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Douglas E. Ray

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WITHDRAWAL OF RECOGNITION FROM AN INCUMBENT UNION UNDER THE NATIONAL LABOR RELATIONS ACT: AN APPRAISAL

DOUGLAS E. RAY†

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† Associate Professor of Law, University of Toledo College of Law. B.A. University of Minnesota, 1971; J.D. Harvard Law School, 1975. The author thanks Maynard Buck for his research assistance.

(869)
I. INTRODUCTION

The test applied by the National Labor Relations Board (Board) and the courts of appeals for determining whether an employer may withdraw recognition from an incumbent union and refuse to further bargain has been simply stated:

[A]bsent unusual circumstances, a union is irrebuttably presumed to enjoy majority status during the first year following its certification. Upon expiration of the certification year, the presumption of majority status continues but becomes rebuttable. An employer who wishes to withdraw recognition from a certified union after a year may rebut the presumption in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority support, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain. 1

Despite the apparent simplicity of this rule and its almost uniform adoption by the Board and reviewing courts, 2 its application, even by the Board, has not been uniform. A major reason for this disparity is that the rule is applied on a case-by-case basis in an area where exists a conflict between two of the major policies behind the labor laws. On one side is the policy of industrial stability 3 which is fostered by stable, continuing bargaining relationships and infrequent strikes, changes of representative or other potential disruptions to interstate commerce. To follow this policy is to give weight to the re-

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2. See, e.g., Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1109-10 (1st Cir. 1981); National Car Rental Sys., Inc. v. NLRB, 594 F.2d 1203, 1205 (8th Cir. 1979); Pioneer Inn Assocs. v. NLRB, 578 F.2d 835, 839 (9th Cir. 1978); NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 811 (2d Cir. 1978); Celanese Corp., 95 N.L.R.B. 664, 672 (1951).

3. Section 1 of the National Labor Relations Act, as amended, sets forth a basic policy of the Act:
   Experience has proved 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, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

suits of prior representation elections or other means of designating a representative, and to interfere with relationships founded on such results only in extraordinary cases.

On the other side is the policy of protecting the rights of the employee from interference by the employer or the union. Section 7, the cornerstone of the Act, provides:

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 of such activities. 

The greater the emphasis placed on the right to refrain from organizational activity, the less bound will be employees by choices made in prior representation elections. This goal is particularly important in cases where the employees' choice was made long ago when many of those currently represented did not have the opportunity to express their choice.

When the two policies come into conflict, the inherent tension between them results in uncertain and unpredictable rulings in a number of areas. For example, there are presently splits of authority as to the amount of evidence necessary to demonstrate the reasonableness of the employer's doubt as to the union's majority status. The courts are similarly divided over such issues as the kind of evidence required to support an employer's withdrawal of recognition.

4. 29 U.S.C. § 157 (1976). One commentator has observed that "the basic principle of the NLRA is to be found in its section 7, granting to employees the right to form labor organizations, to deal collectively through such organizations regarding terms and conditions of employment and to engage in concerted activities in support of these other rights." R. Gorman, Basic Text on Labor Law—Unionization and Collective Bargaining 1 (1976) (emphasis added).

5. 29 U.S.C. § 157 (1976) (emphasis added). Section 9(a) of the National Labor Relations Act also implicitly recognizes the right of the individual to be free from minority representation by providing that only representatives designated or selected "by the majority of the employees in a unit" shall be the exclusive representatives. Id. § 159(a).

6. Some courts require "clear, cogent and convincing evidence" to establish the reasonableness of the employer's doubt while other courts and the Board hold that the employer need establish only a "reasonable basis." Compare NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979) ("The presumption is rebutted by clear, cogent and convincing evidence.") with NLRB v. King Radio Corp., 510 F.2d 1154, 1156 (10th Cir.), cert. denied, 423 U.S. 839 (1975) (the employer "must show a rational basis in fact for doubt of majority status").

7. For a discussion of the types of evidence necessary to support an employer's withdrawal of recognition, see notes 79-207 and accompanying text infra. See also
particularly in a strike situation, the legal effect of proving that the employer's doubt was reasonable and the remedies appropriate to correct any violation. Thus, there exists great uncertainty as to when an employer, even in good faith, may refuse to bargain with a certified or voluntarily recognized union when it doubts the union's continued majority status.

This uncertainty benefits no one. It harms employees, the union and the employer. An employer who withdraws recognition from an incumbent union has the ability to forestall bargaining for months and even years by asserting the validity of its withdrawal before an administrative law judge, the Board and, ultimately, the court of appeals. Because of the uncertainty and unpredictability of the law,


8. For a discussion of withdrawal of recognition in a strike situation, see notes 139-80 and accompanying text infra. See generally Segar, supra note 8, at 991-92; Note, The Strikers' Replacements Presumption and an Employer's Duty to Bargain with the Incumbent Union, 21 B.C.L. Rev. 455 (1980).

9. The Board and some courts hold that demonstrating the reasonableness of the employer's doubt as to the union's majority status establishes a complete defense for the employer. Other courts hold that such a demonstration shifts the burden to the Board's General Counsel to prove that the union has the support of a majority of employees. For a discussion of these conflicting views of the legal effect of establishing good faith doubt, see notes 216-29 and accompanying text infra.

10. The usual remedy for an employer's unlawful withdrawal of recognition is an order requiring the employer to bargain with the union in question. But in Peoples Gas Sys., Inc. v. NLRB, the Court of Appeals for the D.C. Circuit, after ultimately holding the employer to have unlawfully withdrawn recognition, refused to enforce the Board's bargaining order on the grounds that passage of time (seven years), employee turnover and an intervening election which the union had lost, rendered it less likely that the union still commanded majority support. Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35, 48-50 (D.C. Cir. 1980). The Board had argued that a bargaining order was necessary to prevent the employer from benefitting from its unlawful practices. Id. For a further discussion of Peoples Gas, see notes 11-12 infra.

11. The Court of Appeals for the D.C. Circuit noted in Peoples Gas Sys., Inc. v. NLRB, that the present procedures and standards leave both the Company and the Union in the dark as to when a challenge can be made, often require years to resolve, and run a substantial risk of frustrating actual employee wishes simply because the Board is not satisfied with the Company's ability to identify and articulate the reasons for its doubt about the Union's support.

Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35, 44 (D.C. Cir. 1980).

12. The extent of uncertainty and delay possible in this area is demonstrated by the recent case of Peoples Gas Sys., Inc. v. NLRB, where litigation over an employer's withdrawal of recognition extended a full seven years. Id. at 37. In February 1973, while bargaining over a collective bargaining agreement with a union certified in 1966, the company allegedly concluded that it had reason to doubt the union's continued majority status because of turnover, decline in union dues checkoffs and the union's conduct in bargaining. On these grounds, it refused to bargain further. Initially the Board's Regional Director refused to issue a complaint, a decision which was later reversed by the Office of the General Counsel. Id. at 39. After a hearing, the administrative law judge concluded that the factors relied on by the company...
an employer might well think its withdrawal lawful and later have it determined unlawful. Whether the employer thought it had a strong case or not, however, the possible effect is the same—years of delay and uncertainty. 13

If it is ultimately determined that the employer unlawfully withdrew recognition, it will generally be ordered to bargain with the union. 14 However, this cannot restore to employees the years during which they have been denied their lawful right to a collective bargaining representative. Further, the years of non-recognition may have eroded the union’s support within the unit. There may have been turnover. 15 Employees hired during the pendency of unfair labor practice proceedings will not have had the experience of being represented by the union and their support may not be as strong. Employees may also be frustrated by the union’s apparent inability to do anything for them during the long hiatus.

Nor does this uncertainty and delay always benefit the employer. An employer, under current standards, may believe it no longer has a
duty to bargain with a union and withdraw recognition. If the union files unfair labor practice charges, however, the employer may be constrained in operating its business because of risks involved in changing terms of employment while the charges are pending. The employer's duty to bargain in good faith requires that it bargain to impasse with the exclusive representative before changing any term or condition of employment.\footnote{In firms where a union is the exclusive bargaining representative of the employees, an employer's institution of changes regarding matters which are mandatory subjects of bargaining without first consulting the union is a violation of the duty "to bargain collectively" imposed by § 8(a)(5) of the National Labor Relations Act. 29 U.S.C. § 158(a)(5) (1976). \textit{See} NLRB v. Katz, 369 U.S. 736 (1962).} If the withdrawal of recognition is determined unlawful, the employer will have further violated the law if it has changed or adjusted any benefit during the period in which the legality of the withdrawal is being litigated. The usual remedy for such unilateral change includes restoration of any benefits withdrawn.\footnote{The Supreme Court recognized that an order restoring the \textit{status quo ante} was within the Board's power where the Board had found the employer to have refused to bargain over a mandatory subject of bargaining. \textit{Fibreboard Paper Prods. Corp. v. NLRB}, 379 U.S. 203, 215-16 (1964). \textit{See}, e.g., \textit{Taurus Waste Disposal, Inc.}, 263 N.L.R.B. No. 28, 1982-83 NLRB Dec. (CCH) ¶15,139 (1982) (employer found to have unlawfully withdrawn recognition was ordered to make employees whole by paying all insurance fund, severance fund and pension fund contributions and to continue such payments until it negotiated in good faith with union to a new agreement or to impasse); \textit{Plymouth Locomotive Works, Inc.}, 261 N.L.R.B. 595 (1982) (employer found to have unlawfully withdrawn recognition was ordered to replace employee in the position the employer had eliminated without bargaining). \textit{But see} \textit{Carmichael Constr. Co.}, 258 N.L.R.B. 226 (1981) (although a unilateral change of wage rates was found unlawful where withdrawal of recognition was based on insufficient evidence, the employer was not required to rescind the wage increase).} Consequently, if pay has been adjusted downward to reflect economic problems, if one benefit has been substituted for another, or if certain work has been subcontracted, an employer found to have unlawfully withdrawn recognition will usually be required to restore the \textit{status quo} and make employees whole for any losses sustained as a result of the unilateral change.\footnote{During the period it recognizes the union, the employer may make changes provided it first gives the union notice and negotiates to impasse, and provided the matter is not concerning a term of a collective bargaining agreement. \textit{See}, e.g., \textit{NLRB v. Katz}, 369 U.S. 736, 745 (1962); 29 U.S.C. § 158(d) (1976).} Because of this potential expense, the careful employer may feel compelled to avoid making changes during the entire period of litigation over the alleged unfair labor practices. As a consequence, it will be more restricted in its actions than during the time it recognized the union.\footnote{In firms where a union is the exclusive bargaining representative of the employees, an employer's institution of changes regarding matters which are mandatory subjects of bargaining without first consulting the union is a violation of the duty "to bargain collectively" imposed by § 8(a)(5) of the National Labor Relations Act. 29 U.S.C. § 158(a)(5) (1976). \textit{See} NLRB v. Katz, 369 U.S. 736 (1962).} Further, unlawfully withdrawing recognition may convert an economic strike into an unfair labor practice strike, an effect which may have expensive reper...
In recent years the Board has increasingly found that the evidence offered by employers has not been sufficient to overcome the presumption of continued union majority. The Board has stated that an "employer’s burden is a heavy one" in seeking to withdraw recognition of the existing union. The Board’s strict approach has come under criticism, both by the courts of appeals and various commentators. Imposing anything less than a "heavy" burden on employers undercut both industrial stability and employees’ rights to be represented by their chosen representative. However, the law also seeks to protect the employees’ right to refrain from union activities. This right is compromised when employees are bound by a choice made years in the past by other persons. What is needed is a safety valve. Although circumstantial evidence should be insufficient to demonstrate that the union has lost the support of a majority of the employees, if a majority of employees in a unit truly no longer desire representation, their wishes ought to be honored.

While there exist speedy and efficient means for an employer to

20. When a union goes on strike for a new contract (an economic strike), the employer generally has the right to hire persons to serve as permanent replacements for the strikers. While the permanently replaced strikers remain employees, the employer is required to reinstate them upon their application only as openings arise in the workforce. It need not discharge the replacements to take them back immediately at the end of the strike. See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938) (the employer "is not bound to discharge those hired to fill the place of strikers, upon the election of the latter to resume their employment, in order to create places for them."). See also NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) (a legitimate and substantial business justification for refusing to reinstate strikers exists when their positions have been occupied by workers hired as permanent replacements); Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970) ("[t]he justification for not discharging replacements in order to reinstate strikers . . . is the need of the employer to . . . maintain operation during a strike").

Where, however, an employer commits unfair labor practices which have the effect of causing or prolonging the strike, it has no right to hire replacements on a permanent basis but must reinstate strikers upon their application. Thus, if an employer unlawfully withdraws recognition before or during a strike and refuses to reinstate strikers upon their application to return to work while retaining replacement workers, it can be held liable for back pay to the affected strikers. See, e.g., Vulcan-Hart Corp., 262 N.L.R.B. No. 17 1981-82 NLRB Dec. (CCH) ¶ 19,052 (1982) (employer’s unlawful withdrawal of recognition held sufficient to convert an economic strike into an unfair labor practice strike and accordingly, reinstatement and back pay were granted to the replaced strikers).

21. For a discussion of the use of employee polling by an employer, see notes 197-207 and accompanying text infra.

22. For a discussion of the use of an election to determine continued union support, see notes 230-242 and accompanying text infra.

