

NOTE

THE STRIKERS' REPLACEMENTS PRESUMPTION AND AN EMPLOYER'S DUTY TO BARGAIN WITH THE INCUMBENT UNION

The National Labor Relations Act (NLRA or the Act)¹ requires an employer to bargain in good faith² with representatives designated by a majority of the employees within appropriate bargaining units.³ It is frequently difficult, however, to determine whether a particular union continues to enjoy the support of a majority of such employees. This problem becomes even more difficult after a high degree of turnover, since many of the employees who originally voted for the union are replaced. When this turnover results from an economic strike⁴ and leads to the permanent replacement⁵ of a high percentage of strikers, the employer may seriously doubt whether a union's majority support continues.⁶

¹ 29 U.S.C. §§ 151-187 (1976).

² The duty to bargain in good faith is found in two sections of the National Labor Relations Act (NLRA). Section 7 provides that "[e]mployees shall have the right to self-organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . ." 29 U.S.C. § 157 (1976). Also, section 8(d) provides that "[f]or the purposes of this section, to bargain collectively is the performance of the *mutual obligation* of the employer and the representative of the employees to meet at reasonable times and confer in *good faith* . . ." 29 U.S.C. § 158(d) (emphasis added).

³ The NLRA § 9(a) provides: "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. § 159(a) (1976) (emphasis added).

⁴ A strike is considered to be "economic" if it is in support of the bargaining demands regarding wages, working conditions, or union recognition. Economic strikes are distinguished from unfair labor practice strikes, which are strikes over actions in violation of the Labor Act. *Crossroads Chevrolet, Inc.*, 233 N.L.R.B. 728, 729 n.4, 96 L.R.R.M. 1612 (1977). An economic strike is converted into an unfair labor practice strike when the employer commits an unfair labor practice which would extend the length of the strike. *R. GORMAN, LABOR LAW* 339 (1976).

⁵ Economic strikers may be permanently replaced during the course of the strike. Once permanently replaced, the economic striker is only entitled to full reinstatement when a position, for which he is qualified, becomes available; and then, only if in the interim he has not acquired regular and similar employment. Nevertheless, he may still be denied reinstatement if the employer can show legitimate and substantial business reasons for not reinstating him. *The Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369-70, 68 L.R.R.M. 1252, 1258 (1968), *enforced* 414 F.2d 99, 71 L.R.R.M. 3054 (7th Cir. 1969), *cert. denied* 397 U.S. 920, 73 L.R.R.M. 2537 (1970). Unfair labor strikers are entitled to be reinstated upon an unconditional offer to return to work. They can not be permanently replaced against their will. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278, 37 L.R.R.M. 2587, 2590 (1956).

⁶ Cases in which employers have argued doubts as to the union's majority status due to the existence of strikers' replacements include: *Nat'l Car Rental Sys., Inc. v. NLRB*, 594 F.2d 1203, 100 L.R.R.M. 2824 (8th Cir. 1979); *Arkay Packaging Corp.*, 227 N.L.R.B. 397, 94 L.R.R.M. 1197 (1976) *petition for review denied sub nom.* New York

To aid in determining whether a majority of employees continue to support an incumbent union, and in order to further the policies of the NLRA,⁷ the National Labor Relations Board (NLRB or the Board) has developed certain presumptions. New employees, for example, are presumed to support the union in the same ratio as the employees whom they replace.⁸ Recently the NLRB and the Eighth Circuit have split over the extension of this "new employee presumption" to situations not involving a normal turnover of employees.⁹ Specifically, the dispute has focused on whether employees who replace strikers should be presumed, like all other new employees, to support the union in the same ratio as those employees whom they have replaced. The current Board has answered this question affirmatively, recognizing a "strikers' replacements presumption" within the broader new employee presumption.¹⁰ If the Board's strikers' replacements presumption is accepted, then the number of permanent replacements for striking employees cannot be used as objective evidence to show an employer's good faith doubt of a union's majority support.¹¹ As a result, the employer is obligated to continue negotiations with the incumbent union, even though the union may no longer have the support of a majority of the employees within the bargaining unit.¹²

Printing Pressmen v. NLRB, 575 F.2d 1045, 98 L.R.R.M. 2389 (2d Cir. 1978); *Peoples Gas Sys., Inc.*, 214 N.L.R.B. 944, 87 L.R.R.M. 1430 (1974), *rev'd on other grounds sub nom. Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 92 L.R.R.M. 2077 (D.C. Cir. 1976); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 49 L.R.R.M. 1466 (1962); *Stoner Rubber Co., Inc.*, 123 N.L.R.B. 1440, 44 L.R.R.M. 1133 (1959).

The reasonableness of the employer's doubt of the union's majority status is directly related to the composition of the bargaining unit. Permanent replacements of economic strikers are included in the bargaining unit. *Rudolph Wurlitzer Co.*, 32 N.L.R.B. 163, 166, 8 L.R.R.M. 191 (1941). The unit also contains nonstriking workers, strikers who have been rehired, and, if the election is held less than twelve months after the strike has commenced, replaced economic strikers who have offered to return to work. *C.H. Guenther & Son, Inc., d/b/a Pioneer Flour Mills*, 174 N.L.R.B. 1202, 1203, 70 L.R.R.M. 1433, 1434, (1969) *enforced sub nom. C.H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983, 986, 74 L.R.R.M. 2343, 2345 (5th Cir. 1970), *cert. denied* 400 U.S. 942, 75 L.R.R.M. 2752 (1970).

⁷ The National Labor Relations Act section one provides:

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

29 U.S.C. § 151 (1976).

⁸ *Laystrum Mfg. Co.*, 151 N.L.R.B. 1482, 1484, 58 L.R.R.M. 1624, 1625 (1965), *enforcement denied* 359 F.2d 799, 62 L.R.R.M. 2033 (7th Cir. 1966).

⁹ See, e.g., *Nat'l Car Rental Sys.*, 594 F.2d at 1203, 100 L.R.R.M. 2824 (where the Court of Appeals refused to follow the Board's strikers' replacements presumption).

¹⁰ See, e.g., *Nat'l Car Rental Sys.*, 273 N.L.R.B. No. 23, 99 L.R.R.M. 1027.

¹¹ *Id.* at 5, 99 L.R.R.M. 1027.

¹² *Id.*

This note will examine the appropriateness of the strikers' replacements presumption as defined and adopted by the current members of the NLRB. First, the note will review the employer's bargaining requirements under the NLRA focusing on both the employer's duty to bargain and the underlying congressional policies which the Act seeks to serve. Next, enforcement of the bargaining requirements by the NLRB will be examined. This section will show the evolution of the Board's enforcement practices from the traditional new employee presumption to the development of the strikers' replacements presumption. The section will end with a review of the Eighth Circuit's rejection of the Board's strikers' replacements presumption. The note will then evaluate the strikers' replacements presumption itself, examining its basis in fact, its policy support, and the ability of strikers' replacements to provide evidence of an employer's good faith doubt of the union's majority status. It will be submitted that the strikers' replacements presumption should be abandoned or severely restricted in its application.

I. BARGAINING REQUIREMENTS UNDER THE NATIONAL LABOR RELATIONS ACT

A. *The Employer's Duty*

The National Labor Relations Act imposes a duty on an employer to bargain in good faith with the union.¹³ Failure of the employer to bargain makes him liable for unfair labor practice charges under sections 8(a)(1) and (5) of the Act.¹⁴ The employer's duty to bargain depends upon the union's claim to continued majority support. Should the union lose such support, the employer is no longer required to bargain and a refusal cannot be prosecuted as an unfair labor practice.¹⁵

The Board has developed rules concerning the union's majority support status which are determinative of an employer's duty to bargain. Under the "certification year rule," a union which has been certified by the Board will enjoy for one year, absent unusual circumstances, an irrebuttable presumption of majority support.¹⁶ This presumption continues after the certification

¹³ 29 U.S.C. §§ 151-187 (1976).

¹⁴ The National Labor Relations Act § 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1976). Section 7 of the NLRA provides that "[e]mployees shall have the right to . . . bargain collectively through representatives of their own choosing." 29 U.S.C. § 157 (1976). Also, section 8(a)(5) provides that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(5) (1976). For text of section 159(a), see note 3 *supra*.

¹⁵ See notes 2 and 3 *supra*.

