Who will Guard the Guards?
Is the NLRB Precluded from Issuing a Bargaining Order in a Mixed Unit?

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I. INTRODUCTION

The unique relationship between employers and the employees they hire to “guard” their property (or the property of their customers) has ignited much controversy with respect to the application of the National Labor Relations Act (“NLRA” or the “Act”).1 On the one hand, employers argue that permitting a union to represent both guard and nonguard employees creates a potential or actual conflict of interest for guard employees charged with enforcing employer’s rules and protecting property against the actions of their union brethren. In particular, employers insist that guard employees bear a special duty of loyalty to them because of their unique obligation to protect employers, their property and the property of their customers from the actions of other employees – particularly during periods of industrial unrest. On the other hand, unions and employees argue that guards are employees like any others and should be afforded access to the same protections guaranteed by the NLRA and contend that there should not be any limitations on guards’ rights to select a bargaining representative of their choice.

In passing the Taft-Hartley Amendments to the NLRA in 1947, Congress attempted to address these competing concerns by adding Section 9(b)(3) to the Act.2 Section 9(b)(3) prohibits the National Labor Relations Board (“the Board”) from finding appropriate a bargaining unit that includes guards and other nonguard employees, referred to as a mixed unit. In addition, Section 9(b)(3) also provides that a union may not be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards (the so-called mixed union issue). This seemingly simple provision of the NLRA left numerous questions to be answered by the Board and the Courts, including: Which employees are considered “guards” under the NLRA? What rights do guards have under the Act? Can a mixed guard-nonguard union utilize the Board’s processes to adjudicate bargaining disputes for a guard-only unit? If a mixed union seeks voluntary recognition of a guard-only unit, what means of protecting the stability of that collective bargaining relationship does it have in the absence of a Board certification? Can an employer rescind voluntary recognition and refuse to bargain with a mixed guard-nonguard union? Or can an employer be forced, even by bargaining order, to continue to bargain with a mixed guard-nonguard union?

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1 See generally 29 U.S.C. § 151 et seq.
In this paper, we will discuss the definition of “guards” under the Act, the rights of guards under the Act, the Board’s current limitations in enforcing the bargaining rights of unions representing guards in mixed units and mixed unions, and the potential for reversal of the Board’s decisions on these guard issues.

II. **WHO IS A GUARD AND WHAT RIGHTS DO GUARDS HAVE?**

Although guards are defined as employees under Section 2(3) of the Act,\(^3\) with the passage of the Taft Hartley Amendments, their status as guards and rights as employees have been the subject of numerous Board decisions. In these cases, employers have sought a broader definition of “guards” that allows them to exclude both traditional militarized guard employees and nontraditional guard-like employees from their general employees’ bargaining unit. In contrast, unions have sought a narrower definition of “guards” that allows them to include nontraditional guard-like employees in their general bargaining units. Rather than creating a balancing test or a checklist definition of “guards,” the Board has consistently applied a case-by-case, totality of the circumstances analysis that focuses on perceived possible conflicts of interest and possible breaches of duty of loyalty for the particular employee with respect to the anticipated performance of his or her job during times of industrial turmoil. As discussed below, the determination of whether a particular employee is a “guard” is far from clear.

A. **Who Did Congress Intend to Be “Guards?”**

Section 9(b)(3) provides that the Board shall not:

> decide that any unit is appropriate for [collective bargaining] . . . if it includes, together with other employees, any individual employed as a guard to enforce against its employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(emphasis added).\(^4\) Thus, under Section 9(b)(3), “guards” are individuals who are employed to enforce the employer’s rules against employees and others for the purpose of protecting the employer’s property or the safety of persons present on the employer’s premises.

\(^3\) 29 U.S.C. §152(3).

The legislative history behind Section 9(b)(3) provides little additional guidance as to the meaning of “guard.” According to the legislative history, Congress enacted Section 9(b)(3) largely in response to the Supreme Court’s decision in NLRB v. Jones & Laughlin Steel Corp.\(^5\) In Jones & Laughlin, the Board certified the Steelworkers Union as the collective bargaining representative of the employer’s plant guards and ordered the employer to bargain with that union despite the fact that the same union also represented production employees in a different collective bargaining unit.\(^6\) The United States Court of Appeals for the Sixth Circuit denied enforcement of the Board’s order, reasoning that the militarized plant guards “assumed obligations to the Unions and their fellow workers, which might well bring them in conflict with their obligation to their employers, and with their paramount duty as militarized police of the United States Government.”\(^7\) In a significant five to four decision, the United States Supreme Court reversed the Sixth Circuit’s decision and ordered enforcement of the Board’s original order.\(^8\) The Court explained that it disagreed with the Sixth Circuit’s fears about dire consequences resulting from the Board’s certification of a mixed-union as the guard’s bargaining representative. The Court held that guards organized in a separate bargaining unit had the right to select as their bargaining representative the same union that represented their nonguard colleagues.\(^9\)

At the same time that the Supreme Court issued its decision in Jones & Laughlin, Congress was engaged in discussions over the Taft-Hartley Amendments to the NLRA. The legislative history for those Amendments demonstrates that Congress was motivated by the Sixth Circuit’s concerns about guards’ divided loyalties to their employers and fellow union brethren in enacting Section 9(b)(3).\(^10\) Significantly, the House bill initially proposed excluding guards as employees under Section 2(3) of the Act. However, the Senate refused to do that, indicating that

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\(^5\) 331 U.S. 416 (1947).
\(^6\) 53 N.L.R.B. 1046, 1047 (1943); enf. denied 146 F.2d 718 (6th Cir. 1945), rev’d 331 U.S. 416 (1947).
\(^7\) 146 F.2d 718, 722 (6th Cir. 1944), rev’d 331 U.S. 416 (1947). The Seventh Circuit issued a similar decision in NLRB v. E.C. Atkins & Co., 155 F.2d 567 (7th Cir. 1946), which was also reversed by the Supreme Court. See 331 U.S. 398 (1947).
\(^8\) 331 U.S. at 431.
\(^9\) The Board had long recognized that placing guards in the same bargaining union as nonguards was inherently inappropriate; however, as separate units represented by the same union were involved in Jones & Laughlin, the Board and the Supreme Court did not find the unit to be inappropriate or such that it would create conflict of loyalties.
\(^10\) See generally 93 Cong. Rec. 6601 (1947) (remarks of Senator Taft); 93 Cong. Rec. 6444 (1947). The Court of Appeals for the Sixth Circuit stated with regard to its concern about guards that their functions and obligations are of a dual nature.
guards should remain employees under the Act, but also indicating that it was impressed by the
divided loyalty concerns expressed in the Sixth Circuit’s decision in Jones & Laughlin. Thus,
the compromise reached between the House and the Senate committees, which became Section
9(b)(3), recognized that guards retained their status as employees under the NLRA, but also
codified the status quo established by the Board of requiring guards to be represented in separate
collective bargaining units than their non-guard colleagues, finding mixed guard/non-guard units
inherently inappropriate and further prohibiting the Board from certifying a mixed guard-
nonguard union for a unit of guards.

B. The Definition of “Guards”

Nothing in Section 9(b)(3) indicates that Congress intended to extend the definition of
guards beyond the kinds of plant guards discussed in Jones & Laughlin. Since the Taft Hartley
Amendments, however, the Board has been called upon, in numerous cases, to determine
whether employees were “guards” under the Act. Clear-cut cases of guard status have been rare.
Accordingly, the Board has had to navigate the abundant grey areas of guard status
(in)applicability. In determining guard status, the Board has used the legislative policy of
avoiding the potential conflict of dividing loyalties in any employee “obligated to enforce plant
protection rules against employees and other persons” to make such decisions. Often, the
Board’s decisions have been motivated by the goal to “insure an employer that he would have a
core of plant protection employees, during a period of unrest and strikes.”

