

Motion Picture and Videotape Editors Guild, Local No. 776, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO; International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO and Cosgrove/Meurer Productions, Inc. Case 31-CB-8450

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDAUBAUGH

On July 21, 1992, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondents filed exceptions and a supporting brief and the Charging Party filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Motion Picture and Videotape Editors Guild, Local No. 776, International Al-

¹We correct the following inadvertent errors in the judge's decision which do not affect the judge's findings or rulings. In the fifth paragraph of sec. B, "January 7, 1990" should read "January 7, 1991" and in the second paragraph of sec. C, "Section 8(a)(1)(A)" should read "Section 8(b)(1)(A)."

²While we agree with the judge's conclusion that the part of the Respondents' rule imposing fines on members who did not sign authorization cards violated Sec. 8(b)(1)(A), we do not find it necessary to decide whether the Respondents' rule interferes with the Board's administration of Sec. 9(c)(1)(A) of the Act. Thus, we do not rely on sec. II of the judge's discussion and conclusions.

The Respondents contend that there is a fatal inconsistency between: (1) the reasoning by which the judge concluded that the fines imposed on members violated the Sec. 7 rights of nonmembers eligible to vote in the representation election and therefore violated Sec. 8(b)(1)(A); and (2) the judge's dismissal of the allegation that the Respondents' threats to expel members did not violate Sec. 8(b)(1)(A). We note that no exceptions were filed to the judge's finding that the Respondents' rule threatening expulsion is *not* a violation of the Act and we therefore need *not* consider this argument.

Chairman Stephens agrees with the panel and with the judge as to the result in this case, but he does not find persuasive the judge's attempt to distinguish *Meat Cutters Local 593 (S & M Grocers)*, 237 NLRB 1159 (1978). Chairman Stephens would overrule *S & M Grocers*.

Member Raudabaugh notes that the employees here, unlike those in *S & M* were coerced into designating the Union as their representative. Accordingly, he finds the violation here and does not pass on the continuing viability of *S & M*.

liance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Hollywood, California, and International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Sherman Oaks, California, its officers, agents, and representatives, shall take the action set forth in the Order.

Ann Reid Cronin, Esq., for the General Counsel.
Hope J. Singer, Esq. and *Jonathan K. Walters, Esq.* (*Taylor, Roth, Busch & Geffner*), for the Respondents.
Steven G. Drapkin, Esq. and *Scott J. Witlin, Esq.* (*Proskauer, Rose, Goetz & Mendelsohn*), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. Upon a charge filed on January 11, 1991, by Cosgrove-Meurer Productions, Inc. (Employer), against Motion Picture and Videotape Editors Guild, Local No. 776 and the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO¹ (referred to hereinafter respectively as Respondent Local and Respondent International, and collectively as Respondents), the General Counsel of the National Labor Relations Board (Board), by the Board's Regional Director for Region 31, issued a complaint and notice of hearing on February 28, 1991, and an amendment to the complaint on January 14, 1992, alleging, in substance, that since about August 1990, Respondents have been engaged in an organizing campaign to represent employees of the Employer and that during the campaign in the months of August, October, and December 1990, and January 1991, Respondents violated Section 8(b)(1)(A) of the National Labor Relations Act (Act), by threatening to discipline employees of the Employer, who are members of Respondents, if they refused to obey the demand of the Respondents to sign cards authorizing the Respondent International to be their exclusive representative for purposes of collective bargaining with the Employer.

On February 10, 1992, all of the parties to this proceeding entered into a stipulation of facts. They agreed to submit this proceeding, without a hearing, directly to an administrative law judge for recommended findings of fact, conclusions of law, and Order. The parties also agreed that the charge, complaint and notice of hearing, amendment to the complaint, the stipulation of facts, and the exhibits attached thereto, constitute the entire record in this case.

On February 21, 1992, Deputy Chief Administrative Law Judge Earledean V. S. Robbins issued an order assigning the matter to me to set a time for the filing of briefs and to issue a decision.

On April 10, 1992, pursuant to my order of February 25, 1992, all of the parties to this proceeding filed briefs.

Having considered the parties' briefs and on the basis of the stipulation of facts and the exhibits attached thereto, and the entire record in this case, I make the following

¹As corrected by the stipulation of facts.

FINDINGS OF FACT

I. JURISDICTION

The Employer, which is in the business of producing television and motion pictures, is a California corporation with its principal place of business located in Burbank, California, and a postproduction facility located in Los Angeles, California.

In the course and conduct of its business, the Employer annually sells and ships goods and services valued in excess of \$50,000 directly to customers located outside of the State of California and annually derives gross revenues in excess of \$500,000.

The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. RESPONDENTS' STATUS AS LABOR ORGANIZATIONS

Respondents are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Question Presented*

The question presented is whether Respondents violated Section 8(b)(1)(A) of the Act by threatening to discipline its members, including those who are employed by the Employer, if, during Respondents' campaign to organize their employers, the employee-members refused to sign authorization cards designating the Respondent International as their exclusive representative for purposes of collective bargaining.

