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8 Teamsters Locals 150, 315, 439 and 853

9  
10 **UNITED STATES OF AMERICA**  
11 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

12 LOOMIS ARMORED, INC.,

13 Respondent,

14 and

15 TEAMSTERS LOCALS 150, et al.,  
16 Charging Parties.

Case Nos. 32-CA-25316, et al.

**CHARGING PARTIES TEAMSTERS  
LOCALS 150, 315, 439 AND 853'S  
EXCEPTIONS TO THE PROPOSED  
DECISION OF THE ADMINISTRATIVE  
LAW JUDGE**

17 Pursuant to Section 102.46 of the Board's Rules and Regulations, Charging Parties Teamsters  
18 Locals 150, 315, 439 and 853 hereby except to the Administrative Law Judge's decision (ALJD)  
19 issued January 11, 2012, as follows:

- 20 1. To the Administrative Law Judge's recommendation that the complaints be dismissed  
21 based on current Board law. ALJD: p. 5, lines 37-39, and p. 6, lines 1-6.
- 22 2. To the Administrative Law Judge's conclusion that Respondent has not engaged in  
23 unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and  
24 (1) of the Act. ALJD, p. 5m, lines 48-49.

25 Dated: February 7, 2012

BEESON, TAYER & BODINE, APC

26 By: 

27 ANDREW H. BAKER

28 Attorneys for Teamsters Locals 150, 315, 439  
and 853

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is 483 Ninth Street, 2nd Floor, Oakland, CA 94607. On this day, I served the foregoing Document(s):

**CHARGING PARTIES TEAMSTERS LOCALS 150, 315, 439 AND 853'S EXCEPTIONS TO THE PROPOSED DECISION OF THE ADMINSTRATIVE LAW JUDGE**

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By Electronic Service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, February 8, 2012.

/s/ Lynda Hodge

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10 **UNITED STATES OF AMERICA**  
11 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

12 LOOMIS ARMORED, INC.,

Case Nos. 32-CA-25316, et al.

13 Respondent,

**CHARGING PARTIES TEAMSTERS  
14 LOCALS 150, 315, 439 AND 853'S BRIEF IN  
15 SUPPORT OF EXCEPTIONS TO THE  
16 PROPOSED DECISION OF THE  
17 ADMINISTRATIVE LAW JUDGE**

18 and

19 TEAMSTERS LOCALS 150, et al.,

20 Charging Parties.

21 Pursuant to Section 102.46 of the Board's Rules and Regulations, Charging Parties Teamsters  
22 Locals 150, 315, 439 and 853 submit this brief in support of their exceptions to the Administrative  
23 Law Judge's decision (ALJD) issued January 11, 2012.

24 **STATEMENT OF THE CASE**

25 This case is before the Board pursuant to a stipulated record. The facts, thus, are not in  
26 dispute and the salient facts may be aptly summarized as follows. After decades of recognizing  
27 various Local Unions of the International Brotherhood of Teamsters, a union that represents both  
28 guards and non-guard employees, as the exclusive bargaining representative of its armored car  
drivers, Loomis Armored, Inc. ("the Employer") peremptorily withdrew recognition from all of those  
Local Unions as each collective bargaining agreement expired, asserting its right to do so under the  
Board's decision in *Wells Fargo Armored Services*, 270 NLRB 787 (1984).

1           The issue here is purely legal and raises the question of whether the Board should continue to  
2 adhere to flawed precedent in permitting armored car carriers to withdraw recognition from  
3 voluntarily recognized mixed guard/non-guard unions in the absence of even a scintilla of evidence  
4 the incumbent union has lost majority support. The Administrative Law Judge, in his January 11,  
5 2012, proposed decision simply concludes:

6                           [T]he General Counsel and the Charging Parties urge that I (and  
7 ultimately the Board) reverse the Wells Fargo rule. That argument  
8 must be made to the Board. I am bound by current Board law.  
Accordingly, I recommend dismissal of the complaints.

9 (Administrative Law Judge Decision, p. 5.)

10           We respectfully submit that the time has come for the Board to overturn *Wells Fargo* and to  
11 limit the scope of Section 9(b)(3) to the terms as written and as intended; to wit, as *not* depriving the  
12 Board of authority to order a guard employer to *maintain* a bargaining relationship with a mixed  
13 guard/non-guard union that was voluntarily established in the first instance.

#### 14                           **ARGUMENT**

15           The current Board doctrine on point was articulated in 1984 in the Board's holding in *Wells*  
16 *Fargo Armored Services, supra*. In that case, the Board determined that an employer that has  
17 recognized a mixed guard/non-guard union as the representative of the employer's guards may  
18 lawfully withdraw recognition from the union at the expiration of a collective bargaining agreement.  
19 But the majority's decision in that *Wells Fargo* was based on a flawed reading of Section 9(b)(3),  
20 both the words of the statute and its legislative history, and based on policy considerations that  
21 underemphasized the importance of stabile labor relations under the Act.

22           The majority's decision in *Wells Fargo* has been questioned on more than one occasion, by  
23 both Board members and courts, commencing with Member Zimmerman's dissent in *Wells Fargo*.  
24 The authors of these prior opinions have already done the heavy lifting of laying out in great detail  
25 the flaws with the majority decision in *Wells Fargo* – flaws in reading the statute on its face, in  
26 reading the legislative history, and in applying the policies of the Act - and are thus worth quoting at  
27 length herein.  
28

1           **A. Board Dissent, Court Dissent and the Seventh Circuit Court of Appeals Have**  
2           **Already Thoroughly Laid Out the Basis for Reversing *Wells Fargo*.**

3           Member Zimmerman, in his dissent to the majority's decision in *Wells Fargo*, emphasized the  
4           distinction between the Board's role in establishing an initial bargaining relationship and the Board's  
5           role in enforcing bargaining obligations that arise after a bargaining relationship has already been  
6           established. Of course there is no question that even after the addition of Section 9(b)(3) to the Act,  
7           guard employers remain free to recognize voluntarily mixed guard/non-guard unions as the  
8           bargaining representative for their guard employees. *NLRB v. White Superior Div., White Motor*  
9           *Corp.*, 404 F.2d 1100 (6<sup>th</sup> Cir. 1968). Member Zimmerman pointed out that while Section 9(b)(3)  
10          explicitly bars the Board from ordering an employer to *establish* a bargaining relationship with a  
11          mixed guard/non-guard union as the representative of its guard employees, Section 9(b)(3) is  
12          completely silent on the Board's authority to issue orders directing an employer to fulfill its  
13          obligations to bargaining in good faith with such a union once a bargaining relationship has already  
14          been established.

15                         Sec. 9(b)(3) does not give an employer the right to withdraw  
16                         recognition. It prohibits a union from receiving Board certification  
17                         of it as the representative of a guards' unit when that union is a  
18                         mixed one.

19          *Id.* at 793, n.13.

20          Member Zimmerman, citing both legislative history and the Supreme Court's interpretation of  
21          language in former Sections 9(f), (g) and (h) similarly limiting the Board's certification authority,  
22          concluded that the majority was not justified in expanding the scope of 9(b)(3)'s limitation on the  
23          Board's authority.

24                         Section 9(b)(3) states that, with respect to guards, the Board shall not  
25                         do two things. One, it shall not "decide that any unit is appropriate"  
26                         when it includes both guards and nonguards. The unit involved here  
27                         does not. Consisting as it does of all nonsupervisory guards employed  
28                         by the Respondent, it obviously is an appropriate unit and I do not read  
29                         the majority's opinion as suggesting otherwise. Two, Section 9(b)(3)  
30                         states the Board shall not "certif[y] as the representative" of an all-  
31                         guards unit any union which further admits nonguards to membership  
32                         or is affiliated with another union which does.