¹⁶ The "certification year rule" was approved by the Supreme Court in *Brooks v. NLRB*, 348 U.S. 96, 35 L.R.R.M. 2158 (1954). In *Brooks* the Court found ample policy support for the rule by noting that it would: give proper deference to the "solemn and costly" election process by not allowing it to be reversed by a petition of public meeting; take pressure off the union for instant results; encourage the

year ends, but becomes rebuttable either by a showing that the union no longer commands a majority, or by the "employer's production of sufficient evidence to cast serious doubt thereon."¹⁷ A majority of federal circuit courts hold that once the presumption is successfully rebutted, an employer's refusal to bargain cannot be an unfair labor practice unless it is shown either that on the refusal-to-bargain date the union did in fact represent a majority of the employees, or that the refusal to bargain was not based on a serious good faith doubt of the union's continued majority status.¹⁸ This means that an employer's claim that his refusal to bargain was based on a good faith doubt is only a partial defense. If the requisite doubt is established in these courts, it shifts the burden to the General Counsel to prove by a preponderance of evidence that the union did represent a majority of the employees on the date of the employer's refusal to bargain.¹⁹ If such proof of the union's majority status is made, the employer's refusal to bargain constitutes an unfair labor practice, despite the employer's good faith doubts.²⁰

If, instead of passively relying on the good faith doubt defense, an employer seeks a Board sponsored election to determine the union's support, his request may be denied since an employer has no independent right to petition the Board for a majority representation election (hereinafter "R.M. election") unless he has a good faith doubt of the union's majority support.²¹ This good faith doubt must be grounded in objective evidence.²² Consequently, if the employer's good faith doubt depends on the existence of permanent strikers' replacements, and the Board presumes that these re-

employer to bargain without trying to undermine the union; and minimize interunion raiding. *Id.* at 99-100, 35 L.R.R.M. at 2159.

A similar rule, creating a conclusive presumption of majority support for a reasonable time, is applicable to unions informally recognized by employers. *NLRB v. San Clemente Pub. Corp.*, 408 F.2d 367, 368, 70 L.R.R.M. 2677, 2678 (9th Cir. 1969). Also, when an employer enters into a contract with a union that enjoys majority support, that support is conclusively presumed to continue for the duration of the contract. *Bartenders Ass'n of Pocatello*, 213 N.L.R.B. 651, 652, 87 L.R.R.M. 1194, 1195 (1974).

¹⁷ *Nat'l Cash Register Co. v. NLRB*, 494 F.2d 189, 194, 85 L.R.R.M. 2657, 2660 (8th Cir. 1974).

¹⁸ The NLRB and a minority of courts have held that a serious good faith doubt constitutes a complete defense to the allegations of refusing to bargain. In other words, even if the union did represent a majority of employees on the date of the employer's refusal to bargain, if the employer can prove its good faith doubt, then an unfair labor practice finding and bargaining order are not proper. *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 331-32, 82 L.R.R.M. 2651, 2652 (6th Cir. 1973); *Windham Community Memorial Hosp.*, 230 N.L.R.B. 1070, 1073, 95 L.R.R.M. 1565 (1977), *enforced* 577 F.2d 805, 99 L.R.R.M. 2242 (2d Cir. 1978); *Arkay*, 227 N.L.R.B. at 398, 94 L.R.R.M. at 1198.

¹⁹ *Nat'l Car Rental Sys.*, 594 F.2d at 1207, 100 L.R.R.M. at 2827.

²⁰ *Nat'l Cash Register Co.*, 494 F.2d at 194, 85 L.R.R.M. at 2660; *Automated Business Sys. v. NLRB*, 497 F.2d 262, 270, 86 L.R.R.M. 2659, 2664 (6th Cir. 1974).

²¹ *NLRB v. Richman Bros. Co.*, 387 F.2d 809, 813, 67 L.R.R.M. 2051, 2053-54 (7th Cir. 1967).

²² *Orion Corp. v. NLRB*, 515 F.2d 81, 85, 89 L.R.R.M. 2135, 2137 (7th Cir. 1975). The good faith doubt standard is discussed in the text at notes 132-50 *infra*.

placements support the union, the employer's request for an R.M. election will be denied and the employer will be required to continue bargaining with the union.

As a result of the above Board rules and the NLRA, employers have a strong, continuous, and often irrebuttable duty to bargain with incumbent unions regardless sometimes of the number of employees who actually support them. A partial explanation for the imposition of this duty can be found in the policies underlying the NLRA.

B. Underlying Congressional Policies

The NLRA seeks to promote two Congressional policies in determining an employer's duty to bargain; namely, majority representation and industrial peace through collective bargaining. Congress's concern with majority representation is revealed in section 9(a) of the NLRA²³ which provides that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives of all employees . . ." ²⁴ The use of the word "exclusive" in the Act indicates a clear Congressional intent to obligate an employer to bargain only with a union that has majority support. If an employer believes that the union lost its majority support, section 9(a), read by itself, would require an employer to cease bargaining with the union. Congress's desire for majority representation, however, is tempered by the conflicting policy of industrial peace through collective bargaining (hereafter bargaining stability).²⁵

Section one of the NLRA²⁶ declares the policy of the United States to be the elimination of obstructions to the free flow of commerce through the encouragement of collective bargaining.²⁷ This policy is best fostered through the maintenance of a stable bargaining environment. When an employer doubts that a union has the support of a majority of its employees, however, the employer is obligated to cease bargaining. Thus, there occurs a conflict between the NLRA's policies of encouraging majority representation and promoting bargaining stability. In attempting to reconcile this conflict, the Board has created unnecessary confusion by enforcing the bargaining requirements in situations involving new employees and strikers' replacements.

II. ENFORCEMENT OF BARGAINING REQUIREMENTS BY THE NATIONAL LABOR RELATIONS BOARD

A. Traditional Board Approach: The New Employee Presumption

The new employee presumption, simply stated, is that "new employees will be presumed to support a union in the same ratio as those whom they

²³ 29 U.S.C. § 159(a) (1976).

²⁴ *Id.*

²⁵ 29 U.S.C. § 151 (1976). The Supreme Court in *Brooks v. NLRB*, 348 U.S. 96 (1954), stated, "[t]he underlying purpose of this statute [Taft-Hartley Act] is industrial peace." *Id.* at 103.

²⁶ 29 U.S.C. § 151 (1976).

²⁷ For text of section one, see note 7 *supra*.

have replaced."²⁸ The result of this presumption is that high employee turnover is by itself insufficient to justify an employer's refusal to bargain.²⁹

The Board has applied this presumption most often in what may be termed "normal" turnover situations. In *Laystrum Manufacturing Company*,³⁰ for example, the Board considered an employer's refusal to bargain which was based on two factors. First, the company mentioned the closeness of the certification election, in which seventeen employees had supported, while thirteen opposed, the union.³¹ Second, in the two years following the election, sixteen of the original thirty employees eligible to vote had terminated their employment and were replaced by eight newly hired employees.³² During this two year period of turnover, the union had maintained a contractual relationship with the company and had offered to negotiate a continuation.³³ Because of this close contractual relationship, and the lack of evidence offered to indicate that the union had ignored the new workers, there seemed to be no reason to doubt a presumption that the new employees would support the union in the same ratio as the ones they had replaced. Thus, the Board concluded that, "[t]he certified Union continued to represent a majority of the employees . . . [and the employer] had no reasonable basis for believing otherwise"³⁴ *Laystrum* is an example of a "normal" turnover situation, where turnover occurred over a prolonged period and without any unusual contributing circumstances. A second type of "normal turnover" in which application of the new employee presumption is justified is revealed in *Leatherwood Drilling Company*.³⁵

In *Leatherwood Drilling*, the certified bargaining unit was comprised of roughnecks (derrickmen and floor hands), truck drivers, welders, mechanics and helpers.³⁶ The union did not include the more permanent office and professional employees.³⁷ During the four years between the certification election and the time at which the company expressed its doubt of the union's majority status, a total of 1,761 employees had been hired to fill thirty-six jobs.³⁸ The turnover was so rapid that during the first five months of 1973 the company had experienced a turnover rate of almost 900 percent.³⁹ The Administrative Law Judge held, and the NLRB agreed, that the velocity of

²⁸ *Laystrum Mfg. Co.*, 151 N.L.R.B. 1482, 1484, 58 L.R.R.M. 1624, 1625 (1965) (footnote omitted), *enforcement denied* 359 F.2d 799, 62 L.R.R.M. 2033 (7th Cir. 1966).

²⁹ *NLRB v. Tahoe Nugget*, 584 F.2d 293, 306, 99 L.R.R.M. 2509, 2518 (9th Cir. 1978).

³⁰ 151 N.L.R.B. 1482, L.R.R.M. 1624 (1965), *enforcement denied* 359 F.2d 799, 62 L.R.R.M. 2033 (7th Cir. 1966).

³¹ *Id.* at 1484, 58 L.R.R.M. at 1624.

³² *Id.*, 58 L.R.R.M. at 1624-25.