To be determined a guard, the employee need not wear a uniform or carry a firearm, if he
or she otherwise, and primarily, performs “guard” duties. Thus, where employees have been
found primarily to perform “guard” duties, the Board has consistently held that such employees
to be “guards.” For example, in PECO Energy Co., a janitor performed limited cleaning and
maintenance work but, because of a medical condition, could not perform the full scope of his

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11 Id. at 6499; Compare H.R. REP. No. 245, 80th Cong., 1st Sess. 49-50 (1947); with H.R. REP No. 510,
80th Cong., 1st Sess. 35 (1947).
12 Section 9(b)(3) represents a balance between the concern about the protection of certain property rights
of an employer and the competing claim of stability in collective bargaining relationships. See Stay
Security, 311 N.L.R.B. 252 (1993). But Section 9(b)(3) is not a limitation on employee rights, but rather
13 See Wells Fargo Alarm Services v. NLRB, 533 F.2d 121, 125 (3rd Cir. 1976), citing United States
janitorial duties. To utilize this employee more fully, the employer assigned him additional duties, including monitoring security cameras and checking people in at the employer’s security gate. Although the janitor was not responsible for taking action against any violators and did not wear a uniform or carry a firearm, the Board held that he was clearly a “guard” despite his janitorial duties because the majority of his duties mimicked those performed by the contracted security guards. Similarly, in Allen Services Co., the Board held that employees who were responsible for enforcing the employer’s rules in protecting the safety of railroad equipment, keeping unauthorized persons off railroad property and protecting the employer’s premises were “guards” despite the fact that they did not wear uniforms, did not carry firearms, had no “guard” training and were not required to confront trespassers.

Moreover, an employee may be determined to be a guard if he or she performs some of the duties typically associated with “guards,” but also non-guard duties as long as the requirement that the employee perform guard duties is an essential part of the employee’s overall duties. For example, in Chance Vought Aircraft, Inc., the Board found that the firefighters were “guards” under Section 9(b)(3) where “an essential part of their duties and responsibilities was the enforcement of the employer’s plant protection rules and regulations.” Similarly, in Rhode Island Hospital, shuttle van drivers were determined to be guards because, although their primary duty was to transport employees from one hospital building to another, they were also “charged with the responsibility of being on the look out for and reporting security problems or rule violations” and they also responded to “threatening situations when needed” and these “guard-type” duties were not a minor and incidental part of their overall responsibilities, even if not their primary responsibility. Also, in Rhode Island Hospital, security dispatchers were also determined to be guards because as they were responsible for monitoring the hospital’s closed circuit TV system, they were directly responsible for “being alert to any incident, situation, or

16 Id.
17 Id. at 1084.
19 110 N.L.R.B. 1342, 1346 (1954). See also MGM Grand Hotel, 274 N.L.R.B. 139 (1985) (finding those employees who operated and monitored the safety/fire alarm system to be guards because although they were primarily responsible for monitoring the system for fire prevention, they also monitored door exit alarms, stairwell motion detectors and a watch tour system and, in the event of an alarm, they notified security or other appropriate departments to respond).
problem which needs responsive action and for reporting such incidents to the proper authorities” even though they did not actually respond to such situations or personally confront employees or others because their conduct in observing and reporting infractions was “an essential link in the Hospital’s effort to safeguard its employees and enforce its rules.”21 And, in Wells Fargo Alarm Services, although service technicians were primarily responsible for repairing and servicing their customers’ security systems, another essential job duty was to immediately notify the customer and the police or fire department when the customer’s security alarm had been triggered.22 Depending on the volume of security alarms triggered, service technicians were required to go to the customer’s premises, visually inspect the premises for signs of entry, wait for the arrival of police, firefighters and/or the customer, seek identification from anyone attempting to enter the premises, and refuse entry to unauthorized persons without the use of force.23 Indeed, service technicians responded to about 20 percent of the security alarms that were triggered.24 The Board reasoned that, although the service technicians’ primary duties were to repair and service their customers’ security systems, they had the additional duty of responding to security alarms, and thus, they were “guards.”25

The Board’s finding of guard status has also extended beyond traditional security-type job descriptions. For example, in Broadway Hale Stores, Inc., the Board found that fitting room checkers were guards where they were required to enforce rules regarding how many items customers could bring in dressing rooms, they were required to maintain a constant presence in fitting rooms, and they were required to report anyone acting suspiciously.26 Because fitting

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21 Id. at 347.
23 Id.
24 Id.
25 See also A.W. Schlesinger Geriatric Ctr., 267 N.L.R.B. 1363 (1983)(holding that maintenance employees qualified as “guards”); Wright Memorial Hospital, 255 N.L.R.B. 1319 (1981) (holding that ambulance drivers qualified as “guards” where they made security rounds twice a shift and although they did not personally confront other employees, they were responsible for reporting rule infractions to their supervisors who then took action), enf’d. 771 F.2d 400 (8th Cir. 1985); Local 3, Int’l Brotherhood of Electrical Workers v. NLRB, 1987 U.S. Dist. LEXIS 6577 (S.D.N.Y. July 22, 1987) (finding that electronic technicians are guards within the meaning of the Act as they monitor the fire management safety system and notify and assist the appropriate authorities in the event of a problem). But see Wells Fargo Alarm Services v. NLRB, 533 F.2d 121 (3rd Cir. 1976), enforcing 218 NLRB 68 (1975) (finding that service technicians were not guards where the facts showed that the police were also called in 90% of the cases to respond to alarms and service technicians were not required to search for intruders or restrain other persons from entering the premises).
room checkers enforced the employer’s rules against customers in order to protect the employer’s property, they were deemed to be guards.27 Similarly, in Tulsa Hotel Management Corp., timekeepers who were staffed near the time clock and rear entrance to the facility were found to be guards where they were responsible for ensuring all employees punched their time cards and preventing the ingress of unauthorized persons.28

Furthermore, a guard does not have to protect solely the employer or its property, or to enforce its employer’s rules in order to be deemed a guard. Rather, an employee who is responsible for protecting an employer, an employer’s property or enforcing an employer’s rules will be deemed a guard. Thus, the definition of guard has been extended to include armored car drivers, unarmed courier drivers and contract security personnel who protect property belonging to their employers’ customers.29 The Board has further determined that employees such as “coin room employees” who worked in a vault at their employer’s facility where customers’ valuables were stored and were responsible for counting bags of coins, weighing them, stacking them, wrapping them, taking physical inventory, performing the necessary paperwork regarding the coins received and released, and keeping unauthorized personnel out of the coin room were guards.30

In stark contrast, employees who are labeled “guards” but who lack the requisite responsibility for enforcing an employer’s rules will not be deemed to be guards under the Act. For example, in Wolverine Dispatch, the Board held that a receptionist at an armored-car company who performed primarily clerical duties was not a “guard” even though one of her duties was to grant or deny entry to individuals who attempted to enter the locked facility but where she did not wear a uniform, carry a weapon, receive guard training, make rounds or represent herself to others as a guard.31 Furthermore, in 55 Liberty Owners

27 Id.
29 See e.g., MDS Courier Services, Inc., 248 N.L.R.B. 1320, 1320-21 (1980)(finding drivers who used their personal vehicles to transport non-negotiable instruments and jewelry to customers’ premises after hours to be “guards”); Brinks Inc., 226 N.L.R.B. 1182, 1183-1184 (1976)(classifying couriers who delivered non-negotiable instruments as guards). But see Pony Express Courier Corp. v. NLRB, 981 F.2d 358 (8th Cir. 1992) (holding that armored car company courier-guards who transported other employer’s valuables were not “guards” because they held themselves out as delivery persons, did not receive guard training, had no obligation to protect the property and were not held accountable for it) enforcing 306 N.L.R.B. No. 22 (1992); and Purolator Courier Corp., 300 N.L.R.B. 812 (1990) (same).
Corp., the Board held that doorpersons and elevator operators in several residential cooperative and condominium buildings were not “guards” even though they performed guard-like functions, such as permitting or denying entry into the locked buildings and enforcing no-loitering and no-smoking rules, because they did not make rounds, were not trained as security guards, did not carry firearms, did not use physical force and did not identify themselves as guards to others. Finally, in Tac/Temps, the Board held that checkers who simply reported discrepancies in product count to management were not “guards” because they did not actually investigate whether theft occurred or otherwise act as guards.

