

## Case Comments

### ***NLRB v. Curtin Matheson Scientific, Inc.:* The Effect of a Nonpresumption as to Striker Replacements' Union Sentiments on the Good-Faith Doubt Defense**

#### I. INTRODUCTION

In the 1980s employer hiring of permanent replacements increased, prompting concern by the AFL-CIO.<sup>1</sup> AFL-CIO pressure has led to the introduction of legislation in the House of Representatives<sup>2</sup> and the Senate<sup>3</sup> which would ban the hiring of permanent replacements.<sup>4</sup> This campaign is a high priority for the AFL-CIO because it feels that “the permanent replacement of strikers is a key element in . . . [the] strategy” to eliminate unions.<sup>5</sup>

One of the reasons why the hiring of permanent replacements is such a threat to unionism is because an employer may seek to use the fact that his work force is composed of a substantial number of replacements to justify its refusal to bargain with or its withdrawal of recognition from the union. If permanent replacements are presumed to oppose the union, then when permanent replacements make up fifty percent or more of the bargaining unit, the employer, charged with committing an unfair labor practice for its

---

<sup>1</sup> See N.Y. Times, Sept. 30, 1986, at A18, col. 1 (comments of Professor Charles Perry, Wharton Business School); *AFL-CIO Continues Media Blitz*, LAB. REL. REP. (BNA) 498, 499 (Aug. 20, 1990) (In a General Accounting Office survey, two-thirds of employers and 90% of unions polled “said they believed that permanent replacements were hired less often in the late 1970s than in the late 1980s.”)

<sup>2</sup> H.R. 5, 102 Cong., 1st Sess. (1991). The House passed H.R. 5 in July of 1991. This victory for the AFL-CIO has been termed a “hollow” one because the vote in the House, 247-182, fell short of the two-thirds margin necessary to override an anticipated veto by President Bush. See *House Passes Striker Replacement Bill*, 137 Lab. Rel. Rep. (BNA) 399 (July 29, 1991).

<sup>3</sup> S. 55, 102 Cong., 1st Sess. (1991). S. 55 is the companion bill to H.R. 5 already passed by the House. See *supra* note 2. The Senate is expected to vote on S.55 sometime this fall.

<sup>4</sup> The AFL-CIO has also filed a complaint with the International Labor Organization charging that the *Mackay Radio* doctrine allowing employers to hire permanent replacements for economic strikers violates ILO Convention 87. *AFL-CIO Complains of Strike Replacement Policy*, 134 LAB. REL. REP. (BNA) 504, 504 (Aug. 20, 1990).

<sup>5</sup> *Id.* at 505 (statement by James E. Baker, AFL-CIO European representative).

refusal to bargain with or recognize the union, could defend against these charges by asserting that it had a good-faith doubt that the union enjoyed majority support.

However, in *Buckley Broadcasting Corp. (Station KKHI)*<sup>6</sup> the National Labor Relations Board ("Board") rejected the presumption that replacements oppose the union as well as the presumption that replacements favor the union. In place of these presumptions that the Board had employed in the past, the Board adopted a nonpresumption. Employing the nonpresumption, the Board will neither presume that replacements oppose nor favor the union. Rather, the Board will require an employer charged with violating sections 8(a)(5) and (1) of the National Labor Relations Act ("the Act")<sup>7</sup> to produce further evidence that the union lacks majority support, beyond the mere fact that replacements make up fifty percent of the bargaining unit, in order for the employer to justify its refusal to bargain with or recognize the union. In *NLRB v. Curtin Matheson Scientific, Inc.*,<sup>8</sup> the Supreme Court, in a 5-4 decision, gave its approval to the Board's nonpresumption, holding that such an approach is rational and consistent with the Act.<sup>9</sup>

Part II of this Comment will describe the legal background of the good-faith doubt defense and the Board's varying approaches to the question of replacements' union sentiments. Part III will detail the facts and the Court's holding and reasoning in *Curtin Matheson*. Part IV will analyze the effect of the nonpresumption on the good-faith doubt defense, concluding that the effect is basically the same as that of the Board's prior striker replacement presumption—the employer will be required to produce some further evidence of replacements' anti-union sentiments in order to support his good-faith doubt. Part V will discuss *what* further evidence of replacements' anti-union sentiments will be sufficient to support the employer's good-faith doubt. It will conclude that, if this further evidence must be direct evidence of the replacements' expressed desires to repudiate the union, rather than circumstantial evidence, from which one might infer that the replacements oppose the union, then the good-faith doubt defense has collapsed into the proof-in-fact rule. Assuming that this collapse has occurred, Part VI will examine the conflict between the proof-in-fact rule and the Board's safeguards on employer polling of employees. Finally, Part VII will support the approach which the Court in *Curtin Matheson* sees the Board as taking:

---

<sup>6</sup> 284 N.L.R.B. 1339 (1987), *enforced* 891 F.2d 230 (9th Cir. 1989).

<sup>7</sup> National Labor Relations Act §§ 8(a)(5) and (1), 29 U.S.C. §§ 158(a)(5) and (1) (1988).

<sup>8</sup> 110 S. Ct. 1542 (1990).

<sup>9</sup> *Id.* at 1554.

the Board will not presume either that replacements oppose or support the union, but will give weight to certain circumstantial evidence that an employer may produce as further evidence of the replacements' anti-union sentiments. Part VII will also conclude that this approach is a better alternative from a policy standpoint than reverting to the presumption that replacements oppose the union or eliminating the good-faith doubt defense in favor of the proof-in-fact rule.

## II. LEGAL BACKGROUND

### A. *The Mackay Doctrine*

Sections 7 and 13 of the Act guarantee to employees the right to strike.<sup>10</sup> It is unlawful for an employer to fire employees for exercising this right. However, this right is not without limitations. One such limitation is imposed by permissible countermeasures taken by employers faced with strikes.<sup>11</sup> The employer's right to hire permanent replacement workers for economic strikers is a permissible countermeasure which has been criticized as especially destructive of the employees' right to strike.<sup>12</sup> In its 1938 decision in *NLRB v. Mackay Radio & Telegraph Co.*, the Supreme Court stated that "although section 13 [of the Act] provides, 'nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers."<sup>13</sup>

---

<sup>10</sup> Section 7 guarantees employees a broad right to engage in "concerted activities." 29 U.S.C. § 157. Section 13 is more specific: "Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163.

<sup>11</sup> R. GORMAN, *BASIC TEXT ON LABOR LAW—UNIONIZATION AND COLLECTIVE BARGAINING* 297 (1976).

<sup>12</sup> An "economic striker" is one engaged in a strike in support of bargaining demands, as opposed to unfair labor practice strikers who engage in a strike in protest of unfair labor practices by the employer. *See* R. GORMAN, *supra* note 11, at 339.

<sup>13</sup> 304 U.S. 333, 345 (1938). While this statement was made in dicta, it has been accepted as the law. *See, e.g., NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 225 (1963); *Belknap, Inc. v. Hale*, 463 U.S. 491, 526 (1983) (Brennan, J., dissenting).

Commentators have criticized the *Mackay* Court's assumption that the employer's right to continue operating his business in the face of a strike necessarily means he must have the right to hire permanent replacements for the strikers. *See* Estreicher, *Strikers and Replacements*, 38 *LABOR L.J.* 287, 289 (May 1987); Weinstein, *The Anomalous*

*Mackay* also established that, despite the fact that economic strikers remain "employees" under section 2(3) of the Act,<sup>14</sup> they have no right to automatic reinstatement at the conclusion of the strike.<sup>15</sup> Instead, the employer need only put the strikers on a preferential hiring list and hire them as positions become available; the employer is not required to discharge the permanent replacement workers to make room for the returning strikers. Because strikers denied automatic reinstatement often cannot afford to wait for an opening, "there is often . . . no practical difference between discharge of and permanent replacement of strikers."<sup>16</sup>

### B. *The Good-Faith Doubt Defense*

Upon certification<sup>17</sup> or recognition,<sup>18</sup> a union enjoys an irrebuttable presumption of majority support for one year. During this one-year period, an employer's refusal to bargain with the union is a per se violation of sections 8(a)(5) and (1) of the Act.<sup>19</sup> At the end of the one-year period, the

---

*Mackay Doctrine Permits the Permanent Replacement of Strikers—Even Though They Can't Be Fired*, 7 CALIF. LAW. 44, 47 (Apr. 1987); Note, *The Mackay Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782 (1972). Alternatives to hiring permanent replacements include operation by managerial and supervisory employees, hiring of temporary replacements, and contracting out work usually performed by strikers. See C. PERRY, A. KRAMER, & T. SCHNEIDER, OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENTAL REGULATIONS 63-66 (Industrial Research Unit, The Wharton School, Univ. of Pa., Labor Relations and Public Policy Series No. 23, 1982).