³³ *Id.* at 1488, 58 L.R.R.M. at 1624.

³⁴ *Id.* at 1485, 58 L.R.R.M. at 1625.

³⁵ 209 N.L.R.B. 618, 86 L.R.R.M. 1187.

³⁶ *Id.* at 619, 86 L.R.R.M. 1187.

³⁷ *Id.*

³⁸ *Id.* at 621, 86 L.R.R.M. 1187.

³⁹ *Id.*, 86 L.R.R.M. at 1188.

turnover did not invalidate the presumption because, whether "nine employees might in a given time period fill a single job previously held by a union supporter, does not warrant an assumption that the ninth replacement would support the union to any lesser degree than the first."⁴⁰

Although *Leatherwood* is an example of extreme employee turnover, considering the nature of the industry it is still "normal" turnover. It is considered normal because it occurred over an extended period of time, rather than all at once, and was accompanied by union contact with the new employees. In this type of situation, with rapid turnover among a large pool of employees with similar goals, it is not unreasonable to expect the new employees to support the union in the same ratio as their predecessors. Furthermore, without the new employee presumption the employees would have no bargaining power, because as fast as a union could be certified its supporters could be replaced and another election would be necessary. Normal turnover of this type, therefore, should not give employers the "serious doubt" sufficient to justify a refusal to bargain in good faith.

While the new employee presumption as illustrated by *Lastrum* and *Leatherwood* has been widely accepted by both the Board and the courts,⁴¹ there has been some disagreement as to the types of circumstances in which the presumption should be applied.⁴² At least one court has held that new employee presumption should apply only to the "normal" turnover situation, and that a "normal" turnover does not include the unusual and highly disruptive circumstances of a strike accompanied by the permanent replacement of strikers.⁴³ The NLRB, however, has extended the new employee presumption beyond these normal turnover situations, to encompass even those new employees who have been hired as permanent replacements for strikers.⁴⁴

B. Extension of the Board's Traditional New Employee Presumption to Strikers' Replacements

Early cases show a reluctance by the Board to extend the new employee presumption to the strike situation.⁴⁵ The fact situations of these cases are

⁴⁰ *Id.* at 618, 86 L.R.R.M. 1187 (footnote omitted).

⁴¹ See generally *Laystrum Mfg. Co.*, 151 N.L.R.B. 1482, 1484, 58 L.R.R.M. 1624, 1625, enforced 359 F.2d 799, 62 L.R.R.M. 2033 (7th Cir. 1966); *NLRB v. John S. Swift Co.*, 302 F.2d 342, 345, 50 L.R.R.M. 2017, 2019 (7th Cir. 1962).

⁴² See *Nat'l Car Rental Sys.*, 594 F.2d at 1203, 100 L.R.R.M. at 2824.

⁴³ *Id.*

⁴⁴ See *Nat'l Car Rental Sys.*, 237 N.L.R.B. No. 23 at 5, 99 L.R.R.M. 1027, 1027, enforcement denied, 594 F.2d 1203, 100 L.R.R.M. 2824; *Windham Hosp.*, 230 N.L.R.B. 1070, 1070, 95 L.R.R.M. 1565, 1566, enforced 577 F.2d 805, 99 L.R.R.M. 2242.

⁴⁵ A summary of three early cases reveals not only the Board's earlier view of the strikers' replacements presumption, but also a similarity in fact patterns. The first of these cases is *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 44 L.R.R.M. 1133 (1959). In *Stoner* the Board found that the employer was justified in his serious good faith doubt of the incumbent union's majority status. *Id.* at 1445, 44 L.R.R.M. at 1135. Considered as a factor contributing to the doubt was evidence that on the date of the company's refusal to bargain, its work force was composed of eighteen permanent replacements for strikers and eighteen former strikers, all of whom had to cross picket lines to get to

very similar. They involve a bargaining unit that has at least as many permanent strikers' replacements as the former strikers and the non-striking employees combined.⁴⁶ Thus, the replacements' votes could be a significant factor in the outcome of a new certification election. The replacements have usually been forced to cross picket lines in order to be hired and to report to work.⁴⁷ Also, the replacements usually have not manifested any support for the union and are aware that they are working in opposition to a union strike.⁴⁸ Finally, it is typical in these situations for the unions to ignore the replacements and not make any attempts to solicit their support.⁴⁹

Historically, when presented with this type of strike situation, the Board found that the employer was justified in claiming a serious good faith doubt of the incumbent union's majority status.⁵⁰ The Board expressed this view by stating:

While it is of course possible that the replacements who had chosen not to engage in strike activity, might nevertheless have favored union representation, it was not unreasonable for Respondent to infer that the degree of union support among those employees who had chosen to ignore a Union-sponsored picket line might well be somewhat weaker than the support offered by those who had vigorously engaged in concerted activity on behalf of Union-sponsored objectives.⁵¹

work. *Id.* at 1443, 44 L.R.R.M. at 1134. Speaking of these workers, the Board held it was not "unreasonable to assume that none of the 18 permanent replacements were union adherents." *Id.* at 1444, 44 L.R.R.M. at 1134.

In the case of *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 49 L.R.R.M. 1466 (1962), the Board was again faced with deciding the union sentiments of permanent replacements for strikers. In *Titan*, at the time of the employer's refusal to bargain, the employment unit consisted of nineteen former strikers and twenty-seven replacements. *Id.* at 215, 49 L.R.R.M. 1466. The Administrative Law Judge found no evidence that any of the replacements had authorized the union to support them. *Id.* Based on these findings, the Board held that the company had good cause to doubt the union's majority. *Id.*

In the case of *S & M Mfg. Co.*, 172 N.L.R.B. 1008, 68 L.R.R.M. 1403 (1968), the Board examined a situation where, at the time the employer had refused to bargain, all sixty-five employees were either returning strikers who had resigned from the union, or newly hired replacements who had not manifested any support for the union. *Id.* at 1008, 68 L.R.R.M. at 1404. The Board held that among these sixty-five employees it could not be found that there were any union adherents. *Id.* at 1008-09, 68 L.R.R.M. at 1440.

⁴⁶ See, e.g., *Titan Metal Mfg.*, 135 N.L.R.B. at 215, 49 L.R.R.M. 1466; *Stoner Rubber Co.*, 123 N.L.R.B. at 1442, 44 L.R.R.M. at 1135.

⁴⁷ See, e.g., *S & M Mfg. Co.*, 172 N.L.R.B. at 1008, 68 L.R.R.M. at 1404; *Titan Metal Mfg.*, 135 N.L.R.B. at 205, 49 L.R.R.M. 1466; *Stoner Rubber Co.*, 123 N.L.R.B. at 1442, 44 L.R.R.M. at 1135.

⁴⁸ See, e.g., *S & M Mfg. Co.*, 172 N.L.R.B. at 1008, 68 L.R.R.M. at 1404; *Titan Metal Mfg.*, 135 N.L.R.B. at 215, 49 L.R.R.M. 1466.

⁴⁹ See, e.g., *Natl Car Rental Sys.*, 594 F.2d at 1206, 100 L.R.R.M. at 2826; *Arkay*, 227 N.L.R.B. at 401, 94 L.R.R.M. 1197.

⁵⁰ See cases cited in note 45 *supra*.

⁵¹ *Peoples Gas Sys.*, 214 N.L.R.B. at 947, 87 L.R.R.M. at 1434.

Thus, the Board indicated that the existence of strikers' replacements might justify an employee's good faith doubt of the union's claim to majority support.

A review of these earlier cases shows that in the past the Board allowed the employer to justify his serious doubt of the union's continued majority status on an assumption that all strikers' replacements would be anti-union.⁵² In a number of recent decisions, however, the Board has begun to reverse itself.⁵³ The change can be seen developing in the 1975 case of *James W. Whitfield, d/b/a Cutten Supermarket*.⁵⁴ The bargaining unit in this case was comprised of four strikers who clearly supported the union and three strikers' replacements.⁵⁵ While the Board decided the majority status issue on these numbers alone, it chose to challenge the employer's contention that the replacements would oppose the union.⁵⁶ The Board stated that, absent any evidence indicating the replacements' anti-union preferences and in recognition of the new employee presumption, the union sentiments of these workers would be considered unknown.⁵⁷ This was a slight but definite step back from the assumption that all of the replacements would not support the union. Nevertheless, the NLRB did not stop here, but went even further to reverse its earlier position.

