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A Recast Midwest Piping Doctrine: The Case for Judicial Acceptance*

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The article examines the Midwest Piping doctrine of employer neutrality in the context of recent NLRB decisions which reinterpret it. The authors begin by discussing the doctrine and its historical development. They identify various flaws in the pre-1982 articulation and implementation of doctrine which account for the reluctance of courts during this period to enforce NLRB orders issued in accordance with the doctrine. They argue that in the NLRB's 1982 modification of the doctrine in Bruckner Nursing Home and RCA Del Caribe, Inc., the agency has responsibly responded to the academic and judicial criticism of its employer neutrality rules; the recast Midwest Piping doctrine, in their view, now deserves judicial acceptance.

INTRODUCTION

Although the National Labor Relations Board (NLRB or Board) has been rightly criticized for the instability, often resembling perpetual oscillation, of many of its policies, the Board has displayed remarkable consistency in its doctrine of employer neutrality. The doctrine, which stems from Midwest Piping & Supply Co.¹ in 1945, seeks to protect the NLRB's election machinery and ultimately to safeguard employee choice by requiring the employer in rival-union situations to withhold voluntary recognition of one of the union contestants.

Despite the Board's consistency in this area, the doctrine of employer neutrality has encountered considerable judicial resistance. The courts have been troubled by the Board's insistence on a hiatus in collective bargaining despite an employer's willingness to recognize and bargain with a union; by the agency's failure to articulate and justify the

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¹ 63 N.L.R.B. 1060 (1945).
regulatory judgments underlying the doctrine; and the Board's absolutist extension of the doctrine to situations involving incumbent unions and weak rival bids not supported by even 30 percent of the employees in the affected unit. From the judicial standpoint, the doctrine stymied collective bargaining, in the service of an abstract preference for the Board's own election machinery—from this vantage, bureaucratic turf control run riot. After three decades of increasing inability to enforce the Midwest Piping doctrine in the courts of appeals, the Board, in two July 1982 rulings, Bruckner Nursing Home\(^2\) and RCA Del Carbide, Inc.,\(^3\) modified the doctrine in response to the judicial criticism.

This article surveys the justifications for the Midwest Piping doctrine and evaluates the performance of the Board and the courts in what is plainly a case study of the Labor Board's difficulties in administering the National Labor Relations Act. In view of the 1982 rulings, which are responsible to much of the criticism levelled against the doctrine, we urge greater judicial receptivity to the Board's now modified insistence upon employer neutrality.

I

THE DOCTRINE OF EMPLOYER NEUTRALITY

A. The Board's Policy from 1945 to 1982

In 1945, the Board held, in Midwest Piping & Supply Co.,\(^4\) that an employer who recognizes and bargains with one union in the face of a rival union bid violates section 8(a)(1) of the NLRA. In later cases, the Board held that an employer who recognizes one or more rival unions also violates section 8(a)(2), which prohibits employers from interfering with or contributing to the formation of any labor organization.\(^5\)

In Midwest Piping, the Steamfitters and the Steelworkers were vying for representation of the employees in two of the employer's three plants. Both unions had filed petitions for an election. The Steelworkers union then notified the employer that it represented a majority of the employees in the two plants. Around the same time, however, the Steamfitters submitted membership cards purportedly signed by a majority of the employees in the two plants, and the employer promptly recognized and signed a closed-shop contract with the Steamfitters.\(^6\)

The Board held that the employer in Midwest Piping violated the Act by recognizing and bargaining with one union when the employer knew a real "question concerning representation" (QCR) of the employ-

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2. 262 N.L.R.B. 955 (1982).
4. 63 N.L.R.B. 1060 (1945).
6. 63 N.L.R.B. at 1069.
ees existed. The employer thus had "elected to disregard the orderly representative procedure set up by the Board under the Act," and had "arrogate[d] to itself the resolution of the representation dispute against the Steelworkers and in favor of the Steamfitters." 7

The Board explained that the employer could not rely on the signed cards as proof of the Steamfitters' claim of majority status because authorization cards in the rival union context are inherently unreliable evidence of majority support. 8 Furthermore, the Board explained that when an employer recognizes one union over another, the employer accords the recognized union "unwarranted prestige" and thus interferes with the employees' section 7 right to choose a representative freely. 9

Although the nonrecognized union in Midwest Piping had filed a petition for representation, the Board later extended the employer neutrality principle to situations in which the rival union had never filed a petition or even demanded recognition. In its 1955 Pittsburgh Valve 10 decision, the Board overruled its prior policy under which employer neutrality was required only after the nonrecognized union filed a petition. The Board stressed that "it is the continuing existence of a claim, and not . . . only the acceptance and processing of a petition by the Board, which determines whether the situation calls for the application of the Midwest Piping doctrine." 11 Over the years, the Board progressively minimized the QCR requirement. 12 Indeed, until 1982 the Board maintained that a real QCR existed if the rival union's claim was not "clearly unsupportable or specious," 13 even if a Board-supervised election could not be held 14 or the rival union had been unable in successive elections to

7. Id. at 1070.
8. Id. at 1070 n.13.
9. Id. at 1071.
11. 114 N.L.R.B. at 195 (citing Sunbeam Corp., 99 N.L.R.B. 546, 553 (1952)).
13. Buck Knives, Inc., 223 N.L.R.B. 983, 985 (1976), enforcement denied, 549 F.2d 1319 (9th Cir. 1977). See Playskool, 195 N.L.R.B. at 560 ("the claim of the rival union must not be clearly unsupportable and lacking in substance").
14. In Sunbeam Corp., 99 N.L.R.B. 546 (1952), the Board found a Midwest Piping violation when the employer recognized one of the three rival unions on the basis of a slim majority of cards. No election petition had been filed by any of the competing unions since the Board had already conducted an election in the unit within the previous year, and a petition would have been barred by the Act's one-year election bar rule in § 9(c)(3). Nevertheless, the Board rejected the employer's claim that no QCR could exist because of the Board's election-year rule. Id. at 553. The Board explained that the employer could have relied on a "consent election conducted by an impartial body," rather than settling the representation issue himself. Id. In subsequent cases, the Board refused to require employer neutrality within one year after a valid election had been held. See text accompanying notes 24 and 25; but see infra note 15.
The Board developed a slightly different policy for situations in which a rival union challenged an incumbent union. Initially, the Board held that in the interest of industrial stability, *Midwest Piping* would not apply to contracts signed with incumbent unions, regardless of the existence of a representation question. In 1958, the Board overruled this policy in *Shea Chemical Corp.* Until 1982, the Board required the employer to cease bargaining with an incumbent union when an insurgent union raised a real QCR. Thus, the duty of neutrality arose as soon as the rival union filed a petition supported by 30 percent of employees, regardless of whether a hearing had been held, an election had been ordered, or a prior demand for representation had been made.