23. For a discussion of the Board’s blocking charge doctrine, see notes 236-39 and accompanying text infra.
determine whether a majority of the employees wish to continue to be represented by a union such as employer polls and employer petitions for election, these means are rarely utilized. Polling entails certain risks to employee free choice and may be illegal in some circumstances.\textsuperscript{24} An employer’s right to petition for an election is presently measured by the same uncertain and difficult standard that is applied to an employer’s decision to withdraw recognition entirely.\textsuperscript{25} Given this rigid standard and the delays resulting from the Board’s practice of refusing to hold an election prior to resolution of certain types of unfair labor practice charges,\textsuperscript{26} few employers resort to these options.\textsuperscript{27}

It is the basic premise of this article that the present system, with its uncertainty and delay, is flawed. A quick and accurate resolution of majority status can be achieved only by recognizing the superiority of the election process as a vehicle for determining the wishes of employees. The Supreme Court, in its \textit{Linden Lumber}\textsuperscript{28} decision, noted that “[i]n terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored.”\textsuperscript{29} The time has come to recognize this truth in the incumbent union context as well.

\begin{itemize}
\item \textsuperscript{24} Because the tests for polling or filing an election petition are similar to the test for completely withdrawing recognition, there is presently little incentive for an employer to use one of these less drastic means. See notes 201 & 235 and accompanying text infra.
\item \textsuperscript{26} See, e.g., NLRB v. Silver Spur Casino, 623 F.2d 571, 581 (9th Cir. 1980), cert. denied, 451 U.S. 906 (1981) (“[t]he Board has accorded too much weight to the presumption” that the union retains majority support after the initial year).
\item \textsuperscript{27} See Krupman, \textit{Withdrawal of Recognition Based on Objective Considerations-Reckoning by Starlight}, 1 \textit{Del. J. Corp. L.} 288, 289 (1976) (“[t]he application of this reasonable doubt doctrine often results in Board orders directing an employer to bargain with a union despite objective considerations making it apparent that the union no longer possesses majority support.”); \textit{Comment, Application of the Good Faith Doubt Test to the Presumption of Continued Majority Status}, 1981 \textit{Duke L.J.} 718, 719, (“[T]he Board has maximized industrial stability at the expense of employee free choice by placing an unduly heavy burden on the employer to prove that the incumbent union no longer commands majority support of the employee unit.”); \textit{Note, NLRB Determination of Incumbent Unions' Majority Status}, 54 \textit{Ind. L.} J. 651, 655 (1979) (“The major and most fundamental problem of the current Board approach to incumbency questions is its focus on the essentially collateral issue of employer’s doubt.”).
\item \textsuperscript{28} Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974). The Supreme Court held in \textit{Linden Lumber} that an election is the only appropriate method for determining majority support in an initial recognition situation unless independent unfair labor practices destroy the “laboratory conditions” necessary for a fair election. \textit{Id.} at 310.
\item \textsuperscript{29} \textit{Id.} at 307.
\end{itemize}
II. IRREBUTTABLE PRESUMPTION OF MAJORITY STATUS

There are certain time periods during which, with few exceptions, a union is insulated from an employer's claim that it has lost its majority status. An employer generally may not challenge a union's continued majority status during the year following certification of a union's election victory and during certain extensions of this period. Nor may it generally withdraw recognition during the term of a valid collective bargaining agreement. During these time periods, the union is held to have an irrebuttable presumption of majority status.

A. Certification Year

Since the National Labor Relations Act requires employers to recognize and bargain only with "[r]epresentatives designated or selected by the majority of the employees in a unit," it could be argued that any time a union loses its majority status, whether ten days or ten years after the representation election, an employer no longer has a duty to bargain. Such a view, however, would give no weight to a union election victory, no opportunity for a union to bargain on behalf of its members, and would in no way contribute to industrial stability, a primary objective of the amended National Labor Relations Act. Thus, in order to permit collective bargaining to go forward and to provide stability in labor relations, the Board, with Supreme Court approval, adopted a rule requiring that, absent unusual circumstances, an employer must recognize a union for the entire year following certification even if it has evidence of the union's loss of majority. During this period of time, the union is irrebuttably

30. For a discussion of the certification year concept, see notes 34-38 and accompanying text infra.
31. For a discussion of possible extensions of the certification year, see notes 39-43 and accompanying text infra.
32. For a discussion of the contract bar rule, see notes 48-54 and accompanying text infra.
33. See notes 37 & 51-57 and accompanying text infra.
35. See note 3 supra.
36. Brooks v. NLRB, 348 U.S. 96 (1954). Unusual circumstances, in the Court's view, included a schism in the certified union, its becoming defunct or a radical fluctuation in bargaining unit size in a short time period. The Board and courts do not take a broad view of the term "unusual circumstances." To do so could involve allowing the exception to engulf the rule. See, e.g., NLRB v. Mr. B. IGA, Inc., 677 F.2d 32 (8th Cir. 1982) (three-year delay between representation election and certification during which a reduction in bargaining unit size from 19 to 3 persons occurred through the sale of 3 of 4 stores in the unit and fact that remaining 3 employees did not vote in original election held not to create "unusual circumstances" sufficient to justify refusal to bargain in certification year); Airport-Shuttle, 257 N.L.R.B. 955
presumed to enjoy majority status. Upon expiration of the certification year, the presumption of majority status continues, but becomes rebuttable.

If the employer refuses to bargain in good faith during the certification year in contravention of section 8(a)(5), the Board has the power to remedy the violation by extending or renewing the certification year. Thus, where the certification year is interrupted by litigation of section 8(a)(5) unfair labor practice charges, it has been held that the employer is obligated to bargain "for a reasonable period of time exclusive of the period during which the bargaining relationship was suspended by litigation of the . . . unfair labor practices." When the litigation is terminated, whether by Board order or settlement agreement, the certification year is extended "to embrace that time in which the employer has engaged in its refusal to bargain." The rationale for such extension is to provide a remedy for an unfair labor practice. In the case of a Board-approved settlement agreement—(1981) ("disaffection" petition allegedly signed by majority of employees and union's failure to contact employer until eight months after certification do not constitute "unusual circumstances"); Ajax Magnethermic Corp., 229 N.L.R.B. 317 (1977), enforced, 541 F.2d 1210 (6th Cir. 1979) (Board rejected employer's arguments that employee turnover and changes in "conditions" constituted "unusual circumstances" justifying withdrawal).

37. Brooks v. NLRB, 348 U.S. 96, 98-104 (1954). During the certification year, the employer also may not allege doubt as to the union's majority status to justify deviation from normal good faith bargaining within the certification year. See Crestline Memorial Hosp. Ass'n v. NLRB, 668 F.2d 243 (6th Cir. 1982) (employer found to have violated duty to bargain in good faith when it informed union that it would only ratify two-month collective bargaining agreement effective until end of certification year).

38. See J. Ray McDermott & Co. v. NLRB, 571 F.2d 850, 858 (5th Cir.), cert. denied, 439 U.S. 893 (1978) ("the presumption is rebuttable and may be overcome by 'objective evidence' proffered by an employer"); NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 811 (2d Cir. 1978) ("following the expiration of the certification year, the presumption remains in effect but becomes rebuttable"); NLRB v. Frick Co., 423 F.2d 1327, 1330 (3d Cir. 1970) ("although a presumption of majority status continues after one year, it then becomes rebuttable") (emphasis in original); Celanese Corp., 95 N.L.R.B. 664 (1951) ("after the first year. . . the presumption is. . . rebuttable even in the absence of unusual circumstances") (emphasis in original). Celanese Corp. was cited with approval in Brooks v. NLRB, 348 U.S. 96 (1954). For a further discussion of Brooks, see note 36 supra.

39. See Franks Bros. Co. v. NLRB, 321 U.S. 702, 703-04 (1944); Glomac Plastics, Inc. v. NLRB, 592 F.2d 94, 100-101 (2d Cir. 1979) (renewal of entire certification year); Cocker Saw Co. v. NLRB, 446 F.2d 870, 872-73 (2d Cir. 1971) (renewal of entire certification year); General Elec. Co. v. NLRB, 400 F.2d 713, 750 (5th Cir. 1968), cert. denied, 394 U.S. 904 (1969) (nine month extension of certification year).

40. NLRB v. Swift Co., 302 F.2d 342, 346 (7th Cir. 1962) (citing Superior Engraving Co. v. NLRB, 183 F.2d 783, 792 (7th Cir. 1950)).


42. The Supreme Court has noted that "a bargaining relationship once right-
ment, there exists the further rationale that the \textit{quid pro quo} for the union’s agreement to withdraw its unfair labor practice charges is the extension of the time period within which the union is insulated from attack.\footnote{Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1110-11 (1st Cir. 1981).}

\section*{B. Voluntarily Recognized Unions}

Where a union has been voluntarily recognized\footnote{Voluntary recognition is considered by the Board and the courts to further the objectives of the national labor policy and is therefore generally encouraged. \textit{See} NLRB v. Broadmoor Lumber Co., 578 F.2d 238, 241 (9th Cir. 1978); NLRB v. Broad Street Hosp. & Medical Center, 452 F.2d 302, 305 (3d Cir. 1971).} by the employer and there has been no Board-conducted election, a similar presumption of continued majority support is applied.\footnote{Despite its recognition of the general rule, the \textit{Soule} court held that because the Board had previously set aside the settlement agreement, it could not be held to bar the employer’s subsequent withdrawal of recognition. \textit{Id.} at 1112. \textit{See also} NLRB v. All Brand Printing Corp., 554 F.2d 926, 931 (2d Cir. 1979); NLRB v. Vantran Elec. Corp., 580 F.2d 921, 924-25 (7th Cir. 1978).} This presumption is invoked even where the voluntary recognition agreement has not been reduced to writing.\footnote{\textit{See}, e.g., Landmark Int'l Trucks, 257 N.L.R.B. 1375 (1981), vacated on other grounds, 699 F.2d 815 (6th Cir. 1983) (successor employer violates Act when it withdraws recognition 6 weeks after voluntarily recognizing union). In addition, the Board has held that an employer which has voluntarily recognized a union must continue to bargain during the “reasonable period of time,” even if the unit agreed upon might not have been an appropriate unit in a representation election context. \textit{See also} Fertilizer Co., 254 N.L.R.B. 1382 (1981) (employer who polled employees on whether they wished union representation only three weeks after voluntarily recognizing union held to have violated the Act since a reasonable period of time had not passed); Keller Plastics Eastern, Inc., 157 N.L.R.B. 583, 587 (1966) (“with respect to...a bargaining status established as the result of voluntary recognition of a majority representative, we conclude that, like situations involving certifications, the parties must be afforded a reasonable time to bargain. . . .”).}

In cases of voluntary recognition, however, the irrebuttable presumption of continued majority support continues only for a “reasonable period” of time after recognition rather than for an arbitrary fully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944).
period of one year. The question asked in determining what is a
reasonable period of time is whether bargaining had a "fair chance to
succeed." Thus, in the 1977 case of Brennan's Cadillac, Inc., the
Board held an employer's withdrawal of recognition only a little more
than four months after the union was recognized was lawful because
the parties had fully explored all issues at the bargaining table in
their eight meetings during the four-month period.

C. Contract Bar

The Board has also established a virtually irrebuttable presump-
tion of majority status which binds the employer for the period dur-
ing which the collective bargaining agreement would bar an election
petition. This presumption is based on the Board's contract-bar
rule which bars an election petition while a written contract is in ef-
flect. Since 1962, the Board has held that an election petition will be
barred during the term of an agreement which extends not more than
three years or during the first three years of a contract of longer dura-
tion. As the Supreme Court has noted, "[D]uring this time, an em-
ployer cannot use doubt about a union's majority as a defense to a
refusal-to-bargain charge." The rule applies even though a major-

47. See NLRB v. Frick Co., 423 F.2d 1327, 1332 (3d Cir. 1970) (rebuttable presump-
tion of continued majority support for a voluntarily recognized union exists
after the initial irrebuttable "reasonable period").


49. Id.

50. Id. at 225. But see Cardox Div. of Chemtron Corp., 258 N.L.R.B. 1202
(1981), enforcement denied & remanded, 699 F.2d 148 (3d Cir. 1983) (three and one-half
months not a "reasonable time" where only one 45-minute bargaining session held
and delays attributable to employer).

51. See Pioneer Inn Ass'n v. NLRB, 578 F.2d 835, 838 (9th Cir. 1978) (employer
may not refuse to abide by contract terms on basis of doubt as to majority status of
union); Shamrock Dairy, Inc., 119 N.L.R.B. 998, 1002 (1957), on remand, 124
N.L.R.B. 494, 495-96 (1959), enforced sub nom. Local 310, Int'l Bhd. of Teamsters v.
NLRB, 280 F.2d 665 (D.C. Cir.), cert. denied, 364 U.S. 892 (1960) (employer must
recognize the union for at least the term of the contract); Hexton Furniture Co., 111
N.L.R.B. 342, 344 (1955) (during term of collective bargaining agreement, employer
may not refuse to recognize or bargain with the union). See also NLRB v. West Sand
& Gravel Co., 612 F.2d 1326, 1331 (1st Cir. 1979) (a collective bargaining agreement
creates a presumption of majority status); NLRB v. Morse Shoes, Inc., 591 F.2d 542,
545 (9th Cir. 1979) (presumption of majority status, created when employer volun-
tarily recognized union, continues through term of collective bargaining agreement);
NLRB v. Marcus Trucking Co., 286 F.2d 583, 593 (2d Cir. 1961) (employer may not
withdraw its recognition of a union during the term of the collective bargaining
agreement even though a majority of employees favor a different union).

52. General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962).

(citations omitted).
ity of employees in the unit have freely abandoned the union.\textsuperscript{54} Presumption of continued majority status has thus been substantially extended from the one year period following certification of a union after a Board-conducted election, to the possible three-year duration of a collective bargaining agreement, whether the agreement be the first between the parties or a subsequent one between a successor to the employer and the same group of employees.\textsuperscript{55} Thus, under ordinary circumstances, an employer may challenge a union's majority status only at the termination of a contract.