The present position of the NLRB can best be understood by a review of three principal cases: *Arkay Packaging Corporation*,⁵⁸ *Windham Community Memorial Hospital*,⁵⁹ and *National Car Rental System, Inc.*⁶⁰ It is important to review

⁵² See cases cited in note 45 *supra*. This view has also found support among legal scholars. As one commentator wrote: "It is generally assumed that the new employees hired to replace economic strikers do not support the union. When such permanent replacements constitute a majority of the unit, reasonable grounds exist to question majority support." Seger, *The Majority Status Of Incumbent Bargaining Representatives*, 47 TUL. L. REV. 961, 991 (1973) (footnote omitted) [hereinafter cited as Seger]. Another authority noted: "[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, as a strike breaker, or worse), it is generally assumed that he does not support the union and that he ought not be counted toward a union majority." R. GORMAN, *LABOR LAW* 112 (1976).

⁵³ See *Nat'l Car Rental Sys.*, 237 N.L.R.B. No. 23, 99 L.R.R.M. 1027; *Windham Hosp.*, 230 N.L.R.B. 1070, 95 L.R.R.M. 1565.

⁵⁴ 220 N.L.R.B. 507, 90 L.R.R.M. 1250 (1975).

⁵⁵ *Id.* at 508, 90 L.R.R.M. at 1253.

⁵⁶ *Id.* at 509, 90 L.R.R.M. at 1253. The reason that the employer even sought to challenge the union when it appeared that the union had a clear 4-3 majority, was because a dispute existed over the employment status of the store superintendent. The employer claimed that the superintendent was an employee and did not support the union. *Id.* Thus, a 4-4 tie would have existed. *Id.* The Board, however, found that the superintendent was "a supervisor within the meaning of the Act and is, therefore, not within the unit and ineligible to vote." *Id.* (footnote omitted).

⁵⁷ *Id.*

⁵⁸ 227 N.L.R.B. 397, 94 L.R.R.M. 1197, *enforced* 575 F.2d 1045, 98 L.R.R.M. 2389.

⁵⁹ 230 N.L.R.B. 1070, 95 L.R.R.M. 1565, *enforced* 577 F.2d 805, 99 L.R.R.M. 2242.

⁶⁰ 237 N.L.R.B. No. 23, 99 L.R.R.M. 1027, *enforcement denied* 594 F.2d 1203, 100 L.R.R.M. 2824.

these cases together since they are closely interrelated, both in the time sequence in which they occurred and in their reasoning. This trilogy of cases reveals the confusion that has existed in recent years concerning the extension of the new employee presumption to permanent replacements of strikers.

In *Arkay Packaging Corporation*,⁶¹ one of the seven unions representing Arkay's employees commenced an economic strike, which included picketing, on June 10, 1974.⁶² In July of 1974, as a result of harassment at the picket line, seventeen or eighteen employees, comprising most of the membership of three other unions, went on strike.⁶³ Five days later the employer gave the strikers notice that if they remained on strike they would be permanently replaced.⁶⁴ After the workers failed to respond, the employer hired eleven new employees as permanent replacements for the eighteen economic strikers.⁶⁵ The employer and employees had no further contact with one union for seven months and with the other two unions for nine months.⁶⁶ During this period the unions made no attempt either to enforce the union security and dues checkoff provisions, or to require the company to make health and pension fund contributions on behalf of the replacement employees.⁶⁷ Between January and April of 1975 each of the unions expressed its desire to negotiate a new agreement.⁶⁸ Arkay replied that it no longer recognized the unions because of "valid, objective considerations" giving rise to serious doubt as to the incumbent union's majority status.⁶⁹ Thereafter, the unions filed their 8(a)(1) and 8(a)(5) charges.⁷⁰

The Administrative Law Judge found that the presumption of majority support was rebutted.⁷¹ He rationalized:

It is reasonable to conclude that none of the three Unions in fact had been designated by any of the replacements, nor is there evidence to the contrary. This and their apparent lack of interest for several months reasonably casts serious doubt on each Union's continued majority status.⁷²

The Judge, however, then concluded that General Counsel had met his burden of proving that, at the time Arkay refused to bargain, the unions did represent a majority.⁷³ Therefore, Arkay was guilty of 8(a)(1) and 8(a)(5) charges for its refusal to bargain.⁷⁴

⁶¹ 227 N.L.R.B. 397, 94 L.R.R.M. 1197.

⁶² *Id.* at 400, 94 L.R.R.M. 1197.

⁶³ *Id.* at 398, 94 L.R.R.M. at 1198-99. The exact number seems to be uncertain because one employee returned to work behind the union's picket lines but he continued to pay union dues.

⁶⁴ *Id.* at 401, 94 L.R.R.M. 1197.

⁶⁵ *Id.* at 394, 94 L.R.R.M. at 1199.

⁶⁶ *New York Printing Pressmen*, 575 F.2d at 1047, 98 L.R.R.M. at 2391(enforcing *Arkay*).

⁶⁷ *Id.*

⁶⁸ *Arkay*, 227 N.L.R.B. at 398, 94 L.R.R.M. at 1199.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 402, 94 L.R.R.M. at 1197-98.

⁷² *Id.*, 94 L.R.R.M. at 1198.

⁷³ *Id.*, 94 L.R.R.M. at 1197.

⁷⁴ *Id.* at 403, 94 L.R.R.M. at 1197.

In a two to one decision, the NLRB refused to affirm the ruling of the Administrative Law Judge.⁷⁵ While the Board agreed with the Judge's finding that the serious doubts of the employer as to the incumbent union's majority status were justified, it followed the minority view and held that such doubt is a complete defense regardless of proof of a de facto majority.⁷⁶ With respect to the strikers' replacements presumption, the majority stated: "As for the 11 striker replacements, we would not . . . charge Respondent, in fact or law, with a belief that they desired representation by the Unions."⁷⁷ The majority, after citing the *Laystrum*⁷⁸ version of the new employee presumption, concluded that such a presumption would only apply in a normal turnover situation.⁷⁹ They explained that:

[I]n 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.⁸⁰

The Board limited this apparent rejection of a strikers' replacements presumption only six months later in *Windham Community Memorial Hospital*.⁸¹

Windham is important because it reveals the Board's present position on the strikers' replacements presumption and the confusion that exists over the Board's interpretation of *Arkay*. *Windham* involved a strike by nurses and other medical personnel.⁸² The hospital based its good faith doubt of the union's majority on the fact that "20 employees did not go on strike and 40-some were hired as replacements, some of the nonstrikers did not approve of the strike, and the intensity of the picketing slackened."⁸³ Despite these assertions, the Administrative Law Judge found that a good faith doubt of majority status did not exist.⁸⁴ Although the Judge did not find that the employer's refusal to bargain was justified, his handling of the strikers' replacements is noteworthy. In tallying the pro-union and anti-union vote, he assumed that all of the replacements would not support the union.⁸⁵ Citing the Board's decision in *Arkay*, the Judge said that the strikers' replacements "might well be presumed not to want the union to represent them."⁸⁶

⁷⁵ *Id.* at 397, 94 L.R.R.M. at 1198.

⁷⁶ *Id.* at 398, 94 L.R.R.M. at 1198.

⁷⁷ *Id.* at 397, 94 L.R.R.M. at 1198 (footnote omitted).

⁷⁸ 151 N.L.R.B. 1482, 58 L.R.R.M. 1642. This case was discussed earlier in this note. See text at notes 30-34 *supra*.

⁷⁹ *Arkay*, 227 N.L.R.B. at 397-98, 94 L.R.R.M. at 1198.

⁸⁰ *Id.* (footnote omitted) (relying on *Peoples Gas Sys.*, 214 N.L.R.B. 944, 87 L.R.R.M. 1430).

⁸¹ 230 N.L.R.B. 1070, 95 L.R.R.M. 1565. It is interesting to note that *Windham Hosp.* was argued before the Second Circuit on February 9, 1978, three months before that same court, with different judges presiding, decided the *Arkay* appeal.

⁸² *Windham Hosp.*, 230 N.L.R.B. at 1072, 95 L.R.R.M. at 1566.

⁸³ *Id.* at 1074, 95 L.R.R.M. 1565 (footnote omitted).

⁸⁴ *Id.*, 95 L.R.R.M. at 1566.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1073, 95 L.R.R.M. at 1566.

In affirming the holding, but modifying the analysis of the Administrative Law Judge, a unanimous Board took the opportunity to clarify its position on the strikers' replacements presumption.⁸⁷ Extending the new employee presumption into the strike situation the Board said: "The general rule. . . is that new employees, including strikers' replacements, are presumed to support the union in the same ratio as those whom they have replaced."⁸⁸

In explaining why the *Arkay* decision had not classified the permanent strikers' replacements as pro-union, the Board in *Windham* characterized that case as a limited exception to the new employee presumption.⁸⁹ The Board considered *Arkay* unique because there the unions had abandoned the bargaining unit and, therefore, the workers would naturally refuse to continue to support the union.⁹⁰ This explanation of *Arkay*, and the general rationale underlying *Windham* was heavily relied upon by the Board in *National Car Rental System*,⁹¹ the last principal case to be examined.