33                         Today, in a novel but untenably expansive construction of Section  
34                         9(b)(3), the Board holds that this latter proscription privileges the  
35                         Respondent to withdraw from its voluntarily entered into bargaining relationship

1 “when it did,” “at the time that it chose to do so,” and “on 2 June.”<sup>[FN1]</sup>  
2 This view of Section 9(b)(3) is required, the majority asserts, because a  
3 literal adherence to the 9(b)(3) certification bar would give the  
4 “Charging Party indirectly—by a bargaining order—what it could not  
5 obtain directly—by certification” and that would be “inconsistent with  
6 congressional intent” behind Section 9(b)(3). The majority, in my  
7 judgment, has both mischaracterized the question and misread the  
8 legislative history.

9 Usage of the term “bargaining order” strikes me as particularly  
10 specious in a case of this character. True, if the Charging Party were to  
11 prevail, the Board would issue an Order which would have the effect of  
12 requiring the Respondent to bargain. But we would not thereby be  
13 *establishing* the bargaining obligation. The Respondent itself did that.  
14 Our Order more fairly would be characterized as one compelling  
15 Respondent to *maintain* the relationship it, not we, created.

16 The distinction between the Board’s creation and maintenance of a unit  
17 has long been recognized. In *Westinghouse Electric Corp. v. NLRB*,  
18 236 F.2d 939 (3d Cir. 1956), which involved the 9(b)(1) limitation with  
19 respect to mixed professional and nonprofessional employee bargaining  
20 units, the court characterized that limitation as having the “obvious  
21 effect” of being “merely a limitation on the Board’s power to *create*”  
22 such units.<sup>[FN2]</sup> In part relying on *Westinghouse*, the Board made the  
23 same distinction between its establishment of a unit and its upholding  
24 of the validity of such a unit in *Retail Clerks Local 324 (Vincent  
25 Drugs)*, 144 NLRB 1247 (1963)—today found to be “error” by my  
26 colleagues. And it was on the basis of *Westinghouse* and *Vincent Drugs*  
27 that the Board, in *International Telephone & Telegraph Corp.*, 159  
28 NLRB 1757 (1966), issued the very bargaining order the majority now  
says it is not empowered to issue.

Moreover, the distinction finds support in the enactment,  
contemporaneous with the enactment of Section 9(b)(3), of former  
Subsections 9(f), (g), and (h). For those sections demonstrate that,  
when Congress wished to disqualify a union not only from certification  
but, more broadly, from resort to the Board for the protection of  
existing bargaining relationships, Congress well knew how to achieve  
that end. All three subsections not only disqualified noncomplying  
unions from having their petitions processed, they further, and  
specifically, provided that their charges could not result in complaints.  
Indeed, in *NLRB v. Mine Workers District 50*, 355 U.S. 453 (1958), the  
Supreme Court held that a Board Order requiring an employer to  
withdraw recognition from the Mine Workers unless and until it was  
certified by the Board was an abuse of Board discretion *precisely*  
*because* the Mine Workers Union was noncomplying and therefore  
could not be certified. The Court reasoned that, in the context of an  
unfair labor practice proceeding,<sup>[FN3]</sup> the Mine Workers noncompliance  
with Section 9(f), (g), and (h) need not, and should not, have operated  
to frustrate the right of the employees involved to select the Mine  
Workers as their representative.

And the distinction finds support in the language of Section 9(b)(3)  
itself. Plainly, Congress could have written that mixed unions could not  
represent all-guards units. It did not. Given the shape Section 9(b)(3)  
ultimately took, Congress plainly could have written that the Board should not decide

1 to be appropriate either a mixed unit or a unit which, though not mixed,  
2 was represented or sought to be represented by a mixed union. It did  
3 not. Instead, as the structure of Section 9(b)(3) makes evident, it  
4 permitted a unit composed exclusively of guards to be found by the  
5 Board to be appropriate whether or not it was represented or sought to  
6 be represented by a mixed union. The net effect is that cases involving  
7 voluntary recognition represent the precise circumstance which gives  
8 meaning to Congress' determination that the Board, though not able to  
9 certify a mixed union, could decide that the unit such a union represents  
10 is appropriate.

11 The legislative history of the section is consonant with such a  
12 construction. Certainly, and more importantly, nothing in it supports  
13 the view that when Congress wrote the Board should not certify mixed  
14 unions it meant to deprive them of not only certification, but also long-  
15 established rights flowing from voluntary recognition. Indeed, to the  
16 extent it can be read as overcoming the language of Section 9(b)(3), the  
17 legislative history more narrowly suggests that Congress only intended  
18 to prohibit the Board from *certifying some* mixed unions, namely, those  
19 which directly or indirectly admitted *coworkers* of the guards to  
20 membership. Previous Boards have recognized as much, but have  
21 construed the words of Section 9(b)(3) to mean precisely what they  
22 say.<sup>[FN4]</sup> Here, the Board refuses to do either, and so the legislative  
23 history commands renewed attention.

24 Prior to Taft-Hartley, three recurring issues were posed by the  
25 representation of guards, all three of which were present, at one stage  
26 or another, in *Jones & Laughlin*.<sup>[FN5]</sup> The first was whether the guards  
27 were employees within the Act's meaning or excluded from coverage  
28 because of the purported supervisory, confidential, or managerial  
nature of their duties. The second was whether, if found to be  
employees, representation of the guards by the same union already  
representing their coworkers was so incompatible with their duties in  
relation to those coworkers that petitions for their representation by an  
incumbent union should be dismissed. With respect to both issues, the  
Board's consistent policy was to find the guards to be employees<sup>[FN6]</sup>  
and to permit their representation by incumbent unions.<sup>[FN7]</sup>  
Significantly, there is no case prior to Taft-Hartley in which  
representation of guards was attacked on the ground that the union  
seeking their representation *elsewhere* represented nonguards.

29 The third issue was the impact on both these policies of the widespread  
30 militarization of guards employed by employers producing war  
31 materiel during World War II. The Board's response to militarization,  
32 however, was the same, finding that it did not alter the employee status  
33 of the guards or their right to choose, in the words of Section 7,  
34 "representatives of their own choosing."<sup>[FN8]</sup>

35 In *Jones & Laughlin*, on application of the Board for enforcement of an  
36 Order premised on these principles, the Sixth Circuit denied  
37 enforcement finding that militarization did not alter the employee status  
38 of the guards but that it did alter the appropriateness of the unit. The  
finding was *not* based merely on a perceived conflict of loyalties in the  
representation of guards by a "mixed" union. The dispositive  
consideration was not even a perceived conflict of loyalties in the  
representation of the guards by the same union which represented Jones & Laughlin's 5

1 production employees. It was, instead, the guards' militarization (146  
2 F.2d at 721-723):

3 We think that ... the Board failed to give adequate consideration  
4 to the national welfare and this is a fundamental error. ... [T]he  
5 Board failed to give effect to the fact that from December 11,  
6 1941, the country was at war ... [and] the further unquestionable  
7 fact that [the] respondent was engaged in the production of war  
8 material and other necessities for the armed forces and the  
9 national war effort....

10 ....  
11 The national welfare is of supreme importance and especially is  
12 this true in time of war. The evidence reflects the deep concern of  
13 the Government for the ... protection of [the respondent's plant]  
14 and for the integrity and volume of [its] products....

15 ....  
16 When [the union was] selected as bargaining [agent] for the plant  
17 protection employees, these employees might in an effort to  
18 discharge their duty to their employer find themselves in conflict  
19 with other members of their Union over the enforcement of some  
20 rule ... or upon the other hand, in conflict with the Federal  
21 Government because of fealty to the Union at the time of a  
22 dispute involving the public interest.

