**Auciello Iron Works, Inc. *and* Shopmen's Local Union No. 501 a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL–CIO).** Case 1–CA–25969

May 9, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

This case is on remand from the United States Court of Appeals for the First Circuit.[1] The court has instructed the Board to determine whether the Board erred in refusing to consider the Company's argument ''that, in declining to recognize the Union or to bargain further with it, the Company was acting pursuant to a well-supported good-faith doubt that the Union still had majority support among those it supposedly represented.''[2] The court questioned whether the Company should be permitted to present evidence that, at the time of the certified Union's purported acceptance of the Company's outstanding offer during negotiations for a successor labor agreement, the Union lacked majority support and was therefore incapable of creating by its acceptance a valid contract. The Board accepted the court's remand.

## A. *Background: The Case Before the Board and the Court*

The relevant facts are undisputed. The Respondent operates an iron fabrication shop. In 1977, the Board certified the Union as the collective-bargaining representative of the Respondent's production and maintenance employees. Since that time, the parties have executed successive bargaining agreements. On September 21, 1988,[3] 4 days before the agreement then in effect was to expire, the parties commenced negotiations for a new agreement and met on several occasions in September and October. On October 13, the union membership voted to reject the Respondent's latest proposal and to strike. A strike commenced on October 14.

Negotiations continued on October 18 and November 17, when the Respondent presented numerous proposals. The picketing effectively ended by November 18. On November 27, the Union notified the Respondent by telegram that the unit employees had voted to accept the November 17 offer and to return to work.[4] On November 28, the Respondent sent the Union a telegram stating in pertinent part: ''Employer now has reason to believe that Local 501 no longer represents a majority of employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations.'' In support of its contention, the Respondent relied, inter alia, on employee criticisms of and statements of disaffection with the Union, abandonment of the strike by several employees, and the refusal of other employees to strike, all of which occurred prior to the Union's November 27 acceptance of the Respondent's proposals.

The strike ended as stated in the Union's November 27 telegram, but the Respondent refused to sign a collective-bargaining agreement containing the terms of its November 17 proposals. No further negotiations occurred.

The complaint alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a written contract and by withdrawing recognition from the Union. The Respondent contended, inter alia, that it had a good-faith doubt that the Union continued to represent a majority of the unit employees, and on this basis disclaimed any further obligation to bargain with the Union.

The administrative law judge found that after the Union accepted the Respondent's contract offer, the parties had formed a valid contract and the Respondent could not rely on a good-faith doubt of the Union's majority status to withdraw recognition or avoid its contractual bargaining obligations. The judge therefore found it unnecessary to consider whether the Respondent's alleged good-faith doubt was supported by reasonable and objective evidence. The Board adopted the judge's findings that the Respondent violated the Act as alleged, stating:

> [U]nder established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a respondent's alleged good-faith doubt of the union's majority status. *Belcon, Inc.*, 257 NLRB 1341, 1346 (1981); *North Bros. Ford*, 220 NLRB 1021, 1022

[1] On June 27, 1991, the National Labor Relations Board issued its Decision and Order in this proceeding in which it found, inter alia, that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from the Union and by refusing to execute an agreed-on collective-bargaining agreement. 303 NLRB 562. Thereafter, the Board filed with the court a petition for enforcement of its Order. In an opinion dated November 30, 1992, the court remanded the case in part for further proceedings consistent with the court's opinion. *NLRB v. Auciello Iron Works*, 980 F.2d 804 (1st Cir. 1992).

By letter dated April 22, 1993, the Board notified the parties that it had accepted the court's remand and that statements of position could be filed with respect to the issues raised by the court's opinion. The General Counsel and the Respondent filed statements of position with the Board.

[2] 980 F.2d at 813.

[3] All subsequent dates are in 1988 unless otherwise indicated.

[4] The court enforced the Board's findings that the Respondent's offer remained open and available for acceptance on November 27 when the Union accepted it, and that ratification by the union membership was not a precondition to the formation of a contract. These issues are not before the Board in this proceeding.

(1975).[5] We also agree with the judge that the Board's decision in *Bickerstaff Clay Products*, 286 NLRB 295 (1987), enf. denied 871 F.2d 980 (11th Cir. 1989), in which the Board addressed the respondent's good-faith doubt defense even though the Board found that the parties had reached a binding agreement, did not overrule the precedent followed in *Belcon*.[6]

In its opinion, the court questioned the Board's reliance on *North Bros. Ford*, stating that the Board failed to address the Respondent's contention ''that a lack of majority status on the date the Union purported to accept the Company's outstanding offer should be distinguished from a good faith doubt of majority status based on events occurring *after* a valid contract was made,'' as in *North Bros. Ford*.[7] The court questioned whether the acceptance of a contract offer by a union that lacks majority support at the time of acceptance can create a valid and binding contract that prevents the employer from withdrawing recognition or otherwise refusing to bargain based on an alleged lack of majority status during the contract term.

In asking for a clearer explication of the Board's position, the court instructed the Board to address the Seventh Circuit's decision in *Chicago Tribune Co. v. NLRB*,[8] which, relying on *Ladies Garment Workers v. NLRB*,[9] denied enforcement of the Board's Order that the employer recognize and bargain with the union.[10] The Seventh Circuit observed that the Board's approach in *Chicago Tribune* appears to conflict with the firmly established principle that an employer may not contract with a minority union.[11] The First Circuit in this case also noted that in two other cases the Board ''appears to have overlooked altogether its *North Bros. Ford* and *Belcon* precedent'' and ''allowed an employer to litigate an issue of good faith doubt *after* the union had accepted an outstanding offer'': *Curtin Matheson Scientific, Inc.*,[12] and *Bickerstaff Clay Products Co.*,[13] 980 F.2d at 812. Stating that it was ''without policy guidance and reasoned analysis to decide the issue,'' the court remanded the case, instructing the Board ''to revisit, clarify and explain the principles that it thinks apply in the present circumstances,'' and to explain the application of precedent in factually distinguishable situations.[14]

[5] In *Belcon*, as here, the employer withdrew recognition after the union accepted its contract offer, relying on conduct that occurred prior to acceptance to support its alleged good-faith doubt. There, the Board adopted the judge's finding that the respondent's withdrawal of recognition was unlawful because ''it was during the term of the newly negotiated agreement and at a time when it was not lawfully permissible for [r]espondent to do so.'' 257 NLRB at 1346.

The Board in *North Bros. Ford* held that once the parties reached final agreement on the substantive terms of the contract, the employer was not free to refuse to bargain even if it had lawful grounds for believing that the union had subsequently lost its majority status. 220 NLRB at 1022.

In *Bickerstaff Clay Products*, the Board found that the employer had not met its burden of establishing a good-faith doubt, when as here, the respondent first raised the doubt after the union there had accepted its offer.

[6] 303 NLRB at 562 fn. 2.

[7] 980 F.2d at 812. The court acknowledged that *Belcon* was not so limited.

[8] 965 F.2d 244, 250 (7th Cir. 1992), rehearing denied Nos. 91–2750, 91–2916 (June 24, 1992), denying enf. 303 NLRB 682 (1991).