In *National Car Rental*, all ten of the company's employees commenced a strike on March 29, 1977.⁹² On May 20, the striking employees were notified that if they did not return to work they would be permanently replaced.⁹³ When none of the ten employees returned, National then hired ten permanent replacements.⁹⁴ National then refused to bargain with the union, stating that it did not believe that the union still represented a majority of the employees.⁹⁵ National filed a petition for a representation election⁹⁶ and on December 9 the Administrative Law Judge heard the case.⁹⁷

⁸⁷ *Id.* at 1070, 95 L.R.R.M. at 1566.

⁸⁸ *Id.* In support of the presumption, the Board cited *Cutten Supermarket*, 220 N.L.R.B. 507, 90 L.R.R.M. 1250 (1975), and *Surface Indus., Inc.*, 224 N.L.R.B. 155, 93 L.R.R.M. 1074 (1976). The use of these cases as precedent for the Board's strikers' replacements presumption is questionable. In *Cutten Supermarket* the Board held only that the union sentiments of replacement workers were unknown. 220 N.L.R.B. at 509, 90 L.R.R.M. at 1253. Although the Board did recite the new employee presumption, it did not hold specifically that strikers' replacements could be presumed to support the union to the same extent as those they had replaced. *Id.*, see also text at notes 53-57 *supra*. *Surface Indus.* is equally poor precedent because it depends on *Cutten Supermarket* in extending the new employee presumption to strikers' replacements. 224 N.L.R.B. at 163, 93 L.R.R.M. 1074.

Thus, if *Windham* is to be viewed as the basis for the current extension of the new employee presumption to include permanent strikers' replacements, this extension is not only lacking in strong precedent, but was announced in dicta. It is dicta because, even with the classification of all the replacements as anti-union, the Board still did not find an objective good faith doubt and, therefore, the replacements' status was not essential to the case's determination. See, *Windham*, 230 N.L.R.B. at 1074, 95 L.R.R.M. 1565.

⁸⁹ *Windham*, 230 N.L.R.B. at 1070, 95 L.R.R.M. at 1566.

⁹⁰ *Id.*

⁹¹ 237 N.L.R.B. No. 23, 99 L.R.R.M. 1027.

⁹² *Id.*, slip op. at 3, 99 L.R.R.M. 1027.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*, slip op. at 1, 99 L.R.R.M. 1027.

At the hearing National based its doubt of the union's majority status on the following factors: all ten of the company's employees went on strike and were permanently replaced; all replacements constantly had to cross picket lines knowing they were replacing strikers;⁹⁸ and, there was no showing that the replacements were contacted by the union or that they supported it.⁹⁹ Citing extensively from *Windham*,¹⁰⁰ the Administrative Law Judge applied that version of the strikers' replacements presumption and found National Car Rental System in violation of section 8(a)(5) of the Act.¹⁰¹ Referring to the strikers' replacements presumption, the Judge then commented that: "There is no way that I can alleviate Respondent's counsel from his conclusion that the current Board law is absurd. . . ." ¹⁰² The Board affirmed the decision without discussing the Administrative Law Judge's view of its strikers' replacements presumption.¹⁰³

In summary, the *Arkay*, *Windham*, and *National Car* discussions present as clearly as possible the Board's present rule on strikers' replacements. Succinctly stated, the Board presumes that all "new employees, including permanent replacements for economic strikers, support the union in the same ratio as their predecessors. This presumption can only be rebutted by the employer's production of objective evidence,¹⁰⁴ such as the union's abandonment of the bargaining unit in *Arkay*.¹⁰⁵ In cases following *National Car*, the Board has consistently applied its strikers' replacements rule.¹⁰⁶ This rule remained unscathed until March 8, 1979, when the court of Appeals for the Eighth Circuit reviewed *National Car Rental System*¹⁰⁷ and flatly rejected it.¹⁰⁸

C. Rejection by the Eighth Circuit

The employer in *National Car Rental* petitioned for review of the Board's bargaining order and the Board filed cross application for enforcement.¹⁰⁹ In its opinion denying enforcement, the court of appeals dealt extensively with the strikers' replacements presumption. After citing the *Windham*¹¹⁰ rule, the court said:

If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the ten new employees fa-

⁹⁸ *Nat'l Car Rental Sys.*, 237 N.L.R.B. No. 23, slip op. at 4, 99 L.R.R.M. 1027.

⁹⁹ *Nat'l Car Rental Sys.*, 594 F.2d at 1206, 100 L.R.R.M. at 2826.

¹⁰⁰ 230 N.L.R.B. 1070, 95 L.R.R.M. 1505.

¹⁰¹ *Nat'l Car Rental Sys.*, 237 N.L.R.B. No. 23, slip op. at 3, 99 L.R.R.M. 1027.

¹⁰² *Id.* at 4, 99 L.R.R.M. 1027.

¹⁰³ *Id.* at 1, 99 L.R.R.M. 1027.

¹⁰⁴ Examples of the different types of objective evidence which the Board has consistently accepted are presented in the text at notes 140-46 *infra*.

¹⁰⁵ 227 N.L.R.B. at 397, 94 L.R.R.M. at 1197.

¹⁰⁶ See *Pennco, Inc.*, 242 N.L.R.B. No. 73, 101 L.R.R.M. 1195 (1979); *Int'l Union of Operating Eng'rs*, 238 N.L.R.B. No. 158, 99 L.R.R.M. 1353 (1978).

¹⁰⁷ 237 N.L.R.B. No. 23, 99 L.R.R.M. 1027.

¹⁰⁸ *Nat'l Car Rental Sys.*, 594 F.2d at 1206, 100 L.R.R.M. 2826-27.

¹⁰⁹ *Id.* at 1203, 100 L.R.R.M. at 2824.

¹¹⁰ See text at note 88 *supra*.

vored 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 after they were hired. This presumption of the Board is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment.¹¹¹

The judges of the Eighth Circuit held, that "the 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."¹¹² This holding shows the Eighth Circuit's partial rejection of the rationale underlying the Board's decisions in *Windham* and *National Car*. The court did not consider the permanent replacement of all strikers to be "normal" turnover.

The extent to which the court's rejection of the strikers' replacements presumption was based on its view that the replacement of strikers is not "normal" turnover is further illustrated in the court's conclusion that if "the replacements had been hired over a period of time without having to cross picket lines to apply for or attend work, (i.e., a normal turnover situation) the presumption might have some validity."¹¹³ Under the facts as presented, however, the court rejected that presumption and consequently found that there was no substantial evidence to support the Board's conclusion that National Car Rental System did not have a good faith doubt of the union's majority support.¹¹⁴ In rejecting the Board's strikers' replacements presumption, the Eighth Circuit properly questioned the propriety of extending the rationale of the new employee presumption to encompass the strike situation.

III. EVALUATION OF THE EXTENSION OF THE NEW EMPLOYEE PRESUMPTION TO INCLUDE STRIKERS' REPLACEMENTS.

In the wake of *National Car Rental*, the National Labor Relations Board now recognizes a strikers' replacements presumption which is unsupported by early Board decisions, and which has been rejected by the Eighth Circuit. The strikers' replacements presumption can not be justified by the rationale of the new employee presumption for the presence of strikers' replacements do provide a reasonable basis for an employer's good faith doubt of the union's majority support.

A. *The Rationale for the New Employee Presumption*

The underlying policy support for the new employee presumption can be found in section one of the National Labor Relations Act.¹¹⁵ This section indicates Congress's intent in the NLRA to promote labor organizations for the purpose of collective bargaining. An adjudicatory rule, such as the new

¹¹¹ *Nat'l Car Rental Sys.*, 594 F.2d at 1206, 100 L.R.R.M. at 2826.

¹¹² *Id.* (footnotes omitted).

¹¹³ *Id.* at 1207, 100 L.R.R.M. at 2827 (explanation added).

¹¹⁴ *Id.*

¹¹⁵ For text of section one, 29 U.S.C. § 151 (1976) see note 7 *supra*.

employee presumption, which guarantees a presumption of incumbent union majority, would therefore promote the intent of the Act by maintaining bargaining stability.