23 The impact of militarization in the initial Sixth Circuit decision in  
24 *Jones & Laughlin* is not debatable. When the case went to the Supreme  
25 Court, on conclusion of the war and the demilitarization of the guards,  
26 the Court remanded the case to the Sixth Circuit for reconsideration  
27 *because of* demilitarization.

28 As the majority notes, however, subsequent to demilitarization, but  
prior to reconsideration, the guards in *Jones & Laughlin* had become  
auxiliaries of the Cleveland police force, so that, in the Sixth Circuit's  
words, “[t]he precise question [on review was] not whether the plant  
guards should be permitted to organize, but whether the peculiar  
classification into which they [fell made] it improper for the Board to  
permit their organization by the same union which represented the  
production employees.”<sup>[FN9]</sup>

If then Section 9(b)(3) were read as no more than codification of the  
Sixth Circuit's opinion in *Jones & Laughlin*, it might be construed as  
extending only to situations in which the guards sought to be  
represented shared some connection with public or governmental  
entities. The words of Section 9(b)(3), however, are far broader than  
that, as is other legislative history. Then again, if we were to read it as  
codification of one aspect of *Jones & Laughlin*—simultaneous  
representation of both guards and their coworkers—we might construe  
the words of Section 9(b)(3) as only slightly different from what they  
are, prohibiting instead the certification of a labor organization which  
directly or indirectly admits “to membership ... coemployees of  
guards.” This reading has uniform support in the legislative history:

[W]e provided that [plant guards] could have the protection of the  
Wagner Act only if they had a union separate and apart from *the*  
*union of the general employees.*<sup>[FN10]</sup>

1 Although this case [the Sixth Circuit's holding in *Jones &*  
2 *Laughlin*] was recently reversed by the Supreme Court ... four of  
3 the Justices agreed with the Circuit Court that this was an abuse  
4 of the discretion permitted to the Board under the Act. *One of the*  
5 *members of the Board has also expressed this view in a number*  
6 *of dissenting opinions.*<sup>[FN11]</sup>

7 Either reading, though narrowing the scope of Section 9(b)(3), at least  
8 could find some support in its legislative history. Here, the majority  
9 enlarges the scope of Section 9(b)(3) without any such support.  
10 Obviously, in enacting Section 9(b)(3) Congress was concerned with  
11 potential conflicts of loyalties. But Section 9(b)(3) is Congress'  
12 response to that concern and the response does not reflect a  
13 determination to prohibit a voluntarily recognized mixed union, or the  
14 employees it represents, from asserting rights under the statute shared  
15 by other unions and employees. The limitation on them is the one  
16 Congress put in Section 9(b)(3).

17 The result here is not only far beyond either the words of Section  
18 9(b)(3) or its legislative history, it envisions a form of collective  
19 bargaining that is foreign to the statute as a whole. The majority's  
20 construction of the section ascribes to Congress an intention to permit  
21 an employer to voluntarily recognize a mixed union as representative of  
22 its guards subject to that union's, and those guards', understanding that  
23 the employer could walk away from the relationship perhaps at any  
24 time and certainly at any contract's end. Even if limited to the latter  
25 context, such voluntary bargaining is contrary to the stability of  
26 collective-bargaining relationships promoted by the statute.

27 The Charging Party here does not seek to have the Board certify it. It  
28 seeks, instead, to have the Board determine whether the Respondent  
lawfully withdrew recognition from it. The test for that, whether the  
recognition was voluntarily extended or not, is whether the Respondent  
had reasonable doubt about the union's continuing majority status  
based on objective considerations.<sup>[FN12]</sup> The Respondent seemingly  
concedes that is not the case. Indeed, as the judge found, this  
Respondent withdrew recognition in response to a bargaining  
stalemate. Neither Section 9(b)(3) nor its legislative history makes that  
an exception to the principles governing when recognition may be  
withdrawn.<sup>[FN13]</sup> I would find the withdrawal to be in violation of  
Section 8(a)(5).

29 FN1. My colleagues employ such terminology because, in their  
30 words, they "find it unnecessary to pass on whether the Respondent  
31 would have been privileged to withdraw recognition within the  
32 contract term" too. Similarly, they find the Board's decision in *Burns*  
33 *Detective Agency*, 134 NLRB 451 (1961), both "irrelevant" and  
34 "inapposite" to the issue posed here. See also *Wallace-Murray*  
35 *Corp.*, 192 NLRB 1090 (1971), to which the majority does not  
36 allude but in which the Board did not permit an employer to amend,  
37 much less walk away from, an extant contract which covered a  
38 mixed unit of guards and nonguards, that is, a unit which the Board  
could not decide was appropriate under Sec. 9(b)(3). I agree that the  
principles reflected in *Burns* and *Wallace-Murray*, in a technical  
sense, do not control here. But those cases are nonetheless quite  
relevant. For, if a respondent could withdraw recognition during a contract term

1 from a voluntarily recognized mixed union, the net result, in light of  
2 today's decision, would be that the 9(b)(3) bar against "certifying" a  
3 mixed union as the representative of an all-guards unit becomes no  
4 less than the statutory equivalent of Sec. 8(f) and/or Sec. 14(a). If  
5 that is the construction this majority gives to Sec. 9(b)(3), it should  
6 tell us so. If it has yet not made up its mind, I believe it should await  
7 that moment before deciding this case.

8 FN2. 236 F.2d at 943, emphasis added.

9 FN3. The Mine Workers had been found to have been an unlawfully  
10 assisted union within the proscription of Sec. 8(a)(2) upon charges  
11 filed by a Teamsters local in compliance with the provisions of Sec.  
12 9(f), (g), and (h).

13 FN4. See, e.g., *International Harvester*, 145 NLRB 1747 (1964).  
14 Like the Board there, I view Sec. 9(b)(3) as not restricted to  
15 situations in which the mixed union represents or seeks to represent  
16 coworkers of the guards. Like the Board there, I do so on the basis  
17 of the words of Sec. 9(b)(3) which define what has come to be  
18 called a mixed union. See my concurring position in *Bally's Park*  
19 *Place*, 257 NLRB 777 (1981).

20 FN5. *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947),  
21 revg. 154 F.2d 932 (6th Cir. 1946). The Board's Decision and  
22 Direction of Election is reported at 49 NLRB 390 (1943). The  
23 Board's Order is reported at 53 NLRB 1046 (1943). The Sixth  
24 Circuit's original order denying enforcement is reported as amended  
25 at 146 F.2d 718 (6th Cir. 1945). The Supreme Court's grant of the  
26 Board's petition for certiorari, vacatur, and remand to the Sixth  
27 Circuit is reported at 325 U.S. 838 (1944).

28 FN6. See, e.g., *Bendix Products.*, 3 NLRB 682 (1937); *Chrysler*  
*Corp.*, 36 NLRB 593 (1941).

FN7. See, e.g., *Westinghouse Electric & Mfg. Co.*, 28 NLRB 799  
(1940); *R.C.A. Mfg. Co.*, 30 NLRB 668 (1941).

FN8. The first reported case on the impact of militarization is  
*Chrysler Corp.*, 44 NLRB 881 (1942). See especially *Dravo Corp.*,  
52 NLRB 322 (1943).

FN9. 154 F.2d at 934.

FN10. 2 Leg. Hist. 1544 (LMRA 1947) (remarks of Sen. Taft).

FN11. The reference apparently is to former Member Reynolds.  
Compare id. at 1541 with 12 NLRB Annual Report 23 fn. 95 and  
cases there cited.

FN12. See, e.g., *NLRB v. Windham Community Memorial Hospital*,  
577 F.2d 805 (2d Cir. 1978); *Club Cal-Neva*, 231 NLRB 22 (1977).

