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Confusion Surrounding the Good Faith Doubt Evidentiary Standard Goes Unchecked: NLRB v. Curtin Matheson Scientific, Inc.

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SUPREME COURT RAMIFICATIONS

CONFUSION SURROUNDING THE GOOD FAITH DOUBT EVIDENTIARY STANDARD GOES UNCHECKED: *NLRB v. CURTIN MATHESON SCIENTIFIC, INC.*

The National Labor Relations Board[1] ("NLRB" or "the Board") was established by the National Labor Relations Act ("NLRA" or "the Act")[2] as the authority through which national

[1] *See* 29 U.S.C. § 160 (1988). The existence and powers of the National Labor Relations Board were created by the National Labor Relations Act. *Id.* "The Board performs two distinct functions under the Act—the prevention and remedying of unfair labor practices, and the determination of questions concerning employee representation." L. MODJESKA, NLRB PRACTICE §1.1, at 7 (1983). The Board has the responsibility of being both prosecutor and judge of violations of the Act. A. COX, D. BOK & R. GORMAN, LABOR LAW 84 (10th ed. 1986). The responsibility is manifested in the ability to issue complaints, prosecute the offenders, and decide cases on their merits. *Id.*

Federal courts are authorized to review the Board's decisions as to issues of law. *Id.* When faced with issues of fact, the courts are restricted to determining whether the Board's findings are supported by "substantial evidence." *Id. See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1957) (Congress gave Board exclusive authority to ascertain and prevent unfair labor practices).

[2] National Labor Relations [Wagner] Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1988)). The predecessor to the National Labor Relations Act was the National Industrial Recovery Act of 1934 (NIRA). *See* D. TWOMEY, LABOR LAW AND LEGISLATION § 17 (7th ed. 1985). Section 7(a) of that Act pro-

labor policies are developed and enforced.[3] The Board's rules and policies are afforded great deference by the courts provided that they are rational and consistent with the Act.[4] The primary pur-

vided, *inter alia*, that "employees shall have the right to organize and bargain collectively through representatives of their own choosing." *Id.* The NIRA was ultimately declared unconstitutional on the ground that it improperly delegated legislative power to the President in prescribing codes of fair competition. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935). Immediately after the *Schechter* decision, Congress enacted the National Labor Relations Act, the purpose of which was to eliminate the barriers which perpetuated labor's lack of bargaining power and had resulted in a number of detrimental consequences, "namely, poor working conditions, depression of wage rates, and diminution of purchasing power, all of which had served to cause and aggravate business depressions." TWOMEY, *supra*, § 17, at 42-3.

The basis for the enactment of the NLRA was congressional power to regulate interstate commerce. *Id.* "[L]abor practices may have so direct a relation to commerce as to come within the ambit of Federal jurisdiction." S. REP. No. 1184, 79th Cong., 2d Sess. 11 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1112 (1949). Section one of the Act states that "protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest. . . ." 29 U.S.C. § 151 (1988). The constitutionality of the Act was immediately challenged. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937). The challenge was dismissed and the Act's constitutionality upheld. *See id.* at 41. The Court stated that "stoppage of [manufacturing] operations by industrial strife would have a most serious effect upon interstate commerce," and is, therefore, within the realm of congressional power. *Id.*

The NLRA led to the growth of labor unions and rapid spread of collective bargaining. COX, BOK & GORMAN, *supra* note 1, at 89. As a result of perceived abuses of power by labor organizations, Congress subsequently passed the Taft-Hartley Act of 1947. *Id.* Taft-Hartley curbed the power of the unions by reviving legal intervention into labor disputes, recognizing the right to refrain from union activities, and extending governmental regulation of collective bargaining. *Id.* at 89-93. Congress undertook similar changes again in 1959 when it passed the Landrum-Griffin Act expanding on the restrictions of the earlier amendment. *Id.* at 94.

[3] *See* NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957) (Buffalo Linen). The Supreme Court has recognized that "[t]he function of striking [a] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Id. See, e.g.*, Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500-01 (1978). In *Beth Israel*, the Court enforced the Board's ruling that hospital employees were allowed to distribute literature in areas of the hospital that would not disrupt patient care. *Id.* The Court stated the following in regard to the Board's responsibilities: "[T]he Board is expert in federal national labor relations policy, and it is in the Board, not [the Hospital], that the 1974 amendments vested responsibility for developing that policy in the health-care industry." *Id.*; NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963) (Court recognized Board's special function of applying Act's provisions to complexities of industrial life).

[4] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). The Board is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Id. See also* NLRB v. Iron Workers, 434 U.S. 335, 350 (1978) (considerable deference given Board rulings where they represent defensible construction of NLRA); NLRB v. Weingarten, Inc., 420 U.S. 251, 265-

pose of the Act was to establish industrial peace and foster stability in bargaining relationships[5] through the exercise of employee freedom of choice[6] within a bargaining unit.[7] Once a union has

66 (1978) (Board may depart from its earlier precedents as "evolutional approach is particularly fitting" for construction of NLRA); NLRB v. Bufco Corp., 899 F.2d 608, 609 (7th Cir. 1990) ("we extend the Board deference in fashioning national labor policy"). *But see* NLRB v. Brown, 380 U.S. 278, 291-92 (1965). The courts have a responsibility to review Board decisions "that they deem inconsistent with [the] statutory mandate or that frustrate the Congressional policy underlying [the] statute." *Id. See also* Cox, Bok & Gorman, *supra* note 1, at 110. The principles guiding judicial review of Board decisions are very general, leaving the courts much discretion. *Id.* For example, in fiscal year 1982, 78.6% of the Board's decisions were affirmed in the Tenth Circuit, while the First Circuit affirmed only 42.1% of the Board's decisions. *Id.*

The Board's findings of fact are conclusive unless they are not "supported by substantial evidence on the record considered as a whole." *See* 29 U.S.C. § 160(e) (1988). The courts have wider latitude when reviewing the Board's conclusions of law, but it is generally recognized that Board policies are subject only to limited review. K. McGuiness & J. Norris, How to Take a Case Before the NLRB § 17.19, at 424 (5th ed. 1986). *See, e.g.*, Charles D. Bonanno Linen Servs., Inc. v. NLRB, 454 U.S. 404, 412-18 (1982). In deciding that a bargaining impasse did not justify an employer's unilateral withdrawal from a multi-employer bargaining unit, the Court upheld the Board and noted that "the Board, employing its expertise in the light of experience, has sought to balance the 'conflicting legitimate interests' in pursuit of the 'national policy of promoting labor peace through strengthened collective bargaining.'" *Id.* at 413 (quoting NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957) (Buffalo Linen)).

[5] *See* 29 U.S.C. § 1511 (1988). Section 1 sets forth this objective as follows:

> It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.

In enacting the NLRA, Congress sought "to remove certain important sources of industrial unrest engendered, first, by the denial of the right of employees to organize and by the refusal of employers to accept the procedure of collective bargaining . . . ." H.R. Rep. No. 969, 74th Cong., 1st Sess. Pt. 6 (1935), *reprinted in* 2 NLRB Legislative History of the National Labor Relations Act, 1935, at 2915 (1949). "Such unrest . . . leads to strikes and other forms of economic pressure which obstruct and burden the free flow of interstate and foreign commerce." *Id.* at 2915-16.

[6] 29 U.S.C. § 1577 (1988). Section 7 states:

> Employees shall have the right 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 or protection, and shall also have the right to refrain from any or all such activities . . . .

Id.