[9] 366 U.S. 731 (1961).

[10] *Chicago Tribune Co.*, 303 NLRB 682 (1991) (when parties reached agreement and formed a binding contract, the employer was not entitled to rely on conduct that occurred prior to the contract's formation to support a good-faith doubt of the union's continuing majority status as a defense to 8(a)(5) allegations; there were no changed circumstances that would have led parties reasonably to conclude that the respondent's offer was withdrawn).

[11] The Board in *Chicago Tribune* adopted without comment the administrative law judge's detailed rationale for requiring an employer to raise the good-faith doubt defense to an 8(a)(5) allegation prior to the formation of an otherwise valid contract. The judge discussed the difficulty of litigating the concept of a ''good-faith doubt'' that is first expressed after a contract is reached, particularly when the employer is seeking to show the doubt as it existed in the employer's mind at the time of the contract's formation. Describing such an inquiry as too subjective, the judge reasoned that the relevant inquiry should instead be whether changed circumstances exist to vitiate an outstanding contract offer accepted before the refusal to bargain. The judge found that because the factors on which the respondent relied to support its good-faith doubt were present and known at the time the respondent renewed its offer, they were not ''changed circumstances'' that would have led both parties reasonably to conclude that the respondent had withdrawn the offer. Therefore, the judge concluded that the good-faith doubt defense failed because it was not conveyed to the union prior to the formation of the contract. 303 NLRB 690–691.

As indicated, the Seventh Circuit in denying enforcement in *Chicago Tribune* focused on the statutory issues raised by Sec. 8(a)(2). The court found that the Board's Rule that a union's acceptance of an offer creates a binding contract, if applied in the context of a ''loss of majority support,'' would violate the principle of *Ladies Garment Workers*, 366 U.S. at 737–738, that an employer may not contract with a ''minority union,'' would give too much weight to the interests of unions and too little weight to the interests of employees, and would authorize ''sweetheart deals'' between companies and unions at the employees' expense. The court also suggested that the Board's blocking charge rule unfairly prevents employers from challenging a union's majority status, a factor not present here. 965 F.2d at 250.

[12] 287 NLRB 350 (1987), enf. denied 859 F.2d 362 (5th Cir. 1988), rehearing denied 864 F.2d 791 (5th Cir. 1988), revd. 494 U.S. 775 (1990), on remand 905 F.2d 871 (5th Cir. 1990).

[13] 286 NLRB 295 (1987), enf. denied 871 F.2d 980 (11th Cir. 1989), cert. denied 493 U.S. 924 (1989).

[14] 980 F.2d at 812–813.

Although some of the court's language in ordering a remand in this case refers to an ''actual loss'' of majority status as well as a ''good-faith'' doubt of majority status, there is a significant distinction between a case involving a claim of actual loss of majority status and one involving a claim of good-faith doubt. As the Supreme Court stated in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 fn. 8 (1990), unlike in an actual loss of majority status case, an employer need not show an actual numerical loss of majority support to prove a good-faith doubt and may rely instead on circumstantial evidence to satisfy its burden of proof. We emphasize that this case involves only the issue of whether the Respondent had a good-faith doubt that the Union retained majority support. In fact,

*Continued*

B. *Contentions of the Parties*

The General Counsel contends that the Board should adhere to its decisions in *Belcon* and *Chicago Tribune* and reaffirm its findings that the Union's acceptance of the Respondent's offer created a valid contract that precluded the Respondent from demonstrating its alleged good-faith doubt. As a basis for this contention, the General Counsel relies on the presumptive majority status of a union during the life of a contract. The General Counsel further argues that a rule permitting an employer to ''sit'' on a purported doubt to await the outcome of contract negotiations and to raise its doubt because of subsequent dissatisfaction with the contract would encourage employers to manipulate the bargaining process resulting in ''inequity and . . . destabilize[d] bargaining relationships.'' The General Counsel also contends that reliance on *Ladies Garment Workers* is misplaced because the union in that case, unlike the certified Union here, had never enjoyed majority support when the employer granted recognition.[15]

The Respondent, citing *Ladies Garment Workers*, contends that the Board's refusal to consider its alleged good-faith doubt violates the principle that an employer may not enter into an agreement with a minority union and that the Board's general rule that a contract offer is open for acceptance until an employer expressly withdraws it must be conditioned on the union's maintaining majority status through acceptance. Arguing that this case involves a contract forced on management by a minority union, the Respondent further contends that the Board's result forces unwanted representation on employees in the same way as occurs when a colluding union and employer, faced with a loss of the union's majority support and the possibility of a decertification petition, sign a contract in violation of Section 8(a)(2) and (1) and Section 8(b)(1)(A).

Finally, the Respondent maintains that the Board's refusal to consider its alleged good-faith doubt is inconsistent with *Curtin Matheson Scientific, Inc*., above, and *Bickerstaff Clay Products*, above, and with the Board's decision in *Viking Lithographers*.[16] The Respondent argues that the Board, in contrast to this case, permitted the employers in each of those cases to litigate an alleged good-faith doubt as a defense to 8(a)(5) charges when the refusal to bargain was based on the employer's rejection of the union's purported acceptance due to an alleged erosion of the employees' union support.

As noted above, the Board has accepted the court's remand. As the court has reminded us, our responsibility is to develop coherent and correct legal standards governing labor negotiations and to explain their application to the relevant facts. The precise issue before us is whether, when negotiations for a collective-bargaining agreement after the certification year has ended have culminated in the union's acceptance of an employer's contract proposals, an employer may withdraw recognition or otherwise refuse to bargain by presenting objective evidence, in existence and known to the employer before acceptance, to support a good-faith doubt that the union lacked majority status at the time of acceptance.[17]

For the reasons below, we reaffirm our findings that the Union's acceptance of the Respondent's November 17 proposals created a valid and binding contract, and that the Respondent was not thereafter entitled to present evidence of a good-faith doubt as a defense to the allegation of an 8(a)(5) violation.

We have structured our analysis to respond to the court's concerns. After discussing the Board's presumptions regarding a certified union's majority status and the statutory policies that the presumptions further, we set forth legal principles, based on statutory, practical, and policy considerations, governing when an employer lawfully may refuse to bargain based on an alleged good-faith doubt. Our discussion accords with and elaborates on the administrative law judge's analysis in *Chicago Tribune*. As instructed by the court, we also analyze the statutory issues the Seventh Circuit raised in *Chicago Tribune*. In this regard, we examine the specific conduct prohibited by Section 8(a)(5) and (2) of the Act, discuss the applicability of these provisions to the Respondent's withdrawal of recognition, and consider analogous cases in which Congress, the Board, and the Supreme Court have resolved the tension between the policies arising out of obligations im-

at no point in the proceedings before the Board or the court did the Respondent urge that the Union had suffered an actual loss of majority support, and there has been no finding that, or discussion of whether, the Union actually lacked majority status when it accepted the Respondent's final contract offer. As the Respondent stated in its supplemental brief to the Board: ''[T]he issue which has been remanded to the Board by the Court of Appeals is whether an employer who, at the time of a Union's effort to accept a previously expressed management proposal, has a good faith doubt of the Union's continued majority status, may refuse to execute an agreement based on that Union's 'acceptance' and whether it should be allowed to present evidence to support its claim that, at the time of the Union's 'acceptance,' it had a basis for such good faith doubts.'' Therefore, we address here only the Respondent's good-faith doubt defense in evaluating the 8(a)(5) violations alleged.

