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Employer Refusal to Bargain with an Incumbent Striking Union: Determining Liability under Section 8(a)(5)

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EMPLOYER REFUSAL TO BARGAIN WITH AN INCUMBENT STRIKING UNION: DETERMINING LIABILITY UNDER SECTION 8(a)(5)

I. INTRODUCTION

One of the most controversial and frequently litigated problems in the field of labor relations law is the question of an employer's obligation to bargain collectively[1] with an incumbent union[2] engaged or which has engaged in an economic strike[3] when the employer believes that a majority of employees no longer support the union. Under the National Labor Relations Act (Act),[4] an employer has a clearly established duty to bargain collectively with the bargaining representative chosen by a majority of its employees.[5] Breach of this duty constitutes an unfair labor prac-

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1. Collective bargaining is defined in the National Labor Relations Act as:

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiations of an agreement, or any question arising thereunder . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

29 U.S.C. § 158(d) (1982). In addition, where there is a collective bargaining agreement already in effect, the parties to such contract have the duty to refrain from terminating or modifying the contract without proper notice and negotiation. *Id.*

2. For the purposes of this Comment, an "incumbent union" is one that has been recognized by an employer as the exclusive bargaining representative of its employees, either as the result of an election or other formal National Labor Relations Board certification procedures, or through informal recognition. *See generally* Brooks v. NLRB, 348 U.S. 96, 98 (1954); NLRB v. San Clemente Publishing Corp., 408 F.2d 367, 368 (9th Cir. 1969). *See also* R. GORMAN, LABOR LAW 108-09 (1976). This Comment will not address the issue of whether a difference in recognition procedure is significant in the analysis of an employer's duty to bargain collectively.

3. An economic strike is negatively defined as any strike not precipitated or prolonged by an employer's unfair labor practice. Pulley v. NLRB, 395 F.2d 870, 879 (6th Cir. 1968). Typically, employees engage in an economic strike to pressure their employer and thereby gain some economic objective, usually higher wages or better working conditions. Crossroads Chevrolet, Inc., 233 N.L.R.B. 728, 729 n.4 (1977). *See also* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967). ("The economic strike against the employer in the ultimate weapon in labor's arsenal for achieving agreement upon its terms . . . ."). In contrast, an unfair labor practice strike is brought to protest employer conduct in violation of the National Labor Relations Act. *Crossroads Chevrolet*, 233 N.L.R.B. at 729 n.4.

4. 29 U.S.C. §§ 151-169 (1982).

5. An employer's duty to bargain collective with the representative chosen by a majority of its workers is derived from sections 7-9 of the Act. 29 U.S.C. § 157 (1982) [hereinafter section 7] provides:

tice.[6] Correspondingly, it is also an unfair labor practice for an employer to bargain with a bargaining representative that does not have the support of a majority of the workers.[7] Thus, an employer is faced with a dilemma in situations where an incumbent union's majority support is questionable. This dilemma is especially pronounced in an economic strike context where the incumbent striking union demands that the employer continue to bargain with it after the employer has permanently replaced the striking union members with nonunion workers.[8]

In the typical case, the employer resolves its bargaining dilemma by withdrawing recognition from the incumbent union and discontinuing all collective bargaining. The union's response is usually to file unfair labor

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> 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 protection . . . .

29 U.S.C. § 159(a) (1982) [hereinafter section 9(a)] provides in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .

29 U.S.C. § 158(a) (1982) [hereinafter section 8(a)] provides:

> It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title:
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> . . . .
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> (5) to refuse to bargain collective with the representatives of his employees . . . .

6. An employer's unlawful refusal to bargain with a representative chosen by a majority of its employees violates both section 8(a)(1) and section 8(a)(5) of the Act. *See* 29 U.S.C. § 158(a)(1) (1982) [hereinafter section 8(a)(1)]; 29 U.S.C. § 158(a)(5) (1982) [hereinafter section 8(a)(5)]. The full text of these sections is set forth in note 5, *supra*.

7. An employer who bargains with a minority union violates section 8(a)(1) of the Act, see *supra* note 5, and section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2) (1982), which provides that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." *See* ILGWU v. NLRB, 366 U.S. 731 (1961) (employer extension of recognition to minority union found to be an interference with the organizational rights of employees in violation of section 8(a)(1) and a grant of support in violation of section 8(a)(2)). *Accord* Thomas Indus., Inc. v. NLRB, 687 F.2d 863, 866 (6th Cir. 1982); NLRB v. West Sand & Gravel Co., 612 F.2d 1326, 1328 (1st Cir. 1979).

8. One of the weapons available to an employer in an economic strike is the right to permanently replace striking employees if replacement is necessary to enable the employer to continue its business operations. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938). In such a case, an employer is not obligated to discharge permanent replacements in order to create vacancies for strikers wishing to return to work during the pendency of, or at the conclusion of, the strike. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967) (hiring of permanent replacements to continue operations is a "legitimate and substantial business justification" for refusing to reinstate striking workers). In contrast, unfair labor practice strikers are ordinarily entitled to reinstatement even if the employer has hired permanent replacements. *Id.* at 379 n.5 (citing Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956)).

practice charges against the employer,[9] charging, inter alia, that the employer's refusal to bargain violates section 8(a)(5) of the Act.[10]

The National Labor Relations Board (Board)[11] has developed several procedural devices to facilitate the determination of section 8(a)(5) actions. Union majority support on the refusal to bargain date, one of the prima facie elements of the section 8(a)(5) charge,[12] may be demonstrated by assertion of the majority support presumption, which provides that a union certified as the exclusive bargaining representative of an employer's workers enjoys an irrebuttable presumption of majority support for a reasonable time, usually one year following its certification.[13] After the first year, the presumption of majority support continues but becomes rebuttable.[14] Absent sufficient countervailing proof, the majority support presumption establishes, without more, an employer's duty to bargain with an incumbent union.[15]

Once the majority support presumption is asserted, an employer must justify its refusal to bargain by rebutting the presumption in order to avoid being found guilty of a section 8(a)(5) violation. An employer may rebut the majority support presumption in one of two ways: the employer may show, by clear, cogent and convincing evidence, that the incumbent union had actually lost its majority support on the refusal to bargain date, or the employer may establish that it had a reasonable doubt about the incumbent union's majority support at the time of the

9. See *infra* note 22 for a discussion of the mechanics of the initiation and disposition of a section 8(a)(5) charge.

10. See *supra* note 5 for the full text of section 8(a)(5).

11. The National Labor Relations Board is a federal administrative agency granted exclusive original jurisdiction over all unfair labor practice proceedings. *See* 29 U.S.C. § 160(a) (1982). As part of this grant of jurisdiction, the Board is empowered to issue either cease and desist orders or bargaining orders to remedy unfair labor practices. *See generally* 29 U.S.C. § 160(c) (1982) (authority to issue cease and desist orders); NLRB v. Gissel Packing Co., 395 U.S. 575, 610-15 (1969) (Board may issue bargaining order in appropriate cases). For a discussion of the Board's power to issue a nonmajority bargaining order, see *infra* note 94.

12. See *infra* notes 22-35 and accompanying text for discussion of the prima facie section 8(a)(5) case.

13. *See, e.g.*, Brooks v. NLRB, 348 U.S. 96, 98 (1954); Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295, 1296-97 (9th Cir. 1984); NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Celanese Corp. of Am., 95 N.L.R.B. 664, 672 (1951).

14. *See, e.g.*, Premium Foods, Inc. v. NLRB, 709 F.2d 623, 630 (9th Cir. 1983); NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Celanese Corp. of Am., 95 N.L.R.B. 664, 672 (1951). The majority support presumption is discussed in detail at notes 29-35 and accompanying text, *infra*.

15. NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978) (citing NLRB v. Tesoro Petroleum Corp., 431 F.2d 95, 97 (9th Cir. 1970), *cert. denied*, 442 U.S. 921 (1979)).

refusal to bargain.[16]

The operation of the majority support presumption in section 8(a)(5) actions arising in the context of an economic strike is more complicated. In such actions, the employer will usually contend that its permanent replacement of some or all of the striking union members with nonunion workers is sufficient to support a reasonable doubt about the striking union's majority support, since the replacements numerically weaken the striking union's support.[17]

In response to such employer contentions, the Board created what has become known as the striker replacement presumption.[18] This presumption provides that replacements for union members engaged in an economic strike are presumed to support the striking union in the same ratio as those workers they have replaced.[19] As with the majority support presumption, the striker replacement presumption is a rebuttable one. However, an employer may rebut the striker replacement presumption only by demonstrating that the interests of the striker replacements are diametically opposed to the interests of the striking union members whom they have replaced.[20] In practice, employers have met with little success in rebutting the striker replacement presumption.[21]

This Comment will examine the procedure employed in the adjudication of section 8(a)(5) unfair labor practice charges. First, the prima facie section 8(a)(5) case and the operation of the majority support presumption will be discussed. The Comment will then analyze the evolution and application of the two primary affirmative defenses currently available to an employer in a section 8(a)(5) action, the actual loss of majority defense and the reasonable doubt defense. Emphasis will be placed on the various types of evidence available to employers to estab-

16. *Id. See also* N.T. Enloe Memorial Hosp. v. NLRB, 682 F.2d 790, 794 (9th Cir. 1982). See *infra* notes 36-129 for a detailed discussion of employer defense of a section 8(a)(5) charge.

17. *See, e.g.*, NLRB v. Pennco, Inc., 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); National Car Rental Sys: v. NLRB, 594 F.2d 1203 (8th Cir. 1979); Arkay Packaging Corp., 227 N.L.R.B. 397 (1976); James W. Whitfield, 220 N.L.R.B. 507 (1975).

See *infra* note 142 for a discussion of the numerical effect that replacement of strikers has on union support.

18. The majority support presumption is also known as the ancillary ratio presumption. *See, e.g.*, Whisper Soft Mills, Inc. v. NLRB, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 11,233 (9th Cir. October 31, 1984).

19. *See, e.g.*, Windham Community Memorial Hosp., 230 N.L.R.B. 1070, 1070 (1977), *enforced*, 577 F.2d 805 (2d Cir. 1978); James W. Whitfield, 220 N.L.R.B. 507, 509 (1975).

20. *See* IT Services, 263 N.L.R.B. 1183, 1186 (1982). *See also* Beacon Upholstery Co., 226 N.L.R.B. 1360 (1976).

21. See *infra* notes 144-45 and accompanying text for further discussion on this point.

lish the affirmative defenses. In this context, the Comment will discuss the development and operation of the striker replacement presumption.

This Comment will conclude that the operation of the majority support presumption in combination with the narrow evaluation of the evidence of union loss of support proffered by employers contravenes the objectives of the National Labor Relations Act and violates Federal Rule of Evidence 301. A modification of section 8(a)(5) procedure will then be proposed. First, it will be suggested that the actual loss of majority defense and the reasonable doubt defense be combined into a single defense that measures the objective reasonableness of an employer's refusal to bargain. Next, the Comment will propose that the establishment of the "reasonableness" defense by an employer constitute a complete defense to the section 8(a)(5) charge. Finally, a more realistic approach to employer evidence of union loss of support will be advocated. In particular, the Comment will argue that the striker replacement presumption is legally and practically unsound and should therefore be abandoned.

II. CURRENT SECTION 8(a)(5) PROCEDURE

A. The Prima Facie Section 8(a)(5) Case

In all actions brought pursuant to section 8(a)(5) of the Act,[22] the burden is on the General Counsel[23] to prove the necessary elements of

22. See *supra* note 5 for the text of section 8(a)(5).

A section 8(a)(5) unfair labor practice action is initiated by the filing of a written charge with the regional director of the Board for the region in which the alleged violations have occurred or are occurring. 29 C.F.R. § 101.2 (1984). Once filed, the charge is investigated by the Board's field staff. 29 C.F.R. § 101.4 (1984). Upon completion of this investigation, the case may be concluded informally, or the regional director may issue a formal complaint if it is believed that the charge has merit. *See* 29 C.F.R. § 101.4-101.7 (1984) (means of informal conclusion); 29 C.F.R. § 101.8 (1984) (authority for regional director to issue complaint). Subsequent to the issuance of the complaint, a public hearing is conducted on the charge. *See* 29 U.S.C. § 160(b) (1982); 29 C.F.R. § 101.10 (1984). *See also* 29 C.F.R. §§ 102.34-102.44 (1984) (procedures governing unfair labor practice hearings). This hearing is presided over by an administrative law judge and is conducted, as far as practicable, in conformity with the Federal Rules of Evidence. *See* 29 U.S.C. § 160(b) (1982) (Federal Rules of Evidence applicable to Board proceedings); 29 C.F.R. § 102.34 (1984) (hearings on Board complaints conducted by administrative law judge); 29 C.F.R. § 102.39 (1984) (Federal Rules of Evidence controlling as far as practicable in hearings upon Board complaints). The aggrieved union's case is presented by a Board attorney attached to the office of the General Counsel. 29 C.F.R. § 101.10(a) (1984). *See also infra* note 23.

23. The General Counsel is the branch of the Board responsible for exercising supervisory authority over the issuance of unfair labor practice complaints and the investigation of unfair labor practice charges. The General Counsel also renders legal advice and services to the Board, and prosecutes unfair labor practice actions on behalf of unions and employees. *See generally* 29 U.S.C. § 153(d) (1982). *See also* 29 C.F.R. § 101.10(a) (1984).

the alleged violation.[24] In order to establish a violation of section 8(a)(5), the General Counsel must prove two prima facie elements:

(1) that the charged employer did in fact refuse to bargain with the incumbent union;[25] and

(2) that the incumbent union represented a majority of the employees in the appropriate bargaining unit on the refusal to bargain date.[26]

In the typical section 8(a)(5) action arising in an economic strike context, the employer will withdraw recognition from the incumbent union, thereby terminating all collective bargaining.[27] Such employer conduct clearly and conclusively establishes the refusal to bargain element of the section 8(a)(5) charge.[28] Accordingly, the key issue in such

24. 29 C.R.F. § 101.10(b) (1984). *See generally* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (General Counsel carries burden of proving elements of an unfair labor practice charge); Saks & Co. v. NLRB, 634 F.2d 681, 687 (2d Cir. 1980) ("In unfair labor practice proceedings, 'the Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act . . . .' " (quoting 29 C.F.R. § 101.10(b) (1979)).

25. *See, e.g.*, Sahara-Tahoe Corp. v. NLRB, 648 F.2d 553, 554-55 (9th Cir. 1980) ("Where an employer has been charged with a violation of [section 8(a)(5)] . . . the General Counsel must show that . . . the employer refused to bargain with the union."), *cert. denied*, 451 U.S. 984 (1981); NLRB v. Great Atlantic & Pacific Tea Co., 346 F.2d 936, 939-40 (5th Cir. 1965) ("[T]he burden of establishing a refusal to bargain in good faith rests initially with the General Counsel.").

Although antiunion animus is a prima facie element of some section 8 unfair labor practices, the General Counsel has not been required to make such a showing in connection with an employer's refusal to bargain in order to establish a section 8(a)(5) violation. *Compare* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 300 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979) and cases cited *infra* note 26 *with* Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 700 (1983) (antiunion animus must be shown to establish a violation of section 8(a)(3)).

26. Sahara-Tahoe Corp. v. NLRB, 648 F.2d 553, 555 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981); NLRB v. Silver Spur Casino, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); NLRB v. West Sand & Gravel Co., 612 F.2d 1326, 1328 (1st Cir. 1979); NLRB v. Dayton Motels, Inc., 474 F.2d 328, 331 (6th Cir. 1973); Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n, 213 N.L.R.B. 651, 651 (1974).

An employer is relieved of all duty to bargain with the incumbent union if the General Counsel is unable to prove the majority status of the union in the first instance. *See* NLRB v. Dayton Motels, Inc., 474 F.2d 328, 331 (6th Cir. 1973); Maphis Chapman Corp. v. NLRB, 368 F.2d 298, 303 (4th Cir. 1966); Gourmet Foods, Inc., 270 N.L.R.B. No. 113, 1983-84 NLRB Dec. (CCH). ¶ 16,352, at 27,907 n.7 (April 26, 1984).