<sup>14</sup> *Mackay*, 304 U.S. at 345. See 29 U.S.C. § 152(3).

<sup>15</sup> *Mackay*, 304 U.S. at 345-46. In contrast, unfair labor practice strikers must be automatically reinstated by the employer at the conclusion of the strike.

<sup>16</sup> *AFL-CIO Complains of Strike-Replacement Policy*, 134 LAB. REL. REP. (BNA) 504, 505 (Aug. 20, 1990) (quoting James E. Baker, AFL-CIO European representative, in a letter written to the International Labor Organization's Freedom of Association Branch).

<sup>17</sup> See *Brooks v. NLRB*, 348 U.S. 96, 103-04 (1954).

<sup>18</sup> See *NLRB v. Physicians & Surgeons Community Hosp.*, 577 F.2d 305, 307 (5th Cir. 1978).

<sup>19</sup> *Celanese Corp. of Am.*, 95 N.L.R.B. 664, 672 (1951); R. GORMAN, *supra* note 11, at 109.

Section 8(a)(5) provides: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5). A violation of § 8(a)(5) will derivatively violate § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section 7." For simplicity's sake, the remainder of this Comment

presumption that the union represents a majority of the bargaining unit employees continues, but is rebuttable.<sup>20</sup>

The employer may challenge the incumbent union's majority status by refusing to bargain with it. If the employer does so, the union has two options. First, it can petition for a new representation election in which it can prove its majority status and obtain recertification. However, if the union is at all uncertain of its majority position, for example because the bargaining unit is now composed of a substantial number of permanent replacements who may oppose the union, it will want to avoid an election.<sup>21</sup> The second, more commonly chosen option is for the union to file a section 8(a)(5) charge against the employer. Section 8(a)(5) makes it an unfair labor practice for the employer to refuse to bargain with the majority representative of its employees.<sup>22</sup>

As a defense to an 8(a)(5) charge, an employer may rebut the presumption that the union is supported by a majority of the bargaining unit employees. The Board has recognized two ways in which this may be done. First, the employer can produce evidence that the union did not in fact have majority support at the time of the employer's refusal to bargain.<sup>23</sup> This is referred to as the "proof-in-fact rule."

Second, the employer can rebut the presumption of continuing majority status 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."<sup>24</sup> This is referred to as the "good-faith doubt defense." This label is a misnomer, however, since the defense is not merely subjective, but

---

will refer only to § 8(a)(5), unless otherwise specified.

<sup>20</sup> *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987).

<sup>21</sup> R. GORMAN, *supra* note 11, at 108.

<sup>22</sup> The source of the majority rule principle is § 9(a) of the Act which provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . ." 29 U.S.C. § 159(a).

<sup>23</sup> *Station KKHI*, 284 N.L.R.B. 1339, 1340 (1987), *enforced* 891 F.2d 230 (9th Cir. 1989).

<sup>24</sup> *Id.*

contains an objective element: a good-faith *reasonable* doubt is what is required.<sup>25</sup>

Under the good-faith doubt defense, an employer's proof of a reasonable good-faith doubt is a complete defense to an 8(a)(5) charge;<sup>26</sup> the Board will not inquire into whether the union in fact represents a majority. Because the good-faith doubt defense requires only proof of objective evidence supporting a good-faith doubt and not proof-in-fact that the union has lost its majority representative status, the employer will opt to use the good-faith doubt defense and not the proof-in-fact rule to rebut the presumption of continued majority status. Part V of this Comment will discuss whether the good-faith doubt defense survives *Curtin Matheson* or whether it has been collapsed into the proof-in-fact rule.

An employer who has hired permanent replacements may submit this fact to the Board as objective evidence supporting its good-faith doubt. Because permanent replacements are considered "employees" and hence bargaining unit members under the Act, their union sentiments "count" for purposes of determining whether the union represents a majority.<sup>27</sup> The Board has struggled with whether it should presume these replacements are pro-union, anti-union, or whether their union sentiments cannot be presumed one way or the other.

---

<sup>25</sup> Comment, *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 DUKE L.J. 718, 721 n.19.

<sup>26</sup> See *Celanese Corp. of Am.*, 95 N.L.R.B. 664, 671 (1951). A different version of the good-faith doubt defense was articulated by the Board in *Stoner Rubber Co. v. NLRB*, 123 N.L.R.B. 1440 (1959). Under the *Stoner* approach, the employer's showing of a good-faith doubt is *not* a complete defense. The employer's showing of a good-faith doubt rebuts the presumption of union majority status *and* shifts the burden to the General Counsel to prove that the union in fact represented a majority of the employees at the time of the employer's refusal to bargain. Although *Stoner* has never been overruled or expressly rejected by the Board, "[r]ecent Board decisions have moved away from the *Stoner* rationale in favor of the *Celanese* approach." Comment, *supra* note 25, at 723; see, e.g., *Automated Business Sys.*, 205 N.L.R.B. 532 (1973), *enforcement denied*, 497 F.2d 262 (6th Cir. 1974). For a full discussion of the distinction between the *Celanese* and *Stoner* approaches to the good-faith doubt defense see Comment, *supra* note 25.

<sup>27</sup> National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1988). See also *Pacific Tile & Porcelain Co.*, 137 N.L.R.B. 1358, 1360 (1962) (holding that permanent replacements for economic strikers are eligible to vote in board elections).

*C. The Board's Struggle to Deal with the Question of Replacements' Union Sentiments: The Gorman Presumption, the Striker Replacement Presumption and the Nonpresumption*

1. *The Gorman Presumption*

Two competing policy values embodied in the NLRA—industrial stability<sup>28</sup> and employee free choice<sup>29</sup>—have guided the Board's treatment of an employer's hiring of replacements as an objective factor in the good-faith doubt defense. It has long been the practice of the Board when dealing with regular employee turnover to presume that new employees support the union in the same proportion as those they replace.<sup>30</sup> In this context, the need for industrial stability outweighs the principle of employee free choice. If an employer could rid itself of the union merely on the basis of regular employee turnover, this would lead to industrial chaos.

A very different situation is presented when the change in the composition of the workforce is due to the employer's hiring of replacement workers during a strike. The Board's earliest position on this issue was to

---

<sup>28</sup> The concern for industrial stability may be seen in § 1 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.

29 U.S.C. § 151. For a full discussion of industrial stability as a policy consideration affecting the Board's good-faith doubt analysis see Comment, *supra* note 25, at 728–39.

<sup>29</sup> The concern with the maximization of employee free choice may be seen in § 7 of the Act:

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 . . . .

29 U.S.C. § 157. For a full discussion of employee free choice as a policy consideration affecting the Board's good-faith doubt analysis see Comment, *supra* note 25, at 730–38.

<sup>30</sup> See, e.g., National Plastic Prods. Co., 78 N.L.R.B. 699, 706 (1948).

presume that replacement workers oppose the union.<sup>31</sup> This position has become known as the Gorman presumption after Professor Robert A. Gorman's statement that "if a new hire agrees to serve as a replacement for a striker (in union parlance, as a strikebreaker, or worse), it is generally assumed that he does not support the union and that he ought not to be counted toward a union majority."<sup>32</sup> This position is certainly in line with "what would seem to be commonsense assumptions"<sup>33</sup> about the views of replacement workers. It seems reasonable to assume that a "scab" who crosses a union picket line to permanently replace a striking worker does not support the union. This assumption is especially compelling when one considers that the union will almost inevitably demand that the employer oust the replacements to make way for returning strikers and that replacements are often the targets of striker violence and threats.

If these "commonsense assumptions" are true and replacements do oppose the union, then the Gorman presumption furthers employee free choice by allowing the employer to withdraw recognition from the union when replacements make up at least fifty percent of the bargaining unit.<sup>34</sup> Employees will then be free to either recertify the incumbent union, participate in the organization of a different union, or refrain from union activity altogether.