Under the *Shea Chemical* rule, the Board tolerated a hiatus in a preexisting bargaining relationship because it feared that continued dealings with the incumbent union in the face of a QCR would pressure the employees to vote for the incumbent rather than the insurgent union in the subsequent election. Yet the Board did permit an incumbent union to “continue administering its contract or processing grievances” to minimize the disruptive effect on unit employees and prevent an employer

15. In *Playskool*, 195 N.L.R.B. 560 (1972), for example, one union had tried unsuccessfully to organize the company’s employees. The employer constantly refused to recognize the union on the basis of a card check and always insisted upon a Board-controlled election. The union lost each election. In the last election, the union received almost 30% of the total votes. Afterwards, a rival union began organizing the employees. After the rival union tendered a majority of signed authorization cards, the employer recognized the rival union, even though the initial union had continued its organizational activity. The Board held that the employer violated the *Midwest Piping* rule by recognizing and contracting with the rival union. *Id.* at 561.


17. 121 N.L.R.B. 1027 (1958). Interestingly enough, *Shea Chemical* was not a real incumbent union situation. In *Shea Chemical*, the employer recognized a union on the basis of signed cards, at a time when no rival union claimed representation. The recognition agreement, however, contained no substantive terms. *See id.* at 1027. Twelve days later, a rival union appeared claiming to represent a majority of the employees. The employer refused to meet with the rival because of its recognition agreement with the first union. The rival union then filed a representation petition supported by the requisite 30% showing of interest. The employer subsequently signed a collective bargaining contract with the incumbent. The Board held that the employer violated 8(a)(2) by contracting with the recognized union while the rival union’s petition was pending since the petition raised a QCR. *See id.* at 1029.


20. In *Shea Chemical*, the Board did not explain its rationale in extending the *Midwest Piping* doctrine to the incumbent union context. However, in a subsequent case, *St. Louis Indep. Packing Co.*, 129 N.L.R.B. 622 (1960), *enforcement denied*, 291 F.2d 700 (7th Cir. 1961), the Trial Examiner explained that the *Shea Chemical* prevents entrenchment of the incumbent union, *id.* at 629 (intermediate report) (“the right of employees to change their bargaining representative carries no less dignity in the statutory scheme than their right to choose in the first instance between unions competing for representative status”).
from giving “undue advantage” to the rival union.21

Finally, in 1972, the Board extended Midwest Piping to the filing of decertification petitions. In Telautograph Corp.,22 the Board held that an employer must cease bargaining with an incumbent once the employees have filed a decertification petition supported by the requisite 30 percent of the unit.

In theory, the Midwest Piping doctrine requires that the QCR be capable of resolution in a NLRB election. Employer neutrality is not required if an election would be barred by the Board’s contract bar, election year, or certification-year rules, or if the rival union’s petition involved an inappropriate unit.23 Thus, if an insurgent union filed a petition while the contract between the employer and the incumbent was still in effect, the Board’s contract-bar rule would preclude the finding of a QCR.24 Similarly, employer neutrality is not required during the year following a valid election, because section 9(c)(3) prohibits the holding of an election within one year after a valid election has been held (although here the Board displayed considerable inconsistency25). Neutrality is also not required during the one-year period after a successful decertification election. Moreover, where an insurgent union does not file a timely petition before the 60-day insulated period that precedes the expiration of the incumbent’s contract, any contract executed during the insulated period will also bar a future election.26 Finally, the Board held that an employer need not delay negotiations with a union that has won a valid Board-conducted election, even though the rival union has filed timely objections to the election.27

B. The Board’s Justification

The Midwest Piping doctrine is essentially a prophylactic rule, reaching conduct that does not itself violate section 8(a)(2). Midwest Piping attempts to preserve the conditions for employee free choice; indeed, the Board premised its 1945 decision on section 8(a)(1)’s prohibition of employer interference with employee free choice. Thus, an employer would be guilty of an unfair labor practice (ULP) under Mid-

west Piping if the employer recognizes one of two or more rival unions when a QCR exists, regardless of whether the employer acted in good faith. Moreover, a finding of a ULP does not depend on whether the employer recognized a minority supported union. In fact, the doctrine assumes that the recognized union may be a majority representative at the time of recognition. Otherwise, reliance on the Midwest Piping rule would be unnecessary. Whether the Board may proscribe such voluntary recognition depends on the grounds for the Board's regulatory judgment that employee preferences in rival-union situations can be reliably determined only by means of its election machinery.

1. Preservation of the Integrity of NLRB Election Machinery

In the rival-union context, the Board has consistently viewed authorization cards and other informal indicia of majority support as inconclusive proof of majority support. In the Board's view, a rival-union contest must be resolved "in a manner attended by the safeguards of the Board's election machinery." The Midwest Piping doctrine rests on the assumption that employees who are the object of union organizing drives are, as a group, a risk-averse lot who will tend to shape their preferences in favor of a known outcome rather than confront an uncertain, possibly hazardous state of affairs. The Board reasons that employees view recognition as an ex-


29. The administrative law judge (ALJ) in Peter Paul, Inc., 185 N.L.R.B. at 288, explained: We are not concerned with a majority issue, but with an assistance issue. The gravamen of the charge . . . is that [the employer] . . . unlawfully determined the majority issue in the face of a representation claim by a rival union. If in fact there is a rival claim sufficient to establish a question concerning representation, the majority issue can only be resolved following the free choice of the employees as expressed in an election. The quantity or quality of other evidence available to [the employer] becomes irrelevant, since the existence of the rival claim shows its validity to be the very question at issue and not something that the employer can determine on its own.

