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James D. Dasso

University of Michigan Law School

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Employer Postcertification Polls to Determine Union Support

Under the National Labor Relations Act (NLRA),¹ an employer commits an unfair labor practice if it refuses to bargain in good faith with a union that has the support of a majority of the employees in the appropriate bargaining unit.² Because the right of employee free choice includes the right to refrain from union activities,³ an employer also violates the Act if it bargains with a union that does not have majority support, even if it does so in good faith.⁴ For one year following a union's certification,⁵ an employer need not accurately gauge union support because the union enjoys an irrebuttable presumption of majority support.⁶ A similar presumption also exists during the life of

1. 29 U.S.C. §§ 151-169 (1982). The NLRA is also known as the Wagner Act. This Note will sometimes refer to the NLRA as "the Act."

2. Section 8(a) of the NLRA provides: "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a) (1982). Section 8(d) defines "to bargain collectively" as "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 with respect to wages, hours, and other terms and conditions of employment" 29 U.S.C. § 158(d); *see also* NLRB v. Borg-Warner Corp., 356 U.S. 342, 348-49 (1958) (duty to bargain is limited to issues of wages, hours, and other terms and conditions of employment). Section 9(a) states that a representative selected by a majority of the employees in the appropriate bargaining unit shall be the exclusive collective bargaining representative of all the employees. 29 U.S.C. § 159(a). A violation of § 8(a)(5) would also be a derivative violation of § 8(a)(1) which prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their § 7 (free-choice) rights. 29 U.S.C. § 158(a)(1).

3. The Act guarantees to employees "the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." 29 U.S.C. § 157 (1982). Section 8(a)(3) permits a union to enforce union shop provisions by requiring the payment of "periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" 29 U.S.C. § 158(a)(3) (1982); *see also* Brooks, *Stability Versus Employee Free Choice*, 61 CORNELL L. REV. 344, 345-46 (1976); Seger, *The Majority Status of Incumbent Bargaining Representatives*, 47 TUL. L. REV. 961 (1973).

4. Section 8(a)(2) makes it 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" 29 U.S.C. § 158(a)(2) (1982). This section has been interpreted as generally prohibiting employer recognition of a minority union. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961); *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863, 866 (6th Cir. 1982); *NLRB v. West Sand and Gravel Co.*, 612 F.2d 1326, 1328 (1st Cir. 1979); *NLRB v. Book*, 532 F.2d 877 (2d Cir.), *cert. denied*, 429 U.S. 920 (1976).

5. A union may be designated the appropriate collective bargaining agent after either voluntary recognition by the employer or an election conducted by the National Labor Relations Board ("Board") following the procedures set forth in § 9 of the Act. An election culminates in formal Board certification of the results if the election indicates that the union has the support of a majority of the employees in the bargaining unit. *See* R. GORMAN, *BASIC TEXT ON LABOR LAW* 40 (1976).

6. *Brooks v. NLRB*, 348 U.S. 96 (1954). Although a strict application of the majority principle to union elections would require that a union be decertified whenever it loses majority support, the Court in *Brooks* analogized a union election to elections in the business and political spheres where voters are bound by their decisions for a fixed period of time. This tenure, the

a collective bargaining agreement.⁷ After the expiration of these periods, the presumption of majority support continues but becomes rebuttable.⁸

During the time when the presumption of majority support may be rebutted, an employer may decide that the union no longer retains the support of a majority of its employees. The employer most likely would want to withdraw its recognition from the union and refuse to bargain.⁹ If subsequently charged with committing an unfair labor

Court argued, promotes coherence in bargaining relationships, enhances the solemnity of the election process, gives the union time to carry out its mandate without pressure to produce hot-house results, encourages good-faith bargaining by the employer, and minimizes industrial strife. 348 U.S. at 99-100; *see also* *Pennco, Inc.*, 250 N.L.R.B. 716, 717 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982) (presumption of majority support provides coherence in bargaining relationships which promotes industrial stability and protects the employees' right to select a representative of their own choosing). The Board may extend or recommence the certification year if the employer has refused to bargain in good faith.

The Court in *Brooks* listed three exceptions to the rule that extends a year-long presumption of majority support to a certified union: (1) the certified union has dissolved or become defunct; (2) as a result of schism, substantially all of the members of a certified union have transferred their affiliation to a new local or international; or (3) the size of the bargaining unit has fluctuated radically within a short time. *Brooks*, 348 U.S. at 98-99. The Board and the courts take a very restrictive view of what constitutes "unusual circumstances," to prevent the exception from swallowing the rule. *See, e.g.*, *NLRB v. Mr. B. IGA, Inc.*, 677 F.2d 32 (8th Cir. 1982) (a three-year delay between representation election and certification, a reduction in bargaining unit size from 19 to 3, the sale of 3 of 4 stores in the bargaining unit, and the failure of the remaining three employees to vote in the original election did not constitute "unusual circumstances" justifying a refusal to bargain during the certification year); *Airport-Shuttle, Cincinnati, Inc.*, 257 N.L.R.B. 955, 956 (1981), *enforced*, 703 F.2d 220 (6th Cir. 1983) (petition signed by a majority of the employees and the failure of the union to contact the employer until 8 months after the certification election do not constitute "unusual circumstances"); *Ajax Magnethermic Corp.*, 229 N.L.R.B. 317 (1977), *enforced*, 541 F.2d 1210 (6th Cir. 1979) (Board rejected employer's arguments that employee turnover and changes in "conditions" constituted "unusual circumstances" justifying withdrawal).

A union that has been voluntarily recognized by the employer also enjoys a presumption of majority support, *e.g.*, *Landmark Intl. Trucks, Inc.*, 257 N.L.R.B. 1375 (1981), *vacated on other grounds*, 699 F.2d 815 (6th Cir. 1983), although the presumption continues only for a reasonable time rather than for an arbitrary one-year period. *NLRB v. Frick Co.*, 423 F.2d 1327, 1332 (3d Cir. 1970).

7. This "contract bar" presumption binds the employer to recognize the union for the period during which a collective bargaining agreement would bar a decertification petition. *See Pioneer Inn Assocs. v. NLRB.*, 578 F.2d 835, 838 (9th Cir. 1978); *Shamrock Dairy, Inc.*, 119 N.L.R.B. 998, 1002 (1957); *Hexton Furniture Co.*, 111 N.L.R.B. 342, 344 (1955). Since 1962, the Board has held that a decertification election petition is barred during the term of an agreement which extends not more than three years or during the first three years of a contract of longer duration. *General Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962). *See generally* Ray, *Withdrawal of Recognition from an Incumbent Union Under the National Labor Relations Act: An Appraisal*, 28 VILL. L. REV. 869, 880-81 (1983); Seger, *supra* note 3, at 996-98.

8. *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850 (5th Cir.), *enforcing* 233 N.L.R.B. 1087, *cert. denied*, 439 U.S. 893 (1978); *NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970); *Pennco, Inc.*, 250 N.L.R.B. 716 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); *Celanese Corp.*, 95 N.L.R.B. 664 (1951).

9. An employer may also file a petition with the Board for a decertification election. 29 U.S.C. § 159(c)(1)(B) (1982). However, an employer who seeks to withdraw recognition from a union would not find a decertification petition to be a realistic alternative. Such a petition will only be granted if an employer has reasonable, objective grounds for believing that the union no longer retains majority support. *United States Gypsum Co.*, 157 N.L.R.B. 652 (1966). Since the

practice, the employer may defend its action by rebutting the presumption of majority support in either of two ways. The employer can prove that when it withdrew recognition, the union did not, in fact, have majority support. Alternatively, the employer may present objective evidence¹⁰ sufficient to establish the employer's reasonable good-faith doubt as to the union's majority status at the time the employer refused to bargain.¹¹ The good-faith-doubt test has evolved into a standard "generally tantamount" to requiring proof "that the union did not in fact have majority support."¹² An employer may use a variety of evidence to justify its withdrawal of recognition including: a rapid decline in the number of union checkoffs,¹³ union inactivity (in particular, failure to monitor contract provisions and to pursue grievances),¹⁴ and employee expressions of dissatisfaction with the union.¹⁵

Gypsum test for granting an employer a decertification petition is identical to the test an employer must meet to withdraw recognition, see notes 11-15 *infra* and accompanying text, an employer with sufficient proof of loss of majority support will withdraw recognition rather than taking the less effective step of filing a decertification petition. Ray, *supra* note 7, at 914. Furthermore, the Board's "blocking charge" doctrine, which requires that the Board dismiss a union decertification petition whenever serious unfair labor practice charges are pending against the employer, ensures that a petition will rarely result in an actual election. *Id.*

10. See, e.g., *Pioneer Inn Assocs. v. NLRB*, 578 F.2d 835, 839 (9th Cir. 1978); *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1977).