[15] Finally, the General Counsel maintains that if the Board reaches the merits of the Respondent's good-faith doubt defense, the Respondent did not have the necessary objective evidence to support its alleged good-faith doubt. The Respondent contends to the contrary.

[16] 184 NLRB 139 (1970).

[17] As our analysis will make clear, this case does not involve an employer's voluntary initial recognition of a union or an alleged *actual* loss of a union's majority status. See fns. 14, supra, and 74, infra.

posed by Section 8(a)(5) and those imposed by Section 8(a)(2).

### C. *The Board's Mandate and the Presumptions Respecting a Certified Union's Majority Status*

The Board's mandate in administering the Act is to further industrial peace and labor relations stability by encouraging the practice and procedure of collective bargaining while preserving for employees the right to choose, or to refrain from choosing, a bargaining representative.[18] In enforcing the Nation's labor laws, the Board seeks to balance these dual objectives while recognizing that the overriding policy of the Act is ''industrial peace.''[19]

The Board has established several presumptions respecting a union's majority support in order to further industrial peace by promoting stability in collective-bargaining relationships without impairing the free choice of employees.[20] The presumptions ''indicate the relationship between the existence of a Board certificate and the right of an employer to question a union's majority in good faith.''[21] At the outset, it is well settled that absent unusual circumstances a union enjoys an irrebuttable presumption of majority status during the first year following its certification. After the certification year (and in the absence of a collective-bargaining agreement), the presumption of majority status remains, but becomes rebuttable.[22] An employer may rebut the presumption of majority status by establishing either (1) that at the time of the refusal to bargain a majority of employees did not in fact support the union, or (2) ''that the refusal was predicated on a good-faith and reasonably grounded doubt, supported by objective considerations, of the union's majority status.''[23]

A valid collective-bargaining agreement also affects the presumptions of majority status. In general, a union enjoys an irrebuttable presumption of majority status during the contract term.[24] On the contract's expiration, the presumption becomes rebuttable.[25] The issue here arises at the time the rebuttable postcontract term presumption would become the irrebuttable contract term presumption and raises the question whether that change in status can occur when an employer asserts that it had objective evidence to support a good-faith doubt of majority status before or at the time the union accepted its offer, but had failed to raise such a doubt until after the agreement was reached pursuant to that acceptance.[26]

As the Supreme Court in *Fall River* noted, the Board bases its presumptions of majority status not on absolute certainty that the union's majority status will not erode following certification, but rather on carefully considered policy choices intended to further the Act's objectives. The Court, commenting approvingly on the Board's presumptions concerning majority support for an incumbent union, explained how the presumptions promote industrial peace:

> In essence, [the presumptions] enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. . . . The presumptions also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees . . . . The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace.[27]

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[18] See 29 U.S.C. § 151.

[19] *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 38–39 (1987); *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

[20] See *Fall River*, 482 U.S. at 38–39.

[21] *Celanese Corp. of America*, 95 NLRB 664, 671 (1951), overruled in part on other grounds *Hawaii Meat Co.*, 139 NLRB 966, 968 (1962).

[22] *Fall River*, 482 U.S. at 37–38 (and cases cited therein).

[23] *Burger Pits, Inc.*, 273 NLRB 1001, 1001 (1984), enfd. 785 F.2d 796 (9th Cir. 1986).

[24] We note, however, that with the exception of the healthcare industry and seasonal operations, a rival representation or decertification petition may be filed during the ''window'' period, which is more than 60 days but less than 90 days before the expiration date of the existing contract of 3 years' duration or less.

[25] *Burger Pits*, 273 NLRB at 1001 (and cases cited therein).

[26] See *Chicago Tribune Co.*, 965 F.2d at 250.

The First Circuit in remanding the present case stated that the Board's decisions regarding the availability of the good-faith doubt defense after the parties have reached a binding agreement are based on the contract bar rule. 980 F.2d at 810. Under that rule, a contract meeting certain requirements is valid and will bar an election. See generally *Hexton Furniture Co.*, 111 NLRB 342 (1955). Although the Board has on occasion framed its discussion of a union's continuing majority support during the term of a contract in terms of the contract bar rules (see, e.g., *Westwood Import Co.*, 251 NLRB 1213, 1213–1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982)), we emphasize that the precise rule of law applicable here is the irrebuttable presumption that a union retains majority status during the contract term. We note, however, that the same policy underlies both the presumptions of majority status and the contract bar rules: achieving a reasonable balance between industrial stability and employee freedom of choice. See *Crompton Co.*, 260 NLRB 417, 418 (1982), and discussion below.

[27] 482 U.S. at 38–39 (citations and footnote omitted).

Although the issue in *Fall River* concerned a successor employer's obligation to bargain under the Act, we find that the Court's discussion of the rationale supporting the presumptions is also pertinent to the issue presented in this case.

### D. *Circumstances Under Which an Employer May Withdraw Recognition Based on Good-Faith Doubt*

In accord with the court's instructions, we now examine when an employer may lawfully withdraw recognition or otherwise refuse to bargain based on a good-faith doubt of a certified union's continuing majority status. Before addressing the facts here, we set forth two related rules and their rationales.

1. Within a reasonable time before a collective-bargaining agreement expires, an employer that establishes a good-faith doubt of a union's majority status may announce that it does not intend to negotiate a new agreement.[28] Additionally, after the contract has expired, an employer is entitled to raise a good-faith doubt of a union's continuing majority status at any time prior to a union's acceptance of its contract proposals.[29] The existence of a good-faith doubt is a question of fact. The employer has the burden of proving that it had a reasonable, good-faith belief that the union no longer represented a majority of the bargaining unit employees.[30] Although the good-faith doubt must be reasonably grounded and supported by objective considerations known to the employer, the employer need not conclusively demonstrate that a majority of its employees no longer desire to be represented by the union.[31] When, however, an employer fails to assert a good-faith doubt by announcing it and acting on it during the period when the presumption is rebuttable, no evidence exists from which to infer that the employer has rebutted the presumption of the union's continuing majority. From a practical standpoint, the placement of the burden of proof on an employer stabilizes labor relations—and protects employee free choice—by prohibiting an employer from withdrawing recognition or refusing to bargain without first adducing objective evidence of its employees' desires to no longer be represented by the union.