Indeed, the new employee presumption promotes bargaining stability by denying the employer an opportunity to refuse to bargain after an arbitrary amount of employee turnover. If this presumption did not exist, the employer would be permitted to deny a union's majority status following a turnover of employees, and a company could completely bypass the bargaining process, defend its good faith in an unfair labor practice proceeding, and shift the burden to the unions to prove their majority status.¹¹⁶ This unrestrained employer's power could disrupt bargaining, undermine union support, and cast "an impossible burden on the certified union of being perpetually prepared after the certification year, without notice, to furnish independent documentary proof of its majority as of any given moment selected by the employer."¹¹⁷

In addition to maintaining bargaining stability, the new employee presumption may be justified on the basis that there is no reason to assume that the new employees would not want to be represented by the incumbent union. With normal nonstrike turnover, the goals of new employees should be similar to those of the union because the new employees are hired under circumstances similar to those of the employees who were just replaced. Also, the new employees would benefit by being represented by a union that had strong employee support and could better press their demands, whether the support was real or only presumed. Thus, the new employee presumption has merit, not only because it maintains bargaining stability, but also because it is a rational assumption concerning the desires of the new hires. The rationale behind the new employee presumption falters, however, once the presumption is extended to include permanent strikers' replacements.

B. Extension to Strikers' Replacements

The strikers' replacements presumption can not be justified by an extension of the commonsense rationale offered for the new employee presumption. As the NLRB admitted in *Arkay*, "in the strike situation . . . it would be wholly unwarranted and unrealistic to presume . . . replacements for the union employees who had gone out on strike to favor representation by the

¹¹⁶ *Stoner Rubber Co.*, 123 N.L.R.B. at 1447-50, 44 L.R.R.M. at 1136-38 (dissent).

¹¹⁷ *Id.* at 1450, 44 L.R.R.M. at 1137 (Member Jenkins concurring in part and dissenting in part) (footnote omitted). In support of this contention, Members Jenkins and Fanning provide the following example:

Assuming, . . . a continuing or large turnover of employees in a plant, and considering the minimum requisite in Section 8(a)(3) that new employees be given a 30-day grace period before requiring their membership under a union-shop contract, a true test of majority could be a virtual impossibility without a properly conducted election; and to impose such a burden on an incumbent union to prove its majority, without reasonable notice, is an arbitrary and inequitable distortion of the majority rule.

Id. at 1450 n.32, 44 L.R.R.M. at 1137-38 n.32.

unions to the same extent as the strikers."¹¹⁸ The reasons for this commonsense argument are twofold. First, the very act of the employees in accepting strikers' jobs and crossing picket lines would indicate that they do not support the union with the same enthusiasm as the workers who are on strike.¹¹⁹ This is especially true when the strikers are so pro-union that they refuse to work knowing that they may be permanently replaced. The second aspect of the commonsense argument disfavoring the strikers' replacements presumption is that most replacements would consider their interests to be diametrically opposed to those of the incumbent union.¹²⁰ The replacements might well view the union as being loyal to the strikers alone. This would appear especially true in the frequent examples where the union has never contacted the replacements. In these situations the replacements must be well aware that "if negotiations with the Union resumed they would be the prime target of the Union, because the Union would seek their replacement immediately."¹²¹ Arguing this point, the employer in *National Car* stated that "in order to presume that the strikers' replacements supported the Union we must also presume that they are idiots."¹²²

Since the logical conclusion is that strikers' replacements do not support the incumbent union to the same degree as the strikers, there must exist another explanation for the Board's use of the presumption. This explanation can be found in the Board's desire to promote the NLRA's goal of bargaining stability.¹²³ The strikers' replacements presumption encourages continued bargaining in strike situations in the same way that the new employee presumption encourages bargaining during normal turnover.¹²⁴ Nevertheless, when consideration is given to the employee's right to majority representation, found in section 9(a) of the Act,¹²⁵ the factually illogical strikers' replacements presumption can not be justified by the explanation that it promotes the pur-

¹¹⁸ *Arkay*, 227 N.L.R.B. at 397-98, 94 L.R.R.M. at 1198 (footnote omitted).

¹¹⁹ This was one of the arguments offered by the employer in *Nat'l Car Rental Sys.*, 237 N.L.R.B. No. 23, slip op. at 4, 99 L.R.R.M. 1027.

¹²⁰ This argument was offered against the strikers' replacements presumption by the employers in *Int'l Union of Operating Eng'rs*, 238 N.L.R.B. No. 158, slip op. at 16, 99 L.R.R.M. 1353; *Nat'l Car Rental Sys.*, 237 N.L.R.B. No. 23, slip op. at 4, 99 L.R.R.M. 1027.

¹²¹ *Nat'l Car Rental Sys.*, 237 N.L.R.B. No. 23, slip op. at 4, 99 L.R.R.M. 1027.

¹²² *Id.* Recently, the NLRB has attempted to dispose of the common sense argument that strikers' replacements would not favor the union by reasoning that, when a replacement accepts employment during a strike, it signifies no more than a vote of no confidence in the strike action and a willingness or need to obtain a wage. *Henry Marx and Saul Greenburg, d/b/a Ray's Liquor Store*, 234 N.L.R.B. 1136, 1140, 98 L.R.R.M. 1038 (1978). The Board also reasons that since there would be no particular reason for the replacements to presume that the union would favor the strikers over themselves, there would therefore be no reason not to expect the replacements to desire the union. *Int'l Union of Operating Eng'rs*, 238 N.L.R.B. No. 158, slip op. at 17, 99 L.R.R.M. 1353.

¹²³ The NLRA's goal of bargaining stability can be found in section one, which provides for "encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151 (1976).

¹²⁴ See text at notes 116-17 *supra*.

¹²⁵ 29 U.S.C. § 159(a) (1976).

poses of the NLRA. If through the replacement of strikers the union no longer has majority support, it should not be allowed to hide behind a Board created presumption. This would allow the incumbent union to remain in control possibly against the wishes of the majority and would subordinate the rights of the employees to the survival of the incumbent union.¹²⁶

This argument that the presumption is based on a policy which gives more value to the incumbent union as an organization than to the wishes of a majority of the employees also can be viewed from the employer's side. The employer might contend that through enforcement of the strikers' replacements presumption the Board causes the employer to ignore his duty owed new employees to refuse to recognize the incumbent, and now minority, union.¹²⁷ If the employer recognizes a minority union, he violates section 9(a) of the Act¹²⁸ and may discourage the formation of a new union which actually does represent a majority of employees.

The strikers' replacements presumption operates counter to the intent of the Act in another way by interfering with the efficient flow of commerce.¹²⁹ An employer who has withdrawn recognition from a union can not take any unilateral action with respect to working conditions without subjecting himself to a potential unfair labor practice charge.¹³⁰ If the Board finds that a majority of employees still support the union, the employer who has acted is then guilty of an unfair labor practice. Consequently, because the strikers' replacements presumption allows the Board to find that a union has majority support, when in actuality it may not, the employer is inhibited from changing the status quo without first reaching an agreement with the minority union. This rule, when coupled with the fact that the incumbent union's constituency may be comprised predominately of strikers who have been permanently replaced, creates a dilemma under the Act. If the union refuses to negotiate, then the efficient flow of commerce is damaged. On the other horn of the dilemma, if the union does bargain, the employees' right to majority representation is ignored. The absurd result follows that a union which represents a minority of working employees is allowed to determine the employment conditions of all working employees. This dilemma continues at least until other objective evidence of the union's loss of majority is produced or until the employees or a rival union can hold a decertification election.

¹²⁶ It was stated in *NLRB v. Schwartz*, 146 F.2d 773, 15 L.R.R.M. 870 (5th Cir. 1945), that: "Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions" *Id.* at 774, 15 L.R.R.M. at 871. For an excellent discussion of the conflict between the stability and majority representation goals of the NLRA, see *Seeger*, *supra* note 52.

¹²⁷ *Pennco, Inc.*, 242 N.L.R.B. No. 73, slip op. at 6, 101 L.R.R.M. at 1197.

¹²⁸ 29 U.S.C. § 159(a) (1976). See note 3 *supra*.

¹²⁹ Section 1 of the NLRA provides that: "It is declared to be the policy of the United States to eliminate . . . obstructions to the free flow of commerce" 29 U.S.C. § 159 (1976). See note 7 *supra* for complete quote.

¹³⁰ *Stoner Rubber Co.*, 123 N.L.R.B. at 1447, 44 L.R.R.M. at 1136 (members Jenkins and Fanning, concurring in part and dissenting in part).

The employer's dilemma is compounded in this circumstance since he has no independent right to petition the Board for a majority representation election unless he has a good faith doubt of the union's majority support.¹³¹ If the employer's good faith doubt depends on the existence of permanent strikers' replacements, the Board will deny his petition for an R.M. election. This combination of the strikers' replacements presumption and the good faith doubt requirement prolongs even further the dilemma created by the Board's presumption. The dilemma can be resolved by rejecting the strikers' replacements presumption and recognizing that the presence of strikers' replacements provides sufficient evidence to support an employer's good faith doubt of a union's majority support. An examination of the good faith doubt standard and the sufficiency of strikers' replacements as evidence of an employer's justified doubt is therefore necessary to complete evaluation of the strikers' replacements presumption.