11. *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486 (2d Cir. 1975); *Allied Indus. Workers Local 289 v. NLRB*, 476 F.2d 868 (D.C. Cir. 1973); *Terrell Mach. Co. v. NLRB*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); *Pennco, Inc.*, 250 N.L.R.B. 716 (1980), *enforced*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982).

12. R. GORMAN, *supra* note 5, at 114. Although application of the good-faith-doubt test is far from uniform, the employer's burden is always a heavy one and often approximates proving actual loss of majority status. See Comment, *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 Duke L.J. 718 (tracing the evolution of the good-faith-doubt test). The Board has vacillated between two different standards. Under the first, adopted in *Celanese Corp.*, 95 N.L.R.B. 664 (1951), the Board asks whether the employer reasonably and in good faith believed that the union did not have majority support. If so, the employer's withdrawal of recognition was lawful and no inquiry into actual majority status need be made. 95 N.L.R.B. at 671-75. Under the second standard, the good faith of the employer is not dispositive in the situation where the employer has unilaterally changed working conditions; the crucial inquiry then becomes whether an actual majority exists. Under this standard, an employer's good-faith doubt merely eliminates the presumption of majority support and forces the union to prove actual majority status. *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444-45 (1959). Recent Board decisions have moved away from the *Stoner* approach in favor of the *Celanese* standard. These decisions also indicate that the burden under the *Celanese* standard has become so heavy that, in effect, the employer must affirmatively prove the union's lack of majority. See Comment, *supra*, at 723-24 (citing cases).

13. *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542 (7th Cir. 1970). A dues checkoff is a voluntarily authorized deduction by the employer of union dues from the pay of a union member, similar to a deduction for taxes or insurance. The employer then pays the amount deducted to the union. R. GORMAN, *supra* note 5, at 670-71.

14. E.g., *Star Mfg. Co. v. NLRB*, 536 F.2d 1192, 1194 (7th Cir. 1976).

15. See *Automated Business Sys. v. NLRB*, 497 F.2d 262 (6th Cir. 1974) (employee dissatisfaction is sufficient when no unfair labor practices exist). Other indicia of loss of support include the filing of a representation petition by an outside union, employee turnover, and the union's margin of victory in the certification election. For a general discussion of the various types of objective evidence used by employers to prove union loss of support, see Ray, *supra* note 7, at 886-908; Seger, *supra* note 3 at 990-96.

Some employers attempt to establish their good-faith doubt by reference to polls of employees taken by the employer.¹⁶ At present, the federal courts of appeals disagree with the National Labor Relations Board as to if and when an employer may legally poll its employees once a union has been certified.¹⁷ Since its 1974 *Montgomery Ward* decision,¹⁸ the Board has only allowed employers to poll employees to determine whether the union deserves continued recognition (postcertification polling) if (1) the employer conducts the poll in accordance with the guidelines for polls conducted prior to a union's certification (precertification polling) established by the Board in *Struksnes Construction Co.*,¹⁹ and (2) the employer can sufficiently prove an objective basis for doubting the union's continued majority status.²⁰ The Board has held that the second prong of its postcertification test requires proof sufficient to satisfy the good-faith-doubt test for withdrawal of

16. See, e.g., *Mingtree Restaurant, Inc.*, 265 N.L.R.B. 409 (1982), *enforcement denied*, 736 F.2d 1295 (9th Cir. 1984); *Houston Shopping News Co.*, 233 N.L.R.B. 105, 107 (1977); *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974).

17. Although the judgment of the federal courts may in some sense be considered superior to that of the Board because the courts may review, enforce, modify, or set aside the Board's decisions, 29 U.S.C. § 160(e) & (f), this disagreement nonetheless presents a serious conflict. The Board maintains that it is not bound to follow the law of the courts of appeals but rather must decide, in each case, whether it will acquiesce in the decisions of those courts or adhere to its previous holding until overruled by the Supreme Court of the United States. See, e.g., *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615 (1963), *enforced in part*, 331 F.2d 176 (8th Cir. 1964); *Novak Logging Co.*, 119 N.L.R.B. 1573 (1958).

In the polling controversy, the Board has apparently decided not to acquiesce in the courts of appeals' decisions establishing a more lenient standard for postcertification polling. See e.g., *Hutchinson Hayes Intl., Inc.*, 264 N.L.R.B. 1300, 1308 (1982) (Board adopts decision of administrative law judge that rejects the courts of appeals' decisions by citing to the principle in *Iowa Beef Packers*). The Board's refusal to acquiesce in the courts' decisions is particularly costly to litigants due to the significant financial burden of appealing each decision of the Board to the courts of appeals. For a more complete discussion of the Board's nonacquiescence doctrine and the argument that it should be modified or eliminated, see *The NLRB v. The Courts: The Board's Refusal to Acquiesce in the Law of the Federal Circuit Courts of Appeals*, 35 N.Y.U. CONF. LAB. 195 (1982).

18. *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974) (poll by employer to determine union status is not proper when there is no valid basis for doubting the union's continuing majority). Although the decision was authored by an administrative law judge, the Board expressly adopted it as its own. *Id.* at 717. Therefore, this Note will consider this decision to be the Board's.

19. 165 N.L.R.B. 1062, 1063 (1967):

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

See also *Retired Persons Pharmacy*, 210 N.L.R.B. 443, 447 (1974), *enforced*, 519 F.2d 486 (2d Cir. 1975) (polling of employees considered defective when the *Struksnes* guidelines were not met).

20. See *Mid-Continent Refrigerated Serv. Co.*, 228 N.L.R.B. 917 (1977); *Jackson Sportswear Corp.*, 211 N.L.R.B. 891 (1974).

recognition.²¹

Since an employer can only conduct a postcertification poll if it already can legitimately withdraw recognition, the Board's standard robs postcertification polling of its function as an indicator of a union's status. This result has caused one court of appeals to characterize the Board's test as tantamount to an outright ban on employer-sponsored polls in the incumbent union context.²² Unlike the Board, the courts of appeals allow postcertification polling, conducted in a manner consistent with *Struksnes*, if the employer can show "substantial, objective evidence of a loss of union support, even if that evidence is insufficient in itself to justify withdrawal."²³

This Note evaluates these competing standards in light of the two major policy objectives of the NLRA: industrial stability²⁴ and employee free choice.²⁵ It concludes that the courts of appeals properly apply a less stringent standard.²⁶ Part I considers employer polling in the larger context of the general law of employer interrogation. This section concludes that the Board's standard for postcertification polling deviates significantly from the general law of employer interrogation as well as the more specific rules established for precertification polling. The remainder of this Note demonstrates that the Board's

21. *Hutchinson-Hayes, Intl. Inc.*, 264 N.L.R.B. 1300, 1306 (1982); *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974).

22. *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984). Even a poll that shows the employees overwhelmingly reject the union will not serve as objective evidence justifying withdrawal of recognition unless the employer could have withdrawn recognition absent the poll. *R. GORMAN, supra* note 5, at 112.

23. *Thomas Indus. v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982); *accord* *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295 (9th Cir. 1984); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981) (employer must also give notice to the union).