2. We reaffirm the rule set forth in *North Bros. Ford* that a union's acceptance of an employer's outstanding contract offer precludes the employer from raising a good-faith doubt of the union's majority status based on events occurring *after* acceptance. Thus, the employer's good-faith doubt based on subsequent events is not available to defend a refusal to execute a valid agreement or a withdrawal of recognition. This rule is based on the fact that before or at the time the contract was formed no one had questioned the majority status of the union and the consequent validity of the agreement. As the Supreme Court reasoned in *Fall River*, this rule promotes industrial peace and labor relations stability by enabling a union to concentrate on obtaining and fairly administering its collective-bargaining agreements without the concern that, absent immediate results, it will lose majority support and be decertified.[32]

3. Turning to the facts of this case, we reaffirm the principle applied in our initial decision and in the Board's decisions in *Chicago Tribune* and *Belcon*: where objective evidence to support a good-faith doubt of a union's majority status is known to the employer before a union's acceptance of the employer's contract offer but the employer does not act on that evidence prior to acceptance, the union's acceptance creates a valid collective-bargaining agreement. Therefore, an employer that disclaims its bargaining obligation in reliance on a good-faith doubt at that point violates Section 8(a)(5) of the Act. Further, the employer is precluded during the contract term from withdrawing recognition or otherwise refusing to bargain based on an alleged good-faith doubt that the union lacked majority status at the time of acceptance. We adhere to this rule for the following reasons.

### E. *Statutory Considerations Arising from Section 8(a)(5)*

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. The Supreme Court in *First National Maintenance Corp. v. NLRB* described the labor policies furthered by the statutory bargaining obligation:

> A fundamental aim of the [Act] is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. . . . Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management. . . . Congress ensured that collective bargaining would go forward by . . . giving [the NLRB] the power to condemn as unfair labor practices certain conduct by unions and em-

[28] *Burger Pits*, 273 NLRB at 1001.

[29] This was, in fact, the situation present in *Viking Lithographers*, in which the Board found that when the parties during contract negotiations had not reached a complete agreement, the employer did not violate Sec. 8(a)(5) and (1) by withdrawing recognition from the union based on reasonable objective factors to support its good-faith belief that the union had lost majority status. Specifically, the Board found that although the union had accepted the respondent's purported ''final offer,'' there was in fact no final offer ''comprising a complete contract.'' 184 NLRB at 139–140. We therefore reject the Respondent's contention that *Viking Lithographers* is dispositive here, and we find that case factually distinguishable from the present one. We reaffirm our finding in our initial decision, as enforced in pertinent part by the court, that unlike in *Viking Lithographers*, the parties here had reached a complete and binding agreement when the Respondent sought to withdraw recognition.

[30] *Pilgrim Industries*, 286 NLRB 244 (1987).

[31] *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720, 728 (5th Cir. 1978).

[32] 482 U.S. at 38–39.

ployers that it deemed deleterious to the process, including the refusal ''to bargain collectively.''[33]

Relying on this mandate, we agree with the administrative law judge in *Chicago Tribune* that it is inconsistent with the concept of good-faith bargaining for the Board to adopt a rule that an employer may continue to bargain—and thus to treat the union as the representative of a majority of its employees—by leaving its contract offer on the table to await the outcome of negotiations before deciding whether to raise a doubt of the union's majority support based on grounds that it knew existed prior to the formation of the contract.[34]

Case law supports this interpretation of the obligations imposed by Section 8(a)(5). The Board's development of the good-faith doctrine in *Celanese Corp.* makes clear that the issue of whether an employer's questioning of a union's majority status is in good faith depends not only on whether reasonable grounds exist for believing that the union lost majority support, but also on whether the employer *sought to control the timing of the assertion of the doubt* to undermine the union's representational role. The Board cautioned:

> [T]he majority issue must *not* have been raised by the employer in a context of illegal antiunion activities or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union.[35]

In a similar vein, the Court in *Fall River* explained that the presumptions of majority status remove any temptation to avoid good-faith bargaining in the hope that by delaying, an employer will unfairly undermine the union's majority status.[36] Thus, the Board has found that an employer's claim of good-faith doubt is neither held in good faith nor reasonable when the employer did not raise it until the parties had fully agreed on a contract, even though the claim was based on information known to the employer throughout bargaining.[37] Similarly, the First Circuit itself has held that an employer lacked good faith when, despite the employer's doubts about the union's majority status it had entertained prior to negotiations, it entered into negotiations ''hoping to get a contract to its liking.''[38]

### F. *Practical and Policy Considerations*

The Board's emphasis on the timeliness of the employer's manifestation of its good-faith doubt, by, e.g., withdrawing recognition or petitioning for an election, furthers the same principles and is in complete accord with our rationale for the two rules discussed above. The employer controls whether or when its doubt will be asserted. As noted above, without an employer's objective manifestation of the doubt, there is no doubt cast on the union's authority to bargain with the employer, and thus, no obstacle to the union's binding the employer by accepting the employer's contract offer.

Further, we share the awareness of the administrative law judge in *Chicago Tribune* of the practical difficulties of litigating a doubt alleged to have been held before or at the time the contract was reached but on which the employer did not act until after the contract was reached. As he suggested, a determination of the critical issue of whether an employer had a reasonable doubt, held in good faith but not articulated, at an ''earlier unspecified time''—presumably prior to the union's acceptance of the employer's contract offer—would involve an inquiry into matters too speculative and subjective ''not only to vitiate that contract but to dissolve the bargaining relationship.''[39] Instead, as discussed above, the existence of a good-faith doubt of majority support is a question of fact, and to demonstrate it, the employer must show, inter alia, that the doubt is grounded in objective, demonstrable evidence.[40]

Thus, practicalities support the rule that, if an employer is aware of objective evidence to support a good-faith doubt *before* the union accepts its offer, it must, for the defense to be timely raised, act on this doubt before the union accepts its offer. Further, and this policy choice goes to the heart of the First Circuit and Seventh Circuit's concerns, if an employer fails to raise a doubt based on known preacceptance factors until after acceptance, the Board will not view those factors as ''changed circumstances'' vitiating the employer's offer or the contract's validity. Board recognition of the factors supporting the doubt as changed circumstances would defeat in large part the purpose of denying the employer the privilege of raising the after-

[33] 452 U.S. 666, 674 (1981) (footnotes and citations omitted).

[34] The Board and the courts have held that the common law rule that a rejection or counterproposal terminates an offer has little relevance in the collective-bargaining setting. In collective bargaining, an offer will remain on the table and be capable of acceptance unless the offeror explicitly withdraws it or changed circumstances would lead both parties reasonably to believe that the offer was withdrawn. *Chicago Tribune Co.*, 303 NLRB 682, 690 (1991) (citing *NLRB v. Burkart Foam*, 848 F.2d 825, 830 (7th Cir. 1988)).

[35] 95 NLRB at 673.

[36] 482 U.S. at 38.

[37] *Bennett Packaging Co.*, 285 NLRB 602, 608 (1987). See also *King Radio Corp.*, 208 NLRB 578, 584 (1974), enfd. 510 F.2d 1154 (10th Cir. 1975), cert. denied 423 U.S. 839 (1975) (Board found employer's claim of doubt, asserted as a defense to withdrawal of recognition, was not held in good faith when it knew of the factors relied on to establish its doubt during negotiations but failed to raise the doubt until the parties were close to reaching agreement on a contract the employer did not want).

[38] *Bolton-Emerson, Inc. v. NLRB*, 899 F.2d 104, 107 (1st Cir. 1990), enfg. 293 NLRB 1124 (1989).