[7] *See* Cox, Bok & Gorman, *supra* note 1, at 282-83. In determining bargaining units, the Board seeks to group employees who are united by a "community of interest." *Id.* at 282. The factors the Board uses to determine if there is a "community of interest" among employees are: similar earnings and earnings determination; similar employment benefits,

majority support within a bargaining unit, an employer is obligated to recognize the union and negotiate with it in good faith.[8] To promote stability in bargaining relationships, the Board has adopted the presumption of continuing majority support[9] for an incumbent union.[10] An employer may rebut this presumption, and lawfully withdraw recognition of the union,[11] if it has a "good

working hours and other terms of employment; similar type of work performed; similar job skills and qualifications; similar geographic proximity; frequency of interemployee communication; continuity of the production process; common supervision; history of collective bargaining; desires of employees; and extent of union organization. *Id.* at 283. *See also* NLRB v. Purnell's Pride Inc., 609 F.2d 1153 (5th Cir. 1980). The "community of interest" analysis has been developed by the Board and the courts to guide the Board in choosing "viable bargaining units . . . ." *Id.* at 1156. In order to determine whether a group is bound by a " 'community of interest,' the Board and the courts have looked to 'such factors as bargaining history, operational integration, geographic proximity, common supervision, similarity in job function, and degree of employee interchange.' " *Id.*

[8] *See* 29 U.S.C. §§ 157, 158(a), 159(a) (1988). The duty of an employer to bargain with the union representative chosen by its employees is set forth in Sections 7-9 of the NLRA. *See* 29 U.S.C. § 151-169 (1988). *See generally* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84 (1944) (under Section 9(a) chosen representatives of majority of unit employees are exclusive representatives for purposes of collective bargaining); Whisper Soft Mills, Inc. v. NLRB, 754 F.2d 1381, 1385 (1984) ("The duty of an employer to bargain with the chosen representatives of his employees . . . is an obligation only to the certified bargaining representative.") (citing 29 U.S.C. § 159(a) (1978)).

[9] *See* Brooks v. NLRB, 348 U.S. 96, 98 (1954). During the first year of certification, the union enjoys an irrebuttable presumption of majority support. *Id.* In *Brooks*, the Supreme Court found that the certification year rule, as applied by the Board, was rational and consistent with the Act. *Id.* at 103-04. It supported the policy of industrial peace by not allowing an employer to move slowly in recognition of the union and thereby allowing the union's majority to fade. *Id.* at 100. This rule forces employers to bargain in good faith with the union and hence promote industrial peace. *Id.*

In the years following the certification year, the union enjoys a rebuttable presumption of majority support. NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 279 n.3 (1972) (citing Celanese Corp. of America, 95 N.L.R.B. 664, 672 (1951)). *See also* Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295, 1296-97 (9th Cir. 1984) (presumption rebuttable one year after certification); NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978) (same), *cert. denied*, 442 U.S. 921 (1979).

[10] *See Brooks*, 348 U.S. at 98. *See also* NLRB v. San Clemente Publishing, 408 F.2d 367, 369 (9th Cir. 1969) (*Brooks* rule applies to unions chosen by means other than Board-conducted election).

An incumbent union is one that has been recognized by an employer as the exclusive bargaining representative of its employees. *See* Comment, *Employer Refusal to Bargain with an Incumbent Striking Union: Determining Liability Under Section 8(a)(5)*, 18 LOY. L.A.L. REV. 731, 731 n.2 (1985) [hereinafter Comment, *Determining Liability*]. A union becomes the bargaining agent either as the result of an election or other formal NLRB certification proceeding or through informal recognition. *Id. See also* 29 U.S.C. § 159(a) (1988). "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining . . . ." *Id.*

[11] *See* Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1109-10 (1st Cir. 1981). To

faith doubt" of the union's majority status.[12] Determining the lawfulness of an employer's withdrawal of recognition becomes complex, however,[13] when the withdrawal is justified by the fact that the employer has hired striker replacements[14] for its employees

overcome the union's majority support presumption an employer has the burden of demonstrating either 1) that the union in fact no longer has the majority; or 2) "a reasonable, good faith doubt of the union's majority." *Id.* (citing National Rental Car Sys., Inc. v. NLRB, 594 F.2d 1203, 1205 (8th Cir. 1979)). *See also* Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 489 (2d Cir. 1975) (evidence of dissatisfaction with union activities insufficient to raise reasonable doubt of majority support), *enforcing* 19 N.L.R.B. 290 (1971); Terrell Mach. Co. v. NLRB, 427 F.2d 1088, 1090 (4th Cir. 1970), *enf'g*, 173 N.L.R.B. 1480 (1969).

Even during the certification year, an employer can lawfully withdraw recognition of the union when there are "unusual circumstances". *See* Seger, *The Majority Status of Incumbent Bargaining Representatives*, 47 TUL. L. REV. 961, 966-78 (1973). The Board has defined "unusual circumstances" as 1) when the union has become defunct, 2) when a schism has developed within the union, and 3) when there has been a rapid fluctuation in the size of the bargaining unit. *Id. See also* NLRB v. Lee Office Equip., 572 F.2d 704, 706 (9th Cir. 1978) (during certification year union lost all employee support); Carson Pirie Scott & Co., 69 N.L.R.B. 935, 938-39 (1946) (overwhelming majority of employees transferred to new local union during certification year); Public Serv. Elec. & Gas Co., 59 N.L.R.B. 325, 326 (1944) (during certification year, employees unanimously voted to dissolve union); Westinghouse Elec. & Mfg. Co., 38 N.L.R.B. 404, 409 (1942) (radical change in bargaining unit size during certification year).

[13] *See* Buckley Broadcasting Corp., 284 N.L.R.B. 1339, 1340 (1981) (presumption of majority status may be rebutted by evidence of good faith doubt), *enforced*, 891 F.2d 230 (9th Cir. 1989). *See also* Celanese Corp. of Am., 95 N.L.R.B. 664, 672-73 (1951). In *Celanese*, the Board identified two essential considerations in a review of the employer's good faith doubt: (1) the employer must have a reasonable basis in fact for doubting the union's majority status; (2) the issue cannot arise from the employer's illegal antiunion activity aimed at undermining union majority support. *Id.*

[14] Flynn, *The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements*, 61 TEMP. L. REV. 691, 694 (1988). The complexity is a result of the fact that both strikers and permanent striker replacements are considered employees under Section 2(3) of the Act. *Id.* Employee is defined as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained regular and substantially equivalent employment . . . ." 29 U.S.C. § 152(3) (1988). Therefore, both strikers and permanent replacement strikers can vote in a union election and both strikers and permanent replacement strikers are part of the bargaining unit. Flynn, *supra*, at 694.

[15] *See, e.g.*, NLRB v. Mackay, 304 U.S. 333, 345-46 (1938). In *Mackay*, the Supreme Court affirmed the Board's decision that an employer is not guilty of an unfair labor practice if it hires replacements for striking employees in order to maintain operations and carry on its business. *Id.* In addition, the employer is not obligated to discharge replacements once the strike is over. *Id.* This is true as long as the strike is an economic strike. *See* R. GORMAN, LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 341 (1976). Employers are not allowed to hire permanent replacement workers during an unfair labor practice strike. Brown Shoe Co., 1 N.L.R.B. 803, 834 (1936). *See* Laidlaw Corp., 171 N.L.R.B. 1366, 1369-70 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). After the strike has terminated, the employer is required to reinstate economic strikers who have not obtained equivalent employment once vacancies arise, and absent any

when the union has commenced an economic strike.[15]

Historically, the Board has taken several different positions in attempting to determine striker replacement support for the union.[16] Initially, it adopted a presumption that striker replacements opposed the union ("replacement anti-union presump-

legitimate business reasons. *Id.* at 1369.

Recently, there has been a push in Congress to pass a bill which would prohibit an employer from hiring permanent replacement workers during the first 10 weeks of a strike. *See Unions Back Brennan Bill to Prohibit Immediate Hiring of Striker Replacements*, DAILY LAB. RPT. (BNA) No. 54, at A-11 (March 22, 1989) (bill proposed by Rep. Joseph Brennan (D-Maine) as amendment to NLRA). Rep. Brennan stated that the impetus for the bill was the 1988 strike by the United Paperworkers International Union against the International Paper Corp. (IP). *Id.* In one of the affected IP plants, replacement workers were hired 13 days into the strike, and eventually more than 1,000 replacement workers were hired. *Id.* A disheartened Rep. Brennan declared that "[w]orkers who spent ten, twenty, thirty years of their lives at IP. . .were thrown out like yesterday's newspapers." *Id.* Rehiring of the striking workers eventually became the main issue in the prolonged strike, which was officially called off by the union in October 1988. *Id.* The union asserted that very few strikers had been rehired, "[i]n effect," said Brennan, "these workers were fired for exercising their rights to strike." *Id.* The bargaining strategy of employers hiring striker replacements immediately after commencement of a strike became a prevalent practice after President Reagan fired striking air traffic controllers in 1981. *Id.*

More recently, however, in Eastern Air Lines, Inc. v. Airline Pilots Ass'n Int'l, 920 F.2d 722, 727-29 (11th Cir. 1990), the airline was required to reinstate returning pilots prior to giving permanent pilot positions to newly hired pilots still in training, holding that trainees are not employees. *But see* Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendents, 109 S. Ct. 1225 (1989). The Supreme Court held that the airline would not be required to displace junior crossovers from the strike in order to reinstate more senior full-term strikers. *Id.* at 1230. The Court reasoned that to distinguish crossovers from new hires would penalize nonstrikers in order to benefit strikers. *Id.* at 1233.