In sum, an employee is a “guard,” regardless of his or her title or position, if his or her responsibilities include either enforcing an employer’s rules against others, protecting an employer’s or customer’s property or premises from the actions of others, or protecting the safety of individuals on the premises. In any of these situations, the employee could be faced with potential conflicting loyalties between the duty of loyalty he or she owes to perform his responsibilities to the employer and the duty of loyalty owed to fellow union members. Section 9(b)(3) was intended to address employees faced with the potential for these divided loyalties.

C. Determining “Guard” Status in Modern Times

Although there have been few recent cases involving the determination of “guard” status under Section 9(b)(3), there is no indication that the Board intends to limit or change its interpretation of the definition of guard. Indeed, it appears that the Board has consistently decided guard status based on the facts showing the presence or absence of a perceived conflict of loyalties for such employees. The Board has also consistently analyzed “guard” status based on the totality of the existing circumstances. As demonstrated above, the definition of a “guard” can range from a seemingly non-guard janitor to a firefighter to a security system technician.

It remains to be seen which professions might be deemed to be guards in this modern technology-friendly era. The Board has not yet, however, begun tackling these issues. It is

33 314 N.L.R.B. 1142 (1994). See also Syracuse University, 325 N.L.R.B. 162, 167-68 (1997) (holding that parking enforcement officers who issued tickets and tow warnings for parking violations were not guards because they did not carry guns, receive guard training, have keys to offices, make rounds, present themselves to others as guards, or possess the authority to enforce any of the employer’s security rules). And see City of Boston Cab Ass’n, 177 N.L.R.B. 64, 65 (1969)(holding that “starters” who monitored the flow of cabs at the airport and reported drivers who violated cab rules were not “guards”).
possible that today’s most indiscernible “guards” may be found in the surveillance, computer-monitoring, quality and inventory control and safety fields.

For example, many workplaces have become increasingly concerned with security issues and have hired private security personnel and/or systems. These personnel are expected to keep their workplaces safe by monitoring and responding to criminal or other improper conduct. If an employee’s sole duty is to monitor the video footage and report any suspicious behavior to armed guards who then act on these reports, is that employee a “guard”? What if that employee’s report leads to the termination of an employee? Does the employee now become a “guard?”

Similarly, employees are also deeply concerned about the potential for the abuse of, unauthorized use of, or unauthorized access to employer-provided computers and other electronic systems. Many employers have enacted work rules designed to limit employee use of company-provided electronic systems, including email and internet, to business only use and/or to ensure that such use complies with the employers’ prohibitions against harassment and discrimination. To this end, many employers have implemented regular monitoring of employee internet and email use. It is easy to imagine an IT professional who is required sporadically to monitor email and internet use by the company’s employees and who, as part of those duties, is required to report any abnormalities or potential violations to his or her superior. If depending on the gravity of the abnormality, such report leads to discipline being issued to the employee who has violated the company’s rules, is this IT employee a “guard?”

In this tough and competitive economic climate, employers are facing increased challenges to the safety and quality of their products, as well as an increase in incidents of employee theft. As a result, many employers may hire quality or inventory control employees who are charged with ensuring that all products comply with the proper rules and regulations and/or ensuring that employees are not damaging or stealing their employer’s products. The report of such a quality or inventory control employee could surely lead to repercussions for other employees, including possible discipline for a dishonest employee or a poorly performing one. Is such an employee a “guard?”

34 The Board’s reasoning with respect to the security dispatchers in Rhode Island Hospital would seem to support a finding of guard status on these facts. 313 N.L.R.B. at 343.
35 The Board’s decision in Tac/Temps, 314 N.L.R.B. at 1142, suggests that employees whose sole responsibility it is to report discrepancies in inventory to management would not be guards. However, the
Finally, many employees are also facing an increased number of on-the-job injuries or illnesses with corresponding claims for worker’s compensation. As a result, employers may find it necessary to have safety or ergonomic monitors to ensure that employees are performing their duties in a safe manner or using employer-provided equipment consistent with ergonomic standards. Many employers have adopted strict safety regulations or employee work rules which penalize employees for safety offenses. If these safety or ergonomic monitors are required to monitor safety practices, do they become “guards”? If their responsibilities also require them to report employee safety violations, do they then become “guards”?

A determination of guard status will depend upon the totality of the circumstances and consideration of all of the factors used by the Board to evaluate “guard” status. However, in making such a determination, the Board will focus on whether the employee’s responsibilities to the employer could interfere with their duty of loyalty to a union or fellow union members. As discussed below, the classification of an employee as a “guard” will impact the employee’s, the employer’s and union rights with respect to the collective bargaining process.

D. What Rights Do “Guards” Have Under the Act?

As a result of the Taft-Hartley Amendments, guards retained their status as “employees” under Section 2(3) of the Act. As such, the Board has determined that guards are entitled to Section 7 rights, which include the rights to “self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection” or to refrain from doing so.36 Guards are entitled to join a mixed guard-nonguard union and are protected by Sections 8(a)(1) and (3) of the Act and thus, employers may

Board’s decision in Burns International Sec. Services, Inc., 278 N.L.R.B. 565 (1986) certainly suggests that, in some circumstances, inventory control employees might be construed to be “guards” where they are responsible for inspecting equipment before it leaves the employer’s premises to ensure that employees or others have not engaged in theft.

36 29 U.S.C. §157. And see Wackenhut Corporation, 348 N.L.R.B. 1290 (2006) (adopting the ALJ’s rejection of the employer’s affirmative defense that guards had no rights under Section 8(a)(1) of the Act and adopting the ALJ’s findings that Section 7 rights, as protected by Section 8(a)(1), apply to any labor organization, without reference to mixed status). However, some commentators have opined that “because Section 9(b)(3) limits the organizational choices of guard employees, its coexistence with Section 7 of the Act [which gives employees the right to organize and bargain collectively through representatives of their own choosing] creates an apparent anomaly in the federal labor laws.” See The NLRA’s “Guard Exclusion”: An Analysis Of Section 9(b)(3)’s Legislative Intent and Modern-Day Applicability, 61 Ind. L. J. 457, 458 (1985-1986).
not discriminate against guards for supporting or opposing a labor organization or for engaging in activities on behalf of or in opposition to such an organization.\footnote{See NLRB v. White Superior Div., White Motor Corporation, 404 F.2d 1100 (6th Cir. 1968). And see Bel-Air Mart, Inc., 203 N.L.R.B. 339 (1973) (finding a violation of Sections 8(a)(1) and (3) of the Act where a guard was discharged for attending the meetings of a nonguard union), enf’d Bel-Air Mart, Inc., 497 F.2d at 322 (rationalizing that if Section 9(b)(3) does not prevent guards from joining the same union which represents non-guards, the Act certainly cannot be said to prevent a guard from attending a union meeting).

\footnote{The more appropriate question for this paper would be: “Is the NLRB precluded from issuing a bargaining order for an all guard bargaining unit to a mixed union?” as Section 9(b)(3) explicitly prohibits the Board from finding a mixed unit appropriate, let alone from issuing a bargaining order for such a unit. Indeed, the contract bar rule does not apply in cases involving mixed guard-nonguard units and a collective bargaining agreement between an employer and a union representing a mixed guard-nonguard unit will not bar a petition for a guards-only unit. See Corrections Corp. of Am., 327 N.L.R.B. 577 (1999). In contrast, a petition for an election by a guards-only union for an election composed solely of guards will be barred by a collective bargaining agreement between an employer and a mixed guard union. See Stay Security, 311 N.L.R.B. 252, 253 (1993) (basing its decision on the importance of stability in collective bargaining agreements and stating that it was “not the purpose of Section 9(b)(3) to relieve an employer during the contract period from its collective bargaining agreement with a union which it voluntarily recognized even if that union would not qualify under Section 9(b)(3) for certification”).}

III. WHAT ARE THE RIGHTS OF MIXED-GUARD UNITS AND MIXED GUARD UNIONS UNDER THE ACT?

Section 9(b)(3) has two significant mandates. Specifically, Section 9(b)(3) states that the Board: (1) shall not “decide that any unit is appropriate for [collective bargaining] if it includes, together with other employees, any individual employed as a guard;” and (2) that “no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.” The first mandate prohibits the Board from treating as appropriate a mixed unit of guards and nonguards and the second mandate prohibits the certification of a mixed guard-nonguard union in a guard unit. Although the language of Section 9(b)(3) appears to be clear, there have been significant divisions between the Board and the Courts on the actual limits placed by these provisions on the Board and on “guard” employees.