[39] 303 NLRB at 691.

[40] See generally *Brown & Root U.S.A.*, 308 NLRB 1206 (1992), and *Laidlaw Waste Systems*, 307 NLRB 1211 (1992).

the-fact doubt defense—it would vitiate a contract as to the validity of which no doubts had been raised at the time it was formed.

Accordingly, we reaffirm as consistent with our statutory mandate and the practicalities of case litigation the rule that once the union accepts the employer's offer, in the absence of a previous assertion of good-faith doubt or other changed circumstances to call into question the union's competence to enter into a contract, the parties have formed a valid contract precluding the employer from raising a good-faith doubt or refusing to bargain with the union during its term.[41]

Having reaffirmed that the Respondent could not raise its alleged good-faith doubt as a defense to its withdrawal of recognition and refusal to execute the contract, we find it unnecessary to pass on whether the Respondent presented sufficient objective evidence to support a reasonable, good-faith doubt of the Union's majority status. Some features of the Respondent's evidence illustrate however, the practical difficulties of determining, without a timely assertion of doubt accompanied by appropriate action, *when* an employer possesses sufficient objective evidence to support an alleged good-faith doubt.[42]

The court found that the Respondent relied on events prior to the Union's November 27 acceptance to support its good-faith doubt, asserted on November 28. Ralph Auciello, the Respondent's vice president, testified that *after* receiving the Union's telegram, management met on November 28, discussed each employee's union sentiment, and that ''at that time, it was clear to me that the union did not represent the men.'' He attributed this belief to employees' oral statements of dissatisfaction with the Union over several months. For example, Auciello admitted that one employee's statement that the Union was a joke could have been made immediately after the strike began or ''6 months before.'' He could not recall the most recent conversation with an employee who did not support the Union, but testified that ''quite a few'' discussions occurred on November 18 and that some of the conversations took place the week of November 21.[43]

According to Auciello, November 28 was the first time that the Respondent discussed the Union's majority status ''in such depth'' and that management had not discussed the issue previously because contract negotiations were ongoing.[44] Auciello admitted, however, that management prepared a list of employees indicating who was likely to vote against union representation ''toward the end of the strike''[45] and ''on or before'' November 28. The Respondent did not take any action on the list because negotiations were ongoing and because the document represented a ''worst case scenario.''

Auciello's testimony makes it clear that the Respondent harbored its doubt while its contract offer was outstanding. If we were to permit Respondent to ''sit'' on that doubt and to raise it after the offer is accepted, we would effectively permit an employer to unilaterally control a vital part of the collective-bargaining process. An employer with such a doubt would then not only be able to act on it and nullify the offer, but also it could wait until the offer is accepted and then vitiate the contract. If the Board's policies were to permit an employer to retain complete control over when to act on its purported doubt, control that can even invalidate after the fact a union's prior, appropriate, and good-faith bargaining acts, the demonstration of that doubt, with its profound legal and practical consequences, becomes amenable to post-hoc reasoning and self-serving interpretations.

### G. *Section 8(a)(2), Ladies Garment Workers, and Balancing Employee Free Choice Against Bargaining Stability*

Our affirmation of *Belcon*, which we applied in our initial decision, is based on the obligations imposed by the statutory duty to bargain in good faith under Section 8(a)(5). The Seventh Circuit in *Chicago Tribune*[46] maintained, however, that irrespective of whether an employer continues to negotiate by leaving an offer on the table, Section 8(a)(2),[47] which protects the right of employees to decide for themselves whether to be represented, requires consideration in determining the

[41] We note that an employer's ability to manipulate the timing of its good-faith doubt defense and the difficulty of litigating the issue given that fact have influenced our approach in this case. Our focus here does not, however, necessarily carry over into other areas that do not present the same policy considerations. For example, in the case before us, the statutory period of limitations began to run when the Respondent refused to execute the contract and asserted that it was withdrawing recognition from the Union, not when the Respondent formed its good-faith doubt.

[42] Member Cohen does not rely on general pronouncements concerning the timeliness of an employer's assertion of a good-faith doubt of majority status. He confines himself to the specific facts of this case, i.e., the assertion of the doubt after a contract offer has been accepted, in circumstances where the assertion is based on facts that were known prior to acceptance.

[43] See *Bolton-Emerson*, 293 NLRB at 1129, enfd. 899 F.2d at 107 (company representative's testimony that the company entertained good-faith doubt throughout negotiations conclusive of bad-faith bargaining).

[44] We note that Auciello testified that he did not take notes about the employees' antiunion sentiments until the Respondent began to prepare its response to the Union's November 27 telegram.

[45] We note that the picketing ended on November 18 and that the Union called off the strike in its November 27 telegram.

[46] We note that the Seventh Circuit issued its decision in *Chicago Tribune* after the instant case was argued before the First Circuit.

[47] Sec. 8(a)(2) prohibits an employer from dominating or interfering with the formation or administration of any labor organization or from contributing financial or other support to it.

availability of the good-faith doubt defense.[48] According to the *Chicago Tribune* court, applying *Ladies Garment Workers*, the interests of the majority of employees who had not desired representation when the contract was formed dictate that the employer should not be estopped from withdrawing its offer and refusing to bargain with the union based on an alleged good-faith doubt of the union's majority status even though it might have been at fault for leaving its offer on the table and inviting acceptance by the union.

In *Ladies Garment Workers*, the employer voluntarily recognized a union based on a good-faith but mistaken belief that the union represented a majority of the unit employees. The Court held that by extending recognition to a minority union, regardless of its bona fide belief in the union's majority status, the employer violated Section 8(a)(2), and that by its acceptance of exclusive bargaining authority the union violated Section 8(b)(1)(A). The Court held that a grant of exclusive recognition to a minority union is unlawful because the union so favored is given ''a marked advantage over any other in securing the adherence of employees.''[49]

We respectfully disagree that *Ladies Garment Workers* resolves the issue here. As an initial matter, this case is factually distinguishable from *Ladies Garment Workers*. The instant case concerns a certified union and the employer's obligation to bargain with it as enforced by Section 8(a)(5), whereas *Ladies Garment Workers* involved the employer's inadvertent voluntary recognition of a union the majority of its employees never supported in violation of Section 8(a)(2). Additionally, this case, unlike *Ladies Garment Workers*, occurred in the context of ongoing negotiations and the shifting balances of power caused by an economic strike, as discussed below. It follows from these distinctions, as well as from the different legislative purposes of the two provisions, that different accommodations between the dual interests of furthering labor relations stability and ensuring employee freedom of choice are appropriate.

Thus, *Ladies Garment Workers* presented a fundamentally different issue from the one presented here. That case involved an employer's *recognition* of a nonincumbent, initially organizing, *actual-minority* union. This case, on the other hand, involves the Respondent's *withdrawal of recognition* of the incumbent, *presumptively majority* Union. In *Ladies Garment Workers*, the employer's asserted good-faith belief that the union had *achieved* majority status at the time of recognition was no defense to its unlawful recognition; in this case, the issue is whether the Respondent's asserted good-faith belief that the Union had *lost* its presumptive majority status is a validly raised defense to its withdrawal of recognition.