FN13. Under Sec 9(b)(1) professional employees are entitled to a  
separate vote on whether they wish to be included in a bargaining  
unit with nonprofessionals. The Board may not decide that any unit is appropriate

1 if the professionals have not been included on that basis. That is to  
2 say, the prohibition running to the Board is to its “deciding the unit  
3 is appropriate.” In *ITT*, 159 NLRB 1757, the employer withdrew  
4 recognition from a mixed unit of professionals and nonprofessionals.  
5 In other words, it was seeking to assert the professionals’ 9(b)(1)  
6 privilege. *Utah Power Co.*, 258 NLRB 1059 (1981), on the other  
7 hand, was a unit case in which the professionals sought the separate  
8 unit that is theirs to seek under Sec. 9(b)(1). The two cases are in no  
9 way inconsistent. Nor are they relevant here despite my colleagues’  
10 discussion of the two cases and their unfounded suggestion that a  
11 respondent withdrawing recognition is the “beneficiary” of Sec.  
12 9(b)(3). Sec. 9(b)(1) gives professionals, but not employers, the right  
13 to a separate vote. Sec. 9(b)(3) does not give an employer the right  
14 to withdraw recognition. It prohibits a union from receiving Board  
15 certification of it as the representative of a guards’ unit when that  
16 union is a mixed one.

17 *Id.* at 790-793.

18 The union sought review of the Board’s *Wells Fargo* decision with the Second Circuit which,  
19 in a two-to-one decision, enforced the Board’s order. *Teamsters Local No. 807 v. NLRB*, 755 F.2d 5  
20 (1985). In an eloquent dissent, Judge Mansfield elaborated on Member Zimmerman’s reasons for  
21 concluding that Section 9(b)(3) does *not* bar the Board from ordering an employer to maintain an  
22 established bargaining relationship with a mixed guard/non-guard union.

23 In my view the Board’s action (with one member dissenting) in  
24 overruling the ALJ’s recommended decision is unfortunate. Its effect is  
25 to upset well-established labor relationships by conferring upon  
26 employers of such personnel an unfair advantage going beyond the  
27 purpose and plain language of the Act.

28 Section 9(b)(3) of the Act was adopted by Congress in response to the  
reasoning of the Sixth Circuit in *NLRB v. Jones & Laughlin Steel  
Corporation*, 154 F.2d 932 (6th Cir.1946). Though it was later reversed  
by the Supreme Court, 331 U.S. 416, 67 S.Ct. 1274, 91 L.Ed. 1575  
(1947), the Court held that if demilitarized plant guards (who were also  
commissioned policemen) were represented by the same union as plant  
employees, they might find themselves in conflict with the latter when  
required as part of their duties to protect the employer’s property and  
personnel. 154 F.2d at 934-35. The House proposed to resolve the  
conflict problem by excluding guards from the definition of  
“employee” in § 2(3) of the Act. However, Congress chose not to go  
that far. Instead, it adopted § 9(b)(3) as a compromise between the  
House bill and a Senate version that extended the Act’s coverage to  
guards. The Conference Committee’s Report expressly stated that

“[T]he Senate rejected a provision in the House bill which would  
have excluded plant guards as employees protected by the Act....  
*Under the language of clause (3), guards still retain their rights  
as employees under the National Labor Relations Act, but the  
Board is instructed not to place them in the same bargaining unit with other*

1 employees, or to certify as bargaining representatives for the  
2 guards a union which admits other employees to membership or  
3 is affiliated directly or indirectly with labor organizations  
4 admitting employees other than guards to membership.” 93  
5 Cong.Rec. 6444, reprinted in *II NLRB, Legislative History of the*  
6 *Labor Management Relations Act of 1947*, at 1541. (Emphasis  
7 supplied).

8 For present purposes the pertinent language of § 9(b)(3) is its provision  
9 that “*no labor organization shall be certified as the representative of*  
10 *employees in a bargaining unit of guards if such organization admits to*  
11 *membership, or is affiliated directly or indirectly with an organization*  
12 *which admits to membership, employees other than guards.”* (Emphasis  
13 supplied).

14 Nothing in the language of § 9(b)(3) prohibits the organization of a  
15 mixed-guard union or bars it from functioning as the representative of  
16 any group of employees. As the Supreme Court stated in *United Mine*  
17 *Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72, 76 S.Ct.  
18 559, 564-65, 100 L.Ed. 941 (1956):

19 “Section 8(a)(5) declares it to be an unfair labor practice for an  
20 employer ‘to refuse to bargain collectively with the  
21 representatives of his employees, *subject to the provisions of*  
22 *section 9(a).*’ (Emphasis supplied). Section 9(a), which deals  
23 expressly with employee representation, says nothing as to how  
24 the employees’ representative shall be chosen. See *Lebanon Steel*  
25 *Foundry v. Labor Board*, 76 U.S.App.D.C. 100, 103, 130 F.2d  
26 404, 407 [ (1942) ]. It does not make it a condition that the  
27 representative shall have complied with § 9(f), (g) or (h), *or shall*  
28 *be certified by the Board, or even be eligible for such*  
*certification.*<sup>8</sup>” [Second emphasis supplied and footnotes  
omitted].

FN<sup>8</sup> A Board election is not the only method by which an  
employer may satisfy itself as to the union’s majority status.”  
(Citations omitted).

In *NLRB v. White Superior Division, White Motor Corp.*, 404 F.2d  
1100 (6th Cir.1968), the court confronted the question of whether an  
employer violated § 8(a)(1) and (5) by discouraging membership of  
guard employees in a mixed-guard union. It concluded that, even  
though the NLRB could not certify the union in question (the IAM)  
because of its mixed-guard status, membership in such a union was not  
unlawful and the employees could rightfully choose it to represent  
them:

“It is true the I.A.M. [the mixed-guard union] could never be  
certified as bargaining agent for the guards but this does not  
change the fact that the guards have a right under § 7 of the Act  
to be members of the I.A.M. To hold otherwise would attribute  
too much to certification. It would, in effect, be saying that no  
labor organization has rights under the Act save a certified one.  
Certification gives an organization which achieves it additional  
rights not all its rights.” 404 F.2d at 1103 n. 5.

1 Indeed, the Board has for many years recognized that the prohibition  
2 against certification does not constitute a bar to recognition. *See, e.g.,*  
3 *Wm. J. Burns Int'l Detective Agency, Inc.*, 134 N.L.R.B. 451, 463  
4 (1961):

5 “Congress could readily have declared a guard unit inappropriate  
6 if the representative of that unit admitted non-guards to  
7 membership or was a direct or indirect affiliate of a labor  
8 organization which did so. Congress did not so declare, and the  
9 preceding statutory language covering the ‘mixed guard unit’  
10 compels the conclusion that this omission in the latter situation  
11 was deliberate.”

12 Although a union gains some advantages from certification (*e.g.*,  
13 protection from raiding unions, § 8(b)(4)(C), right to engage in  
14 concerted action in support of a jurisdictional dispute, § 8(b)(4)(D)), a  
15 non-certified union representing a majority of the employees in a unit is  
16 entitled to the protections of the Act. *See NLRB v. Gissel Packing Co.*,  
17 395 U.S. 575, 598-99, 89 S.Ct. 1918, 1932, 23 L.Ed.2d 547 (1969);  
18 *Rock-Hill-Uris, Inc. v. McLeod*, 236 F.Supp. 395 (S.D.N.Y.1964), *aff'd*  
19 *per curiam*, 344 F.2d 697 (2d Cir.1965) (placement of non-certified  
20 union's name on ballot); *NLRB v. White Superior Division, White*  
21 *Motor Corp.*, *supra* (protection against employer's discouraging  
22 employees from choosing a mixed-guard union); *Bally's Park Place*,  
23 257 N.L.R.B. 777 (1981) (mixed guard union's name may appear on  
24 ballot as intervenor in representation election); *Amoco Oil Co.*, 221  
25 N.L.R.B. 1104 (1975) (employer required to recognize plant guard  
26 representative from uncertifiable union elected by production and  
27 maintenance unit); *Wm. J. Burns Int'l Detective Agency, Inc.*, 134  
28 N.L.R.B. 451 (1961) (normal contract-bar rules apply to a collective-  
bargaining agreement between an employer and mixed-guard union).  
As the Sixth Circuit pointed out in *NLRB v. White Superior Division,*  
*White Motor Corp.*, *supra*:

“Since membership by guard employees in a union which also  
represents non-guards is not unlawful, it would be an unfair labor  
practice for an employer to take discriminatory action against  
guard employees on account of such membership.” 404 F.2d at  
1103.