The presumption of continuing majority status is meant to serve the policy of ensuring stability in bargaining relationships.\textsuperscript{56} The Board has also noted that it would be anomalous to allow an employer unilaterally to determine whether its employees wished to be represented by a union at a time when the Board would refuse to conduct an election for that purpose, even on petition of the employees.\textsuperscript{57}

If, however, the contractual bargaining unit is ambiguous or no real collective bargaining relationship exists, majority status will not automatically be presumed.\textsuperscript{58} In cases where the employer has voluntarily recognized a minority union, or a union that does not fairly represent the employees in a proper unit, the goal of industrial stability must yield to the employees' rights to have a representative of

\begin{itemize}
\item \textsuperscript{54} Osteopathic Hosp. Founders Ass'n v. NLRB, 618 F.2d 633 (10th Cir. 1980).
\item \textsuperscript{55} See NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272 (1972). In Burns, the Court held that an employer acquiring a previously unionized business must bargain with and recognize the union if the bargaining unit remains the same and a majority of employees of the unit are hired by the new employer. \textit{Id.} at 278.
\item \textsuperscript{56} NLRB v. West Sand & Gravel Co., 612 F.2d 1326, 1331 (1st Cir. 1979).
\item \textsuperscript{57} Hexton Furniture Co., 111 N.L.R.B. 342, 344 (1955). The employer in Hexton withdrew union recognition after a majority of its employees signed forms cancelling their dues check-off authorizations. \textit{Id.} at 343. Since the collective bargaining agreement had one more year to run, any election or decertification petition would have been denied by the Board. \textit{Id.} at 344. The Board held that it was an unfair labor practice for the employer unilaterally to decide the issue of representation when, under the contract-bar rule, the Board would refuse to redetermine the issue. \textit{Id.}
\item \textsuperscript{58} Glenlynn, Inc., 204 N.L.R.B. 299 (1973) (union's absence and apathy towards employees taken as indication that a true collective bargaining relationship, from which a presumption of majority status arises, never existed); Bender Ship Repair Co., 188 N.L.R.B. 615, 616 (1971) (presumption that union was a majority representative was denied because contract did not provide wage scales for all employees, thereby failing to define a unit clearly or to evidence the parties' intent to enter into a real collective bargaining unit); Ace-Doran Hauling & Rigging Co., 171 N.L.R.B. 645, 645-46 (1968) (presumption of majority status denied because contracts did not clearly delineate whether an employer-wide or multi-employer unit was involved and union did not demand enforcement of certain provisions thereby suggesting that the parties did not intend a collective bargaining relationship).
\end{itemize}
III. WITHDRAWAL OF RECOGNITION

Once the certification year has expired, an employer may lawfully withdraw recognition from an incumbent union in certain circumstances. The union, however, continues to enjoy a rebuttable presumption of continued majority status. To overcome this presumption, the employer has the burden of demonstrating either of the following: 1) the union in fact no longer has a majority; or 2) that it has a reasonable good faith doubt of the union's continued majority status. Because of the difficulty of demonstrating that the union does not in fact enjoy a majority, litigation has focused on the second of these tests, that of reasonable good faith doubt based on "objective considerations."

Before determining which indicia of alleged employee non-sup-
port have qualified for treatment as "objective considerations," however, it is necessary to deal with two preliminary matters: the absence of employer unfair labor practices and the meaning of good faith.

A. Absence of Employer Unfair Labor Practices

The employer's alleged good faith doubt must be raised in a context free from unfair labor practices aimed at undermining the union's position or causing disaffection among its members. When an unfair labor practice occurs prior to the employer's refusal to bargain, the possibility arises that it was the employer's unlawful acts that caused the loss of majority. Where this can be shown, withdrawal of recognition will generally be held unlawful. If it can be shown, however, that the unfair labor practice did not significantly contribute to the union's loss of majority status, withdrawal of recognition may be lawful.

63. Burroughs Corp., 180 N.L.R.B. 331, 332 (1969). The Board in Burroughs Corp. stated that the employer's good faith doubt "must not have been raised in the context [of] illegal anti-union activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." Id. (citation omitted).

The Supreme Court made a similar point in an earlier case:

Petitioner cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will.

Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 687 (1944). Accord Sky Wolf Sales, 470 F.2d 827, 830 (9th Cir. 1972) (employer cannot assert good faith doubt as to majority status when he commits an unfair labor practice by assisting in circulation of a decertification petition); NLRB v. Frick Co., 423 F.2d 1327, 1333 (3d Cir. 1970) (employer who had engaged in unfair labor practices to induce striking employees to return to work could not base his good faith doubt of majority support on employees' return).

64. See Osteopathic Hosp. Founders Ass'n v. NLRB, 618 F.2d 633, 638-39 (10th Cir. 1980).

65. See National Cash Register Co. v. NLRB, 494 F.2d 189 (8th Cir. 1974). In this case, the court held:

The existence of an unfair labor practice prior to the refusal to bargain interjects an element of uncertainty about whether the employer thus caused the possible loss of majority. But if it is shown that the unfair labor practice did not significantly contribute to the loss of status, the employer may avoid a bargaining order.

Id. at 195. See also NLRB v. Nu-Southern Dyeing & Finishing, Inc., 444 F.2d 11 (4th Cir. 1971). The Fourth Circuit noted in this case that "[a]n employer may avoid a bargaining order by showing that the unfair labor practices did not significantly contribute to such a loss of majority or to the factors upon which a doubt of such a majority is based." Id. at 16.
B. The Good Faith Requirement

Since its 1951 decision in *Celanese Corp.*,\(^{66}\) the Board has, in one fashion or another, indicated that the legality of the employer’s decision to withdraw recognition will turn in part on whether the employer “in good faith” believed that the union no longer represented a majority of its employees.\(^{67}\) While it is now clear that good faith alone is insufficient to justify withdrawal, the exact role played by the employer’s state of mind is no longer clear. While the Board and reviewing courts make frequent reference to the term,\(^{68}\) it is given little explanation.

Commentators differ in their views as to the propriety and degree of the Board’s reliance on the good faith test. One view argues that the Board has withdrawn too far from the good faith test of *Celanese* in ways allegedly unfair to employers.\(^{69}\) On the other hand, it has also been suggested that the good faith doubt standard is unnecessary and irrelevant to an inquiry into majority status, and that an evidentiary test applying objective criteria and taking into account the effect of any prior employer unfair labor practices should suffice.\(^{70}\) Thus, it is argued, the ultimate issue in withdrawal cases should be whether or not the bargaining representative actually did have majority support at the time of the withdrawal. Further, continued reliance upon the good faith component may encourage frivolous majority challenges by employers and lead to more withdrawal attempts.\(^{71}\)

While there is support for both arguments, it is suggested that total abandonment of the good faith test is not the complete answer. From the perspective of the employer, the union has access to all the

66. 95 N.L.R.B. 664 (1951).
67. *Id.* at 671. The Board described its analysis in *Celanese* as follows:

We believe that the answer to the question whether the Respondent violated Section 8(a)(5) of the Act on October 8 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.* (emphasis in original).

68. *See*, e.g., *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 43 (D.C. Cir. 1980) (“It made far more sense to rely on an efficient and speedy method of ascertaining actual employee wishes than to permit lengthy and ambiguous disputes over employer intent and good faith.”).

69. *See* *Krupman*, *supra* note 27, at 289.
70. *See* *Seger*, *supra* note 7, at 984-89.
71. *Id.* at 987-88. For further discussion of the legal effect of establishing good faith doubt, see notes 216-29 and accompanying text *infra*. 
facts. Under current Board practices, alternative means for more accurately determining the employee's choice are dangerous and difficult for the employer. Thus, use of the good faith standard provides an opportunity for an employer, presented with substantial evidence that its employees no longer wish representation, to assert these employees' rights.

From the union perspective, the good faith doubt standard, as presently applied, can provide a further safeguard and screening device. First, the test can be used in conjunction with the requirement that any asserted doubt of majority status be raised in a context free from unfair labor practices. Unfair labor practices designed to undermine a union's support will render illegal an employer's withdrawal of recognition. Retention of the good faith requirement allows the Board to look to employer unfair labor practices that did not directly contribute to the union's present loss of majority support, and, in appropriate cases, to draw an inference of bad faith from the employer's anti-union history.

Finally, it is suggested that the type of "objective evidence" which has been relied on in the past to justify withdrawal of recognition is not entirely objective and is often of the type which can be manipulated by an employer seeking to evade its bargaining responsibilities. An employer seeking the chance to refuse to bargain will be likely to have already sought legal or other counsel. Counsel may have advised the employer to record every employee statement of dis-

72. See Stoner Rubber Co., 123 N.L.R.B. 1440 (1959). In Stoner, the Board noted:

Proof of majority is peculiarly within the special competence of the union. It may be proved by signed authorization cards, dues checkoff cards, membership lists, or any other evidentiary means. An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity.

Id. at 1445.

73. For a discussion of the limitations that have been imposed on polling employees, see notes 197-207 and accompanying text infra.

74. It must be recognized here that the Board and courts react with more suspicion when an employer claims to be derivatively asserting the rights of its employees. See Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 490 (2d Cir. 1975) (Board may treat an employer's assertion of employee rights by refusal to bargain with union differently than employee assertion of rights through a decertification petition).

75. For a discussion of the requirement that a withdrawal of recognition take place in a context free from unfair labor practice charges levied against the employer, see notes 63-65 and accompanying text supra.

76. See Furr's, Inc. v. NLRB, 381 F.2d 562, 570 (10th Cir.), cert. denied, 389 U.S. 840 (1967) ("Case law leaves no doubt that 8(a)(1) conduct is cogent evidence of lack of good faith," barring an employer from asserting a good faith doubt as to the union's majority status in defense of a refusal to bargain charge).
satisfaction and to gather documentation on all relevant "objective factors." Further, an employer may, in various ways, encourage or coerce employees to "say the right thing." Not all such efforts will be detected by the union or the Board. Indeed, one might argue that an employer acting in good faith will not be able to present as convincing a case because it will not have sought counsel or begun to gather evidence until after it has received input sufficient to justify a good faith doubt.

C. Objective Criteria

With respect to the types of evidence which would be required before an employer could lawfully withdraw recognition, the Supreme Court stated in *Brooks v. NLRB*,

Furthermore, the Board has ruled that one year after certification the employer can ask for an election or, if he has fair doubts about the union's continuing majority, he may refuse to bargain further with it. This, too, is a matter appropriately determined by the Board's administrative authority.

The Board has exercised this "administrative authority" by ruling that an employer's good faith withdrawal of recognition will be lawful only when based on sufficient "objective considerations."

Several such considerations, all indicating loss of majority support, are generally required, with no one factor being determinative. In essence, these criteria are used by the employer as circumstantial evidence allegedly showing that employees no longer wish to be represented by the union.

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77. It is common knowledge that where a union wins a closely contested election, not all members of the unit gracefully concede the union's new role as majority representative. Unit members continuing to oppose the union may volunteer their services to an employer they know to oppose the union. These persons will not readily volunteer to serve as Board or union witnesses. Similarly, an employee promised a promotion or pay raise "once the union is gone" may not be favorably inclined to testify in order to retain the union.

78. Recognizing this possibility, the administrative law judge in *White Castle System, Inc.* credited a manager's testimony that over 100 employees had made antiunion statements to him even though the manager could identify only 13 by name, noting that the manager was not in daily contact with unit employees and took no notes. 224 N.L.R.B. 1089, 1092 (1976). See also *Stressskin Prods.*, 197 N.L.R.B. 1175, 1179 (1972) (reliance on reports of supervisors, even if hearsay, held sufficient to support withdrawal decision).


80. Id. at 104 (citation omitted).

81. Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1110 (1st Cir. 1981).

82. Id.
The following categories represent the types of evidence most often introduced by employers as allegedly “objective considerations” in support of withdrawal of recognition. The development of the law, at least at the Board level, has been one of a search for reliability. As Board analysis has evolved, evidence introduced by the employer has come under more intense scrutiny. Only that evidence which points unequivocally to a union loss of support will generally suffice.

1. Statements by Employees

Statements by employees repudiating the union are the most common form of evidence introduced by employers in support of their withdrawal of recognition. These statements, which may be oral or written, are sometimes accepted by the Board and reviewing courts as evidence of objective considerations supporting a reasonably based doubt of majority status. Because oral statements may be less seriously intended and may be subject to various interpretations, they are sometimes less reliable indicators of true employee sentiment. For this reason, the Board and reviewing courts have been careful to distinguish between statements merely indicating discontent or dissatisfaction with the performance of the union and statements actually indicating a lack of support for the union as bargaining representative. For example, in the 1979 case of NLRB v. Roger's I.G.A., Inc., the Tenth Circuit evaluated an employer's claim that it had an objective basis for doubting the union's continued majority support. In enforcing the Board's ruling that the employer had failed to establish a good faith reasonable doubt of the union's majority status, the court noted that only four of the employer's thirteen employees had clearly indicated that they no longer wanted the union to represent them.

83. See, e.g., NLRB v. Sacramento Clinical Lab., Inc., 623 F.2d 110 (9th Cir. 1980) (presumption of majority status may be rebutted by petition circulated by employee and signed by one half of the unit); KPNX Broadcasting Co., 262 N.L.R.B. No. 83, 1982-83 NLRB Dec. (CCH) ¶ 15,025 (1982) (decertification petition signed by a majority of the employees and untainted by employer unfair labor practices is sufficient reason for employer good faith doubt); Hydro Conduit Corp., 254 N.L.R.B. 443 (1981) (written petition circulated by nonmanagement employee is sufficient to rebut presumption); Frito-Lay, Inc., 151 N.L.R.B. 28 (1965) (oral statement made in response to a supervisor's questions could form the basis of a good faith doubt).

84. The Board's definition of what constitutes a clear and reliable expression of employee sentiment has been criticized as unreasonably restrictive. See Krupman, supra note 27, at 290. It is important, nevertheless, that chance, offhand or ambiguous comments not be elevated to the status of reliable evidence. Complaints are not always seriously intended and, when talking with a supervisor or employer known to be critical of the union, an employee might well exaggerate the strength of his or her disaffection with the union.

85. 605 F.2d 1164 (10th Cir. 1979).

86. Id. at 1166.
While four others had indicated that they did not want to join the union or pay dues to it, in the court's view, this did not amount to a repudiation of the union since employees may wish union representation without the financial obligations of membership. Similarly, courts have distinguished between an employee's express refusal to support a strike and an express refusal to support the union as representative.

It is also important to determine whether statements of rejection of the union have been made by a majority of the unit employees prior to the date recognition is withdrawn. There must be evidence of rejection by a majority. Rejection of the bargaining representative by only a minority of unit employees has been held insufficient to support a reasonable doubt of the union's continued majority status in the view of the Board. The Board has similarly found unpersuasive an employer's reliance on statements made by some employees that in their opinion a majority of the employees no longer want the union to represent them. Statements justifying a withdrawal of recognition must have been made prior to the withdrawal of recognition because statements postdating the withdrawal may well have been influenced by the withdrawal itself.

The Board and reviewing courts will generally consider written statements more reliable than oral expressions of employee discontent. Written statements of discontent may take the form of individual letters addressed to the employer or may be in the form of a written petition addressed to the employer. These written expressions of the employees' rejection of the union, however, must be spontaneous and made without solicitation or coercion on the part of the employer. In a number of cases, employers have unsuccessfully sought to rely on letters or petitions circulated by employees either at the em-

87. Id. See also Fertilizer Co., 254 N.L.R.B. 1382 (1981) (insufficient proof of lack of majority support for union where affidavits on which employer relied stated only that signers had not designated union between date they were hired and date union was recognized).