On the other hand, if the employer is not permitted to use evidence that his hiring of replacement workers has created a situation in which the incumbent union does not enjoy majority support, the employer may be found to have violated section 8(a)(5), and, if so, the Board will issue a bargaining order. An order to bargain with a union which does not represent a majority of the employees will not maximize employee free choice as guided by the majority rule principle of section 9(a) of the Act.<sup>35</sup>

---

<sup>31</sup> See, e.g., *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444 (1959) (stating that it was not "unreasonable to assume that none of the . . . permanent replacements were union adherents").

<sup>32</sup> R. GORMAN, *supra* note 11, at 112.

<sup>33</sup> *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1555 (1990) (Rehnquist, C.J., concurring).

<sup>34</sup> *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 300 (9th Cir. 1978) ("If union support is lacking, the employer's action actually furthers the cause of employee democracy by overcoming the inertia which helps maintain the status quo."), *cert. denied*, 442 U.S. 921 (1979); Comment, *supra* note 25, at 732.

<sup>35</sup> 29 U.S.C. § 159(a); see *supra* note 22 and accompanying text. The inhibiting effect of a bargaining order on employee free choice is shown by the following statement by the Court of Appeals for the District of Columbia Circuit:

The Gorman presumption has been criticized, however, for leading to industrial instability.<sup>36</sup> Professor Samuel Estreicher refers to the need for industrial stability as a need for "bounded conflict."<sup>37</sup> According to the principle of bounded conflict, "while economic conflict is an essential, legitimate feature of our collective bargaining system, a strike should ordinarily not provide an occasion for terminating the bargaining relationship. The strike is a means of resolving a dispute, not destroying the underlying bargaining structure."<sup>38</sup> Because the Gorman presumption makes it easier for an employer to use the occasion of a strike to eliminate the union, it violates the principle of bounded conflict, thus leading to industrial instability.

## 2. *The Striker Replacement Presumption*

From 1975 to 1987 the Board employed, with some wavering, the striker replacement presumption under which the Board presumed "that permanent strike replacements hired during a strike support the union in the same ratio as the striking employees whom they replaced."<sup>39</sup> Even a proponent of the striker replacement presumption has referred to it as

---

After a bargaining order is entered, there is a "reasonable period," similar to the year after a Union is initially certified, during which no decertification petition will be considered. Then, if a contract is signed, which seems likely to occur in the course of a year of bargaining, the three-year contract bar would stymie any attempt by the employees to choose another Union or decertify the present Union, unless the Board were to provide for an exception to its normal rules.

*Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 45 n.17 (D.C. Cir. 1980). See Comment, *supra* note 25, at 732-33.

<sup>36</sup> See, e.g., Flynn, *The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements*, 61 TEMP. L. Q. 691, 704-06 (1988).

<sup>37</sup> Estreicher, *supra* note 13, at 288.

<sup>38</sup> *Id.*

<sup>39</sup> *Station KKHI*, 284 N.L.R.B. 1339, 1340 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989) (citing *Pennco, Inc.*, 250 N.L.R.B. 716 (1980)). The Board's first use of the striker replacement presumption occurred in *Cutten Supermarket*, 220 N.L.R.B. 507 (1975). Although the Board briefly seemed to abandon the presumption as "wholly unwarranted and unrealistic" in *Arkay Packaging Corp.*, 227 N.L.R.B. 397 (1976), *review denied sub nom. N.Y. Printing Pressmen & Offset Workers Union v. NLRB*, 575 F.2d 1045 (2d Cir. 1978), it has reaffirmed it many times since. See, e.g., *Windham Community Memorial Hosp.*, 230 N.L.R.B. 1070 (1977), *enforced* 577 F.2d 805 (2d Cir. 1978); *Pennco, Inc.*, 250 N.L.R.B. 716 (1980), *enforced* 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982). The striker replacement presumption was abolished by the Board in *Station KKHI*, 284 N.L.R.B. at 1340.

“patently absurd” and “counterfactual.”<sup>40</sup> The value of the striker replacement presumption is that it serves the goal of industrial stability, *i.e.*, it puts bounds on the conflict. If the striker replacement presumption is employed by the Board, an employer’s showing that permanent replacements make up at least fifty percent of the bargaining unit will not be sufficient to support the employer’s good-faith doubt that the union lacks majority support because the Board will presume that the replacements support the union. Therefore, such a showing will not justify the employer’s refusal to bargain with or recognize the union. Thus, the striker replacement presumption assures that an employee strike and an employer’s subsequent hiring of permanent replacements “do not *routinely* lead to the obliteration of bargaining relationships.”<sup>41</sup>

The striker replacement presumption obtains industrial stability, but not without a price; the price is the nonmaximization of employee free choice. Consider, for example, a situation in which a bargaining unit composed of ten employees goes on strike. The employer hires ten permanent replacements and then refuses to bargain any longer with the incumbent union on the grounds that the employer has a reasonable good-faith doubt of the union’s majority status. Using the striker replacement presumption, the Board would presume that the ten replacements favor the union despite the fact that the union will undoubtedly negotiate for their ouster.<sup>42</sup> The Board would order the employer to bargain with the incumbent union. If the replacements in fact oppose the union, the bargaining order inhibits their free choice.<sup>43</sup>

### 3. *The Station KKHI Nonpresumption*

The Board’s striker replacement presumption met rejection in the Courts of Appeals.<sup>44</sup> In 1987 in *Station KKHI* the Board abolished the presumption,

---

<sup>40</sup> Estreicher, *supra* note 13, at 293.

<sup>41</sup> *Id.* (emphasis added).

<sup>42</sup> See Estreicher, *supra* note 13, at 292–93.

<sup>43</sup> See *supra* note 35 and accompanying text.

<sup>44</sup> See *NLRB v. Randle-Eastern Ambulance Serv., Inc.*, 584 F.2d 720, 728 (5th Cir. 1978); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1110 (1st Cir. 1981); *National Car Rental Sys., Inc. v. NLRB*, 594 F.2d 1203, 1206 (8th Cir. 1979). *But see* *NLRB v. Windham Community Memorial Hosp.*, 577 F.2d 805, 813 (2d Cir. 1978) (enforcing Board order but refusing to adopt the striker replacement presumption or the Gorman presumption); *NLRB v. Pennco, Inc.*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982) (enforcing Board order but refusing to adopt the striker replacement presumption or the Gorman presumption).

finding that it had “no articulated basis in reason or policy” and “no evidentiary or empirical basis.”<sup>45</sup> However, the Board did not return to its former Gorman presumption, favored by the Courts of Appeals, because the Board found it to be “equally unsupportable.”<sup>46</sup> Instead, the Board stated that because it could not “discern [any] overriding generalization about the views held by strike replacements” it would “decline to maintain or create any presumptions regarding their union sentiments” and would rather, “review the facts of each case,” requiring “some further evidence of union nonsupport.”<sup>47</sup> In *Curtin Matheson*, the Supreme Court gave its approval to the Board’s new “nonpresumption.”

### III. *NLRB v. CURTIN MATHESON SCIENTIFIC, INC.*

#### A. *The Facts*

The dispute between Curtin Matheson and the union began in May of 1979 when a collective bargaining agreement between the parties expired. Negotiations proved fruitless; when the union rejected the employer’s final offer, the employer locked out the twenty-seven bargaining unit employees. When the employer ended the lockout and reiterated its last offer, the union again rejected the offer and instituted an economic strike.<sup>48</sup>

Five of the twenty-seven bargaining unit employees immediately crossed the picket line and returned to work. Then on June 25, the employer hired twenty-nine permanent replacements for the twenty-two striking employees. The record contains no evidence that either the crossovers or the replacements were subject to violence or threats by the strikers. Although the union terminated the strike on July 16 and offered to accept unconditionally the employer’s final offer, the employer stated that the offer was no longer open. Furthermore, the employer withdrew its recognition of the union on the basis that it had a good-faith doubt of the union’s majority status. When the union requested information from the employer regarding the number of

---

<sup>45</sup> *Station KKHI*, 284 N.L.R.B. at 1344.

<sup>46</sup> *Id.*

“The National Labor Relations Board determines on an *ad hoc* discretionary basis whether or not to acquiesce in the views of national labor law and policy articulated by the various federal circuit courts of appeals.” Modjeska, *The NLRB Litigational Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399 (1989).