H. *Statutory Considerations—Section 8(a)(2)*

The violation in *Ladies Garment Workers* arose under Section 8(a)(2). The gravamen of an 8(a)(2) violation is the domination or interference by an employer with the formation or administration of any labor organization. Congress' goal in enacting Section 8(a)(2) was to preserve for employees the right to choose their bargaining representative free of employer interference or coercion.[50] The Court in *Ladies Garment Workers* made clear that the violation found was the employer's initial grant of exclusive representation status to a union that had not been chosen by a majority of its employees.[51]

We respectfully disagree with the Seventh Circuit's finding in *Chicago Tribune* that the employers' conduct in *North Bros. Ford* and *Belcon*, and therefore also in the instant case, is prohibited by Section 8(a)(2). The Board's presumptions of continued majority status under Section 8(a)(5) operate only to maintain lawfully established continuing bargaining relationships.[52] In *Ladies Garment Workers*, following the employer's unlawful recognition of the minority union, the Board voided the agreement and the union was no longer presumed to be the majority representative. By contrast, the Union in this case was not recognized unlawfully, but was the certified representative of the Respondent's unit employees. A Board-certified election clarifies beyond question a union's status as the employees' exclusive collective-bargaining representative.[53] Before acceptance of the Respondent's offer, when the Union was operating under a rebuttable presumption of continued majority support, there was no legally cognizable evidence that continued bargaining would involve dealing with a minority union. Rather, the presumption was unchallenged at the time of acceptance, even though the Respondent and the unit employees themselves were free to attack it. Under the circumstances, Section 8(a)(2) does not preclude a finding that the parties formed a valid agreement preserving the Union's presumptive majority during the contract's term. Thus, the aim of Congress in enacting Section 8(a)(2)—to prevent employers from foisting representatives on unwilling employees[54]—is not frus-

[48] 965 F.2d at 250.

[49] 366 U.S. at 738 (citing *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267 (1938)).

[50] *Electromation, Inc*., 309 NLRB 990, 994 fn. 18 (1992).

[51] 366 U.S. at 736.

[52] *Royal Coach Lines v. NLRB*, 838 F.2d 47, 52 (2d Cir. 1988).

[53] See *W. A. Krueger Co*., 299 NLRB 914, 916 fn. 18 (1990). Members Stephens and Cohen do not rely on this and subsequent references to *W. A. Krueger*.

[54] *Electromation*, 309 NLRB at 994.

trated by the presumption's protection of the status of a certified incumbent union against post-hoc attack.[55]

Thus, we respectfully disagree with the courts in this case and *Chicago Tribune* to the extent that they hold that 8(a)(2) considerations require that an employer be permitted to raise a ''reasonable doubt'' defense to an 8(a)(5) withdrawal-of-recognition violation when the objective considerations assertedly supporting the reasonable doubt existed *before* the union accepted the employer's contract offer, but the reasonable doubt itself was not expressed by the employer until *after* the union accepted the contract offer.

### I. *Voluntary Recognition as Distinct from Board Certification*

The procedure used to accord recognition to a union also affects the duration and effect of the presumption of majority status. When a union is certified following a Board-supervised election, the presumption of majority status generally remains irrebuttable for 1 year. Voluntary recognition, however, presents risks to stable bargaining relations not present where employees have chosen a union through a Board-conducted election. Thus, when an employer voluntarily recognizes a union, the Board has set the period of irrebuttably presumptive majority at a less definite ''reasonable time'' for bargaining.[56] Without the safeguards of a Board-conducted election, voluntary recognition can lead to recognition of a minority union, as occurred in *Ladies Garment Workers*. In this case, although the certification year had ended, the Union remained the presumptive majority representative of the unit employees when it accepted the Respondent's offer. The Union's longstanding status as the employees' certified bargaining representative distinguishes it from the uncertified union in *Ladies Garment Workers*; and the national labor policy of stabilizing bargaining relationships[57] supports, from a policy perspective, our finding that the Respondent's attempted withdrawal of recognition posed a risk to stable bargaining relations not addressed by Section 8(a)(2), but falling within the purview of conduct prohibited by Section 8(a)(5) of the Act.[58]

### J. *The Significance of an Economic Strike During Bargaining and Shifting Balances of Power*

The Seventh Circuit in *Chicago Tribune* also warned that finding a valid contract on the union's acceptance of an employer's offer notwithstanding that ''the union lost the support of the workers'' between the offer and its acceptance would undermine employee free choice because the resulting agreements would be ''sweetheart deals'' between the company and the union.[59] As a practical matter, because many good-faith doubt cases occur during strikes, we find that ''sweetheart'' deals are less likely in this context than the court prophesied.

A strike is defined by discord between the union and the employer to gain bargaining power. In this atmosphere, an employer and a union struggling to reach agreement on contract terms, or an employer hoping to oust a union through weakening it during the strike, would be unlikely to conspire to bar a decertification petition, or a representation petition by another union, despite their knowledge of lack of majority status. Here, far from hoping to keep a minority union in place at the employees' expense, the Respondent prepared forms for employees to resign from the Union, thus seeking to alter the prevailing balance of power and weaken the Union's economic position. The Union's eventual acceptance of the Respondent's contract offer was not collusive; it was a recognition of the Respondent's increased bargaining strength as the unit employees abandoned the strike. Yet even after

[55] We further note that, contrary to the Seventh Circuit's suggestion in *Chicago Tribune*, the Board's blocking charge rule does not prevent an employer from challenging a union's majority status. An employer is entitled to secure evidence to support an alleged good-faith doubt despite the pendency of a decertification petition and is privileged to withdraw recognition based on tangible evidence of a loss of majority support. See *Atwood & Morrill Co*., 289 NLRB 794 (1988).

[56] See *Royal Coach Lines*, 838 F.2d at 51–52.

[57] See *Excel Corp*., 313 NLRB 588, 589 (1993), discussed below. See also *Edison Sault Electric Co*., 313 NLRB 753 (1994) (petitioner precluded from filing unit clarification petition after contract agreement reached but prior to ratification when petitioner did not reserve the right during bargaining to file; decision extends Board's Rule and policy that to entertain a unit clarification petition during the term of a contract which defines the bargaining unit would disrupt the bargaining relationship); *Union Plaza Hotel & Casino*, 296 NLRB 918, 918 fn. 4 (1989), enfd. sub nom. *E. G. & H. Inc. v. NLRB*, 949 F.2d 276, 278, 280 (9th Cir. 1991) (employer may not repudiate agreement formed but not yet signed by arguing that the unit is inappropriate because it contains statutory supervisors).