27. *See, e.g.*, Vulcan Hart Corp. v. NLRB, 718 F.2d 269 (8th Cir. 1983); Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981); National Car Rental Sys. v. NLRB, 594 F.2d 1203 (8th Cir. 1979); NLRB v. Randle-Eastern Ambulance Serv., Inc., 584 F.2d 720 (5th Cir. 1978); Pennco, Inc., 242 N.L.R.B. 467 (1979); Windham Community Memorial Hosp., 230 N.L.R.B. 1070 (1977), *enforced*, 577 F.2d 805 (2d Cir. 1978).

28. This is not to suggest that the question of whether an employer refused to bargain is never an issue in a section 8(a)(5) action arising in the context of an economic strike. Employer refusal to bargain is the threshold question in all section 8(a)(5) actions. Thus, absent an express repudiation of the union or a complete cessation of all bargaining, it must be decided in the first instance whether employer conduct did in fact constitute a refusal to bargain.

actions becomes the incumbent union's majority status.

The General Counsel may rely on the majority support presumption to satisfy its burden of proving the prima facie element of the incumbent union's majority support on the refusal to bargain date.[29] The majority support presumption is in reality two separate presumptions. For a reasonable time, usually one year after certification or voluntary recognition, a union's majority support is irrebuttably presumed absent unusual circumstances.[30] Upon expiration of the certification year, the union's

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This issue comes up most frequently under the rubric of "good faith bargaining" in situations where an employer ostensibly continues to bargain, but bargains in a manner which suggests that it does not desire agreement. *See generally* R. GORMAN, *supra* note 2, at 399-495 and cases cited therein. The issue may also arise in situations where an employer unilaterally changes working conditions, contending that the instituted change was not a valid subject of collective bargaining. *See generally* R. GORMAN, *supra* note 2, at 496-531 and cases cited therein. *See also* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

The effect of a finding that an employer did not refuse to bargain within the meaning of section 8(a)(5) is to conclude the unfair labor practice action in favor of the employer. It is only after a finding of a refusal to bargain that it must be further determined whether such a refusal was unlawful.

29. *See* Sahara-Tahoe Corp. v. NLRB, 648 F.2d 553, 555 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

30. *See id.*, NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

The majority support presumption was developed by the Board in Whittier Mills Co., 15 N.L.R.B. 457 (1939), *enforced*, 111 F.2d 474 (5th Cir. 1940). In *Whittier Mills*, the employer refused to bargain with a Board-certified union seven months after the certification date. The Board found that the employer had violated section 8(a)(5), stating:

> To hold that, 7 months following certification by the Board of a collective bargaining representative, the employer can question with impunity the status of the certified representative . . . would be to render such a certification negatory. The Congress cannot have intended by Section 9(c) of the Act to authorize the Board to do a futile and meaningless thing. . . . To prevent employers from thus flouting the Act, to give meaning to the Board's authority to certify representatives designated by employees in appropriate units, to effectuate the policies of the Act, the presumption of the continuing effectiveness of such a certification by the Board must be held not to be rebuttable, under the circumstances here presented. . . .

15 N.L.R.B. at 462-63.

The majority support presumption was further defined in the landmark Board decision in Celanese Corp. of Am., 95 N.L.R.B. 664 (1951). In *Celanese*, the Board held that once a union is certified as the exclusive bargaining representative of a group of employees, its majority status is presumed to continue for one year from the date of certification. *Id.* at 671-72. The Board explained that, in practical effect, such a presumption meant two things: (1) the certification, without more, established the *fact* of the union's majority status during the certification year; and (2) during the certification year an employer, absent unusual circumstances, could not lawfully refuse to bargain with the incumbent union. *Id.* at 672 (emphasis in original). For further discussion of the *Celanese* decision, see *infra* notes 60-68 and accompanying text.

The Board holding in *Celanese* was approved by the United States Supreme Court in Brooks v. NLRB, 348 U.S. 96, 104 (1954). The *Brooks* Court also identified three unusual circumstances where the majority support presumption will not apply:

(1) the certified union has dissolved or is defunct;

majority support continues to be presumed, but such presumption is rebuttable.[31]

In its original formulation, the majority support presumption was designed to protect newly certified unions from employer challenges, thereby preventing employers from circumventing the collective bargaining provisions of the Act.[32] In addition, the presumption was created to remove result-oriented pressure from the new union. Unions were free to negotiate with strength and patience knowing that if favorable results were not immediately forthcoming, they would be insulated from challenges to their majority support by the majority support presumption.[33] Under current practice, the scope of the protection afforded by the majority support presumption has been expanded.

The majority support presumption has become a primary mechanism for enforcement of the collective bargaining mandates of the Act. Assertion of the presumption obviates the need for an incumbent union

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(2) as a result of a schism, substantially all the members and officers of the certified union transferred their affiliation to a new local or international; or

(3) the size of the bargaining unit fluctuates radically within a short period of time.

Id. at 98-99. In each of these three situations, the representative status of the newly certified union is so questionable that the employer is freed from its duty to bargain and a fresh assessment of employee preference is required. *See* R. GORMAN, *supra* note 2, at 108.

31. Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295, 1296-97 (9th Cir. 1984); NLRB v. Silver Spur Casino, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

This corollary of the original majority support presumption was set forth by the Board for the first time in the *Celanese* decision. *See* Celanese Corp. of Am., 95 N.L.R.B. 664, 672 (1951) ("[A]fter the first year of the certificate has elapsed, though the certificate still creats [sic] a presumption as to the fact of majority status by the union, the presumption is at that point *rebuttable* even in the absence of unusual circumstances." (emphasis in original)). In the years since the *Celanese* decision, the rebuttable element of the majority support presumption has become the focal point of section 8(a)(5) litigation.

32. *See* Whittier Mills Co., 15 N.L.R.B. 457 (1939), *enforced*, 111 F.2d 474 (5th Cir. 1940):

> A certification would be futile and meaningless, could an employer, . . . prior to carrying on any bargaining with the certified representative, . . . require the certified representative to prove anew its status as majority representative. Collective bargaining under such circumstances could be indefinitely delayed by employers and the rights of employees to bargain collectively would be rendered illusory and the policies of the Act thwarted.

Id. at 463.

33. In Brooks v. NLRB, 348 U.S. 96 (1954), the United States Supreme Court discussed the rationale underlying the majority support presumption:

> In the political and business spheres, the choice of the voters in an election binds them for a fixed time. This promotes a sense of responsibility in the electorate and needed coherence in administration. These considerations are equally relevant to healthy labor relations . . . .
>
> A union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out.

Id. at 99-100.

to make an evidentiary showing of its own majority status each time it seeks to enforce employee collective bargaining rights against an employer's refusal to bargain.[34] Absent sufficient countervailing proof, assertion of the presumption also establishes the employer's duty to bargain and the unlawfulness of its refusal to do so without the need for further evidence.[35]

B. Employer Defense of the Section 8(a)(5) Charge

An employer faced with an assertion of the majority support presumption by the General Counsel will be found to have violated section 8(a)(5) unless it can overcome the presumption.[36] Recognizing that an incumbent union's support may erode over time, the Board and the courts provide two ways for an employer to overcome the majority support presumption and defend the section 8(a)(5) charge:

> (1) the employer may demonstrate that the incumbent union did not in fact have the support of a majority of the employees on the refusal to bargain date; or
>
> (2) the employer may demonstrate that it had a good faith reasonable doubt about the union's majority support at the time of the refusal to bargain.[37]

The employer is required in either case to establish the defense by "clear,

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34. *See* NLRB v. Tahoe-Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). Employee collective bargaining rights are set forth in section 7 of the Act. *See supra* note 5 for the text of this section.

The majority support presumption has frequently been challenged on the grounds that it cannot, as a matter of law, satisfy the General Counsel's burden of proof in section 8(a)(5) actions, since a presumption is not evidence, but rather a measure of probability that has not probative force. *See generally* Ref-Chem Co. v. NLRB, 418 F.2d 127, 130-31 (5th Cir. 1969) (application of the majority support presumption is limited by evidentiary considerations of whether it is sensible to assume that the fact which it purports to establish is true, since the principal reason for the recognition of a presumption is probability); Ariasi v. Orient Ins. Co., 50 F.2d 548, 552-54 (9th Cir. 1931) (presumption is not evidence and carries no probative force or weight); 9 J. WIGMORE, EVIDENCE § 2491 (3d ed. 1940). These challenges have consistently been rejected by the courts on the ground that the majority support presumption is not merely an evidentiary tool based on probability, but also a means of maintaining industrial peace, and, as such, is a valid exercise of the Board's power to stabilize labor-management relations. *See Tahoe Nugget*, 584 F.2d at 303-04.

35. *See* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Terrell Mach. Co. v. NLRB, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970).

36. *See supra* notes 34-35 and accompanying text.

37. *See* 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); NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 489-90 (2d Cir. 1975); Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n, 213 N.L.R.B. 651, 651 (1974); Terrell Mach.

cogent and convincing" evidence.[38]

1. The actual loss of majority defense

Proof of an incumbent union's actual loss of majority support has long been recognized as a defense available to employers in section 8(a)(5) actions.[39] The actual loss of majority defense is primarily derived from section 9(a) of the Act, which provides that "[r]epresentatives designated or selected . . . *by the majority of the employees in a unit* . . . shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining."[40] The implication drawn from this language is that an employer's ability to prove that an incumbent union has in fact lost its majority support relieves the employer of any obligation to bargain with that union, since the union, by virtue of its inability to maintain the statutorily-mandated foundation of majority support, is no longer considered the exclusive bargaining representative of the unit.[41] Accordingly, an employer's proof of an incumbent union's actual loss of majority support concludes the section 8(a)(5) action in favor of the employer.[42]

The actual loss of majority defense is highly ineffective under current section 8(a)(5) practice.[43] Proof of a union's minority status is a straightforward factual question.[44] Thus, when an employer raises the actual loss of majority defense, it has the burden of introducing direct evidence demonstrating that the incumbent union did not in fact have the

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Co., 173 N.L.R.B. 1480, 1481 (1969), *enforced*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970).

38. *See* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 489-90 (2d Cir. 1975).

39. *See, e.g.*, NLRB v. Whittier Mills Co., 111 F.2d 474, 478 (5th Cir. 1940) (the presumed status of union majority continues until shown to have ceased); Celanese Corp. of Am., 95 N.L.R.B. 664, 672 (1951).

40. 29 U.S.C. § 159(a) (1982) (emphasis added).

41. *See generally* Whisper Soft Mills, Inc. v. NLRB [5 Labor Relations] LAB. L. REP. (CCH) ¶ 11,233, at 23,060-61 (9th Cir. October 31, 1984) ("The duty of an employer to bargain with the chosen representatives of his employees . . . is an obligation only to the certified bargaining representative." (citing 29 U.S.C. § 159(a) (1978))); Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720, 735 (6th Cir. 1964). *See also* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84 (1944) (employer has "exclusive obligation" under section 9(a) of the Act to bargain collectively with the chosen representatives of its employees).

42. *See, e.g.*, NLRB v. Dayton Motels, Inc., 474 F.2d 328, 331 (6th Cir. 1973) (failure to prove majority status of union relieves employer of duty to bargain).

43. This point is well illustrated by the fact that, in the last 20 years, there are no reported decisions in which an employer has successfully raised the defense in a section 8(a)(5) action.

44. *See* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 298 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

support of a majority of the employees on the refusal to bargain date.[45] The problem with the defense is that an employer does not have at its disposal the direct evidence necessary to carry this burden.[46] The burden of directly proving a union's minority status essentially requires an employer to ascertain the representative preference of each of its employees individually.[47] For all practical purposes, this can only be accomplished by means of an employee poll.

The Board has expressly stated that an employer may not justify a refusal to bargain by polling its employees as to their union preference.[48]

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45. *See* Celanese Corp. of Am., 95 N.L.R.B. 664, 672 (1951). "Direct evidence" is commonly defined as evidence which, if believed, proves the existence of the fact in question without inference or presumption. *See* 1 J. WIGMORE, EVIDENCE § 25, at 953 n.2 (Tillers rev. 1983). In essence, proffered evidence is direct when the evidence, if true, conclusively establishes the fact sought to be proved. *See* CAL. EVID. CODE § 410 (West 1966). In contrast, circumstantial evidence is evidence which directly proves a secondary fact which, by logical inference, demonstrates the main fact sought to be proved. 1 J. WIGMORE, EVIDENCE § 25, at 953-55 (Tillers rev. 1983).

A question arises at this juncture as to whether the actual loss of majority defense is an affirmative defense to the section 8(a)(5) charge, or merely represents a rebuttal of the majority support presumption. Despite the similarity between the language used in characterizing the defense and the presumption, the actual loss of majority defense is an affirmative defense, since establishment of the defense concludes the section 8(a)(5) action in favor of the employer.

46. This problem has been consistently recognized by the Board and the courts. *See* Stoner Rubber Co., 123 N.L.R.B. 1440, 1445 (1959) ("Proof of majority is peculiarly within the special competence of the union."); NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 301 (9th Cir. 1978) ("the employer usually [has] inferior access to the relevant information and may risk further penalty in garnering additional data" (footnote omitted)), *cert. denied*, 442 U.S. 921 (1979).

47. There are, of course, many other ways an employer may attempt to demonstrate an incumbent union's loss of support. See *infra* notes 139-97 and accompanying text for a detailed discussion of the various categories of evidence probative of union support in the economic strike context. However, the probative value of these types of evidence with respect to union support is not direct, but depends on inference. By way of example, evidence of union inactivity does not directly prove lack of union support, but rather proves only that the union has been inactive. The relevance of the evidence to union support depends on the inference that an inactive union is not supported by a majority of employees. Conversely, a "head count" of pro- and anti-union employees is directly and numerically probative of the level of union support. Under current section 8(a)(5) practice, circumstantial evidence is properly introduced into the action by way of the reasonable doubt defense, while direct evidence of union support comes into the action through the actual loss of majority defense.

48. Montgomery Ward & Co., 210 N.L.R.B. 717, 717 (1974). Ordinarily, an employer's polling of its employees regarding their union sentiments will be found to violate section 8(a)(1) of the Act, which proscribes employer interference with the organizational or collective bargaining rights of its employees. *See supra* note 5. However, the Board will allow an employer to poll its employees in the limited circumstance where a labor organization demands initial recognition and the employer is willing to voluntarily recognize the organization without resort to a Board-conducted election if the employer is able to satisfy itself that a majority of its employees do in fact desire representation by the particular labor organization. *See* Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967). *See also* Montgomery Ward, 210 N.L.R.B.

Under the Board approach, in order for an employer to lawfully conduct a poll of its employees, it must first demonstrate preexisting objective considerations which cast doubt on the incumbent union's majority support.[49] In effect, the Board's position is that since an employer is required to advance sufficient objective evidence of the incumbent union's loss of support before it can secure a Board recertification election[50] or withdraw recognition, no less a showing should be required to justify the employer's own "election" poll challenging union support.[51]

The courts of appeals are currently divided over the question of whether an employer should be allowed to poll its employees in order to test the support for an incumbent union. The Eighth Circuit has completely rejected the Board rule, choosing instead to allow an employee poll if done in a noncoercive manner and in compliance with the *Struksnes* procedural safeguards.[52] The Sixth and Ninth Circuits have modified the Board rule and allow employee polls where the employer has "substantial, objective evidence" of the union's loss of support, even if

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at 724 (administrative law judge decision). In order to conduct a poll under such circumstances, the employer must comply with the following procedural safeguards:

> (1) the purpose of the poll must be to determine the truth of the union's claim of majority support;
> (2) this purpose must be communicated to the employees;
> (3) assurances against reprisal must be given;
> (4) the employees must be polled by secret ballot; and
> (5) the employer must not engage in unfair labor practices or otherwise create a coercive atmosphere.

165 N.L.R.B. at 1063 (citing Blue Flash Express, Inc., 109 N.L.R.B. 591 (1954)).

49. Montgomery Ward & Co., 210 N.L.R.B. 717, 717 (1974). The Board has explained this rule by stating that "it would be wholly contrary to the purposes of the Act for [the] Board to rely upon the fruits of an unfair labor practice to justify a dishonoring of the [employer's] bargaining obligation." *Id.*

50. In order to petition the Board for an election challenging an incumbent union's continuing majority support, an employer must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority support. United States Gypsum Co., 157 N.L.R.B. 652, 656 (1966) (discussing the prerequisite for a recertification petition filed pursuant to section 9(c)(1)(B)).

51. *See generally* Franks Bros. v. NLRB, 321 U.S. 702 (1944):

> [A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed . . . . After such a reasonable period, the Board may, *in a proper proceeding and upon a proper showing*, take steps in recognition of changed situations which might make appropriate changed bargaining relationships."