24. Section 1 of the Act states:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151 (1982).

25. Section 7 sets forth this basic policy of the Act:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

29 U.S.C. § 175 (1982); *see also* note 3 *supra*.

26. In *Montgomery Ward*, the Board states two reasons for its decision. First, the employer did not establish sufficient objective evidence to satisfy the good-faith-doubt test. Second, the poll was conducted during a period when the Board would have been prohibited from conducting an election by its "contract bar" doctrine. 210 N.L.R.B. 717, 724 (1974). This Note only argues that the objective evidence standard should be changed. It agrees that employer polls should be prohibited when the Board would not conduct an election because of its "certification year," "contract bar," "blocking charge," or similar doctrines. The union should also be protected from continued-recognition polling when a Board-conducted election is pending. *See Struksnes*, 165 N.L.R.B. at 1063.

distinctions between pre- and postcertification polling do not justify this deviation. Part II argues that allowing properly conducted employer polling enhances rather than harms employee free choice. Part III finds that the Act's policy of encouraging industrial stability also fails to support the Board's standard. Finally, Part IV concludes that even if employer polling disrupts existing bargaining relations to some extent, that disruption is consistent with the fundamental goals of the NLRA.

I. A DEPARTURE FROM THE LAW OF EMPLOYER INTERROGATION

The Board has moved from rejecting all attempts by employers to question employees about their union activity (employer interrogation²⁷) to applying a test which examines the totality of employer conduct. Originally, fearing intimidation and coercion of employees, the Board uniformly held that employer questioning of any kind was a per se violation of the Act.²⁸ Under this standard, the employee did not need to prove actual intimidation or coercion.²⁹ In 1954, prompted by the courts of appeals' rejection of this test,³⁰ the Board adopted an alternative, totality-of-conduct test for employer interrogation under

27. Employer interrogation means any attempt by the employer directly to question employees concerning any aspect of their union activity. However, "[t]he use of the word seems unfortunate and perhaps prejudicial. The term smacks of the inquisition and third degree; whereas, very often, the employer's questioning is quite innocent on its face, unaccompanied by the overt pressures and threats 'interrogation' seems to import." Recent Decisions, *Labor Law — Unfair Labor Practice — Employer May Violate § 8(a)(1) in Attempting to Ascertain Union Majority Status*, 41 NOTRE DAME LAW. 579, 580 n.11 (1966). Interrogation should not be confused with employer free speech, since it is neither the expression of any view or opinion, nor, if one accepts the premise that it is inherently coercive, protected by the first amendment. *Id.*

28. The Board argued:

Interrogation by an employer not only invades the employee's privacy and thus constitutes interference with his enjoyment of the rights guaranteed to him by the Act. Its effect on the questioned employee . . . is to "restrain" or to "coerce" the employee in the exercise of those rights. The employee . . . is reasonably led to believe that his employer not only wants information on the nature and extent of his union interests but also contemplates some form of reprisal once the information is obtained. . . . He fears that a refusal to answer or a truthful answer may cost him his job. He is also in effect warned that any contemplated union activity must also be abandoned, or he will risk loss of his job. . . . The Board [has] assumed the violation [to be] "obvious."

Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358, 1361-62 (1949) (footnotes omitted). *See also* Syracuse Color Press, Inc., 103 N.L.R.B. 377 (1953), *enforced*, 209 F.2d 596 (2d Cir.), *cert. denied*, 347 U.S. 966 (1954).

29. The Board, however, failed to find violations when the employer's coercive conduct was isolated or trivial. *See, e.g.*, Poe Mach. & Engg. Co., 107 N.L.R.B. 1372 (1954); H.R. Vanover Coal Co., 107 N.L.R.B. 1339 (1954); General Motors Corp., Cent. Foundry Div., 107 N.L.R.B. 1096 (1954); McGraw Constr. Co., 107 N.L.R.B. 1043 (1954); Howard W. Davis, 106 N.L.R.B. 1355 (1953).

30. *See, e.g.*, NLRB v. Mississippi Prods., Inc., 213 F.2d 670 (5th Cir. 1954); NLRB v. England Bros., 201 F.2d 395 (1st Cir. 1953); NLRB v. Authur Winer, Inc., 194 F.2d 370 (7th Cir.), *cert. denied*, 344 U.S. 819 (1952). *But see* NLRB v. Jackson Press, Inc., 201 F.2d 541 (7th Cir. 1953).

the Act.³¹ Today, that test remains the appropriate standard for determining whether employer interrogation constitutes an unfair labor practice.³²

Despite the flexibility of the Board's test for employer interrogation, the Board subjects postcertification polling to the practical equivalent of a per se prohibition.³³ This standard clashes with the totality-of-conduct test for interrogation.³⁴ That appears anomalous because the Board itself has recognized that a properly conducted secret ballot poll of an entire bargaining unit is inherently less coercive than the direct questioning of an individual employee.³⁵

Polling, or systematic interrogation, however, has long functioned under a more specific set of guidelines. This separate treatment began in 1965, when the District of Columbia Court of Appeals recognized the unsettled status of the law³⁶ and directed the Board to "outline at least minimal standards to govern the ascertainment of union status."³⁷ In response, the Board established the standards for precertifi-

31. *Blue Flash Express, Inc.*, 109 N.L.R.B. 591 (1954). A classic statement of the totality-of-conduct test may be found in *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941): "If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act."

32. *NLRB v. Acme Die Casting Corp.*, 728 F.2d 959, 962 (7th Cir. 1984) (explicitly rejecting the per se test for employer interrogation); *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 466 (3d Cir. 1981); *Midwest Stock Exch. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980):

It is well established that interrogation of employees is not illegal per se. Section 8(a)(1) of the act prohibits employers only from activity which in some manner tends to restrain, coerce, or interfere with employee rights. To fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.

See also *Rossmore House*, 269 N.L.R.B. 1176, 1177 (1984), *aff'd. sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (citing *Blue Flash Express, Inc.*, 109 N.L.R.B. 591 (1954), for the proposition that "a per se approach [was] rejected by the Board 30 years ago when it set forth the basic test for evaluating whether interrogations violate the Act . . .").

33. *See* note 22 *supra* and accompanying text.

34. The courts of appeals have rejected attempts to establish per se rules for other variants of employer interrogation. For example, the Second Circuit, in *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466, 479-81 (2d Cir. 1976), refused to find a per se violation when an employer requested copies of written statements of employees given to NLRB agents who were investigating alleged unfair labor practices of the employer. *See also* *Robertshaw Controls, Co. v. NLRB*, 483 F.2d 762, 767-70 (4th Cir. 1973).

35. The Board has argued that "[s]ecrecy of the ballot will give further assurance that reprisals cannot be taken against employees because the views of each individual will not be known." *Struksnes Constr. Co. Inc.*, 165 N.L.R.B. 1062, 1063 (1967). Obviously, since direct questioning of individual employees means that the employer will know the views of individual employees, the chance of reprisal, and consequently the inherent coerciveness of the technique, is much greater. The Board's recent decision to apply the totality-of-conduct test in adjudicating § 8(a)(1) claims against an employer for questioning an open and active union supporter accentuates this anomaly. *See* *Rossmore House*, 269 N.L.R.B. 1176 (1984).

36. For a more thorough discussion of the decisions of this period, including the *Struksnes* decision, *see* Recent Decisions, *supra* note 27.

37. *International Union of Operating Engrs. v. NLRB*, 353 F.2d 852, 856 (D.C. Cir. 1965).

cation polling in *Struksnes Construction Co.*³⁸ that are still in use today in the initial-recognition context.³⁹

The Board's guidelines for postcertification polling mark a significant departure from the specific standards developed for employer polling in the initial-recognition context. While the *Struksnes* test accepts the underlying philosophy of the totality-of-conduct test and structures the inquiry to increase certainty, the Board's *Montgomery Ward* rule regulating postcertification polling rejects that philosophy. Although these inconsistencies do not in themselves prove that the Board's postcertification guidelines are improper, such departures from the legal rules governing the law of employer interrogation should be reasonably justified.⁴⁰ The Board's past attempts to do so by reference to the goals of industrial stability and employee free choice have been inadequate.