[15] *See* Crossroads Chevrolet, Inc., 233 N.L.R.B. 728, 729 n.4 (1977) (strike to achieve objective such as higher wages, shorter hours, or recognition by means of economic pressure). *See also* GORMAN, *supra* note 14, at 339. Economic strikes involve union demands concerning union recognition, wages, hours and/or working conditions. *Id.* If a strike occurs shortly after an employer's unfair labor practice, it is referred to as an unfair labor practice strike. *Id.* An economic strike can be converted into an unfair labor practice strike if an employer commits an unfair labor practice that in turn extends the length of the strike. *Id.* In theory, the employee is an economic striker during the period the economic strike would have proceeded on its own. *Id.* Thereafter, for the period the strike is prolonged, the employee is considered an unfair labor practice striker. *Id.*

[16] NLRB v. Buckley Broadcasting Corp. of Cal., 891 F.2d 230, 232-33 (9th Cir. 1989), *enforcing*, Buckley Broadcasting Corp., 284 N.L.R.B. 1339 (1987), *cert. denied*, 110 S. Ct. 2619 (1990). In the past, the Board has used three different approaches to determine the union sentiments of striker replacements. *Id.* at 232. Until 1975, the Board consistently held that striker replacements oppose the incumbent union. *Buckley*, 284 N.L.R.B. at 1340. In 1975, Board dictum suggested that striker replacements support the union in the same ratio as those employees they have replaced. *Id.* at 1341 (citing Cutten Supermarket, 220 N.L.R.B. 507, 509 (1975)). In *Buckley*, the Board rejected both the aforementioned presumptions and decided that they would not presume anything with regard to the union sentiments of striker replacements and would render decisions on a case-by-case basis. *See Buckley*, 891 F.2d at 233.

tion").[17] It later presumed that striker replacements supported the union in the same ratio as the employees they replaced ("replacement pro-union presumption").[18] After meeting resistance to both presumptions at the circuit level,[19] the Board changed its position once again and announced it would follow a no-presumption approach when determining the union sentiments of striker replacements.[20] This most recent position was affirmed by the Supreme Court in *NLRB v. Curtin Matheson Scientific, Inc.*.[21]

In 1970, Teamsters Local 968, was certified by the Board as collective bargaining agent for Curtin Matheson's production and maintenance employees.[22] After twenty-four days of unsuccessful negotiations aimed at reaching a new collective bargaining agreement,[23] the union commenced an economic strike on June 12, 1979.[24] Immediately, five union employees crossed the picket line and reported for work,[25] and soon thereafter twenty-nine permanent replacement employees were hired.[26] The union ended its strike on July 16 by offering to accept Curtin Matheson's final offer made prior to the commencement of the strike but were in-

[17] *See infra* notes 57-60 and accompanying text.

[18] *See infra* notes 67-69 and accompanying text.

[19] *See* Whisper Soft Mills, Inc. v. NLRB, 754 F.2d 1381, 1388 (9th Cir. 1984) (enforcement denied as court noted opposition to presumption by other circuits); NLRB v. Pennco, Inc., 684 F.2d 340, 342 (6th Cir.) (enforced Board order although Court rejected both replacement presumptions), *cert. denied*, 459 U.S. 994 (1982); Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1111 (1st Cir. 1981) (enforcement denied in relevant part as court found replacements are presumed not to support union whose picket line they cross); National Car Rental Sys., Inc. v. NLRB, 594 F.2d 1203, 1206 (8th Cir. 1979) (enforcement denied as court found pro-union presumption inapplicable where turnover results from hiring permanent striker replacements); NLRB v. Randle-Eastern Ambulance Serv., Inc., 584 F.2d 720, 729 (5th Cir. 1978) (enforced Board order although court noted rejection of pro-union presumption).

[20] *See Buckley*, 284 N.L.R.B. at 1344-45 (adopting case-by-case review requiring evidence of nonunion support before presumption of continued majority support is rebutted), *enforced*, 891 F.2d 230, 233 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990).

[21] 110 S. Ct. 1542 (1990).

[22] *Id.* at 1547.

[23] *Id.* Negotiations began after the May 21, 1979 expiration of the parties' collective bargaining agreement. *Id.* Following the Union's rejection of the employer's final offer on May 25, a lockout was instituted. *Id.* Eight days later, the offer was renewed. *Id.* However, the union again rejected the offer. *Id.*

[24] *Id.*

[25] *Id.* There were 27 bargaining unit employees, 22 of whom took part in the strike. *Id.*

[26] NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1547 (1990). The 29 permanent replacements were hired to replace the 22 employees on strike. *Id.*

formed that the offer had been withdrawn.[27] Subsequently, Curtin Matheson refused to recognize or bargain with the Union any further stating that it doubted the Union's majority support.[28]

On July 30, the Union filed an unfair labor practice charge with the NLRB alleging that the employer's withdrawal of recognition, refusal to execute a contract embodying the terms of the employer's final offer prior to the strike, and failure to provide requested information violated sections 8(a)(5) and 8(a)(1) of the NLRA.[29] Following an investigation, the Board issued a complaint.[30] In defense, Curtin Matheson maintained that its good faith doubt was based on the hiring of striker replacements, anti-union statements made by replacements, cross-overs, and strikers, as well as statements made by union representatives regarding the weakness of the union and poor employee support.[31] The Administrative Law Judge (ALJ) dismissed the complaint, finding that no unfair labor practices had occurred.[32] On review, the Board reversed the ALJ's ruling and, applying the no-presumption policy, found that Curtin Matheson had not presented sufficient evidence to establish that the replacements opposed the union.[33] The

[27] *Id.* at 1547.

[28] *Id.* On the date of the withdrawal of recognition from the Union, the bargaining unit consisted of 25 striker replacements, the 5 employees who crossed the picket line and approximately 20 former strikers who had applied for reinstatement upon termination of the strike. *Id.*

[29] *Id.* On the day the strike was terminated the union requested that Curtin Matheson supply it with information regarding the number of employees in the bargaining unit, the job classifications and seniority of each employee. *Id.* On July 20, Curtin Matheson refused to respond to this request because it had withdrawn recognition of the union. *Id.*

[30] NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1547 (1990).

[31] Id. at 1547-48. The anti-union sentiments expressed by the employees included: a single replacement employee asserting that the union did not represent the company and was not needed; two cross-over employees (not union members) indicating the union had done nothing for the employees; four strikers, including the shop steward, stating that the union, not the employees, wanted the strike, that employees wouldn't man the picket line, were not supporting the union and wanted the strike to end. *Id.*

Curtin Matheson relied on the rationale of NLRB v. Randle-Eastern Ambulance Serv. Inc., 584 F.2d 720, 728 (5th Cir. 1978), in making its good faith doubt contentions. In *Randle-Eastern*, the court announced its adoption of the so-called "*Gorman* presumption," namely that "if a new hire agrees to serve as a replacement for a striker . . . it is generally assumed that he does not support the union and that he ought not be counted toward a Union majority" *Id.* (citing R. GORMAN, LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 112 (1976)).

[32] Curtin Matheson Scientific, Inc., 287 N.L.R.B. 350, 350 (1987), *enforcement denied*, 859 F.2d 362 (5th Cir. 1988), *rev'd*, 110 S. Ct. 1542 (1990).

[33] *Id.* The Board cited with approval its decision in Buckley Broadcasting Corp., 284

Board found that Curtin Matheson was unable to prove a good faith doubt of union majority support because it lacked a sufficient objective basis on which to sustain such doubt.[34] Therefore, Curtin Matheson violated the Act when it withdrew recognition from the union.[35] The United States Court of Appeals for the Fifth Circuit refused to enforce the Board's order and held that the Board *must* presume striker replacements oppose the union and that Curtin Matheson was justified in its doubt of union majority support.[36] The court maintained that the effect of the no-presumption approach was the same as the pro-union presumption which it had previously rejected in *NLRB v. Randle-Eastern Ambulance Service, Inc.*[37] Additionally, it should be noted that the Fifth Circuit's holding in *Curtin Matheson* was in accord with holdings in the First and Eighth Circuits.[38] Other circuit courts, while not flatly rejecting the replacement pro-union presumption, had expressed disapproval.[39]

N.L.R.B. 1339 (1987), which adopted the no-presumption approach to determine the union sentiments of striker replacements. *Id. See also* NLRB v. Pennco, 684 F.2d 340, 342 (6th Cir. 1982), *cert. denied*, 459 U.S. 994 (1982).

