



3-1-1974

## Union's Waiver of Initiation Fees Interferes with Employee's Freedom of Choice in Representative Elections and Constitutes an Unfair Labor Practice.

William R. Garmer

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Labor and Employment Law Commons](#)

---

### Recommended Citation

William R. Garmer, *Union's Waiver of Initiation Fees Interferes with Employee's Freedom of Choice in Representative Elections and Constitutes an Unfair Labor Practice.*, 6 ST. MARY'S L.J. (1974).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol6/iss1/12>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

## CASE NOTES

### LABOR LAW—Union Elections—Union's Waiver Of Initiation Fees Interferes With Employee's Freedom Of Choice In Representative Elections And Constitutes An Unfair Labor Practice

*NLRB v. Savair Manufacturing Co.*,—U.S.—,94 S. Ct. 495, 38 L. Ed. 2d 495 (1973).

The Mechanics Educational Society of America requested that the National Labor Relations Board conduct an election among the production and maintenance employees of Savair Manufacturing Company. This request was made pursuant to Section 9(a) of the National Labor Relations Act under which the union, if it wins the election, becomes "the representative of the employees,"<sup>1</sup> for the purposes of collective bargaining. In order to request the election, the Union selected five employees who solicited authorization cards from a majority of the employees.<sup>2</sup> The five employees were authorized to explain the Union's policy that no initiation fees would be charged to those who signed the cards before the election. Subsequently, the Union won the election by a vote of 22 to 20. Savair filed objections to the election with the NLRB, and a hearing officer found that the Union's waiver of initiation fees had not interfered with the employees' freedom of choice<sup>3</sup> and certified the Union as the employees' bargaining representative. Savair, however, continued in refusing to bargain with the Union. Upon the filing of an unfair labor practice charge by the Union with the general counsel of the NLRB, a complaint was issued alleging that Savair was acting in violation of the National Labor Relations Act. The NLRB sustained the allegations and Savair was again ordered to bargain with the Union. Savair appealed the NLRB determination and the Court of Appeals for the Sixth Circuit denied enforcement of the NLRB's order. Held—*Affirmed*.

---

1. Section 9(a) provides:

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 . . . .

29 U.S.C. § 159(a) (1970).

2. 29 C.F.R. §§ 101.17 and 101.18 provide that upon obtaining signed authorization cards from 30 percent of the employees in a bargaining unit, a union may request a representative election.

3. *NLRB v. Savair Mfg. Co.*, — U.S. —, —, 94 S. Ct. 495, 496 n.4, 38 L. Ed. 2d 495, 499 n.4 (1973).

It is an unfair labor practice for a union to waive initiation fees for those employees who sign union authorization cards prior to a representative election.<sup>4</sup>

The National Labor Relations Act sets forth the general guidelines governing the conduct of both management and the unions prior to representative elections.<sup>5</sup> These guidelines provide that elections should be conducted in such a way that employees can arrive at a decision free from extraneous and unwarranted interference.<sup>6</sup> The National Labor Relations Board, which pursuant to the Act establishes the specific standards for representative elections,<sup>7</sup> has held that the granting of benefits by management prior to an election constitutes interference with the employees' freedom of choice.<sup>8</sup> The granting of benefits by management, of and by itself, however, is not sufficient to constitute interference. For example, if the benefits are part of an ongoing management policy which was in existence before the representative election was scheduled, no interference will be found.<sup>9</sup> On

4. *Id.* at —, 94 S. Ct. at 500-01, 38 L. Ed. 2d at 504.

5. Section 7 grants employees the right to organize labor unions stating that "Employees shall have the right to self organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all such activities . . ." 29 U.S.C. § 157 (1970).

Section 8 proscribes management and union activities:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 157 . . . .