B. *The Facts*

The essential facts in this case are undisputed, having been stipulated by the parties. The following is a summary of the facts, designed to place in focus the question presented.

Respondent International represents employees employed by employers in the motion picture and television industries. Respondent Local, one of the Respondent International's constituent locals, has jurisdiction over the postproduction employees represented by the Respondent International and acted as Respondent International's agent for all purposes material to this case.

The Employer, a producer of television and motion pictures, during the time material, employed 35 postproduction employees, of whom 17 were members of the Respondents. These 17 employees (employee-members), joined Respondents in connection with their employment with other employers or in connection with obtaining placement on a seniority roster used by employer signatories to a multiemployer collective-bargaining agreement with the Respondent International. All of the employee-members joined Respondents well before the start of Respondents' campaign to organize the Employer's postproduction employees.

Commencing in the last week of November 1990, Respondents began an organizational campaign among the postproduction employees of the Employer. One of Respondents' objects in engaging in this organizing campaign was to obtain recognition for Respondent International as the employees' exclusive collective-bargaining representative, by means of either voluntary Employer recognition or by Em-

ployer recognition resulting from a Board certification, after winning a Board-conducted representation election.

On January 7, 1990, Respondent Local, on behalf of Respondent International, wrote the Employer stating that a majority of the Employer's postproduction employees had designated Respondent International as their collective-bargaining representative, that Respondent International was ready to prove its majority status by submitting signed authorization cards to an impartial person, and demanded that the Employer recognize the Respondent International and negotiate with it concerning the employees' wages, hours, and other terms and conditions of employment.

On January 10, 1991, Respondent International filed a petition with the Board's Regional Office, in Case 31-RC-6769, seeking a Board-conducted representation election in a unit of the Employer's postproduction employees. The Respondent International alleged in the petition, among other things, that "[a] substantial number of employees wish to be represented for purposes of collective bargaining by [Respondent International]" and further alleged that the petition "is supported by 30% or more of the employees in the unit."

The basis for Respondent International's claim of majority status expressed in its recognition and bargaining demand made to the Employer on January 7, 1990, as well as the basis for the 30-percent showing of interest it was required to submit to the Board in support of its representation petition filed in Case 31-RC-6769, consisted of authorization cards which were solicited by Respondents during the organizational campaign which commenced late in November 1990. The authorization cards did not request an election, but designated Respondent International as the employees' representative for the purpose of collective bargaining. The cards read as follows:

I, [name of signer] hereby authorize [Respondent International] to represent me for the purpose of collective bargaining with my employer [name of employer] and to negotiate and conclude all agreements respecting wages, hours, and other terms and conditions of employment. I understand this card can be used by the Union to obtain recognition from my employer without an election.

Prior to the start of the Respondents' campaign to organize the Employers' employees and during the campaign, Respondents threatened their members, who were employed by nonunion employers, including the Employer, with possible discipline, if, during Respondents' campaign to organize the employees of nonunion employers, Respondents' employee-members refused to sign the above-described union authorization cards designating Respondent International as the employees' representative for the purpose of collective bargaining. In this respect, Respondents engaged in the following conduct: on August 1, 1990, Respondent Local's executive board sent a memo to Respondents' members which notified them that if they were employed by a nonunion employer, that during an organizational campaign they would be solicited to sign authorization cards, which would be used by Respondent International as the basis for demanding recognition from their employer, and that the employee-members were "obliged to sign" the authorization cards and if they did not

sign the cards the Respondent Local's executive board would "levy fines or bring charges" against them; in October 1990, by means of the October 1990 edition of its newsletter, the Respondent Local notified Respondents' members that if they were employed by a nonunion employer and refused to assist the Respondents in organizing the nonunion employer "by refusing to sign a representation card," that they "will be immediately brought up on charges and, if found guilty, subjected to discipline"; on December 6, 1990, Respondent Local's assistant executive director, Tarnawsky, met with a group of the Employer's postproduction employees, including 14 who were members of Respondents, and solicited them to sign the above-described authorization cards and warned the employee-members that if they refused to sign the authorization cards they could be brought up on charges before a union trial board, and if found guilty by the trial board, could be fined, expelled or otherwise disciplined; and, in January 1991, by means of the January 1991 edition of its newsletter, Respondent Local notified Respondents' members that if they were employed by nonunion employers, "they are expected to cooperate with the union to help organize the show" and warned that "[f]ailure to cooperate can result in disciplinary action."²

In threatening its members employed by nonunion employers with the possibility of discipline if they refused to sign authorization cards in support of a campaign by the Respondents to organize their nonunion employers, the Respondent Local in its above-described memo and newsletters offered its members the following justifications:

The reality of the film business today is that much of the work is nonunion, but it is everybody's best interest to assist in organizing of non-union productions For years IATSE members have fought and sacrificed to get salary and benefit packages you are now entitled to. You and your fellow crew members should not have to work for less. Do not sabotage the efforts of those still fighting on your behalf. [Contained in the August 1, 1990 memo.]