*C. Strikers' Permanent Replacements as Evidence
of a Good Faith Doubt*

An employer can rebut the presumption of the continuing majority status of an incumbent union, after the certification year,¹³² by establishing her good faith doubt of the union's majority status.¹³³ This can be accomplished by presenting "clear and convincing evidence of loss of union support capable of raising a reasonable doubt of the union's continuing majority."¹³⁴ The test requires objective evidence, although "subjective evidence may be used to bolster the argument that such doubt existed at the relevant time."¹³⁵ In determining sufficient doubt, all evidence is considered as cumulative.¹³⁶

With respect to the objective evidence aspect of the test, an argument has been offered against using strikers' replacements as proof of an employer's doubt.¹³⁷ This argument reasons that since the employer can only presume that the strikers' replacements do not support the union, such a presumption is not objective evidence.¹³⁸ This argument can be dismissed, however, by recognizing that the connection between the strikers' replacements and the conclusion that they do not support the union is so strong that a presumption is not necessary. Instead, all that is required is the same type of permissible

¹³¹ *NLRB v. Richman Bros. Co.*, 387 F.2d 809, 813, 67 L.R.R.M. 2051, 2053-54 (7th Cir. 1967).

¹³² *Windham Hosp.*, 577 F.2d at 811, 99 L.R.R.M. at 2245.

¹³³ *Id.*

¹³⁴ *Id.* (quoting *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 489-90, 89 L.R.R.M. 2879, 2881 (2d Cir. 1975)).

¹³⁵ *Orion Corp.*, 515 F.2d at 85, 89 L.R.R.M. at 2173.

¹³⁶ See *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 547, 74 L.R.R.M. 2658, 2661 (7th Cir. 1970).

¹³⁷ *Arkay*, 227 N.L.R.B. at 400, 94 L.R.R.M. at 1200 (Member Jenkins, dissenting).

¹³⁸ *Id.*

inference that is characteristic of all circumstantial evidence.¹³⁹ Therefore, the existence of permanent strikers' replacements is consistent with the characteristics of objective evidence necessary to prove a good faith doubt. Indeed, the use of strikers' replacements as objective evidence is supported by the Board's consistent use of similar inferential assumptions to rebut the continuing majority support presumption. Among these are the admission of lack of majority status by the bargaining representatives;¹⁴⁰ a decline in the number of union dues check off authorizations;¹⁴¹ lack of incumbent union activity;¹⁴² oral statements of employees, particularly when numerous and reliable;¹⁴³ written repudiations of the union by the employees;¹⁴⁴ the history of employer-union relations;¹⁴⁵ and, the employees' filing of decertification petitions.¹⁴⁶

Although these grounds have not always been held to be sufficient proof of loss of majority support, either by themselves or cumulatively,¹⁴⁷ the Board has consistently allowed them to be considered in determining the reasonableness of an employer's doubt.¹⁴⁸ Nevertheless, the existence of permanent strikers' replacements, a very similar and equally probative ground for doubt, has been singled out and denied consideration by the Board.¹⁴⁹ In fact, the Board has even presumed the opposite effect.¹⁵⁰ This inconsistent treatment of evidence can be explained only as an attempt to avoid what the Board evidently perceives as the unfair consequence arising from the current right of employers to justify a unilateral refusal to bargain based on good faith doubt.

¹³⁹ R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 142 (1977).

¹⁴⁰ *Universal Life Ins. Co.*, 169 N.L.R.B. 1118, 1119, 67 L.R.R.M. 1355, 1357 (1968).

¹⁴¹ *Peoples Gas Sys.*, 214 N.L.R.B. 944, 946, 87 L.R.R.M. 1430, 1433; *Wooster Brass Co.*, 80 N.L.R.B. 1633, 1636, 23 L.R.R.M. 1279, 1281 (1948).

¹⁴² *Ingress-Plastene, Inc.*, 430 F.2d at 547, 74 L.R.R.M. at 2661; *Arkay*, 227 N.L.R.B. at 97, 94 L.R.R.M. at 1198; *Dixie Gas Co.*, 151 N.L.R.B. 1257, 1259, 58 L.R.R.M. 1587, 1588 (1965).

¹⁴³ *Faye Nursing Home, Inc.*, 215 N.L.R.B. 658, 664, 88 L.R.R.M. 1404, 1404-05 (1974); *Frito-Lay*, 151 N.L.R.B. 28, 33, 58 L.R.R.M. 1328, 1329 (1965).

¹⁴⁴ *NLRB v. Gallaro*, 419 F.2d 97, 100, 73 L.R.R.M. 2043, 2046 (2d Cir. 1969); *Randell Co.*, 133 N.L.R.B. 289, 295, 48 L.R.R.M. 1644, 1644 (1961).

¹⁴⁵ *Gallaro*, 419 F.2d at 102, 73 L.R.R.M. at 2047. This factor is usually used as evidence of the good faith aspect of the objective consideration test.

¹⁴⁶ *Cadillac Mfg. Corp.*, 232 N.L.R.B. 586, 589, 96 L.R.R.M. 1281, 1281 (1977).

¹⁴⁷ See generally *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 490, 89 L.R.R.M. 2879, 2879 (2d Cir. 1975) (repudiation of the union by some employees and filing for decertification election); *Sierra Dev. Co.*, 231 N.L.R.B. 22, 23, 95 L.R.R.M. 1597, 1598 (1977) (repudiation, by some employees); *Cut and Curl, Inc.*, 227 N.L.R.B. 1869, 1873, 94 L.R.R.M. 1332, 1332-33 (1977) (lack of union activity and repudiation by some employees); *Bartenders Ass'n*, 213 N.L.R.B. 651, 652, 87 L.R.R.M. 1194, 1196 (dues checkoff by few employees).

¹⁴⁸ See notes 140-46 *supra*.

¹⁴⁹ See *Nat'l Car Rental Sys.*, 237 N.L.R.B. No. 23, 99 L.R.R.M. 1027; *Windham Hosp.*, 230 N.L.R.B. 1070, 95 L.R.R.M. 1565.

¹⁵⁰ See cases cited in note 149 *supra*.

As demonstrated above, the Board's current strikers' replacements presumption is factually unrealistic. In addition, the policy reasons favoring the presumption are outweighed by those which can be presented against it. For these reasons, the strikers' replacements presumption should be either totally abandoned or, as a compromise, at least be abandoned when an employer petitions the Board for a majority representation election.

IV. PROPOSALS

A. Abandon the Strikers' Replacements Presumption

Without the strikers' replacements presumption, permanent replacements for economic strikers would not be presumed to support the union in the same ratio as the strikers. On the contrary, their mere existence, particularly if accompanied by picketing or their abandonment by the incumbent union, would be objective evidence of the employer's good faith doubt of the union's majority status.¹⁵¹ Consequently, in a situation like the one found in *National Car Rental*, where all the employees went on strike and all were permanently replaced, the employer would probably have enough objective evidence to support his good faith doubt and rebut the presumption of continuing majority support.¹⁵² This would allow him unilaterally to refuse to bargain with the union and to make changes without consulting the union.¹⁵³

In a less drastic strike situation, where less than all of the employees have gone on strike and only some of the strikers were replaced, the presence of replacements may not by itself constitute sufficient grounds for a good faith doubt. This would probably be true even in a violent strike situation with no contact between the incumbent union and the replacements.¹⁵⁴ Nevertheless, while the mere existence of replacements by itself may not be capable of supporting a good faith doubt, the Board's willingness to view all objective evidence in a cumulative manner¹⁵⁵ would allow evidence of replacements to carry some weight in satisfying the good faith doubt standard. Therefore, without a strikers' replacements presumption, the presence of strikers' replacements even in a mild strike situation might justify an employer's refusal to bargain.

If abandonment of the strikers' replacements presumption does allow an employer to establish his good faith doubt, the incumbent union is not necessarily rejected. Under the view adopted by a majority of courts, but not by the Board, an employer's good faith doubt of the union's majority status is not an

¹⁵¹ These two factors were stressed in *Nat'l Car Rental Sys.*, 237 N.L.R.B. No. 23, 99 L.R.R.M. 1027.

¹⁵² *Id.*

¹⁵³ The employer's power to act unilaterally is discussed in *Stoner Rubber Co.*, 123 N.L.R.B. at 1447, 44 L.R.R.M. at 1136 (members Jenkins and Fanning, concurring in part and dissenting in part).