<sup>47</sup> *Station KKHI*, 284 N.L.R.B. at 1344 (quoting *NLRB v. Pennco*, 684 F.2d 340, 343 (6th Cir. 1982)).

<sup>48</sup> *Curtin Matheson*, 110 S. Ct. at 1547. See *supra* note 12 regarding economic strikers.

bargaining unit employees and the job classification and seniority of each employee, the employer refused to provide it.<sup>49</sup>

In response to the employer's withdrawal of recognition, refusal to bargain, and refusal to provide information, the union filed 8(a)(5) and (1) charges with the Board.<sup>50</sup> The employer invoked the good-faith doubt defense, and the Administrative Law Judge ("ALJ"), finding that the employer had a reasonable good-faith doubt, dismissed the complaint.<sup>51</sup> On appeal, the Board applied its *Station KKHI* nonpresumption and rejected the opinion of the ALJ, holding that the employer did not satisfy the good-faith doubt test.<sup>52</sup> The Fifth Circuit denied enforcement of the Board order,<sup>53</sup> and the Supreme Court granted certiorari "to resolve a circuit split on the question whether the Board must presume that striker replacements oppose the union."<sup>54</sup>

### B. Analysis of the Case

Justice Marshall wrote the opinion of the Court in a 5-4 decision reversing the judgment of the Court of Appeals and enforcing the order of the Board. The Court's opinion is marked by great deference to the expertise of the Board in recognition that the Board "has the primary responsibility for developing and applying national labor policy."<sup>55</sup> The Court reviewed the Board's nonpresumption using a deferential standard under which "[the Court] will uphold a Board rule as long as it is rational and consistent with the Act."<sup>56</sup>

---

<sup>49</sup> *Curtin Matheson*, 110 S. Ct. at 1547.

<sup>50</sup> *Id.* See *supra* note 19.

<sup>51</sup> *Curtin Matheson*, 110 S. Ct. at 1547.

<sup>52</sup> *Curtin Matheson Scientific, Inc.*, 287 N.L.R.B. 350 (1987), *enforcement denied*, 859 F.2d 362 (5th Cir. 1988), *rev'd*, 110 S. Ct. 1542 (1990).

<sup>53</sup> *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362 (5th Cir. 1988), *rev'd*, 110 S. Ct. 1542 (1990).

<sup>54</sup> *Curtin Matheson*, 110 S. Ct. at 1548-49.

<sup>55</sup> *Id.* at 1549.

<sup>56</sup> *Id.* (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987)).

In his dissenting opinion, Justice Scalia, with whom Justices O'Connor and Kennedy joined, argued that the proper standard of review is provided by the substantial evidence rule; the court should determine "whether there was substantial evidence to support the Board's conclusion that respondent had not established a reasonable good-faith doubt of the union's majority status." *Id.* at 1562 (Scalia, J., dissenting). See Administrative Procedure Act, 5 U.S.C. § 706(2)(E); *Universal Camera Corp. v. NLRB*, 340 U.S. 474,

The Court found the Board's nonpresumption to be "rational as an empirical matter."<sup>57</sup> The Court accepted the Board's reasoning that, although it may be true that most replacements oppose the union, it cannot be presumed that this is inevitably so. A replacement may cross the union's picket line, not out of opposition to the union, but due to financial hardship. Or, a replacement "may disagree with the purpose or strategy of the particular strike and refuse to support that strike, while still wanting that union's representation at the bargaining table."<sup>58</sup> While picket line violence and union demands for ouster of replacements *may* create a situation in which the interests of strikers and replacements are "diametrically opposed,"<sup>59</sup> these factors are not always present. *Curtin Matheson* itself provides an example of a situation in which these factors were not present.<sup>60</sup> The Court concluded, therefore, that it is rational for the Board not to presume that replacements oppose the union.<sup>61</sup>

---

488 (1951) (a court must set aside a Board decision when it "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view").

The Court countered Scalia's criticism by noting that it granted certiorari on the question of "[w]hether the Board permissibly refused to adopt a general presumption applicable to all cases of this type" and not on "an evidentiary question concerning the facts of this particular case." *Curtin Matheson*, 110 S. Ct. at 1545 n.2.

<sup>57</sup> *Curtin Matheson*, 110 S. Ct. at 1550. While voting with the Court, Justice Rehnquist noted in his concurring opinion that "[t]he Board's 'no-presumption' rule seems . . . to press to the limit the deference to which the Board is entitled in assessing industrial reality . . ." *Id.* at 1554 (Rehnquist, C.J., concurring).

<sup>58</sup> *Id.* at 1550. In criticizing the Court for accepting the Board's view of industrial reality, Justice Scalia stated:

The question is not whether replacement employees accept employment for economic reasons. Undoubtedly they do—the same economic reasons that would lead them to oppose the union that will likely seek to terminate their employment. Nor is the question whether replacements would like to be represented by a union. Some perhaps would. But what the employer is required to have a good-faith doubt about is majority support, not for "union representation" in the abstract, but for representation by *this particular complainant union, at the time the employer withdrew recognition from the union.*

*Id.* at 1560 (Scalia, J., dissenting).

<sup>59</sup> *Id.* at 1550.

<sup>60</sup> *Id.* at 1552 n.9.

<sup>61</sup> *Id.* at 1553.

The Court denied any inconsistency between the Board's nonpresumption as to replacements' union sentiments and the Board's doctrines expressed in *Service Electric Co.*<sup>62</sup> and *Leveld Wholesale, Inc.*<sup>63</sup> In *Service Electric* and *Leveld*, the Board held that an employer is not obligated under section 8(a)(5) of the Act to bargain with the union concerning the employment terms of permanent replacements.<sup>64</sup> The Board offered two justifications in support of this doctrine. First, to require the employer to bargain with the union in regard to the replacements' terms of employment "would be to nullify the [employer's] right to hire replacements."<sup>65</sup> The Board was not willing to take such a step. Second, and more importantly, to require an employer to bargain with the union regarding the replacements' employment terms would impose upon the union the "concomitant obligation"<sup>66</sup> under section 8(b)(3) of the Act<sup>67</sup> to bargain with the employer in the best interests of the replacements.<sup>68</sup> The Board in both *Service Electric* and *Leveld* saw this as problematic because "it is not logical to expect [the union] 'to negotiate in the best interests of strike replacements during the pendency of a strike, where the strikers are on the picket line.'"<sup>69</sup> In sum, the Board refused to impose an obligation on the union to bargain in the best interests of the replacements because the interests of the replacements are "diametrically opposed" to those of the strikers, to whom the union already owes a bargaining duty.<sup>70</sup>

The doctrine expressed in *Service Electric* and *Leveld* seems patently inconsistent with the Board's view in *Station KKHI* and *Curtin Matheson* that it "[could] discern no overriding generalization about the views held by strike replacements."<sup>71</sup> Justice Blackmun in his dissenting opinion in *Curtin*

---

<sup>62</sup> 281 N.L.R.B. 633 (1986).

<sup>63</sup> 218 N.L.R.B. 1344 (1975).

<sup>64</sup> *Service Electric*, 281 N.L.R.B. at 639; *Leveld*, 218 N.L.R.B. at 1350.

<sup>65</sup> *Service Electric*, 281 N.L.R.B. at 637 (quoting Times Publishing Co., 72 N.L.R.B. 676, 684 (1947)). See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938); see *supra* note 13 and accompanying text.

<sup>66</sup> *Service Electric*, 281 N.L.R.B. at 639.

<sup>67</sup> 29 U.S.C. § 158(b)(3). Section 8(b)(3) of the Act makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer." *Service Electric*, 281 N.L.R.B. at 639.

<sup>68</sup> *Service Electric*, 281 N.L.R.B. at 638; *Leveld*, 218 N.L.R.B. at 1350.

<sup>69</sup> *Service Electric*, 281 N.L.R.B. at 539 (quoting *Leveld*, 218 N.L.R.B. at 1350).

<sup>70</sup> *Id.* at 634.

<sup>71</sup> *Station KKHI*, 284 N.L.R.B. at 1344; *Curtin Matheson*, 287 N.L.R.B. at 352.