II. EMPLOYEE FREE CHOICE

The Board's stringent rule for postcertification polling results primarily from the fear that employer polling undercuts a union's legitimate majority status and subverts employee free choice.⁴¹ As the

38. 165 N.L.R.B. 1062, 1063 (1967). The guidelines are set forth in note 19, *supra*. The Board also provided its justification for the rules:

The purpose of the polling in these circumstances is clearly relevant to an issue raised by a union's claim for recognition and is therefore lawful. The requirement that the lawful purpose be communicated to the employees, along with assurances against reprisal, is designed to allay any fear of discrimination which might otherwise arise from the polling, and any tendency to interfere with employees' Section 7 rights. Secrecy of the ballot will give further assurance that reprisals cannot be taken against employees because the views of each individual will not be known. And the absence of employer unfair labor practices or other conduct creating a coercive atmosphere will serve as a further warranty to the employees that the poll does not have some unlawful object, contrary to the lawful purpose stated by the employer. . . . [T]his rule is designed to effectuate the purposes of the Act by maintaining a reasonable balance between the protection of employee rights and legitimate interests of employers.

165 N.L.R.B. at 1063. The Board also held that polls taken while a petition for a Board election is pending would not serve any useful purpose and consequently would continue to be violative of § 8(a)(1). 165 N.L.R.B. at 1063.

39. See, e.g., *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984), *affg.* 265 N.L.R.B. 409 (1982); *American Mirror Co.*, 277 N.L.R.B. 179 (1986); *Hutchinson-Hayes Intl., Inc.*, 264 N.L.R.B. 1300, 1306 (1982); *Rockland Lake Manor, Inc.*, 263 N.L.R.B. 1062, 1069-70 & n.25 (1982); *Retired Persons Pharmacy*, 210 N.L.R.B. 443, 447 (1974), *enforced*, 519 F.2d 486 (2d Cir. 1975) (polling of employees considered defective where the employer did not comply with the *Struksnes* guidelines).

40. The standard supported by this Note requires that the employer have some objective evidence of a loss of union support before it can be allowed to conduct a postcertification poll. There is no similar requirement in the precertification context. This additional requirement serves two purposes. First, the increased concern for industrial stability in the postcertification context justifies the imposition of a threshold requirement for postcertification polling, even though it does not justify eliminating polling entirely. See *Peoples Gas Sys. v. NLRB*, 629 F.2d 35, 44 (D.C. Cir. 1980). Second, the legitimate concern over employer assertions of employee rights requires that the Board and the courts maintain an additional level of control over those assertions. See notes 63-73 *infra* and accompanying text.

41. *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 724 (1974).

Board noted in *Struksnes*: “[A]ny 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.”⁴² Obviously, an employee’s fear of reprisal need not have a strong factual basis for it to have a substantial chilling effect on that employee’s activities.⁴³ The Board is concerned largely with the possibility that employer polls may indicate to employees that the employer disfavors unionization and that that may inhibit employees’ exercise of their section 7 rights.⁴⁴ The risk of employer coercion, however, should not prevent postcertification polling conducted consistent with the *Struksnes* standards.

A. *The Courts of Appeals’ Standard Adequately Protects Against Coercive Polling*

The courts of appeals’ standard requiring substantial evidence of loss of employee support before polling, prohibits an employer from repeatedly polling to undermine a union’s strength. First, the Board’s “contract bar” doctrine establishes a virtually irrebuttable presumption of majority support during the term of a collective bargaining agreement.⁴⁵ During this period an employer cannot use a union’s lack of majority status as a defense to an unfair labor practice charge for a refusal to bargain.⁴⁶ Consequently, an employer could not have a good-faith reason for polling its employees during this period. It therefore would be prohibited from doing so under the *Struksnes* guidelines.⁴⁷ Since nearly ninety percent of the collective bargaining agreements have a life of at least two years,⁴⁸ the vast majority of employers would be prohibited from polling more than once every two years.⁴⁹

42. 165 N.L.R.B. 1062, 1062 (1967). The Board has also observed that an “employer cannot discriminate against union adherents without first determining who they are.” *Cannon Elec. Co.*, 151 N.L.R.B. 1465, 1468 (1965).

43. *A.W. Thompson, Inc. v. NLRB*, 651 F.2d 1141, 1144 n.3 (5th Cir. 1981).

44. *See Montgomery Ward & Co.*, 210 N.L.R.B. 717, 724 (1974).

45. *See* note 7 *supra* and accompanying text.

46. The Supreme Court has declared that “during this time, the employer cannot use doubt about a union’s majority as a defense to a refusal-to-bargain charge.” *NLRB v. Burns Intl. Security Servs.*, 406 U.S. 272, 290 n.12 (1972) (citing *Oilfield Maintenance Co.*, 142 N.L.R.B. 1384, 1387 (1963)).

47. The first criterion in *Struksnes* requires that “the purpose of the poll is to determine the truth of a union’s claim of majority.” *See* note 19 *supra*. Since during this period an employer cannot use a union’s loss of majority support to defend against an unfair labor practice charge, an employer cannot legitimately have as its purpose the desire to determine union status. Polling during this period would consequently violate the *Struksnes* guidelines.

48. Sixty percent of the contracts reported in 1984 had a duration of three years and 29% had a duration of two years. Of the rest, 7% extended for one year. *Economic Data*, 1984 LAB. REL. Y.B. (BNA), at 502.

49. Employers might reduce the length of labor contracts in order to free themselves from

Second, even absent a collective bargaining agreement, polling would be prohibited for one year following the union's certification by the Board's "certification year" doctrine.⁵⁰ Finally, polling is costly and entails a considerable amount of employee time away from the job.⁵¹ Many employers, particularly smaller ones,⁵² will be unwilling to face the costs of repeated polls unless their anti-union sentiment is very strong.⁵³ In such cases the Board would be unable effectively to prohibit polling anyway.⁵⁴

Most important, the *Struksnes* guideline that prohibits employer polling when the employer has "engaged in unfair labor practices or otherwise created a coercive atmosphere"⁵⁵ allows the Board to handle coercive polls on a case-by-case basis. In *Struksnes*, the Board stated that this requirement would serve as a warranty to the employees that the poll does not serve some unlawful or coercive purpose.⁵⁶ The guideline should protect the employees in the postcertification context as well. A case-by-case approach would both make the standard for postcertification polling more consistent with the general law of interrogation,⁵⁷ and permit postcertification polling in those circumstances where it serves a legitimate purpose.

this constraint. Such a response is extremely unlikely given the disadvantages of short-term contracts, which include an increase in the time spent on negotiations, a rise in the number and costs of strikes, adverse effects upon employee morale, and an overall rise in labor costs. See generally Jacoby & Mitchell, *Employer Preferences for Long-Term Union Contracts*, 5 J. LAB. RESEARCH 215 (1984) (employers oppose a ban on long-term contracts, citing the above disadvantages as reasons).

It may be argued that an employer might still subvert employee free choice by polling a number of times between contract terms. However, a second poll so soon after the first would not be useful in determining majority status, absent a dramatic change in circumstances, and therefore would violate the first of the *Struksnes* guidelines. See note 19 *supra*; cf. note 47 *supra* and accompanying text.

50. Because good-faith doubt as to a union's majority status cannot be used to legitimate a withdrawal of recognition during this period, an employer poll would violate the *Struksnes* guidelines. See note 47 *supra*.

51. See Note, *NLRB Determination of Incumbent Unions' Majority Status*, 54 IND. L.J. 651, 663 (1979).

52. In 1977 the average number of employees voting in all types of NLRB supervised elections was 53. Approximately three-fourths of all collective bargaining and decertification elections involved 59 or fewer employees. 42 NLRB ANN. REP. 20 (1977).

53. Note, *supra* note 51, at 663.

54. One author states:

Some employers are ideologically opposed to unions and would under no circumstances recognize a union . . . [These] employers realize that the unfair labor practice and litigation routes are the most efficacious means [of keeping the union out]. . . .