. . . .
As you recall, the Editors Guild modified the roster rules several years ago with a particular goal in mind—to do what we could to impede the growth of non-union films and television productions. We hoped to attack this problem by reaching out to all qualified editors, drying up the non-union labor pool and then insisting through organizing and internal discipline, that if Producers want our editors to work on their projects, they must provide health and pension benefits, as well as wage scales and other working conditions of our contract.

²When the above-described January 1991 threat of possible discipline is viewed in the context of the earlier threats of possible discipline, supra, it was reasonably calculated to lead the employee-members to whom it was addressed to interpret it as a threat of possible discipline if they refused to sign an authorization card. This conclusion is also supported by the fact that the January 1991 threat of possible discipline, specifically referred to the Respondent Local's October 1990 warning, supra, that if employee-members refused to sign a representation card that they would be immediately brought up on charges and, if found guilty, subjected to discipline.

Of course, to accomplish this, all members need to understand we are only as strong as our weakest link. . . . [Contained in the October 1990 newsletter.]

. . . .
We believe all members must, in these anti-union times, share in the commitment to unionize as many jobs as possible. We all need to protect each others health benefits, pensions, wages and working conditions. [Contained in the January 1991 newsletter.]

C. Discussion and Conclusions

Section 7 of the Act provides, in pertinent part, that all employees shall have the right to "assist labor organizations" and "to bargain collectively through representatives of their own choosing" and shall also have the right to "refrain from . . . such activities."

Section 8(a)(1)(A) of the Act makes it an unfair labor practice for a labor organization or its agent to

restrain or coerce employees in the exercise of the rights guaranteed in Section 7; Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

A refusal by an employee, who is a member of a union, to sign a union authorization card designating the union as the employee's exclusive bargaining representative, solicited during a union organizational campaign, is the kind of employee conduct which the plain language of Section 7 of the Act encompasses. In the instant case, as described supra, Respondents threatened to impose internal union discipline on their members employed by nonunion employers, including the Employer, if, during Respondents' campaign to organize the nonunion employers, the employee-members refused to sign authorization cards designating the Respondent International as the employee-members' representative for the purpose of collective bargaining.³ The complaint alleges that

³As I have found supra: in its August 1, 1990 memo, Respondent Local notified Respondents' employee-members employed by non-union employers, including the Employer, if, during an organizational campaign, they refused to sign authorization cards, Respondent Local's executive board would "levy fines or bring charges" against them; in the October 1990 edition of its newsletter, Respondent Local notified Respondents' employee-members employed by nonunion employers, including the Employer, if, during an organizational campaign, they refused to sign authorization cards, they "will be immediately brought up on charges and, if found guilty, subjected to discipline by the [Respondent Local] or possibly the [Respondent International]"; on December 6, 1990, Respondent Local's assistant executive director personally told 14 of the Respondents' employee-members employed by the Employer that if they refused to sign the authorization cards he was soliciting them to sign, they could be brought up on charges before a union trial board, and, if found guilty by the Trial Board, could be fined, expelled, or otherwise disciplined; and, in the January 1991 edition of its newsletter, Respondent Local notified Respondents' employee-members employed by nonunion employers, including the Employer, that they were expected to "cooperate" with Respondent Local's campaign to organize the employees of nonunion employers and implicitly warned them that if they refused to sign authorization cards, it would be viewed as a failure to "cooperate" and could result in their being brought up on charges and if found guilty, subject to discipline.

by engaging in this conduct Respondents violated Section 8(b)(1)(A) of the Act.

Respondents argue that because they did not unequivocally threaten their employee-members with internal union discipline, but merely threatened to subject them to the Respondents' internal disciplinary process, where they would have the right to defend themselves, that Respondents' conduct does not constitute "coercion" within the meaning of Section 8(b)(1)(A). This argument, however, is not entirely factually correct inasmuch as Respondent Local's August 1, 1990 memo to the employee-members, *supra*, unequivocally threatened to levy fines against those employee-members who refused to sign authorization cards. In any event, the law is settled that a threat by a labor organization to file internal union charges against an employee-member and the actual trial on those charges constitutes a form of "coercion" interdicted by Section 8(b)(1)(A) of the Act. *Laborers' Northern California Council (Baker Co.)*, 275 NLRB 278 (1985); *Plasterers Local 521 (Arthur McKee)*, 189 NLRB 553 (1971); *Auto Workers UAW Local 1989 (Caterpillar Tractor)*, 249 NLRB 922, 923 (1980).

The finding that Respondents' conduct herein constitutes the type of "coercion" interdicted by Section 8(b)(1)(A) does not end the matter, because the Respondents' principle contention is that the proviso to Section 8(b)(1)(A) permits a labor organization, by means of threats of internal union discipline, to coerce its employee-members to sign authorization cards designating the union as the employee-members' exclusive bargaining representative.