29 U.S.C. § 158 (1970).

6. The Court of Appeals for the Fifth Circuit set out the general guidelines in *NLRB v. Trinity Steel Co.*, 214 F.2d 120 (5th Cir. 1954) stating: "[A]n election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammled choice for or against a bargaining representative . . ." *Id.* at 123; *accord*, *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067 (5th Cir. 1973); *NLRB v. Commercial Letter, Inc.*, 455 F.2d 109, 111 (8th Cir. 1972); *NLRB v. UAW*, 320 F.2d 12, 15 (5th Cir. 1963); *NLRB v. Houston Chronicle Publishing Co.*, 300 F.2d 273, 278 (5th Cir. 1962).

7. The NLRB has both adjudicatory power and rule making power, 29 U.S.C. § 156 (1970). There has been considerable controversy, however, over whether the NLRB can promulgate rules by *stare decisis* through its adjudicatory power. *See, e.g.*, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 775-80 (1969).

8. *E.g.*, *MPC Restaurant Corp. v. NLRB*, 481 F.2d 75, 77 (2d Cir. 1973); *Bally Case & Cooler, Inc. v. NLRB*, 416 F.2d 902, 905-06 (6th Cir. 1969), *cert. denied*, 399 U.S. 910 (1970); *NLRB v. Dorn's Transp. Co.*, 405 F.2d 706, 714 (2d Cir. 1969); *NLRB v. Zanes Ewalt Warehouse, Inc.*, 384 F.2d 794, 795 (5th Cir. 1967).

9. *NLRB v. Yokell*, 387 F.2d 751, 756 (2d Cir. 1967); *NLRB v. Douglas & Lomason Co.*, 333 F.2d 510, 512-13 (8th Cir. 1964); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 739 (D.C. Cir. 1950). Although the court in *Joy Silk Mills* held the promising by management of a shift rotation and a canteen in which to eat lunch, did constitute interference, the opinion went on to say that "[t]he Act does not preclude an employer from introducing benefits during an organizational period." *Id.* at 739.

the other hand, if the purpose in granting the benefits stems from a desire on the part of management to influence the election, a contrary conclusion will be reached.<sup>10</sup> There is a strong presumption by the NLRB, whenever there is a granting of benefits by management, that the purpose or motive is to influence the election. Because this presumption is generally a difficult one for management to overcome, the granting of *any* benefits to employees by management prior to an election subjects the election to possible invalidation by the NLRB.<sup>11</sup>

The rationale underlying this restrictive policy with respect to management is based on the premise that the employer has considerable power to affect the everyday lives of the employee.<sup>12</sup> Justice Harlan, in *NLRB v. Exchange Parts Co.*,<sup>13</sup> recognized the influence which management may exert.

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.<sup>14</sup>

Benefits granted to employees by unions, on the other hand, have not been so strictly regulated.<sup>15</sup> This policy has been followed by the NLRB under the theory that the union has no real power to grant immediate benefits other than outright bribes or gifts.<sup>16</sup> The union's granting of benefits

10. In *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964) management announced birthday holidays, the grant of overtime and increased vacation benefits prior to an election. In holding that this action constituted interference, the Court said the Act "prohibits . . . conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice . . ." *Id.* at 409; *accord*, *NLRB v. Taylor Mart, Inc.*, 407 F.2d 644, 646 (7th Cir. 1969); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1362 (4th Cir. 1969); *NLRB v. Miller Redwood Co.*, 407 F.2d 1366, 1368 (9th Cir. 1969).

11. *MPC Restaurant Corp. v. NLRB*, 481 F.2d 75, 77 (2d Cir. 1973); *Bally Case & Cooler, Inc. v. NLRB*, 416 F.2d 902, 906 (6th Cir. 1969), *cert. denied*, 399 U.S. 910 (1970); *NLRB v. Dorn's Transp. Co.*, 405 F.2d 706, 714 (2d Cir. 1969); *NLRB v. Zanes Ewalt Warehouse, Inc.*, 384 F.2d 794, 795 (5th Cir. 1967).

12. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *NLRB v. Rexall Chemical Co.*, 418 F.2d 603, 605 (5th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); *NLRB v. Flomatic Corp.*, 347 F.2d 74, 77 (2d Cir. 1965).