One of the normal requirements of the Act is that once a valid  
bargaining relationship has been established the employer may not, if  
the union continues to represent a majority, repudiate it at the end of a  
contract since the effect would be to destroy the stability of  
relationships which the Act is designed to promote. *NLRB v. A.*  
*Lasaponara & Sons, Inc.*, 541 F.2d 992, 995 (2d Cir.1976); *Int'l*  
*Telephone & Telegraph Corp.*, 159 N.L.R.B. 1757 (1966), *enforced in*  
*rel. pt.*, 382 F.2d 366 (3d Cir.1967), *cert. denied*, 389 U.S. 1039, 88  
S.Ct. 777, 19 L.Ed.2d 829 (1968); *Retail Clerks Local 324 (Vincent*  
*Drugs)*, 144 N.L.R.B. 1247 (1963).

“On the basis of the foregoing findings the Board held that the  
Company violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C.  
§ 158(a)(5), (1), by withdrawing recognition from the Union and  
refusing to bargain collectively and by unilaterally changing the  
terms and conditions of employment of its employees. We agree. Once a

1 collective bargaining agent is voluntarily recognized by an  
2 employer as the representative of its employees the bargaining  
3 relationship must be permitted to continue and recognition may  
4 not be withdrawn at will.” 541 F.2d at 995. [Citation omitted]

5 To hold otherwise would be to put the employees at an unfair  
6 advantage, particularly during the period of an economic strike after the  
7 current contract has terminated, which is the situation in the present  
8 case. The threat of instant withdrawal of recognition thereafter, like a  
9 Sword of Damocles, would pose such a severe penalty that the  
10 employees would, despite having established a valid, healthy and long-  
11 continued bargaining relationship, be unable to continue it on a fair  
12 basis by invoking the protections of the Act to which they are entitled.

13 Thus a distinction must be drawn between creating, establishing, or  
14 certifying a union as the agent for establishing a collective bargaining  
15 relationship, on the one hand, and maintaining such a relationship after  
16 it has been created by the parties, on the other. Once an employer  
17 recognizes a non-certified union, that union is entitled to seek and  
18 obtain from the Board the same remedies as those available to a  
19 certified union. As the Board stated in *Int'l Telephone & Telegraph*,  
20 *supra*, 159 N.L.R.B. at 1764:

21 “On the contrary, we find that the unit which both parties  
22 recognized as appropriate when they entered into their 1964  
23 negotiations was a product of the agreement of the parties.  
24 Bearing in mind that such a unit is not inherently inappropriate,  
25 and considering particularly the long bargaining history in that  
26 unit, as well as the timing and context of the Respondent’s  
27 withdrawal, we hold that the Respondent is estopped at this time  
28 from disputing the appropriateness of the unit which it itself had  
accepted as a proper basis for bargaining during the very  
negotiations which it later disrupted by its withdrawal of  
recognition. Accordingly, we find that the Respondent, by  
withdrawing recognition from and refusing to bargain with the  
Union as bargaining representative of the professional employees  
in the engineer-technician unit has violated Section 8(a)(5) and  
(1) of the Act since October 8, 1964.”

29 In enacting § 9(b)(3) as a compromise Congress was well aware of  
30 these distinctions. It recognized that it could have declared a mixed-  
31 guard union or affiliation to be inherently inappropriate. Instead, it  
32 chose to discourage such organizations only to the extent of denying  
33 them certification. It refused to make certification a condition precedent  
34 to representation by a mixed-guard union or recognition of such a union  
35 by an employer. If, as here, an employer chose to enter into a collective  
36 bargaining relationship with such a union, “[u]nder the language of  
37 clause (3), guards still retain their rights as employees under the  
38 National Labor Relations Act,” *II NLRB, Legislative History of the*  
*Labor Management Relations Act of 1947*, at 1541.<sup>FN2</sup> In view of the  
scalpel-like precision with which Congress, after much debate, chose  
its compromising language, we should adhere to its plain unambiguous  
terms. *See, e.g., Garcia v. United States*, 469 U.S. 70, 105 S.Ct. 479, 83  
L.Ed.2d 472 (1984) (when court finds the terms of a statute  
unambiguous, its inquiry is complete, except in “rare and exceptional

1 circumstances”) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60, 51  
S.Ct. 49, 50, 75 L.Ed. 156 (1930)).

2 FN2. The majority relies on the statement of Senator Taft that “plant  
3 guards ... could have the protection of the Wagner Act only if they  
4 had a union separate and apart from the union of the general  
5 employees,” as indicating that such a union could not invoke the  
6 processes of the Act. However, it is clear that Senator Taft was  
7 referring to a union’s right to obtain *certification* as a collective  
8 bargaining representative, not to its other rights under the Act,  
9 which were clearly recognized in the quoted text of the Conference  
10 Committee’s Report and in the numerous decisions so interpreting §  
11 9(b)(3). The majority also refers (Maj.Op. 9) to a statement by Sen.  
12 Murray as indicating an intent to change existing bargaining  
13 patterns. The context makes clear, however, that Sen. Murray was  
14 not asserting that, except for certification, the changes wrought by §  
15 9(b)(3) deprived guards of other rights under the Act. Moreover, the  
16 Conference Committee’s report, which flatly states that guards  
17 retain their rights as employees under the National Labor Relations  
18 Act, prevails over the passing statement of one legislator. *See, e.g.,*  
19 *United States Dep’t of State v. Washington Post Co.*, 456 U.S. 595,  
20 600, 102 S.Ct. 1957, 1960, 72 L.Ed.2d 358 (1982) (“Passing  
21 references and isolated phrases are not controlling when analyzing a  
22 legislative history.”); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311,  
23 99 S.Ct. 1705, 1722, 60 L.Ed.2d 208 (1979) (in analyzing legislative  
24 history, remarks of single legislator (even sponsor) are not  
25 controlling, and must be considered along with reports of both  
26 Houses and statements of other Congressmen).

27 Despite the plain language of § 9(b)(3) and the foregoing legislative  
28 history, the majority seeks to rewrite the Act on the basis of what it  
conceives to be “policy concerns inherent in the statute” and “policy  
considerations behind the statute” (Maj. Op. 10), relying on its own  
*ipse dixit* that “it is reasonable to infer from the statutory language and  
the decisions under it that the preclusion of certification portends more  
than merely a simple check on the Board’s power to certify the results  
of an election.” (Maj.Op. 9-10). Nothing in the statutory language or  
decisions under the statute supports that broad statement.<sup>FN3</sup> Moreover,  
the statement is directly contrary to the Act’s strong policy in favor of  
maintaining ongoing relationships between an employer and a union  
representing a majority of its employees.

FN3. The majority reliance on *Teamster’s Local 71 v. NLRB*, 553  
F.2d 1368 (D.C.Cir.1977), is misplaced. It understandably held that  
a mixed-guard union could not picket for the purpose of obtaining  
certification barred to it by § 9(b)(3). The court carefully noted,  
“However, it is not inconsistent for the Board to allow an *incumbent*  
non-qualifying union to appear on the ballot where a qualifying  
union has petitioned for an election.” *Id.*, 553 F.2d at 1376 n. 29.  
(Emphasis in original). In the present case we are dealing with an  
incumbent mixed-guard union that has been recognized in the past  
by Wells-Fargo as the authorized bargaining representative of its  
guard employees.