Id. (intermediate report).

30. See Playskool, 195 N.L.R.B. at 561.


32. The Board's judgment about human behavior are often based on little more than the intuitive feel of the five members holding office at a particular time. The empirical basis for the Board's judgments has come under question. See, e.g., J. Getman, S. Goldberg & J. Herman, Union Representation Elections: Law and Reality (1976); Goldberg, Getman & Brett, Union Representation Elections: Law and Reality: The Authors Respond to the Critics, 79 Mich. L. Rev. 504 (1981). The Board's critics themselves have been challenged. See, e.g., Cooper, Authorization Cards and Union Representation Election Outcomes: An Empirical Assessment of the Assumption Underlying the Supreme Court Gissel Decision, 79 NW. U.L. Rev. 87 (1984); Dickens, The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again, 36 Indus. & Lab.
pression of employer preference and, by virtue of the act of recognition, are less willing than they might have been to support a union that the employer seems to disfavor. Although employees may not necessarily vote for a union simply because the employer favors it, the favored union will nevertheless receive a certain amount of prestige if only because it is viewed as the "winner," and acceptance of the recognized union, the path of least resistance. The opposition may also become demoralized in the face of employer recognition, and employee interest and organizational commitment to the rival may seriously wane. When recognition of one union occurs before an election, the Board presumes that employees prefer to maintain rather than to disrupt the status quo. Thus, is born the "bird-in-hand" effect, motivating employees to support, or at least desist from opposing, the favored union.

For this reason, *Midwest Piping* requires employer neutrality to preserve the integrity of the Board's election machinery. Although the Board could still hold an election even after the employer recognized one of the competing unions, provided that a timely petition had been filed, employee free choice will, in the Board's view, have been tainted by the "unwarranted prestige" bestowed on the favored union. The Board thus crafted a prophylactic rule to ensure the availability of a reliable method of determining which union enjoyed uncoerced majority support, even when one of the competing unions appears to have garnered a majority of authorization cards.35

33. Professor Getman argues that "[E]mployees are more likely to vote against a union thought to be favored by the employer on the assumption that it will not be aggressive enough in advancing their interests." Getman, *Midwest Piping Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. CHI. L. REV. 292, 307 (1964).

34. Presumably, the Board will not apply the contract bar or certification-year rule in the rival-union context.

35. See *International Harvester Co.*, 87 N.L.R.B. 1123, 1127 (1949) ("To hold otherwise would be to sanction futile elections and invite abuse of our process."). In its Tenth Annual Report, the Board stressed that an employer may not disregard the jurisdiction of the Board and preclude the holding of an election under Board auspices by resolving the conflicting representation claims on the basis of proof which the employer deems sufficient, but which is not necessarily conclusive. Moreover, the effect of such conduct is to accord unwarranted prestige and advantage to one of two competing labor organizations and thereby prevent a free choice by the employees.

Is the Board guilty of unprincipled dualism in its attitude toward authorization cards? In the single-union situation, the Board’s critics point out, an employer is permitted to recognize a union before an election on the basis of authorization cards, whereas in the rival-union context, the Midwest Piping doctrine bars recognition of any union prior to an election.36

The Board’s position here may be justified in several ways. On one level, the Board may be manifesting a consistently strong distrust of authorization cards. Since NLRB v. Gissel Packing Co.,37 the Board had confined bargaining orders without elections to the remedial sphere. To the extent voluntary recognition in the single-union context is tolerated, the Board may simply be heeding to congressional judgment, so pointedly developed by Professor Lesnick,38 that unions may be “designated” the exclusive bargaining agent even without an election. In light of Gissel and Linden Lumber Co. v NLRB,39 any attempt by the Board to prohibit voluntary recognition in the single-union context would render wholly nugatory this deliberate congressional decision embodied in section 9(a).

On a second level, it can be argued that even if the Board were not limited by congressional dictate, authorization cards may be more reliable indicators of employee choice in the single-union setting than in the rival-union context. The Board’s assumption, presumably reflecting the institution’s accumulated expertise, is that the employee’s decision to opt for unionization vel non represents a deliberate, profound, fairly fixed position (absent employer ULPs undermining the environment for free choice),40 whereas an employee’s choice of one union over another represents a relatively unstable, mutable preference. In many rival-union campaigns, even if the most sophisticated and politically active employees are generally in favor of unionization, they may have not yet made a firm commitment to support one union over another.

During the rival-union campaign, employee support may shift back and forth between the two unions. This phenomenon of dual support is clearly demonstrated by the prevalence of employees signing more than one authorization card.41 Evidence of dual allegiance establishes a factual predicate for believing that employees have overcome the threshold question of whether to unionize, but may not have formed a particular preference for one union over another. Thus, where employee preference for one union is not certain, employer recognition prior to the election

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36. See Getman, supra note 33, at 302-03.
40. See J. Getman, S. Goldberg & J. Hermann, supra note 32, at 21, 137.
could easily cause employees to vote differently in a subsequent election than they would if the election campaign had occurred without employer interference. This rationale becomes less valid, of course, when the requirement for a QCR is lowered. When the nonrecognized union has minimal support, the potential for dual allegiance and employer coercion is correspondingly diminished.\footnote{2}