13. 375 U.S. 405 (1964).

14. *Id.* at 409. For a contrary view see Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228 (1968) where it is argued that the union and management have equal power to persuade:

This argument that the employees would have voted for the union but for the employer's economic power is based on the questionable premise that '[p]ower can persuade and substantial power can persuade substantially.'

*Id.* at 236.

15. *Amalgamated Clothing Workers v. NLRB*, 345 F.2d 264, 267 (2d Cir. 1965) (union allowed to waive initiation fee prior to an election); *Primco Casting Corp.*, 174 NLRB 244, 245 (1969) (union allowed to refund strike assessment to members just prior to an election).

16. The NLRB noted that there was a difference between an outright gift and a

will not enhance the employee's economic position since it amounts to no more than promises which cannot be realized by the employee unless the union wins the election.<sup>17</sup>

The position of the NLRB on whether the waiver of initiation fees by unions constitutes interference with the employee's freedom of choice has vacillated over the years. In a 1950 decision, *Root Dry Goods Co.*,<sup>18</sup> the NLRB held that the waiver of initiation fees did not interfere with the representative election.<sup>19</sup> In that case the Union had publicly waived its \$10 initiation fee for all persons who joined prior to the election. In arriving at this decision, the NLRB determined that "the Union was merely offering special organizing rates for membership during a preelection campaign . . . ."<sup>20</sup> In a similar case, *De Vilbiss Co.*,<sup>21</sup> the NLRB categorized the waiver of initiation fees as "lawful union propaganda."<sup>22</sup> In neither case, however, was the waiver made specifically contingent upon how the employees voted, or on the outcome of the election.<sup>23</sup>

In 1954 the NLRB introduced a distinction in *Lobue Bros.*<sup>24</sup> wherein if the waiver of the initiation fee was made contingent on how the employee voted in the election or on the outcome of the election, then such a waiver constituted interference with the election.<sup>25</sup> In *Lobue Bros.*, employees who signed Union membership cards before the representative election were given a free membership in the Union. The cards which the employees signed stated that the holder was "entitled to a membership book free of initiation fee after election and certification" of the Union. In its decision, the NLRB said that the wording on the cards made it clear that the waiver of initiation fees was contingent on the outcome of the election and therefore interfered with the employees' freedom of choice.<sup>26</sup>

The distinction made in *Lobue* has not been applied in subsequent deci-

---

waiver of initiation fees in *Wagner Elec. Corp.*, 167 NLRB 532, 533 (1967) where Union offered life insurance policies to prospective members prior to the election.

17. This theory was relied upon by the court in *NLRB v. G.K. Turner Associates*, 475 F.2d 484 (9th Cir. 1972) in holding that a waiver of initiation fees did not constitute coercion. In the words of the court:

A union promise to waive initiation fees for unit employees does not constitute improper inducement . . . .

. . . . [A]n employee must recognize that as a practical matter the waived or reduced initiation fee can become of value to him only if the union wins the election.

*Id.* at 489; *accord*, *NLRB v. DIT-MCO, Inc.*, 428 F.2d 775, 779 (8th Cir. 1970).

18. 88 NLRB 289 (1950).

19. *Id.* at 291.

20. *Id.* at 291.

21. 102 NLRB 942 (1953).

22. *Id.* at 943.

23. *Id.* at 943; *Root Dry Goods Co.*, 88 NLRB 289, 290 (1950).

24. 109 NLRB 1182 (1954).

25. *Id.* at 1183.