88. NLRB v. Frick Co., 423 F.2d 1327, 1333 (3d Cir. 1970). See also note 147 and accompanying text infra.


90. Id. at 647 n.4. See also Roza Watch Corp., 249 N.L.R.B. 284, 286 (1980). Of course, some employees may be more reliable than others with regard to such reports and, in appropriate cases, the Board may give some weight to an employer's reliance on employee reports. See, e.g., Stresskin Prods. Co., 197 N.L.R.B. 1175, 1179 (1972) (communication by former member of negotiating committee to management that union is not maintaining its strength deemed reliable evidence). Cf. Lincoln Hills Nursing Home, 257 N.L.R.B. 1145, 1154 (1981) (letter from attorney asserting that majority had signed petition disavowing union not sufficient evidence).

91. See, e.g., NLRB v. Gallaro, 419 F.2d 97, 100-101 (2d Cir. 1969).
employer's request\textsuperscript{92} or with the active assistance of the employer or its supervisors.\textsuperscript{93} For example, where supervisors induce, encourage and assist employees to circulate a petition on company premises and during working time, the employer may not rely on this petition as a reliable indicator of employee sentiment.\textsuperscript{94}

More difficult cases arise where anti-union petitions are circulated by individuals of quasi-supervisory status. When these individuals are not actual "supervisors" under the Act, where there is no evidence that these people speak for management or that the employees considered them to be acting on behalf of management, an employer has sometimes been allowed to rely on these petitions.\textsuperscript{95} For example, in a case where six of the twelve members of a bargaining unit signed a petition indicating they did not intend to be represented by the union after a co-worker predicted dire consequences that would result from unionization, the Ninth Circuit overturned a Board finding that an employer had wrongfully withdrawn recognition.\textsuperscript{96} In \textit{NLRB v. Sacramento Clinical Laboratory}, a part-time employee who had drafted the petition which urged the employer to withdraw recognition of the union had told three other part-time workers that they would lose their jobs if the union entered.\textsuperscript{97} While the Board had found the petition "tainted" by the employee's "threats" of lost jobs, the court determined that there was no evidence to support a finding that the employee was acting with the knowledge or encouragement of management in making these statements and that the

\textsuperscript{92} See \textit{Fort Wayne Newspapers}, 247 N.L.R.B. 548, 550 (1980) (antiunion petition signed by 15 of 26 employees was tainted and could not serve as the basis of employer's refusal to bargain because at least 3 of the signatures had been solicited by a supervisor). See also \textit{Jax Mold & Mach., Inc.}, 255 N.L.R.B. 942, 951-52 (1981) (employee petitions against union were tainted by employer's excessive involvement in their preparation and circulation).

\textsuperscript{93} See \textit{Martinsburg Concrete Prods. Co.}, 248 N.L.R.B. 1352 (1980) (where employer's president directed preparation in its office of letters rejecting union which were then presented to unit employees to sign, employer found to have violated §§ 8(a)(5) and 8(a)(1) of the Act by seeking to undermine union). See also \textit{Nassau Glass Corp.}, 222 N.L.R.B. 792 (1976) (employer committed an unfair labor practice when, through a supervisor, it prepared and presented to the employees a decertification petition); \textit{Suburban Motor Homes Corp.}, 173 N.L.R.B. 497 (1968) (solicitation of signatures for a decertification petition by a supervisor is an employer 8(a)(1) violation).


\textsuperscript{95} See \textit{Hydro Conduit Corp.}, 254 N.L.R.B. 433 (1981) (withdrawal of recognition held lawful even though foreman circulated anti-union petition because foreman may not have been "supervisor" and management did not encourage, authorize or ratify his action).

\textsuperscript{96} \textit{NLRB v. Sacramento Clinical Lab., Inc.}, 623 F.2d 110, 114 (9th Cir. 1980).

\textsuperscript{97} \textit{Id}.
petition, signed by half the members of the unit, was sufficient evidence that the union had lost its majority status.98

The issues involved in this subcategory of cases present a microcosm of the entire withdrawal of recognition problem. If we are to take the good faith doubt requirement seriously, then an employer’s reliance on an apparently reliable source indicating loss of majority should be sufficient, provided, of course, that the employer has done nothing to cause the employees to become dissatisfied with the union. The less emphasis placed on the good faith factor, the more emphasis will be placed on clearly establishing that employees constituting a majority have individually stated clearly that they do not wish the union to represent them.

Further, even where a majority of employees clearly state by written petition that they do not wish the union to continue to represent them, this petition may not accurately reflect a signer’s true state of mind. In an industrial setting, peer pressure and other circumstances may well cause one to sign a petition that does not truly reflect one’s state of mind.99 Thus, even a written petition, the most clear and unequivocal of the “objective considerations” which presently justify withdrawal of recognition, is far less reliable than a secret ballot election.

2. Filing of Decertification Petition

In some cases, an employer will assert that its doubt is based on the fact that a decertification petition has been filed by employees. In its 1972 opinion in *Telautograph Corp.*,100 the Board seemed to hold that the filing by one of the employees of a decertification petition presented valid grounds for not bargaining with an incumbent union, a position later adopted by the Eighth Circuit.101

The majority of the Board, however, has since rejected such a *per se* rule, requiring some further evidence of loss of majority support in addition to the filing of a decertification petition.102 A number of

98. Id.

99. As the Board has noted with respect to recognition cards which unequivocally state that the signer wishes to be represented by the union, “[i]t is well known that membership cards obtained during the heat of rival organizing campaigns. . . do not necessarily reflect the ultimate choice of a bargaining representative. . . .” *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060, 1070 n.13 (1945).


102. *See Flex Plastics, Inc.*, 262 N.L.R.B. No. 78, 1981-82 NLRB Dec. (CCH) ¶ 19,104 (1982) (withdrawal of recognition unlawful where no showing that decertifica-
courts have concurred in this interpretation. As stated by the Court of Appeals for the District of Columbia Circuit,

The naked showing that a decertification petition has been filed, with no indication of the number of signatories or other related matters, is an insufficient basis in fact for refusing to bargain since it establishes no more than that the petition was supported by the requisite 30% "showing of interest."

In its September, 1982 ruling in Dresser Industries, Inc., the Board once again considered the question of the legal effect of filing a decertification petition. In Dresser, after a decertification petition was filed, the employer sent a letter to the union stating that it could not legally bargain with it until the representation issue was resolved, thus cancelling previously-scheduled collective bargaining meetings. Consistent with the above analysis, the Board held that "[t]he filing of a decertification petition, standing alone, does not provide a reasonable ground for an employer to doubt the majority status of a union." The Board noted that a petition may be properly filed on the basis of only thirty percent of the unit employees desiring such an election.

The Board in Dresser then went one step further. It observed that under its previous decision in Telautograph Corp., an employer waiting for a decertification election could not legally bargain with an incumbent union because of the requirements that it not favor a minority union and that it facilitate employee free choice in the election petition had support of more than requisite 30 percent of employees); Lammert Indus., 229 N.L.R.B. 895, 932 (1977), enforced, 578 F.2d 1223 (7th Cir. 1978) (mere filing of decertification petition does not destroy presumption of union majority status). But see Antonio's Restaurant, 246 N.L.R.B. 833, 833 & n.3 (1979), enforced, 648 F.2d 1206 (9th Cir. 1981) (Member Penello, concurring) (where a decertification petition raises a real question of representation, an employer could decide not to bargain with union until the Board decided the question).

103. See, e.g., NLRB v. Maywood Plant of Grede Plastics, 628 F.2d 1, 4-5 (D.C. Cir. 1980); Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 490-91 (2d Cir. 1975).


106. The petition was filed in an untimely manner, one day before the end of the certification year. Since the petition had not been dismissed as untimely filed, the Board treated it as timely for purposes of the case. Id., slip op. at 2 n.2.


108. 264 N.L.R.B. No. 145, slip op. at 4.

In Dresser, the Board overruled Telautograph and held that the "mere filing of a decertification petition will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union." The rationale for the holding was that the prior rule did not give due weight to the "incumbent union's continuing presumption of majority status" and was not the best way to achieve employer neutrality.

In a footnote to its opinion, the Board majority stressed that its rule did not erode the principle that an employer, with good faith doubt as to a union's majority status, may, on the basis of objective evidence, withdraw from bargaining. The Board stated that if the employer were presented with a valid decertification petition supported by a majority of the unit employees, "it may be privileged to withdraw from bargaining." This was consistent with earlier cases holding that if the filing of the decertification petition provides the employer with evidence that more than fifty percent of the employees in the unit wish to reject the union, then the employer may withdraw recognition and refuse to bargain further.

A commonly raised issue in withdrawal cases involving decertification petitions is the degree of employer involvement in the filing process. The employer may not threaten or encourage employees to begin decertification proceedings. Nor may supervisors solicit employee participation or actively assist employees in an existing decertification petition.

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110. 264 N.L.R.B. No. 145, slip op. at 4-5.
111. Id. at 6. This resolution was patterned after the rationale of the Board's recent decision in RCA Del Caribe, Inc., 262 N.L.R.B. No. 116, 1981-82 NLRB Dec. (CCH) ¶ 19,103 (1982). In RCA Del Caribe, the Board held that an employer must continue to bargain with an incumbent union despite the filing of a representation petition by another union. Id.
112. In dissent, Chairman Van de Water argued that the majority's position permitted the choice of representative to be influenced improperly by the employer's actions at the bargaining table. 264 N.L.R.B. No. 145, slip op. at 7-9 (Chairman Van de Water, dissenting).
113. Id. at 6 n.7. The Board here missed an opportunity to rule that elections are the preferred means to resolve questions of employee choice by holding that an employer may not withdraw recognition while such petition was pending. For a discussion of why elections should be the preferred means for determining an incumbent union's representative status, see notes 243-53 and accompanying text infra.
114. 264 N.L.R.B. No. 145, slip op. at 6 n.7.
115. See, e.g., Hemet Casting Co., 260 N.L.R.B. No. 60, 1981-82 NLRB Dec. (CCH) ¶ 18,771 (1982) (withdrawal of recognition lawful where employees had prepared three decertification petitions without employer participation or influence and, after receiving two of the petitions, employer knew that more than 50% no longer wanted union).
116. See Maywood Plant Grederes Plastics Div., 235 N.L.R.B. 363, 364 (1978), modified & enforced, 628 F.2d 1 (D.C. Cir. 1980) (employees were threatened with discharge if they did not sign decertification petition and were promised pay raises if they did sign). See also Holly-Manor Nursing Home, 235 N.L.R.B. 426, 429 (1978)
tification movement. If the employer is found to have engaged in such activities, the petition will be deemed "tainted" and will not constitute evidence on which the employer may base objective good faith doubt.\textsuperscript{17}

3. Filing of Representation Petition by Outside Union

The filing of a representation petition by an outside challenging labor organization will not, by itself, justify an employer in withdrawing recognition. In its 1958 decision in \textit{Shea Chemical Corp.},\textsuperscript{18} the Board had held, however, that an employer faced with a petition from an outside union was required to cease bargaining with the incumbent and maintain neutrality until either the incumbent or the challenging labor organization had been certified following a Board-conducted election.

In July, 1982, the Board in \textit{RCA Del Caribe, Inc.}\textsuperscript{19} overruled \textit{Shea Chemical} and held that an employer must continue bargaining with the incumbent despite the filing of a representation petition by another labor organization. In \textit{RCA Del Caribe}, the employer and the IBEW were parties to a collective bargaining agreement due to expire on January 2, 1975. Negotiations for a new contract took place from November, 1974, through January, 1975. On January 27, 1975, an independent union filed a petition seeking to represent the employer's production and maintenance employees. The employer first refused to recognize or continue to negotiate with the incumbent IBEW local. Later, however, the employer agreed to resume negotiations, ultimately executing a new collective bargaining agreement with the IBEW while the outside union's petition was still pending. The Board majority ultimately determined that this action did not violate the Act.\textsuperscript{20}

\textsuperscript{17}See, e.g., Connecticut Distribs., Inc., 255 N.L.R.B. 1255 (1981) (where supervisors are involved in the preparation of a decertification petition or the solicitation of signatures, a certain element of coercion is inevitable and the activity will be deemed an unfair labor practice). An employer may, however, in direct response to questions from employees, accurately advise such employees as to the procedures to be followed for decertification. \textit{See KONO-TV-Mission Telecasting Corp.}, 163 N.L.R.B. 1005, 1006 (1967).


\textsuperscript{20}Id., slip op. at 10-11.
The Board majority concluded that *Shea Chemical* "failed to accord incumbency the advantages which in nonrival situations the Board has encouraged in the interest of industrial stability."\(^{121}\) As the *RCA Del Caribe* majority viewed it, "The recognition of the special status of an incumbent union indicates a judgment that, having once achieved the mantle of exclusive bargaining representative, a union ought not to be deterred from its representative functions even though its majority status is under challenge."\(^{122}\)

Thus, the Board held that the filing of a representation petition by an outside, challenging union neither required nor permitted an employer to withdraw from bargaining or from executing a contract with an incumbent union.\(^{123}\) In a footnote, the Board observed that it was not changing its general rules with regard to withdrawal of recognition, and stated that the *RCA Del Caribe* rule "will not preclude an employer from withdrawing recognition in good faith based on other objective considerations."\(^{124}\)

In dissent, Chairman Van de Water and Member Jenkins argued that the majority’s position permitted the employer to influence the employees’ choice of bargaining representative by its conduct of bargaining.\(^{125}\) In this, as in other areas, however, the Board has viewed concerns of stability in collective bargaining relationships to outweigh any perceived impact on employee choice.\(^{126}\)

4. **Employee Turnover**

In attempting to justify a withdrawal of recognition, employers frequently bring forward evidence of employee turnover. The longer the period of time since election, or the less stable employment in the industry, the higher will be the percentage of turnover. If evidence of high turnover alone were sufficient to justify withdrawal of recognition, all Board certifications would eventually become suspect.\(^{127}\) Turnover is inevitable. Furthermore, employee turnover is partially

\(^{121}\) *Id.* at 8-9.

\(^{122}\) *Id.* at 9.