*Matheson* stated that the Board's failure to explain this inconsistency was, in itself, enough to invalidate the order of the Board.<sup>72</sup>

Attempting to reconcile the doctrine that the union cannot be obligated to bargain in the best interests of the replacements with the doctrine that replacements cannot be presumed to oppose the union, Justice Marshall, writing for the Court, stated:

[E]ven if the interests of strikers and replacements conflict *during* the strike, those interests may converge *after* the strike, once job rights have been resolved. Thus, while the strike continues, a replacement worker whose job appears relatively secure might well want the union to continue to represent the unit regardless of the union's bargaining posture during the strike. Surely replacement workers are capable of looking past the strike in considering whether or not they desire representation by the union.<sup>73</sup>

Although this attempt at reconciliation may not inspire great confidence,<sup>74</sup> it does find support in the language of *Service Electric* and *Leveld*. In both cases the Board noted that it was "during the pendency of the strike," as opposed to after the strike, that the interests of the strikers and replacements were in opposition.<sup>75</sup>

In commenting on *Curtin Matheson*, several avenues are open. First, one could, as does Justice Scalia in his dissent, dispute the fact-finding of the

---

<sup>72</sup> *Curtin Matheson*, 110 S. Ct. at 1556 (Blackmun, J., dissenting). See also *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.") (footnote omitted), *cert. denied*, 403 U.S. 923 (1971).

<sup>73</sup> *Curtin Matheson*, 110 S. Ct. at 1552 (emphasis added).

<sup>74</sup> In response to the Court's statement (*see supra* text accompanying note 73), Justice Scalia stated:

"Replacement workers are capable of looking past the strike in considering whether or not they desire representation by the union," . . . in the same way that a man who is offered one million dollars to jump off a cliff is capable of looking past the probable consequence of his performance to contemplate how much fun he would have with one million dollars if he should survive.

*Id.* at 1562 (Scalia, J., dissenting) (quoting *id.* at 1552).

<sup>75</sup> *Leveld*, 218 N.L.R.B. at 1350; *Service Electric*, 281 N.L.R.B. at 639 (quoting *Leveld*, 218 N.L.R.B. at 1350).

Board and the Court.<sup>76</sup> Second, one could, as does Justice Blackmun in his dissent, criticize the Board's sloppy articulation of its reasons for adopting the nonpresumption. However, this author has chosen a third avenue. This Comment will accept the Court's conclusion that creation of the nonpresumption is within the power of the Board and will then analyze the effects of the nonpresumption on the good-faith doubt defense.

#### IV. EFFECT OF THE NONPRESUMPTION ON THE GOOD-FAITH DOUBT DEFENSE: THE EMPLOYER MUST PRODUCE "FURTHER EVIDENCE" OF ANTI-UNION SENTIMENT

In *Station KKHI* the Board concluded that its past striker replacement presumption was "wholly unwarranted and unrealistic"<sup>77</sup> and that such a presumption had "no articulated basis in reason or policy"<sup>78</sup> and "no evidentiary or empirical basis."<sup>79</sup> How ironic it is then that the nonpresumption, which the Board has substituted for the now discredited striker replacement presumption, operates within the good-faith doubt defense in basically the same way as its predecessor.<sup>80</sup> The Fifth Circuit Court of Appeals cited this as the main reason for its rejection of the nonpresumption when it denied enforcement of the Board's order in *Curtin Matheson*.<sup>81</sup>

Previously, the Fifth Circuit in *NLRB v. Randle-Eastern Ambulance Service*<sup>82</sup> had considered the Board's striker replacement presumption and

---

<sup>76</sup> *Curtin Matheson*, 110 S. Ct. at 1560 (stating that any "reasonable factfinder" would have to conclude that Curtin Matheson had a reasonable good-faith doubt of the union's majority status) (Scalia, J., dissenting).

<sup>77</sup> *Station KKHI*, 284 N.L.R.B. at 1343 (quoting *Arkay Packaging Corp.*, 227 N.L.R.B. 397 (1976), *review denied sub nom.* *N.Y. Printing Pressmen & Offset Workers Union v. NLRB*, 575 F.2d 1045 (2d Cir. 1978)).

<sup>78</sup> *Station KKHI*, 284 N.L.R.B. at 1344.

<sup>79</sup> *Id.* See *supra* notes 44-47 and accompanying text.

<sup>80</sup> The nonpresumption operates in basically the same way as the striker replacement presumption does, but not exactly the same way. The similarity is due to the fact that both result in the employer having to produce "further evidence." However, the striker replacement presumption, under which the Board views the replacements as pro-union, and not simply neutral, would seem more clearly to require direct proof that employees had "expressed desires" to repudiate the union in order to rebut the presumption of union majority support. See *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428, 1433 n.11 (10th Cir. 1990).

<sup>81</sup> *Curtin Matheson*, 859 F.2d at 367.

<sup>82</sup> 584 F.2d 720 (5th Cir. 1978).

had rejected it due to its counterfactual nature.<sup>83</sup> The court instead adopted the Gorman presumption.<sup>84</sup> In *Curtin Matheson*, faced with the Board's *Station KKHI* nonpresumption, the court stated that it "d[id] not agree that *Station KKHI* establishes a new standard because operationally the *Station KKHI* standard has the same effect as" the striker replacement presumption.<sup>85</sup> Under either the striker replacement presumption or the new nonpresumption, the mere fact that a certain number of employees are permanent replacements will not support the employer's good-faith doubt that these employees oppose the union. Rather, some "further evidence" of replacements' anti-union sentiments will be required.<sup>86</sup>

This point may be demonstrated by an examination of the effect of the striker replacement presumption and the effect of the nonpresumption in the factual context of *Curtin Matheson*. At the time *Curtin Matheson* refused to bargain with the union, the bargaining unit was composed of twenty-five striker replacements as well as five crossovers and nineteen strikers.<sup>87</sup> When invoking the good-faith doubt defense, the employer pointed to its hiring of the twenty-five permanent replacements as an objective factor supporting its good-faith doubt in the union's majority representative status.<sup>88</sup>

Using the striker replacement presumption, one would presume that the replacements favored the union in the same proportion as those they replaced. Because all unit members are generally presumed to favor the union, the replacements must also be presumed to favor the union. Therefore, armed only with this piece of objective evidence, the employer

---

<sup>83</sup> *Id.* at 728. The Fifth Circuit in *Randle-Eastern* approached the question of the validity of the Board's nonpresumption as a question of whether the Board's factual inference (as opposed to presumption of law) regarding the union sentiments of replacements was supported by substantial evidence. It concluded that it was not. *Id.* at 728-29. This is the same approach taken by Justice Scalia and those who joined him in his *Curtin Matheson* dissent. See *Curtin Matheson*, 110 S. Ct. at 1542 (Scalia, J., dissenting).

<sup>84</sup> *Randle-Eastern*, 584 F.2d at 728. See *supra* notes 28-38 and accompanying text.

<sup>85</sup> *Curtin Matheson*, 859 F.2d at 367. In *Tube Craft, Inc.*, 289 N.L.R.B. 862 (1988), the Board affirmed an ALJ's finding that an employer had not established sufficient objective evidence to support a good-faith doubt of union nonsupport. The Board noted that, although the ALJ had applied the striker replacement presumption and not the newly established nonpresumption of *Station KKHI*, this would not alter the outcome of the good-faith doubt test. *Id.* at 862 n.2.

<sup>86</sup> *Station KKHI*, 284 N.L.R.B. at 1344 (quoting *NLRB v. Pennco, Inc.*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982)).

<sup>87</sup> *Curtin Matheson*, 110 S. Ct. at 1547.

<sup>88</sup> The employer urged the Board and then the Court to adopt the Gorman presumption. *Id.* at 1550. See *supra* notes 28-38 and accompanying text.

could not overcome the general presumption of union majority support.<sup>89</sup> The employer must produce some "further evidence of union non-support" in order to rebut this presumption.<sup>90</sup>

On the other hand, using the nonpresumption, one would look at the employer's evidence as a nullity. From the fact that the employer hired these twenty-five employees as striker replacements, one could not presume that they either favor or oppose the union. However, because even under the nonpresumption "the general presumption of continuing union majority applies,"<sup>91</sup> the effect of the employer's evidence is the same as it was under the striker replacement presumption: it will not rebut the continuing presumption of union majority status. Rather, to rebut the presumption, "some further evidence of union non-support" will be required.<sup>92</sup>

#### V. THE GOOD-FAITH DOUBT DEFENSE AFTER *CURTIN MATHESON*: WHAT "FURTHER EVIDENCE" WILL BE REQUIRED?

What "further evidence" will suffice to satisfy the employer's burden of producing objective evidence to support his good-faith doubt of union majority status? If the good-faith doubt test is to survive *Curtin Matheson*, there must potentially be some *circumstantial evidence* of the replacements' anti-union sentiments which the employer could produce in order to support his good-faith doubt and defend against the 8(a)(5) charge.<sup>93</sup> If, however, the Board is requiring the employer to produce *direct evidence* of the replacements' anti-union sentiments, *i.e.*, requiring the employer to "make a numerical showing that a majority of employees in fact oppose the union," then this amounts to a forsaking of the good-faith doubt defense.<sup>94</sup> The Board would be requiring the employer to prove lack of majority support *in fact*.<sup>95</sup>

---

<sup>89</sup> See *supra* note 20 and accompanying text.