A. Limitations on the Board’s Power with Respect to Mixed-Guard Units

Section 9(b)(3) forbids the Board from finding a mixed guard-nonguard unit to be an appropriate unit.\footnote{See NLRB v. White Superior Div., White Motor Corporation, 404 F.2d 1100 (6th Cir. 1968). And see Bel-Air Mart, Inc., 203 N.L.R.B. 339 (1973) (finding a violation of Sections 8(a)(1) and (3) of the Act where a guard was discharged for attending the meetings of a nonguard union), enf’d Bel-Air Mart, Inc., 497 F.2d at 322 (rationalizing that if Section 9(b)(3) does not prevent guards from joining the same union which represents non-guards, the Act certainly cannot be said to prevent a guard from attending a union meeting).

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This prohibition codifies the Board’s earlier practice of refusing to approve mixed guard-nonguard units and sends a clear message that such units are to be discouraged.\footnote{See NLRB v. White Superior Div., White Motor Corporation, 404 F.2d 1100 (6th Cir. 1968). And see Bel-Air Mart, Inc., 203 N.L.R.B. 339 (1973) (finding a violation of Sections 8(a)(1) and (3) of the Act where a guard was discharged for attending the meetings of a nonguard union), enf’d Bel-Air Mart, Inc., 497 F.2d at 322 (rationalizing that if Section 9(b)(3) does not prevent guards from joining the same union which represents non-guards, the Act certainly cannot be said to prevent a guard from attending a union meeting).

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B. Limitations on the Board’s Power With Respect to Mixed-Guard Unions

Section 9(b)(3) forbids the certification of a union representing or affiliated with both a unit of guards and a unit of non-guards. Section 9(b)(3) is silent, however, on whether an employer and a mixed guard union may voluntarily establish a bargaining unit of guards. The Board has held, however, that an employer may, if it chooses, recognize a mixed guard union for purposes of collective bargaining. The choice is entirely the employer’s and if the employer refuses to bargain with a mixed guard union, the employer does not commit an unfair labor practice. If the employer, however, voluntarily chooses to recognize a mixed guard union, what are its bargaining obligations and how long do they last? Generally, the Board had held that once an employer has voluntarily recognized a union as the collective bargaining representative for a particular bargaining unit, the parties are required to bargain for a reasonable period of time before any question concerning representation can be raised. Thus, generally once an employer recognizes a union as the representative of a bargaining unit, it cannot refuse to bargain with that representative. To do so is a violation of Section 8(a)(5) of the Act. Moreover, a bargaining representative generally enjoys a rebuttable presumption of continuing majority support following expiration of a collective bargaining agreement, and it is generally a violation of Section 8(a)(5) of the Act for an employer to withdraw recognition from a union simply because the contract has expired. However, for the first time in Wells Fargo Armored Service Corp, (hereinafter “Wells Fargo”), the Board was confronted with the question of whether an employer who voluntarily recognizes a mixed guard union is privileged to withdraw that recognition upon expiration of the collective bargaining agreement.

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40 NLRB v. White Superior Div., 404 F.2d at 1100. See also MGM Grand Hotel, 329 NLRB 464, 466 (1999)(stating that: “It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations”).

41 White Superior Div., 404 F.2d at 1103-1104

42 See Keller Plastics Eastern Inc., 157 N.L.R.B. 583 (1966). And see Sound Contractors Ass’n., 162 N.L.R.B. 364 (1966). But see Dana Corp., 351 N.L.R.B. 434 (2007)(revising the Board’s recognition bar doctrine and holding that collective bargaining contracts executed on or after the date of voluntary recognition will not bar a decertification or rival union petition unless adequate notice of the recognition has been provided to employees and 45 days has passed without a valid petition being filed).

43 See NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 613 (1969)(“a bargaining relationship, once rightfully established must be permitted to exist and function for a reasonable period of time in which it can be given a chance to succeed”). And see Amoco Oil Co., 221 N.L.R.B. 1104 (1975).


1. **The Wells Fargo Decisions**

   a. **The Board’s Decision in Wells Fargo**

   In 1948, Local 820 of the Teamsters Union, a mixed guard union, entered into an agreement with Wells Fargo, an armored car services company which provided for the transportation and delivery of monies, securities and other valuables, to represent a unit consisting of all chauffeurs, custodians and guards working on trucks in the armored car division. For over 30 years, Local 820 and the company engaged in collective bargaining and entered into successive collective bargaining agreements. Thereafter in 1979, Local 820 merged with Local 807 of the Teamsters Union, also a mixed guard union. The company recognized Local 807 and began bargaining for a new contract, however, in 1980, these negotiations stalled and the guards began an economic strike. As a result of the strike, Wells Fargo withdrew its voluntary recognition from the Teamsters as the guards’ collective bargaining representative.

   The Teamsters thereafter filed unfair labor practice charges alleging, among other things, a violation of Section 8(a)(5) based on Wells Fargo’s withdrawal of recognition. Wells Fargo asserted that it retained its right to rescind its voluntary recognition at any time because of the actual or potential conflict of loyalties between its guards and other members of the Teamsters Union.

   The administrative law judge (“ALJ”) rejected the company’s arguments and held that Wells Fargo violated the NLRA because its withdrawal of recognition was based solely on the Teamster’s refusal to accept Wells Fargo’s “final” contract offer. In light of the employer’s earlier recognition of the union, the ALJ concluded that it was “estopped” from withdrawing recognition based on an economic consideration. The ALJ explained that there was a difference between ordering an employer to recognize a noncertified union (which was prohibited by Section 9(b)(3)) and forcing an employer to continue contract negotiations with a noncertified

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46 Id. at 794.
47 Id.
48 Id.
49 Id. at 793.
50 Id.
51 Id. at 800.
52 Generally the rule is that an employer is equitably estopped from challenging the appropriateness of the unit it has agreed to through voluntary recognition. See Red Coats, Inc., 328 N.L.R.B. 205 (1999); and see Alpha Assocs., 344 N.L.R.B. 782 (2005), enf’d. 2006 U.S. App. LEXIS 21223 (4th Cir. 2006).
Further, the ALJ noted that the company was not exercising its right to deny a noncertified union that it had voluntarily recognized and bargained with for years at first instance, but instead had withdrawn recognition in order to gain an advantage at the bargaining table. The ALJ reasoned that Wells Fargo’s conduct essentially deprived the guards of their chosen bargaining representative. Accordingly, the ALJ recommended that the Board issue a bargaining order requiring Wells Fargo to continue its negotiations with the Teamsters.

A divided Board rejected the ALJ’s recommendation. The majority (consisting of Chairman Dotson and Members Hunter and Dennis) held that Wells Fargo was privileged to withdraw its voluntary recognition of the union at the end of the contract term because the bargaining unit was uncertifiable as a result of its affiliation with the Teamsters—a union representing both guards and non-guards. The Board found that because Section 9(b)(3) barred the Board from certifying a mixed-guard union, the Board also could not issue a bargaining order forcing the employer to continue to bargain, or to resume bargaining, with a mixed guard-nonguard union. In other words, it held that requiring an employer to bargain with an uncertifiable union “gives the union indirectly --- by a bargaining order --- what it could not obtain directly --- by certification . . . – i.e., it compels the employer to bargain with the union.”