26. *Id.* at 1183.

sions by the NLRB<sup>27</sup> but the federal courts have applied it in cases where the waiver of initiation fees was clearly made contingent on the outcome of the election.<sup>28</sup> In 1967 the NLRB in *DIT-MCO, Inc.*<sup>29</sup> swept away the distinction and held that

[W]aivers . . . of . . . initiation fees, whether contingent upon the results of an election or not, have no improper effect on the freedom of choice of the electorate, and do not constitute a basis for setting aside an election.<sup>30</sup>

The NLRB, thus, made it clear that the waiver of initiation fees was not considered to be analogous to the granting of benefits but merely legal campaign propaganda. In the *DIT-MCO* decision, the NLRB alluded to the proposition that the union realistically has very little power to influence employees through promises of future economic benefits because those promises are always dependent on whether or not the union wins the election.<sup>31</sup>

Justice Douglas' opinion for the majority in *NLRB v. Savair Manufacturing Co.*<sup>32</sup> adopts the NLRB's rationale in *Lobue* while criticizing the holding in *DIT-MCO*. The basic proposition of *Savair* is that unions and management have equal power to influence and thus, interfere with elections.<sup>33</sup> Justice Douglas, referring to the equal power of both labor and management to influence an election, stated:

The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a nonunion shop or for a nonunion shop and against a union.<sup>34</sup>

27. The NLRB in its decision in *DIT-MCO, Inc.*, 163 NLRB 1019, 1021 (1967) stated: "[T]here is no published decision subsequent to *Lobue* in which the Board found that the facts of the case warranted application of the *Lobue* rule."

28. In *NLRB v. Gilmore Indus., Inc.*, 341 F.2d 240 (6th Cir. 1965), although there were other factors present which constituted interference, the court cited *Lobue* and held that because the waiver of initiation fees was contingent on the outcome of the election it interfered with the election. *Id.* at 242. See *NLRB v. Crest Leather Mfg. Corp.*, 414 F.2d 421, 423 (5th Cir. 1969); *NLRB v. Gafner Automotive & Mach., Inc.*, 400 F.2d 10, 12 (6th Cir. 1968) (dictum).

29. 163 NLRB 1019 (1967).

30. *Id.* at 1022. This new stance by the NLRB was also adopted by the Court of Appeals for the Eighth Circuit. *NLRB v. DIT-MCO, Inc.*, 428 F.2d 775 (8th Cir. 1970).

31. Emphasizing that the promise was dependent on a union victory the NLRB stated: "[T]he gist of the Union's position was merely a prediction upon what would happen if the Union were voted in, and if it succeeded in obtaining a union-security provision in its contract." *DIT-MCO, Inc.*, 163 NLRB 1019, 1021 (1967) (emphasis added).

32. — U.S. —, 94 S. Ct. 495, 38 L. Ed. 2d 495 (1973).

33. Justice Douglas contends that the "velvet glove doctrine" is applicable to union activities as well as management activities and states that "The failure to sign a recognition slip may well seem ominous to non-unionists who fear that if they do not sign they will face a wrathful union regime, should the union win." *NLRB v. Savair Mfg. Co.*, — U.S. —, —, 94 S. Ct. 495, 501, 38 L. Ed. 2d 495, 504 (1973).

34. *Id.* at —, 94 S. Ct. at 500, 38 L. Ed. 2d at 504.

The opinion is based primarily on an interpretation of Section 8 of the National Labor Relations Act which sets out what constitutes an unfair labor practice on the part of the management and the unions. Section 8(a)(1) makes it an unfair labor practice for the employer "to interfere with, restrain or coerce employees." Section 8(b), however, which sets out unfair labor practices for the unions, has no express provision which includes interference by a union as an unlawful activity. The majority concedes that the omission of the word "interfere" in section 8(b) appears at first glance to be a major obstacle to overcome in resolving the issue presented in *Savair*. It is pointed out, however, that section 8(c), which applies to both unions and management, cures any deficiencies inherent in 8(b) by providing that the expression of opinions during an election campaign does not constitute an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit."<sup>35</sup> The majority thereupon concluded that the granting of benefits by a union, in the context of section 8(c), does constitute *interference* with the employees' freedom of choice.<sup>36</sup>