\(^{123}\) *Id.* at 12. The Board noted, however, that if the challenging union prevailed in the election, any contract reached with the incumbent would be void. *Id.*

\(^{124}\) *Id.* at 11 n.13.

\(^{125}\) *Id.* at 22-23 (Chairman Van de Water & Member Jenkins, dissenting). As an alternative, Member Jenkins proposed quick resolution of the representation issue by means of an expedited election to take place within 30 days.

\(^{126}\) See, e.g., *Brooks v. NLRB*, 348 U.S. 96 (1954) (employer presented with evidence that employees have deserted their certified union may not refuse to bargain with that union since "the underlying purpose of [the NLRA] is industrial peace" and such refusal by employer would be inimical to that end).

\(^{127}\) *Seger*, supra note 7, at 991.
within the control of the employer. By failing to improve working conditions and by making disciplinary standards overly strict, an employer, in effect, may be able to encourage the departure of those who voted in the union election.\textsuperscript{128} Similarly, by expanding its workforce and replacing the employees who left, the employer could put those who originally voted for the union in the minority.

The Board has imposed two restrictions to prevent employee turnover from rendering certification moot. First, new employees are presumed to support the union in the same proportion as those they replace.\textsuperscript{129} Second, since 1948 the Board has held that employee turnover, standing alone, is not sufficient to support a good faith doubt of a union’s majority status.\textsuperscript{130} This rule has been routinely applied, even in cases in which the annual turnover rate approached 500 percent and unit size tripled.\textsuperscript{131} Employee turnover evidence, then, plays only a supporting role rather than a primary role. It can be used to add credibility to other evidence of grounds for good faith doubt.\textsuperscript{132}

5. Declining or Minority Dues Checkoff Authorization

In some cases, the employer puts forward evidence of a decline in union dues checkoff authorizations as proof that the union has lost its majority.\textsuperscript{133} Standing alone, such evidence is not sufficient to establish loss of majority.\textsuperscript{134} While the Board has on occasion considered a precipitous decline in the level of dues checkoff authorizations as evidence of loss of ma-

\textsuperscript{128} Of course, an employer may not violate its duty to bargain with the union in good faith. 29 U.S.C. § 158(a)(5)(1982). Nor may it discriminate against persons for exercise of their rights to engage in protected activities. 29 U.S.C. § 158(a)(3)(1982).

\textsuperscript{129} Laystrom Mfg. Co., 151 N.L.R.B. 1482, 1484 (1965), enforcement denied on other grounds, 359 F.2d 799 (7th Cir. 1966).


\textsuperscript{132} See, e.g., Dalewood Rehabilitation Hosp. v. NLRB, 566 F.2d 77 (9th Cir. 1977) (employee statements, union-shop deauthorization vote, declining number of dues checkoffs, filing of decertification petition and high turnover rate held by court to justify withdrawal).

\textsuperscript{133} See, e.g., United Supermarkets, Inc., 214 N.L.R.B. 958 (1974) (employer presented evidence that only 7 of 13 employees authorized payment of dues by checkoff as justification for good faith doubt as to union’s majority status).

\textsuperscript{134} See Servomation, Inc., 235 N.L.R.B. 974, 978 (1978) (refusal of some employees to authorize payment of union dues by checkoff “does not establish objectively” that the union lacks majority status).
It has most often held the mere fact of checkoff authorizations signed by less than a majority of unit employees to be "immaterial." Such evidence most often becomes available in a right-to-work state where, by law, an employee may not be compelled to join a labor organization or pay dues. As the Court of Appeals for the District of Columbia Circuit has stated,

A decline in Union dues check-off authorizations in a right-to-work state seems to lend very little affirmative support to a doubt of majority status. While such a decline is consistent with a corresponding decline in support there are too many other possible explanations for a worker who does not have to pay dues preferring not to, even if the worker still favored Union representation. Such a decline is therefore not a reliable indicator of Union support.

Consistent with this approach, the Board gives very little weight to the fact that only a minority of employees have authorized dues checkoffs, and has even held irrelevant an employer's reference to a union's business records. The Board thus distinguishes union membership from employee desire for continued representation.

6. Strikers, Non-Strikers and Replacements

One of the more controversial and difficult areas of analysis involves withdrawal of recognition in a strike situation. There are four distinct groups of employees whose wishes must be taken into account in the economic strike situation: 1) striking employees; 2) non-striking employees; 3) striking employees who have abandoned the strike and returned to work; and 4) permanent replacements.

Only as to striking employees who remain on strike is the analysis relatively easy. Economic strikers are presumed to support the union. This presumption also applies to economic strikers who

139. The term "economic strikes," when used in this article, means a strike for the purpose of obtaining economic or other concessions from an employer in a collective bargaining agreement. It is to be distinguished from a strike that is caused or prolonged by the union's desire to protest employer unfair labor practices. Such a strike is referred to as an unfair labor practice strike. See note 20 supra.
have been permanently replaced.\textsuperscript{141} Section 9(c)(3) of the NLRA\textsuperscript{142} provides that employees engaged in an economic strike who are not entitled to reinstatement may still vote in any election conducted within twelve months from the commencement of the strike. Consistent with this principle, the Board has held that replaced strikers must be counted in determining the union's majority status, at least during the first twelve months of the strike.\textsuperscript{143}

With respect to non-strikers and returning strikers, the Board and the courts of appeals have held that crossing a picket line to work during a strike does not, in and of itself, provide a basis for presuming that such employees have repudiated the union as their bargaining representative.\textsuperscript{144} In view of the economic realities of a strike, this rule is logical. An employee may have to work for compelling financial reasons, or he or she may disapprove of the particular strike in question without necessarily rejecting the union as representative.\textsuperscript{145} This is particularly true where the employer has threatened strikers with permanent replacement.\textsuperscript{146}

What is required to rebut the presumption of majority support is a clear and unequivocal statement by an employee. As previously observed with respect to oral statements, an ambiguous statement will not suffice.\textsuperscript{147} Similarly, employee actions that do not carry a clear message that the employee repudiates the union, such as working during a strike, will not be sufficient to rebut the presumption of majority support.

In certain circumstances, however, it has been held that the crossing of picket lines by non-strikers and returning strikers does add support to a withdrawal of recognition. Where there is other evidence of repudiation, crossing a union picket line may be seen as con-

\textsuperscript{141} An employer may permanently replace economic strikers but not unfair labor practice strikers. See note 20 supra.
\textsuperscript{142} 29 U.S.C. § 159(c)(3) (1976).
\textsuperscript{143} See Pioneer Flour Co., 174 N.L.R.B. 1202 (1969), enforced, 427 F.2d 983 (5th Cir. 1970). See also Bio-Science Labs. v. NLRB, 542 F.2d 505, 508 (9th Cir. 1976).
\textsuperscript{147} See notes 84-88 and accompanying text supra.
sistent with such behavior. This has been held to be particularly appropriate where working employees must expose themselves to threats and violence to cross the picket line.

The most difficult questions arise in determining how to treat new employees hired to replace economic strikers. If such persons are presumed to oppose the union, an employer who hires permanent replacements in numbers equal to or greater than the number of strikers would almost always be able to withdraw recognition. This could destroy the strike weapon and upset the balance of economic weapons so carefully safeguarded by the Board and courts.

On the other hand, it almost defies logic to presume that persons who cross union picket lines to acquire jobs previously held by unionized strikers support the union to the same extent as do the striking employees. This presumption is especially difficult to accept when replacements know that at the bargaining table the union is demanding that the replacements be laid off and the strikers be permitted to return to work. The history of Board analysis in this area is checkered. In its 1962 Titan Metal decision, the Board held that when permanent replacements constitute a majority of the unit, reasonable grounds exist to question the union's continued majority support. In

148. See Peoples Gas Sys., Inc., 214 N.L.R.B. 944 (1974), rev'd on other grounds sub nom., Teamsters Local 769 v. NLRB, 532 F.2d 1385 (D.C. Cir. 1976), supplemented, 238 N.L.R.B. 143 (1978), modified, 629 F.2d 35 (D.C. Cir. 1980). In Peoples Gas System, the Board stated that it was “not unreasonable for Respondent to infer that the degree of union support among [those] 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. The Board stated that the employer-respondent had sufficient grounds for believing that the union no longer enjoyed majority status in light of the cumulative weight of the number of employees to cross the picket line, the decline in the union dues checkoff authorizations, the considerable employee turnover since union authorization, and the “unusual conduct” of the union during negotiations. Id. at 946-47.

149. See George Braun Packing Co., 210 N.L.R.B. 1028 (1974). In George Braun Packing Co., the Board stated that “the mere fact that a full work complement was willing to report for work daily—in spite of the picket line abuse and potential physical danger—is strong evidence that a substantial number of employees were disenchanted with [the Union].” Id. at 1033. It might be argued that one might risk picket line violence if one's financial need were great enough and that this does not necessarily mean one rejects the union. On the other hand, the risk of alienation from the union movement is high among victims of violence.

150. See notes 151-80 and accompanying text infra.

151. See, e.g., NLRB v. Erie Resistor, 373 U.S. 221 (1963) (granting 20 years super-seniority to non-strikers was illegal because of its destructive impact on the right to strike).

1976, in *Arkay Packaging Corp.*, the Board majority distinguished a normal turnover situation from the strike replacement situation and stated that in the circumstances of that case "it would be wholly unwarranted and unrealistic to presume as a matter of law that, when hired, the replacements for the union employees who had gone out on strike favored representation by the Unions to the same extent as the strikers." \(^{154}\)

In that same year, the Board decided *Beacon Upholstery Co.* In *Beacon*, thirteen employees were in the bargaining unit on the date the employer withdrew recognition: three non-strikers and ten strike replacements who had taken the place of strikers who were later discharged. The administrative law judge, whose decision was affirmed by the Board, refused to presume that the ten strike replacements supported the union and dismissed the complaint. The rationale for refusing to apply the presumption was that "[t]he interests of the discharged employees was [sic] diametrically opposed to those of the strike replacements. If the discharged employees returned to work, the strike replacements would lose their jobs." \(^{156}\)

Only six months after its decision in *Arkay*, however, the Board decided *Windham Community Memorial Hospital*, a case involving a strike by nurses and other hospital personnel. In *Windham*, a unanimous Board distinguished *Arkay*, and announced that the presumption of union support would apply in the strike situation. The Board stressed that "the general rule ... is that new employees, including striker replacements, are presumed to support the union in the same ratio as those whom they have replaced." \(^{159}\)

The Board has reaffirmed this rule in subsequent decisions. In


\(^{154}\) Id. at 397-98 (citation omitted).

\(^{155}\) 226 N.L.R.B. 1360 (1976).

\(^{156}\) Id. at 1368. See also *Kaydee Metal Prods.*, 195 N.L.R.B. 687, 692 (1972).


\(^{158}\) Id. at 1070. The Board noted that the *Arkay* holding was limited to the unique situation in which a union has apparently abandoned the bargaining unit. Id.

\(^{159}\) Id. (citing James W. Whitfield, 220 N.L.R.B. 507, 508-09 (1975); *Surface Indus. Inc.*, 224 N.L.R.B. 155 (1976)). For a thorough discussion of this ruling and the general area of withdrawal of recognition in the strike situation, see Note, *supra* note 8.
its *Pennco* decisions, the Board took the opportunity to discuss its rationale for extending the presumption to cover replacements for striking employees. In support of its withdrawal of recognition, the employer in *Pennco* had contended that it had sufficient objective evidence to establish a good faith doubt of the incumbent union’s continued majority status because, during an economic strike, the number of employees—including both strike replacements and new employees—who crossed the union’s picket line exceeded the number of employees on strike. The employer maintained that the replacements should be presumed not to support the union. The Board rejected this argument, holding that this evidence did not rebut the continuing presumption of the union’s majority status, a corollary of which was that, absent evidence to the contrary, new employees are presumed to support the incumbent union in the same ratio as those they replace.

The Board held that the presumption of majority status applied as a matter of law and that it was “incumbent upon [the employer] to rebut it even, and perhaps especially, in the event of a strike.” The Board reasoned that an employee’s return to work during a strike, or a new employee’s willingness to take a job as a strike replacement does not provide a reasonable basis for presuming that the employee has rejected the union as a bargaining representative, since return to work could have been motivated by other reasons such as financial need or disapproval of the particular strike. In the absence of any other probative evidence that those who crossed the picket line did not support the union, the Board concluded that the employer failed to meet its burden of establishing a good faith doubt based on objective considerations in withdrawing recognition from the union.

162. 250 N.L.R.B. at 716.
163. *Id.* at 717. The Board stated that the employer in *Pennco* would be in error if he were urging the Board to adopt the presumption that the striker replacements opposed representation by the incumbent union. *Id.*
165. 250 N.L.R.B. at 718. In its September, 1982, decision in *IT Corp.*, the Board may have withdrawn slightly from a broad reading of *Windham* with regard to the issue of strike replacements. See *IT Corp.*, 263 N.L.R.B. No. 186, 1982-83 NLRB Dec. (CCH) ¶ 15,381 (1982). In this case, the Board affirmed the administrative law judge’s ruling that an employer had properly withdrawn recognition in a strike situation. The decision was based on the following facts:

1) The workforce consisted of 36 replacements and 31 strikers when recognition was withdrawn;
The Board's application of this ancillary ratio presumption to strike replacements has received mixed review in the courts of appeals, with the First, Fifth and Eighth Circuits rejecting it.\(^{166}\) For example, in \textit{National Car Rental System, Inc. v. NLRB},\(^{167}\) the Eighth Circuit expressly rejected the \textit{Windham} presumption. Adopting the rationale of \textit{Arkay Packaging Corp.},\(^{168}\) the court held that the presumption that new employees support the union in the same ratio as those they replaced does not apply to those employees hired as permanent replacements for striking employees. The court stated,

If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the ten new employees favored representation by the union even though they had crossed the union's picket line to apply for work and to report to work each day after they were hired. This presumption of the Board is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment.\(^{169}\)

In contrast, both the Second and Sixth Circuits have rejected arguments made by employers that replacements should be counted as opposing the union.\(^{170}\)

2) The union had demanded that the replacements be discharged, a fact of which the replacements were aware;

3) Violence, threats and intimidation had been directed at replacements during the 11-month strike; and

4) Thirty-four of the replacements had spoken with a supervisor indicating that they did not want the union to represent them.