....

1 For these reasons I would be guided by the Court's statement in *NLRB*  
2 *v. Yeshiva University*, 444 U.S. 672, 691, 100 S.Ct. 856, 867, 63  
3 L.Ed.2d 115 (1980), that although "we accord great respect to the  
4 expertise of the Board when its conclusions are rationally based on  
5 articulated facts and consistent with the Act ... [i]n this case ... the  
6 Board's decision satisfied neither criterion." As in *American*  
7 *Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318, 85 S.Ct. 955, 967, 13  
8 L.Ed.2d 855 (1965), "the role [here] assumed by the Board ... is  
9 fundamentally inconsistent with the structure of the Act and the  
10 function of the sections relied upon."

11 I would reverse the Board's order for the reason that Wells Fargo's  
12 withdrawal of recognition of Local 807 violated § 8(a)(1) and (5) of the  
13 Act and remand the case to the Board for adoption of the ALJ's  
14 recommended order.

15 *Id.* at 11-16.

16 In *Temple Security, Inc.*, 328 NLRB 663 (1999), the full Board considered the continuing  
17 viability of *Wells Fargo Armored Services*. A three-member majority voted to affirm *Wells Fargo*  
18 *Armored*; members Fox and Liebman dissented. In their well-reasoned dissent, the minority  
19 summarized the dissenting opinions of Member Zimmerman and Judge Mansfield, and added:

20 The underlying purpose of the Act is to encourage stable labor-  
21 management relationships. In furtherance of that purpose, it is general  
22 Board policy that an employer which has voluntarily recognized a  
23 union must maintain that relationship, absent, at the very least, a good-  
24 faith doubt of the union's majority status. An employer has a right,  
25 absent the commission of unfair labor practices, to insist on a Board-  
26 conducted election before recognizing a union. *Linden Lumber Div. v.*  
27 *NLRB*, 419 U.S. 301 (1974). But, once it voluntarily recognizes a  
28 majority union, no matter how informally, the right is lost. "[O]nce an  
employer has affirmatively agreed to recognize a union, it cannot  
change its mind." *NLRB v. Brown & Connolly, Inc.*, 593 F.2d 1373,  
1374 (1st Cir. 1979). Once a voluntary bargaining relationship is  
established, it "must be permitted to continue and recognition may not  
be withdrawn at will." *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d  
992 (2d Cir. 1976), cert. denied 430 U.S. 914 (1977). Moreover,  
"[v]oluntary recognition is a favored element of national labor policy."  
*NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978).

29 In accordance with these principles, we agree with dissenting Board  
30 Member Zimmerman and Circuit Judge Mansfield that a guard  
31 employer, having voluntarily entered into a bargaining relationship  
32 with a mixed guard union, is estopped from repudiating that  
33 relationship. In our view, in rejecting that approach the majority is  
34 elevating the narrow purpose of Section 9(b)(3) over the overall  
35 purpose of the Act to encourage stable labor relationships.

36 *Id.* at 665-666.

1           The union appealed the Board’s dismissal of the complaint in *Temple Security*. On appeal,  
2 the Seventh Circuit issued a unanimous decision reversing the Board majority’s decision, and  
3 remanded the case to the Board. *SEIU Local No. 73 v. NLRB*, 230 F.3d 909 (2000). While  
4 acknowledging that the Board’s interpretation of Section 9(b)(3) was entitled to deference, the  
5 Seventh Circuit nonetheless concluded that the Board majority had misconstrued Section 9(b)(3) in  
6 *Wells Fargo Armored*.

7           The Act considers guards “employees.” See 29 U.S.C. §§ 152, 159. It  
8 grants employees rights to join labor unions and bargain collectively in  
9 section 7. See 29 U.S.C. § 157. In section 8(a), it limits employer  
10 activity in order to protect those section 7 rights: pertinent to our  
11 discussion here, section 8(a)(1) prohibits employers from interfering  
12 with, restraining, or coercing employees in the exercise of their section  
13 7 rights; section 8(a)(3) forbids employers from discriminating in  
14 regard to hiring or any term or condition of employment to encourage  
15 or discourage employee membership in a labor union; and section  
16 8(a)(5) prohibits an employer from refusing to bargain collectively with  
17 a representative union. See 29 U.S.C. §§ 158(a)(1), (3), and (5).

18           The duty to bargain and to refrain from instituting unilateral changes in  
19 wages and working conditions under section 8(a)(5) normally outlives  
20 the parties’ CBA. An employer is required to “maintain the status quo  
21 after the expiration of a collective bargaining agreement until a new  
22 agreement is reached or until the parties bargain in good faith to  
23 impasse.” *NLRB v. Emsing’s Supermarket*, 872 F.2d 1279, 1285 (7th  
24 Cir.1989) (internal quotations omitted); see also *Peerless Roofing Co.*  
25 *v. NLRB*, 641 F.2d 734, 736 (9th Cir.1981). This rule is designed to  
26 promote industrial peace by protecting the stability of long term  
27 employer-union relationships. See *Fall River Dyeing & Finishing*  
28 *Corp. v. NLRB*, 482 U.S. 27, 38, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987).  
The enforcement of the *status quo ante* during renegotiations helps to  
ensure that the employer will not be able to exercise an unfair  
advantage by threatening to remove all the concessions for which the  
union has previously bargained. See *Peerless Roofing*, 641 F.2d at 736.

          The twist here is that, as a mixed-guard union, the Union was not  
entitled at the outset to be certified as the representative of its  
employees. Nothing in section 9(b)(3), however, forbids an employer  
from voluntarily recognizing such a union. (We note as well that  
section 9(b)(3) looks nothing like section 8(a)(2), 29 U.S.C. §  
158(a)(2), which absolutely forbids employer-dominated unions. See  
*NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241,  
251, 60 S.Ct. 203, 84 L.Ed. 219 (1939).) The Board insists that the fact  
that certification is forbidden has consequences beyond the usual  
benefits that go along with certification (about which we have more to  
say below). It reasons that the prohibition found in section 8 against  
employer unilateral action after a CBA has expired cannot apply to a  
union whose role in the workplace began with voluntary recognition.  
Instead, it continues, once the term of a CBA is up, the Act entirely  
ceases to apply to the parties. One could imagine policy arguments both for and

1 against the Board's position: proponents would argue that there should  
2 be a way of ending a voluntary relationship, while opponents would  
3 point out that this position runs counter to the Act's policy of  
4 attempting to ensure fair and smooth CBA renegotiations in order to  
5 promote stable, long term employer-union relationships. In our view,  
6 however, the policy arguments are all beside the point (and thus we  
7 have no duty to defer to the Board's preferred policy), because the  
8 exception proposed by the Board is simply not a part of the Act's plain  
9 text.

10 The Board relies on a Second Circuit decision, *Truck Drivers Local  
11 Union No. 807 v. NLRB*, 755 F.2d 5 (2d Cir.1985), which upheld *Wells  
12 Fargo Armored Service Corp. v. Truck Drivers Local Union No. 807*,  
13 270 NLRB 787, 1984 WL 36553 (1984), to support its position. The  
14 *Truck Drivers* and *Wells Fargo* argument proceeds as follows: (1)  
15 section 9(b)(3) of the Act states that the Board may not certify a unit  
16 represented by a mixed-guard union; (2) the purpose of this prohibition  
17 is to prevent potential intra-union conflicts between guards and non-  
18 guards; and (3) (here is the imaginative leap) requiring maintenance of  
19 the status quo under section 8(a)(5) of the Act after the term of the  
20 CBA has expired is analogous to requiring certification of the unit;  
21 since the Act prohibits the latter, it must prohibit the former.