[34] *See Curtin Matheson*, 287 N.L.R.B. at 352-53.

[35] *Id.* at 353 (concluding that evidence insufficient to rebut presumption of union's continuing majority status). *See also* Buckley Broadcasting Corp., 284 N.L.R.B. 1339, 1345 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989) (insufficient evidence to support withdrawal of recognition).

[36] NLRB v. Curtin Matheson Scientific, Inc., 859 F.2d 362, 367 (5th Cir. 1988) (disagreeing that *Buckley Broadcasting* (Station KKHI) established no-presumption standard). *See also* NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1549 n.7.

[37] *See Curtin Matheson*, 859 F.2d at 367. Under either the replacement pro-union presumption or the neutral position, the employer carries the burden of producing objective evidence that the replacements do not support the union in order to overcome the presumption of continuing majority support. *Id. See also* NLRB v. Randle-Eastern Ambulance Serv., Inc., 584 F.2d 720, 728 (Court rejected Board's application of pro-union presumption in an economic strike situation).

[38] *See Curtin Matheson*, 859 F.2d at 367. *See also* National Car Rental Sys., Inc. v. NLRB, 594 F.2d 1203, 1206 (8th Cir. 1979) (8th Circuit adopted striker replacement anti-union presumption, i.e., "Gorman presumption"); Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1110-11 (1st Cir. 1981) (replacements are not presumed to support union and when striker replacements constitute majority of unit, presumption of union support is undermined) (citing Titan Metal Mfg. Co., 135 NLRB 196 (1962)). *But cf. infra* notes 70 and 71 (cases cited advocating pro-union presumption).

[39] *See* NLRB v. Wilder Constr. Co., 804 F.2d 1122, 1126 (9th Cir. 1986) (explicit evidence of union rejection and repudiation necessary to rebut presumption of continuing majority support); NLRB v. Pennco, Inc., 684 F.2d 340, 342 (6th Cir. 1982) (court declined to recognize presumption that new hires, i.e., replacements, either supported or opposed the union, holding that objective evidence governs), *cert. denied*, 459 U.S. 994 (1984); NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 813 (2d Cir. 1978)

In an attempt to resolve the split among the circuits, the Supreme Court granted certiorari[40] and in a 5-4 decision reversed the Fifth Circuit's holding.[41] The Court held that the Board did not have to presume that the striker replacements opposed the union.[42] Further, the Board's no-presumption approach to assessing the union sentiments of striker replacements was found to be rational and consistent with the NLRA.[43]

Justice Marshall, writing for the Court, stated that the specific issue before the court was "whether, in *assessing* whether a particular employer possessed a good faith doubt, the Board must adopt a general presumption of replacement opposition to the union."[44] The majority reasoned that the circumstances involved in each strike situation varied dramatically; consequently, the Board's no-presumption approach was rational.[45] The Court held the Board's new policy approach was not only consistent with previous decisions, but was also consistent with the NLRA's overall policy of promoting industrial peace.[46] The Court further explained that its duty in administrative cases was merely to review the Board's refusal to adopt an anti-union presumption and to express its opinion on whether the no-presumption approach was rational and consistent with the NLRA.[47] Where the Board's actions have re-

(court rejected pro-union presumption but also expressed disapproval of the anti-union presumption).

[40] NLRB v. Curtin Matheson Scientific, Inc., 109 S. Ct. 3212 (1989).

[41] NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542 (1990).

[42] *Id.* at 1554.

[43] *Id.*

[44] *Id.* at 1545 n.2.

[45] *Id.* at 1552. Striker replacements might not recognize a strike due to financial reasons or they might not agree with the purpose of a particular strike, while still wanting that union's representation at the bargaining table. *Id.* at 1550.

[46] NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1553 (1990). The no-presumption policy is rational and consistent with the NLRA because it furthers the overall policy of "industrial peace." *Id.* The no-presumption rule limits an employer's ability to oust a union without significant evidence of lack of majority support. *Id. See also* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 40 (1987). Since this presumption does not allow an employer to easily oust a union it gives employees freedom to engage in concerted activities. *Id.*

[47] *See Curtin Matheson*, 110 S. Ct. 1542, 1545 n.2 (1990). The Majority countered Justice Scalia's assertion that the issue before the Court was whether "substantial evidence" supported the Board's factual finding that good faith doubt was not established based on the evidence, by proclaiming that the "substantial evidence" standard was inapplicable to the question at hand. *Id.* The issue, the majority declared, was simply to determine whether the Board's refusal to adopt the presumption was rational and consistent with the Act. *Id.*

mained rational and consistent with the Act,[48] the Court has accorded great deference[49] to its decisions, even when it has departed from previous positions.[50]

In dissent,[51] Justice Scalia argued that the issue before the Court was not whether the Board can take a no-presumption approach, but whether there was *in fact* substantial evidence to support the Board's findings in this case.[52] Justice Scalia found that

(citing NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 787 (1979)).

The Court in *Curtin Matheson* also stated that it was for the Court of Appeals, on remand, to consider, without applying any replacement presumptions, whether the evidence supported a finding that the respondent failed to present an objectively reasonable doubt of the union's majority status. *Curtin Matheson*, 110 S. Ct. at 1545 n.2.

[48] *Curtin Matheson*, 110 S. Ct. at 1549. *See also* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501 (1978). "The judicial role is narrow: the rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Id.*

[49] *Curtin Matheson*, 110 S. Ct. at 1549. *See also* NLRB v. Weingarten, Inc., 420 U.S. 251, 266 (1976) (Board's special competence in industrial field is justification for the deference accorded its determinations).

[50] *Curtin Matheson*, 110 S. Ct. at 1554. *See also* Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 413 (1982) (Though Court may have struck a different balance reviewing *de novo*, it noted that assessing dynamics of collective bargaining is within Board's authority); NLRB v. Truck Drivers, 353 U.S. 87, 95-96 (1957) (judgment of Court not to be substituted for that of Board with respect to issues that Congress intended Board to resolve).

[51] *Curtin Matheson*, 110 S. Ct. at 1557 (Scalia, J., dissenting). Justices O'Connor and Kennedy joined in dissent with Justice Scalia. *Id.* Justice Blackmun wrote a separate dissenting opinion. *Id.* at 1555. (Blackmun, J., dissenting). Justice Blackmun stated that the Board cannot simply create a new policy without a supporting rationale. *Id.* at 1556. "The reviewing court also must ask whether the agency's decision is the product of an adequate deliberative process and is consistent with other agency pronouncements . . . ." *Id.* at 1556 (Blackmun, J., dissenting). This dissent asserts that the new no-presumption policy cannot be reconciled with previous Board decisions. *Id.* (Blackmun, J., dissenting). *See* Leveld Wholesale, Inc., 218 N.L.R.B. 1344, 1350 (1978) (Striker replacements can reasonably foresee that if union is successful strikers will return to work and striker replacements will be out of job); Service Elec., 281 N.L.R.B. 633, 641 (1968) (because strikers want to return to work and striker replacements want to remain working inherent conflict exists between the two groups).

[52] *Curtin Matheson*, 110 S. Ct. at 1557 (Scalia, J., dissenting). Justice Scalia asserted that the issue confronting the Court was whether the Board's factual findings were supported by substantial evidence. *Id.* (Scalia, J., dissenting). Justice Scalia averred that it was a mistake for the Board to treat presumptions created by law, and inferences or presumptions of fact as equivalent. *Id.* at 1563-66 (Scalia, J., dissenting). Justice Scalia stated that the Board may create and use presumptions of law, such as the presumption of continuing majority support during the first year of a union's certification. *Id.* at 1564. But, the Board may not, as it has done in *Curtin Matheson*, create presumptions of fact. *Id.* The Board may only use reasonable and logical inferences drawn from the facts of a particular situation. *Id.* Whenever a Board decision is reversed for lack of "substantial evidence" it is because the Board ignored logical inferences that must be reasonably drawn. *Id.*

there was substantial evidence to support Curtin Matheson's good faith doubt of union majority.[53] In addition, Justice Scalia asserted that the majority's decision allowed the Board to make policy in the guise of fact-finding and thus evade proper scrutiny.[54] Finally, writing separately in dissent, Justice Blackmun expressed concern over the Board's lack of empirical evidence to support its no-presumption policy.[55]

In view of the responsibility placed on the Board and the considerable deference the court has historically granted Board rules, it is submitted that the decision to affirm the no-presumption approach in *Curtin Matheson* was correct. Nevertheless, the concerns voiced in the concurring and dissenting opinions were not wholly without merit. The Court should have admonished the Board for the apparent inconsistencies and limitations in its present no-presumption policy with regard to the way in which an employer may establish a good faith doubt of the union's majority support. This comment will first analyze the history preceding the no-presump-

[53] *Id.* at 1560 (Scalia, J., dissenting). Justice Scalia reasoned that unions almost always demand that striker replacements be fired. *Id.* (Scalia, J., dissenting). Striker replacements know this, Justice Scalia said, and consequently have interests which are in direct opposition to those of the strikers. *See id.* at 1560-61. Furthermore, Justice Scalia declared that "there was not a shred of affirmative evidence that any striker replacement supported, or had reason to support the union." *Id.* at 1560.