Although the Board agreed with the ALJ that Wells Fargo’s initial voluntary recognition of the union was proper, the Board disagreed with his opinion that there was a tangible difference between ordering an employer to establish a bargaining relationship with an uncertified union and ordering an employer to a bargaining relationship with such a union already established and opined that such opinion “completely overlooks the purpose for which Section 9(b)(3) was enacted.” The Board emphasized that based on Senator Taft’s statement that the House-Senate Conference Committee relied on the Sixth Circuit’s decision in Jones & Laughlin in enacting Section 9(b)(3), Congress intended to “shield employers of guards from the potential conflict of loyalties resulting from a guard union’s representation of non-guard

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53 270 N.L.R.B. at 798-800.
54 Id.
55 Id. at 798-99.
56 Id. at 801.
57 Id. at 787, 790.
58 Id. at 787-88.
59 Id.
60 Id.
61 Id. at 788.
employees or its affiliation with other unions who represent nonguard employees.”

Viewed in light of this legislative history, the majority concluded that there was no difference between certification and compulsory maintenance of a bargaining relationship through the use of a bargaining order. Rather, the majority stated: “In either case, saddling the employer with an obligation to bargain presents it with the same set of difficulties and the same potential conflict of loyalties that Section 9(b)(3) was designed to avoid.” Accordingly, the majority concluded that the employer was privileged to withdraw from that relationship once the parties’ collective bargaining agreement had expired. The majority further rejected the ALJ’s determination that the employer was estopped from withdrawing recognition because it had previously extended recognition to the union. In rejecting the estoppel argument, the majority concluded that estoppel was improper because the bargaining relationship between the company and Local 807 was “less than 1 year old when recognition was withdrawn.” The majority further rejected the ALJ’s reliance on the Board’s decision in International Telephone and Telegraph Corp. to support his estoppel finding, arguing that such was distinguishable from the instant facts.

In a strong dissent, Member Zimmerman rejected what he deemed to be the majority’s “expansive” view of Section 9(b)(3) and argued that Wells Fargo’s withdrawal of recognition from the noncertified union in response to a bargaining stalemate violated the NLRA. Zimmerman argued that, while in certain circumstances, the Board may not certify a union in a particular unit, it may nevertheless uphold a bargaining unit earlier established by the parties in that unit. In support of his position that there is a distinction between the creation and

62 Id at 789.
63 Id. at 789.
64 Indeed, the majority found that, on at least one occasion, the potential for a conflict of loyalties which had concerned Congress had “turned into a reality” in the instant case. Id at n.10
65 Id. at 789-90. The Wells Fargo majority found it unnecessary to decide whether the employer would have been privileged to withdraw recognition within the contract term. Thus, the Board’s holding in Burns Detective Agency, 134 N.L.R.B. 451, 453 (1961) that normal contract bar rules apply to collective bargaining agreements between an employer and a mixed guard union was left undisturbed. And see Stay Security, 311 N.L.R.B. at 252 (same).
66 Id. at 790. This finding is peculiar given that the majority appears to have ignored the over 30-year history in which the company had bargained with Local 820, Local 807’s predecessor.
67 159 N.L.R.B. 1757 (1966). In distinguishing International Telephone and Telegraph Corp. from the instant facts, the majority concluded that the estoppel theory cannot be used to preclude the intended beneficiary of the statute from asserting rights hereunder and that “Inasmuch as [the employer] obviously belongs to a class which is the intended beneficiary of Section 9(b)(3), it was not estopped from asserting its rights under that section by refusing to bargain with the Union when it did.” 270 N.L.R.B. at 790.
68 Id. at 793.
maintenance of a unit already-recognized, he cited cases involving Section 9(b)(1)’s limitation that the Board may not find mixed units of professionals and non-professionals appropriate unless the professionals have had an opportunity to vote on their inclusion.69 He asserted that for the withdrawal of recognition to be valid, Wells Fargo needed to demonstrate reasonable, objective doubt about the union’s continuation as the majority of its employees’ representative of choice.70 He urged that the majority’s ruling mischaracterized the legislative history of Section 9(b)(3) because nothing in that history supported the majority’s view that Congress intended to divest mixed-guard unions of the “long-established rights flowing from voluntary recognition.”71 He further argued that Congress intended to limit – not prohibit – mixed-guard unions from asserting bargaining rights.72 While Zimmerman acknowledges that “in enacting Section 9(b)(3), Congress was concerned with potential conflict of loyalties,” he states that “Section 9(b)(3) is Congress’s response to that concern and that response does not reflect a determination to prohibit a voluntarily recognized mixed union, or the employees it represents, from asserting rights under the statute shared by other unions and employees.”73 Zimmerman urged that the majority’s decision undermines the stability of collective bargaining relationships envisioned by Congress.74

69 Id. citing to Westinghouse Electric Corp. v. NLRB, 236 F.2d 939 (3d Cir. 1956) and Retail Clerks Union Local No. 324 (Vincent Drugs), 144 N.L.R.B. 1247 (1963). The majority distinguished these cases on the grounds that the legislative history behind Section 9(b)(1) did not demonstrate that Congress intended professional, non-professional units to be inappropriate in all cases, but rather, only in those cases where professionals had not been allowed to vote on their inclusion in the unit of non-professionals and that where professionals had an opportunity to vote for inclusion or exclusion, the unit could thereafter be certified by the Board. In contrast, the majority contended that the legislative history behind Section 9(b)(3) showed a clear intent to discourage mixed guard units by prohibiting the Board from certifying such a unit.
70 270 N.L.R.B. at 793.
71 Id.
72 Id.
73 Id.
74 Id.
b. **The Second Circuit’s Decision**\(^{75}\)

In *Truck Drivers Local Union No. 807 v. NLRB*, the Second Circuit enforced the Board’s Wells Fargo decision.\(^{76}\) In reaching its decision, the Second Circuit reviewed the legislative history of Section 9(b)(3) and held that “[t]here is sufficient support for the Board’s conclusion that in enacting the statute, Congress knowingly decreased the stability of bargaining relationships between employers and mixed guard-nonguard unions in order to further its objective of protecting employers from the potential for divided loyalty.”\(^{77}\) Indeed, the Court found that “the fact that Congress expressly precluded the Board from certifying a mixed guard union as the representative of a union of guards … is certainly evidence that Congress disfavored such relationships.”\(^{78}\) Thus, the Court held: “We find no reasoned basis for a distinction between initial certification and compulsory maintenance of a voluntary relationship.”\(^{79}\) The Court noted that, although an employer that voluntarily recognizes a mixed-guard union may not discontinue the relationship during the contract period, there is no basis for holding that such an employer’s voluntary recognition “be forever binding once accepted.”\(^{80}\) The Court concluded that: “Congress precluded certification of such unions because it realized that employers should

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\(^{75}\) An amicus curiae brief filed by Wilma Liebman and Robert Baptiste on behalf of the International Brotherhood of Teamsters argued that Wells Fargo was wrongly decided because “the legislative history and proper statutory construction compel the conclusion that the Section 9(b)(3) ban on certifying mixed guard unions means only that the Board cannot force a guard employer to bargain de novo” and that “it was not intended to grant guard employers an indefeasible right to destroy ongoing relationships which they voluntarily recognized.” Brief for International Brotherhood of Teamsters as Amici Curiae Supporting Petitioner, *Local 807, International Brotherhood of Teamsters v. N.L.R.B.*., 755 F.2d 5 (2nd Cir. 1985) (No. 84-4083) at p.4. Liebman and Baptiste further argued that Board’s decision would achieve “nothing other than the destruction of stability and collective bargaining rights in an entire industry.” *Id.* at 5.


\(^{77}\) *Id.* at 10, citing to the Senator Taft’s statement that “as to plant guards we provided that they could have the protection of the Wagner Act only if they had a union separate and apart from the union of the general employees.” 93 Cong. Rec. 6444, reprinted in *II NLRB, Legislative History of the Labor Management Relations Act* (1947), at 1544 (1948).

\(^{78}\) 755 F.2d at 14. See also *Velez v. Puerto Rico Marine Management, Inc.*, 957 F.2d 933, 938(1st Cir. 1992) (stating that “In prohibiting Board certification, Section 9(b)(3), rather than acting as a prohibition of membership in a guard-nonguard union, functions as a deterrent to such membership”).