22 The *Truck Drivers* court, writing before the Supreme Court had  
23 elaborated upon the *Chevron* test, first saw this as a case in which it  
24 was obliged to defer to the Board's interpretation of the statute. After  
25 acknowledging both the prohibition on certification for mixed unions  
26 and the validity of voluntary recognition of such unions, it examined in  
27 some detail the legislative history of section 9(b)(3), which it found  
28 was directed toward the risk of divided loyalties when a guard is called  
upon to enforce the employer's rules against a fellow union member.  
Last, the court thought that it was "reasonable to infer from the  
statutory language and the decisions under it that the preclusion of  
certification portends more than merely a simple check on the Board's  
power to certify the results of an election." 755 F.2d at 9-10. In other  
words, the court seemed to be saying, it is reasonable to infer that  
prohibiting certification means something more than prohibiting  
certification.

With part of this we have no disagreement. Section 9(b) plainly cabins  
the power of the Board to certify appropriate bargaining units. See 29  
U.S.C. § 159(b). Section 9(b)(1) prohibits the Board from deciding that  
a unit including professionals and non-professionals is appropriate  
unless a majority of the professionals vote for inclusion. See *id.* Section  
9(b)(3) does two things. First, it prohibits the Board from deciding that  
a unit including guards and non-guards is appropriate. See *id.* Second,  
it explains that "no labor organization shall be *certified* as the  
representative of employees in a bargaining unit of guards" if that labor  
organization is a mixed-guard union. *Id.* (emphasis added). Section  
9(b)(3), then, does not prohibit the Board from finding that units made  
up solely of guards are appropriate. The only limitation on the Board's  
power vis-à-vis units including guards is that, under 9(b)(3), the Board  
may not certify unions to represent them if the union also includes non-  
guards ( *i.e.* it is "mixed").

1 We do not agree, however, that there is any need to look beyond the  
2 language of the Act to understand the scope of the limitation created by  
3 section 9(b)(3). See *Air Line Pilots Ass'n, Intern. v. United Air Lines,*  
4 *Inc.*, 802 F.2d 886, 914 (7th Cir.1986). The Act clearly describes the  
5 certification process, and in so doing it provides the kind of context for  
6 understanding section 9(b)(3) that the Supreme Court called for in  
7 *Brown & Williamson*. Section 9 lays out a process by which  
8 employees, labor organizations, and employers may petition the Board  
9 to conduct an election and then to certify the results. See 29 U.S.C. §  
10 159. An employer also has a right, under section 9(c), to petition the  
11 Board and force a union claiming to represent a majority of employees  
12 in an appropriate unit to undergo a Board-certified election. See 29  
13 U.S.C. § 159(c); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1246  
14 (D.C.Cir.1994). Once a unit has been certified by the Board, the  
15 representative union is protected from interference with its  
16 representation by other unions, the employer, and even dissatisfied  
17 employees for a period of one year (a breaking-in period). See 29  
18 U.S.C. § 159(c).

19 This certification process is not the only way for a union to become a  
20 representative under the Act. An employer may also extend the Act's  
21 coverage to its relationship with a union representing a majority of a  
22 group of its employees by voluntarily recognizing the union. See *NLRB*  
23 *v. Gissel Packing Co.*, 395 U.S. 575, 600, 89 S.Ct. 1918, 23 L.Ed.2d  
24 547 (1969); *Lincoln Park Zoological Soc. v. NLRB*, 116 F.3d 216, 219  
25 (7th Cir.1997). Importantly, there are differences between a certified  
26 union and a voluntarily recognized union. A voluntarily recognized  
27 union is not entitled to the special privileges afforded to Board-certified  
28 unions: those privileges include the section 9(c)(3) one-year non-  
rebuttable presumption of majority status; the section 8(b)(4)(C)  
prohibition against recognitional picketing by rival unions; and the  
freedom from work assignments disputes restrictions in section  
8(b)(4)(D) and from restrictions on recognitional and organizational  
picketing in section 8(b)(7). See 29 U.S.C. §§ 159, 158; *Gissel Packing*  
*Co.*, 395 U.S. at 599 n. 14, 89 S.Ct. 1918.

On the other hand, voluntarily recognized unions are entitled to the  
basic protections of the Act: “[c]ertification gives an organization  
which achieves it additional rights[,] not all its rights.” *NLRB v. White*  
*Superior Division, White Motor Corp.*, 404 F.2d 1100, 1103 n. 5 (6th  
Cir.1968). “Section 9(b)(3) is a limitation not upon employee rights  
[(such as those found in sections 7 and 8 of the Act)] but upon Board  
powers.” *NLRB v. Bel-Air Mart, Inc.*, 497 F.2d 322, 327 (4th Cir.1974).  
Thus, voluntarily recognized unions and the employees represented by  
them are still protected by 8(a)(5)’s duty to bargain. See *Gissel Packing*  
*Co.*, 395 U.S. at 600, 89 S.Ct. 1918. The Act does not hinge  
employees’ section 7 rights, or their section 8 protections, on  
certification; neither section 7 nor section 8 mentions the term. See 29  
U.S.C. §§ 157, 158; *Bel-Air Mart*, 497 F.2d at 327. To qualify for  
section 7 and section 8 protections, a union must simply be a  
“representative[ ] of [the] employees.” 29 U.S.C. § 158(a)(5).  
Representatives include all of those unions “designated or selected for  
the purposes of collective bargaining by the majority of the employees  
in [an appropriate] unit.” 29 U.S.C. § 159(a).

1 In keeping with these principles, courts normally apply the Act's  
2 protections to voluntarily recognized unions. For example, sections 7,  
3 8(b)(3), and 8(b)(1) have been found to apply to protect guard  
4 employees from their employer's attempts to discourage their  
5 membership in a mixed-guard union. See *White Superior*, 404 F.2d at  
6 1103 (refusing to create an exception to section 8(b)(3) for uncertified  
7 unions, because Congress did not do so); see also *Bel-Air Mart, Inc.*,  
8 497 F.2d at 327-28. Section 8(a)(5) has also been found to apply  
9 whether or not certification has occurred. See *NLRB v. Montgomery*  
10 *Ward & Co.*, 399 F.2d 409, 412-13 (7th Cir.1968) (finding that a  
11 voluntarily recognized union representative, just like a certified  
12 representative, must be bargained with, in good faith, for a reasonable  
13 time before a decertification petition will be allowed). The Board itself  
14 has found that the Act's contract-bar rule applies to uncertifiable  
15 mixed-guard union representatives to protect parties to collective  
16 bargaining agreements from outside petitions. See *Stay Security and*  
17 *United Union of Security Guards*, 311 NLRB 252, 252-53, 1993 WL  
18 186154 (1993).

19 We may not attribute more to certification than Congress has chosen to.  
20 Creating an exception to section 8(a)(5) protections based on  
21 uncertifiability would do just that. The Act specifically limits mixed-  
22 guard unions only with respect to Board certification. It attaches  
23 particular benefits to certification, and it refrains from conditioning the  
24 benefits of sections 7 and 8(a) on certification. This has the effect of  
25 establishing a balance between the right of an employer to protect its  
26 property, and "the importance of stability in collective bargaining  
27 agreements." *Stay Security*, 311 NLRB at 252-53. Part of that balance  
28 is the Act's determination that its concern for an employer's property  
rights "is not undermined when the employer voluntarily waives its  
9(b)(3) rights and recognizes a guard/nonguard union for a unit of  
guards." *Id.* Contrary to the Board's arguments, voluntary recognition  
does not permanently lock the parties into their relationship. An  
impasse in good-faith bargaining, or a showing, after a reasonable time,  
of minority rather than majority support, will both allow an employer to  
end its pairing with a recognized representative (whether that  
recognition began voluntarily or through more formal processes). We  
express no opinion at this juncture on the question whether either of  
those exceptions-particularly the majority support requirement, given  
the fact that there is now another union representing these guards-might  
defeat the Union's claim here. Questions like that are best left to the  
Board's consideration on remand.