Once it was established that unions can interfere with the employee's freedom of choice, Justice Douglas then explained why the waiver of initiation fees interferes with the election. In citing the NLRB's decision in *DIT-MCO*, which discounts the reasoning of *Lobue*, Justice Douglas contended that the NLRB ignored "the realities of the situation."<sup>37</sup> The *Lobue* decision was based on the premise that some employees would sign union authorization cards to avoid the possibility of paying initiation fees even though they did not want the union to represent them.<sup>38</sup> The NLRB in *DIT-MCO* refuted this premise, saying that if an employee was actually concerned about not paying an initiation fee and not having the union represent him, then the best way to do so is to vote "no" in the election.<sup>39</sup> In both decisions, however, it is implicit that the waiver of the initiation fees is an input into the employee's decision making process. The majority also points out that, if the employee signs a card without intending to vote for the union, his outward manifestation of support may serve as a useful campaign tool for the union.<sup>40</sup> This would arise if manifestation of support gives the false impression to other employees that the union has more support than it ac-

---

35. 29 U.S.C. § 158(c) (1970) (emphasis added).

36. *NLRB v. Savair Mfg. Co.*, — U.S. —, —, 94 S. Ct. 495, 500-01, 38 L. Ed. 2d 495, 504 (1973).

37. *Id.* at —, 94 S. Ct. at 499, 38 L. Ed. 2d at 502.

38. *Lobue Bros.*, 109 NLRB 1182 (1954).

39. *DIT-MCO, Inc.*, 163 NLRB 1019, 1022. Expanding on this idea the NLRB said, "an employee who did not want the union to represent him would hardly be likely to vote for the union just because there would be no initial cost in obtaining membership." *Id.* at 1022.

40. *NLRB v. Savair Mfg. Co.*, — U.S. —, —, 94 S. Ct. 495, 499, 38 L. Ed. 2d 495, 502 (1973).

tually has and induces these other employees to join the union also. Thus the union is being allowed to buy endorsements.<sup>41</sup>

Justice Douglas equates this waiver of fees by the union with granting of benefits by management.<sup>42</sup> It is his opinion that although the ostensible purpose was to induce the employees merely to sign authorization cards, and that to realize the benefit the Union has to be elected as the bargaining representative, nevertheless, the benefit was the same as a cash benefit and the employees' economic positions were thereby enhanced.<sup>43</sup>

The NLRB and the courts have consistently held that the granting of economic benefits by management does not constitute interference per se.<sup>44</sup> But if the granting of benefits has an undue influence on the employee's freedom of choice, then such action has been held to result in interference with the election.<sup>45</sup> In *NLRB v. Gorbea, Perez & Morell*<sup>46</sup> the Court of Appeals for the First Circuit established a test to determine whether the granting of benefits constitutes interference:

The question whether there is interference with the employee's freedom of choice is often subtle and difficult. However, we start with one simplifying principle, avoiding the necessity of making the often impossible determination of its actual impact in the particular instance, that an inducement normally is material if objectively it is likely to have an appreciable effect.<sup>47</sup>

The implications of the majority's opinion in *Savair* are consistent with this test in determining whether union action constitutes interference.<sup>48</sup> The majority opinion concludes that the waiver of initiation fees does in fact result in the granting of an economic benefit which is likely to have an appreciable effect on the employee's freedom of choice and thus is an unfair labor practice.<sup>49</sup>

41. The majority emphasizes this when they say, "We do not believe . . . the . . . policy of fair elections . . . permits endorsements . . . to be bought and sold in this fashion." *Id.* at —, 94 S. Ct. at 499, 38 L. Ed. 2d at 502.

42. *Id.* at —, 94 S. Ct. at 499, 38 L. Ed. 2d at 502.

43. *Id.* at —, 94 S. Ct. at 500, 38 L. Ed. 2d at 502.

44. *NLRB v. Yokell*, 387 F.2d 751, 756 (2d Cir. 1967); *NLRB v. Douglas & Lomason Co.*, 333 F.2d 510, 512-13 (8th Cir. 1964); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 739 (D.C. Cir. 1950).

45. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067 (5th Cir. 1973); *Amalgamated Clothing Workers v. NLRB*, 345 F.2d 264, 267 (2d Cir. 1965); *NLRB v. UAW*, 320 F.2d 12, 15 (5th Cir. 1963).

46. 328 F.2d 679 (1st Cir. 1964).

47. *Id.* at 680.

48. *NLRB v. Savair Mfg. Co.*, — U.S. —, —, 94 S. Ct. 495, 500-01, 38 L. Ed. 2d 495, 504 (1973).

49. The opinion discusses the closeness of the election and alludes to the fact that, if only one voter was influenced by the waiver, the effect on the election outcome would be appreciable. *NLRB v. Savair Mfg. Co.*, — U.S. —, —, 94 S. Ct. 495, 499, 38 L. Ed. 2d 495, 502 (1973).



Mr. Justice White in his dissent acknowledges that the waiver is a form of economic inducement, but contends that such inducement is valid. He views the waiver as falling in the category of benefits merely promised by the union and sees the waiver as analagous to the promise of better working conditions and increased wages, which are "the primary rationale of the existence of the union."<sup>50</sup> To not allow the waiver, it is argued, will place "restrictions on the communications of the Union as to potential benefits and may unduly prevent the intelligent exercise" of the employee's choice.<sup>51</sup> Justice White agrees with the *DIT-MCO* reasoning in that the employee who does not want a union can hedge by signing the authorization card and then vote "no" in the election. He maintains that the waiver, at best, only induces an employee to sign an authorization card and that it has virtually no effect on the way the employee votes in the election.<sup>52</sup>

It appears to be conceded by both the majority and dissenting opinion that the waiver of initiation fees does indeed have an effect on the manner in which an employee views an election.<sup>53</sup> The opinions differ in assessing just how appreciable that effect is. In *Lobue* and *Savair* the effect was held to be significant enough to have interfered with the employee's freedom of choice. Indeed it was considered to be analagous to buying votes. In *DIT-MCO* and in the dissent in *Savair* the waiver was not considered to have interfered with the employee's freedom of choice. Nevertheless, it is conceded that the employee was required to ascertain the distinction between signing an authorization card and voting in an election.<sup>54</sup> This distinction, as Justice Friendly points out in a concurring opinion in *Amalgamated Clothing Workers v. NLRB*,<sup>55</sup> is one that a lawyer might respect, but that an employee in the heat of an election probably would not.<sup>56</sup>

In *Savair* the result of the election was a vote for the Union of 22 to 20.<sup>57</sup> The difference of one vote would have changed the outcome of the election. It is true that 28 employees signed authorization cards and only 22 voted for the union, which means six employees did hedge and make the distinction which Justice Friendly thought would not be clear to the aver-

50. *Id.* at —, 94 S. Ct. at 502, 38 L. Ed. 2d at 506 (dissenting opinion).

51. Justice White notes this theory in a footnote to the dissent where he contends, because the National Labor Relations Act encourages collective bargaining, that by preventing the unions from promising benefits the Court's decision runs counter to the policy behind the Act. *Id.* at —, 94 S. Ct. at 503 n.4, 38 L. Ed. 2d at 507 n.4.

52. *Id.* at —, 94 S. Ct. at 502, 38 L. Ed. 2d at 506.

53. The dissent discusses the fact that several employees talked about hedging to avoid paying the membership fee if the Union should win. *Id.* at —, 94 S. Ct. at 503 n.5, 38 L. Ed. 2d at 507 n.5.

54. *Id.* at —, 94 S. Ct. at 502, 38 L. Ed. 2d at 506; *DIT-MCO, Inc.*, 163 NLRB 1019, 1021 (1967).

55. 345 F.2d 264 (2d Cir. 1965).

56. *Id.* at 268 (concurring opinion).

57. *NLRB v. Savair Mfg. Co.*, — U.S. —, —, 94 S. Ct. 495, 499, 38 L. Ed. 2d 495, 499 (1973).