Id. at 705-06 (emphasis added and citations omitted). *See also* Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295, 1297 (9th Cir. 1984) (critical discussion of Board arguments in support of *Montgomery Ward* rule); R. GORMAN, *supra* note 2, at 112.

52. *See* NLRB v. North Am. Mfg. Co., 563 F.2d 894, 896 (8th Cir. 1977) ("An employer who believes that a union no longer possesses majority support may poll his employees by secret ballot, provided he complies with the safeguards of *Struksnes Construction Co.* . . . ." (citations omitted)).

that evidence is insufficient in itself to justify a refusal to bargain.[53] The position of the Fifth Circuit is unclear with respect to employee polls.[54]

Despite the recent court language sanctioning noncoercive polling of employee support for an incumbent union, it is unlikely that the actual loss of majority defense will ever be a viable defense to a section 8(a)(5) charge arising out of an economic strike. Such polls will always be coercive when they seek to measure the level of support for an economically striking union.[55] In sum, while the conceptual basis of the actual loss of

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53. *See* Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295, 1299 (9th Cir. 1984):

> We believe that polling can be a useful and legitimate tool for the employer who is in sincere doubt of the union's majority status. We therefore hold . . . that as long as the employer complies with the *Struksnes* conditions and procedural safeguards, it may poll its employees to determine their union settlement if it has substantial, objective evidence of a loss of union support, even if that evidence is insufficient by itself to justify withdrawal of recognition . . . .

See also Thomas Indus., Inc. v. NLRB, 686 F.2d 863, 867 (6th Cir. 1982) (objective evidence required to justify employee poll; however, such objective evidence need not establish that over 50% of employees have expressed dissatisfaction with incumbent union).

54. In NLRB v. Randle-Eastern Ambulance Serv., Inc., 584 F.2d 720 (5th Cir. 1978), the Fifth Circuit held that employer-conducted employee polls were proscribed unless the employer had "objective evidence to support a good faith doubt of majority status, the same standard used to determine the lawfulness of withdrawing recognition." *Id.* at 729 (quoting Montgomery Ward & Co., 210 N.L.R.B. 717 (1974)). Subsequently, in NLRB v. A.W. Thompson, Inc., 651 F.2d 1141 (5th Cir. 1981), the Fifth Circuit seemed to recant, stating that employee polls would be allowed without the necessity of affirmatively establishing doubt of union majority sufficient to justify withdrawal. The *Randle-Eastern* proscription against employee polls without this showing was dismissed at dictum. *Id.* at 1144. However, the *Thompson* court's discussion of employee polls was arguably dictum as well, since the court found that the employer had committed various other unfair labor practices in violation of the Act. *See id.* at 1145. Thus, the Fifth Circuit's position on this issue remains uncertain.

55. In discussing its restrictive approach to employee polls, the Board has stated that "any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights." Struksnes Constr. Co., 165 N.L.R.B. 1062, 1062 (1967). This rationale is particularly relevant in the economic strike context. Since the polling of the striking union members about their support for the striking union would appear to be a meaningless excercise, for all practical purposes the determinative group with respect to union support is the permanent striker replacements. See *infra* note 142 for a discussion of how the hiring of permanent striker replacements affects the numerical support of the incumbent union. It is difficult to imagine how this group could be polled in a noncoercive manner or in compliance with the *Struksnes* criteria. During an economic strike, employer-union tension is at its height, thereby creating an inherently coercive atmosphere in the workplace. Additionally, the permanent striker replacements are those employees most susceptible to coercion and reprisal, since their prospects of continuing employment at the conclusion of the strike are within the discretion of the employer. Against this backdrop, even a secret ballot would be ineffective, for a pro-union result would subject the permanent replacements as a group to possible reprisal through discharge at the end of the strike. *Compare Struksnes* at 1063. *But see* Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983) (breach of contract and misrepresentation causes of action brought by discharged permanent striker replacements not preempted by the Act). In light of these considerations, employers will probably continue

majority defense is sound, the unavailability to an employer of any evidence directly probative of union support reduces the defense to one that is all form and no substance.[56]

2. The reasonable doubt defense

The reasonable doubt defense is a Board-created means of overcoming the majority support presumption available to employers in section 8(a)(5) litigation.[57] An employer, upon assertion of the reasonable doubt defense, assumes the burden of producing objective evidence demonstrating that the circumstances surrounding the incumbent union's representation were such that it was reasonable for the employer to refuse to bargain.[58] The key distinction between the reasonable doubt defense and the actual loss of majority defense is that the establishment of the actual loss of majority defense requires evidence directly probative of the incumbent union's level of support, while the reasonable doubt defense allows the introduction of circumstantial evidence from which it may be inferred that the incumbent union has lost support.[59]

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to be prohibited from using an employee poll to assess the numerical support for a striking union, and will be forced to rely instead on inferential evidence to justify any refusal to bargain.

56. The narrow evaluation of employer evidence of reasonable doubt renders the reasonable doubt defense equally ineffective in the large majority of section 8(a)(5) actions. See *infra* notes 204-08 and accompanying text.

57. See *infra* notes 60-87 and accompanying text for a discussion of the creation and historical delineation of the reasonable doubt defense.

The source of the reasonable doubt defense should be contrasted with the statutory source of the actual loss of majority defense. *See supra* notes 39-42 and accompanying text.

58. *See generally* Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1110 (1st Cir. 1981); Bellwood Gen. Hosp., Inc. v. NLRB, 627 F.2d 98, 103-05 (7th Cir. 1980); NLRB v. Randle-Eastern Ambulance Serv., Inc., 584 F.2d 720, 727-28 (5th Cir. 1978); Dalewood Rehabilitation Hosp., Inc. v. NLRB, 566 F.2d 77, 80 (9th Cir. 1977); NLRB v. Dayton Motels, Inc., 474 F.2d 328, 333 (6th Cir. 1973); Ingress-Plastene, Inc. v. NLRB, 430 F.2d 542, 546-47 (7th Cir. 1970).

59. See *supra* note 45 and 47 for a discussion of the distinction between direct and circumstantial evidence.

The reasonable doubt defense has been criticized by some legal commentators on the ground that it focuses improperly on the subjective state of mind of an employer in refusing to bargain, whereas such subjective analysis was discredited by the Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), and Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974). *See, e.g.*, Note, *NLRB Determination of Incumbent Unions' Majority Status*, 54 IND. L.J. 651, 655-56 (1979). Such criticism seems unwarranted in light of express statements by both the Board and the courts that the reasonable doubt test is an objective test. *See, e.g.*, NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 299 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 811 (2d Cir. 1978); Pennco, Inc., 242 N.L.R.B. 467, 469 (1979); James W. Whitfield, 220 N.L.R.B. 507, 508 (1975). The problem that gives rise to this criticism is the frequently subjective application of the defense employed by the Board and the courts. *See* Comment, *Application of the Good-*

a. historical development of the defense: the Celanese *and* Stoner *decisions*

The seminal case in the development of the reasonable doubt defense is *Celanese Corp. of America.*[60] In *Celanese,* the incumbent union engaged in an economic strike after having been certified as the exclusive bargaining representative of the employees approximately two and one-half years before the strike.[61] In order to maintain its business, the employer replaced the striking union members with non-union employees.[62] The employer then refused to bargain further with the striking union, asserting that " 'to the best of our knowledge and belief, the Union does not represent any of the employees now working in this plant.' "[63]

The *Celanese* Board began its analysis of the refusal to bargain problem by explaining:

> [T]he answer to the question whether the [employer] violated Section 8(a)(5) of the Act . . . 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.[64]

The Board then created a framework for analyzing this defense. Two factors were held to be essential to a finding of good faith in an employer's refusal to bargain: (1) the employer must have "reasonable grounds for believing that the union has lost its majority status"; and (2) "the majority issue must not have been raised by the employer in a context of illegal antiunion activities, or other conduct . . . aimed at causing disaffection from the union or indicating that . . . the employer was merely seeking to gain time in which to undermine the union."[65] The Board was careful to explain that an employer's good faith in challenging an incumbent union's majority cannot be determined by the ap-

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Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions, 1981 DUKE L.J. 718, 727-28 n.58 (1981). In light of these criticisms, it should be kept in mind that the true distinction between the reasonable doubt defense and the actual loss of majority defense is not a subjective versus objective focus, but rather the nature of the evidence necessary to prove the defense.

60. 95 N.L.R.B. 664 (1951) (cited with approval by the United States Supreme Court in Brooks v. NLRB, 348 U.S. 96, 104 (1954)).

61. *Id.* at 668.

62. *Id.* at 669.

63. *Id.* at 670.

64. *Id.* at 671 (emphasis in original). It is clear from this language that the *Celanese* Board intended that the reasonable doubt defense be a complete defense to a section 8(a)(5) charge.

65. *Id.* at 673 (emphasis in original).

plication of a simple formula, but must be evaluated in light of the totality of all relevant circumstances involved in a particular case.[66]

Applying the new standards, the Board found that because the union's certification was over two years old, 268 of the 286 non-supervisory personnel employed in the plant on the refusal to bargain date were either striker replacements or former strikers who had abandoned the strike and crossed the picket line, and the employer had a history of compliance with the Act, the employer's doubt about the union's majority support was reasonably based and not asserted in a context of antiunion activities.[67] Accordingly, the Board held that the employer had completely defended the section 8(a)(5) charge.[68]

The second important decision in the development of the reasonable doubt defense was *Stoner Rubber Co.*[69] In *Stoner*, the employer refused to bargain with the incumbent striking union fourteen months after the union had been certified in a Board-conducted election by a vote of 32 to 27.[70] At the same time, the employer unilaterally instituted a wage increase without consulting with or informing the union.[71] The employer justified both of these actions on the ground of a good faith belief that the union no longer retained its majority support.[72] The five-member Board, in a plurality opinion, held that the employer had not violated section

66. *Id.*

67. *Id.* at 670-71, 673-75.

68. *Id.* at 675. Two Board members dissented from the majority's determination that the establishment of a good faith doubt by an employer constituted a complete defense to a section 8(a)(5) charge. While agreeing with the majority's general discussion of the legal principles controlling in section 8(a)(5) actions, the dissenting members criticized the majority's legal reasoning, stating that "it [certainly] does not follow from the fact that one has the right to *rebut* a presumption by showing that a different status obtains, that it is sufficient overcome the presumed status to show that one has good faith doubts as to the truth of the presumption." *Id.* at 675 (emphasis in original) (Houston & Murdock, Members, dissenting in part). The dissent accordingly argued that an employer's good faith doubt was irrelevant, and that the real issue, and thus the only means available to overcome the majority support presumption, was the union's actual lack of majority support. *Id.* at 676 (Houston & Murdock, Members, dissenting in part). To bolster this argument, they maintained that classifying an employer's good faith doubt as a complete defense to a section 8(a)(5) charge would encourage annual challenges to an incumbent union's majority support, thereby disrupting bargaining stability. *Id.* at 677 (Houston & Murdock, Members, dissenting in part).

Applying their reasoning to the *Celanese* facts, the dissenting members found that the evidence presented by the employer was insufficient to show actual loss of majority, and therefore concluded that the section 8(a)(5) violation found by the trial examiner should have been affirmed. *Id.* at 677-78 (Houston & Murdock, Members, dissenting in part).

69. 123 N.L.R.B. 1440 (1959) (plurality opinion).

70. *Id.* at 1441-42.

71. *Id.* at 1442.

72. *Id.*

8(a)(5).[73]

In reaching its conclusion, the *Stoner* plurality applied the *Celanese* test but used an analytical approach specially adapted to the fact situation before them. The plurality first discussed the reasonableness of the employer's doubt about the union's majority support, finding that in light of the circumstances surrounding the refusal to bargain, the employer's doubt was in fact reasonable.[74] After deciding the reasonable doubt issue, the plurality next addressed what they considered to be the central question in the case: should the reasonable doubt defense be available to an employer who not only refuses to bargain but also unilaterally changes working conditions or takes some other action likely to be detrimental to the incumbent union's support?"[75]

In answering this question, the plurality first reaffirmed the *Celanese* rule: good faith doubt of union majority support is a defense to a section 8(a)(5) refusal to bargain charge in all cases.[76] The plurality explained that the *Celanese* rule was justified because an employer, by successfully raising the good faith doubt defense, does nothing more than require the incumbent union to prove its majority support in a Board-conducted secret election.[77]

In *Stoner*, however, the employer's unilateral wage increase effectively predetermined the result of the election against the union.[78] Con-

73. *Id.* at 1445-46.

74. *Id.* at 1443-44. The plurality based their reasonableness determination on the following considerations: (1) prior to the refusal to bargain and concurrent wage increase, the economic strike had been in progress for five months, during which time there had been no bargaining meetings; (2) the union had not communicated with the employer for three months; (3) the union had won the original certification election by only five votes; and (4) at the time the employer first refused to bargain, its plant was being operated by a workforce of 36 employees, 18 former strikers who had crossed the picket line to return to work and 18 permanent striker replacements. *Id.* The plurality stated that in light of the fact that 27 employees had originally voted against the union, it was not unreasonable for the employer to assume that none of the 18 former strikers supported the union. *Id.* at 1444. Nor was it unreasonable, in the plurality's view, for the employer to believe that the 18 permanent striker replacements were not union supporters. *Id.*

75. *See id.* By framing its discussion in this manner, the plurality decided a question left unanswered by the *Celanese* decision. In *Celanese*, one of the factors necessary for a finding of good faith was that the majority issue not be raised in a context of employer activity aimed at causing disaffection from the union. 95 N.L.R.B. at 673. However, the *Celanese* Board never discussed the procedural effect of such activity. In *Stoner*, this issue was squarely presented, since the unilateral wage increase had the effect of undermining union support.

76. 123 N.L.R.B. at 1444.

77. *Id.* In *Celanese*, the Board did not discuss the ultimate result of a successful employer assertion of the reasonable doubt defense. The *Stoner* Board clarified this point by stating that an incumbent union will be required to recertify itself in a Board-conducted secret election if the employer is successful in establishing a reasonable doubt about its majority support. *Id.*

78. *See id.* at 1445.

sequently, the *Stoner* plurality was forced to extend the *Celanese* analysis in order to protect the union's potential majority. Accordingly, they retained the reasonable doubt defense but limited its effect by holding that when an employer combines a refusal to bargain with a unilateral change in working conditions potentially detrimental to the incumbent union's support, the employer acts at its own peril even if the refusal to bargain was reasonable.[79] If a majority of the employees in fact supported the incumbent union on the refusal to bargain date, then the employer will be found to have violated section 8(a)(5).[80] Conversely, if the incumbent union did not have majority support on that date, the employer is not guilty of a section 8(a)(5) violation.[81]

The *Stoner* plurality, having framed the determinative issue as actual union majority support where an employer's unilateral action forecloses a fair recertification election, then set forth a procedure for determining the question of union majority support when the employer asserts the reasonable doubt defense in this context:

> [Since] [p]roof of majority is peculiarly within the special competence of the union . . . 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.[82]

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79. *Id.* Chairman Leedom concurred with the conclusion that the employer was not guilty of a section 8(a)(5) violation, but disagreed with the methodology used by the plurality to reach this result. The chairman argued in favor of a broad application of the reasonable doubt defense whereby an employer may, once it had a reasonable and verifiable doubt of union majority support, take any unilateral action so long as the action did not indicate bad faith. *Id.* at 1446 (Leedom, Chairman, concurring). Under the chairman's view, the reasonable doubt defense would constitute a complete defense to the section 8(a)(5) charge in all cases where the doubt was raised in good faith.

Members Jenkins and Fanning, dissenting in part, argued that an employer's unilateral actions taken concurrently with or subsequent to a refusal to bargain with an incumbent union should be given great weight as evidence of the employer bad faith. *Id.* at 1449-51 (Jenkins & Fanning, Members, concurring in part and dissenting in part). They further argued that the test as set out by the plurality was inimical to the policy of industrial stability since it would encourage constant challenges to the union's majority status. *Id.* at 1450 (Jenkins & Fanning, Members, concurring in part and dissenting in part).

80. *Id.* at 1445.