[54] *Id.* at 1565 (Scalia, J., dissenting).

> It is one thing to say, 'The facts do not support conclusion X, and we decline to impose conclusion X as a matter of law, since that would have adverse policy consequences.' It is quite another thing to say, 'Even though the facts require conclusion X, we reject it for policy reasons.' The former is what the Board has said here, and the latter is what it would have to say to support its decision properly on policy grounds.

Id. (Scalia, J., dissenting).

[55] *See id.* at 1556 (Blackmun, J., dissenting). In his dissent, Justice Blackmun opined that the Board's order should be invalidated because it had "departed, without explanation, from principles announced and reaffirmed in its prior decisions" and that it had "made no effort to explain the apparent inconsistency" between the present decision and those in *Service Electric*, 281 N.L.R.B. 633 (1986), and *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344 (1975). *Id.* at 1556. *See also* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

> An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.

Id. at 852 (footnotes omitted).

tion policy. Then it will analyze the appropriateness of the no-presumption policy as a sound compromise between the logic underlying the replacement anti-union presumption and its furtherance of the Act's policies as embodied in the pro-union presumption. This comment will then discuss the Supreme Court's decision in *Curtin Matheson*. It will assess the impact of the Court's failure to require the Board to enunciate specific evidentiary standards upon which an employer may rely when asserting a good faith doubt of union majority status. This comment will then discuss developments in this area which have occurred subsequent to *Curtin Matheson*. Finally, this comment will suggest evidentiary standards the Board should adopt in an attempt to alleviate the remaining confusion surrounding the no-presumption policy.

I. PRE-*CURTIN MATHESON*: HISTORY PRECEDING NO-PRESUMPTION POLICY

The Board has consistently upheld a long standing policy presumption that employees hired in a non-strike situation support the union in the same ratio as those they replace.[56] Until 1975, the Board had refused to impose this policy in economic strike situations.[57] Its policy in strike situations had been that striker

[56] *See* Ray McDermott & Co. v. NLRB, 571 F.2d 850, 859 (5th Cir. 1978), *cert. denied*, 439 U.S. 893 (1978) (advocated presumption of majority support); NLRB v. A.W. Thompson, Inc., 525 F.2d 870, 871-72 (5th Cir.), *cert. denied*, 429 U.S. 818 (1976) (refusal to bargain may not be based on combination of employee turnover and anti-union complaints); NLRB v. Washington Manor, Inc., 519 F.2d 750, 753 (6th Cir. 1975) (lack of objective evidence that new employees do not support union is not considered evidence of loss of majority status); Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1141 (7th Cir. 1974), *cert. denied*, 419 U.S. 838 (1974) (high turnover of employees is not evidence of loss of majority support); Laystrum Mfg. Co., 151 N.L.R.B. 1482, 1488-89 (1965) (presumption of continuing majority support is valid absent preponderance of evidence to rebut it); Seger, *The Majority Status of Incumbent Bargaining Representatives*, 47 TUL. L. REV. 961, 990 (1973) (employee turnover standing alone is no ground for good faith doubt); Note, *The Striker's Replacement Presumption and an Employer's Duty to Bargain With the Incumbent Union*, 21 B.C.L. REV 455, 456 (1980) [hereinafter Note, *Striker's Replacement Presumption*] ("New employees . . . are presumed to support the union in the same ratio as the employees whom they replace.").

[57] *See* Stoner Rubber Co., 123 N.L.R.B. 1440, 1444-45 (1959). The Board stated that an employer cannot possibly prove that the union no longer has majority support as it does not have access to membership lists and cannot directly interrogate employees. *Id.* It is sufficient for the employer to produce evidence which will "cast a serious doubt" on the union's majority status. *Id.* Therefore it was not unreasonable for the employer to assume that none of the striker replacements supported the union. *Id.* at 1445-46. S & M Mfg. Co.,

replacements oppose the union.[58] For example, in *S & M Manufacturing Co.*,[59] the Board found that the employer had lawfully withdrawn recognition from the union on the basis that the striker replacements, constituting a majority, opposed the union.[60] Thus, it was presumed that the union no longer enjoyed majority support.[61] While the replacement anti-union presumption was a logical position,[62] the effect of this presumption was adverse to the

172 N.L.R.B. 1008, 1008-09 (1968) (among striker replacements it could not be found that there were any union adherents); *See also* Titan Metal Mfg. Co., 135 N.L.R.B. 196, 215 (1962) (ALJ found no evidence that replacements oppose union); *Cf.* Note, *Striker's Replacement Presumption*, *supra* note 56, at 455 (striker replacement presumption should be abandoned or severely restricted).

[58] *See* R. GORMAN, *supra* note 14, at 112-13. The Board stated,

> [I]f a new hire agrees to serve as a replacement for a striker . . . it is generally assumed that he does not support the Union and that he ought not be counted toward a Union majority. When such strikebreakers or permanent replacements constitute a majority of the unit, the presumption of union support is undermined.

Id.

[59] 172 N.L.R.B. 1008 (1968).

[60] *Id.* at 1008. On the date the employer withdrew recognition of the union the only employees were former strikers that had resigned from the union and striker replacements. *Id. See also* Jackson Mfg. Co., 129 N.L.R.B. 460, 461 (1960) ("it is doubtful that the union represented anything near a majority of the employees, unless it could be shown (it was not) that the replacements hired during the strike had chosen the Union to represent it—a most improbable situation."); Peoples Gas Sys., Inc., 214 N.L.R.B. 944 (1974), *enforcement denied*, 532 F.2d 1385 (D.C. Cir. 1976) (employer based its reasonable good faith doubt partly on the fact that 40% of the employees were replaced during an economic strike) The Board in *People Gas*, stated that "It was not unreasonable for respondent to infer that the degree of union support among these employees who had chosen to ignore a union-sponsored picket line might well be somewhat weaker than the support offered by those who had vigorously engaged in concerted activity on behalf on [sic] union-sponsored objectives." *Id.* at 947.

[61] *See* S & M Mfg. Co., 172 N.L.R.B. 1008, 1008-09 (1968).

[62] *See* Buckley Broadcasting Corp., 284 N.L.R.B. 1339 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990).

> [U]nions and strikers have sometimes shown hostility toward the permanent replacements, and in some instances, the Union has lacked interest, at least . . . in negotiating on the replacements' behalf . . . . Permanent replacements are typically aware of the union's primary concern for the striker's welfare rather than that of the replacements. In this regard, the replacements' attitude towards union representation may be influenced by this awareness . . . ."

Id. at 1344; *see, e.g.*, Belknap, Inc. v. Hale, 463 U.S. 491, 496 (1983) (union obtains discharge of replacements); NLRB v. Randle-Eastern Ambulance Serv., Inc., 584 F.2d 720, 724 (5th Cir. 1978) (union demands priority of strikers over replacements); IT Servs., 263 N.L.R.B. 1183, 1185 (1982) (union demanded that replacements be terminated; great deal of violence directed against replacements). *See also* Flynn, *The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements*, 61 TEMP. L. REV. 691, 708 (1988) ("replacement with any nose for survival, . . . will surely not support the union"); Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 390 (1984) (union will insist on bumping replacements as condition of

policies of the Act. The replacement anti-union presumption discouraged strikes,[63] weakened bargaining stability,[64] and provided a sanctioned means of ousting a union simply by hiring a sufficient number of striker replacements.[65]

In 1975, the Board suggested in *Cutten Supermarket*[66] that striker replacements could cross a picket line and support the union in the same ratio as those they replace.[67] The Board offered no support for this position.[68] *Windham Community Hospital*[69] was the first case to apply this replacement pro-union presumption propounded in *Cutten Supermarket*.[70] This presumption prevented union ousting, protected the right to strike and promoted indus-

any settlement).