2. Prevention of Employer Manipulation of the Organization Process

A related, although often unstated, purpose behind the Midwest Piping doctrine is to prevent the employer from distorting the employee decisionmaking process by controlling the timing of employer recognition in the rival-union context. If the employer enjoys untrammeled freedom in deciding when to recognize one union over another, the employer will be in a position to manipulate the organizational process. Thus, the employer could “observe the ebb and flow of fluctuating sentiment” and could make “timely recognition of the favored union.”\footnote{3}

Cleaver-Brooks Mfg. Corp.\footnote{4} presents a classic example. The employer freely rejected one union’s claim to majority support and waited until another union gathered sufficient proof of majority support. The employer then recognized the second union and was able to sign a con-

\footnote{2. In some past cases, the Board extended its colorable claim standard beyond all defensible limits. For example, in American Bread Co., 170 N.L.R.B. 85 (1968), \textit{enforcement denied}, 411 F.2d 147 (6th Cir. 1969), the Board found a QCR in an initial organizing case, when the employer was aware of the rival union’s organizing attempts, the rival had lost an election within the proceeding year, and the rival had collected only one signed authorization card out of a 92-employee union. \textit{Id. at} 88. Given these facts, it would seem that the rival union’s chance of winning majority support in a future election were highly dubious.}


\begin{quote}
Often we were faced with the scenario of a union presenting substantial evidence of majority support based on cards which the employer would reject while invariably professing a preference for the Board’s election procedures. A short time thereafter, the employer would recognize another union and, typically, sign a contract in a remarkably accelerated bargaining process. This scenario was played once too often, so we determined that in order to protect the democratic right of the employees to their own collective bargaining representative, and to prevent employer abuse, we would require an election whenever there were two or more unions on the scene, and each had some support or organizational interest in the unit sought.
\end{quote}

Bruckner Nursing Home, 262 N.L.R.B. 955, 962 (1982).}

\footnote{4. 120 N.L.R.B. 1135 (1958), \textit{enforcement denied}, 264 F.2d 637 (7th Cir.), \textit{cert. denied}, 361 U.S. 817 (1959). In this case, the employer first rejected the Steelworkers’ request for recognition on January 16, 1957. The Steelworkers then filed a representation petition and a notice of hearing was issued. On January 21, the Independent union collected 35 out of a possible 47 employees’ signatures support a proposed charter. On February 2, the Independent requested recognition from the company. On February 15, the company recognized the Independent and entered into bargaining, which culminated in an agreement effective April 2. The Board held that the employer violated §§ 8(a)(1) and 8(a)(3) by recognizing and contracting with the Independent, while the Steelworkers’ competing recognitional claim presented a question of representation. \textit{Id. at} 1136. The Seventh Circuit refused enforcement of the Board’s order, holding that the 35 signatures on the charter was a “clear showing of majority representation.” 264 F.2d at 642.}
tract in a "remarkably accelerated bargaining process." A post-recogn-
ition election could not readily determine what the employees' prefer-
ence would have been had the employer withheld recognition. The
agreement entered into with the union would tend to influence the prefer-
ences of employees in a subsequent election, especially if the employees
viewed the terms as particularly favorable. Even if the terms were not
especially generous, risk-averse employees would tend to opt for the cer-
tainty of a bargaining representative for which the employer had clearly
shown a preference.

This view has met with some criticism. For example, Professor
Getman, in his paper on Midwest Piping, argues that concern over em-
ployer manipulation is misplaced. Tactical recognition, in Getman's
view, is not so sufficiently widespread that the Board should "infer its
existence from the fact of recognition" based on informal evidence of
majority support. Getman further contends that the strategic recogni-
tion rationale is unavailable where the employer can demonstrate that he
was in fact neutral.

If, however one starts with the Board's assumption regarding em-
ployee indecision between one union and another, and the consequent
need for a sober second look in the form of a Board-supervised election,
the fact that the employer recognized a union that enjoyed majority sup-
port at a particular moment does not address the Board's concern.
Moreover, it is difficult to fashion a fair, reliable mechanism for ascer-
taining employee choice that includes the participation of the nonfavored
union, unless the employer is willing to replicate the Board's secret bal-
lot and challenge procedures. If the employer is willing, why not await a
NLRB election?

Lastly, it should be noted that the Board need not be too concerned
with the potential for employer manipulation in the single-union context.
In the single-union situation, the employer's usual reluctance to recog-
nize any union serves as a built-in check. Absent an unlawful recogni-
tion of a minority union, most employers will not voluntarily recognize

45. See Bruckner Nursing Home, 262 N.L.R.B. at 956.
46. Getman, supra note 33, at 304. According to Getman, under this rationale, a finding of a
violation is only possible when the Board "properly finds as a matter of fact than an employer had
used this tactic." Id.
47. Id.
48. At least one former Board member suggested that a card check could be a reliable means of
determining majority status where all the rival unions were permitted to participate. See Wintex-
Knitting Mill, Inc., 223 N.L.R.B. 1293, 1293-94 (1976) (Walther, Member, concurring), enforce-
ment denied, 610 F.2d 430 (6th Cir. 1979); Buck Knives, Inc., 223 N.L.R.B. 983, 986-87 (1976)
(Walther, Member, concurring), enforcement denied, 549 F.2d 1319 (9th Cir. 1977); Walther, Mid-
west Piping—Such a Sentence Would Not Have the Slightest Effect, Speech Presented to the Annual
Meeting of the Labor Relations Law Section of the State Bar of Michigan (Sept. 16, 1976). A
majority of the Board has never accepted this approach.
a union unless the union's majority support is unassailable. In general, "an employer is more likely to favor one union over another than to favor one over none." Thus, a prophylactic rule which restricts the employer's ability to manipulate the organizational process is most appropriate in the rival-union situation. In rival-union settings, unionization is decidedly more probable and the employer has an incentive to prefer one union over another.

II
PROBLEMS IN APPLYING THE MIDWEST PIPING DOCTRINE: THE JUDICIAL RESPONSE

The Midwest Piping doctrine has not fared well in the courts. Judicial criticism has centered on two basic issues: (1) the determination of when a QCR exists; and (2) the treatment of the bargaining hiatus problem.

