[204] Charleston Nursing Center, 257 NLRB 554, 555 (1981); Pennypower Shopping News, 244 NLRB 536, 537 n. 4, 538 (1979), supp. decision 253 NLRB 85 (1980), enforced, 726 F.2d 626 (10th Cir. 1984); Swearingen Aviation Corp., 227 NLRB 228, 236 (1976), *enforced* (but not with regard to the dictum in issue), 568 F.2d 458 (5th Cir. 1978).

[205] *See* BLUE EAGLE at 162-69 for detailed analyses of these cases.

[206] *See id.* at pages 155-56.

The General Counsel's assertion "that an employer has no obligation to discuss grievances with a union, once that union has lost majority support"[207] is misleading and unsupported by the case he cited, *Mooresville Cotton Mills.*[208] That case involved a union that had been active at the plant for a number of years and reasonably believed that it represented a majority of the employees when it sought to settle several grievances affecting the entire bargaining unit. The grievances were not settled; consequently, 48 hours after their presentation "approximately a thousand of respondent's 1400 employees went out on strike."[209] At the time of the grievance request, however, it turned out that the union's actual membership was less than a majority. The Board stated in dictum—for it did not decide whether the employer had refused to bargain about the grievances—that the employer had no duty to discuss the grievances because the union at the time of the request represented only a minority of the unit employees. This was thus only a garden-variety *false majority* case where a union was seeking to represent an entire bargaining unit—not just it members—when in fact it represented only a minority of the unit.[210] It is undisputed that an employer has

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[207] Memorandum p. 17.

[208] *Supra* note 184.

[209] 2 NLRB at 955.

[210] *Mooresville Cotton Mills* is unique, however, because the Board used this case to clarify—for the first time—that a union's majority must exist, i.e., be provable, at the time the union makes its request to bargain. Obviously, the union and the Regional Director both thought that a majority existed at the time of the meeting, when the grievance request was made—and the overwhelming support for the strike suggests that it did, but there was no way to prove it with objective evidence. At the meeting, the union leaders probably had no idea as to exactly how many dues-paying members they had, and they had no reason to believe—if they thought about it at all—that the numbers who went on strike would not be sufficient to prove majority representation. Nowhere in the Board's

no obligation to negotiate unit-wide grievances with a minority union that is purporting to represent a majority of the unit employees when in fact it does not.

3. Summation

The General Counsel failed to present any statutory basis for his refusal to issue a complaint. As demonstrated by unambiguous statutory text and cogent legislative history, that refusal was contrary to the intent of Congress. In addition, there are absolutely no cases—indeed, the General Counsel could cite none—where the Board had ever ruled on the issue of an employer's duty to bargain with a minority union for its members only where there is no Section 9(a) majority representative. The few cases that he cited were unrelated to that issue. Nevertheless, even if the Board were to conclude that it had already determined that the Act does not protect that right of less-than-majority employees to bargain collectively—which is unlikely considering the decisional evidence reviewed above—a fresh look at this issue would be in order and an accurate declaration of statutory meaning should now be issued in accordance with the rule proposed herein.

C. The Absence of Any Factual Issue—A Pure Question of Law

Rulemaking is especially appropriate here for the reason that the issue posed is purely legal, requiring no resolution of any issue of fact. [211]

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factual discussion of the dispute does it appear that the union claimed to be acting as anything other than the exclusive representative of all the employees.

[211] *See* discussion of Massachusetts v. EPA at notes 4-8 *supra*.

IV. Conclusion

For all the reasons discussed hereinabove, the time has come for the Board to correctly declare the applicable law under the Act by promulgating the rule which Petitioners have proposed. As this Petition has established, the plain language of the Act and its legislative history mandate formal recognition that non-majority unions have an enforceable right to bargain collectively on behalf of their member-employees. Furthermore, issuance of the proposed rule will correct the egregious error represented by the failure of the General Counsel to issue a complaint in *Dick's Sporting Goods, Inc*., Case No. 6-CA-24821. Rulemaking is especially appropriate here because this matter involves a pure question of law, without any issue of fact.

Petitioners submit that with the promulgation of this rule, the national labor policy of encouraging collective bargaining will be substantially advanced. As a consequence, significant equitable and democratic values will have a fresh opportunity to flourish in the American workplace, the fruits of which will make a positive contribution to the social and economic health of the nation.

Respectfully submitted this 14th day of August, 2007.

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