<sup>90</sup> *Station KKHI*, 284 N.L.R.B. at 1344 (quoting *Pennco*, 684 F.2d at 343).

<sup>91</sup> *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362, 367 (5th Cir. 1988).

<sup>92</sup> *Station KKHI*, 284 N.L.R.B. at 1344 (quoting *Pennco*, 684 F.2d at 343).

<sup>93</sup> 29 U.S.C. § 158(a)(5). See *supra* note 19.

<sup>94</sup> *Curtin Matheson*, 110 S. Ct. at 1550 n.8.

<sup>95</sup> If the Board requires the employer to produce direct evidence of lack of majority status, then there is no "good-faith doubt defense." "Direct" describes evidence which, if accepted as genuine or believed true, necessarily established the point for which it is offered." C. MUELLER & L. KIRKPATRICK, *EVIDENCE UNDER THE RULES 60* (1988). For example, if the employer in *Curtin Matheson* presented evidence that the 25 replacements came to him and individually made statements repudiating the union as their

Sections A and B will compare the *Curtin Matheson* majority's view of the Board's treatment of circumstantial evidence of the replacements' union sentiments, such as picket line violence by strikers and union demands for the discharge of replacements, with the Board's treatment of such evidence in *Johns-Manville Sales Corp.*<sup>96</sup> Section C will look at signs in *Johns-Manville* that the Board is requiring an employer to produce direct evidence of the replacements' anti-union sentiments, thereby collapsing the good-faith doubt defense into the proof-in-fact rule.

#### A. *Circumstantial Evidence as "Further Evidence" of Anti-union Sentiment in Curtin Matheson*

For the good-faith doubt defense to remain a "good-faith doubt" defense, rather than collapsing into the proof-in-fact rule, there must be some kind of circumstantial evidence regarding the replacements' anti-union sentiments that would be considered by the Board to be sufficient to support an employer's good-faith doubt. In *Curtin Matheson*, the Court maintains that the Board's position is merely that "the hiring of permanent replacements who cross a picket line, *in itself*, does not support an inference that the replacements repudiate the union as collective-bargaining representative."<sup>97</sup> As the Court views the Board's approach, the Board will consider the employer's hiring of permanent replacements to be relevant if certain circumstantial evidence—picket line violence and/or the union's demand for ouster of the replacements—is produced from which the replacements' union sentiments may be inferred.<sup>98</sup>

---

representative, this would be evidence which "if accepted as genuine" would "necessarily establish[] the point for which it is offered," namely, that the 25 replacements oppose the union. *Id.* This is proof-in-fact and has nothing to do with the employer's doubt.

"'Circumstantial' means evidence which, even if fully credited, may nevertheless fail to support (let alone establish) the point in question, simply because an alternative explanation seems as probable or more so . . ." *Id.* This circumstantial evidence may establish a point if "alternative explanations [are] so much less likely than the one advanced by the proponent as to seem preposterous . . ." *Id.* at 60-61. For example, in *IT Services*, 263 N.L.R.B. 1183 (1982), the employer presented the circumstantial evidence that the striker replacements were subjected to violence and threats by the strikers, and the Board found that this circumstantial evidence established the replacements opposition to the union. *Id.* at 1187-88.

<sup>96</sup> 289 N.L.R.B. 40 (1988).

<sup>97</sup> *Curtin Matheson*, 110 S. Ct. at 1552 (quoting *Station KKHI*, 284 N.L.R.B. 1339, 1344 (1987) (emphasis added in *Curtin Matheson*)).

<sup>98</sup> *Curtin Matheson*, 110 S. Ct. at 1552.

In both *Station KKHI* and *Curtin Matheson*, the Board has indicated, somewhat indirectly, that evidence of picket line violence will serve this purpose. In *Station KKHI*, the Board stated that it could *not* “ascertain the replacements’ union sentiments . . . from their having crossed a peaceful and sporadic picket line.”<sup>99</sup> One can infer from this statement that, had the replacements crossed a hostile picket line, the Board may have been able to ascertain their union sentiments. In *Curtin Matheson*, the Board noted that the record contained no evidence of picket line violence directed toward the replacements and used this fact to distinguish the situation in *Curtin Matheson* from that in *NLRB v. Randle Eastern Ambulance Service, Inc.*<sup>100</sup> In *Randle Eastern*, the Fifth Circuit Court of Appeals held that replacements could be presumed to oppose the union and that this is “especially true”<sup>101</sup> when the replacements face picket line violence or when the union demands their discharge.

*IT Services*<sup>102</sup> provides an example of a case in which the Board inferred from striker violence aimed at replacements that the replacements opposed the union. The violence is described as follows:

Throughout the strike pickets spat on replacements, broke the windows of employees’ cars as they entered and left the yard, put nails in the driveways, punctured tires of company and employee cars, and threw beer bottles and rocks at employees and management officials. These events occurred almost on a daily basis. Pickets called the strike replacements “black bastards” and “nigger.”<sup>103</sup>

The ALJ, whose opinion the Board adopted, concluded that the level of violence was so high that the employer could rationally presume that those subjected to it “did not desire to make the perpetrator of that conduct their agent for bargaining.”<sup>104</sup>

A union demand that replacements be ousted is also listed by the *Curtin Matheson* majority as the type of circumstantial evidence the Board “has not deemed . . . irrelevant to its evaluation of replacements’ attitudes toward the union.”<sup>105</sup> In both *Station KKHI* and *Curtin Matheson*, cases in which the

---

<sup>99</sup> *Station KKHI*, 294 N.L.R.B. at 1345.

<sup>100</sup> *Curtin Matheson*, 287 N.L.R.B. at 353 n.11 (distinguishing *NLRB v. Randle-Eastern Ambulance Serv., Inc.*, 584 F.2d 720 (5th Cir. 1978)).

<sup>101</sup> *Randle-Eastern*, 584 F.2d at 728.

<sup>102</sup> *IT Servs.*, 263 N.L.R.B. 1183 (1982).

<sup>103</sup> *Id.* at 1187 (footnote omitted).

<sup>104</sup> *Id.* at 1188.

<sup>105</sup> *Curtin Matheson*, 110 S. Ct. at 1552.

employer did not come up with sufficient “further evidence,” the union was not negotiating for the replacements removal at the time of the employer’s refusal to bargain.<sup>106</sup> This is in contrast to *IT Services* in which the union made an “adamant demand” that the replacements be ousted.<sup>107</sup> The ALJ and Board in *IT Services* viewed this demand as circumstantial evidence that the replacements opposed the union. Based on this contrast, the *Curtin Matheson* majority concluded that “such demands [for ouster of replacements] will be a factor in the Board’s analysis” in “most” cases in which the union has made such demands.<sup>108</sup>

#### B. *Exclusion of Circumstantial Evidence as “Further Evidence” in Johns-Manville Sales Corp. v. NLRB*

Although the Board’s decisions in *Station KKKH* and *Curtin Matheson* and the Supreme Court’s opinion in *Curtin Matheson* indicate that the Board will find an employer’s evidence of picket line or strike-related violence and/or union demands for replacement ouster to be relevant to the question of the replacements’ union sentiments, it is not entirely clear that this is so. As Justice Rehnquist warns in his *Curtin Matheson* concurrence:

Although the Board’s opinion in this case does not preclude a finding of good-faith doubt based on circumstantial evidence, some recent decisions suggest that it now requires an employer to show that individual employees have “expressed desires” to repudiate the incumbent union in order to establish a reasonable doubt of the union’s majority status.<sup>109</sup>

One of the cases referred to by Justice Rehnquist as imposing a requirement that the employer present evidence that “employees have ‘expressed desires’ to repudiate the incumbent union” is *Johns-Manville Sales Corp.*<sup>110</sup> The Board issued its *Johns-Manville* opinion on June 27, 1988, about seven months after its decision in *Curtin Matheson*. In *Johns-Manville*, the employer, charged with violations of sections 8(a)(5) and (1), defended by presenting numerous objective factors in support of its good-faith doubt

---

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1553. See *IT Servs.*, 263 N.L.R.B. at 1185-86.