[58] We note further that an employer that has voluntarily recognized a union is permitted to defend an 8(a)(5) complaint allegation by introducing evidence demonstrating a lack of majority at the time of recognition. If the employer is successful, the presumption of majority status ends. See *Moisi & Son Trucking*, 197 NLRB 198 fn. 2 (1972); *Concord Services*, 310 NLRB 821, 822 (1993). This defense, of course, is cognizable only when recognition has occurred within 6 months of the filing of the related unfair labor practice charge. See *Sewell-Allen Big Star, Inc*., 294 NLRB 312, 313 (1989), enfd. mem. 138 LRRM 2160 (6th Cir. 1991); *Jim Kelley's Tahoe Nugget*, 227 NLRB 357 (1976), enfd. 584 F.2d 293 (9th Cir. 1978), cert. denied 442 U.S. 921 (1979). The Board's decision in *Burger Pits*, 273 NLRB at 1001, however, suggests that even in voluntary recognition cases, once the parties have formed a valid collective-bargaining agreement, an employer cannot challenge the union's majority status during the contract's term in order to avoid the bargaining obligations imposed by the agreement. This finding reflects the Board's policy, discussed above, of preserving enduring bargaining relationships.

Members Stephens and Cohen do not pass on the issue of whether an employer can challenge a contract based on the minority status of the union at the time of recognition, when such recognition occurred less than 6 months prior to the challenge.

[59] 965 F.2d at 250.

the Union capitulated to the Respondent's offer, the Respondent still sought to terminate, rather than continue, the bargaining relationship.[60]

### K. *Balancing Statutory Considerations*

The court's remand calls on us to determine whether the Respondent can rely on the employees' statutory right of free choice to justify withdrawing recognition from the Union. We have found that the Respondent's conduct in bargaining with the Union does not come within the gravamen of an offense under Section 8(a)(2). As the Respondent's conduct implicates the employees' statutory right of free choice, however, we shall examine the Board's and the Supreme Court's accommodations of the dual interests in employee free choice and stable bargaining relations. We have consistently recognized in our prior decisions that employee free choice may be outweighed, in some circumstances and in limited appropriate degrees, by the goal of industrial stability, and this approach has found favor in the courts.

In *Bryan Mfg. Co*., the Supreme Court held that where a collective-bargaining agreement was executed at a time when the union did not represent a majority of the unit employees, complaints alleging lack of majority status were barred by Section 10(b) of the Act when they were filed more than 6 months after the execution of the agreement. In so finding, the Court recognized the competing interests at stake—employee self-determination versus burying stale disputes in the interest of stability—and concluded that Congress had decided the appropriate balance by establishing the 6-month statutory limitations period. Thus, the minority status of the union could not be litigated once the statutory period had run ''even at the expense of the vindication of statutory rights.''[61]

In cases involving lawful bargaining relationships where Congress has not determined the outcome of the accommodation analysis, the Supreme Court has refused to allow employers to rely on assertions of employees' rights to justify refusals to bargain. In *Brooks v. NLRB*,[62] the Court held that the employer was obligated to bargain with the certified union even if shortly after the election and through no reason attributable to the employer the union lost its majority support. After recognizing that the Board has procedures through which parties can petition the Board for release from their bargaining obligations, the Court stated:

> 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. . . .
>
> In placing a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers, Congress has discarded common-law doctrines of agency.[63]

In *Franks Bros. Co. v. NLRB*,[64] the Court affirmed the Board's Order that an employer bargain with a union which had lost its majority following the employer's unlawful refusal to bargain with it. The Court stated that such an order involves no ''injustice to employees who may wish to substitute for the particular union some other . . . arrangement,'' because ''a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.''[65] Similarly, in the situation where the Board has issued a bargaining order to remedy an employer's unfair labor practices, the argument has been made that a bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' Section 7 rights of free choice. The Supreme Court rejected this argument in *NLRB v. Gissel Packing Co*.[66] by pointing out that ''[t]here is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition.'' And, in the situation when the Board issued an affirmative bargaining order because it found that a successor employer did not have a good-faith doubt of the incumbent union's majority status when the employer refused to recognize that union, the Fourth Circuit recently held that even though such an order ''infringes upon'' and ''restricts employees' freedom of choice,'' such ''a restriction does not . . . render the remedy inappropriate,'' because ''[i]t does not fix a permanent bargaining relationship between the em-

[60] In contrast to the good-faith doubt cases involving certified unions, cases involving voluntary recognition—and thus cooperation—between an employer and a union present a more likely context for sweetheart deals to occur. For example, in *Baby Watson Cheesecake*, 309 NLRB 417 (1992), the Board found that the employer and the voluntarily recognized incumbent union unlawfully executed a renewal agreement when faced with an organizing campaign by a rival union, despite their knowledge that the incumbent union did not enjoy majority status.

[61] 362 U.S. at 429. By the same token, the Board has acknowledged employers' interests in maintenance of a status quo that has developed in the absence of timely action by the bargaining representative. Thus, for example, if more than 6 months pass after a union is on notice of an employer's refusal to execute a bargaining agreement, the Board will not entertain an 8(a)(5) charge on any continuing violation theory, because parties to a collective-bargaining relationship must ''be able to assess their obligations to each other expeditiously and with reasonable certainty.'' *Chambersburg County Market*, 293 NLRB 654, 655 (1989).

[62] 348 U.S. 96 (1954).

[63] 348 U.S. at 103.

[64] 321 U.S. 702 (1944).

[65] 321 U.S. at 705 (citations omitted). See also *NLRB v. Mexia Textile Mills*, 339 U.S. 563 (1950) (claim of an intervening loss of majority no defense to a proceeding for enforcement of an order to cease and desist from certain unfair labor practices).

[66] 395 U.S. 575, 613 (1969).

ployer and the union'' and ''[a]fter a reasonable period, the employees will be free to reject the union, if they so choose . . . .'' *NLRB v. Williams Enterprises*, No. 94–1294, slip op. at 13–14 (4th Cir. Apr. 6, 1995).

In addition to Court precedent, Board decisions involving challenges to incumbent unions' status offer further guidance in analyzing, from a policy perspective, the limits on the Respondent's right to challenge the Union's majority status. In *Excel Corp*., the Board refused to permit the decertification petitioners to submit signatures in support of their showing of interest after the expiration of the window period. The parties in *Excel* executed a successor agreement after the window period expired. Emphasizing that the parties had an enduring bargaining relationship, the Board found that to permit a decertification election based on untimely signatures would ''unjustifiably place at risk the collective-bargaining agreement and the bargaining relationship between the Employer and the Union.''[67]

In *W. A. Krueger Co*., the Board held that an employer may not make unilateral changes in employees' terms and conditions of employment after a union loses the tally in a decertification election but before a certification of results issues. Although recognizing that an employer may act unilaterally at its peril in an initial certification where it has no preexisting duty to bargain,[68] the Board found that different interests prevail respecting a decertification petition, as it is filed in the context of an existing bargaining relationship where the employer has a duty to bargain over changes in unit employees' terms and conditions of employment. The Board found that its Rule—i.e., that election results are not final until a certification issues—promotes stability ''while the Board determines whether the apparent employee choice was freely made.''[69] Finally, the Board majority, in addressing the dissent's concerns that an employer might be compelled to bargain with a minority union, stated:

> [B]y referring to the confusion that can exist over a union's status and an employer's corresponding obligations, our colleague has inadvertently highlighted a compelling reason for establishing a date certain for a losing union's change in status.[70]

From a policy perspective, then, the delineation of a precise point in time when a certified union's majority status ceases to be rebuttable promotes stability during the period when the union's status is in doubt.