\(^{79}\) 755 F.2d at 14.

\(^{80}\) *Id.* In addition, it is clear that the Board will still find and remedy violations of Section 8(a)(5) where the employer has not repudiated the bargaining relationship. See e.g. *Amoco Oil Co.*, 221 N.L.R.B. at 1104. And see *New CF & I, Inc.*, 2000 NLRB LEXIS 316 (ALJ Metz, May 17, 2000).
not be forced to bargain with mixed guard unions.” Accordingly, the Court enforced the Board’s decision in favor of Wells Fargo, holding that an employer is free to withdraw recognition from a mixed guard-nonguard union anytime after the expiration of a collective bargaining agreement.

A lengthy dissent by Circuit Judge Mansfield rejected the Court’s decision and its rationale. Judge Mansfield specifically complained that the Act “does not authorize an employer unilaterally to withdraw recognition of a union with which the employer has had collective bargaining agreements for over 30 years merely because that labor organization is a ‘mixed-guard’ union that could not in the first place have been certified as a representative of the employees.” Judge Mansfield further complained that the effect of the Board’s decision “is to upset well-established labor relationships by conferring upon employers of such personnel an unfair advantage going beyond the purpose and plain language of the Act.” Indeed, Mansfield explained that: “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.” He argued that nothing in the Act “prohibits the organization of a mixed-guard union or bars it from functioning as the representative of any group of employees.” Indeed, he noted that in NLRB v. White Supervision Div. White Motor Corp., the Sixth Circuit had confronted the question as to whether an employer had violated Sections 8(a)(1) and (5) of the Act by discouraging the membership of guard employees in a mixed guard union and had concluded that, although the

81 755 F.2d at 17.
82 Id. at 17-18. In reaching this conclusion, the Court specifically rejected the union’s argument that estoppel should apply to preclude the employer from withdrawing recognition. As to the union’s reliance on cases such as NLRB v. A. Lasaponara & Sons, Inc., 541 F.2d 992 (2nd Cir. 1976), cert. denied, 430 U.S. 914, 51 L.Ed.2d 592, 97 S.Ct. 1325 (1977), the Court distinguished such from the instant facts as that case applies only to the situation in which a certifiable union is voluntarily recognized as compared to an uncertifiable union in the instant case.
83 755 F.2d at 19-35.
84 Id. at 19.
85 Id. at 20.
86 Id. at 25-27 citing to NLRB v. A. Lasaponara & Sons, Inc., 541 F.2d 992, 005 (2d Cir. 1976); International Telephone & Telegraph Corp., 159 N.L.R.B. 1757 (1966); enf’d in rel. pt., 382 F.2d 366 (3rd Cir. 1967), cert. denied, 389 U.S. 1039, 97 L.Ed. 2d 829, 88 S.Ct. 777 (1968); Retail Clerks Local 324 (Vincent Drugs), 144 N.L.R.B. 1247 (1963).
87 755 F.2d at 21.
88 404 F.2d at 1100.
NLRB could not certify the union in question because of its mixed guard status, membership was not unlawful, and thus, employees still possessed Section 7 rights and could rightfully choose that union. Indeed, he stated that the bar was exclusively to the certification of such a unit, but that did not mean that a non-certified union representing a majority of the employees in a unit is no longer entitled to the protections of the Act.\textsuperscript{89} Mansfield argued the majority’s decision would put employees at an unfair disadvantage, particularly during an economic strike after the contract has terminated because the employer could threaten instant withdrawal to gain concessions. Thus, Mansfield held that “a distinction must be drawn between creating, establishing or certifying a union as the agent for establishing a collective bargaining relationship, on the one hand, and maintaining such a relationship after it has been created by the parties, on the other.”\textsuperscript{90} He argued further that an employer is free to decide whether or not to recognize an unqualified union at the beginning of the bargaining relationship, but that: “Once an employer recognizes a non-certified union, the union is entitled to seek and obtain from the Board the same remedies as those available to a certified union.”\textsuperscript{91}

2. **The Temple Security, Inc. Cases**

   a. **The Board’s Decision in Temple Security**

In 1999, the Board reaffirmed its Wells Fargo decision in *Temple Security, Inc.*\textsuperscript{92} In 1986, Temple Security, a provider of guard services whose entire workforce consisted of “guards,” and the General Service Employees Union, Local 73 (“Local 73”) entered into a memorandum of understanding in which the company voluntarily recognized the mixed-guard union as the exclusive bargaining representative for all of its employees.\textsuperscript{93} The parties thereafter renewed their collective bargaining agreements every two years until 1994.\textsuperscript{94} However, in 1994, when it came time to initiate bargaining negotiations, the company informed the Union that, as

\textsuperscript{89} Id. at 1103.
\textsuperscript{90} 755 F.2d at 27.
\textsuperscript{91} Id. See also James P. McCabe, *Voluntary Recognition of a Mixed Guard Union Under Section 9(b)(3) of the National Labor Relations Act – Bargaining At Will: Truck Drivers Local 807 v. NLRB, 60 St. John’s L. Rev. 162, 169 (Fall 1985) (arguing that while Section 9(b)(3) of the Act protects an employer from compulsory recognition of mixed guard unions, “this was a threshold protection afforded the employer, rather than a continuing protection invokeable after an employer has voluntarily recognized a mixed-guard union”).
\textsuperscript{92} 328 N.L.R.B. 663 (1999), enf. denied 230 F.3d 909 (7th Cir. 2000), on remand at 337 N.L.R.B. 372 (2001).
\textsuperscript{93} Id.
\textsuperscript{94} Id.
allowed by the Second Circuit and Board’s decisions in Wells Fargo, it was withdrawing its voluntary recognition as of the expiration of their collective bargaining agreement. Just days after Temple Security withdrew its voluntary recognition from the Union, the Independent Courier Guards, a wholly guards union, notified the company that it represented a majority of the employees and asked to be recognized as the bargaining representative. Temple Security voluntarily recognized the Guards Union and the parties executed a collective bargaining agreement. Thereafter, Local 73 filed charges against Temple Security under Section 8(a)(5) for failure to bargain. While the General Counsel and the union recognized that Wells Fargo provided the governing law, they argued that Wells Fargo was wrongly decided and should be overruled.

The Board majority (composed of Chairman Truesdale and Members Hurtgen and Brame), refused to overrule Wells Fargo, in spite of the Union’s argument that Section 9(b)(3) was silent with regard to the voluntary creation of bargaining relationships between employers and mixed-guard unions. The Board noted that the Wells Fargo decision was thorough in its analysis and reasoning and had been enforced by the Second Circuit. Accordingly, the Board held that Temple Security acted lawfully when it withdrew its voluntary recognition at the expiration of its collective bargaining agreement with the mixed-guard union.

The dissent (composed of Members Liebman and Fox) argued that Wells Fargo should be overruled. The dissent was rooted almost entirely in the dissents of Member Zimmerman and Circuit Judge Mansfield in the Wells Fargo cases, which focused on the fundamental unfairness to the employees, the contrariness to the overall goal of the Act of encouraging stability in collective bargaining relationships and the unnecessary expansion of the plain language of Section 9(b)(3) in holding that it prohibits anything more than the certification of mixed-guard unions by the Board. Specifically, according to the Temple Security dissent, although an employer has the absolute right to insist on a Board-conducted election before recognizing a

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95 Id. at 664.
96 Id.
97 Id.
98 Id.
99 Id. at 664-65.
100 Id. at 665.
101 Id.
102 Id.
103 Id. at 665-66.
union, that right is forfeited once the employer voluntarily recognizes a union. They further argued that once an employer voluntarily enters into a collective bargaining relationship with a mixed-guard union, it is estopped from repudiating that relationship. The dissent complained that the majority “elevat[ed] the narrow purpose of Section 9(b)(3) [that is to protect employers from potential conflicting loyalties when a guard is called upon to enforce the employer’s rules against a fellow union member] over the overall purpose of the Act of encouraging stable labor relationships.”

b. The Seventh Circuit’s Decision in Temple Security

In General Service Employees Union, Local 73 v. NLRB, the Seventh Circuit refused to enforce the Board’s decision in Temple Security, concluding that “the Board pushed further than the Act permits when it concluded that a prohibition against certifying certain types of unions under the terms of Section 9(b)(3) . . . also meant that unions were otherwise unprotected by the statute.” In reviewing the Board’s and Second Circuit decisions in Wells Fargo, and the Board’s Temple Security decision, the Seventh Circuit explained that there was no need to look beyond the language of the Act to understand the scope of the limitation in Section 9(b)(3). Specifically, while Section 9(b)(3) prohibits the Board from certifying a mixed-guard union, nothing prohibits an employer from voluntarily recognizing a mixed-guard union and that, accordingly, voluntarily recognized mixed-guard unions are entitled to the same protections as any other voluntarily recognized union.