\textit{Id. }It is difficult to determine whether this indicates a change in the law because \textit{IT Corp.}'s deviation from the blanket rule laid down in \textit{Windham} may be attributable to the fact that so many of the replacements had advised a supervisor of their anti-union sentiments. Such facts will not likely occur often in the absence of possibly unlawful interrogation by an employer. \textit{Compare} \textit{Vulcan-Hart Corp.}, 262 N.L.R.B. No. 17, 1981-82 NLRB Dec. (CCH) ¶ 19,052 (1982) (strike replacements presumed to desire union representation).

166. \textit{See} \textit{Soule Glass & Glazing Co. v. NLRB}, 652 F.2d 1055 (1st Cir. 1981); \textit{National Car Rental Sys., Inc. v. NLRB}, 594 F.2d 1203, 1206 (8th Cir. 1979); \textit{NLRB v. Randle-Eastern Ambulance Serv., Inc.}, 584 F.2d 720 (5th Cir. 1978).

167. 594 F.2d 1203 (8th Cir. 1979).

168. 227 N.L.R.B. 397 (1976), \textit{petition for review denied}, 575 F.2d 1045 (2d Cir. 1978) (there was no presumption that striker replacements favored union representation to same extent as strikers). The Board was later to call \textit{Arkay} a "limited exception" to the \textit{Windham} rule based on the "unique circumstance" that the union had apparently abandoned the bargaining unit. \textit{Windham Community Memorial Hosp.}, 230 N.L.R.B. 1070 (1977), \textit{enforced}, 577 F.2d 805 (2d Cir. 1978).

169. 594 F.2d at 1206.

The Supreme Court may at some point review some of the questions raised regarding striker replacements. In November, 1982, however, the Court denied certiorari to the Sixth Circuit’s decision in *Pennco, Inc. v. NLRB*. Justice White, with whom Justices Blackmun and Rehnquist joined, dissented from the denial of certiorari. In their view,

The questions of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union, have produced conflict among the courts of appeal and between the courts of appeal and the agency charged with enforcing the National Labor Relations Act. The questions are of obvious significance to national labor policy. The need for a uniform approach to these questions is equally obvious.

To resolve the conflict, it will be necessary to look at the concerns voiced by both proponents and opponents of the Board’s presumption. Opponents of this presumption note that it may make little sense in a given case. For example, it would be extremely odd for a striker replacement who crossed violent picket lines and who knew that the incumbent union sought at the bargaining table to gain the reemployment of strikers at the expense of replacements, to state that he or she supported the union. On the other hand, adopting a presumption that permanent strike replacements oppose the union is fraught with pitfalls for the stability of the collective bargaining process. It was this possibility that caused the Board in *Pennco* to observe,

171. 103 S.Ct. 355 (1982).
172. 684 F.2d 340 (6th Cir. 1982), cert. denied, 103 S.Ct. 355 (1982). The Sixth Circuit rejected both the Board’s presumption that striker replacements support the union in the same ratio that the strikers support the union and the employer’s proposed presumption that striker replacements oppose the union. *Id.* at 342. However, the Sixth Circuit held the employer’s withdrawal of recognition unlawful because the employer failed to establish a sufficient basis for its belief that the certified union had lost its majority status. *Id.* at 343. For a discussion of the Board’s treatment of the *Pennco* case, see notes 160-64 and accompanying text supra.
174. See, e.g., note 27 supra.
175. See IT Corp., 263 N.L.R.B. No. 186, 1982-83 NLRB Dec. (CCH) ¶ 15,381 (1982) (striker replacements would not want to make the perpetrator of such conduct their bargaining agent). Of course, it is considered illegal for an employer to interrogate an employee with respect to his or her union sentiments. Such interrogation may interfere with employees’ protected rights as well as yield unreliable results. See notes 92-94 and accompanying text supra.
[A]doption of Respondent's presumption would allow an employer to withdraw recognition and eliminate a union as its employees' representative as soon as an economic strike commences and a number of employees equivalent to the number on strike are willing to cross a picket line. Such an additional burden on the employees' right to strike would effectively impair that right, and disturb the delicate balance of competing weapons which the Board and the courts have recognized in the labor relations arena. 176

Perhaps the most rational approach would be to adopt no presumption at all with respect to strike replacements. 177 This position may have been taken by the Board in its 1975 decision in James W. Whitfield. 178 There the Board noted that there were three replacements "whose union sentiments were not known." 179 Under a "no-presumption" approach an employer wishing to withdraw recognition would have to justify its good-faith doubt with objective evidence from one of the other categories. In other words, it would have to have evidence that a majority of its workforce did not wish representation. With respect to replacements, the employer would have to present evidence indicating that such persons did not wish the union to represent them.

A no-presumption rule has the advantage of being more consistent with common beliefs as to the wishes of striker replacements. To the extent that such a rule has the adverse effect feared in Pennco 180 of impairing the right to strike and upsetting the balance of economic weapons, resolution should come from re-thinking the entire test, rather than from stretching its individual components to a point where they bear little relationship to reality.

7. Union Admissions

In some cases, the employer asserts that the union has admitted that it lacks majority status. If a union official or representative, who is in a position to know, admits that the union no longer has the sup-

176. 250 N.L.R.B. at 717.
177. See, e.g., NLRB v. Pennco, Inc., 684 F.2d at 342.
179. Id. at 509. The Board may not have intended by this wording to state that there was no presumption. The opinion earlier states that new employees are presumed to support the union as those whom they have replaced. Id. But see Note supra note 8, at 463 (reading opinion as stating that sentiments of replacements to be considered unknown).
port of a majority, the employer has been allowed to rely on such an admission.

A recent example of this type of case is the decision of a Board panel majority in *Upper Mississippi Towing Corp*. In that case, the union's representative told the employer's attorney that the union could not win an election over a rival union unless it could develop and implement a revised employee health insurance plan. The Board found these statements to the employer's attorney to be clear statements of the union's estimate that it lacked employee support justifying withdrawal of recognition.

Clear and explicit admissions, particularly by experienced union officials who understand their legal significance, are predictably rare. Where the statement is susceptible of other interpretations, the Board will not necessarily credit it for purposes of withdrawal. While an experienced union official is not likely to give the employer an explicit admission that the union does not have majority support, there are times during negotiations when union officials make statements which an employer will later use as evidence to support withdrawal of recognition. For example, a statement may be made to induce the employer to accept the union's bargaining proposal. In *NLRB v. Randle-Eastern Ambulance Service*, the union was attempting to negotiate the return of strikers to work. In attempting to convince the employer to accept its proposal, the union stated that one-fourth to one-half of striking employees would not be coming back to work. The Fifth Circuit concluded that the employer was allowed to rely on this statement in determining the number of union supporters.

8. **Union's Conduct During Negotiations**

In other cases, the employer, while lacking evidence of explicit admissions by union officials, has argued that the union, by its conduct has implicitly admitted its lack of majority status. For example,

181. 246 N.L.R.B. 262 (1979). In his dissent, member Jenkins viewed the statements as too vague to justify withdrawal.


183. 584 F.2d 720, 729 (5th Cir. 1978).

184. Id. at 729. The employer relied also on the small number of returning strikers, resignations from the union, and the number of replacement employees in ultimately doubting the union's majority status. Id.

One could argue, given the circumstances and the possibility of exaggeration in the negotiations context, that reliance on the union's statement concerning the number of returning workers was unreliable. Further, not all unions would have adequate information about strikers to make such an assessment with any degree of accuracy. The message to unions engaged in future negotiation is clear, however.

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in *Viking Lithographers, Inc.*\(^{185}\) the employer and union had engaged in a number of bargaining sessions for approximately nine months. For the next four months, the employer heard nothing from the union regarding negotiations. During this time, several employees expressed to management dissatisfaction with the union. The employer then received a telegram from the union in which it accepted the company’s “final offer” and requested that the employer reduce the agreement to writing.\(^{186}\) The union “made no attempt at that time to secure any bargaining advantage whatsoever, but simply capitulated completely.”\(^{187}\) At the time, there were certain areas necessary to an agreement that had not been part of any company offer. In light of this and the turnover that had occurred since the election, the Board stated,

> [W]e believe that the Respondent was not unreasonable or unrealistic in construing the Union’s contractual surrender and haste to enter into a contract, the terms of which were at best ambiguous, as an attempt to secure its bargaining status in the face of declining employee support.\(^{188}\)

Similarly, in its first opinion in *Peoples Gas System, Inc.*,\(^{189}\) the Board determined that the employer’s assertion of reasonably based doubt of the union’s majority status was supported by the “unusual conduct of the Union during negotiations.”\(^{190}\) In *Peoples Gas*, the union’s bargaining position was that if agreement was not reached by February 6, it would strike. The union stated it would present the employer’s last contract proposal to its membership on February 5, but that it would recommend rejection. On February 5, however, the union reversed its position and recommended the proposal which was accepted by the membership. When it developed that certain issues were yet unresolved, the union requested that the employer “submit to us contract clauses... which we will sign and agree upon. . . .”\(^{191}\) A little over one week later, the employer withdrew

\(^{185}\) 184 N.L.R.B. 139 (1970).

\(^{186}\) Id.

\(^{187}\) Id.

\(^{188}\) Id. at 140. The Board noted that at the time the union accepted the company’s final offer “only four of the unit employees employed at the time of the election remained in the plant with two of those four having announced their intent to quit—doing so in 2 or 3 weeks.” Id.


\(^{190}\) Id. at 944.

\(^{191}\) Id. at 945.
recognition.

Describing the union's conduct during negotiations, the Board noted, "We think it was not unreasonable of Respondent to regard these developments as evidencing a very considerable lack of confidence by the Union in the strength of support which the membership would afford it." Similar cases have held union inactivity during bargaining and even the composition of the union's bargaining team to be probative of a lack of union support.

To an even greater degree than explicit admissions, however, conduct at the bargaining table is susceptible of many interpretations. Thus, in its supplemental opinion in Peoples Gas the Board completely disavowed its earlier interpretation of the union's bargaining tactics, ruling that the "odd" bargaining behavior of the union was ambiguous. The implications raised by the union's capitulation and eagerness to sign were deemed to be essentially subjective and thus insufficient to supply adequate objective evidence to justify withdrawal of recognition.

9. Polling Employees

In some cases, an employer seeks to justify its withdrawal of recognition on the basis of a poll of employees. Because questioning by employers can have a coercive effect on employees and yield unreliable results, the Board has substantially limited the employer's right

192. Id. at 947.
193. See, e.g., Southern Wipers, Inc., 192 N.L.R.B. 816 (1971). The Board found it particularly significant that during the 7 month interval after bargaining with the employer "the Union was wholly inactive in the plant and several employees indicated to management that they were glad the union had left." These circumstances, in addition to heavy employee turnover, provided an "objective basis" for the employer to infer "that the Union had lost its majority status." Id.
194. See White Castle Sys., Inc., 224 N.L.R.B. 1089, 1091 (1976) (one of several factors "indicative of a union which did not enjoy employee support" was that none of the employer's employees was on the union bargaining team).
195. 238 N.L.R.B. at 1008.
196. Id. at 1010.
197. See, e.g., Houston Shopping News Co., 233 N.L.R.B. 105, 108 (1977) (employer conducting a poll which revealed that 16 of 27 bargaining unit members did not support the union held justified in refusing to bargain. Such a poll, of course, must be taken before the employer withdraws recognition. See Retired Persons Pharmacy, 210 N.L.R.B. 443 n.2 (1974), enforced, 519 F.2d 486 (2d Cir. 1975). The Board in Pharmacy stated, An employer may not withdraw from a bargaining relationship without adequate objective evidence to justify its action, and thereafter utilize a poll, the results of which may well have been skewed by the employer's own unlawful withdrawal of recognition, to attempt to justify that self-same unlawful withdrawal.

Id.
to poll its employees with regard to whether they wish to continue to be represented by the incumbent union. First, the Board has determined that polling to test continued representative status must be conducted, if at all, in a manner consistent with the rule of Struksnes Construction Co., 198 which provides,

Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. 199

Second, as a prerequisite to polling employees in this context, the Board requires that the employer have an objective basis for doubting the union's majority status. 200 The Board has interpreted this test to be identical to that applied in cases involving employer withdrawal of recognition of a union after expiration of the certification year. 201 For this reason, there has been little incentive for employers to poll employees. Even a poll which shows the employees to have overwhelmingly rejected the union will not be grounds for withdrawing recognition unless the employer could have withdrawn recognition absent the poll.

In Thomas Industries, Inc. v. NLRB, 202 however, the Sixth Circuit disagreed with the Board's position on what constitutes a sufficient objective basis to justify the taking of a poll by an employer. Describing the Board's stance as "untenable," the court held that an employer may poll its employees to determine their union sentiment if it has "substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal." 203

199. Id. at 1063. See Retired Persons Pharmacy, 210 N.L.R.B. 443, 447 (1974), enforced, 519 F.2d 486 (2d Cir. 1975) (the polling of employees was considered defective where the Struksnes safeguards were not met).
202. 687 F.2d 863 (6th Cir. 1982).
203. Id. at 867. According to the Sixth Circuit, the test should not be the same as that for withdrawal of recognition. If the test were the same, an employer could take a poll only when no poll was necessary. Id. The Board has continued to apply its rule after the Sixth Circuit's decision in Thomas Industries. See Hutchison-Hayes Int'l, Inc., 264 N.L.R.B. No. 168, 1982-83 NLRB Dec. (CCH) ¶ 15,420 (1982) (pol-
In *Thomas*, the employer relied on a number of factors which the court found persuasive. First, the number of employees on dues checkoff declined from 63% in January, 1979, to 31% in October, 1979, when the poll was taken. Second, 42 of 120 employees in the bargaining unit had made negative comments about the union. Third, six union officials had resigned. Considering this evidence cumulatively, the court was of the view that the company presented substantial objective evidence of loss of union support sufficient to justify taking a poll. The court did not reach the issue of whether the evidence of loss of support would have been sufficient, by itself, to justify a refusal to bargain.

The Sixth Circuit's decision in *Thomas Industries* points up the need for a means to enable a union's majority status to be tested other than by the lengthy and disabling processes involved in traditional unfair labor practice proceedings. It recognizes that the wishes of employees may best be determined by asking them. Nonetheless, employer polling is an inadequate substitute for the election process after which it is modeled. An election conducted by the Board has major advantages as a means for determining employee wishes. First, the Board, as a branch of the federal government, is perceived as neutral. An election conducted under its auspices will yield more reliable results. Second, an official election takes place after notice and time for thought and debate, a consideration the *Struksnes* rule fails to take into account.