A. Determining When a Question Concerning Representation Exists—Rejection of the Prophylactic Rule

In general, the courts of appeals have taken the position that once there has been some expression of majority support for a union, the Midwest Piping doctrine is inapplicable. As the Seventh Circuit has explained:

[T]he courts first look to the support held by the majority union and find that no question concerning representation exists if that union has the validly-obtained support of an employee majority and the rival-union is thus shown to be no genuine contender.

Generally, the courts have rejected the prophylactic dimension of Midwest Piping and viewed the doctrine only as a means of preventing the

50. We recognize, however, that recognition may also occur when a union can credibly threaten recognitional picketing.
51. Getman, supra note 35, at 304 n.45.
52. The potential for employer manipulation in the rival-union context would be especially detrimental. Once the employer recognizes the preferred union, the rival would be likely to file a ULP petition, causing the Board to suspend the election proceeding while it investigates the charge. However, the Board would be unable to obtain a temporary injunction under § 10(j) of the Act to force the employer to cease bargaining and withdraw recognition since under the pre-1982 state of the law, there would be insufficient likelihood of success on the merits. See Eisenberg v. Hartz Mountain, 519 F.2d 138 (3d Cir. 1975).
53. E.g., Inter-Island Resorts, Ltd., 201 N.L.R.B. 139 (1973), enforcement denied, 507 F.2d 411 (9th Cir. 1974); American Bread Co., 170 N.L.R.B. 85 (1968), enforcement denied, 411 F.2d 147 (6th Cir. 1969); Air Master Corp., 142 N.L.R.B. 181 (1963), enforcement denied, 339 F.2d 553 (3d Cir. 1964); Indianapolis Newspapers, Inc., 103 N.L.R.B. 1750, enforcement denied, 210 F.2d 501 (7th Cir. 1954).
54. Playskool, Inc. v. NLRB, 477 F.2d 66, 70 n.3 (7th Cir. 1973).
employer from imposing a minority union upon the employees. The agency’s insistence on a Board-conducted election, the courts charge, is but an attempt to give its own procedures “unwarranted significance.”

The Third Circuit stated: “It is interference with the employees’ choice, not frustration of the Board’s design to hold an election, which the statute proscribes as an unfair labor practice.”

Although the courts have accepted the Board’s verbal formulation, they have limited the doctrine’s application to situations in which the employer has or should have a reasonable basis for believing that the recognized union did not represent a majority. Thus, an employer has been permitted to recognize one of two rival unions on the basis of a majority of signed cards, even where the nonrecognized union filed a petition supported by a 30 percent showing or made some other colorable claim of representation, or to cease bargaining with an incumbent and recognize an insurgent union on the basis of informal evidence of majority support.

Under the court’s interpretation of the neutrality doctrine, an employer could recognize a union on the basis of authorization cards or an informal ballot, whether or not the employer performed a cross-check to make sure that the same employees did not sign cards for the rival union, or permitted the rival labor organization to challenge dual cards. For example, in Buck Knives, Inc. the Board held that the employer committed a Midwest Piping violation by bargaining with one union after conducting a closed card check, when a rival union had previously raised a colorable claim of representation. The Ninth Circuit refused to enforce the Board’s order, reasoning that the card check represented sufficient evidence of majority status, even though the rival union was not permitted to participate.

The courts, without explanation, have simply ignored the intended thrust of the Midwest Piping prophylaxis. Commentators, notably Pro-

55. Getman, supra note 33, at 305. See Playskool, 477 F.2d at 70; NLRB v. Air Master Corp., 339 F.2d 553, 556 (3d Cir. 1964).
56. Air Master Corp., 339 F.2d at 556.
57. See, e.g., Wintex Knitting Mill, Inc. v. NLRB, 610 F.2d 430 (6th Cir. 1977); Playskool, 477 F.2d 66; Modine Mfg. Co. v. NLRB, 453 F.2d 292 (8th Cir. 1971).
59. See NLRB v. Buck Knives, Inc., 549 F.2d 1319 (9th Cir. 1977); Playskool, 477 F.2d 66 (7th Cir. 1973).
60. 223 N.L.R.B. 983 (1976).
61. Id. at 985.
62. 549 F.2d at 1320. Similarly in Playskool, the Seventh Circuit specifically rejected the Board’s determination that the card check “was not an ‘accurate barometer of the employees’ sentiments’ because [the rival union] had not participated in the card check and because some employees had evidentially signed authorization cards for both unions.” 477 F.2d at 69.
63. E.g., Playskool, 477 F.2d at 69.
fessor Getman, have attempted to explain why a prophylactic rule is simply unnecessary in the rival-union context. First, Professor Getman argues that recognition of one union is no more coercive of employee free choice than a direct statement of preference by the employer, which the employer is permitted to make under section 8(c).64 Yet there is, as the legislative history behind the free-speech provision makes clear,65 significant difference between voicing one's views and acting on them. Once the employer recognizes and begins negotiation with one union, the employer's expression of preference can no longer be viewed simply as campaign rhetoric.

Second, Professor Getman claims:

[W]here an incumbent union is involved, whatever aura of responsibility may otherwise attach to recognition has already been acquired through the previous history of representation. It cannot be erased by a short suspension of recognition, particularly since the Board in Shea Chem. Corp. specifically stated that the employer may permit the incumbent to continue administrating its contract or processing grievances through its stewards.66 Getman further argues that it was unlikely "that employees would view the continuation of dealing with an incumbent as an expression of choice to the same extent as they would view recognition of one of two outside unions."67 Accordingly, "[p]eople tend to notice . . . new modes of behavior; customary forms are accepted."68 Thus, an employer's continued bargaining with an incumbent would be "attributed to habit [rather] than to choice,"69 and any break in the relationship with the incumbent actually may be viewed as a rejection of the incumbent.70 As shown below, in the Board's 1982 modification of the Midwest Piping doctrine, the agency has incorporated this branch of the Getman critique.