Other courts have accepted the Act's balancing of section 9(b) interests  
with the general policies of the Act, refusing to create exceptions to  
section 8(a)(5) based on concerns dealt with elsewhere in the Act. See,  
*e.g., International Tel. & Tel. Corp. v. NLRB*, 382 F.2d 366, 369-71 (3d  
Cir.1967) (finding that a mixed unit of professional and non-  
professional employees, though frowned upon within section 9 of the  
Act, was still protected by section 8(a)(5)'s bargaining requirement).  
We similarly decline to create an exception to the application of section  
8(a)(5) for mixed unions.

*Id.*, at 912 -916.

1 On remand, the Board accepted the Circuit Court’s decision as the law of the case, but  
2 declined to overturn *Wells Fargo*. As explained by Members Liebman and Walsh:

3 Member Liebman dissented from the Board's original decision in this  
4 case. 328 NLRB at 665. She adheres to the views expressed in her  
5 dissent. Member Walsh shares those views. For institutional reasons,  
6 however, neither Member Liebman nor Member Walsh would vote to  
7 overrule the Board's original decision, or the Board's decision in *Wells  
8 Fargo Armored Service Corp.*, 270 NLRB 787 (1984), in the absence  
9 of a third vote to do so.

10 *Temple Security, Inc.*, 337 NLRB 372, 374 n.7 (2001).

11 The Board now has a full complement of five members, and the time has come, finally, to  
12 overrule *Wells Fargo*.

13 **B. None of Respondent’s Arguments Warrant a Contrary Result.**

14 In its brief to the Administrative Law Judge Respondent made several arguments in support of  
15 maintaining the continuing viability of *Wells Fargo*; none of those arguments has merit.

16 Respondent argues that an order certifying a mixed-guard union is indistinguishable from an  
17 order directing an employer to maintain a voluntarily established bargaining relationship with a  
18 mixed-guard unit. This argument has been squarely addressed and rejected by Member Zimmerman,  
19 Justice Mansfield and the Seventh Circuit. All point out the historic distinction between the Board’s  
20 authority to create a unit and the Board’s authority to issue orders maintaining bargaining  
21 relationships already established. Member Zimmerman adds that Congress knew how to make  
22 explicit a limitation on the Board’s authority to protect bargaining relationships – it did so in enacting  
23 former Subsections 9(g), (g), and (h), but did *not* do so in enacting Subsection 9(b)(3). Member  
24 Zimmerman and the Seventh Circuit emphasize the clear and unambiguous language of Section  
25 9(b)(3) does not support an extension of the ban on certification to reach a ban on all bargaining  
26 orders.<sup>1</sup>

27 Respondent, citing concerns expressed by the Sixth Circuit in *NLRB v. Jones & Laughlin  
28 Steel Corp.*, 154 F.2d 932, 935 (1946), about the potential “dual character” of guards’ obligations to

<sup>1</sup> Respondent argues that because the Board in *Armored Motor Service Co., Inc.*, 106 NLRB 1139 (1953),  
extended the definition of “guard” to armored car drivers, Section 9(b)(3) must for all purposes be given an  
expansive reading. Whether the Board was right or wrong in *Armored Motor Service Co.* is not at issue in this  
case, and is completely irrelevant to the question of whether the Board in *Wells Fargo* correctly applied  
Section 9(b)(3).

1 “the municipality and the state” and their obligation to their union, concerns echoed by Senator Taft in  
2 supporting the Congressional adoption of Section 9(b)(3), argues that Section 9(b)(3)’s legislative  
3 history mandates the Board’s holding in *Wells Fargo*. This argument, too, has been thoroughly  
4 rejected. Member Zimmerman notes that in enacting Section 9(b)(3) Congress made a conscious  
5 compromise, electing *not* to deprive guards or mixed-guard unions of all rights under the Act, instead  
6 narrowly framing the limitation. Likewise, Justice Mansfield, after reviewing Section 9(b)(3)’s  
7 legislative history, concludes: “In view of the scalpel-like precision with which Congress, after much  
8 debate, chose its compromising language, we should adhere to its plain unambiguous language.”  
9 *Teamsters Local 807 v. NLRB, supra*, 755 F.2d at 14.

10 Finally, Respondent argues that a decision overruling *Wells Fargo* would not further the  
11 purposes of the Act. According to Respondent, if guard employers are not free to withdraw  
12 recognition from mixed-guard unions, they will be discouraged from recognizing them voluntarily in  
13 the first place. Putting aside the obvious irony of this argument coming from an entity that was most  
14 likely vehemently opposed to the legislative amendments to the Act recently introduced in Congress,  
15 this argument nevertheless completely misses the point that the policy adopted by the Board in *Wells*  
16 *Fargo* serves to undermine existing bargaining relationships. Thus, *Wells Fargo* effects a  
17 destabilization of established collective bargaining relationships and thus directly contradicts a well-  
18 established policy goal of the Act. In any event, if an employer’s right to unilaterally withdraw  
19 recognition from voluntarily established bargaining relationships actually fostered the purposes of the  
20 Act, the Board would have long since extended the holding of *Wells Fargo* to all voluntarily  
21 established bargaining relationships. But to the contrary, the Board’s long-standing policy is just the  
22 opposite. See, e.g., *Lamons Gasket*, 357 NLRB No. 72 (2011).

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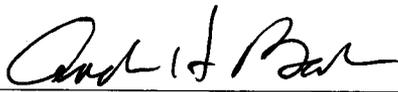
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1 **CONCLUSION**

2 For the reasons articulated by Member Zimmerman in *Wells Fargo Armored*, by Judge  
3 Mansfield in *Teamsters Local No. 807 v. NLRB*, by Members Fox and Liebman in *Temple Security*,  
4 and by the Seventh Circuit in *SEIU Local No. 73 v. NLRB*, Teamsters Locals 150, 315, 439 and 853  
5 respectfully request the Board to conclude that the majority decision in *Wells Fargo Armored*  
6 misconstrued Section 9(b)(3) and to issue a decision overruling *Wells Fargo Armored* and directing  
7 the Employer to bargain in good faith with the previously recognized Local Unions.

8  
9  
10 Dated: February 8, 2012

BEESON, TAYER & BODINE, APC

11 By:   
12 \_\_\_\_\_  
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14 Attorneys for Teamsters Locals 150, 315, 439  
15 and 853  
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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

3 I declare that I am employed in the County of Alameda, State of California. I am over the age  
4 of eighteen (18) years and not a party to the within cause. My business address is 483 Ninth Street,  
2nd Floor, Oakland, CA 94607. On this day, I served the foregoing Document(s):

5 **CHARGING PARTIES BRIEF IN SUPPORT OF EXCEPTIONS**

6  By Facsimile Transmission to the parties in said action, as addressed below, in accordance  
7 with Code of Civil Procedure §1013(e).

8  By Electronic Service. Based on a court order or an agreement of the parties to accept  
9 service by electronic transmission, I caused the documents to be sent to the persons at the electronic  
notification addresses listed in item 5. I did not receive, within a reasonable time after the  
transmission, any electronic message or other indication that the transmission was unsuccessful.

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23 I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland,  
California, on this date, February 8, 2012.

24  
25 /s/ Lynda Hodge  
26 Lynda Hodge  
27 BEESON, TAYER & BODINE, APC  
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28 Oakland, CA 94607