Wolkinson, *The Remedial Efficacy of NLRB in Joy Silk Cases*, 55 CORNELL L. REV. 1, 33 (1969).

55. See note 19 *supra*.

56. See note 38 *supra*.

57. See Part I *supra*.

B. *Employer Polling Enhances Employee Free Choice*

Employee free choice includes not only the right to bargain collectively but also the right to refrain from bargaining collectively.⁵⁸ Thus, employee free choice is compromised when a majority of the employees no longer supports the union but is bound to the union by a decision made in years past. In such a situation, an employer's refusal to bargain actually implements the will of a majority of the employees.⁵⁹ Therefore, employer polling, to the extent that an employer effectuates its employees' sentiments, promotes rather than inhibits employee free choice.⁶⁰

Two arguments might be advanced against this claim. First, an employer might conduct its poll improperly.⁶¹ If a poll did not accurately reflect employee sentiment, then employer actions based upon the results of that poll would be flawed. However, polls conforming to *Struksnes* guidelines generally provide valid results. The guidelines have consistently identified errors in employer-conducted polls.⁶² Thus, questions about the validity of the results of employer polling do not justify a rule which essentially prohibits all postcertification polling.

More troublesome is the argument that because of the potential conflict between employers and employees over issues involving union representation, the courts as well as the Board need to be wary of employer attempts to assert employee rights.⁶³ Employers, however, are

58. See note 3 *supra*.

59. Cf. Comment, *supra* note 12, at 732 (withdrawal of recognition from a minority union enhances employee free choice). When deciding whether postcertification polling should be permitted, it seems improper to assume that the union retains majority support when that is exactly the question that a poll attempts to answer.

60. After stating that the primary criterion for its decision was employee free choice, the Sixth Circuit upheld an employer postcertification poll where the employer adhered to the *Struksnes* guidelines, and was prompted by objective evidence of loss of support even if that evidence was not sufficient in itself to justify a refusal to bargain. *Thomas Indus., Inc. v. NLRB*, 687 F.2d 863 (6th Cir. 1982).

61. E.g., *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981) (poll conducted in a coercive atmosphere); *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 723 (1974) (over 25% of poll results questioned when employer deviated from its own stated procedure, gave employees insufficient time to respond to its poll, and unilaterally decided questions of eligibility.)

62. In those cases in which the reliability of a poll has been questioned, the poll violated the *Struksnes* guidelines and would not have been upheld even under the standard advocated by this Note. See *Rockland Lake Manor, Inc.*, 263 N.L.R.B. 1062, 1070-71 & n.25 (1982) (employees individually polled "in an atmosphere permeated by the Employer's coercive speeches and individual interrogation and threats . . ."); *Retired Persons Pharmacy*, 210 N.L.R.B. 443, 447 (1974), *enforced*, 519 F.2d 486 (2d Cir. 1975) (poll not conducted by secret ballot and true purpose of poll not communicated to employees).

63. See, e.g., *Brooks v. NLRB*, 348 U.S. 96, 103 (1954) ("The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it."); *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 301 (9th Cir. 1978) ("In refusing to bargain because of an alleged decline in union adherents, the employer is acting as a vicarious champion of its employees, a role no one asked it to assume."), *cert. denied*, 442 U.S. 921 (1979); *Pioneer Inn Assocs. v.*

allowed to assert their employees' rights in some circumstances.⁶⁴ Employer postcertification polling should present another such situation because employees sometimes are unable adequately to assert their rights themselves.⁶⁵

An employee's remedy, if she thinks that the union no longer retains majority support, consists of filing a decertification petition.⁶⁶ If at least thirty percent of the employees in the bargaining unit sign the petition, the Board will conduct a decertification election to determine whether the union has majority support.⁶⁷ Filing a petition and gathering the requisite thirty percent interest requires employee organization and initiative,⁶⁸ as well as the knowledge that the procedure is available.⁶⁹ Employees may also abstain from filing decertification pe-

NLRB, 578 F.2d 835, 840-41 (9th Cir. 1978) ("[T]he Board may strike the balance more favorable toward the union when the union's status is challenged by the employer rather than the employees themselves.").

64. One example is the employer decertification petition. See Ray, *supra* note 7, at 892-93. Another is an employer refusal to bargain. See notes 9-12 *supra* and accompanying text.

65. The argument that an employer should not be able to assert employee free-choice rights necessarily assumes that employees who are dissatisfied with their representation have other means of expressing their dissatisfaction. Comment, *supra* note 12, at 730.

66. See 29 U.S.C. § 159(c)(1)(A)(ii) (1982).

67. See J. FEERICK, H. BAER & J. ARFA, *NLRB REPRESENTATION ELECTIONS: LAW, PRACTICE, & PROCEDURE* § 6.3.5 (2d ed. 1985).

68. For employees represented in large bargaining units, this obstacle is almost insurmountable. The unit that the employee attempts to decertify must be coextensive with the unit that was previously certified. See *American Metal Prods., Co.*, 139 N.L.R.B. 601, 602 n.4 (1962). Apart from the sheer problem of size in a number of these units, many times a collective bargaining agreement will cover unrelated jobs that do not share a community of interest with the potential petitioner, thereby compounding the organizational problems. Rosenthal, *Issues in Decertification Proceedings*, 34 N.Y.U. CONF. LAB. 149, 160 (1982). Moreover, many bargaining contracts are multiplant agreements. The petitioner would not only have to canvass employees in her own plant whom she knows and works with, but also those in other plants with whom she may be completely unfamiliar. See Brooks, *supra* note 3, at 355. Thus, in many situations, no one person could undertake the task of getting thirty percent of the employees to sign a decertification petition. The only potential challenger to a union's domination is another union — an unacceptable alternative if the employees do not wish to be represented by a union at all — or the employer. *Id.* at 354-55. Without the employer's aid, workers in such industries "are effectively and permanently denied any choice of bargaining representative." *Id.* at 355.

69. "Employees who are unhappy with union representation have few sources from which to gain information concerning the way to undo the relationship." Krupman & Rasin, *Decertification: Removing the Shroud*, 30 LAB. L.J. 231, 233 (1979). Although the Board does publish pamphlets which refer to the decertification process and although an employee may obtain information by visiting or telephoning a NLRB office, "an employee must have the initiative to visit or telephone the Board in order to obtain these publications or to speak with a Board employee." *Id.* Moreover, an employee cannot ask an employer for its help, since the employer commits an unfair labor practice if it gives more than "mere ministerial aid" to employees seeking to decertify the union. *Consolidated Rebuilders, Inc.*, 171 N.L.R.B. 1415, 1417 (1968). See generally Rosenthal, *supra* note 68, at 153-56 (discussing what is considered ministerial aid).

In addition, the Board's "contract bar" doctrine, explained in note 7 *supra*, exacerbates the knowledge gap. The existence of a collective bargaining agreement will prevent petitions from being filed except during a thirty-day period beginning three months prior to the end of the contract. Ray, *supra* note 7, at 919. Contracts are commonplace with incumbent unions. Thus, even if the employees know they have the right to file a petition they may not know when they may legally file. Professor Ray has suggested that the knowledge problem might be overcome by

titions to avoid incurring the union's disfavor.⁷⁰

Finally, the Board will also hold in abeyance any decertification petition where unfair labor practice charges have been filed that allege violations of the Act which interfere with the employees' free choice. These "blocking charges"⁷¹ are often filed solely to impede or delay the processing of the decertification petition.⁷² Employee free choice, therefore, is not sufficiently protected by the employee decertification petition procedure alone.⁷³ Although employer assertions of employee free-choice rights justify severe scrutiny, the potential conflict of interest between employer and employee does not justify a per se rejection of employer polling.

III. INDUSTRIAL STABILITY

The Board's second major objection to postcertification polling is that such polling will unduly disrupt industrial stability.⁷⁴ This concern does not justify prohibiting postcertification polling entirely.⁷⁵

requiring either the union or the NLRB to disseminate information about the petition process to the employees. *Id.* at 919-21. However, there is no guarantee that the methods suggested (e.g., posting notices on company bulletin boards) will adequately inform the employees. Moreover, this proposal ignores the problems of union animosity and circumvention, peer pressure, employee organization and employee initiative. Finally, Professor Ray's proposal may never actually be instituted.