81. *Id.*

82. *Id.* (emphasis in original). The plurality noted several means by which the union may prove its actual majority support: signed authorization cards, dues check-off cards and membership lists. On the other hand, it was argued that an employer is basically incapable of proving an incumbent union's actual loss of majority support since it does not have access to

Applying this test, the plurality found that the employer had not violated section 8(a)(5) in spite of the unilateral wage increase because it was able to produce evidence sufficient to rebut the majority support presumption, and the General Counsel failed to produce evidence proving actual union majority support.[83]

The *Celanese* and *Stoner* decisions have traditionally been interpreted as setting forth two independent approaches to the reasonable doubt defense.[84] Such a view is erroneous. Actually, the *Celanese* and *Stoner* tests constitute an integrated procedural framework governing the overall application of the defense. The *Stoner* test does not alter the procedural application of the reasonable doubt defense articulated in *Celanese*.[85] Rather, it is merely a narrow extension of the *Celanese* test. Thus, in the typical case where an employer refuses to bargain with an incumbent union and nothing more, the *Celanese* test should still be applied.[86] However, in the situation where an employer couples its refusal to bargain with some unilateral action foreclosing a fair Board-conducted election, the *Stoner* test should be applied, and, upon affirmative proof of the reasonable doubt defense by the employer, the General Counsel should be permitted to recertify the incumbent union in the section 8(a)(5) proceeding by producing evidence of the union's actual majority support on the refusal to bargain date.[87]

b. application of the reasonable doubt defense

i. Board

Under current Board practice, an employer's affirmative proof of a reasonable doubt about an incumbent union's majority support consti-

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the union's membership lists and direct questioning of employees would be problematic both as to its legality and its practical usefulness. *Id.* *See supra* notes 43-56 for a discussion of this point.

83. 125 N.L.R.B. at 1445-46.

84. *See, e.g.*, Seger, *The Majority Status of Incumbent Bargaining Representatives*, 47 TUL. L. REV. 961, 979-84 (1973); Comment, *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 DUKE L.J. 718, 720-24 (1981); Note, *NLRB Determination of Incumbent Union's Majority Status*, 54 IND. L.J. 651, 655-57 (1979).

85. The *Stoner* Board members all agreed that *Celanese* represented sound law and was not being overruled. *See* 123 N.L.R.B. at 1444. However, the Board members disagreed as to the reach of the reasonable doubt defense, with the main opinion representing a compromise between the extreme views of the chairman and the dissenting members. *See id.* In no way was the *Stoner* decision intended to change the *Celanese* formulation of the reasonable doubt defense. *See id.*

86. *See infra* notes 88-100 and accompanying text.

87. *See* 123 N.L.R.B. at 1445.

tutes a complete defense to the section 8(a)(5) charge.[88] Proof of the defense effectively decertifies the union and requires it to recertify itself in a Board-conducted secret election.[89] This general rule applies in all but four situations: (1) where an employer raises the majority issue in a context of illegal antiunion activities;[90] (2) where the majority issue is raised by an employer in order to gain time to undermine the incumbent union's support;[91] (3) where an employer takes action intentionally aimed at causing disenchantment with the incumbent union;[92] and (4) where an employer takes some action which unintentionally fore-

88. *See, e.g.*, KPNX Broadcasting Co., 262 N.L.R.B. 687, 691-92 (1982) (administrative law judge decision); Upper Miss. Towing Corp., 246 N.L.R.B. 262, 262-64 (1979); Arkay Packaging Corp., 227 N.L.R.B. 397, 398 (1976), *enforced sub nom.* New York Printing Pressmen & Offset Workers Union v. NLRB, 575 F.2d 1045 (2d Cir. 1978); Beacon Upholstery Co., 226 N.L.R.B. 1360, 1367-68 (1976) (administrative law judge decision); Raymond Convalescent Hosp., Inc., 216 N.L.R.B. 494, 499-501 (1975) (administrative law judge decision); Faye Nursing Home, Inc., 215 N.L.R.B. 658, 658 n.3 (1974); Lloyd McKee Motors, Inc., 170 N.L.R.B. 1278, 1278-79 (1968). *Contra* Michigan Prod., Inc., 236 N.L.R.B. 1143, 1143 (1978); Peoples Gas Sys., Inc., 214 N.L.R.B. 944, 947 (1974), *enforcement denied*, 532 F.2d 1385 (D.C. Cir. 1976); Taft Broadcasting, 201 N.L.R.B. 801 (1973).

89. *See* 123 N.L.R.B. at 1444.

90. *See* 95 N.L.R.B. at 673. In most cases, employer conduct in this context wil also violate section 8(a)(1) of the Act, *see supra* note 5, and section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1982), which proscribes employer conduct discouraging membership in any labor organization. For examples of employer conduct held to be illegal antiunion activity, see United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026 (1979) (discharge of employees for union activity; coercive interrogation of employees about union vote; conversion of positions to nonunion status to avoid unionization with concommitant termination of employees who refused to accept status change); *aff'd in part*, 633 F.2d 1054 (3d Cir. 1980); Heck's, Inc., 166 N.L.R.B. 186 (1967) (coercive interrogation of employees; threatening employees with reprisals for union support; creating impression of surveillance of union activities; discharging employees for union support), *enforcement denied in part on other grounds*, 398 F.2d 337 (4th Cir. 1968), *reversed in part on other grounds*, 395 U.S. 575 (1969); Flomatic Corp., 157 N.L.R.B. 1304 (1964) (pre-election letter urging employees to reject union and promising benefits to employees negotiation directly with employer), *enforcement denied in part on other grounds*, 347 F.2d 74 (2d Cir. 1965).

91. *See* 95 N.L.R.B. at 673. For examples of employer conduct of this type, see Greyhound Terminal, 137 N.L.R.B. 87 (1962) (employer insistence on certification election two days after examining and accepting signed membership cards and acknowledging union as majority representative), *enforced*, 314 F.2d 43 (5th Cir. 1963) (per curiam); Snow & Sons, 134 N.L.R.B. 709 (1961) (employer repudiation of a previously agreed-upon card check indicating union majority), *aff'd*, 308 F.2d 687 (9th Cir. 1962).

92. *See* 95 N.L.R.B. at 673. Employer conduct in this respect primarily consists of an affirmative grant of some benefit or privilege intended to dissuade employees from joining or supporting a union, thereby destroying the collective bargaining process. *See, e.g.*, United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026 (1979) (distribution of a large, unprecedented Christmas bonus only to potential union members immediately after election petition filed), *aff'd in part*, 633 F.2d 1054 (3dCir. 1980); Northwest Engineering Co., 148 N.L.R.B. 1136 (1964) (employer granted economic benefits to employees and promised future benefits if union rejected), *enforced*, 376 F.2d 770 (D.C. Cir. 1967).

closes the possibility of a fair recertification election.[93] In the first three situations, a violation of section 8(a)(5) will be found regardless of the reasonableness or strength of the evidence of the employer's doubt about the union's support because the employer's conduct is per se indicative of bad faith.[94] The fourth situation is governed by the *Stoner* test. In such a case, the reasonable doubt defense is only a prima facie defense to the section 8(a)(5) charge.[95] Once established, the employer's reasonable

93. *See* 123 N.L.R.B. at 1445. In this situation, employer conduct usually takes the form of a unilateral change in wages or working conditions. The crucial focus with respect to conduct of this type is the reason for the action. In contrast to the conduct discussed in note 92, *supra*, where the employer clearly intended to circumvent the collective bargaining process, employer conduct of this type is usually motivated by some independent business purpose. For example, in *Stoner*, the unilateral wage increase was justified on the ground that it was necessary to retain employees in light of industry-wide competitive pressures and wage increases. *See* 123 N.L.R.B. at 1442. Another common example is unilateral action taken after a long impasse in bargaining. *See generally* NLRB v. Cromptom-Highland Mills, Inc., 337 U.S. 217, 224 (1949). In such cases, the employer conduct is not per se indicative of bad faith, even though the action has the effect of undermining union support by suggesting to the employees that they can secure benefits without union representation.

94. *See* 95 N.L.R.B. at 673. *See also* Cavalier Div., 192 N.L.R.B. 290, 291 (1971) (reasonable doubt defense unavailable where employer has committed unfair labor practice), *modified on other grounds and enforced sub nom.* Allied Indus. Workers Local Union No. 289 v. NLRB, 478 F.2d 868 (D.C. Cir. 1973); Motorola, Inc., 94 N.L.R.B. 1163, 1173-74 (1951) (intermediate report), *enforced*, 199 F.2d 82 (9th Cir. 1952), *cert. denied*, 344 U.S. 913 (1953). The question of whether a bargaining order may issue to remedy the section 8(a)(5) violation absent a showing of the incumbent union's majority support is still unanswered. *Compare* Conair Corp. v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983) (no minority bargaining order), *cert. denied*, 104 S. Ct. 3511 (1984) *with* United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980) (minority bargaining order permissible). The Board has recently held that a nonmajority bargaining order is not within its remedial discretion. *See* Gourmet Foods, Inc., 270 N.L.R.B. No. 113, 1983-84 NLRB Dec. (CCH) ¶ 16,352, at 27,912 (April 26, 1984). *See also* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 132-39 (1964); Note, United Dairy Farmers Cooperative Association: *NLRB Bargaining Order in the Absence of a Clear Showing of a Pro-Union Majority*, 80 COLUM. L. REV; 840 (1980); Hunter, Conair: *Minority Bargaining Orders Usher in 1984 at NLRB*, 33 LAB. L.J. 571 (1982).

A "per se" approach was approved by the United States Supreme Court in a related context in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In *Gissel*, the Court evaluated the propriety of a bargaining order as a remedy for an employer's refusal to recognize a union asserting majority support based on employee authorization cards, where the employer also committed independent unfair labor practices which precluded a fair certification election. The Court held that, in order to deter employer misconduct and safeguard employee free choice, a bargaining order may be imposed without inquiry into the majority status of a union in " 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices . . . if they are of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had.' " *Id.* at 613-14 (quoting NLRB v. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967)). *See also Conair*, 721 F.2d at 1392 (Wald, J., dissenting).

95. A prima facie defense is one which, when sufficiently established by a defendant's evidence, entitles the defendant to a verdict in its favor if the opponent does nothing more in the

doubt is sufficient to overcome the majority support presumption.[96] However, because of the impossibility of holding a fair recertification election, the effect of the reasonable doubt defense becomes rebuttable.[97] Thus, the General Counsel may reestablish the majority support element of its section 8(a)(5) case by producing evidence of the union's actual majority support on the refusal to bargain date.[98] If the General Counsel is successful, the employer will be found to have violated section 8(a)(5) in spite of its reasonable doubt.[99] However, if the General Counsel fails to meet its burden, the effect of the employer's reasonable doubt remains unrebutted and, under the *Celanese* rule, the section 8(a)(5) action is conclusively decided in the employer's favor.[100]

Automated Business Systems[101] illustrates the current Board application of the reasonable doubt defense.[102] In *Automated*, the employer refused to bargain with the incumbent union seventeen years after the union's initial certification, basing its withdrawal of recognition on a doubt as to the union's continued majority support.[103] In response, the union filed a section 8(a)(5) charge.[104]

The *Automated* majority first clarified the procedural application of

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way of producing evidence. *See* 9 J. WIGMORE, EVIDENCE § 2494, at 379 (Chadbourn rev. 1981).

96. *See* 123 N.L.R.B. at 1445.

97. *See id.* The effect of the reasonable doubt defense becomes rebuttable in order to resolve the remedy problem created by the employer's unilateral action. Under ordinary Board practice, the incumbent union is effectively decertified upon proof of the reasonable doubt defense, and must resort to a certification election to reestablish its majority. *See supra* notes 88-89 and accompanying text. However, in a *Stoner* situation, an election is not a viable alternative, since the election result has most likely been predetermined against the union by the employer's unilateral conduct. The incumbent union is thus placed in a precarious position. It will most likely be required to establish its majority support to be entitled to a bargaining order, *see* Conair Corp. v. NLRB, 721 F.2d 1355, 1376-85 (D.C. Cir. 1983) (no minority bargaining order even where employer commits pervasive unfair labor practices), *cert. denied*, 104 S. Ct. 3511 (1984), yet there is no impartial means by which it may do so. Accordingly, the Board gives the incumbent union the ability to reestablish its majority in the section 8(a)(5) proceeding.

98. *See* 123 N.L.R.B. at 145.

99. *See id.*

100. *See id.*

101. 205 N.L.R.B. 532 (1973), *enforcement denied on other grounds*, 497 F.2d 262 (6th Cir. 1974).

102. *See* authorities cited *supra* note 88.

103. 205 N.L.R.B. at 532.

104. *Id.* Subsequent to the filing of the section 8(a)(5) charge, the employer and the union agreed to a settlement whereby the majority support issue would be decided in a secret ballot election. *Id.* at 532-33. Shortly before the election, the employer engaged in various unfair labor practices intended to undermine the union's standing with the employees. *Id.* at 533. The election resulted in a vote of 110 to 84 against the union, causing the union to join a section 8(a)(1) charge with the refusal to bargain charge. *Id.*

the reasonable doubt defense.[105] This was done in response to a line of cases applying the *Stoner* test in the absence of unilateral employer action.[106] The majority reasserted the *Celanese* proposition that there are two distinct ways an employer can defend a section 8(a)(5) charge: by affirmatively demonstrating the incumbent union's actual loss of majority support, or by establishing a reasonable doubt as to the union's majority support.[107] The Board majority carefully explained that these defenses are separate legal issues in a section 8(a)(5) proceeding, so that determination of one does not resolve the other.[108] The Board then strongly reaffirmed the *Celanese* rule that an employer's establishment of reasonable doubt constitutes a complete defense to a section 8(a)(5) charge, explaining that when a reasonable doubt as to union majority support has been affirmatively proven, " 'there is no need to ascertain whether the Union

105. The majority opinion expressly reaffirmed the *Celanese* formulation of the reasonable doubt defense as governing in section 8(a)(5) proceedings. *Id.* at 534-35.

106. The *Automated* majority prefaced its discussion of the law governing section 8(a)(5) actions with a detailed critique of the *Stoner* decision. The majority first reiterated the point that all the Board members in *Stoner* agreed that *Celanese* was controlling law. *Id.* at 534. The Board explained that the plurality opinion in *Stoner* resulted from disagreement as to the reach of the *Celanese* rule. *Id.* The majority also argued that the *Stoner* decision should not be accorded much precedential value as it was a "minority rationale [that] has never been the rule of law under which the question of actual loss of union majority has been resolved." *Id.* (footnotes omitted).

The misapplication of the *Stoner* test appears to have had its genesis in Lodges 1746 and 743, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 416 F.2d 809 (D.C. Cir. 1969) (*United Aircraft*), *cert. denied*, 396 U.S. 1058 (1970). In *United Aircraft*, the court stated that under the legal principles controlling section 8(a)(5) litigation:

> [T]he presumption [of majority support] continues [after the certification year] but becomes rebuttable upon a showing of "sufficient evidence to cast serious doubt on the union's continued majority status." At that point, the burden shifts to the General Counsel to prove that . . . the union in fact represented a majority of the employees.

Id. at 811-12 (footnotes omitted) (citing and quoting Stoner Rubber Co., 123 N.L.R.B. 1440, 1445 (1959)). As the *Automated* majority correctly explained, this is a misstatement of the controlling law. The *Stoner* test is only applicable in those situations where the employer has made unilateral changes in addition to its refusal to bargain, which was not the case in *United Aircraft*. 205 N.L.R.B. at 534 & n.12.

The *Automated* majority was also highly critical of the legal analysis in Taft Broadcasting, 201 N.L.R.B. 801 (1973). There, as in *United Aircraft*, the *Stoner* test was applied in a situation where the employer did not act unilaterally. This use of *Stoner* was categorically rejected as dictum and a "major departure from existing law" by the *Automated* Board. 205 N.L.R.B. at 535.

107. 205 N.L.R.B. at 534.

108. *Id.* at 535. Member Kennedy dissented from the majority opinion on this point. He argued that *Stoner* articulated an established principle of law which governs general refusal to bargain actions with respect to the burdens of proof of the parties. *Id.* at 538 (Kennedy, Member, dissenting in part). In essence, Member Kennedy argued that actual union majority support should be the determinative issue in all section 8(a)(5) actions.

in fact represented a majority of the . . . employees.' "[109] Applying these principles, the Board found that the employer had a reasonable basis for its doubt of the union's majority support and therefore concluded that the employer had not violated section 8(a)(5) by refusing to bargain.[110]

ii. court review proceedings

In reviewing Board decisions,[111] a majority of courts of appeals have adopted the view that an employer's reasonable doubt of union majority support is never a complete defense to a section 8(a)(5) charge.[112] Rather, the courts apply the reasonable doubt defense as a prima facie defense in all cases except those where the employer is guilty of an egregious unfair labor practice, in which case the defense is not available.[113]

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109. *Id.* at 534-35 (quoting Celanese Corp. of Am., 95 N.L.R.B. 664, 675 (1951)).