In reaching this decision, the Court reasoned that Section 9(b)(3)’s prohibition on certification of mixed unions was explicit and thus, there was no reason to read anything else into the express language. The Court refused to read Section 9(b)(3) as depriving mixed-unions of the many protections, aside from Board-certification, guaranteed by the Act. The Court explained that creating an exception to Section 8(a)(5) based on uncertifiability would go beyond the prohibitions that Congress had created in Section 9(b)(3) and condition the benefits of Sections 7 and 8(a) on certification. It further explained that Section 9(b)(3) has “the effect of

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104 Id. at 666.
105 Id.
106 Id.
107 See General Service Employees Union, Local No. 73 v. NLRB, 230 F.3d 909 (7th Cir. 2000).
108 Id. at 912.
109 Id.
110 Id. at 914-915.
establishing a balance between the right of an employer to protect its property and “the importance of stability in collective bargaining agreements.”

The Court concluded that “Part of that balance is the Act’s determination that its concern for an employer’s property rights ‘is not undermined when an employer voluntarily waives its 9(b)(3) rights and recognizes a guard/nonguard union for a unit of guards.’” As a result, the Court unanimously denied enforcement of the Temple Security decision and remanded the case to the Board.

c. The Temple Security Decision on Remand to the Board

On remand, the Board unanimously agreed to “accept the [Seventh Circuit] court’s decision as to the law of the case” and held that Temple Security was not privileged to withdraw its voluntary recognition from the Union simply because it was a mixed-guard union. Accordingly, the Board issued a bargaining order requiring the employer to recognize and bargain with a mixed-guard union. The Board expressly decided, however, to not overrule its original decision in Temple Security or its decision in Wells Fargo.

3. What is the Board’s Current Standard for Responding to an Employer’s Withdrawal of Recognition from a Mixed Guard Union?

Following the Wells Fargo and Temple Security decisions, one would have expected a hotbed of contradictory decisions to be issued by the Board and the Circuit Courts. However, there has been only one Board decision arising out of an employer’s withdrawal of voluntary recognition from a mixed-guard union upon expiration of the parties’ collective bargaining agreement.

111 Id. at 916, citing to Stay Security, 311 NLRB at 252-53.
112 Id. Indeed, some have argued that Section 9(b)(3) strikes the proper balance between the employer’s concern with protecting its property and employees’ right to select a bargaining representative of their choosing by allowing for voluntary recognition, but not certification of a mixed union. At least one commentator has argued that “an employer’s voluntary recognition of a mixed union gives rise to an inference that the risk of divided loyalties is either highly negligible or nonexistent. And even if that possibility exists, an employer accepts that risk by his decision to recognize the union.” See The NLRA’s “Guard Exclusion”: An Analysis Of Section 9(b)(3)’s Legislative Intent and Modern-Day Applicability, 61 Ind. L. J. 457, 473-74 (1985-1986).
113 230 F.3d at 916.
115 Id. at 373-74.
116 Id. at 373 n.7.
117 While there has only been one occasion for the Board to consider the continued viability of Wells Fargo after the Temple Security decision, the Board has considered whether the Board’s prohibition from certifying a mixed union for a unit of guards means that the mixed union is barred from any of the Board’s processes and has consistently found that to be the case. See e.g. University of Chicago, 272
Chairman Battista and Members Liebman and Meisburg issued a unanimous decision based on the facts set forth in Northwest Protective Serv.\(^{118}\) Specifically, for approximately 30 years, Northwest’s guard employees had been represented by the International Union of Security Officers (“IUSO”), a guards-only union.\(^{119}\) IUSO thereafter merged with the SEIU, Local 24/7 (Local 24/7) and became a mixed guard-nonguard union.\(^{120}\) Following the merger, Local 24/7 requested recognition from Northwest but although Northwest agreed to meet with Local 24/7, it expressly reserved its right not to recognize any union other than IUSO and to bargain exclusively with a guards-only union.\(^{121}\) Meanwhile, the International Union, Security, Police and Fire Professionals of America (“SPFP”) informed Northwest that it had majority support among the guards and requested voluntary recognition.\(^{122}\) Northwest refused to voluntarily recognize SPFP at that time but advised that it would consider, if at all, voluntarily recognizing SPFP only if a card check established that SPFP, in fact, represented a majority of its guards and only after the expiration of its existing collective bargaining agreement with IUSO.\(^{123}\) SPFP performed a card check that established its status as the representative of a majority of Northwest’s guards and, accordingly, Northwest voluntarily recognized SPFP as the exclusive representative of its guards as of the expiration of the existing contract with IUSO.\(^{124}\)

Northwest informed Local 24/7 of its decision to voluntarily recognize SPFP. Local 24/7 responded by threatening picketing and general disruption of Northwest’s business if it did not recognize and bargain with Local 24/7.\(^{125}\) As a result, Northwest recognized Local 24/7 prior to the expiration of its existing contract with IUSO and, consequently, voided its voluntary recognition agreement with SPFP.\(^{126}\) SPFP responded by filing unfair labor practice charges

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\(^{119}\) Id. at 1201.

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id.

\(^{124}\) Id. at 1201-02.

\(^{125}\) Id. at 1202.

\(^{126}\) Id.
against Northwest and Local 24/7, alleging that that Northwest had unlawfully withdrawn its voluntary recognition of SPFP and that Local 24/7 had unlawfully accepted Northwest’s improper voluntary recognition.\textsuperscript{127}

The Board (Chairman Battista and Member Meisberg) relied on \textit{Wells Fargo} in holding that Northwest had lawfully withdrawn its voluntary recognition from a mixed-guard union upon expiration of the collective bargaining agreement.\textsuperscript{128} In doing so, the Board observed that “the policy underlying Section 9(b)(3) is to shield employers from being forced to accept the potential conflict of loyalties presented by a mixed-guard union.”\textsuperscript{129} Chairman Battista and Member Meisberg went on to note that the Board has consistently adhered to \textit{Wells Fargo} and explained that in \textit{Temple Security}, the Board had again upheld the employer’s right to withdraw its voluntary recognition from a mixed-guard union upon the expiration of their contract.\textsuperscript{130} Chairman Battista and Member Meisberg explicitly applied \textit{Wells Fargo} to hold that Northwest’s withdrawal of recognition from Local 24/7 was lawful because it occurred after the expiration of its existing agreement with IUSO.\textsuperscript{131} As a result, Northwest’s recognition of SPFP was valid.\textsuperscript{132}

Based on this decision, it appears that \textit{Wells Fargo} is still the controlling Board precedent on this issue.