70. The Board has upheld the expulsion of union members who "dared" to initiate decertification proceedings. *Tawas Tube Prods., Inc.*, 151 N.L.R.B. 46 (1965).

71. *See generally* *Surprenant Mfg. Co. v. Alpert*, 318 F.2d 396 (1st Cir. 1963).

72. *Krupman & Rasin*, *supra* note 69, at 233; *Rosenthal*, *supra* note 68, at 158-59.

73. While the number of successful employee decertification petitions has been rising, the procedure still fails to secure employee free-choice rights adequately. In 1967, unions lost 65% of the 234 elections that resulted from 624 petitions filed by employees. 32 NLRB ANN. REP. 10-12 (1967). Ten years later unions were ousted in 76% of the 849 elections; 1,867 petitions were filed. 42 NLRB ANN. REP. 17 (1977). This trend in the percentage of unions ousted in decertification elections parallels the unions' increasing inability to win initial certification elections. In 1967, unions won 60% of the collective-bargaining elections, 32 NLRB ANN. REP. 11, 18 (1967), while in 1977 unions won only 48% of the collective-bargaining elections. 42 NLRB ANN. REP. 17-18 (1977). The increasing percentage of unions ousted in decertification elections probably signals disillusionment among employees about unions in general, and not employees' increasing ability to use the decertification procedure. *Krupman & Rasin*, *supra* note 69, at 232; *Rosenthal*, *supra* note 68, at 152-53 (factors contributing to the increasing number of decertification petitions include the movement to a service economy, disillusionment with unions as a result of stagflation at that time, and the increasing role of the government, rather than the union, as the protector of employee safety). What is clear is that decertification remains "a relatively difficult process, and existing procedures tend to thwart rather than facilitate decertification elections." *Id.* at 153.

74. The Board has argued that postcertification polling, like employer decertification petitions, should be allowed only when there are sufficient objective considerations to justify a refusal to bargain in order to "minimize the interruption and impairment of a bargaining relationship and the opportunity for a recalcitrant employer . . . from keeping [sic] the bargaining relationship in a recurrent state of turbulence by periodically compelling the union to reestablish its majority . . ." *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 724 (1974); *cf.* *United States Gypsum Co.*, 157 N.L.R.B. 652 (1966) (establishing the standard for employer decertification petitions).

75. The Board also maintains that because employer decertification petitions are barred unless supported by objective considerations equivalent to that necessary to allow a withdrawal of

A. Permitting Polling Achieves Greater Industrial Stability

Protecting a union from postcertification polling may achieve the appearance of stability in the short run. However, in the long run, this practice actually disrupts effective bargaining. Before an employer may poll its employees, the union must have lapsed into ineffectiveness or otherwise demonstrated a loss of majority support.⁷⁶ A union whose support is seriously questioned by the employer will have little leverage at the bargaining table, little success in issuing a strike call, and generally less effectiveness than if the employees had no union at all.⁷⁷ Maintenance of existing bargaining relationships under these circumstances cannot promote industrial stability. Strikes may occur even if the union cannot be repudiated; indeed, the employees' inability to rid themselves of an unwanted union may actually precipitate a strike.⁷⁸ Moreover, since a union would be adequately protected from

recognition, see note 9 *supra*, allowing postcertification polling without the same support would permit the employer to usurp a function committed to the Board under the Act. *Hutchinson-Hayes Intl., Inc.*, 264 N.L.R.B. 1300, 1304-05 (1982); *Thomas Indus., Inc.*, 255 N.L.R.B. 646, 647 (1981), *enforced in part and denied in part*, 687 F.2d 863 (6th Cir. 1982); *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 723-24 (1974). Even assuming the validity of the Board's employer petition standard, see *United States Gypsum Co.*, 157 N.L.R.B. 652, 656 (1966) (Board upholds the standard while acknowledging that "the statute does not specifically grant the Board discretion to dismiss a petition where continued majority status is not validly challenged."); *but see* *Talent, U.S. Gypsum Company — More of the Same*, 17 LAB. L.J. 559 (1966) (arguing that the standard is violative of "established precedent as well as the language and fair intent of the National Labor Relations Act"), the standard for postcertification polling advanced by this Note does not allow an employer to usurp a Board function. First, postcertification polling is no more of a usurpation of a Board function than precertification polling is a usurpation of the Board's initial election certification function. Second, the Board's strict standard for employer decertification petitions results from the Board's concern that a less strict standard would allow employers to circumvent the good-faith-doubt test that it otherwise must meet to withdraw recognition. *United States Gypsum Co.*, 157 N.L.R.B. at 656. While the employer decertification procedure is a substitute for a withdrawal of recognition, the continued-recognition poll functions as an index of loss of employee support to be used in determining the validity of such a withdrawal. Because the poll is not a substitute for the good-faith doubt, the Board's concern over usurpation of its authority is misplaced.

76. The standard of the courts of appeals, supported by this Note, requires that before an employer may poll, it must have substantial objective evidence of the union's loss of majority support, even if that evidence is not enough to justify a withdrawal of recognition under the good-faith-doubt test. See note 23 *supra* and accompanying text. Board decisions illustrate that, in fact, employers generally have substantial doubt of continued majority support before they poll. *E.g.*, *Hutchinson-Hayes Intl., Inc.*, 264 N.L.R.B. 1300 (1982) (employer polls after union checkoffs decline from 86% to 40% of the employees in the bargaining unit, there was significant employee turnover in the eight years since certification, union failed to renegotiate the contract (instead allowing automatic renewal), and employer learned of a decline in union membership and lack of attendance at union meetings); *Thomas Indus., Inc.*, 255 N.L.R.B. 646 (1981) (poll conducted after supervisors received disparaging comments about the union from 42 out of 124 employees, checkoffs declined from 63% to 31% in eight months, and 24 members of the union, including some officers, committeemen and stewards, resigned from the union), *enforced in part and denied in part*, 687 F.2d 863 (6th Cir. 1982).

77. Comment, *supra* note 12, at 738.

78. Comment, *Employee Repudiation of Bargaining Representatives: An Appraisal of Existing Restrictions*, 66 YALE L.J. 223, 235 (1956). The Board has recognized this possibility in cases holding that the contract bar extends for only a reasonable time. *Trailer Co.*, 51 N.L.R.B. 1106, 1111 (1943).

disruptive polling under the courts of appeals' standard, the Board's strict position is unnecessary.

The Board's practical prohibition of employer polling in the incumbent-union context further disrupts effective collective bargaining by exacerbating the uncertainty surrounding an employer's withdrawal of recognition. The present state of confusion as to the law concerning an employer's refusal to bargain⁷⁹ often leaves the employer unsure about its ability to articulate to the Board's satisfaction its reasons for doubting the union's continued majority.⁸⁰ An attempt to withdraw recognition may result in years of litigation,⁸¹ depriving the employees of effective representation⁸² and the employer of control over its business.⁸³ However, under the Board's standard for postcer-

79. At present, the courts of appeals are split as to the amount of evidence necessary to prove that an employer's doubts about a union's majority status are reasonable. *Compare* NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 297 (9th Cir. 1978) ("[t]he presumption is rebutted . . . by clear, cogent and convincing evidence . . . that the employer had a good faith reasonable doubt of majority support"), *cert. denied*, 442 U.S. 921 (1979), with NLRB v. King Radio Corp., 510 F.2d 1154, 1156 (10th Cir.) (the employer "must show a rational basis in fact for doubt of majority status."), *cert. denied*, 423 U.S. 839 (1975). The effectiveness of various kinds of evidence in supporting an employer's withdrawal of recognition also remains uncertain. *See* Seger, *supra* note 3, at 990-96; *see also* notes 13-15 *supra* and accompanying text (discussing kinds of evidence used by employers to support withdrawal of recognition). This uncertainty is especially acute in a strike situation. *See* Ray, *supra* note 7, at 896-903; Seger, *supra* note 3, at 991-92; Note, *The Strikers' Replacements Presumption and an Employer's Duty to Bargain with the Incumbent Union*, 21 B.C. L. REV. 455 (1980). Furthermore, there is confusion among the courts over whether an employer's good-faith doubt establishes a complete defense to an unfair labor practice charge or whether it merely shifts the burden to the union to prove actual majority support. *See* note 12 *supra*.