**IV CURRENT PROPOSALS EXAMINED**

Current suggestions for change are of three major types: 1) maintaining the good faith doubt test but reevaluating and clarifying the weight given to various elements of objective evidence; 2) shifting the inquiry from an evaluation of the employer's state of mind to an analysis of actual majority status as the ultimate issue; and 3) changing the standards to make elections more available on
employer petition. While any one of these resolutions might improve the system, no one of them can resolve all the problems presented in this area.

A. Readjusting the Good Faith Doubt Test

One commentator, critical of current Board analysis, has suggested that the good faith doubt test has already been abandoned by the Board and replaced with a test of "reasonable grounds" or "objective considerations." He argues that the reasonable doubt test presently applied is unfair to employers because of arbitrary application by the Board and too much reliance on "doubtful presumptions of continuing majority status." He suggests that what is needed is "a more realistic appraisal" by the Board. This commentator argues that employee statements are too rigorously screened, that turnover ought to be given more weight and that checkoff figures and union membership figures ought to be found relevant. He notes that an employer cannot act with absolute certainty given the limited amount of tangible evidence which it has available. He argues that the presumption of continuing majority status ought to be treated as rebuttable "on any reasonable showing that the new employees do not, in fact, support the union to the same extent as the employees they have replaced."

While the tests for determining whether there is sufficient objective evidence to satisfy a good faith doubt arguably could be improved to make the outcome more predictable, this alternative cannot provide a lasting solution. The tests, in some categories at least, have already been so stretched that they no longer have much relationship to reality. For example, the policy reasons behind the present pre-

208. Krupman, supra note 27, at 288.
209. Id. at 289-90.
210. Id. at 290.
211. Id. at 299.
212. Id. at 296, 298. Another commentator has suggested that the Board promulgate rules outlining objective criteria sufficient to rebut the presumption of continued majority support. He observes that this would encourage voluntary compliance by enhancing predictability. See Note, supra note 27, at 664. This suggestion has its risks. First, an employer seeking to manufacture evidence to eliminate the union would be provided a checklist to assist it in its task. Second, the Board has already provided a list of guidelines in case law. The criteria outlined above are the major categories into which evidence usually falls. See notes 83-207 and accompanying text supra. These cases have not substantially enhanced predictability. It is suspected that such guidelines would only give the appearance of predictability, becoming blurred by interpretations designed to meet individual cases. In any event, the Board's general reluctance to use rulemaking makes this resolution unlikely.
213. Krupman, supra note 27, at 298.
sumption that strike replacements support the union in the same ratio as do strikers are powerful. The presumption itself, however, invites disbelief and judicial reversal. The idea that strike replacements support the union to the same extent as do striking employees is unsupportable where the union is trying to get strikers reinstated and the replacements laid off.

So long as the test applied by the Board and the courts is worded in terms of good faith objectively based doubt, it will appear to employers deceptively easy to satisfy. However, a review of recent cases indicates that the employer presently bears a "heavy" burden in attempting to rebut the presumption of continued majority support. Because of the NLRA's concern for industrial stability, this is not likely to change. Consequently, there is a need for a solution that involves more than a mere adjustment to the present system.

B. Legal Effect of Establishing Good Faith Doubt

A number of commentators advocate that the Board change its position on the legal effect of establishing good faith doubt. The Board currently holds that where the employer succeeds in producing evidence of a good faith objectively based doubt as to the union's continued majority status, such proof conclusively rebuts the presumption of continued majority support and is a complete defense to a refusal to bargain charge. A number of courts, however, have held that a showing of such doubt merely shifts the burden to the General Counsel, who may still establish an unlawful refusal to bargain by proving that the union had actual majority status on the date

214. For a discussion of the conflicting treatments of this presumption by the Board and courts, see notes 150-65 and accompanying text supra.
216. See Note, supra note 27.
Proof of majority is peculiarly within the special competence of the union. It may be proved by signed authorization cards, dues checkoff cards, membership lists, or any other evidentiary means. An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit.
of refusal to bargain.\textsuperscript{218} This approach is similar to the approach followed by the Board in the much earlier case of \textit{Stoner Rubber Co.}\textsuperscript{219} There the Board required a formal two-step process. Believing that proof of majority status could best be made by the union, the Board required the employer only to produce sufficient evidence to cast serious doubt on the union's continued majority status. To succeed, the General Counsel was then required to come forward with evidence that on the date the employer refused to bargain with the union, the union did in fact represent a majority of the employees.\textsuperscript{220}

Advocates of a return to the two-step approach of \textit{Stoner Rubber} argue that it is more realistic in two ways. First, it is argued that the present test, imposing a "heavy" burden on the employer to establish a good faith doubt, in effect requires the employer virtually to prove loss of majority.\textsuperscript{221} Second, echoing \textit{Stoner Rubber}, it is argued that the real question should be proof of actual majority status and that such proof is more easily obtained by the union and the Board rather than the employer which has strict legal constraints on its ability to gather information.\textsuperscript{222} Proponents of the two-step approach argue, in effect, that present Board policy has been weighted too heavily on the side of industrial stability at the expense of employee free choice.\textsuperscript{223} It is argued that employees may well be burdened with a minority union because the employer is unable to meet the high standard of proof presently required. Rather, it is suggested, the test should be more easily met and the burden ultimately shifted to protect employee rights. It is further argued that such modification poses little risk to unions which truly represent a majority because a union thus displaced need only file a petition for election to reattain its status in the event it truly represents a majority.\textsuperscript{224}

\textsuperscript{218} See, e.g., \textit{Automated Business Sys., Inc. v. NLRB}, 497 F.2d 262 (6th Cir. 1974) (evidence offered by the employer of employee signatures on decertification petition showed reasonable belief of a lack of union majority which was not rebutted); \textit{AIW, Local 289 v. NLRB}, 476 F.2d 868 (D.C. Cir. 1973) ("The employer's good faith doubt as to union's continued majority status was precluded by employer's prior unfair labor practices and . . . refusal to furnish union with information essential to its bargaining obligation"); \textit{NLRB v. Frick Co.}, 423 F.2d 1327 (3d Cir. 1970) (evidence of unfair labor practices cannot be offered by an employer to rebut the presumption of continued union majority status).

\textsuperscript{219} \textit{123 N.L.R.B.} at 1440 (1959).

\textsuperscript{220} \textit{Id.} at 1445.

\textsuperscript{221} See Comment, \textit{supra} note 27, at 719.

\textsuperscript{222} \textit{123 N.L.R.B.} at 1455. The \textit{Stoner} Board stated that "[a]n employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity." \textit{Id.}

\textsuperscript{223} See Comment, \textit{supra} note 27, at 732.

\textsuperscript{224} \textit{Id.} at 733.
While this return to the Stoner Rubber test does seem to be more consistent with traditional views on allocating the burden of proof, it fails to solve the problem of delay. Even if adopted by the Board, application of the test could result in delays rivaling the seven year period involved in Peoples Gas. For example, the Board might hold that the employer failed to establish even the less burdensome good faith doubt test advocated. The Board would then order bargaining. If a court of appeals were to disagree and find good faith established, the case would then be remanded to the Board for a determination of actual majority status. Whether or not the Board or employer ultimately prevailed, years of delay would have occurred. If the union were indeed a majority union, the employees would have been deprived of their lawful representative for these years, a loss for which there is no remedy. If the union's majority status is not ultimately established, thus rendering the employer's withdrawal of recognition lawful, the employer would have spent years during which its ability to run its business by changing terms and conditions of employment would have been hampered by fear of a bargaining order. Further, during these years of uncertainty the employees would not have been free to either redesignate this union or choose any other union because of operation of the Board's blocking charge doctrine. Only if the union is willing to drop its unfair labor practice charge regarding the original withdrawal of recognition would an election proceed.

Another problem with the two-step approach is that it is based on the assumption that the General Counsel or the union would be able to prove actual majority status, if in fact it exists. This is far from clear. If some form of the present tests are to be retained, a two-step approach may only accentuate the problem of delay.

If the present test is viewed as involving too great a risk of requiring bargaining where a union has the support of only a minority and if there are genuine fears that a less stringent test would invite bad

225. See notes 219-20 and accompanying text supra.
226. For a discussion of these delays, see note 12 supra.
227. For a discussion of the risks an employer faces when he challenges a union's representative status, see notes 17-19 and accompanying text supra.
228. For a discussion of the blocking charge doctrine, see notes 236-39 and accompanying text infra.
229. See Comment, supra note 27, at 736 (stating that "[a]n incumbent union is in a much better position than an employer to prove majority support"). This may not be true. Unlike the employer's supervisors, union officials do not see their members every day. Attendance at union meetings is of little relevance. Members may not attend for many reasons, among them, satisfaction with the way things are being handled by the union. While the union could question those it represents, there is little reason to believe responses would be necessarily sincere.
faith employers to frustrate the bargaining desires of majority unions, then another alternative need be considered.

C. Availability of Employer Petition for Election

A number of proponents of change have recommended that the law be modified to more readily enable an employer who doubts a union's status to file its own petition for election. An election would clearly provide a more accurate picture of employee sentiment than the circumstantial evidence relied on in withdrawal cases. Moreover, an election can be conducted in only a few months. In contrast, by unilaterally withdrawing recognition, an employer can cause years of delay.

Under § 9(c)(1)(B) of the National Labor Relations Act an employer may file a petition for election after expiration of the certification year. This, it would seem, would constitute a far less serious risk to the bargaining relationship and cause less interference with employee choice than the outright refusal to bargain involved in withdrawing recognition. Despite the seemingly obvious advantages afforded by the election process, current Board policy does not encourage an employer to attempt to file an election petition rather than withdrawing recognition altogether. Instead, filing an election petition is made to seem equally, if not more, difficult.

Since its 1966 decision in United States Gypsum Co., the Board has held that an employer petitioning for election where there is an incumbent union must 1) establish the union's claim for continued recognition and 2) demonstrate by objective considerations that it has reasonable grounds for believing that the union has lost its majority status since certification.

After analyzing the legislative history of the 1947 amendment to the National Labor Relations Act, the Board was of the view that Congress, in enacting § 9(c)(1)(B), did not intend to allow an employer, acting without good faith doubt of a union's majority status, to repeatedly obtain elections. In the view of the Board, to do so would disrupt collective bargaining and frustrate industrial stability. Thus, the test for filing an election petition is almost identical

231. See note 13 and accompanying text supra.
234. Id. at 656. See 93 CONG. REC. 1911 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 983 (1948) (remarks of Senator Morse); 93 CONG. REC. 4153 (1947), reprinted in 2 NLRB, LEGISLATIVE.
to that applied to withdrawal of recognition. 235

There are few cases discussing the employer-filed petition. First, the similarity in legal tests encourages employers to withdraw recognition entirely rather than file petitions. Second, those petitions filed rarely result in elections due to operation of the Board’s blocking charge doctrine. Under this doctrine, the Board dismisses an employer’s petition seeking a union decertification election during the pendency of serious unfair labor practice charges against that employer. Courts have recognized the Board’s discretion to apply this doctrine 236 and have denied employer attempts under the principles of Leedom v. Kyne, 237 to obtain an election through preliminary injunctive relief in the federal courts. 238

For example, if an employer ceases bargaining with the union pending resolution of its decertification petition, the union may file a charge with the Board alleging violation of the duty to bargain in good faith. This charge will be sufficient to “block” the election while the Board resolves the sufficiency of the employer’s doubt. 239 Only if the employer continues bargaining after filing its petition, and only if no other serious unfair labor practice charges are filed, will an elec-

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235. See R. Gorman, supra note 4, at 110.

236. See Bishop v. NLRB, 502 F.2d 1024 (5th Cir. 1974) (refusing to review application of “blocking charge” rule absent abuse of discretion); Pacemaker v. NLRB, 260 F.2d 880 (7th Cir. 1956) (courts of appeals have no authority to take action based on delay even though delay appears to be totally unwarranted). Cf. Templeton v. Dixie Color Printing Co., 444 F.2d 1064 (5th Cir. 1971) (recognizing jurisdiction in district court to order Board to process decertification petition filed by employees which had been held up 3 years by unfair labor practice charges).

237. 358 U.S. 184 (1958). In Leedom, the Board had approved as appropriate a bargaining unit containing both professional and nonprofessional employees without first polling the professional employees. Id. at 185-86. This action flew directly in the face of section 9(b)(1) of the Act which forbids the Board to approve such a mixed unit “unless a majority of [the] professional employees vote for inclusion in such a unit.” 29 U.S.C. § 159(b)(1)(1976). On appeal to the Supreme Court, the Board candidly admitted that it had acted in excess of its powers and violated the statutory rights of the professional employees. 358 U.S. at 187. The Board did not, however, admit that its action gave a federal district court jurisdiction to review its decision. Id. The Supreme Court held that under these circumstances, the courts were empowered “to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.” Id. at 188. The Leedom doctrine has been narrowly construed with jurisdiction appropriate only when there is a “strong and clear” demonstration that a clear, specific and mandatory provision of the Act has been violated. McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916, 917 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969).


239. See NLRB v. West Sand & Gravel Co., 612 F.2d 1326, 1331 (1st Cir. 1979) (company’s decertification petition dismissed because of pending unfair labor practice charges).
tion proceed. Because an employer's refusal to bargain at the time of filing an election petition will be likely to cause the union to file an unfair labor practice charge and delay the election, an employer should continue recognizing and bargaining with the union pending election. The principles of *RCA del Caribe*240 and *Dresser Industries*,241 which generally require continued bargaining by the employer pending the outcome of an employee-filed decertification of election petition, should apply even more strongly in the case of the employer petition.242

V. A FURTHER PROPOSAL

The present system, with its reliance on circumstantial evidence of doubtful reliability, is an inefficient and ineffective means for determining whether employees wish to continue being represented by their current bargaining representative. It is uncertain, unpredictable.