Finally, Getman argues, employees are more sophisticated and less readily coerced than the Board assumed. He doubts that there are many cases in which employer recognition would motivate employees to vote for the favored union out of fear of reprisals if they support the nonrecognized union.71 In addition, Getman questions the notion that the negotiation of an agreement will pressure the employees to vote to retain the

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64. Getman, supra note 33, at 307-08.
65. Senator Taft explained: "[T]he privilege of this subsection is limited to expression of 'views, arguments, or opinions.' It has no application to statements which are acts in themselves or contain directions or instructions." 93 CONG. REC. 7002 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1624 (1948).
66. Getman, supra note 33, at 299 (footnote omitted).
67. Id.
68. Id.
69. Id. at 300.
70. Id.
71. Id. at 307.
agreement, regardless of their previous preference.\textsuperscript{72} Instead, the employees might feel that this new contract is only "the minimum that a new union may obtain."\textsuperscript{73}

Professor Getman's view flows from a different assumption about employee behavior and preference formation than the Board's. Where Getman sees simply the whetting of the employee appetite, the Board finds a momentum predisposing employees to opt for certainty over the unknown. This is not the place to discuss the larger question of the extent to which the Board may rely on intuition \textit{cum} "expertise," rather than empirical studies. The issue here is whether the Board's judgment is so patently without merit or impermissible under the statute that a reviewing court, also acting without the benefit of contrary empirical studies, may simply sweep it aside. Clearly, it is not.

B. Tolerating a Bargaining Hiatus

Judicial resistance to \textit{Midwest Piping} has also focused on the bargaining hiatus that the doctrine creates in the face of a real QCR.\textsuperscript{74} Many courts view the policy of promoting industrial stability as requiring the employer to be able to recognize one of two competing unions as soon as that union tenders evidence of uncoerced majority support. The Seventh Circuit stated:

Recognition of one competitor as bargaining agent during [the rival-union context] . . . absent proof of majority support, is a proscribed act . . . . The Act does not require, however, that this neutrality continue until the last dissident voice is stilled. Indeed, in keeping with the purpose of the Act, harmonious employer-employee relations require that the instability inherent in a contest end when one contestant is able to muster majority support.\textsuperscript{75}

The "hiatus" objection is particularly compelling in the incumbent-union context. As Professor Getman points out, the "cure [is] more drastic than the violation," because the "hiatus period may coincide with the termination of a collective bargaining agreement."\textsuperscript{76} In the incumbent-union situation, employees will be denied the possibility of wage increases or other improvements until the representation question is settled by a Board election.\textsuperscript{77} It should be added that \textit{Shea Chemical} was also inconsistent with the board's presumption of the continuing majority status of an incumbent union—a rule designed to promote the goal of pre-

\textsuperscript{72} \textit{Id.} at 308.

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{See, e.g.}, NLRB v. Peter Paul, Inc. 467 F.2d 700, 702 (9th Cir. 1972); \textit{Air Master Corp.}, 339 F.2d at 556-57.

\textsuperscript{75} \textit{Indianapolis Newspapers, Inc.}, 210 F.2d at 503 (7th Cir. 1954).

\textsuperscript{76} Getman, \textit{supra} note 33, at 301.

\textsuperscript{77} \textit{Id.}
serving stability and continuity of the bargaining relationship. Since an incumbent union is entitled to a presumption of majority support, at the very least the Board should have required more than the usual 30 percent showing by a rival union to force a halt to continued bargaining.

The *Midwest Piping* doctrine has also been criticized for forestalling bargaining in the initial-representation context. In such cases, Professor Getman argues that it would be a wiser policy to permit the employer to recognize any union that presents some informal evidence of uncoerced majority support, because "a minority union can delay the election by technical objection or an unfair labor practice charge." Getman adds that "the Board should realize that its election process is only a means for determining employee choice. It should not be used as a basis for delaying effectuation of that choice."

Here, however, the Board is not disrupting a preexisting bargaining relationship. Rather, the Board is attempting to restore the status quo ante. Employees are not presented with the false signals of departure from customary modes of behavior. Instead, they are shielded from the misinformation inherent in a collective agreement negotiated in the face of a substantial rival bid. The delay created by the "blocking" effect of an ULP charge predicated on a *Midwest Piping* violation is unavoidable under the Board's view, because an election cannot be held while an employer's unlawful recognition remains in effect.

III
THE BOARD'S 1982 MODIFICATION

In *Bruckner Nursing Home,* the Board held that in rival-union, initial organizing situations it would no longer bar recognition of a union enjoying an uncoerced, unassisted majority, which occurs before a valid petition for an election has been filed. However, once notified of a valid petition filed with the requisite 30 percent support, "an employer must refrain from recognizing any of the rival unions."

The Board thus abandoned its prior view that a QCR exists so long as the rival union presented a colorable claim to representation. The Board will no longer have to define, on a case-by-case basis, what constitutes a "colorable claim." Therefore, *Midwest Piping* will not be extended to situations where the nonrecognized union's claim is tenuous at best.

*Bruckner Nursing* purports to establish a "clearly defined rule of

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79. Getman, supra note 33, at 305 (footnote omitted).
80. Id.
81. 262 N.L.R.B. 955 (1982).
82. Id. at 957.
83. Id.
The employer "will no longer have to guess whether a real question concerning representation has been raised but will be able to recognize a labor organization unless it has received notice of a properly filed petition." The Board chose the filing of a valid petition as the benchmark for when a QCR arises because, based on its "broad experience in conducting elections," evidence of 30 percent support indicates that the union has "substantial support in the petitioned-for unit."