110. *Id.* at 535. The Board nevertheless issued a bargaining order in spite of the employer's reasonable doubt due to the fact that the employer's conduct during the consent election constituted an unfair labor practice within the meaning of section 8(a)(1). *Id.* at 536-37.

111. Board orders in section 8(a)(5) actions are reviewable by the court of appeals in the circuit where the refusal to bargain allegedly occurred upon petition of any party aggrieved by the order. 29 U.S.C. § 160(f) (1982); 29 C.F.R. § 101.14 (1984). The Board itself may also petition the appropriate court of appeals for enforcement of its orders. 29 U.S.C. § 160(e) (1982); 29 C.F.R. § 101.14 (1984). The reviewing court is required to give deference to the Board's findings and reasoning since it is the Board that is charged with the responsibility for ensuring that the underlying goals are achieved. *See* Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35, 42-43 (D.C. Cir. 1980). *See also* 29 U.S.C. § 160(e) (1982) (Board findings of fact are conclusive if supported by substantial evidence); NLRB v. Koenig Iron Works, Inc., 681 F.2d 130, 137 (2d Cir. 1982) ("determination of the sufficiency of the employer's evidence regarding loss of majority status or good faith doubt is a question of fact for the Board which is subject to limited review"). Nonetheless, the reviewing courts may not function simply as the Board's enforcement arm, but must closely examine Board decisions to ensure that the purposes of the Act are being effectuated. *See Peoples Gas*, 629 F.2d at 42-43 (citing NLRB v. Brown, 380 U.S. 278, 291-92 (1965)).

112. *See, e.g.*, Bellwood Gen. Hosp., Inc. v. NLRB, 627 F.2d 98, 104 (7th Cir. 1980); NLRB v. Silver Spur Casino, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); National Car Rental Sys., Inc. v. NLRB, 594 F.2d 1203, 1205-07 (8th Cir. 1979); W & W Steel Co. v. NLRB, 599 F.2d 934, 939 (10th Cir. 1979); Dalewood Rehabilitation Hosp., Inc. v. NLRB, 566 F.2d 77, 80 (9th Cir. 1977); Automated Business Sys. v. NLRB, 497 F.2d 262, 269 (6th Cir. 1974). For cases representative of the minority approach, see NLRB v. Koenig Iron Works, Inc., 681 F.2d 130, 137 (2d Cir. 1982), and NLRB v. Dayton Motels, Inc., 474 F.2d 328, 331-32 (6th Cir. 1973). *See also* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979), where the court observed: "Some courts view these as complete defenses; other courts say they simply shift the burden to the General Counsel. Since the General Counsel usually relies on the [majority support] presumption alone . . . the distinction is primarily academic." *Id.* at 297-98 (footnotes omitted).

113. *See, e.g.*, NLRB v. Carilli, 648 F.2d 1206 (9th Cir. 1981), where the court, in deciding that the reasonable doubt defense was unavailable to an employer who had committed unfair labor practices designed to undermine union support, explained:

> Reasonable doubt as to majority status must only be asserted in good faith and may

Once the employer proves its reasonable doubt, the majority support presumption is deemed rebutted.[114] The burden of proof regarding the incumbent union's majority support is then shifted back to the General Counsel. The General Counsel must prove that the union did in fact represent a majority of the employees on the refusal to bargain date, but it may not resort to the majority support presumption to meet this burden.[115] Instead, the General Counsel must provide *evidence* affirmatively demonstrating the union's majority rule.[116]

Under the court interpretation of the reasonable doubt defense, an employer's affirmative showing of a reasonable doubt of union majority support, standing alone, can never operate to decertify an incumbent union or mandate a Board-conducted election to decide the majority issue.[117] The union is effectively decertified only upon a failure by the General Counsel to carry its burden of proving the union's actual majority.[118]

The Seventh Circuit decision in *Orion Corp. v. NLRB*[119] is typical of the procedural application of the reasonable doubt defense currently espoused by a majority of the courts of appeals.[120] In *Orion*, the employer

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not be raised in the context of an employer's conduct aimed at causing disaffection from the Union . . . . Because [the employer] by its actions precluded a fair determination of the majority status issue, it cannot now rely on the reasonable good faith doubt defense.

Id. at 1216.

See authorities cited *supra* note 112 for examples of the court application of the reasonable doubt defense as a prima facie defense. See *supra* note 95 for a definition of a prima facie defense. See *supra* notes 88-109 for a discussion of the Board's practice in this context.

114. *See* NLRB v. Silver Spur Casino, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); National Car Rental Sys. v. NLRB, 594 F.2d 1203, 1205 (8th Cir. 1979) (citing National Cash Register Co. v. NLRB, 494 F.2d 189, 193-94 (8th Cir. 1974)).

115. *See* NLRB v. Silver Spur Casino, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); National Car Rental Sys. v. NLRB, 594 F.2d 1203, 1205 (8th Cir. 1979). The General Counsel may also overcome the employer's assertion of the reasonable doubt defense by showing that "the refusal to bargain was not predicated upon a good faith and reasonably grounded doubt of the union's continued majority status." *National Car Rental*, 594 F.2d at 1205 (citation omitted).

116. *See* NLRB v. Silver Spur Casino, 623 F.2d 571, 577 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); National Car Rental Sys. v. NLRB, 594 F.2d 1203, 1205 (8th Cir. 1979).

117. Compare the Board approach, discussed *supra* notes 88-89 and accompanying text. *See also* Stoner Rubber Co., 123 N.L.R.B. 1440, 1444 (1959).

118. *See, e.g.*, Bellwood Gen. Hosp. v. NLRB, 627 F.2d 98 (7th Cir. 1980), where the Board order requiring the employer to bargain with the incumbent union was denied enforcement because the employer had affirmatively proved its reasonable doubt of union majority support, and the General Counsel failed to come forward with proof of the union's actual majority support. Thus, the union's claim to be the statutory bargaining representative was rendered nugatory, since it was unenforceable.

119. 515 F.2d 81 (7th Cir. 1975).

120. *See* cases cited *supra* note 112.

appealed a Board decision ordering it to cease and desist from refusing to bargain with the incumbent union.[121] The employer, relying on the language of *Stoner* as the basis of its appeal, argued that it had produced evidence sufficient to cast "serious doubt" on the union's majority support, thereby making out a prima facie defense of reasonable doubt and shifting the burden of proving actual majority support back to the General Counsel.[122] The Board in turn argued that the evidence produced by the employer was insufficient to meet its burden of proving the reasonable doubt defense.[123]

In response to these arguments, the *Orion* court framed the central legal issue in the case as the weight and effect to be given to the majority support presumption in section 8(a)(5) proceedings.[124] The court contrasted what it perceived to be the inconsistent treatment accorded to the reasonable doubt defense by the Board in *Celanese* and *Stoner* and determined that the *Celanese* and *Stoner* decisions delineated two independent approaches to the defense of a section 8(a)(5) charge:

> We conclude that the two versions of the applicable standard . . . are not inconsistent. If the employer can produce evidence proving that the union lacked a majority on the date in question, the presumption of continued majority has been rebutted and an absolute defense to a section 8(a)(5) complaint based on refusal to bargain established . . . . Alternatively, if the employer produces evidence of the existence of a good faith doubt as to the continuing majority status, the presumption is likewise rebutted and the burden shifts to the General Counsel to prove the union did represent a majority on the date in question. The "good faith doubt" must satisfy an objective test . . . [and] [t]he evidence must qualify as "clear, cogent and convincing."[125]

Ultimately, the court found that the Board's conclusion that the employer had failed to meet either of these tests was supported by substantial evidence, and accordingly enforced the Board's cease and desist order.[126]

As evidenced by the *Orion* decision, the courts have diverged from

121. 515 F.2d at 82-83.
122. *Id.* at 85.
123. *Id.*
124. *Id.* at 84. In order to decide this issue, the court deemed it necessary to reconcile the divergent treatments accorded the allocation and measure of the burden of proof in refusal to bargain cases. *Id.*
125. *Id.* at 85 (citations omitted).
126. *Id.* at 85-86.

the Board standards governing the reasonable doubt defense set out in the *Celanese* and *Stoner* decisions.[127] The scope of the *Stoner* decision has been greatly expanded under the court approach. Upon affirmative proof of reasonable doubt by an employer, the burden of proving union majority is shifted back to the General Counsel in *all* cases, even those lacking employer conduct foreclosing a new election.[128] Likewise, the courts have severely limited the effect of the *Celanese* test by holding that an employer can completely defend a section 8(a)(5) charge only by proving the union's actual loss of majority.[129]

c. evidence of reasonable doubt

The reasonable doubt defense was viewed in its initial formulation as focusing on two related considerations, the subjective state of mind or "good faith" of an employer in refusing to bargain, and the objective factors underlying the employer's decision not to bargain.[130] This analy-

127. See *supra* notes 60-100 for a discussion of the *Celanese* and *Stoner* decisions and the Board standards governing the reasonable doubt defense.

The courts are arguably outside the permissible scope of their judicial review in modifying the application of the reasonable doubt defense. The courts should only be reviewing the Board's findings of fact to decide whether they are supported by substantial evidence and the Board's conclusions of law to see if they are consistent with the policies of the Act. *See supra* note 111. The courts should not review or modify the legal standards created by the Board, except to the extent that these standards are inconsistent with the requirements of the Act, since it is the Board that is charged with the responsibility of creating national labor policy. *See* NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957), (*Buffalo Linen*) (Congress committed the difficult and delicate responsibility of effectuating national labor policy to the Board, subject to limited judicial review); Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35, 44 (D.C. Cir. 1980) ("[Although] a clearcut, objective standard governing the conditions under which an employer will be permitted to challenge a Union's status would seem preferable to the present procedure and standards . . . we must grapple with the standard the Board now applies.").

128. *See* 515 F.2d at 85.

129. *See id.*.

130. One commentator has referred to this analysis as the Board's "dual test" for dealing with the majority status issue. *See* Seger, *supra* note 84, at 979-90. The "dual test" interpretation of the reasonable doubt defense appears to have originated from the Board's language in Celanese Corp. of Am., 95 N.L.R.B. 664 (1951), where the Board stated: "The answer to the question whether the Board stated: "The answer to the question whether the [employer] violated Section 8(a)(5) . . . depends . . . upon whether *the Employer in good faith* believed that the Union no longer represented the majority of the employees." *Id.* at 671 (emphasis in original). *See also* Seger, *supra* note 84, at 980-81. However, as later language in the *Celanese* opinion and subsequent interpretations of the reasonable doubt defense have made clear, the Board's intent in framing the issue as the employer's "good faith" was that the majority issue be raised only if there is some reasonable, objective basis for believing the union has lost its majority, and only if the employer does not raise the majority issue in the context of unfair labor practices. *See Celanese*, 95 N.L.R.B. at 673. *See also* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 299-300 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

sis has been rejected in recent years,[131] largely as a result of the United States Supreme Court decision in *NLRB v. Gissel Packing Co.*[132] In *Gissel*, the Court eliminated employer motivation as a factor to be considered in evaluating the lawfulness of the employer's refusal to initially recognize a union.[133] Under the current evidentiary interpretation of the reasonable doubt defense, an employer may lawfully refuse to bargain with an incumbent union if the employer can prove, by clear and convincing evidence, that it holds a reasonable doubt of the union's majority support which is supported by objective considerations.[134] The "good faith" criterion of the old reasonable doubt test is inferred from the employer's knowledge of objective grounds for its refusal to bargain.[135]

The evidentiary test of an employer's evidence of reasonable doubt is a cumulative one.[136] No single factor is generally sufficient to either establish or defeat the reasonable doubt defense.[137] Rather, the defense requires a judicial evaluation of all indicia relevant to union support. Each evidentiary factor must be accorded some inferential weight, and then the cumulative inferential weight of all the employer's evidence must be considered against the force and policy basis of the majority support presumption.[138]

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131. *See, e.g.*, NLRB v. Tahoe Nugget Inc., 584 F.2d 293, 299 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

132. 395 U.S. 575 (1969).

133. *Id.* at 694. *See also* NLRB v. Tahoe Nugget Inc., 584 F.2d 293, 299-300 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

134. *See* NLRB v. Silver Spur Casino, 623 F.2d 571, 579 (9th Cir. 1980), *cert. denied* 451 U.S. 906 (1981); NLRB v. Tahoe Nugget Inc., 584 F.2d 293, 297-300 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

The clear and convincing evidence burden requires a party to prove that the truth of the contention in question is "highly probable." *See* McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242 (1944). This place upon the proponent of the contention the burden of inducing persuasion to a relatively high degree. *Id.* at 253. In section 8(a)(5) litigation, the clear and convincing evidence burden attached to the reasonable doubt defense means that the employer must present evidence from which it may be unequivocally inferred that union support has declined to a minority. *See* NLRB v. Silver Spur Casino, 623 F.2d 571, 579 (9th Cir. 1980) (discussing *Tahoe Nugget* and Sahara-Tahoe Corp. v. NLRB, 581 F.2d 767 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979)).

135. *See* NLRB v. Tahoe Nugget Inc., 584 F.2d 293, 299 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). *See also supra* note 130.

136. *See* NLRB v. Tahoe Nugget Inc., 584 F.2d 293, 305 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

137. *See id.*

138. *See id.* The majority support presumption is a procedural device designed to promote the policies of the Act. *See id.* at 303. *See also supra* notes 32-35 and accompanying text. Thus, in evaluating the inferential weight of an employer's evidence against the force of the majority support presumption, the Board and the courts should be evaluating the circumstances surrounding an incumbent union's representation in order to determine whether the interests of the employees and the policies of the Act would be better served by holding a secret

In the economic strike context, employer evidence of reasonable doubt generally falls into one of four categories: permanent replacement of striking workers; striker abandonment of the strike; union admissions; and employer-union bargaining history.[139] This evidence may be relevant to union support either during the pendency of the economic strike, or at the conclusion of the strike.[140] Each of these evidentiary categories will be discussed in turn below.

i. permanent replacement of striking workers

Evidence of the permanent replacement of some or all striking union members with nonunion workers[141] is offered by employers to show that the support for the striking union was numerically diluted to such an extent that it was reasonable to believe the union no longer retained its majority status.[142] In evaluating such evidence the Board uses a pre-

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election to ascertain the employee's preference or by requiring the employer to resume bargaining with the incumbent union.

In evaluating employer evidence, the Board and the courts are guided by four evidentiary considerations:

(1) Evidence manifesting declining union support is more pertinent than evidence showing union support is low;
(2) In gauging union support, the employer is often without direct evidence of minority status, and therefore he may properly rely on reasonable inferences from the available information. But that does not justify wishful speculation on the employer's part;
(3) When information signifying lack of union support would be readily available if union support had eroded an insubstantial showing by the employer may be convincing proof the union has majority support;
(4) When the employer has consistently demonstrated impartiality regarding employee representation, his decision may be some evidence that the grounds relied on are reasonable.

NLRB v. Tahoe Nugget Inc., 584 F.2d 293, 305 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

139. For a general discussion of employer evidence of reasonable doubt, see Seger, *supra* note 84, at 990-99.

140. *See id.* at 991-92.

141. *See supra* note 8.