240. For a discussion of *RCA del. Caribe, Inc.*, see notes 119-25 and accompanying text supra.

241. For a discussion of *Dresser Industries*, see notes 105-15 and accompanying text supra.

242. See *N. T. Enloe Memorial Hosp. v. NLRB*, 684 F.2d 790 (9th Cir. 1982). In *N. T. Enloe Memorial Hospital*, the Ninth Circuit had occasion to deal with the obligations of an employer who has filed a representation petition. Before the expiration of its current collective bargaining agreement, the employer filed a timely decertification petition with the Board's regional office claiming a good faith doubt as to the union's continued majority status. The Regional Director scheduled a hearing. The union then requested bargaining for a new contract. The employer refused. The union filed an unfair labor practice charge based on the refusal to bargain. The Regional Director thereafter postponed the hearing on the employer's petition pending resolution of the union's charge. *See note 236 and accompanying text supra.* After the collective bargaining agreement expired, the employer implemented wage and benefit changes for all its personnel and the unfair labor practice charge was amended to include this unilateral change. Ultimately the matter went to hearing and an administrative law judge, affirmed by the Board, found that the employer had failed to rebut the presumption of majority status because it did not have reasonable grounds based on an objective basis for doubting the union's majority.

The employer contested before the court of appeals that it was privileged to suspend bargaining for a new contract once the Regional Director had set a hearing date to consider the representation petition. The court rejected this argument deeming it "reasonable to require the employer to continue bargaining until the Regional Director has determined whether an election should be held." 682 F.2d at 793.

The court held that neither the filing of decertification petition nor the scheduling of a hearing by the Regional Director suspended the duty to bargain. *Id.* at 794. This, the court suggested, was consistent with dicta in the Supreme Court decision of *Brooks v. NLRB*, 348 U.S. 96 (1954). In *Brooks*, the Court stated that "if an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit." *Id.* at 103.

Thus, the Ninth Circuit in *N. T. Enloe Memorial Hospital* suggested that the employer "should have continued to bargain until there was some independent sign, based on Board investigation beyond [the employer's] petition itself, that the union had lost majority status." 682 F.2d at 794.
able and slow. By contrast, a secret ballot election can be certain and quick. What is required is, first, a recognition that secret ballot elections are the safest and most reliable means of determining all representation issues, not just issues of initial representation. Second, it is necessary to determine which type of secret ballot election is most appropriate to further the national labor policy of fostering industrial stability while protecting individual rights. Finally, a practical means must be devised for implementing this change.

With respect to the first issue, the same reasons that make a secret ballot election the preferred means for resolving questions of initial recognition make it the preferred means for determining an incumbent’s representative status. In *Linden Lumber*, the Supreme Court confronted the question of whether an employer who doubts a union’s claim of majority status must file an election petition when it is faced with a claim of majority status from a union which has a card majority. The real question was whether the union requesting or demanding recognition in such a situation could press unfair labor practice charges against the employer for its refusal to bargain rather than filing its own election petition to establish its representative status. The Court held that, absent unfair labor practices of sufficient magnitude to impede an election, an employer could lawfully refuse to bargain until the union established its representative status by election. In so ruling, the Court noted that the Board’s processing of unfair labor practice charges in a contested case can take years, with a then median time of 388 days. By contrast, the Court noted, the median time between the filing of a petition for election and the decision of the regional director was then about 45 days. Based on these figures, the Court stated that “[i]n terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored.”

The arguments of *Linden Lumber* apply with equal strength in the withdrawal of recognition situation, especially since these cases can stretch on for as long as seven years. In the fiscal year ending September 30, 1980, for instance, the median time between filing an unfair labor practice charge and issuance of the Board decision was 484 days. In contrast, for the same fiscal year, the median time

244. *Id.* at 306 (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 611 n.30 (1969)).
245. *Id.* at 306-07.
246. *Id.* at 307.
247. For an example of such a delay, see note 13 supra.
between filing an election petition and the regional director’s decision was 38 days.\textsuperscript{249} In the incumbent union situation, it is possible that an election petition could be processed even more quickly.\textsuperscript{250}

Thus, the arguments for encouraging elections in the initial recognition context apply equally well to the incumbent union situation. An election provides a comparatively quick and certain result. Independent withdrawal of recognition provokes lengthy unfair labor practice proceedings with accompanying delays and uncertainty. These delays harm management, employees and unions alike.\textsuperscript{251}

Despite these reasons for encouraging elections as the preferred means to resolve questions of representation, the Board has failed to fully adopt this principle, even in cases where representation petitions have been filed. For example, in its 1982 decision in Dresser Industries,\textsuperscript{252} the Board explicitly reaffirmed by footnote that even where employees have filed a decertification petition, there might exist situations where the employer could lawfully withdraw recognition rather than await the outcome of the election.\textsuperscript{253} This, it is submitted, was error. At least where a petition has been filed, there ought to be no question that an election is the more reliable means of determining employee choice.

Second, it must be determined which type of election is the more appropriate. It has been suggested, for instance, that employer-filed petitions ought be made more readily available.\textsuperscript{254} While such a step would be a major improvement if the employer’s right to withdraw recognition were also limited or eliminated, there is room for argument as to whether it is the best of the alternatives. First, employers could disrupt bargaining and ultimately undermine the union if allowed to repeatedly file petitions without substantial cause. Second, Congress may have intended that questions of continuing representation be resolved by employee decertification petition under § 9(c)(1)(A)(ii) of the National Labor Relations Act\textsuperscript{255} rather than by

\textsuperscript{249} Id. at 15, Chart No. 10.

\textsuperscript{250} It is possible, for example, that there would be no need for a hearing since the unit description might be the same.

\textsuperscript{251} For a discussion of the deleterious impact delay has on the employer, employees and the union, see notes 14-20 and accompanying text supra.


\textsuperscript{253} See note 113 supra. The Board stated that even if an employer is presented with a valid decertification petition supported by a majority of the employees, it may still be privileged to withdraw from bargaining. 264 N.L.R.B. No. 145, slip op. at 6 n.7.

\textsuperscript{254} See text accompanying note 230 supra.

employer petition. As noted by the Supreme Court in *Linden Lumber*, the history of the employer petition provision "indicates it was aimed at eliminating the discrimination against employers which had previously existed under the Board's prior rules, permitting employers to petition for an election only when confronted with claims by two or more unions." The Court concluded that "[t]here is no suggestion that Congress wanted to place the burden of getting a secret election on the employer."

By contrast, § 9(c)(1)(A)(ii) was enacted for the specific purpose of allowing employees to reject their current collective bargaining representative if they so choose. As Senator Taft, Chairman of the Senate Committee on Labor and Public Welfare, stated in describing the changes that the 1947 labor bill would make:

We provide, further, that there may be an election asked by

256. 419 U.S. 301 (1974).
257. Id. at 307 (citing S. REP. No. 105, 80th Cong., 1st Sess., 10-11; 93 CONG. REC. 3838 (1947)(remarks of Senator Taft)). Other portions of the legislative history make it even more clear that Congress was primarily concerned with the initial recognition context. As Senator Taft, Chairman of the Senate Committee on Labor and Public Welfare, stated,

"Today an employer is faced with this situation. A man comes into his office and says, "I represent your employees. Sign this agreement or we strike tomorrow."... The bill gives him the right to go to the Board under those circumstances and say, "I want an election. I want to know who is the bargaining agent for my employees.""

93 CONG. REC. 3954 (1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1013 (1948).

In *Brooks v. NLRB*, the Supreme Court did state that "[i]f an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit." 348 U.S. 96, 103 (1954). This does not indicate, however, that the Court favored employer petitions in the incumbent union context. First, this was dicta and the Court did not examine the legislative history of the Taft-Hartley Act in making such a statement. The real issue before the Court in *Brooks* was the validity of the Board's practice in refusing to hold an election or allow withdrawal of recognition in the one year period following a certification.

Further, and most importantly, the Court explicitly recognized the authority of the Board to set the rules for when and how unions lose their status as exclusive representative. The Court stated, for instance, that "[a]lthough the Board may, if the facts warrant, revoke a certification or agree not to pursue a charge of an unfair labor practice, these are matters for the Board; they do not justify employer self-help or judicial intervention." Id. at 104 (emphasis added) (citations omitted).

It is under this administrative authority that the Board determines when to allow withdrawal of recognition and what standards will govern petitions for election. The Board should act under this authority to reexamine its standards.

258. 419 U.S. at 307.
the men to decertify a particular union. Today if a union is once certified, it is certified forever; there is no machinery by which there can be any decertification of the particular union. An election under this bill may be sought to decertify a union and go back to a non union status, if the men so desire.

The decertification process is presently inadequate to meet Senator Taft's purpose and protect employee rights because of one primary failing: lack of employee knowledge. Further, because of the "certification year bar" doctrine and the "contract bar" doctrine, there are only certain limited time periods during which such petitions may be validly filed. In the incumbent union situation, there is likely a collective bargaining agreement which will prevent petitions from being validly filed except during a thirty-day period which falls not more than ninety or less than sixty days before the contract's expiration date. While petitions can be filed after the contract expires, the employer and union may well have entered into a new collective bargaining agreement effective on expiration of the old. The new contract will then operate to bar petitions. Thus, employees may lack knowledge that they have the right to petition at all. If they have this knowledge, it is unlikely that they will know to file precisely within the thirty-day "window period."

To render decertification elections a viable alternative to employer withdrawal or employer-filed petitions, a means of providing such information to employees is needed. This requires a determination of the appropriate party to provide such information: the employer, the union or the Board. Of these, the employer is the least appropriate. An employer providing employees with unsolicited information on how to decertify their union violates its duty to bargain with that union in good faith and may interfere with employee
Thus, it is suggested that either the union or the Board should advise employees of their rights.

If, for example, the union timely posts a notice advising employees of their rights and the employees take no steps to decertify, it should be the law that the employer may not, in view of the employees' silence, withdraw recognition. If the union, however, posts no such notice, the present rules for determining the legality of the employer's withdrawal could apply.

An alternative is for the Board to determine administratively that it should post notices advising employees of their rights. The notice is not entirely unprecedented. The notices, of course, should neither encourage nor discourage the filing of petitions. Again, if with full knowledge of their rights, employees fail to take steps to decertify, an employer should not be allowed to determine, on its own, that such employees do not want representation.

265. See notes 116-17 and accompanying text supra.

266. The Court of Appeals for the Seventh Circuit in NLRB v. Drives, Inc., in an opinion by then Judge Stevens, enforced a bargaining order against an employer of pre-election and post-election unfair labor practices which materially diminished the possibility that a second election could be fairly held. The court, however, modified the Board's order to include provision for a notice to employees advising them of their independent right to petition for a new election. NLRB v. Drives, Inc., 440 F.2d 354, 367 (7th Cir. 1971). Discussing the bargaining orders and their possible impact on employee free choice, the court noted that any disenfranchisement of employees is not permanent in light of the employees' right to reject the union by petitioning for a secret ballot election. The court noted, however, that there was a problem of notice, stating "[y]et we wonder how many employees are aware of the existence of this seldom invoked right." Id. Because the union had been rejected by secret ballot election, the court considered it particularly important that employees understand their right to petition and that it was the Board, rather than the employer or union, on whom they should rely for an explanation of this right. See also NLRB v. Priced-Less Discount Foods, Inc., 405 F.2d 67, 71-72 (6th Cir. 1968), on remand, 407 F.2d 1325 (1969).

267. In 1947, the Bureau of National Affairs published a special report to provide readers an understanding of the 1947 Act. After discussing an employer's previously existing right to withdraw recognition prior to passage of the Taft-Hartly Act, the publisher's editorial staff stated,

Under the new law, the duration of an employer's obligation to bargain may well become an open and shut matter, and this may not always work to the employer's advantage. Quite possibly the Labor Board will take the view that a union, once certified, retains bargaining rights unless and until (1) it is unseated by another union in a new election or (2) on the basis of a new election held at the request of employees, the union is decertified. Under the new law, the employer himself is free to petition for an election if a union claims the right to represent employees. But the Board would appear to be free to reject an employer's petition, on the ground that no question of representation existed, if the union previously had been certified as bargaining agent and none of the employees and no other union were challenging its status.

BUREAU OF NATIONAL AFFAIRS, THE NEW LABOR LAW, SPECIAL ANALYTICAL REPORT 49-50 (1947). It is suggested that this common sense approach ought to be the
While this process of insuring employee knowledge of the decertification procedure might seem designed to lead to more decertifications and less union representation, such result is by no means certain. First, by eliminating an employer's ability to determine unilaterally the union's status and either terminate or delay bargaining, the process of collective bargaining will be furthered. Fewer unions will lose bargaining rights through the delays engendered by lengthy litigation. Second, the requirement that petitions be signed by at least thirty percent of the employees in the unit will prevent frivolous petitions.\textsuperscript{268} Finally, it seems that Congress did intend that employees have the right to decertify their collective bargaining representative.\textsuperscript{269} Before a right can be meaningful however, it must be known.

VI. CONCLUSION

The present system for determining whether an employer's duty to bargain with an incumbent union has terminated is unwieldy, unpredictable, and ultimately unworkable. It imposes costs to employers and unions alike, while sometimes ignoring the wishes of those whom Congress sought to protect, the employees.

The present system represents an attempt to determine, by circumstantial evidence, whether employees wish to continue to be represented by their current collective bargaining representative. At times it produces rational results. At other times, as in a strike situation, no solution seems satisfactory. Even where it seems to produce rational results however, the system imposes on the parties and employees the cost of delay. Further, constant fine tuning is required to keep in balance the conflicting policies of employee free choice and industrial stability. This produces uncertainty.

Perhaps the solution to the delays and uncertainties plaguing the present system lies not in minor readjustments, but rather in a major reexamination. The question is how best to effectuate Congress' intent to recognize employee rights to refrain from union activities without unduly threatening industrial stability or interfering with employee rights to engage in union activities.

\textsuperscript{268} The NLRB has adopted an administrative requirement that petitions for election be supported by at least 30 percent of employees in the voting unit. \textit{See} note 108 and accompanying text \textit{supra}.

\textsuperscript{269} \textit{See} note 260 and accompanying text \textit{supra}.
Because of the speed and certainty which the election process provides, it is suggested that it be recognized as the preferred means of resolving questions of continued employee support. Withdrawal of recognition based on an employer's determination that the union no longer represents a majority of its employees ought be allowed only as a last resort. Where employees have knowledge and opportunity to rid themselves of their union, a failure to so act ought be considered convincing proof that they do not wish their bargaining representative removed.