The Supreme Court in *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), interpreted the proviso to Section 8(b)(1)(A) and in so doing laid down the following principle, which applies to this case: "Sec. 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." Where, however, the union rule in question, "invades or frustrates an overriding policy of the labor laws, the rule may not be enforced, even by fine or expulsion, without violating" Section 8(b)(1)(A) of the Act. *Id.* at 429.

The question I must decide, therefore, is whether Respondents' rule which requires that employee-members employed by nonunion employers sign authorization cards designating the Respondent International as the employee-members' bargaining representative, "impairs [any] policy Congress has imbedded in the labor laws," to the extent that it "invades or frustrates an overriding policy of the labor laws," so that it is not privileged by the proviso to Section 8(b)(1)(A).⁴ I am of the opinion, for the reasons below, that Respondents' rule, except insofar as it threatens expulsion from member-

ship, is not protected by the proviso to Section 8(b)(1)(A), because it invades and frustrates and is outweighed by the overriding policy of the Act which guarantees employees the right to freely designate a union as their exclusive bargaining representative and because it interferes with the Board's administration of Section 9(c)(1)(A) of the Act.

I.

The employees' right to freely designate their exclusive bargaining representative by means of union authorization cards is such an important part of the national labor policy and the consequences which would flow from permitting unions to coerce employee-members to sign such cards by the threat of internal union discipline are so great, that it would be impermissible to conclude that the proviso to Section 8(b)(1)(A) permits a union, under the guise of achieving union solidarity, to coerce its employee-members to sign authorization cards designating the union as the employee-members' exclusive bargaining representative.

While ordinarily a labor organization has the right to impose internal union discipline on its members for failing to obey internal union rules aimed at maintaining union solidarity, employees, at the same time, have a long-established statutory right to be free from coercion when deciding whether to designate a union as their exclusive bargaining representative. The plain language of Section 7 of the Act—"all employees have the right to "assist labor organizations" or "to bargain collectively through representatives of their own choosing" or to "refrain from . . . such activities"—is the basis of this longstanding right, and where a Board-conducted representation election is the means used by the employees to designate a union as their exclusive bargaining representative, the employees' right to free choice is given further support by the principles inherent in Section 9(c)(1)(A) of the Act. See *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

Although the Board's representation election procedures are the most reliable method of resolving questions concerning majority status and the composition of the unit (*Linden Lumber v. NLRB*, 419 U.S. 301, 304, 309-310 (1974)), they are not, however, the exclusive method. Voluntary recognition of a union based on alternative means of determining majority support among employees in an agreed-upon unit is, as it always has been," a favored element of national labor policy." *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978). Thus, the law is settled that the benefit of utilizing Board election procedures does not outweigh the important role that voluntary recognition plays in expeditiously resolving representation issues. See *NLRB v. Lyon & Ryan Ford.*, 647 F.2d 745, 752 (7th Cir. 1981); *NLRB v. Broadmoor Lumber Co.*, *supra* at 241-242.

The most common method of effecting voluntary recognition involves the use of signed union authorization cards similar to those used by the Respondents in this case. When confronted with a request for recognition based on a check of authorization cards, an employer has the right to refuse that request and insist that the union seek a Board election. *Linden Lumber v. NLRB*, *supra* at 309. However, once an employer agrees to a card check and confirms the union's majority status through that procedure, his right to insist on an election is lost and he is left with the obligation to bargain with the union on the basis of its demonstrated majority

⁴Respondents' conduct met the other elements of the *Scofield* test. There is no evidence or contention that the union rule at issue was not properly adopted, and the rule reflects the legitimate union interest of promoting membership solidarity during an organizational campaign. *Meat Cutters Local 593 (S & M Grocers)*, 237 NLRB 1159, 1160-1161 (1978). In addition, it is settled that union members are free to leave the union even under a contractual union security provision (as long as they pay the equivalent of union dues) and escape the Respondents' discipline. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985); *Machinists Local 1414 (Neufield Porsche-Audi)*, 270 NLRB 1330, 1331 (1984).

status. *NLRB v. Brown & Connolly*, 593 F.2d 1373, 1374 (1st Cir. 1979); *NLRB v. Lyon & Ryan Ford*, supra at 750; *Jerr-Dan Corp.*, 237 NLRB 302, 303 (1978), enf. 601 F.2d 575 (3d Cir. 1979).

The voluntary recognition of a union by an employer based on authorization cards signed by a majority of the unit employees, effects not just the employment environment of the majority of the unit employees who signed the cards, but also effects the employment environment of the minority who refused to sign authorization cards. For, under Section 9(a) of the Act, the representative designated by a majority of the employees in an appropriate unit represents all of the employees in the unit, including the minority who did not choose to be represented by it and who would prefer to exercise their Section 7 right to refrain from being represented by it. Moreover, the principle of exclusive representation “extinguishes the individual employee’s power to order his own relations with his employer” and “only the union may contract the employee’s terms and conditions of employment and provisions for the processing of his grievances,”⁵ and, the employer is “forbidden to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours, and working conditions.” *Medo Photo Corp. v. NLRB*, 321 U.S. 678, 684 (1944).