142. At the outset, it is important to understand how the bargaining unit is determined in economic strike cases when striking union members are permanently replaced with nonunion workers. During the pendency of the economic strike, the replaced striking union members retain their status as employees. *See* 29 U.S.C. § 152(3) (1982); NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967). Thus, the permanent replacement of economic strikers is in effect an expansion of the employer's workforce. For purposes of determining union support, the bargaining unit is defined as the number of pre-strike workers still employed on the refusal to bargain date plus the number of permanent striker replacements employed as of that date. *See* C.H. Guenther & Sons, Inc. v. NLRB, 427 F.2d 983, 987 (5th Cir.) (economic strikers are included in the bargaining unit when determining whether a union continues to enjoy majority support), *cert. denied*, 400 U.S. 942 (1970). *See also* 29 U.S.C. § 159(c)(3) (1982) (employees engaged in an economic strike are eligible to vote in union elections within 12 months of commencement of strike); R. GORMAN, *supra* note 2, at 113. By way of example, assume a

sumption known as the striker replacement presumption. This presumption provides that replacements for striking workers are presumed to support the striking union in the same ratio as those they have replaced.[143] The striker replacement presumption is a rebuttable presumption which may be overcome by a showing of an extreme conflict of interest between the striking union members and the striker replacements[144] or evidence that the replacements rejected the union as their bargaining representative.[145]

The historical development of the striker replacement presumption demonstrates the confusion and controversy that has surrounded the presumption. In its early decisions, the Board espoused the view that, unless the striker replacements in some way expressed a desire to be represented by the striking union, they were presumed not to support the union and could not be counted toward the union majority.[146]

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pre-strike workforce of 10 union employees. Assume further that all 10 union members engage in an economic strike, and the employer replaces them with 10 nonunion replacements. The appropriate bargaining unit in this example would be composed of all 20 employees, evenly divided between the 10 striking union supporters and the 10 nonunion striker replacements.

143. *See* Pennco, Inc., 250 N.L.R.B. 716, 717-18 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); Windham Community Memorial Hosp., 230 N.L.R.B. 1070, 1070 (1977), *enforced*, 577 F.2d 805 (2d Cir. 1978).

144. For example, in IT Services, 263 N.L.R.B. 1183 (1982), the striker replacement presumption was deemed rebutted where the striking union consistently demanded that all striker replacements be discharged regardless of the availability of jobs at the conclusion of the strike. *Id.* at 1186. In addition, there was evidence of extensive picket line violence. *Id.* at 1186-88. *See also* Whisper Soft Mills, Inc. v. NLRB, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 11,233, at 23,063 (9th Cir. October 31, 1984) (striker replacement presumption found rebutted where union intractably demanded that all strikers be reinstated with a resultant loss of employment for the striker replacements); Beacon Upholstery Co., 226 N.L.R.B. 1360, 1368 (1976) (striker replacement presumption rebutted by fact that all striker replacements would lose jobs if discharged economic strikers were reinstated). The presumption may not be rebutted by a showing that the striker replacements had to cross a picket line to work. *See generally* Pennco Inc., 250 N.L.R.B. 716, 717 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982).

If the employer is able to make the requisite showing, the striker replacement presumption drops out of the section 8(a)(5) action and the employer will be allowed to introduce evidence of the numerical breakdown of its workforce, unadjusted by the presumption, to support the reasonable doubt defense. *See, e.g.*, IT Services, 263 N.L.R.B. at 1188.

145. *See, e.g.*, IT Services, 263 N.L.R.B. 1183, 1186-88 (1982); Pennco Inc., 250 N.L.R.B. 716, 718 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982).

146. *See* Titan Metal Mfg. Co., 135 N.L.R.B. 196 (1962); Jackson Mfg. Co., 129 N.L.R.B. 460 (1960).

About this same time, another important presumption, termed the "new hire presumption" was created by the Board. This presumption provides that employees hired in a normal turnover situation are presumed to support the incumbent union in the same ratio as the workers they have replaced. *See* Laystrom Mfg. Co., 151 N.L.R.B. 1482, 1484 (1965), *enforced*, 359 F.2d 799 (7th Cir. 1966). In *Laystrom*, the incumbent union had not engaged in an eco-

In 1975, the Board inexplicably changed its position with its decision in *James W. Whitfield*.[147] In *Whitfield*, the Board rejected the employer's reasonable doubt defense based on the permanent replacement of 75% of its workforce, stating that "it is a well-settled principle that new employees are presumed to support the union in the same ratio as those they have replaced."[148] In creating this new rule, the Board did not overrule or otherwise explain its earlier contrary position.[149]

Two decisions subsequent to *Whitfield* added further confusion to this already unclear line of precedent. In *Arkay Packaging Co.*,[150] the Board accepted the employer's assertion of the reasonable doubt defense based on the permanent replacement of eleven of eighteen strikers, stating that:

> [The] presumption has been held to obtain in the normal turnover situation . . . [b]ut, in the strike situation present in this 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.[151]

The decision in *Windham Community Memorial Hospital*[152] represents the current Board position regarding the striker replacement presumption.[153] In *Windham*, the Board reasserted as a "general rule" the principle that new employees, including striker replacements, are presumed to support the striking union in the same ratio as the workers they

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nomic strike prior to the employer's refusal to bargain. Thus, the new hire presumption represents a policy balance applicable only in a normal attrition context.

147. 220 N.L.R.B. 507 (1975). In *Whitfield*, all four employees comprising the bargaining unit engaged in an economic strike. The employer hired three new employees to replace the striking workers, filed a decertification petition, and refused to bargain further with the union.

148. *Id.* at 509 (citing Laystrom Mfg. Co., 151 N.L.R.B. 1482 (1965)).

149. The Board's opinion in *Whitfield* is unclear with respect to whether the extension of the new hire presumption to permanent striker replacements was a misapplication of precedent or a conscious policy decision. The absence of any discussion of the policy underlying the *Laystrom* decision and any attempt to explain or distinguish *Titan Metal* and *Jackson* renders the *Whitfield* conclusion questionable.

150. 227 N.L.R.B. 397 (1976), *aff'd sub nom.* New York Printing Pressmen & Offset Workers Union v. NLRB, 575 F.2d 1045 (2d Cir. 1978).

151. *Id.* at 397-98 (footnote omitted). The voting pattern of Board member Penello in these striker replacement presumption cases is illustrative of the difficulty the Board has had in grappling with the presumption. In *Whitfield*, Member Penello voted in favor of applying the striker replacement presumption. However, in *Arkay*, he voted to reject the presumption. Finally, in Windham Community Memorial Hosp., 230 N.L.R.B. 1070 (1977), he again supported the application of the presumption.

152. 230 N.L.R.B. 1070 (1977), *enforced*, 577 F.2d 805 (2d Cir. 1978).

153. *See, e.g.*, Pennco, Inc., 250 N.L.R.B. 716 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982).

have replaced.[154] *Arkay* was categorized as a limited exception to this general rule, applicable only in the unique circumstance where the union apparently abandons the bargaining unit.[155]

The courts of appeals have generally been unwilling to approve the Board's use of the striker replacement presumption. At the present time, the use of the presumption has been rejected by the First,[156] Fifth,[157] Sixth,[158] Eighth,[159] and Ninth Circuits.[160] Second Circuit opinions suggest that that circuit also disapproves of the use of the presumption.[161]

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154. 230 N.L.R.B. at 1070.

155. *Id.*

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

157. *See* NLRB v. Randle-Eastern Ambulance Serv., Inc., 584 F.2d 720, 728 (5th Cir. 1978).

158. NLRB v. Pennco, Inc., 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982). Justice White, joined by Justices Blackmun and Rehnquist, dissented from the denial of the writ of certiorari in *Pennco*, stating:

> The questions of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements would be presumed to oppose the certified union or favor the certified union . . . are of obvious significance to national labor policy. The need for a uniform approach to these questions is equally obvious.

459 U.S. at 996 (White, J., dissenting).

159. *See* National Car Rental Sys., Inc. v. NLRB, 594 F.2d 1203, 1206 (8th Cir. 1979). The discussion in *National Car Rental* is typical of the arguments advanced by the courts and legal commentators in support of rejection of the presumption. In *National Car Rental*, a Board-certified union comprised of 10 workers engaged in an economic strike in an attempt to force their employer into contract concessions. During the pendency of the strike, the employer permanently replaced the striking workers with 10 nonunion employees. The employer then refused to conduct further contract negotiations, basing its decision on a reasonable doubt about union majority. On review, the Eighth Circuit was highly critical of the striker replacement presumption, stating that:

> If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the 10 new employees favored representation by the union even though they had crossed the union's picket lines to apply for work and to report to work each day . . . . This presumption . . . is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment.

Id. at 1206. The court concluded that, based on the evidence of the permanent replacement of all the striking workers, the employer had affirmatively established its reasonable doubt defense and was therefore not guilty of a section 8(a)(5) violation. *Id.* at 1207. In reaching this conclusion, the court explained: "[T]he presumption that new employees hired in the normal employee turnover situation support the union in the same ratio as those they have replaced . . . does not apply where the 'turnover' results from the hiring of all new permanent replacements for all striking employees." *Id.* at 1206. *See also* R. GORMAN, *supra*, note 2, at 112 ("if a new hire agrees to serve as a replacement for a striker . . . it is generally assumed that he does not support the Union and that he ought not to be counted toward a Union majority"); Note, *The Strikers' Replacements Presumption and an Employer's Duty to Bargain with the Incumbent Union*, 21 B.C.L. REV. 455 (1980).

160. *See* Whisper Soft Mills, Inc. v. NLRB, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 11,233, at 23,059 (9th Cir. October 31, 1984).

161. *See* NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 812-13 (2d Cir.

However, despite this widespread disapproval of the use of the striker replacement presumption, the circuit courts have been unwilling to adopt an opposite presumption that striker replacements do not support the striking unions.[162]

Evidence of the permanent replacement of striking workers, standing alone, is presently an insufficient basis for an employer's reasonable doubt of union majority support. Under current Board practice, such evidence is accorded no inferential weight regarding the union's loss of support.[163] To the contrary, the Board's continued application of the striker replacement presumption actually renders the evidence supportive of the union's claim to majority support.[164] The courts of appeals take a more moderate approach. Permanent striker replacements are not presumed to either support or reject the incumbent union.[165] Rather, the striker replacements are viewed as being neutral with respect to union representation.[166] In order for the evidence of replacement of union members to have any relevance to the reasonable doubt defense, it must be proffered in conjunction with other evidence from which the inference can be drawn that the striker replacements do not desire union representation.[167]

1978); New York Printing Pressmen & Offset Workers Union v. NLRB, 575 F.2d 1045, 1048 (2d Cir. 1978).

162. *See, e.g.*, NLRB v. Pennco, Inc., 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 812 (2d Cir. 1978) (the presumption that no permanent striker replacement supports the union is equally, if not more, assailable, than the Board striker replacement presumption).

163. *See, e.g.*, Pennco, Inc., 250 N.L.R.B. 716 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982).

164. *See id.*.

165. *See, e.g.*, NLRB v. Pennco, Inc., 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); NLRB v. Windham Community Memorial Hosp., 577 F.2d 805, 812 (2d Cir. 1978).

At present, only the Eighth Circuit has deviated from this position. *See* Vulcan Hart Corp. v. NLRB, 718 F.2d 269, 276 (8th Cir. 1983) (In dictum, court stated "it may be reasonable to presume that . . . replacements did not support the Union."); National Car Rental Sys., Inc. v. NLRB, 594 F.2d 1203 (8th Cir. 1979) (court found employer had reasonably grounded doubt about union support based solely on the permanent replacement of striking union members).

166. *See* NLRB v. Pennco, Inc., 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982).

167. *See* Whisper Soft Mills, Inc. v. NLRB, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 11,233, at 23,062-63 (9th Cir. October 31, 1984) (permanent replacement of striking workers found to support employer's reasonable doubt where employer offered evidence of permanent replacement in connection with evidence that union intractably demanded strikers be reinstated at expense of replacements); Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1111 (1st Cir. 1981) (permanent replacements held to not support union where there was additional evidence that a large number of replacements testified they wanted nothing to do with union).

Although the evidence an employer must introduce in order to support a reasonable

ii. striker abandonment

Evidence that a number of striking union members have abandoned a strike and crossed a picket line to return to work is frequently offered by employers in an attempt to show that those employees have repudiated the union and therefore should not be counted toward the union majority. The Board, with court approval, has consistently rejected such claims, holding that "there is no presumption that an employee's return to work during a strike demonstrates a rejection of the union as his bargaining representative."[168] The rationale underlying this rule is that the employee's conduct is ambiguous with respect to union support, since it may mean no more than the employee was forced to return to work for financial reasons, or that the employee disapproves of the particular strike, but would support other union activities.[169] Thus, absent some supporting evidence clearly establishing the relevance of the employee's return to work to his union sympathy, such evidence is an insufficient basis upon which to ground a doubt as to union majority support.[170]

iii. union admissions

Union admissions regardings its level of support may take one of two forms: express admissions or tacit admissions by conduct. A union's express admission that it lacks majority support will always provide a sufficient basis for an employer's doubt about the union's continued majority status.[171] This view was first articulated by the Board in its

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doubt based on the replacement of strikers is very similar to the evidence necessary to rebut the striker replacement presumption, there is one crucial procedural distinction between the Board and court approaches. Under the courts' interpretation of the representation preference of striker replacements, neither the union nor the employer is forced to bear the risk of nonpersuasion if it is unable to rebut either the striker replacement presumption or an opposite presumption. In this way, the prestrike status quo is maintained, and any party wishing to use the union preference of the replacements as evidence must introduce affirmative proof of that preference.

168. *See* Frick Co., 175 N.L.R.B. 233, 233 n.1 (1969), *enforced*, 423 F.2d 1327 (3d Cir. 1970). *See also* Pennco, Inc., 250 N.L.R.B. 716, 717-18 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); Strange & Lindsey Beverages, Inc., 219 N.L.R.B. 1200, 1201 (1975); King Radio Corp., 208 N.L.R.B. 578, 583 (1974); Cavalier Div., 192 N.L.R.B. 290, 291 (1971), *modified on other grounds and enforced sub nom.* Allied Indus. Workers Local Union No. 268 v. NLRB, 478 F.2d 868 (D.C.Cir. 1973).

169. *See* Pennco, Inc., 250 N.L.R.B. 716, 718 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982).

170. *See id.*.

171. *See, e.g.*, Lodges 1746 & 743, Int'l Ass'n of Mach. & Aerospace Workers v. NLRB, 416 F.2d 809, 813 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970); Upper Miss. Towing Corp., 246 N.L.R.B. 262, 263 (1979); Universal Life Ins. Co., 169 N.L.R.B. 1118, 1119 (1968). *Compare* Harvey's Wagon Wheel, Inc., 236 N.L.R.B. 1670 (1978) (admission by union's chief

decision in *Universal Life Insurance Co.*[172] In *Universal Life*, the union's chief negotiator, in a conversation with the employer's attorney during an economic strike in which sixty-four of the ninety-nine striking union members were permanently replaced, conceded that the union no longer represented a majority of the workers.[173] The Board held that, in light of this admission on the part of the union, the employer's doubt as to the union's representative status was reasonable.[174] Accordingly, the mployer's withdrawal of recognition was not an unfair labor practice under section 8(a)(5).[175]

Union conduct which supports a reasonable inference that the union has implicitly acknowledged that it lacks majority support may also provide a sufficient basis for the reasonable doubt defense. Such "tacit admissions"[176] commonly fall into three categories: (1) union refusal to submit to an election to resolve the majority support issue; (2) failure of the union to object to the permanent replacement of its striking members, or to otherwise enforce the provisions of a collective bargaining agreement; or (3) questionable or unusual behavior by the union.

It is difficult to formulate a general rule as to whether a union's refusal to submit to an election to resolve questions about its level of support is sufficient to support an employer's reasonable doubt, since the analysis of the union's conduct is highly dependent on the factual context involved. In *NLRB v. Laystrom Manufacturing Co.*,[177] the court found that the union's refusal to establish its majority through a secret election provided a reasonable basis for the employer's belief that the union no longer represented a majority of the employees, explaining: "The Union's refusal, when challenged, to submit the issue to an election where each employee would be permitted in secrecy to make his choice, leads to the inescapable inference that it . . . was doubtful and fearful of the result."[178] In contrast, in *NLRB v. Cornell of California, Inc.*,[179] the

executive officer that "union was in trouble" held insufficient basis for reasonable doubt since admission made three years before refusal to bargain).

In most section 8(a)(5) cases, a union admission of lack of support will be dispositive of the refusal to bargain charge. *See* United Supermarkets, Inc., 214 N.L.R.B. 958, 962 (1974) (Kennedy, Member, dissenting).

172. 169 N.L.R.B. 1118 (1968).

173. *Id.* at 1119.

174. *Id.*

175. *Id.*

176. A tacit admission or admission by conduct is generally defined as conduct of a party circumstantially inconsistent with the claim it asserts in a legal action. *See* 4 WIGMORE, EVIDENCE § 1048, at 2-7 (Chadbourn rev. 1972). In the context of a section 8(a)(5) proceeding, a union's tacit admission is conduct by the union inconsistent with its claim of majority support.