80. The Court of Appeals for the D.C. Circuit stated in *Peoples Gas Sys. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980), that the present practices and procedures leave both the Company and the Union in the dark as to when a challenge can be made, often require years to resolve, and run a substantial risk of frustrating actual employee wishes simply because the Board is not satisfied with the Company's ability to identify and articulate the reasons for its doubt about the Union's support. 629 F.2d at 44.

81. *E.g.*, *Peoples Gas Sys. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980) (litigation over withdrawal of recognition extends over seven years); *Pick-Mt. Laurel Corp. v. NLRB*, 625 F.2d 476 (3d Cir. 1980) (nearly a four-year lapse from withdrawal of recognition to final resolution of dispute).

82. A recent article notes:

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

Ray, *supra* note 7, at 873 (footnotes omitted).

83. An "employer's duty to bargain in good faith requires that it bargain to impasse with the [union] before unilaterally changing any term or condition of employment." Ray, *supra* note 7, at 874. Consequently, the employer violates the law if it adjusts any benefit when the legality of the union's support is the subject of litigation that the union eventually wins. Since the usual remedy for a unilateral change of this nature includes restoration of withdrawn benefits, an employer is compelled by the potential expense to avoid making any changes, including substituting one benefit for another or adjusting pay to reflect economic difficulties. An employer, therefore,

tification polling, an employer has no real alternative to test continued support short of a refusal to bargain.⁸⁴ Postcertification polling represents a quick and easy method to ascertain a union's status and to resolve employer doubt.⁸⁵ While surely not a panacea for the problem of uncertainty, employer polling can reduce its disruptive effects, thereby promoting the goal of industrial harmony.

B. *Distinctions Between the Pre- and Postcertification Contexts*

Similarities between the pre- and postcertification contexts demonstrate the utility of employer polling in both situations. Both require a speedy resolution of disputes concerning union status that might otherwise disrupt stable bargaining relationships.⁸⁶ Both involve a potential conflict of interest between the employer and its employees regarding union representation. Both require the resolution of the same underlying questions of majority status. Yet the Board's present guidelines result in "an anomaly: unions are given minimal protection at the inception of the bargaining relationships when they are the most

is more restricted after a withdrawal of recognition than before. Furthermore, an unlawful withdrawal of recognition may convert an economic strike, in which an employer may hire replacement workers, into an unfair labor practice strike, in which it may not hire replacements, but rather must reinstate workers upon request. *Id.* at 873-75; cf. Brown, *The Risks of Granting or Withholding Benefits During a Union Campaign*, 7 EMPLOYEE REL. L.J. 511 (1981-82) (discussing risks and appropriate strategies for management during a union campaign).

84. Because the Board requires the equivalent of "good-faith doubt" for postcertification polling, employer decertification petitions, and withdrawal of recognition, an employer has no motivation to use the less drastic means. See notes 9 & 22 *supra* and accompanying text.

85. Secret-ballot elections promote industrial peace by determining a union's support with certainty. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 307 (1974) ("In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored."); *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 564-65 (4th Cir. 1967) ("There must be a secret ballot, so that each employee may express his true conviction free of any concern that employer, union or others to whom he may have made a commitment, or of whom he may feel in awe, will know his true feelings.").

Professor Ray argues that industrial peace can be promoted equally well in the incumbent union context through employer election petitions and postcertification polling. Indeed, postcertification polling could be administered more quickly and easily than the current system of withdrawal of recognition which is followed by the administrative red tape of the unfair labor practice proceedings. Ray, *supra* note 7, at 875 n.7, 916-17.

Professor Ray also argues, however, that employer polls are inadequate for determining union support for two reasons. Ray, *supra* note 7, at 908. He first argues that since the federal government is perceived as neutral, the results of Board-conducted elections are more reliable. The rule articulated in *Struksnes*, however, ensures the reliability of polls in the incumbent union context. See notes 61-62 *supra* and accompanying text. More important, the alternative to an employer poll is not a Board-conducted poll, but rather a decision concerning whether or not to withdraw based upon less than reliable objective criteria. An employer poll is undoubtedly a more reliable gauge of employee sentiment than present techniques. See note 96 *infra* and accompanying text. Second, Professor Ray notes that official elections are conducted after notice to and debate among employees while employer polls are not. Although the significance of notice and debate remains unclear, one court has required that an employer give notice to a union before conducting a postcertification poll. *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1145 (5th Cir. 1981). If necessary, this requirement could be added to the *Struksnes* guidelines in the postcertification context.

86. See notes 76-84 *supra*.

vulnerable, and maximum freedom from rejection after the employees have had an opportunity to evaluate the union's performance."⁸⁷

The Board's attempt to justify this paradox is not convincing. In *Montgomery Ward*,⁸⁸ the Board explained its more stringent standard for postcertification polling by referring to the Act's concern for industrial stability, a concern that does not exist prior to a union's certification.⁸⁹ The Board first argued that although a union is properly called upon to show majority support in the initial recognition stage, an incumbent union is presumed to have a majority.⁹⁰ If the law gave employers an unrestricted license to search for proof of loss of majority, the argument goes, disruption of already existing bargaining relationships would result. This disruption would prevent the presumption of union support from advancing the Act's policy of allowing employees to bargain through representatives of their own choosing.⁹¹

The existence of the presumption, however, cuts the other way. While the policies of the Act may justify placing the burden of disproving majority support on the employer,⁹² these same policies do not require that the employer be denied the use of the tools necessary to meet that burden. The courts of appeals' standard does not give an employer an unrestricted license to poll its employees; an employer must have objective evidence of loss of majority support before it may poll. Furthermore, the employer usually will have less access than the union to information relevant to majority support.⁹³ Preventing the employer from obtaining evidence about employee sentiments through noncoercive means⁹⁴ merely shrouds the incumbent union in an impenetrable cloak of majority support and contravenes the same policy

87. Note, *supra* note 51, at 662; *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1298 (9th Cir. 1984).

88. *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974).

89. 210 N.L.R.B. at 724-25; *see also* *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141, 1144 (5th Cir. 1981) ("[A]t the pre-certification stage the congressional policy of encouraging stability of established bargaining relationships does not come into play.").

90. 210 N.L.R.B. at 723; *see* notes 5-8 *supra* and accompanying text.

91. 210 N.L.R.B. at 724; *see also* *NLRB v. A.W. Thompson, Inc.*, 651 F.2d at 1144.

92. *See* note 6 *supra*.

93. The Board has admitted that the union generally has superior access to information about employee support. *Compare* *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1445 (1959) ("[p]roof of majority is peculiarly within the special competence of the union"), *with* *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Assn.*, 213 N.L.R.B. 651, 653-54 (1974) ("[I]t is clear that the facts . . . were . . . known to the employer before it withdrew recognition from the union."). Commentators and courts support this view. *Compare* *Seeger*, *supra* note 3 at 982-83, 988 (citing *Stoner Rubber Co.* with approval), *with* *Ray*, *supra* note 7, at 912 n.229 (questioning whether an incumbent union is actually in a better position than the employer to prove majority support); *compare* *Automated Business Sys. v. NLRB*, 497 F.2d 262, 271-72 & n.7 (6th Cir. 1974), *with* *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 301 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979) ("[T]he employer usually [has] inferior access to the relevant information Yet we think the burden [on the employer to refute the presumption of union majority status] is fair.").