[63] *See also* Buckley Broadcasting Corp., 284 N.L.R.B. 1339, 1344 (1987) (risk of replacement and loss of union due to unfair presumption impairs employees' right to strike), *enforced*, 891 F.2d 230 (9th Cir. 1989); Weiler, *supra* note 62, at 390 (employer, by hiring replacements, can fend off union pressure resulting in settlement unfavorable to strikers); *see generally* NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938) (permanently replaced strikers do not have right to reinstatement unless vacancies arise).

[64] *See* Pennco, Inc., 250 N.L.R.B. 716, 717 (1980) (industrial stability promoted by presumption of continuing majority status), *enforced on other grounds*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982), *overruled by* Buckley Broadcasting Corp., 284 N.L.R.B. 1339 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990); Flynn, *supra* note 62, at 705 (discussing undesirable consequences of antiunion presumption).

[65] *See* Weiler, *supra* note 62, at 390 (employer who hires enough permanent replacements for strikers can eliminate union through NLRB-sponsored election); Schatzki, *Some Observations and Suggestions Concerning a Misnomer - "Protected" Concerted Activities*, 47 TEX. L. REV. 378, 383 (1969) (*MacKay* is invitation to employer to rid itself of union); *see generally* NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938) (economic strikers have no legal standing to "bump" striker replacements).

[66] Cutten Supermarket, 220 N.L.R.B. 507 (1975) (dictum).

[67] *Id.* at 509.

[68] *Id.*

[69] 230 N.L.R.B. 1070 (1977), *enforced*, 577 F.2d 805 (2d Cir. 1978).

[70] *See id.* at 1070. In *Windham*, the Board held that new employees, including striker replacements, were presumed to support the union in the same ratio as those they replace. *Id. But see* Beacon Upholstery Co., 226 N.L.R.B. 1360 (1976); Arkay Packaging Corp., 227 N.L.R.B. 397 (1976). In both *Beacon Upholstery* and *Arkay* the Board held that under some circumstances the employer could not presume that the replacements supported the union. *Beacon Upholstery*, 226 N.L.R.B. at 1368; *Arkay*, 227 N.L.R.B. at 397-98. In *Beacon Upholstery*, the Administrative Law Judge (ALJ) found that the employees had lawfully been terminated. *Beacon Upholstery*, 226 N.L.R.B. at 1368. Therefore, the interests of the striker replacements and the strikers were diametrically opposed. *Id.* In *Arkay*, the Board found that a reasonable doubt existed as to the majority status of each union. *Arkay*, 227 N.L.R.B. at 397. Therefore the employer could reasonably presume the replacements opposed the union. *Id.* In later decisions, the Board viewed *Arkay* as a "limited exception" to the replacement pro-union presumption due to its unique circumstances. *See* Windham Community Memorial Hosp., 230 N.L.R.B. 1070 (1977), *enforced*, 577 F.2d 805 (2d Cir. 1978).

trial stability by inducing settlements and fostering constancy in the bargaining between the employer and the union throughout a strike.[71] However, the underpinnings of this presumption are patently irrational, based neither on logic nor fact.[72] The circuit courts uniformly criticized this replacement pro-union presumption,[73] even while enforcing Board orders in particular cases.[74]

II. Introduction of the No-Presumption Policy

In 1987, the Board changed its striker replacement policy once again. The Board, in *Buckley Broadcasting Corp.*[75] abandoned the presumptive approach entirely, stating that it could not make policy presuming the union sentiments of striker replacements.[76] Al-

[71] *See Flynn, supra* note 62, at 707. The pro-union presumption prevented the employer from provoking a strike and then hiring replacements as a means of ousting the union. *Id.* Further, knowledge of this presumption created more confidence in the employees that a strike would not jeopardize their representation and the possibility of returning to their jobs. *Id.*

[72] *See* Weiler, *supra* note 62, at 390 (replacements are likely to be hostile to union, if only because union will insist on their discharge as condition of settlement). *See also* Flynn, *supra* note 62, at 708 (presumption that replacements support union is irrational); National Car Rental Sys., Inc. v. NLRB, 594 F.2d 1203, 1206 (8th Cir. 1979) ("wholly unwarranted and unrealistic" to presume replacement support for union).

With respect to the irrationality of the pro-union presumption, the Court has ruled that the Board may not adopt presumptions which are irrational. *See* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 787 (1979) (presumption adopted and applied by Board must rest on sound factual connection between proved and inferred facts); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501 (1978) (Board rules are reviewable for rationality).

[73] *See, e.g.*, National Rental Car Sys., Inc. v. NLRB, 594 F.2d 1203 (8th Cir. 1979). The court stated, "[t]he presumption . . . is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment . . . ." *Id.* at 1206. *See also* Whisper Soft Mills, Inc. v. NLRB, 754 F.2d 1381, 1388 (9th Cir. 1984) (presumption that strike replacements support Union in same ratio as strikers never embraced by *any* circuit court); Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981); NLRB v. Randle-Eastern Ambulance Serv., Inc., 584 F.2d 720 (5th Cir. 1978).

[74] Vulcan Hart Corp. v. NLRB, 718 F.2d 269, 275 (8th Cir. 1983) (enforced on grounds other than pro-union presumption which was criticized); NLRB v. Pennco, Inc., 684 F.2d 340, 342 (6th Cir.) (same), *cert. denied*, 459 U.S. 994 (1982), *overruled by* Buckley Broadcasting Corp., 284 N.L.R.B. 1339 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990); Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1110 (1st Cir. 1981) (same); NLRB v. Randle-Eastern Ambulance Services, Inc., 584 F.2d 720, 728 (5th Cir. 1978) (same); NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 812 (2d Cir. 1978) (same).

[75] Buckley Broadcasting Corp., 284 N.L.R.B. 1339 (1987), *aff'd*, 891 F.2d 230 (9th Cir. 1989). The Board noted that the striker replacement pro-union presumption had only been adopted as recently as 1975. *Id.* at 1342-43 (citing Cutten Supermarket, 220 N.L.R.B. 507 (1975)).

[76] *Id.* at 1344 (NLRB expressly overruled *Pennco* to extent it relied upon pro-union

though this approach did not preclude the employer from withdrawing recognition from the union, as did the replacement pro-union presumption, it severely reduced the means of doing so because the Board required a showing of good faith doubt of majority support which was virtually unattainable.[77]

III. The Court Affirms the No-Presumption Policy

In analyzing the no-presumption approach, it is submitted that it is rational to conclude that there are situations where striker replacements may not oppose the union.[78] It is also rational to envision circumstances where the interests of the replacements and strikers are not "diametrically opposed."[79] If, however, there is a situation where the interests of the strikers and the replacements are opposed, the no-presumption approach is rational as it does not preclude a finding that the replacements reject the union.[80] Rather, it places the burden of demonstration entirely on the employer.[81]

It is submitted that in order to be consistent with the Act, it is important for the Board to establish a rational equilibrium be-

presumption).

[77] *See* Comment, *Determining Liability*, *supra* note 10, at 734. The Board, by removing all presumptions, charged the employer with the full burden of establishing that it had an objective basis to have a reasonable doubt that the majority of his employees supported the union as it had with the pro-union presumption. *Id.* at 740-41. There remained only a few ways by which the employer could establish such a claim: violence on the picket line, union demand for discharge of replacements, employee resignations from the union, decertification petitions filed by employees, expressed desires to repudiate the union, union admission of failing support. *Id.* at 759. The presence of replacements could contribute to evidence of union repudiation but only given additional facts and circumstances evidencing repudiation by the replacements. *Id.* at 759-60.

[78] NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1550 (1990) (citing Lyng v. Automobile Workers, 485 U.S. 360, 371 (1988)) (striker replacements who, in fact, support union and desire representation may oppose strike or be forced to work for economic reasons).