177. 359 F.2d 799 (7th Cir. 1966).

178. *Id.* at 801. The court emphasized that on a previous occasion, the union had con-

court held that, under the facts presented, the union's unwillingness to agree to an election did not support a reasonable doubt about the union's continuing majority status.[180] In reaching this result, the court explained that two contradictory inferences may be drawn from the union's refusal: the refusal can be interpreted to mean that the union doubts its majority support, or it can be interpreted to mean that the union is unaware or does not believe that the employer has a good faith doubt and therefore feels no obligation to participate in the burdensome election procedure.[181] The court noted that in *Laystrom* the union had resolved past majority support questions by agreeing to an election rather than by attempting to avoid the election procedure, and had been informed of the employer's doubts about its majority prior to the election request.[182] In *Cornell*, however, there was no past union practice of resorting to the election procedure to resolve the majority issue, and the employer's doubt was not communicated to the union until long after the election request.[183] Based on this distinction, the court concluded that no weight should be given to the union's refusal.[184]

As the court's discussion in *Cornell* indicates, a union's mere refusal to consent to an election is normally viewed as ambiguous with respect to the union's state of mind regarding its own level of support. In order to remove this ambiguity and raise the inference that the union's refusal results from a doubt about its majority, two additional facts must be shown: some past union practice inconsistent with the present refusal,[185] and a communication by the employer of its doubt about the union's majority support prior to the election request.[186] Absent a showing of either of these elements, the union's conduct remains ambiguous and will

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sented to an election to resolve a majority question, and if it had again agreed to do so, extended litigation of the issue would probably have been avoided. *Id.* The court also emphasized that the parties had enjoyed a harmonious and friendly bargaining relationship for four years prior to the refusal to bargain. *Id.* For further discussion of evidence of prior bargaining history, see *infra* notes 193-97 and accompanying text.

179. 577 F.2d 513 (9th Cir. 1978).

180. *Id.* at 517-18.

181. *Id.*

182. *Id.* at 518. *See also supra* note 178.

183. 577 F.2d at 518.

184. *Id.*

185. The *Laystrom* and *Cornell* opinions leave unanswered the question of what type of past practices are sufficient to satisfy this requirement. In *Cornell*, the court indicated that the past practices must be sufficient to "fuel the inference that the union doubted its support." *Id.* Clearly, the requirement is satisfied if, as in *Laystrom*, the union had previously submitted to an election. It remains to be seen whether this is the exclusive means to satisfy the requirement, or whether other practices, such as the union's prompt resolution of past majority questions through nonelection means, will suffice.

186. *See* 577 F.2d at 518.

be insufficient to support the reasonable doubt defense.[187]

The failure of a union to respond to the permanent replacement of its striking members or to enforce the provisions of a collective bargaining agreement will provide a reasonable basis for an employer's doubt about the union's majority status in the appropriate case.[188] The theory underling this evidentiary treatment is that, because collective bargaining agreements are viewed with great importance by organized labor, inactivity by the union with respect to such agreements in effect amounts to an abandonment of the employees.[189]

The most common form of unusual union behavior asserted by employees in support of the reasonable doubt defense is a sudden and unexplained change in the union's bargaining position.[190] The inference sought to be drawn from such conduct is that the union's actions are based on a lack of confidence in its level of support. The Board and the courts hold that since there may be various plausible explanations for the union's behavior, union capitulation alone does not support a reasonable inference that the union no longer possessed majority support.[191] As explained by the District of Columbia Circuit:

> [Such conduct] is not a clear enough indication that the Union is in serious trouble with employees to permit the company to terminate bargaining and disrupt an established relationship.

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187. The imposition of this dual requirement is consistent with the general evidentiary principal that a party's refusal to produce evidence is relevant to its state of mind only if, under the circumstances, a reasonable party would have produced the evidence. *See generally* 2 WIGMORE, EVIDENCE § 285, at 192-99 (Chadbourn rev. 1972). The *Cornell* factors insure that the union is fully aware of the circumstances surrounding its refusal to consent to an election and that, under similar circumstances in the past, the union deemed it reasonable to consent to the selection.

188. *See, e.g.*, Arkay Packaging Corp., 277 N.L.R.B. 397 (1976), *aff'd sub nom.* New York Printing Pressman & Offset Workers Union v. NLRB, 575 F.2d 1045 (2d Cir. 1978). *Compare* Kuno Steel Prod. Corp., 252 N.L.R.B. 904 (1980), *enforced sub nom.* NLRB v. Koenig Iron Works, Inc., 681 F.2d 130 (2d Cir. 1982), where the Board explained that neither a mere lapse of time nor lack of picketing will justify an employer's reasonable doubt. This suggests that in order for union inactivity to support a reasonable doubt, it must be inactivity in the face of affirmative unlawful action on the part of the employer.

189. *See* 575 F.2d at 1047.

190. In the usual case the union, without explanation, either fails to follow through on some threatened action or eagerly agrees to previously contraverted employer demands, thereby creating the impression that it would sign almost any agreement proposed by the employer.

191. *See* Peoples Gas Sys., Inc., 238 N.L.R.B. 1008 (1978), *aff'd in part*, 629 F.2d 35 (D.C. Cir. 1980).

In *Peoples Gas*, the Board explained that the union capitulation may be due to a desire to avoid risking loss of its majority support by pursuing an unsuccessful strike action or to a feeling that union members would not support a strike action. Thus, the union behavior may in fact be a method of conserving strength rather than a confession of loss of support. *Id.* at 1010 & n.12.

> In the heat of collective bargaining, tactics are sometimes employed which many might regard as bizarre, and may include deliberate attempts to mislead and confuse the opponent. Permitting what is essentially a subjective and speculative interpretation of the probable meaning of particular behavior to suffice as "objective" indicia of lack of majority support would give too little weight to industrial stability, and would result in repeated disruption of collective bargaining at its most critical point, during the negotiation of new contracts.[192]

This passage summarizes the general treatment accorded to employer assertions that its doubt about union support was reasonable because the union tacitly admitted by its conduct that it doubted its own majority support. Since there may be more than one reasonable inference to be drawn from the union's conduct, an employer may not lawfully withdraw recognition from an incumbent union solely on the basis of such ambiguous conduct. Rather, absent some countervailing evidence, the Board and the courts will draw the inference most favorable to the union and will find the employer's doubt about union support to be unreasonable.

iv. bargaining history

At one time, evidence of a long and harmonious bargaining relationship between an employer and an incumbent union was considered crucial in determining whether the employer's withdrawal of recognition violated section 8(a)(5).[193] The rationale behind this position was that a long history of amicable relations between the employer and the union negated any inference of lack of good faith that might arise from the employer's refusal to bargain.[194] In recent years, however, the importance of such evidence has been diminished, largely as a result of the current emphasis placed on the objective factors underlying an employer's decision not to bargain.[195] Nonetheless, evidence of a good bargaining relationship is still considered by the Board and the courts in

192. 629 F.2d at 44.

193. *See, e.g.*, NLRB v. Gallaro, 419 F.2d 97, 102 (2d Cir. 1969); NLRB v. Laystrom Mfg. Co., 359 F.2d 799, 800-01 (7th Cir. 1966).

194. *See* NLRB v. Laystrom Mfg. Co., 359 F.2d 779, 801 (7th Cir. 1969) (no basis for reasonable inference that employer "abruptly changed its course of conduct and for the first time acted in bad faith" in raising the majority issue where there was a long history of good faith dealing on the part of the employer).

195. *See* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 307-08 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). For a discussion of the current emphasis on objective indicia of union support, see *supra* notes 130-35 and accompanying text.

some cases. Although such evidence is insufficient, standing alone, to justify a refusal to bargain, the evidence is relevant in the cumulative evaluation of employer evidence, since it may circumstantially show the employer's decision not to bargain was impartial and, therefore, reasonable.[196]

Evidence of the history of the employee-union relationship has greater probative significance with respect to the reasonable doubt defense. An employer may be able to dispel ambiguities in employee or union conduct by pointing to past instances of employee-led challenges to the incumbent union, or by showing that the union has neglected employee interests in the past.[197] Such evidence, while again not sufficient standing alone to justify a refusal to bargain, may increase the probative weight of the evidence proffered by the employer, and show that, under the totality of the circumstances, the employer's doubt about the union's majority status was reasonable.

III. PROBLEMS WITH CURRENT SECTION 8(a)(5) PROCEDURE

A. Federal Labor Policy

The principal problem with the section 8(a)(5) procedure currently employed by the Board and the courts is that it operates to frustrate, rather than protect, the employees' right to designate a bargaining representative of their own choosing. Employee freedom of choice is at the heart of federal labor policy.[198] The National Labor Relations Act is designed to insure industrial peace and encourage stability in bargaining relationships *through the exercise of employee freedom of choice.*[199]

196. *See generally* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 308 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

197. *See generally id.*

198. *See* Conair Corp. v. NLRB, 721 F.2d 1355, 1381-83 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 3511 (1984).

199. This objective is set forth in section one of the Act:

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

29 U.S.C. § 151 (1982). One commentator has observed that if employee freedom of choice was not the paramount goal of the Act, the Board would be free to achieve industrial stability through the ex parte creation of bargaining relationships or the imposition of bargaining contracts. *See* Note, *NLRB Determination of Incumbent Union's Majority Status*, 54 IND. L.J. 651, 659 (1979). *See also* H.R. REP. No. 245, 80th Cong., 1st Sess. 27 (1947) (Board is prevented from compelling employees to exercise section 7 rights against their will).

Under the Act, employees are guaranteed "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."[200] The Act also protects an employee's right to refrain from participating in collective bargaining activities.[201]

Current section 8(a)(5) procedure upsets the policy balance of the Act. Instead of *promoting* industrial stability through the exercise of employee free choice, the current procedure *imposes* industrial stability by preserving the representative status quo of the incumbent union.[202] Industrial stability is thus maximized despite the fact that the ability of the employees to express their representative preference may be frustrated.[203]

This fundamental flaw in section 8(a)(5) procedure results from the excessive weight accorded the majority support presumption. The weight and force of the majority support presumption is in effect determined by the amount of employer evidence necessary to overcome the presumption.[204] In section 8(a)(5) proceedings, evidence supporting a reasonable doubt of union majority support offered by employers is narrowly evaluated.[205] Although the evidentiary test for the reasonable doubt defense is stated to be cumulative,[206] the Board and the courts frequently ignore the combined effect of employer evidence of reasonable

200. 29 U.S.C. § 157 (1982) (section 7).

201. Section 7 also provides that employees "shall also have the right to refrain from any or all [concerted] activities." 29 U.S.C. § 157 (1982).

202. In NLRB v. Tahoe Nugget, Inc., 584 F.2d 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979), the court candidly admitted that this was the course being followed, stating: "By preserving the status quo, the [majority support] presumption ensures the Act's most valued objective: industrial peace." *Id.* at 303 (citing Brooks v. NLRB, 348 U.S. 96 (1954)).

The problem with preserving the status quo through the use of the majority support presumption is that no steps are taken to determine whether continued representation by the incumbent union comports with employee preference. *See infra* note 203 and accompanying text. The courts of appeals have recently begun to recognize that such an approach is contrary to federal labor policy. *See* NLRB v. Pace Oldsmobile, Inc., 739 F.2d 108, 111 & n.2 (2d Cir. 1984).

203. The potential for the frustration of employee free choice is well-illustrated by the fact that, in 1981, employees voted against union representation in 56.9% of the representation elections conducted by the Board. 46 NLRB ANN. REP. 17 (1981). This statistic represents the continuation of a trend begun in 1975 whereby employees approved union representation in less than one-half of all representation elections. *Id.*

204. *See* NLRB v. Tahoe Nugget, Inc., 584 F.2d 297, 305 (9th Cir. 1978) (total cumulative force of employer evidence to be weighed against force of majority support presumption), *cert. denied*, 442 U.S. 921 (1979). *See generally* 9 J. WIGMORE, EVIDENCE §§ 2490-91 (3d ed. 1940) (discussion of legal and procedural effects of presumptions).

205. See *supra* notes 130-97 and accompanying text for a discussion of the evaluation of employer evidence of reasonable doubt.

206. *See* NLRB v. Tahoe Nugget, Inc., 584 F.2d 297, 305 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). *See also supra* notes 136-38 and accompanying text.

doubt, deciding instead to evaluate the factors relied upon by an employer on an individual basis.[207] The probative force of the employer's evidence is thus reduced, leading to a finding that the majority support presumption has not been overcome. By applying the reasonable doubt evidentiary test in such a narrow fashion, the Board and the courts have given the majority support presumption a virtual irrebuttable force in a large number of cases.[208]

The end result of the operation of section 8(a)(5) procedure in this manner is an increased potential for the entrenchment of a minority union. Employee freedom of choice in the selection of a bargaining representative is dependent on the strength of both the union position and the employer's ability to challenge that position.[209] The union position is protected by the existence and operation of the majority support presumption.[210] However, the weight accorded the presumption greatly weakens the employer position. The operation of the presumption effec-

207. The court's evaluation of employer's evidence in NLRB v. Tahoe Nugget, Inc., 584 F.2d 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979), demonstrates this procedure. In *Tahoe Nugget*, the employer relied upon seven factors in support of its reasonable doubt defense: employee discontent; high turnover; union inactivity; low union membership; union financial difficulties; past bargaining history; and union admissions. *Id.* at 305-08. The court concluded that because each factor was insufficient to establish the reasonable doubt defense, the cumulative effect of the evidence was equivocal. *See id.* at 308.

208. *See generally* Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 VA. L. REV. 281, 289-90 (1977) (irrebuttable presumption is presumption that no amount of proof will dislodge).

Given the narrow evaluation of employer evidence currently employed, an employer in effect must prove that the incumbent union has lost its majority support in order to overcome the majority support presumption. *See* Bartenders, Hotel, Motel and Rest. Employers Bargaining Ass'n, 213 N.L.R.B. 651, 656 (1979) (Kennedy, Member, dissenting). This amounts to an impossible burden, since the employer does not have evidence of union support at its disposal. *See id.* (Kennedy, Member, dissenting) (citing Stoner Rubber Co., 123 N.L.R.B. 1440, 1445 (1959)).

209. Maintenance of the proper equilibrium in section 8(a)(5) procedure requires a delicate balancing of employer interest, union interest, and employee interest. The ultimate goal to be achieved by this equilibrium is the protection of employee freedom of choice. See *supra* notes 198-201 and accompanying text. If an employer is prevented from effectively challenging an incumbent union's majority status, the incumbent union can become entrenched even though it may lack demonstrable majority support. See *infra* notes 211-13 and accompanying text. On the other hand, if an employer's ability to challenge an incumbent union's majority is overly facilitated, a union which may act in fact represent a majority of the employees will be unable to engage in any effective conduct or extended collective bargaining because of the ever present threat of employer challenge. In either case, the employee's right to choose a bargaining representative is potentially derogated. The delicacy of the required balance between the respective party interests, coupled with the fact that employee free choice can be hindered by favoring either union or employer interests, helps to explain much of the confusion present in section 8(a)(5) law. *See generally* Peoples Gas Sys. v. NLRB, 629 F.2d 35, 46-49 (D.C. Cir. 1980) (discussion of balancing required in refusal to bargain actions).

210. *See supra* notes 32-35 and accompanying text.

tively forecloses an employer's ability to challenge an incumbent union's majority status, even in those cases where the circumstances surrounding the union's support, evaluated together, indicate that the union's support *may* have eroded.[211] Thus, the only way the incumbent union can be ousted is through decertification proceedings instituted by the employees.[212] This remedy is illusory in many cases, since the employees as a group are frequently reluctant to challenge the union for fear of reprisal, or lack the organization or resources to mount an effective challenge.[213] This may lead to a frustration of employee freedom of choice, since a union that may be unable to demonstrate its majority support in a secret ballot election cannot be forced to submit to such an election by either the employer or the employees.