<sup>108</sup> *Curtin Matheson*, 110 S. Ct. at 1553 n.11.

<sup>109</sup> *Id.* at 1555 (Rehnquist, C.J., concurring). See *Tube Craft, Inc.*, 289 N.L.R.B. 862 n.2 (1988); *Johns-Manville Sales Corp.*, 289 N.L.R.B. 358 (1988), *enforcement denied*, 906 F.2d 1428 (10th Cir. 1990); *Tile, Terrazzo & Marble Contractors Assoc.*, 287 N.L.R.B. 769 n.2 (1987).

<sup>110</sup> *Curtin Matheson*, 110 S. Ct. at 1555. *Johns-Manville*, 289 N.L.R.B. 358.

of the union's majority status. These objective factors included: 1) the employer's hiring of 267 replacement workers in a 509 member bargaining unit; 2) striker violence, threats, and property damage aimed at replacements; 3) the union's demand that all strikers be reinstated and that the replacement workers be discharged, if necessary; 4) a decertification petition signed by 211 replacement workers; and 5) comments by replacements to the plant manager and supervisor repudiating the union.<sup>111</sup>

In rejecting the ALJ's finding that the employer had sufficient objective evidence to support its good-faith doubt, the Board applied its nonpresumption as to the replacements' union sentiments.<sup>112</sup> It concluded that the fact that the 509 member bargaining unit included 267 replacement workers at the time of the employer's refusal to bargain was not sufficient to establish the reasonableness of the employer's good-faith doubt.<sup>113</sup>

The Board then analyzed the employer's "further evidence." Extensive evidence of striker picket line violence was presented by the employer and accepted by the Board.<sup>114</sup> The Board found that it could not conclude, as it had in *IT Services*, that the replacements subjected to this violence necessarily opposed the union.<sup>115</sup> The Board found the *Johns-Manville* violence to be less outrageous than that in *IT Services*.<sup>116</sup> Therefore, the employer's evidence of striker violence toward replacements was not sufficient "further evidence" of the replacements' anti-union sentiments. The Board justified its discounting of the evidence of striker violence aimed at replacements by stating that "[the employer] here had available other, more reliable factors, including the list for the decertification petition and the statements from identified employees, which could have indicated more tangibly majority employee dissatisfaction with the union, but as we have found, fell short of doing so."<sup>117</sup>

The employer in *Johns-Manville* also presented evidence that the union was negotiating with Johns-Manville for the ouster of the permanent replacements.<sup>118</sup> As noted previously, the *Curtin Matheson* majority indicated its belief that "such demands will be a factor in the Board's

---

<sup>111</sup> *Johns-Manville*, 289 N.L.R.B. at 360-61.

<sup>112</sup> *Id.* at 361.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* See *IT Servs.*, 263 N.L.R.B. at 1187. See also *supra* notes 102-04 and accompanying text.

<sup>116</sup> *Johns-Manville*, 289 N.L.R.B. at 361.

<sup>117</sup> *Id.* at 361-62.

<sup>118</sup> *Id.* at 362.

analysis.”<sup>119</sup> However, the *Johns-Manville* Board did not view this evidence as a factor in its analysis because a union’s demand for discharge of replacements “does not automatically prove that the Union abandoned the replacements or that the replacements do not have any desire for union representation.”<sup>120</sup>

Thus, although the Court in *Curtin Matheson* indicated its belief that the Board will consider circumstantial evidence, such as picket line violence and a union’s demand of the ouster of replacements, as relevant when applying the good-faith doubt defense, the Board’s analysis in *Johns-Manville* puts this in doubt.

*C. A Requirement that the Good-Faith Doubt Defense Be Supported by Direct Evidence Means the Collapse of the Good-Faith Doubt Defense into the Proof-in-Fact Rule*

After the *Johns-Manville* Board discounted the employer’s circumstantial evidence of the lack of employee support for the union, it showed a “preoccupation with a head count” when examining the direct evidence that the employer submitted.<sup>121</sup> As part of its direct evidence in support of its good-faith doubt, the employer submitted a decertification petition signed by 211 replacements.<sup>122</sup> Only 204 of the signatures were legible.<sup>123</sup> A decertification petition asserts that the union which has been certified by the Board as the collective bargaining representative for the unit “is no longer a representative as defined in section 9(a),” in other words, the union no longer enjoys majority support.<sup>124</sup> In order to force an election, the petition must contain the signatures of thirty percent of the employees in the bargaining unit; the 204 signatures clearly met this standard.<sup>125</sup> In rejecting

---

<sup>119</sup> *Curtin Matheson*, 110 S. Ct. at 1553 n.11.

<sup>120</sup> *Johns-Manville*, 289 N.L.R.B. at 362.

<sup>121</sup> *Johns-Manville v. NLRB*, 906 F.2d 1428, 1432 (10th Cir. 1990).

<sup>122</sup> *Johns-Manville*, 289 N.L.R.B. at 358.

<sup>123</sup> *Id.* at 359.

<sup>124</sup> National Labor Relations Act § 9(c)(1)(A)(ii), 29 U.S.C. § 159(c)(1)(A)(ii). *See* 29 U.S.C. § 159(a).

<sup>125</sup> *See* NLRB Rules and Regulations § 101.18(a)(4) (setting 30% standard).

Even though the 204 signatures on the decertification petition clearly met the 30% standard, the Board did not conduct an election. This is because the union’s filing of the unfair labor practice charges against the employer “blocked” the election. In *Hod Carriers Local 840 (Blinne Constr. Co.)*, 135 N.L.R.B. 1153 (1962), the Board explained its policy in regard to “blocking charges”:

the employer's evidence as insufficient to support a good-faith doubt of union majority status, the Board stated that "at most, 217 employees out of a combined total of approximately 509 strike replacements, returning strikers, and strikers had repudiated the union."<sup>126</sup> The Board obtained the figure of 217 by adding the 204 legible signatures on the decertification petition with 13 other identified employee statements and comments indicating repudiation.<sup>127</sup> Thus, the Board was "preoccupied" with the fact that the 204 signatures "did not constitute an absolute majority . . . of the bargaining unit."<sup>128</sup> Such a preoccupation hardly seems consonant with a "good-faith doubt" defense.

In denying enforcement of the Board's order, the Tenth Circuit Court of Appeals characterized the Board's approach as a requirement that the employer produce "direct proof" that a majority of his employees had repudiated the union.<sup>129</sup> Relying heavily on Justice Rehnquist's *Curtin Matheson* concurrence, the Court of Appeals held that the Board had "impermissibly limited the means by which the employer could establish 'good faith doubt.'"<sup>130</sup> The Court of Appeals concluded, as does this Comment, that an approach to the good-faith doubt defense which "essentially require[s] proof of express anti-union statements by each individual worker comprising a majority of the bargaining unit . . . leaves little if anything of the good-faith doubt rule, effectively collapsing it into the proof-in-fact rule."<sup>131</sup>

---

A representation petition assumes an unresolved question concerning representation. A Section 8(a)(5) charge, on the other hand, presupposes that no such question exists and that the employer is wrongfully refusing to recognize or bargain with a statutory bargaining representative. Because of this basic inconsistency, the Board has over the years uniformly refused to entertain representation petitions where a meritorious charge of refusal to bargain has been filed and, indeed, has dismissed any representation petition which may already have been on file.

*Id.* at 1166 n.24.

<sup>126</sup> *Johns-Manville*, 289 N.L.R.B. at 361.

<sup>127</sup> *Id.*

<sup>128</sup> *Johns-Manville Sales Corp. v. NLRB*, 906 F.2d 1428, 1432 (10th Cir. 1990).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1432-33.