¹⁵⁴ *Nat'l Car Rental Sys.* speaks of "all new permanent replacements for all striking employees." 594 F.2d at 1206, 100 L.R.R.M. at 2826 (emphasis added).

¹⁵⁵ See note 133 *supra*.

absolute defense to an unfair labor practice charge.¹⁵⁶ The majority of courts hold that proof of the employer's good faith doubt shifts the burden of proving that on the date of the employer's refusal to bargain, the union did in fact represent a majority of the employees.¹⁵⁷ If the union meets this burden, then the employer will be held not to have had a good faith doubt.¹⁵⁸ Therefore, abandonment of the strikers' replacements presumption does not cause an automatic demise of the incumbent union.

Although abandonment of the strikers' replacements presumption does not always allow an employer to establish a good faith doubt, and although a majority of courts do not view an employer's good faith doubt as an absolute defense, an argument has been offered against totally abandoning the presumption. This argument contends that abandonment of the presumption would impose on the union the difficult burden of furnishing "independent documentary proof of its majority as of any given moment selected by the employer."¹⁵⁹ The inconvenience of requiring the union to prove its majority support is justifiable, however, because section 9(a)¹⁶⁰ of the Act emphasizes a union's need to represent a majority of employees. Nevertheless, the existence of a strikers' replacements presumption need not be phrased in an either/or context. By adopting a compromise rule, the Board need only partially abandon the factually unrealistic strikers' replacements presumption, and still prevent any potential abuses that the good faith doubt standard may allow.

B. *Alternative to Total Abandonment*

Although many alternative solutions are available, this note will submit only one. The Board's major concern appears to be with the employer's freedom, under the good faith doubt standard, to refuse unilaterally to bargain in strike situations and consequently to avoid the Board's settlement procedures. This concern can be abated by a partial abandonment of the factually unrealistic strikers' replacements presumption. Under this alternative, the Board could continue to apply the strikers' replacements presumption in all determinations of an employer's good faith doubt with one exception: an employer should be allowed to use strikers' replacements as objective evidence of a union's loss of majority support when petitioning the Board for a R.M. election. This alternative would impose on the parties to a strike a continuing obligation to bargain until either the majority status of the union is determined by a Board held R.M. or decertification election,¹⁶¹ or until the employer can prove a good faith doubt of the union's majority status, without relying upon

¹⁵⁶ See notes 17-19 *supra*.

¹⁵⁷ *Nat'l Cash Register*, 494 F.2d 189, 194, 85 L.R.R.M. 2657, 2660 (8th Cir. 1974).

¹⁵⁸ *Id.*

¹⁵⁹ *Stoner Rubber Co.*, 123 N.L.R.B. at 1450, 44 L.R.R.M. at 1137 (footnote omitted) (members Jenkins and Fanning, concurring in part and dissenting in part).

¹⁶⁰ 29 U.S.C. § 159(a) (1976). For discussion of this section, see note 3 *supra*.

¹⁶¹ The alternative's emphasis on the availability of Board sponsored elections, can also be seen in the approach suggested by members Jenkins and Fanning in their dissent in *Stoner Rubber Co.*, 123 N.L.R.B. at 1449-50, 44 L.R.R.M. 1137-38.

the existence of permanent replacements for strikers. If, an employer petitions the Board for a R.M. election, the employer should be permitted to use the existence of permanent replacements for strikers as objective evidence in meeting the good faith doubt requirement.

The advantage of this alternative over the Board's current practice can be seen in its reconciliation of the NLRA's conflicting goals of majority representation and bargaining stability¹⁶² in the strikers' replacements context. Due to the rapid employee turnover associated with a strike, the incumbent union may no longer be represented by a majority of the employees. In apparent disregard of this fact, the NLRA¹⁶³ seeks to maintain bargaining stability between the employer and the striking union. Under current practice, through the use of the strikers' replacements presumption, bargaining stability is often protected to the detriment of majority representation. The proposed alternative recognizes that these goals do not have to be mutually exclusive. The alternative serves the same interests as the strikers' replacements presumption by denying the employer the right to unilaterally refuse to bargain, when his requisite good faith doubt of union majority support depends on the presence of a majority of strikers' replacements. Therefore, this alternative avoids the disruption in bargaining and the potential for employer abuse which the strikers' replacements presumption is designed to prevent.

Unlike the strikers' replacements presumption, this alternative also preserves the goal of majority representation in union bargaining.¹⁶⁴ It does this by allowing the employer to consider realistically the existence of strikers' replacements in petitioning the Board for a R.M. election. Under present practice with the strikers' replacements presumption, an employer would not be given a Board sponsored R.M. election if his request depended on the existence of permanent strikers' replacements.¹⁶⁵ This is because the Board requires the employer to demonstrate by objective evidence that he has some reasonable grounds for believing that the union has lost its majority status since its certification as a condition to ordering an employer requested election.¹⁶⁶ The strikers' replacements presumption denies the employer the use of the strikers' replacements as objective evidence in proving his good faith doubt. By contrast the alternative, through its partial rejection of the strikers' replacements presumption, would allow an employer petitioning the Board for a R.M. election to *assume* that the replacements do not support the union. If the union is in fact supported by a majority of employees, the election will demonstrate this status without disruption of bargaining. If the election shows that the union is not supported by a majority of employees, then the employer can cease to bargain. This alternative approach would put an end to unwarranted recognition, and would encourage the incumbent union, a rival

¹⁶² A general discussion of the conflict, without the narrow focus on the strikers' replacements presumption, can be found in Seger, *supra* note 52.

¹⁶³ For discussion of section one of the NLRA, see note 7 *supra*.

¹⁶⁴ This goal is expressed in 29 U.S.C. §§ 151 and 159(a) (1976).

¹⁶⁵ *Richman Bros. Co.*, 387 F.2d at 813, 67 L.R.R.M. at 2053-54.

¹⁶⁶ *Id.*

union, or a new union to begin reorganizing the employees so that a majority is again represented.¹⁶⁷

CONCLUSION

The presumption that permanent replacements for economic strikers support the union in the same ratio as the strikers that they replace is invalid. The National Labor Relations Board uses this presumption in strike situations to circumvent the employer's right to refuse unilaterally to bargain when a union's majority status is in doubt. While this note advocates the complete abandonment of the strikers' replacements presumption by recognizing the reasons which have led to the Board's utilization of the presumption, a compromise alternative is clear. The purposes of the National Labor Relations Act¹⁶⁸ can be served by partially abandoning the irrational and factually unrealistic strikers' replacements presumption and adopting an alternative rule which would deal directly with the potential employer abuse of his right to refuse unilaterally to bargain.

It is suggested that in a strike situation, the parties to the strike should have a continuing obligation to bargain, at least until such time as the majority status of the union is determined by a Board held R.M. or decertification election, or until the employer can prove its requisite good faith doubt without using strikers' replacements as objective evidence. Nevertheless, if an employer requests a Board sponsored R.M. election, the presence of permanent strikers' replacements should be allowed as objective evidence of an employer's good faith doubt. This alternative would ease the present conflict between the Act's majority support emphasis and its concern with the mutual obligation of the employer and the union to settle disputes peacefully.

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¹⁶⁷ The alternative allows for greater expediency in settling disputes than does the present strikers' replacements presumption. This expediency results because the strikers' replacements presumption sometimes restrains the employer from petitioning the Board for an election. See text at note 131 *supra*. However, this benefit of the alternative is not always available because it is the "practice of the National Labor Relations Board not to conduct a representation election when the employer is also charged with an unfair labor practice which might affect the outcome, unless the Union waives any claim to rely upon the employer's conduct to invalidate the election." *Furr's Inc. v. NLRB*, 350 F.2d 84, 85, 59 L.R.R.M. 2769, 2769 (10th Cir. 1965). Thus, if the employer is charged with an unfair labor practice, even if he could use the strikers' replacements as evidence of his good faith doubt, as the alternative allows, the election would be considerably delayed. This possibility restricts one of the benefits of the alternative and argues favorably for the abandonment of the strikers' replacements presumption without providing an accompanying duty to continue bargaining.

It should be noted that the alternative is not susceptible to defeat just because a union claims an unfair labor practice offense. The filing of an unproven unfair labor practice charge does not relieve the Board from considering and acting on a decertification petition. *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1069, 77 L.R.R.M. 2392, 2396 (5th Cir. 1971). Also, if the charge was for a violation of the section 8(a)(5) duty to bargain, 29 U.S.C. § 158(a)(5) (1976), then under the alternative the employer could still point to the presence of strikers' replacements as evidence of his good faith doubt.

¹⁶⁸ 29 U.S.C. § 151 (1976).