The Court’s *Scofield* formulation suggests why the immunity available to a union when regulating “internal affairs” is inapplicable here. As shown above, the conduct which Respondents seek to immunize—the Respondents’ threats to impose internal union discipline on its employee-members employed by nonunion employers, if they fail to support Respondents’ organizational campaign by refusing to sign authorization cards designating the Respondent International as the employee-members’ exclusive bargaining representative—was reasonably calculated to have a significant impact not just on the employee-members employed by the non-union employers, but on the nonmembers employed by the nonunion employers, whose rights the Respondents cannot lawfully impair. This is illustrated by the application of the rule during the Respondents’ campaign to organize the Employer’s employees. Thus, if the Employer had voluntarily recognized the Respondent International based on the Respondent International’s majority status, as shown by a check of the signed authorization cards possessed by the Respondent International, it would have resulted in a substantial impact on the relationship of the nonmember employees to the Employer. For, by virtue of the coercion directed against the 17 members of the Respondents employed by the Employer, the nonmembers employed by the Employer, who may not have desired to be represented by the Respondent International, would have been required to accept the Respondent International as their exclusive bargaining representative, without a Board-conducted secret ballot election. In sum, in seeking to bring the rule in question within the scope of the proviso to Section 8(b)(1)(A), which provides unions with immunity concerning “internal union matters,” Respondents have failed to account for the significant external effect of

the rule on the nonmembers employed by the nonunion employers whom they are seeking to organize.

It is for the above reasons that Respondents’ rule at issue in this case contravenes, and is outweighed by, the Act’s overriding policy which guarantees employees the right to freely designate a union as their exclusive bargaining representative.

II.

The conduct which Respondents seek to immunize—their threat to impose internal union discipline on their members employed by nonunion employers, if these employee-members fail to support Respondents’ campaign to organize the nonunion employers’ employees by refusing to sign cards designating Respondent International as their exclusive bargaining representative—was not privileged by the proviso to Section 8(b)(1)(A) for the additional reason that it interferes with the Board’s administration of Section 9(c)(1)(A) of the Act because it was reasonably calculated to interfere with the Board’s investigation of the representation petition filed by Respondent International in Case 31–RC–6769 and with the Board’s investigation of the other representation petitions which Respondent International is likely to file with the Board, as part of Respondents’ effort to organize other non-union employers.

The Act provides for union recognition and bargaining when the circumstances of majority representation and appropriate bargaining unit are present. Although, as I have described above, the Act does not require the parties to use the formal representation processes of the Board to determine these questions, it does provide administrative machinery under Section 9 of the Act to resolve questions of representation. In this regard, Section 9(c)(1)(A) of the Act provides, in pertinent part:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . by an employee or group of employees or . . . labor organization acting on their behalf *alleging that a substantial number of employees* (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9(a). . . . The Board shall investigate such petition and if it has reasonable cause to believe that a question concerning representation . . . exists shall provide for an appropriate hearing upon due notice. . . . [Emphasis added.]

A union desiring to be certified by the Board as a collective-bargaining representative of an appropriate unit of employees, files a petition with the Board describing the unit alleged to be appropriate. As quoted above, Section 9(c)(1)(A) of the Act provides that the petition must be supported by a “substantial number of employees.” The Board, by rule, defines “substantial” to mean at least 30 percent. In this regard, Section 101.18 of the Board’s Statements of Procedure provides, in pertinent part, that on receipt of the petition, the Board’s Regional Office assigns it to one of its agents for investigation to ascertain, among other things:

whether, if the petitioner is a labor organization seeking recognition, there is sufficient probability, based on the

⁵ *NLRB v. Allis Chalmers Mfg.*, 388 U.S. 175, 180 (1967); *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 63 (1975).

evidence of representation of the petitioner, that the employees have selected it to represent them. The evidence of representation submitted by the petitioning labor organization . . . is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.

The evidence submitted by labor organizations in support of the above-described 30-percent showing of interest is usually in the form of signed and dated authorization cards, similar to those used by the Respondents in this case.

The law is settled that although the 9(c)(1)(A) substantial interest requirement is not a jurisdictional prerequisite to Board action, it constitutes a significant aspect of the Board's administration of Section 9(c)(1)(A) of the Act. As the court explained in *NLRB v. Metro-Truck Body*, 104 LRRM 2498, 2500 (9th Cir. 1980):

Were the NLRB unable to require a substantial interest on the part of the target company's employees before commencing an investigation, it would be forced to investigate every representation petition filed by a union, regardless of the actual chances of that petition's success. To avoid such waste, Congress created the substantial interest requirement, thereby preserving the NLRB policy of investigating only those petitions that the NLRB determined to be of substance.

In Case 31-RC-6769 the Respondent International filed a petition with the Board's Regional Office, seeking a Board-conducted representation election in a unit of the Employer's employees. Respondent International alleged in its petition, among other things, that a substantial number of the unit employees desired to be represented by Respondent International for purposes of collective bargaining and that the petition was supported by 30 percent or more of the unit employees. The basis for Respondent International's 30-percent showing of interest consisted of authorization cards which had been solicited by the Respondents, on behalf of the Respondent International, during an organizational campaign.