[79] Dold Foods, Inc., 289 N.L.R.B. No. 156, 129 L.R.R.M. 1174, 1175 (1988) (due to weak bargaining position union did not request ousting of 169 out of 201 striker replacements); IT Servs., 263 N.L.R.B. 1183 (1982). In *IT Services*, the employer withdrew recognition of the union once it hired 36 replacements for the 31 strikers. *Id.* at 1185. This strike situation was permeated by intolerable levels of violence which was particularly racist in nature. *Id.* at 1187. However, on the date the employer withdrew recognition from the union there was enough work for all the strikers to return to their jobs without laying off a single replacement. *Id.* at 1185.

[80] *See* Flynn, *supra* note 62, at 710.

[81] *Id.*

tween the ability of the employer to challenge an incumbent union and the union's ability to resist that challenge. An employer has an obligation to negotiate with the representative chosen by the majority of all of the employees in the bargaining unit, including striker replacements.[82] However, Board policy must not have a chilling effect on the employees' right to strike.[83] In light of the need to balance these competing interests, it is submitted that the Supreme Court's decision to uphold the Board's new no-presumption approach was correct.

IV. Evidence of Good Faith Doubt: What is the Standard?

For an employer to lawfully withdraw recognition from a union, the Board requires an employer to show either that the union does not have a majority of support or that the employer has an objective good faith doubt that the union does not have majority support.[84] It is submitted that while attempting to strike a balance between the rights of the union and its members with the obligations of the employer, it would appear that the effect of the no-presumption approach is to hold the employer to proof in fact in order to establish a good faith doubt of majority support. Nevertheless, as articulated by the Board, the no-presumption approach would allow the employer to use the facts and circumstances of its own particular bargaining situation to demonstrate an objective basis for a good faith doubt of majority support for the union.[85]

[82] *See* Rudolph Wurlitzer Co., 32 N.L.R.B. 163, 166 (1941) (replacements are employees of company entitled to participate in selection of bargaining representative). This ruling was followed by the adoption of the Labor Management Relations Act of 1947, Pub. L. No. 80-101, Chap. 20, 61 Stat. 136, 137-38 (codified at 29 U.S.C. 141 et seq (1988)) (both strikers and replacements are included as employees).

[83] *See* 29 U.S.C. § 157 (1988). *See also* Weiler, *supra* note 62, at 387-88 ("American labor law affirmatively promises workers the right to strike . . .")

[84] *See* Buckley Broadcasting Corp., 284 N.L.R.B. 1339, 1340 (1987).

[85] Johns-Manville Sales Corp., 289 N.L.R.B. No. 40, 128 L.R.R.M. 1326, 1329 (1989) (relying on ruling in *Buckley Broadcasting*, will review facts of each case and "require some further evidence of union non-support"); Buckley Broadcasting Corp., 289 N.L.R.B. 1339, 1344 (1987) (Board "will review the facts of each case . . ."), *enforced*, 891 F.2d 230 (9th Cir. 1989). *See also* Curtin Matheson Scientific, Inc. v. NLRB, 859 F.2d 362, 370 (5th Cir. 1988), (Williams, J., dissenting), *rev'd*, 110 S. Ct. 1542 (1990). A case by case approach "allows the Board to take into account the particular circumstances surrounding each strike and the hiring of replacements, while retaining the long-standing requirement that the employer must come forward with some objective evidence to substantiate his doubt of continuing majority status." *Id.*

Although the Board had no statutory duty to recognize an employer's good faith doubt of majority support as a defense to withdrawal of recognition, the Board has expressed its adherence to that principle.[86] The employer's good faith defense, as adopted by the Board over time, was measured by objective evidence of the reasonableness of an employer's doubt of majority support at the time it withdrew recognition from the union.[87] In *Celanese Corp. of America*,[88] the Board stated that the reasonableness of evidence should be evaluated in light of all of the facts and circumstances in the particular case and not by application of a formula or any single factor.[89] This is consistent with provisions within the NLRA.[90] Additionally, rules governing judicial review of agency decisions require that findings which are unsupported by substantial evidence be set aside.[91] This requirement is also echoed in the NLRA.[92] Nevertheless, as the concurrence in *Curtin Matheson* noted, the Board's decision against this employer, as well as other recent Board decisions,[93] suggests that the critical factor in the Board's determination of good faith doubt is whether a sufficient number of employees have " 'expressed desires' to repudiate the incumbent union."[94] Board restrictions on polling employees in

[86] *Curtin Matheson*, 110 S. Ct. at 1555-56.

[87] *See* Celanese Corp. of Am., 95 N.L.R.B. 664, 673 (1951) (reasonable grounds for doubting union majority support prerequisite for good faith defense). *See also* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 299 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979) ("[t]he good faith criterion is unconcerned with the employer's subjective motivation; its focus is empirical and objective").

[88] 95 N.L.R.B. 664 (1951).

[89] *Id.* at 673. "By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula." *Id. See also Tahoe Nugget*, 584 F.2d at 305 (evidentiary test for reasonable doubt is cumulative).

[90] 29 U.S.C. § 160(b) (1988). "Any such proceedings shall, so far as practicable, be conducted in accordance with the rules of evidence applicable to the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States . . . ." *Id.*

[91] 5 U.S.C. § 706(2)(E) (1988).

[92] 29 U.S.C. § 160(f) (1988). "[T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive." *Id.*

[93] *See* AMBAC Int'l Ltd., 299 N.L.R.B. No. 66, 135 L.R.R.M. 1056 (1990) (letters signed by employees indicating preference for "individual, direct negotiations" rather than union representation warrants withdrawal recognition); Texas Petrochems. Corp., 296 N.L.R.B. No. 136, 132 L.R.R.M. 1279 (1989) (employer must have reasonable doubt of majority support to conduct poll of employee sentiments).

[94] *See Curtin Matheson*, 110 S. Ct. at 1555. *See also* Tile, Terrazzo & Marble Contractors

order to determine those sentiments, create somewhat of a dilemma.[95] The polling necessary to determine whether the union has a majority of support can itself be conducted only after the employer has established a good faith doubt of majority support.[96]

If, in *Curtin Matheson*, the Board did not abandon the good faith defense, it did abandon its adherence to the *Celanese Corp. of America* "totality of the circumstances" standard for establishing that defense,[97] by requiring evidence of actual loss of majority

Ass'n, 287 N.L.R.B. 769, 769 n.2 (1987) (employee's abandonment of strike did not indicate loss of majority support). Citing *Buckley Broadcasting*, the Board noted that no specific presumption concerning replacements' union sentiments would be applied and held that the Respondents failed to provide "sufficient evidence concerning their employees' expressed desire to repudiate the Union . . . ." *Id.* It is submitted that the apparent failure of the Board to, in fact, consider all the facts and circumstances, in favor of a "head count" of expressed desires to repudiate the union has created genuine concern in the circuits. *See* Johns-Manville Sales Corp. v. NLRB, 906 F.2d 1428, 1433 (10th Cir. 1990). The Tenth Circuit held that it was an error to rely on express statements made by employees as a prerequisite to a finding of good faith doubt of majority support. *Id.* The court reversed the Board, finding that there was insufficient evidence to rebut the presumption of continuing majority support despite proof of harassment of replacements, a petition decertification, union resignations, the union's demand for discharge of replacements and the union's failure to organize replacements. *Id.*

[96] *See* Struksnes Constr. Co., 165 N.L.R.B. 1062, 1063 (1967). The Board adopted the following criteria for employer prompted polling in order to prevent employers use of polling to intimidate unions: 1) the purpose of the poll must be to determine the truth of a union's claim of majority, 2) this purpose must be communicated to the employees, 3) assurances against reprisal must be given, 4) the employees must be polled by secret ballot, and 5) the employer must not engage in unfair labor practices or otherwise create a coercive atmosphere. *Id.*

Since *Struksnes* there has been much debate over the standard of doubt which an employer must meet in order to lawfully poll his employees. The Board's recent requirement of a "head count" of those who express desire to repudiate the union to support a good-faith doubt of union majority is made virtually impossible given the requirement of "reasonable doubt" to justify the poll. *See* Texas Petrochems. Corp., 296 N.L.R.B. No. 136, 132 L.R.R.M. 1279, 1285 (1989) (stringent standard for polling promotes bargaining stability). *But see* NLRB v. A.W. Thompson, Inc., 651 F.2d 1141, 1144-45 (5th Cir. 1981) (rejecting Board's reasonable doubt standard for "loss of support" standard).

[96] *See* Texas Petrochems. Corp., 296 N.L.R.B. No. 136, 132 L.R.R.M. 1279, 1285 (1989).