\textbf{4. What does the Board’s holding in \textit{Wells Fargo} really mean?}

Contrary to the outrage expressed by some commentators at the Board’s holding in \textit{Wells Fargo} and the dire consequences predicted as to the difficulty that will guards will have in organizing or the decrease in bargaining strength that guards will face, the impact of \textit{Wells Fargo}
seems to have been fairly limited. Wells Fargo applies only to circumstances involving mixed guard-nonguard unions and allows for withdrawal of recognition only following the expiration of a collective bargaining agreement. It does not appear to allow employers who have voluntarily recognized a mixed guard-nonguard union to repudiate that relationship during the reasonable period for bargaining. Nor does it allow an employer to withdraw its recognition during the life of the agreement when the principles of contract bar still apply. Finally, the employer must affirmatively repudiate its voluntary recognition upon expiration of the agreement; if it fails to do, it must still bargain in good faith. Bargaining orders can and have been issued in cases involving mixed guard-nonguard unions involving the circumstances described above for failing to bargain with a mixed-union in violation of Section 8(a)(5). Thus, it would seem that the alleged impact of Wells Fargo – to strip mixed guard-nonguard units of all of the Act’s protections – has been, to say the least, overstated.

133 As discussed above, as an advocate for the Teamsters Union, Chairmen Liebman had predicted that the Board’s Wells Fargo decision would mean “nothing other than the destruction of stability and collective bargaining rights in an entire industry.” Brief for International Brotherhood of Teamsters as Amici Curiae Supporting Petitioner, Local 807, International Brotherhood of Teamsters v. N.L.R.B., 755 F.2d 5 (2nd Cir. 1985) (No. 84-4083) at p.5. Similarly, other commentators have predicted that the effect of the Wells Fargo decision would be in decreasing guard unions’ bargaining strength or to decrease the guards’ membership in unions. See The NLRA’s “Guard Exclusion”: An Analysis Of Section 9(b)(3)’s Legislative Intent and Modern-Day Applicability, 61 Ind. L. J. 457, 486-87 (1985-1986). The reality is that relatively current statistics show that approximately 9.6% percent of all guards are represented by unions. See Union Membership and Earnings Data Book, Union Density, Employment, Earnings and Worker Characteristics by Occupation, 2008 at p. 60 (BNA 2009). Given that only 7.2% of the private sector workforce belonged to unions at the end of 2009, it cannot be argued that a large percentage of guards remain unrepresented as compared to the general population due to the Board’s Well Fargo decision. See Unions Lost 771,000 Members in 2009, as Recession Eliminated Jobs, BLS Says, 14 Daily Lab. Rep. (BNA) AA-1 (January 25, 2010). Furthermore, a brief review of national news reveals that unions continue to obtain contracts with employers for guard bargaining units. See e.g. Chris Rauber, Kaiser Security Guards OK first SEIU contract, San Francisco Business Times, July 25, 2009; Alejandro Lazo, Security Guards Get Union Contract, The Washington Post, Monday, April 14, 2008; Press Release, SEIU Local 1877, Security Officers Ratify Historic Union Contract in Los Angeles (January 26, 2008) (on file with author). Thus, contrary to the dire predictions described above, guards have continued to exercise their Section 7 rights to seek union representation and to join unions.

134 But see Dana Corp., 351 N.L.R.B. at 434, which would allow a petition to be filed by employees or a rival union during the first 45 days after voluntary recognition.

135 See e.g. See New CF & I, Inc., 2000 NLRB LEXIS 316 (ALJ Metz, May 17, 2000).

136 See Amoco Oil Co., 221 N.L.R.B. at 1104 (issuing a bargaining order where the employer refused to bargain with the representative of a mixed guard-nonguard union after the employer admitted the union’s status as a representative for the majority). And see New CF & I, Inc., 2000 NLRB LEXIS 316 (ALJ Metz, May 17, 2000)(issuing a bargaining order for a Section 8(a)(5) failure to bargain violation in a unit involving a mixed guard-nonguard union where the employer never repudiated its bargaining relationship with the union following the expiration of the parties’ collective bargaining agreement).
IV. **SHOULD WE ANTICIPATE A REVERSAL OF WELLS FARGO?**

Will the Board continue to adhere to its holding in *Wells Fargo* that Section 9(b)(3) prohibits the Board from issuing a bargaining order when an employer withdraws recognition from a mixed union following expiration of the collective bargaining agreement? That question may very well turn on the composition of the next Board. As noted above, Chairman Liebman strenuously opposed the Board’s decision in *Wells Fargo* in her role as an advocate for the Teamsters Union. Similarly, as a Board member, Chairmen Liebman has opined that *Wells Fargo* was wrongly decided and she has continued to adhere to her dissent in *Temple Security*, during which she relied on the dissents of Member Zimmerman and Judge Mansfield in arguing that the holding in *Wells Fargo* gives an unfair advantage to employers, interferes with the overall goal of the Act of encouraging stability in collective bargaining relationships and represents an unnecessary expansion of the plain language of Section 9(b)(3).\(^{137}\)

Chairman Liebman has been very explicit in expressing her view that the primary goal of the Act is to promote collective bargaining.\(^{138}\) Thus, it would not be a stretch to conclude that Chairman Liebman is likely to oppose what she views as any impediment to the collective bargaining process, including an employer’s privilege to withdraw recognition from a mixed guard union following expiration of a contract.

In addition, if mixed guard unions could convince Liebman that *Wells Fargo* discourages them from seeking voluntary recognition of guards units for fear that the employer could repudiate the agreement at its will upon the expiration of the collective bargaining agreement, Chairman Liebman is also likely to support its reversal as she has long expressed her concerns with any impediment to the “the Act’s fundamental policies of furthering industrial peace and stability of labor relations.”\(^{139}\)

Furthermore, the views expressed by Chairman Liebman in her opposition to the Board’s *Dana Corp.* decisions illustrate her belief that the Board’s policies of encouraging voluntary recognition and stabilizing collective bargaining relationships should be paramount to all other

\(^{137}\) See *Northwest Protective Serv.*, 342 N.L.R.B at 1203 n.13.

\(^{138}\) See e.g. Wilma B. Liebman, Member National Labor Relations Board, Testimony to Subcommittee on Health, Employment Law and Pensions and Senate Health, Education, Labor and Pensions Committee, Subcommittee on Employment and Workplace Safety (December 13, 2007), Congressional Quarterly, p.15.

\(^{139}\) Id.
interests. Specifically, in Dana Corp., Chairman Liebman complained that the majority’s decision “undercuts the process of voluntary recognition as a legitimate mechanism for implementing employee free choice and promoting the practice of collective bargaining.” Rather, she opined that “when an employer has voluntarily recognized a union based on a showing of majority support, the Board should honor the majority’s choice.” And Chairman Liebman further complained that “The majority’s new approach [in allowing a petition for decertification or by a rival union to be filed within the first 45 days after an employer voluntarily recognizes a union] guts the Board’s contract bar rules and their purpose to promote industrial stability.” A mixed guard union might similarly argue that Wells Fargo also interferes with the principles of voluntary recognition, as unions are unlikely to seek it, or industrial stability, by allowing employers to withdraw recognition from a union at its will following the expiration of a collective bargaining agreement. Thus, while one cannot foretell the future, Chairman Liebman’s expressed views on the importance of protecting the policies of voluntary recognition, collective bargaining and industrial stability would suggest that, if faced with another opportunity to overrule Wells Fargo (such as with a different composition of the Board), Chairman Liebman might very well conclude that once an employer voluntarily recognizes a mixed guard union as its employees’ collective bargaining representative, it is estopped from revoking that recognition until the passage of a reasonable period of time or a rebuttal of the presumption of the union’s continued majority support.

140 See e.g., Wilma B. Liebman, Member National Labor Relations Board, Testimony to the House Education and Labor Subcommittee on Health, Employment Law and Pensions; Joint Committee on Senate Health, Education, Labor and Pensions Subcommittee on Employment and Workplace Safety (December 13, 2007), Congressional Quarterly, p.8.
141 351 NLRB at 444-445.
142 Id. at 450.
143 Id. at 448.
144 Moreover, as the Board’s decision in Wells Fargo was based, in part, on the majority’s finding that employers were a beneficiary of Section 9(b)(3) and thus could not be “estopped from asserting its rights under that section by refusing to bargain with the Union when it did” (see Footnote 70), it would not be surprising if Wells Fargo was reversed by Liebman on an argument that Wells Fargo was based on an erroneous assumption that Section 9(b)(3) was intended to benefit employers instead of guards.