Prior to the start of that organizational campaign, the Respondent Local had instituted a policy which required a member of the Respondents employed by a nonunion employer to sign an authorization card designating Respondent International as his or her exclusive bargaining representative, if solicited to sign such a card during a campaign to organize the nonunion employer's employees. Respondents' members, including the 17 employed by the Employer, were notified of this policy and were warned that if they did not obey it they would be brought up on charges and subjected to discipline. Subsequently, during the Respondent Local's campaign to organize the Employer's employees, 14 of the employee-members employed by the Employer were personally reminded by the Respondent Local's assistant executive director of the aforesaid policy and warned by him that if they refused to sign the authorization cards, which he was asking them to sign, that they could be brought up on charges before a union trial board, and if found guilty could be fined, expelled, or otherwise disciplined.

As I have found supra, this threat was "coercive" within the meaning of Section 8(b)(1)(A) of the Act, and, as such, was reasonably calculated to cause the 17 members of the Respondents who were employed by the Employer, to sign the authorization cards, even though they may not have desired to designate the Respondent International as their exclusive bargaining representative while employed by the Employer.⁶ Under the circumstances, the authorization cards which the Respondent International submitted to the Board's Regional Office with the representation petition it filed in Case 31-RC-6769, in support of its allegation that a substantial number of the unit employees desired to be represented by the Respondent International, were likely to have painted a false picture of the Respondent International's support. Thus, Respondent International's further allegation that the petition was supported by a 30-percent showing of interest may not have been an accurate reflection of the unit employees' true sentiments.

In any event, whether a sufficient number of the authorization cards submitted to the Board in Case 31-RC-6769 were untainted by Respondents' coercion herein, so that the Board's 30-percent showing of interest requirement was complied with, is beside the point. For, I am of the opinion that the maintenance of the Respondents' rule reasonably tended to interfere with the Board's investigation of the Respondent International's showing of interest in Case 31-RC-6769 and will reasonably tend to interfere with the Board's investigation of Respondent International's showing of interest in connection with other representation petitions that will be filed in the future by that union, thereby interfering with the Board's administration of Section 9(c)(1)(A) of the Act. In this regard, I note that employers violate Section 8(a)(1) of the Act not only for engaging in conduct reasonably calculated to impede employees' access to Board processes, but also for engaging in conduct reasonably calculated to deter employees from testifying truthfully at Board hearings or from truthfully answering questions of a Board field examiner,⁷ or by interfering with the confidentiality of Board investigations by demanding copies of employee statements given to Board investigators. *Henry I. Siegel Co.*, 143 NLRB 386 (1963), enfd. 328 F.2d 25 (2d Cir. 1964); *Texas Industries*, 139 NLRB 365, 367-368 (1962), enfd. 336 F.2d 128, 132 (5th Cir. 1964); *Ambox, Inc.*, 146 NLRB 1520, 1530 (1964), enfd. in relevant part 357 F.2d 138 (5th Cir. 1966). It is my opinion that Respondents' conduct in maintaining the rule herein is analogous to the aforesaid employer unlawful conduct and by its very nature is reasonably calculated to interfere with the Board's investigation of the representa-

⁶It is quite understandable and reasonable for an employee to choose union representation at one employer and decide to reject it at another because of differing circumstances in the employment relationships the employee has with the respective employers. As a matter of fact, the record indicates that members of Respondents, who work for nonunion employers, have refused to sign authorization cards, when solicited by Respondents during campaigns to organize their nonunion employers. It also appears that it was because of this type of conduct that Respondents promulgated the disputed rule in this case.

⁷*Lloyd A. Fry Roofing Co.*, 123 NLRB 647, 648 (1959); *Jackson Tile Mfg. Co.*, 122 NLRB 764, 766 (1958), enfd. 272 F.2d 181 (5th Cir. 1959); *Saginaw Furniture Shops*, 146 NLRB 587, 592-593 (1964), enfd. 343 F.2d 515 (7th Cir. 1965).

tion petitions filed by Respondent International and was reasonably calculated to interfere with the Board's investigation of the Respondent International's petition filed in Case 31-RC-6769.

III.

Having found that Respondents' rule at issue in this case contravenes, and is outweighed by, the Act's overriding policy which guarantees employees their right to freely designate a union as their exclusive bargaining representative and also interferes with the Board's administration of Section 9(c)(1)(A) of the Act, I further find that for these reasons the rule is not protected by the proviso to Section 8(b)(1)(A), except insofar as the rule threatens expulsion from union membership. The rule's legality insofar as it threatens employee-members with expulsion from membership, is governed by the Board's decision in *Machine Stone Workers Local 89 (Bybee Stone)*, 265 NLRB 496 (1982).