The Board also redefined its policy concerning the usefulness of authorization cards in the rival-union context:

The Board explained that unless a rival union can muster at least 30 percent support, the risk of coercing employee free choice is minimal and cannot justify the harmful effects of delaying the bargaining process:

84. *Id.*
85. *Id.*
86. *Id.* at 957 n.14. The Board, therefore, decided to use the same standard for determining when the employer's neutrality obligation arises as they had used in determining when to hold an election.
87. *Id.* at 958 (footnote omitted). The Board did not rely on any empirical tests in modifying its assessment of the reliability of authorization cards in this context. Instead, the Board tried to reconcile its view of card reliability with the Supreme Court's holdings in *Gissel* and *Linden Lumber* that "while a Board-conducted election was still the optimum vehicle for ascertaining employee preferences, it was certainly not the sole means to that end." *Id.*
88. See supra text accompanying notes 78-79.
Where one of several rival union labor organizations cannot command the support of even 30 percent of the unit, it will no longer be permitted to forestall an employer's recognition of another labor organization which represents an uncoerced majority of employees and thereby frustrate the establishment of the collective bargaining relationship.  

Nevertheless, the Board retained a reasonable feature of the old rule, that the representation issue must be resolved through a Board election rather than through employer recognition once a properly supported petition has been filed. In the single-union case, the Board infers from a 30 percent showing that the union enjoys sufficient support to justify the effort and expense of a Board-conducted election. The Board will make a similar inference in the rival-union context. Once a rival-union gathers 30 percent support, there is substantial doubt concerning true employee preferences, even though another union subsequently tenders a majority of signed cards. In this situation, the employees may generally favor unionization, although their preferences for one union over another may be in flux. The risk of distortion of employee preferences by employer recognition of one union over another justifies the delay entailed in requiring a Board election to resolve the representation issue.

B. The Incumbent Union Context: RCA Del Caribe

In a second case, *RCA Del Caribe, Inc.*[^4] the Board overruled its prior policy concerning employer recognition of incumbent unions. The Board held that an employer need not discontinue negotiations with an incumbent where a petition by a rival union is pending. In fact, under the *RCA Del Caribe* rule, an employer will violate his section 8(a)(5) bargaining duty "by withdrawing from bargaining solely on the fact that a petition has been filed by an outside union."[^5] Nevertheless, the Board stressed that it would not apply its contract-bar rule to preclude an election if the outside union filed a timely petition.^[6]

Finally, in *Dresser Industries, Inc.*[^7], the Board overruled its *Telautograph*[^8] decision. Thus, an employer will no longer violate sections 8(a)(1) and (2) if it continues to bargain with the incumbent union after a valid decertification petition has been filed, and in fact is required to do

[^4]: 262 N.L.R.B. 963 (1982).
[^5]: Id. at 965 (footnote omitted).
[^6]: Id. at 966.
[^9]: 264 N.L.R.B. at 1089.
continue bargaining unless it has "good faith doubts of the union's continued majority status."

IV
THE REMAINING ISSUES

Although the Board narrowed the scope of its Midwest Piping doctrine in Bruckner Nursing Home and RCA Del Caribe, it did not completely overrule its policy. The Board left intact its doctrine of employer neutrality in the following situations: (1) the initial-organized context, in which the nonrecognized union has filed a petition supported by a 30 percent or greater showing of support; and (2) the incumbent-union context, in which an insurgent union tenders evidence of majority support instead of simply filing a petition supported by 30 percent showing. Regarding the latter situation, in Signal Transformer Co., Inc., decided after RCA Del Caribe, the Board held that when a rival union presents the employer with cards signed by a majority of the employees, the employer must cease all negotiations with the incumbent and withhold recognition of the rival union, pending the outcome of a Board election.

For the reasons set out below, courts should uphold the Board's application of the Midwest Piping doctrine in these limited situations, even at the cost of overruling their prior decisions.

A. The Recast Midwest Piping Doctrine in the Initial Organizing Context

During an initial organization in which a rival union files a petition supported by the requisite 30 percent or makes a more substantial showing of support, the Board’s rule requiring neutrality is reasonable. There is some confusion, however, regarding authorization cards as unreliable indicia for conclusively resolving the issue of majority status.

The incidence of dual cards in rival union campaigns strongly argues for reliance on the election process. At least one Board member has suggested that an independent card check by the employer would minimize any bargaining hiatus, and would provide a reliable means of determining majority status if all rival-unions were permitted to participate. A majority of the Board, however, has never accepted reliance on such informal methods. The courts, on the other hand, have permitted an employer to recognize a rival-union after holding a card check even with-

100. 265 N.L.R.B. 272 (1982).
101. See supra note 47 and accompanying text.
102. In fact, the Board in the past had rejected reliance on authorization cards in the rival-union situation, even in cases where a subsequent cross-check revealed that the number of duplicate cards did not change the fact that the favored union received a majority of cards (after the dual cards were discounted). See, e.g., Inter-Island Resorts, Ltd., 201 N.L.R.B. at 142.
out ensuring the nonrecognized union's participation.\textsuperscript{103} Card checks should be accepted, in our view, but only if safeguards are provided to ensure adequate time for campaigning, for rival-union participation, for an honest count, and for appropriate challenges to eligibility and campaign conduct. This would result in a potentially cumbersome procedure that would not necessarily speed up the election process. As an independent, reliable card check procedure would probably not mitigate the problem of delay, reliance on the Board election would be preferable.

Moreover, as the Supreme Court explained in \textit{NLRB v. Gissel Packing Co.},\textsuperscript{104} the problem inherent in the card-solicitation process—including the influence of peer pressure, possible misrepresentation by the card solicitor, and the desire to avoid a personal confrontation—affect the reliability of authorization cards as evidence of majority status. These difficulties are sufficiently magnified when two unions are vying for employee support so as to justify the Board's position that authorization cards are inherently unreliable evidence of majority status in the rival-union context.\textsuperscript{105}

In the single-union situation, however, an employee is less likely to succumb to outside pressures to sign an authorization card if the employee does not desire union representation at all. On the other hand, in the rival union case, an employee may desire representation, but may not have decided which union to choose. An employee who desires unionization might sign a card for a particular union simply because that union's representative was the first to approach her. Alternatively, that employee is more susceptible to coercive campaign tactics because she might not have formed a strong preference for one union over another. The Board reasons that such an employee would be more likely to sign a card for one union, even if her true preference may yet be unformed or even if she may have an equal allegiance to another union.