VI. CATCH-22: THE CONFLICT BETWEEN THE  
PROOF-IN-FACT RULE AND THE BOARD'S  
SAFEGUARDS ON EMPLOYER POLLING

If indeed the Board has collapsed the good-faith doubt defense into the proof-in-fact rule by requiring evidence that a majority of the employees have "expressed desires" to repudiate the union, the Board has put an employer seeking to defend against an 8(a)(5) charge in a very difficult position for several reasons. First, the employer is required to prove a negative—that the union lacks majority support. Second, key information that might help the employer establish lack of support, such as union records, is in the hands of the union, which is unlikely to share news of loss of employee support with the employer.<sup>132</sup> Third, the employer is prohibited by section 8(a)(1) from interrogating employees in regard to their union sentiments when such interrogation might "lead to a perception on the part of the questioned employee that a pro-union response may result in reprisals by the employer."<sup>133</sup>

Finally, and most interestingly, the Board-created safeguards for postcertification polling put the employer in a Catch-22 position.<sup>134</sup> Employers have attempted to produce evidence that a majority of the employees in the bargaining unit repudiate the union by conducting polls of their employees.<sup>135</sup> In 1974, the Board in *Montgomery Ward & Co.* held that an employer could only conduct such a poll if it adhered to the *Struksnes*

---

<sup>132</sup> Comment, *supra* note 25, at 736.

<sup>133</sup> R. GORMAN, *supra* note 11, at 178.

<sup>134</sup> J. HELLER, CATCH-22 (1961).

There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

*Id.* at 46.

<sup>135</sup> See, e.g., *Mingtree Restaurant, Inc.*, 265 N.L.R.B. 409 (1982), *enforcement denied*, 736 F.2d 1295 (9th Cir. 1984); *Houston Shopping News Co.*, 233 N.L.R.B. 105, 107 (1977); *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974). See also Note, *Employer Postcertification Polls to Determine Union Support*, 84 MICH. L. REV. 1770 (1986).

*Construction Co.* safeguards, originally established for precertification polling, and if the employer could establish by sufficient objective evidence that it had a good-faith doubt of the union's majority status.<sup>136</sup> This good-faith doubt standard is the same standard that the employer must meet in order to defeat an 8(a)(5) charge.<sup>137</sup> Thus, while the employer cannot withdraw recognition without having sufficient objective evidence to support its good-faith doubt, it cannot poll its employees in order to obtain such evidence unless it already has a good-faith doubt supported by such evidence. In Justice Rehnquist's *Curtin Matheson* concurrence he stated that he had "considerable doubt whether the Board may insist that good-faith doubt be determined only on the basis of sentiments of employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments."<sup>138</sup> However, this "considerable doubt" did not sway Justice Rehnquist's vote because he felt that the issue was not yet before the Court.<sup>139</sup> Likewise, the majority did not reach the issue of the legitimacy of its good-faith doubt analysis when combined with its strictures on employer polling, because it concluded that the Board does not require direct evidence that a majority of the employees oppose the union.

## VII. CONCLUSION

What is the effect of the Board's nonpresumption as to striker replacements' union sentiments, established in *Station KKHI* and given Supreme Court approval in *Curtin Matheson*, on the good-faith doubt

---

<sup>136</sup> *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 724-26. In *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967), the Board's holding was as follows:

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.

*Id.* at 1063.

<sup>137</sup> *Texas Petrochemicals Corp.*, 296 N.L.R.B. No. 136 (1989) (slip op. at 10).

<sup>138</sup> *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1555 (Rehnquist, C.J., concurring). See also *id.* at 1556 (Blackmun, J., dissenting) (noting concern over the fact that, "while the Board appears to require that good-faith doubt be established by express avowals of individual employees, other Board policies make it practically impossible for the employer to amass direct evidence of its workers' views" (footnote omitted)).

<sup>139</sup> *Id.* at 1555 (Rehnquist, C.J., concurring).

defense? The answer is that the nonpresumption, like its predecessor, the striker replacement presumption, requires the employer invoking the good-faith doubt defense to produce some "further evidence" of employee nonsupport of the union beyond the mere fact that the employee is a replacement worker.<sup>140</sup> If this "further evidence" can be circumstantial evidence, such as the fact that the employee crossed a violent union picket line or that the union demanded that the employer oust all replacements, then the *Curtin Matheson* majority's position that the good-faith doubt defense survives is certainly true. On the other hand, if the "further evidence" which the Board requires of the employer is direct evidence of employee repudiation of the union, then the good-faith doubt defense survives in name only.<sup>141</sup>

The Supreme Court has never considered whether the Board could eliminate the good-faith doubt defense; the Board's power to do so "remains an open question."<sup>142</sup> Although the *Curtin Matheson* majority maintains that the Board has not at this point in time "*sub-silentio* forsaken the good-faith doubt standard," recent Board decisions, such as *Johns-Manville*, call this conclusion into question.<sup>143</sup>

If the Board requires an employer charged with violations of sections 8(a)(5) and (1) to produce evidence that a majority of its employees have "expressed desires" to repudiate the union in order to rebut the presumption of union majority support, then the Board will have collapsed the good-faith doubt defense into the proof-in-fact rule. Even assuming that the Supreme Court would hold, upon consideration of the issue, that the Board has the power to eliminate the good-faith doubt defense, there remains a problem with the Board's analysis: the Board would be requiring that the employer prove lack of majority support in fact, but then, by other Board doctrines concerning unlawful interrogation and postcertification polling, denying it the means to obtain such proof.<sup>144</sup> Two Justices and one Court of Appeals have expressed doubt as to the legitimacy of such a Board position.<sup>145</sup>

In light of these complications, the Board has at least three alternatives. First, the Board could forsake its nonpresumption and return to the Gorman

---

<sup>140</sup> See *supra* notes 77-92 and accompanying text.

<sup>141</sup> See *supra* notes 93-131 and accompanying text.

<sup>142</sup> *Curtin Matheson*, 110 S. Ct. at 1557 (Blackmun, J., dissenting); *id.* at 1550 n.8.

<sup>143</sup> *Id.* at 1550 n.8. See *supra* notes 109-31 and accompanying text.

<sup>144</sup> See *supra* notes 132-39 and accompanying text.

<sup>145</sup> See *Curtin Matheson*, 110 S. Ct. at 1555 (Rehnquist, C.J., concurring); *id.* at 1556 (Blackmun, J., dissenting); *Johns-Manville v. NLRB*, 906 F.2d 1428, 1433 (10th Cir. 1990).

presumption, presuming that striker replacements oppose the union.<sup>146</sup> This would be sure to revive the good-faith doubt defense and would do away with the need for the employer to produce "further evidence" as long as it could establish that replacements made up fifty percent of the bargaining unit. Herein lies the problem: the Gorman presumption has been rightly criticized as not conducive to industrial stability, a major goal of the Act, because it makes it too easy for the employer to rid itself of the union after a strike.<sup>147</sup>

A second alternative is for the Board to make proof of lack of union majority support in fact the only defense to an 8(a)(5) charge.<sup>148</sup> Then, to avoid the Catch-22 situation which is a product of its strictures on employer interrogation and polling of employees, the Board could lessen these strictures. For example, the Board could eliminate the requirement that an employer show good-faith doubt of majority status before conducting a postcertification poll of its employees.<sup>149</sup> However, such a course would be unwise. Such strictures on an employer's methods of seeking information from its employees in regard to their union sentiments serve the legitimate purpose of preventing the creation of a coercive atmosphere.

The third, and in this author's opinion, best alternative, is for the Board to maintain or adopt the position which the *Curtin Matheson* majority sees it as having.<sup>150</sup> The Board should not presume either that replacements oppose or support the union, but rather should require the employer to produce further evidence of replacements' union sentiments. Circumstantial evidence, such as striker violence and union demands for the ouster of replacements, should be considered relevant and weighed cumulatively with any direct evidence the employer may produce. Such a course will do justice to both the need for industrial stability and the principle of maximization of employee free choice.<sup>151</sup>

*Diane Olinger*

---

<sup>146</sup> See *supra* note 32 and accompanying text.

<sup>147</sup> See *supra* notes 37-38 and accompanying text.

<sup>148</sup> See *supra* note 23 and accompanying text.

<sup>149</sup> See *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974); *Texas Petrochemicals Corp.*, 296 N.L.R.B. No. 136 (1989) (slip op. at 10).

<sup>150</sup> See *supra* notes 97-98 and accompanying text.

<sup>151</sup> See Comment, *supra* note 25; Estreicher, *supra* note 13.