In *Bybee Stone* a Board majority (Members Fanning and Jenkins dissenting) agreed with the administrative law judge's conclusion that the union violated Section 8(b)(1)(A) of the Act by levying a \$100 fine against four of its members for voting against it in a Board-conducted representation election. The full Board, however, agreed with the administrative law judge's further conclusion that the union did not violate Section 8(b)(1)(A) by expelling those four individuals from membership due to their votes. The Board unanimously agreed with the judge's reliance on precedent holding that the proviso to Section 8(b)(1)(A) protected the union's expulsion of the four members for having voted against union representation, because by refusing to vote in favor of union representation the four members "have taken actions directly derogatory to and inconsistent with maintenance or promotion of its representation status." 265 NLRB at 497-498.

In the instant case, if Respondents' members refuse to obey the Respondents' instruction to sign authorization cards designating the Respondent International as their exclusive bargaining representative, the Respondents' members will, like the four members involved in *Bybee Stone*, "have taken actions directly derogatory to and inconsistent with maintenance or promotion of [their union's] representational status." The fact that Respondents' rule in question interferes with the Board's administration of Section 9(c)(1)(A) of the Act does not call for a different result under the rationale of the Court's decision in *NLRB v. Marine & Shipbuilding Workers of America*, 391 U.S. 418, 424 (1968), and its progeny, for there are significant differences between proceedings under Section 9 and charges filed under Sections 10(b) and 8 of the Act. In Section 9 proceedings, the Board is concerned with ascertaining the desires of the employees to union representation. An employee who refuses to sign an authorization card is not seeking to redress a wrong committed by the union but is preventing the union from fulfilling the very purpose for which it exists, the representation of employees for collective bargaining. This is significantly different from the situation where a union seeks to block employees from obtaining redress for a statutory wrong by fining or expelling them for having filed Section 8 charges.

IV.

Having found that Respondents notified their members employed by nonunion employers, including the Employer, that if they refused to sign authorization cards designating Respondent International as their exclusive bargaining representative, they would be fined or immediately brought up on charges and, if found guilty, subjected to discipline, or could be brought up on charges before a union trial board and, if found guilty by the trial board, could be fined, expelled or otherwise disciplined; having found that this conduct was coercive within the meaning of Section 8(b)(1)(A) of the Act; having found that Respondents' members have the right under Section 7 of the Act to refrain from signing Respondent International's authorization cards; having found that Respondents' above-described conduct, except for its threat to expel its members, was not protected by the proviso to Section 8(b)(1)(A); I further find that Respondents violated Section 8(b)(1)(A) of the Act by notifying their members employed by nonunion employers, including the Employer, that if they refused to sign authorization cards designating the Respondent International as their exclusive bargaining representative, they would be fined or immediately brought up on charges and, if found guilty, subjected to discipline, or could be brought up on charges before a union trial board and, if found guilty by the trial board, could be fined or otherwise disciplined.

I considered Respondents' contention that by requiring their employee-members employed by nonunion employers to support an organizational campaign of the Respondents by signing authorization cards designating the Respondent International as the employee-members exclusive bargaining representative, that Respondents were only asking the employee-members to perform a ministerial act because, instead of currently signed authorization cards, the Respondent International could have used the membership cards or dues authorizations previously signed by the employee-members. This argument, however, is not relevant to the question presented, because Respondents' rule herein does not require their employee-members to authorize Respondent International's use of previously executed membership cards or dues-checkoff authorizations, but instead requires the employee-members to support Respondents' campaign to organize the employee-members' nonunion employers by signing authorization cards designating Respondent International as their exclusive bargaining representative. Whether the Respondents may legally use previously executed membership cards or checkoff authorizations or even membership lists for the same purpose as the authorization cards they are requiring their employee-members to sign, is beside the point and not relevant to this proceeding.

I also considered Respondents' contention that because the Board in *S & M Grocers*,⁸ held that it was not a violation of Section 8(b)(1)(A) of the Act for the union in that case to discipline its members for refusing to support an organizational campaign, it is likewise not a violation for a union to threaten to discipline its members if they fail to support an organizational campaign specifically by refusing to sign authorization cards designating the union as their exclusive bar-

⁸ *Meat Cutters Local 593 (S & M Grocers)*, supra.

gaining representative. This contention lacks merit for the reasons below.

In *S & M Grocers* the union mailed to its members, including those members employed by the employer, a union resolution which threatened discipline, including but not limited to expulsion, against current members should those members actively oppose or refrain from assisting the union in its organizational drive at the employer's stores.⁹ The Board majority (Members Penello and Murphy dissenting), viewed the basic problem as one of reconciling the union's right of solidarity during an organizing drive with the public policy of employees being free of coercion or restraint in choosing their collective-bargaining representative. They concluded that, on balance, the union's resolution promoted its legitimate interest of organizing unrepresented employees and did not so restrict employees in the exercise of the right to select a representative, so as to contravene public labor policy. Noting that union members are free to resign anytime that the union sets out on a course with which they do not agree or that if union members do not support the union's campaign and have not resigned, they will still be free to make their own determination how to vote on the issue of union representation, the Board majority found that the union's threat of discipline did not unlawfully coerce union members, but was a valid enforcement of a legitimate internal union rule.