The Board's election process guards against these dangers. Aside from the obvious advantages of a secret ballot, Board elections are conducted at the end of the organizational campaign, and therefore, could be viewed by employees as the "last chance" to change their vote. If the

\textsuperscript{103} See supra text accompanying notes 59-63.

\textsuperscript{104} 395 U.S. 575, 603-04 (1969).

\textsuperscript{105} Getman, Goldberg and Hermann, conducted a study and found that authorization cards in the single-union context were reliable about 72 percent of the time as indicators of employee preference in a subsequent election. J. Getman, S. Goldberg & J. Hermann, supra note 32, at 134-35. Nevertheless, the authors stated that the Board's preference for election was "justified," because cards are unreliable indicators of employee sentiment about 25% of the time. Id. at 132-33, 135-36. Thus, the authors endorsed the \textit{Linden Lumber} rule which permitted the employer to insist upon an election. \textit{Id.} Given the 25% unreliability of cards in the single union case, the added dangers of coercion and confusion in the dual union context could adequately support the Board's rule requiring representation questions to be resolved solely by Board elections where there are rival unions vying for majority status.
organizational campaign is permitted to continue until the Board election, without interference by the employer, the employee will be better able to make a sober, informed choice.

In *Bruckner Nursing Home*, the Board held that, until one rival union gathered 30 percent support, the phenomenon of dual cards or other confusions encountered during the rival-union organizing context would "no longer . . . justify our absolute refusal to rely on cards in *Midwest Piping* situations." 106 This is a sensible approach to the reliability of authorization cards. When one union is unable to gather 30 percent support, the risk of dual allegiances is sufficiently doubtful to permit an employer to recognize another union that tenders a majority of cards. If evidence of dual allegiance is minimal, there is little reason to believe that employees are generally uncertain about which union to support when they signed authorization cards.

Thus, when rival unions have had an equal opportunity to solicit the employees, a majority of cards tendered by one union is more reliable evidence of employee sentiment than when employee support is more evenly divided. On the other hand, if the nonrecognized union is able to gather support from 30 percent or more of the employees, there is reason for concern over the shifting predispositions of the employees. 107

Many of the criticisms of the *Midwest Piping* doctrine are minimized by the *Bruckner Nursing Home* decision. The clarity of the 30 percent requirement should minimize litigation. In addition, the "blocking charge" problem would virtually disappear if the courts agree to enforce the Board's ruling. A rival union's ULP charge then could be summarily disposed of in the absence of a 30 percent showing. Moreover, an employer would be less likely to recognize a rival union before a Board election if the Board's invalidation of such recognition were certain to receive court enforcement.

**B. The Recast Midwest Piping Doctrine in the Incumbent-Union Context**

In *RCA Del Caribe*, 108 the Board modified the employer neutrality doctrine in the incumbent-union situation in order to protect an existing bargaining relationship in which an insurgent had filed a petition demonstrating 30 percent support. Nevertheless, the Board stressed that an employer could still withdraw recognition "in good faith based on other objective considerations." 109 Cards signed by a majority of the employ-

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106. 262 N.L.R.B. 955, 958 (1982).
107. As the Board explained in this instance, "the reliability of a rival's expression of a card majority is sufficiently doubtful to require resolution of the competing claims through the Board's election process." *Id.*
108. 262 N.L.R.B. 963 (1982).
109. *Id.* at 965 n.13.
ees in support of an insurgent union may be sufficient to trigger an employer's good faith doubt about the incumbent's majority status. Yet under *Bruckner Nursing Home*, a majority of signed cards is not conclusive proof of a union's majority status when another union presents a valid claim of representation. Thus, as *Signal Transformer* makes clear, even when a rival union tenders a majority of signed cards, neutrality is required pending the outcome of a Board election.

Thus, the modified doctrine prohibits an employer from bargaining with either union, but permits the incumbent union to continue processing grievances until the representation question is resolved by a Board election. As a result, an employer would not be able to ignore completely the incumbent's presumption of majority status by negotiating a contract with the insurgent union. On the other hand, this policy prevents entrenchment of the incumbent when there is evidence to support a good faith doubt about its continuing majority status.

For these reasons, the courts should abandon the view that when an insurgent union tenders a majority of signed cards, the employer may cease bargaining with the incumbent and recognize the insurgent before an election is held. This position undermines the policy of preserving continuity in the bargaining relationship, and gives undue credence to authorization cards. Given the particular dynamics of rival-union bids, the insurgent's evidence of majority support must be viewed as raising a QCR to be resolved by a Board election, rather than as resolving the representation question.

**Conclusion**

The Board's 1982 rulings excised the aspect of the *Midwest Piping* doctrine that had stymied a concrete opportunity for collective bargaining without furthering employee free choice in any meaningful way. The Board's modified doctrine represents a reasonable balance between divergent statutory goals. The courts should respect this balance and implement it in the future.

110. In *Dresser Indus., Inc.*, the Board noted that "if an employer is presented with a valid decertification petition supported by a majority of the unit employees, it may be privileged to withdraw from bargaining" with the incumbent. 264 N.L.R.B. 1088, 1089 n.7 (1982). See also *Signal Transformer Co., Inc.*, 265 N.L.R.B. 272 (1982).

111. See supra note 106 and accompanying text.

112. 265 N.L.R.B. 272 (1982); see supra text accompanying note 99.

113. See, e.g., *Air Master Corp.*, 339 F.2d 553; *Indianapolis Newspapers, Inc.*, 210 F.2d 501.

114. Ironically, the courts have relied on this policy by refusing to enforce the Board's rule requiring neutrality when a rival union challenges an incumbent by filing a petition. See, e.g., *Peter Paul, Inc.*, 467 F.2d at 702.