94. *See* notes 45-57 *supra* and accompanying text.

the Board is attempting to protect.⁹⁵ Finally, since a poll is a reliable indicator of majority support,⁹⁶ denying the employer the use of this tool may aggravate the confusion and uncertainty that plagues this area of the law.⁹⁷

Second, the Board argued that because a union must receive a fair chance to succeed after its election, it must be protected from postcertification polling.⁹⁸ A union worried about its status, the Board contends, will be distracted from long-term goals by the necessity of producing short-term results. However, the "certification year"⁹⁹ and "contract bar"¹⁰⁰ doctrines already protect the union from any employer attack upon its employee support, including postcertification polling, for a substantial period of time¹⁰¹ after the union has been recognized. But a union cannot be insulated from political pressures indefinitely. The political model of industrial democracy lies at the core of the national labor policy.¹⁰² The union, like any other political representative, must be subject to periodic rejection or reaffirmation.¹⁰³ Since employer postcertification polling, conducted under the courts of appeals' guidelines, allows for such political testing in a manner that is orderly and noncoercive, industrial stability is not unduly compromised.

Finally, the Board attempted to distinguish the postcertification context by arguing that while an employer may often have a good-faith reason for polling before the union has been certified, it will almost never have a good-faith motive after certification.¹⁰⁴ The Board's contention is incorrect. An employer may indeed have a good-faith desire to poll its employees in the postcertification context. An employer needs to determine correctly a union's status¹⁰⁵ to avoid committing an unfair labor practice by bargaining with a union that

95. See notes 3-4 *supra*.

96. See *Mingtree Restaurant, Inc.*, 736 F.2d 1295, 1298 (9th Cir. 1984) (where the court approved the use of polls complying with the *Struksnes* safeguards in a precertification context).

97. See notes 79-85 *supra* and accompanying text.

98. *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 724 (1974).

99. See note 6 *supra*.

100. See note 7 *supra*.

101. The "contract bar" extends for the entire term of the contract if the contract does not extend longer than three years or during the first three years of a contract that has a longer duration. *General Cable Corp.*, 139 N.L.R.B. 1123, 1125 (1962). The certification year extends, of course, for one year. At the very least, no more than one election may be held during any twelve-month period. 29 U.S.C. § 159(e)(2) (1982).

102. See, e.g., *Brooks v. NLRB*, 348 U.S. 96, 99 (1954); *NLRB v. Century Oxford Mfg. Corp.*, 140 F.2d 541, 542-43 (2d Cir.), *cert. denied*, 323 U.S. 714 (1944); *Weyand, Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556 (1945).

103. As Professor Brooks argues: "In the final analysis, freedom of choice requires that union leaders not be relieved of the ordinary pressures which are brought to bear in a democratic organization." Brooks, *supra* note 3, at 365.

104. See *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 724, 725 (1974).

105. *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1298 (9th Cir. 1984). Although if

lacks majority support¹⁰⁶ or by refusing to bargain with a union that is supported by the majority of the employees.¹⁰⁷ The Board itself recognized this in its *Montgomery Ward* decision when, one page before it argued that postcertification polling will always be in bad faith, it acknowledged that "the employer may also have a legitimate concern regarding the union's continuing majority status."¹⁰⁸ Moreover, the Board presumes that a desire to resolve the question of a union's status quickly indicates good faith.¹⁰⁹ Because an employer poll can determine whether a union has a majority faster than the current cumbersome procedure,¹¹⁰ this presumption provides further support for the argument that an employer might conduct a postcertification poll in good faith. Thus, the Board's distinctions fail to justify the complete prohibition of employer polling in the incumbent union context.

IV. THE PROPER ACCOMMODATION BETWEEN INDUSTRIAL STABILITY AND EMPLOYEE FREE CHOICE

The Board's argument that postcertification polling disrupts industrial stability incorrectly equates the promotion of the goals of the NLRA with the maintenance of existing bargaining relationships.¹¹¹ The NLRA, however, establishes a more dynamic model of union representation than the Board attempts to implement. Congress intended to promote industrial stability through effective collective bargaining between the employer and an agent who *maintains* the support of a majority of the employees in a bargaining unit.¹¹² The balance be-

challenged, the employer is aided by the presumption of majority support, after a year that presumption may be rebutted. See notes 5-8 *supra* and accompanying text.

106. See note 4 *supra*.

107. See note 2 *supra*.

108. See *Montgomery Ward & Co.*, 210 N.L.R.B. 717, 723 (1974).

109. See Comment, *Employer "Good Faith Doubt,"* 116 U. PA. L. REV. 709, 721 (1968).

110. See notes 79-85 *supra* and accompanying text.

111. The Board does not consider whether industrial stability might encompass more than mere preservation of existing bargaining relationships. See Note, *supra* note 51, at 659 ("[T]he Board has not analyzed its assumption that industrial stability will result [from the preservation of existing bargaining relationships], it merely resorts to ritualistic incantation of the phrase.") (footnotes omitted); Comment, *supra* note 78.

112. Industrial harmony was the major goal behind the enactment of the NLRA as stated in § 1 of the Act:

It is declared to be the policy of the United States to eliminate the cause of certain substantial obstructions to the free flow of commerce . . . 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

29 U.S.C. § 151 (1982). The legislative history of the Act demonstrates that employees' inability to bargain effectively resulted in strikes and other industrial disruptions. As Senator Wagner, the author of the Act, stated:

Again and again [the investigating commissions] found that the denial of labor's right to be heard in the councils of industry was the root cause of the industrial struggle. Again and again they found that the recognition of this right was the only sure basis for industrial peace and the rational conduct of business affairs.

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tween industrial stability and employee free choice in the incumbency situation is problematic. Nevertheless, by prohibiting an employer either from recognizing a minority union or from refusing to recognize a union with majority support,¹¹³ Congress has determined that the existence of majority status is the appropriate fulcrum. The Board's standard, by making it unduly difficult to oppose minority unions,¹¹⁴ has inappropriately reweighed the two policies and established a balance inconsistent with congressional intent. Instead, the Board's rule should be modified to allow properly conducted postcertification polling under a standard that "ensures an accurate determination of actual majority status."¹¹⁵

CONCLUSION

An employer who is faced with a union's initial claim for recognition may legitimately poll its employees if it does so in accordance with the standards established by the Board in *Struksnes*.¹¹⁶ Under the Board's present standard, the same employer cannot poll its employees once the union has been certified unless the employer has sufficient objective evidence of the union's loss of support to withdraw recognition, in addition to meeting the *Struksnes* standards. Because polling is valuable only as a tool to gather support for withdrawal of recognition, the employer that believes that a union no longer retains majority support will withdraw recognition rather than poll its employees. The Board's rule therefore is tantamount to an outright prohibition of polling in the postcertification context. The Board justifies this result by arguing that it is required by the underlying policies of employee free choice and industrial stability. A close consideration of these policies, however, shows that they are better promoted by allowing postcertification polling.

On the other hand, the federal courts of appeals allow postcertification polling consistent with *Struksnes* if an employer has objective evidence of the union's loss of support, even if that evidence is not

on *Education and Labor*, 76th Cong., 1st Sess. 5 (1931) (statement of Sen. Wagner). Both the policy of employee free choice and the policy of industrial stability are means to achieve the end of industrial peace and harmony. Comment, *supra* note 78, at 224.

The Board's excessive concern with the preservation of existing bargaining relationships is also apparent in other contexts. See, e.g., Brooks, *supra* note 3, at 350-67 (the Board has promoted industrial stability at the expense of free choice in a number of contexts); Comment, *supra* note 12, at 719 (discussing the Board's application of the good-faith-doubt test, the author states: "[T]he Board has maximized industrial stability at the expense of free choice by placing an unduly heavy burden on the employer to prove that the incumbent union no longer commands the majority support of the employee unit.").

113. See notes 2-4 *supra* and accompanying text.

114. This conclusion gains support from the lack of § 8(a)(2) cases in the postcertification context.

115. Comment, *supra* note 12, at 740.

116. The standards are set forth in note 19 *supra*.

sufficient to allow the employer to withdraw recognition. This is the better reasoned rule since it comprehends not only the similarity between the pre- and postcertification contexts, but also the legitimate place of polling in labor-management relations.

— *James D. Dasso*