S & M Grocers differs significantly from the instant case because the rule in *S & M Grocers* did not specifically require that the union members employed by the nonunion employer support the union's organizational campaign by foregoing their statutory right to freely designate or select the union as their exclusive bargaining representative. There, the rule in question threatened those members with discipline who "[do] not support, when so requested . . . the organizing activities of the Union." In the instant case, the rule in question specifically threatens the Respondents' members with discipline if they refuse to sign authorization cards designating Respondent International as the employee-members exclusive bargaining representative. That the Board majority in *S & M Grocers* recognized the significance of this difference between the two rules is evident from the part of the majority's decision which notes that, "although members are subject to discipline if they do not support the Union's campaign and have not in the alternative resigned, *they are still free to make their own determination as how to vote on the issue of union representation*" (emphasis added). 237 NLRB at 1161.

As I have found supra, because of the coercive effect of the Respondents' rule requiring their members employed by nonunion employers to support an organizational campaign by signing cards designating the Respondent International as their exclusive bargaining representative, these members will not be free (if their employer voluntarily recognizes the Respondent International based on a card check) to determine how to vote on the issue of union representation. Also of significance, as I have found supra, is that by coercing their members to sign these cards, the Respondents are engaging in conduct which (if the employer voluntarily recognizes the

⁹Many of the employer's employees also held part-time or full-time jobs in other stores which had union-security contracts with the union.

Respondent International based on a card check) will have a substantial impact on the employment environment of the nonmember employees of the employer, who may not desire union representation, but by virtue of the coercion directed against Respondents' members, may be required to accept the Respondent International as their exclusive bargaining representative without a Board-conducted secret ballot election. Moreover, as I have found supra, the application of Respondents' rule is likely to interfere with the Board's investigation of representation petitions filed with the Board by Respondent International pursuant to Section 9(c)(1)(A) of the Act, thereby interfering with the Board's administration of that section of the Act.

It is for the aforesaid reasons that I am of the opinion that while the union rule herein promotes the Respondents' legitimate interest of organizing unrepresented employees that, on balance, considering the importance of the statutory right of employees to freely designate their exclusive bargaining representative and the likely impact of the rule on employees who are not members of the Respondents and the likelihood that the rule will interfere with the Board's administration of Section 9 of the Act, I have concluded that the rule is not protected by the proviso to Section 8(b)(1)(A), except insofar as it threatens members with expulsion, and that the Board's decision in *S & M Grocers* does not govern the disposition of this case.

THE REMEDY

Having found Respondents violated Section 8(b)(1)(A) of the Act by threatening their members, including those employed by the Employer, that if they do not sign authorization cards designating the Respondent International as their bargaining representative, they would be fined or immediately brought up on internal union charges and, if found guilty, subject to discipline, or could be brought up on charges before a union trial board and if found guilty could be fined or otherwise disciplined, I shall recommend an order requiring Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In order to avoid any misunderstanding by the members as to the meaning of the Order I shall include a proviso which will place the members on notice of the right of the Respondents to expel them from membership if they refuse to sign authorization cards designating the Respondent International as their exclusive bargaining representative. See *Machine Stone Local 89 (Bybee Stone)*, supra at 499.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondents, Motion Picture and Videotape Editors Guild, Local No. 776, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Hollywood, California, and International Alliance of Theatrical Stage Em-

¹⁰If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ployees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Sherman Oaks, California, their officers, representatives, and agents, shall

1. Cease and desist from

(a) Threatening their members, including those employed by the Employer, with fines or with the filing of internal union charges which could result in fines or other unspecified discipline, if those members refuse to sign authorization cards designating the Respondent International as their bargaining representative; without prejudice, however, to the Respondents' right to threaten to expel such members from Respondents or to notify those members that Respondents intend to file internal union charges against them for the express purpose of expelling them from Respondents.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at their business offices, hiring facilities and meeting places copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained by Respondents for 60 consecutive days in conspicuous places including all places where notice to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Additional copies of the attached notice marked "Appendix" shall be signed by authorized representatives of the

Respondents, and forthwith returned to the Regional Director for Region 31 for posting by the Employer, it being willing, where notices to its employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our members, including those employed by Cosgrove-Meurer Productions, Inc., with fines or with the filing of internal union charges which could result in fines or other unspecified discipline, if they refuse to sign authorization cards designating International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, AFL-CIO, as their bargaining representative; without prejudice, however, to our legal right to threaten to expel such members or to notify them that we intend to file internal union charges against them for the express purpose of expelling them.

WE WILL NOT in any like or related manner restrain or coerce our members in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

MOTION PICTURE AND VIDEOTAPE EDITORS
GUILD, LOCAL NO. 776, INTERNATIONAL AL-
LIANCE OF THEATRICAL STAGE EMPLOYEES
AND MOVING PICTURE OPERATORS OF THE
UNITED STATES AND CANADA, AFL-CIO

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."