The problem of minority union entrenchment is exacerbated by the procedural application of the reasonable doubt defense employed by the courts of appeals in reviewing Board decisions.[214] Under the court approach, once an employer affirmatively establishes a reasonable doubt about the incumbent union's majority support, the majority support pre-

211. Conceptually, a section 8(a)(5) proceeding is designed to determine whether, under the totality of the circumstances surrounding an incumbent union's representation, the circumstantial indicia of the union's loss of support are sufficiently clear to relieve the employer of its duty to bargain and mandate a new election. *See* Stoner Rubber Co., 123 N.L.R.B. 1440, 1444 (1959) ("Good-faith of majority is . . . a defense to a refusal to deal with an alleged bargaining representative . . . . An employer thereby does nothing more than require the union to prove its majority in the most satisfactory way, by secret election conducted under Board auspices."). An employer should not be required to prove actual union loss of majority in order to defend the section 8(a)(5) charge. Rather, all that should be required is a showing that the objective circumstances of an incumbent union's representation are sufficient to support an inference that the union's support had fallen below majority. *See* Harpeth Steel, Inc., 208 N.L.R.B. 545, 547 (1974) (Miller, Chairman, dissenting) ("We are not here determining whether or not majority support may have existed—we are determining whether [the employer] had objective evidence sufficient for him to have been entitled, legally, to question such support and demand some reasonable proof that such support had, in fact, continued."). Thus, actual union majority should be irrelevant with respect to the reasonable doubt defense. The focus of the defense is on the reasonableness of the employer's belief that the union's majority had dissipated.

212. Decertification proceedings may be instituted by employees by filing a petition for decertification (RD petition) with the Board. 29 C.F.R. § 101.19 (1984). The petition must be signed by 30% of the unit employees. 29 C.F.R. § 101.18 (1984). Upon receipt, a field examiner investigates the petition to ascertain, inter alia, whether there is a bona fide question concerning representation and whether an election would effectuate the policies of the Act and reflect the free choice of the employees. *Id.* If the petition is found to have merit, a formal hearing is held to further examine the representation question. 29 C.F.R. § 101.20 (1984). After the hearing, the Board may order a secret ballot election to resolve the representation issue. 29 C.F.R. § 101.21 (1984).

213. *See* Van Bourg, Allen, Weinberg & Roger v. NLRB, 728 F.2d 1270, 1273 (9th Cir. 1984).

214. See *supra* notes 111-29 for a discussion of the courts of appeals approach to the reasonable doubt defense.

sumption drops out of the section 8(a)(5) action.[215] However, the General Counsel may nevertheless prove a section 8(a)(5) violation if it can demonstrate, with direct evidence rather than by assertion of the majority support presumption, that the union maintained majority support on the refusal to bargain date.[216]

By shifting the burden of proof back to the General Counsel in this manner, the courts have essentially framed actual union support as the determinative issue in all section 8(a)(5) proceedings. This procedure increases the possibility of entrenchment of a minority union in two ways. First, because the union's actual support is determinative of the section 8(a)(5) charge, the reasonableness of the employer's decision to refuse to bargain is rendered largely meaningless, except to the extent that it allows the employer to procedurally overcome the majority support presumption. As a result, employer ability to effectively challenge a union with demonstrable indicia of loss of support is drastically curtailed.[217] Additionally, the court procedure makes it difficult to force a union exhibiting indicia of loss of support to submit to a secret ballot election, since the union's superior access to evidence supporting its majority claim insures that it will prevail in the large majority of section 8(a)(5) actions.[218]

B. Federal Rule of Evidence 301

The heavy evidentiary burden placed upon employers by the weight of the majority support presumption is also problematic under Federal Rule of Evidence 301. Rule 301 provides that in federal civil proceedings, a presumption imposes on the party against whom it is directed the burden of producing evidence sufficient to meet or rebut the presumption.[219] Under Rule 301, a presumption may not operate to shift the

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215. *See supra* note 114 and accompanying text.

216. *See supra* note 115-16 and accompanying text.

217. The court's weakening of the employer position in this manner further upsets the required balance between employer interests and union interest in the section 8(a)(5) proceeding, with potential adverse implications for employee section 7 rights. For further discussion on this point, see *supra* note 209.

218. *See generally* Stoner Rubber Co., 123 N.L.R.B. 1440, 1445 (1959) (proof of majority is "peculiarly within the special competence of the union").

219. Rule 301 states in full:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301. *See also* 29 U.S.C. § 160(b) (1982) (labor proceedings are to be conducted as far as practicable in accordance with the Federal Rules of Evidence).

burden of proving the nonexistence of the presumed fact to the party against whom the presumption is asserted.[220]

Because the Board and the courts narrowly evaluate an employer's evidence of reasonable doubt, an employer must essentially show that the incumbent union has lost its majority support in order to successfully establish the reasonable doubt defense and overcome the majority support presumption.[221] The operation of the majority support presumption in this manner shifts the risk of nonpersuasion of actual union support to the employer in direct contravention of Rule 301.[222]

IV. A PROPOSED MODIFICATION OF SECTION 8(a)(5) PROCEDURE

In order to resolve the problems now existing in section 8(a)(5) procedure, the Board and the courts must take steps to strengthen the employer position in section 8(a)(5) litigation and create an equilibrium between an employer's ability to challenge an incumbent union and an incumbent union's ability to resist employer challenge. In this way, procedural neutrality will be achieved, resulting in maximum protection of employee freedom of choice.[223]

First, the actual loss of majority defense and the reasonable doubt defense should be collapsed into a single defense that measures the objective reasonableness of an employer's decision not to bargain.[224] The implementation of this defense will require the Board and the courts to recognize their misperception about the conceptual nature of employer defense of a section 8(a)(5) charge. An incumbent union's actual major-

220. FED. R. EVID. 301. *See also* Louisell, *supra* note 208, at 284-85.

221. *See supra* notes 204-08 and accompanying text. This is especially true in light of the clear and convincing evidence burden imposed on the employer. In order to overcome the majority support presumption, an employer must show clearly and unequivocally that union support had dwindled to a minority. *See* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 305 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). In essence, the burden requires an employer to prove the union's actual level of support.

222. Employer challenges to the majority support presumption based on Rule 301 have not met with success. *See* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978) (Rule 301 challenge rejected as being based on a superficial reading of the rule), *cert. denied*, 442 U.S. 921 (1979). *But compare* NLRB v. Tragniew, Inc., 470 F.2d 669, 674-75 (9th Cir. 1972) (court approved use of the majority support presumption under the authority of Proposed Federal Rule of Evidence 301, which, until amended, authorized the use of presumptions that shifted the burden of proof).

223. *See supra* note 209.

224. Under current practice, the primary distinction between the two defenses is the nature of the evidence necessary to establish the defense. *See supra* note 59 and accompanying text. A combination of the two defenses would be consistent with the modern evidentiary view that the distinction between direct and circumstantial evidence is largely theoretical, since both types of evidence depend on the inference-drawing process for their probative value. *See* 1 J. WIGMORE, EVIDENCE § 25 (Tillers rev. 1983).

ity support was never intended to be the focal point of section 8(a)(5) litigation.[225] Rather, as was made clear in the *Celanese* decision, a section 8(a)(5) proceeding should focus on the employer's *belief* that the union has lost its majority support.[226] By reformulating the section 8(a)(5) defense to measure the reasonableness of an employer's refusal to bargain, this focus will be attained. Actual union majority support will be relegated to its proper statutory role as a remedy issue rather than a liability issue.[227] As a result, the section 8(a)(5) proceeding will operate not to determine whether the union has majority support, but rather to determine whether, in light of the totality of the indicia of the union's erosion of support proffered by an employer, the status quo should be maintained or a fresh assessment of employee representative preference should be undertaken.

Once established, the reasonableness defense should constitute a complete defense to the section 8(a)(5) charge in all cases except those in which the employer takes some action which intentionally or unintentionally undermines union support.[228] Such a modification offers two ad-

225. The present emphasis in section 8(a)(5) litigation on the incumbent union's actual majority support apparently arises from the language of section 9(a) of the Act, 29 U.S.C. § 159(a) (1982), which provides that "[r]epresentatives designated or selected for the purposes of collective bargaining *by the majority of the employees* . . . shall be the exclusive representatives of all employees in such unit." (emphasis added). This misconstrues the purpose of section 9(a). The reason section 9(a) was incorporated into the Act was to insure that the principle of majority rule would govern the selection of employer bargaining representatives. *See* Conair Corp. v. NLRB, 721 F.2d 1355, 1381-82 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 3511 (1984); Gourmet Foods, Inc., 270 N.L.R.B. No. 113, 1983-84 NLRB Dec. (CCH) ¶ 16,352, at 27,911 (April 26, 1984). In addition, section 9(a) is a remedy provision. Before a union can exercise employee collective bargaining rights, it must demonstrate that it is supported by a majority of the workers. *See supra* notes 22-26 and accompanying text. However, there is no evidence to suggest that section 9(a) was further designed to impose liability on an employer who refuses to bargain without being able to demonstrate that the union has lost its majority support. Thus, an employer should be *allowed* to defend a section 8(a)(5) change by showing actual loss of majority, since such a defense furthers majority rules, but should not be *limited* to such a defense.

226. *See* Celanese Corp. of Am., 95 N.L.R.B. 664, 673 (1951).

227. *See supra* note 225. Of course, evidence of a union's actual loss of majority could still be offered to prove the reasonableness of a refusal to bargain. In fact, an employer's proof of the incumbent union's actual loss of majority support should be per se determinative of the reasonableness of its conduct.

228. The application of the reasonableness defense in this manner should parallel the current Board treatment of the defense. See *supra* notes 88-100 and accompanying text. In those cases where the employer takes some action intentionally aimed at undermining union support, the employer should be found per se guilty of a section 8(a)(5) violation. See *supra* notes 90-94 and accompanying text. In those cases where employer conduct unintentionally weakens union support and forecloses a fair recertification election, the *Stoner* test should apply, and the incumbent union should be allowed to recertify itself in the section 8(a)(5) proceeding by presenting proof of its majority support. See *supra* note 95-100 and accompanying text.

vantages. First, the problem under Federal Rule of Evidence 301 is solved. By casting the reasonableness defense as a complete defense in the section 8(a)(5) proceeding, the defense becomes an affirmative defense to the refusal to bargain charge rather than a contravention of the section 8(a)(5) prima facie case.[229] As such, the risk of nonpersuasion of the reasonableness of the refusal to bargain is placed originally on the employer and remains with the employer throughout the section 8(a)(5) proceeding.[230] Thus, the problem of the shifting burden of proof found in current section 8(a)(5) procedure is eliminated.[231] Additionally, employee freedom of choice in the selection and retention of a bargaining representative is maximized. Upon affirmative proof of the reasonableness of its conduct, the employer would do nothing more than force the union to reestablish its majority in the preferred manner, through a Board-conducted election.[232] This greatly increases employee input into the incumbent union's fate, since the employees can now express their representative preference by secret ballot without the need to mount a formal decertification campaign. For this reason, determining whether a secret ballot election is required in a given refusal to bargain situation should be the ultimate goal in all section 8(a)(5) proceedings.

In order for this proposed modification of section 8(a)(5) procedure to operate in a neutral yet effective manner, evidence offered by an employer to demonstrate the reasonableness of its refusal to bargain must be broadly evaluated.

A "preponderance of the evidence" burden of proof should be imposed on the reasonableness defense. In order to satisfy this burden, an employer will have to demonstrate that under the totality of the relevant

229. An affirmative defense is a defense by which the defendant admits that the plaintiff has stated a prima facie case, but disputes the asserted liability by asserting that there are additional facts and events which support a finding of nonliability. *See* J. KOFFLER & A. REPPY, COMMON LAW PLEADING, § 190, at 379-80 (1969).

230. *See generally* MCCORMICK ON EVIDENCE § 337, at 948-52 (Cleary ed. 1984).

231. Compare *supra* notes 219-22 and accompanying text.

232. See Stoner Rubber Co., 123 N.L.R.B. 1440, 1444 (1959). The operation of the reasonableness defense as a complete defense would in effect allow an employer to defend a section 8(a)(5) charge by vicariously asserting the right to majority rule guaranteed to its employees. This approach has generally been rejected by the courts. *See, e.g.*, Brooks v. NLRB, 348 U.S. 96, 103 (1954) ("To allow employers to rely on employees' rights in refusing to bargain . . . is not conducive to [industrial peace], it is inimical to it."). Such a view rests on the archaic notion that the interests of an employer and its employees are always in conflict. A better approach is for the Board and the courts to sanction an employer's refusal to bargain regardless of the employer's motivation if the refusal to bargain promotes employee democracy. *See* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 300 (9th Cir. 1978) (employer's decision to refuse to bargain furthers cause of employee democracy if union support is in fact lacking), *cert. denied*, 442 U.S. 921 (1979).

circumstances, its decision not to bargain was more reasonable than unreasonable.[233] In effect, the preponderance burden of proof will require the employer to justify its refusal to bargain by demonstrating that, *on balance*, the circumstantial evidence of the union's weakened support was sufficiently strong to mandate an employee vote.

The "cumulative effect" test discussed in *Tahoe Nugget* should be used to evaluate whether an employer has met its burden of proving the reasonableness of its refusal to bargain.[234] Using this approach, the Board and the courts, instead of discounting the probative weight of each indicia of union loss of support as is presently done,[235] should consider the employer's evidence as a whole in order to determine whether the inferential weight of all the evidence is sufficient to support a reasonable belief of the incumbent union's loss of support.[236]

The Board should abandon the striker replacement presumption as part of a broader treatment of employer evidence. The presumption makes little practical sense. It is wholly unrealistic to presume that striker replacements who must frequently cross picket lines and subject themselves to verbal or physical abuse support the very union promoting the picket line and strike conduct.[237] A better approach is to treat the striker replacements as a neutral group with respect to union support. The striker replacements would not be presumed to either support the striking union or reject union representation.[238] In this manner, the risk of nonrebuttal of the striker replacement presumption or an opposite presumption would not exist. Thus, for either the union or the employer to utilize evidence of striker replacement, it will be necessary to introduce evidence of the representative preference of the striker replacements. The striker replacements' freedom to select a bargaining representative of their choice is accordingly protected as well.

V. CONCLUSION

Under current 8(a)(5) procedure, an employer's ability to effectively

233. *See generally* McBaine, *supra* note 134, at 260-61; 9 J. WIGMORE, EVIDENCE, § 2498 (3d ed. 1940).

234. See NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 305 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). *See also supra* notes 136-38 and accompanying text.

235. See *supra* notes 141-97 and accompanying text.

236. In this manner, the focus of the section 8(a)(5) proceeding properly remains on the reasonableness of the employer's belief about loss of union support rather than on the actual level of union support. *See supra* note 211.

237. *See* National Car Rental Sys. v. NLRB, 594 F.2d 1203, 1206 (8th Cir. 1979). *See also supra* note 159.

238. This is consistent with the approach presently followed by a majority of the courts of appeals. *See supra* notes 156-57 and accompanying text.

challenge an incumbent union exhibiting signs of loss of support has been severely limited. This is largely a result of the great weight accorded the majority support presumption by the National Labor Relations Board and the courts of appeals. By narrowly evaluating employer evidence of reasonable doubt, the Board and the courts in effect require an employer to prove that an incumbent union has in fact lost its majority support in order to overcome the majority support presumption. This procedure gives the presumption a virtually irrebuttable force in the large majority of section 8(a)(5) actions.

The weight accorded the majority support presumption has troublesome implications for federal labor policy. The presumption operates to preserve the representative status quo of the incumbent union despite the fact that the union's support may have weakened. In this manner, a minority union may become entrenched and employee freedom of choice may be frustrated since the employer, the party in the best position to challenge the incumbent union, is essentially precluded from doing so by the strength of the majority support presumption.

This Comment has proposed a three part modification of section 8(a)(5) procedure as a solution to this problem. The Comment has advocated that a new section 8(a)(5) defense be created which avoids the legal formalism and pro-union bias of the traditional section 8(a)(5) defenses and instead measures the objective reasonableness of the employer's decision not to bargain. It was also proposed that once established, the reasonableness defense should constitute a complete defense to a section 8(a)(5) charge. In this manner, the protection of employee freedom of choice is maximized, since a successful employer challenge will result in a Board-conducted election to ascertain employee representative preference.

Finally, the Comment suggested a modification of the evidentiary standard applicable to section 8(a)(5) defenses. It was proposed that the employer's evidentiary burden of proving the reasonableness defense be reduced from the present clear and convincing evidence burden to a preponderance of the evidence burden in order to strengthen the employer's ability to challenge a declining union and further protect employee freedom of choice. In conjunction with this evidentiary proposal, the Comment argued that the striker replacement presumption employed by the Board is unsound and should be abandoned in favor of a procedure which maintains the representative neutrality of the striker replacements until further evidence of their union sentiment is advanced.

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