The Supreme Court and the Board did not base these decisions on the certainty that the incumbent unions continued to represent a majority of the unit employees. Rather, these cases reflect the policy determination that bargaining relationships should remain stable in the face of challenges to an incumbent union's status. As both the Court and the Board have observed, this policy is particularly compelling when, as here, the parties have maintained an enduring collective-bargaining relationship.[71]

We emphasize that the intent of these cases is not to impose bargaining relationships and representation on unwilling employees. The cases suggest that with respect to *employers*, however, permissible methods of self-help to select and reject bargaining agents—in this case assertion of a good-faith doubt and attempted withdrawal of recognition—must be carefully circumscribed to prevent stable labor relations from being undermined by total employer control.[72]

Like we did in *Krueger*, we have established a date certain—a union's acceptance of an employer's contract offer—after which *an employer* cannot challenge the majority status of a certified union based on an alleged good-faith doubt. We believe that as a policy matter, the stability resulting from this principle outweighs its potential adverse impact on employee freedom of choice. We further believe that our policy choice stabilizes enduring bargaining relationships, and gives the bargaining agreement that was formed while the union's presumed majority status remained unrebutted a chance to succeed.

### L. *Cases Involving Extraordinary Circumstances*

We recognize that extraordinary circumstances may arise in which a union's acceptance of an employer's final contract offer and the employer's assertion of a good-faith doubt are simultaneous.[73] For example, em-

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[67] 313 NLRB at 589. Member Stephens, who dissented in *Excel Corp*., and Member Cohen find it unnecessary to rely on the above discussion.

[68] See *Mike O'Connor Chevrolet-Buick-GMC*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

[69] 299 NLRB at 916–917.

[70] 299 NLRB at 918 fn. 21. We note that the Board in *Krueger* relied on two decisions that similarly reflect the Board's interest in preserving existing bargaining relationships: *Dresser Industries*, 264 NLRB 1088 (1982) (Rule permitting an employer to withdraw from bargaining solely because a decertification petition has been filed does not give due weight to the incumbent union's continuing presumption of majority status); and *RCA Del Caribe, Inc*., 262 NLRB 963 (1982) (Rule that mere filing of a representation petition by an outside union does not require or permit an employer to withdraw from bargaining with an incumbent union furthers stable bargaining relations and insures employee free choice).

[71] See, e.g., *Excel Corp*., 313 NLRB at 588. See also *Krueger*, 299 NLRB at 915–918.

[72] See *Brooks*, 348 U.S. at 103. Compare the Supreme Court's decision in *NLRB v. Curtin Matheson*, 494 U.S. at 794–796 (Board's refusal to adopt an antiunion presumption regarding the views of strike replacements is consistent with the Act's overriding policy of achieving industrial peace because it limits employers' ability to oust a union without adducing any evidence of the employees' union sentiments and encourages negotiated solutions to strikes).

[73] Cf. *Royal Coach Lines v. NLRB*, 838 F.2d 47 at 54, in which the court, in the context of a discussion of the burden of proof in voluntary recognition cases, recognized the possibility that an employer might provide evidence to cast a serious doubt on majority support for the union immediately prior to or contemporaneous with voluntary recognition.

ployees may first present signed petitions stating that they do not want to be represented by a union at virtually the same time that the union accepts an employer's contract offer. In such infrequent instances, the Board will evaluate case by case whether an employer is permitted to raise a good-faith doubt of the union's majority status. Further, the possibility that an employer may be permitted to raise a good-faith doubt that developed contemporaneously with a union's purported acceptance of its offer does not affect the principle that a union and an employer are not permitted to continue bargaining if the union has actually lost its majority status and the employer and the union are aware of this actual loss.[74]

### M. *Reconciling Curtin Matheson and Bickerstaff*

Finally, we find that the Board's decisions in *Curtin Matheson Scientific, Inc.*, 287 NLRB 350 (1987), and *Bickerstaff Clay Products Co.*, 286 NLRB 295 (1987), although they may appear to be inconsistent with our result here, do not indicate shifting or poorly defined Board policies. The Board's analyses of the cases before it are guided implicitly by the manner in which the cases are pled and litigated and, more explicitly, by the issues raised in the parties' exceptions. In both *Curtin Matheson* and *Bickerstaff*, the parties did not litigate the timeliness of the employers' good-faith doubts even though they were asserted after the unions' acceptances of the respondents' outstanding contract offers. Instead, the parties framed and argued the issue to the Board in both cases as whether the employers had met their burden of demonstrating a good-faith doubt. The focal point of each case in enforcement proceedings narrowed even more and became whether, in evaluating the employers' evidence, the Board should entertain the presumption that striker replacements do not support the union.

The court in this case accepted the Board's insistence that it was not deliberately abandoning *Belcon* in considering the merits of the employers' good-faith doubts in *Curtin Matheson* and in *Bickerstaff*. Rather, the court characterized the Board's evaluation of the good-faith doubt defenses in those cases as ''an unwitting oversight encouraged, perhaps, by a readiness . . . to secure review of an important substantive issue.''[75] Although the resulting appearance of inconsistency is unfortunate, we agree with the court's assessment.[76]

### N. *Conclusion*

We previously found that the Union's acceptance of the Respondent's outstanding contract offer on November 27 created a valid collective-bargaining agreement. The Respondent asserted a good-faith doubt for the first time on November 28, relying on events that occurred prior to the formation of the contract. For all the reasons set forth above, we reaffirm our finding that the Respondent is precluded from demonstrating that it had a good-faith doubt of the Union's majority status at the time of acceptance. We therefore adhere to our previous findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a written contract with the Union and by withdrawing recognition.

## ORDER

The National Labor Relations Board reaffirms its Order in the underlying proceeding, 303 NLRB 562 (1991), and orders that the Respondent, Auciello Iron Works, Inc., Hudson, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

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[74] See *S.M.S. Automotive Products*, 282 NLRB 36, 41–44 (1986); *Clark Equipment Co.*, 234 NLRB 935 (1978), on remand 249 NLRB 660 (1980). In the initial *Clark* decision, the Board found that the General Counsel established a prima facie case that the employer knowingly bargained with a union that had lost majority status. In so finding, the Board found that the evidence presented went beyond ''naked claims'' and included a specific listing of employees who had purportedly signed authorization cards for a rival union. No such arguments are made here. In the second *Clark* decision, however, the Board found that most of the key events established in the General Counsel's prima facie case and relied on by the Board previously did not, in fact, occur, and therefore that the employer did not violate the Act. Cf. *Quality Hardware Mfg. Co.*, 307 NLRB 1445 (1992). We further emphasize that the case before us does not involve allegations of an actual loss of majority status.

[75] 980 F.2d at 812.

[76] In *Curtin Matheson*, the Supreme Court reversed the Fifth Circuit's opinion and held that the Board had acted within its discretion in refusing to adopt an antiunion presumption regarding strike replacements. To the extent that the lower courts' opinions in *Curtin Matheson* and *Bickerstaff* have not been overruled, they are of limited precedential value.