[97] *See* Celanese Corp. of Am., 95 N.L.R.B. 664, 673 (1951) (whether employer has questioned union's majority support in good faith determined by totality of circumstances necessarily including reasonable grounds for belief that union had lost its majority status). In dismissing the complaint against Celanese Corp., the Board held that:

> [W]hether the [employer] violated Section 8(a)(5) . . . depends, not on whether there was sufficient evidence to rebut the presumption of the union's continuing majority status or to demonstrate that the union in fact did not represent the majority of the employees, but upon whether *the employer in good faith* believed that the union no longer represented the majority of the employees.

Id. at 671 (emphasis in original). *Cf.* Stoner Rubber Co., 123 N.L.R.B. 1440, 1445 (1959)

support.[98] It is suggested, therefore, that the Board muddled its analysis by failing to identify and distinguish the evidence required to rebut the presumption of continued majority support from evidence which establishes a reasonable good faith doubt of majority status, in defense of a charge of unlawful withdrawal of recognition from the union. Furthermore, neither the Board nor the Court noted that even a successful good faith defense may not necessarily oust a union, as the union would only need a petition supported by 30% of the bargaining unit employees to gain the right to another certification election.[99] This petition is equivalent to the union's burden of proving majority support once the employer had overcome the presumption of continuing majority support.[100] The failure of the Court to order a review of these inconsistencies has created new concerns.

V. POST-*CURTIN MATHESON: JOHNS-MANVILLE SALES CORP.*

Since the Supreme Court decision in *Curtin Matheson*, there has been further judicial review of the Board's no-presumption approach, *Johns-Manville Sales Corp. v. NLRB*.[101] The *Johns-Manville* strike was permeated by extraordinary levels of strike related violence.[102] After approximately five months of negotiations, the only issue preventing settlement of the strike was the status of the

(evidence casting serious doubt on union's majority status sufficient to overcome presumption and shift burden of proof to union).

[98] *See* Curtin Matheson Scientific, Inc., 287 N.L.R.B. 350, 353 (1987) ("taking all factors into account"), *enforcement denied*, 859 F.2d 362 (5th Cir. 1988), *rev'd*, 110 S. Ct. 1542 (1990); Buckley Broadcasting Corp., 284 N.L.R.B. 1339 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989); Texas Petrochems. Corp., 296 N.L.R.B. No. 136, 132 L.R.R.M. 1279 (1989).

[99] *See* Comment, *Application of the Good-Faith Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 DUKE L.J. 718, 733. "Erroneously deciding the majority status in favor of the union effectively forces a minority union upon the employees, whereas dismissal merely requires the union to reprove its majority support." *Id. See also* 29 U.S.C. § 159(c)(1)(A)(i) (1988) (authorizing and regulating certification elections).

[100] *See* Comment, *supra* note 99, at 733.

[101] 906 F.2d 1428 (10th Cir. 1990).

[102] *Id.* at 1430. The violence that took place during the strike consisted of: 1) strikers blocked the cars of the replacements, shouted at them, made obscene gestures, and called them "scabs", 2) a dummy with the word "scab" on its chest was hanged by its neck near the plant entrance, 3) at least 70 cars were damaged, 4) the home of one of the replacements was burglarized, the word "scab" was written on the wall and some furniture was stolen. *Id.* Johns-Manville paid employees over $20,000 in compensation for the damages related to the strike. *Id.*

striker replacements.[103] The union wanted all replacements fired and Johns-Manville refused.[104] Once the replacements were informed of the union's position they immediately gathered enough signatures to force an election on decertification of the union.[105] Johns-Manville used the decertification petition and other evidence to support its good faith doubt of majority support and its subsequent withdrawal of union recognition.[106] Employing the no-presumption approach, the Board ruled that Johns-Manville did not have enough evidence of replacement opposition to the incumbent union to support its withdrawal.[107] The Tenth Circuit, while supporting the no-presumption approach, reversed the Board's ruling[108] stating that the Board failed to assess the cumulative effect of all the evidence as required by its own standard.[109] The court further asserted that by emphasizing that the employer must demonstrate the "expressed desires" of a majority of employees to repudiate the union, the Board limited the devices by which the employer could make out a good faith doubt of union support.[110] Finally, the court declared that in that circuit, until the Board formally rejects the good faith doubt standard as a basis for the withdrawal of recognition, it will require that the Board look at the "totality of the circumstances" to decide whether good faith existed.[111]

VI. Suggested Evidentiary Standards

The primary purpose of the Supreme Court's grant of certiorari in *Curtin Matheson* was to resolve the split among the Circuit Courts in the application of the striker replacement presump-

[103] *Id.*
[104] *Id.*
[105] *Id.* On the day the petition was signed the bargaining unit consisted of 290 striker replacements, 9 returning strikers, 2 workers returning from layoff, and 208 strikers. *Id.* In a period of less than a week the striker replacements gathered 211 signatures on a decertification petition. *Id.* This number was well in excess of the 30% needed to force an election. *See* 29 U.S.C. §159(c)(1)(A) (1988).
[106] *Johns-Manville*, 906 F.2d at 1433.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 1434.
[110] *Id.*
[111] *Johns-Manville*, 906 F.2d at 1433-34.

tions.[112] However, the Supreme Court's decision has raised a new issue: how will the Board and the circuit courts determine "good faith doubt" under the no-presumption approach? In adopting the no-presumption policy, it is submitted that the Board attempted to devise a fair, more logical and effective rule in determining the relative support for an incumbent union. Nevertheless, the Board must be consistent in its review of the employer's evidence of good faith doubt or it should abandon the good faith option.[113] It has been submitted that the loss of majority status by a union should be inferable by the cumulative weight of several factors: the presence of permanent replacements; the abandonment of the union by returning strikers; union admission of failing support; picket-line violence; statements made by replacements, strikers, union representatives, and returning strikers which clearly repudiate the union; and union settlement demands that replacements be discharged so that strikers can return to their jobs.[114] The existence of one or more of these factors is usually the only evidence available to employers to establish good faith doubt of majority support because the Board makes it "practically impossible to amass direct evidence of its workers' views."[115] Therefore, the Board must give them considerable weight when their accumulation indicates a lack of majority support if the "good faith" defense is to mean anything at all.[116]

Conclusion

In *Curtin Matheson*, the Supreme Court, in light of the level of review given administrative decisions, and the no-presumption position's logic and consistency with the NLRA was justified in approving the Board's decision to abandon all striker replacement

[112] NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 1548-49 (1990).

[113] *Cf. Johns-Manville*, 906 F.2d at 1431-32.

[114] *Id.* at 1432. "The Board erred as a matter of law in its reliance in this case, at least partially, upon a requirement that good-faith doubt must be established by the express statements of individual workers." *Id.*

[115] *See Curtin Matheson*, 110 S. Ct. at 1556 (Blackmun, J., dissenting).

[116] *See Johns-Manville*, 906 F.2d at 1432-33. *See also* Hajoca Corp. v. NLRB, 872 F.2d 1169, 1175 (3d Cir. 1989) (current standard is one based on "all the circumstances"); NLRB v. Wilder Constr. Co., Inc., 804 F.2d 1122, 1125 (9th Cir. 1986) (employer must prove knowledge of facts giving reasonable basis for doubting union's majority).

presumptions. The Court, however, passed up the opportunity to instruct the Board to distinguish the evidentiary requirements for proving an actual loss of majority support and the evidentiary requirements for a reasonable objective basis for a good faith doubt of the union's majority status. The Court's failure to address this issue will permit the Board to continue to decide cases based upon undefined evidentiary criteria, leaving the employer uninformed as to his obligations and liabilities and burdening the circuit courts with the task of requiring the Board to clarify its evidentiary requirements. This comment has suggested that the Board clearly identify the objective circumstantial evidence necessary for the employer to establish a good faith doubt of majority support for purposes of withdrawal of recognition, and distinguish that evidence from the evidence necessary to prove an actual loss of continuing union support by the employees in the bargaining unit. Once that distinction is properly made and the objective criteria is established, the no-presumption approach will become useful in determining majority support for the union. Without such clarification, however, the circuit courts will continue to struggle with the new no-presumption policy and in all likelihood inconsistent decisions will permeate this area of the law.*

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* As we go to press, Senator Howard Metzenbaum, in light of the recent Eastern Airline, Greyhound, and the New York Daily News strikes, has sponsored, with bi-partisan support, a bill which would amend the NLRA and the RLA to bar employers from hiring permanent replacements for striking workers.