Levitz Furniture Company of the Pacific, Inc., formerly Levitz Furniture Company of Northern California, Inc. d/b/a Levitz *and* United Food and Commercial Workers Union, Local 101, United Food and Commercial Workers International Union, AFL–CIO. Case 20–CA–26596

March 29, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN, HURTGEN, AND WALSH

In this case we reconsider whether, and under what circumstances, an employer may lawfully withdraw recognition unilaterally from an incumbent union.[1] The Board has long held that an employer may withdraw recognition by showing either that the union has actually lost the support of a majority of the bargaining unit employees or that it has a good-faith doubt, based on objective considerations, of the union's continued majority status. *Celanese Corp.,* 95 NLRB 664 (1951). On the same showing of good-faith doubt, an employer may test an incumbent union's majority status by petitioning for a Board-conducted (RM) election, *United States Gypsum Co.*, 157 NLRB 652 (1966),[2] or by polling its employees to ascertain their union sentiments, *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1059 (1989), enfd. as modified 923 F.2d 398 (5th Cir. 1991).

The General Counsel, the Charging Party Union, and the AFL–CIO as amicus curiae urge the Board to abandon the *Celanese* rule and prohibit employers from withdrawing recognition except pursuant to the results of a Board-conducted election. They also oppose lowering the standard that employers must meet to obtain RM elections. Employers urge the Board to retain the *Celanese* rule but to lower the standard for processing RM petitions.

While this case was pending, the Supreme Court issued *Allentown Mack Sales & Service v. NLRB,* 522 U.S. 359 (1998), which addressed the Board's good-faith doubt standard. The Court held that maintaining a unitary standard for an employer's withdrawal of recognition, filing an RM petition, and polling its employees was rational, but indicated that the Board also could rationally adopt a nonunitary standard, including, in theory, imposing more stringent requirements for withdrawal of recognition.[3] The Court also held that the Board's "good-faith doubt" standard must be interpreted to permit the employer to act where it has a "reasonable uncertainty" of the union's majority status, rejecting the Board's argument that the standard required a good-faith disbelief of the union's majority support.

In addressing the arguments concerning the *Celanese* rule and the standards for holding RM elections, then, we must take into account the Court's teachings in *Allentown Mack*. In particular, we must avoid the confusion over terminology which the Court identified in our application of the good-faith doubt standard.

After careful consideration, we have concluded that there are compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty or even disbelief concerning unions' majority status. We therefore hold that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule *Celanese* and its progeny insofar as they permit withdrawal on the basis of good-faith doubt. Under our new standard, an employer can defeat a postwithdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status.

We have also decided to allow employers to obtain RM elections by demonstrating good-faith reasonable *uncertainty* (rather than *disbelief*) as to unions' continuing majority status. We adopt this standard to enable employers who seek to test a union's majority status to use the Board's election procedures—in our view the most reliable measure of union support—rather than the more disruptive process of unilateral withdrawal of recognition.

In parts I through III of this decision, we set forth the background and facts of the case and the principal arguments of the parties and amici. In part IV, we review the historical development of the good-faith doubt standard. In part V, we explain our new standards, discuss the kinds of evidence that may support a good-faith reasonable uncertainty as to a union's majority status, and indicate why we shall not apply the new withdrawal of recognition standard in pending cases. Finally, in part VI, we discuss the merits of this case and our reasons for dismissing the complaint.

I. BACKGROUND

On charges filed by United Food and Commercial Workers Union, Local 101, United Food and Commercial Workers International Union, AFL–CIO (the Union),

[1] Our analysis is limited to cases where there have been no unfair labor practices committed that tend to undermine employees' support for unions. We adhere to the Board's well- established policy that employers may not withdraw recognition in a context of serious unremedied unfair labor practices tending to cause employees to become disaffected from the union. See, e.g., *Williams Enterprises*, 312 NLRB 937, 939–940 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995).

[2] See Sec. 9(c)(1)(B) of the Act.

[3] 522 U.S. at 365–366, 373–374.

on March 8, 1995, against Levitz Furniture Company of the Pacific, Inc., formerly Levitz Furniture Company of Northern California, Inc., d/b/a Levitz, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on January 10, 1997. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the Respondent's employees.

On April 21, 1997, the General Counsel, the Respondent, and the Union submitted a joint motion to transfer proceedings to the Board and filed a stipulation of facts in which they waived their right to a hearing and the issuance of findings of fact, conclusions of law, and a decision by an administrative law judge, and submitted the case directly to the Board for findings of fact, conclusions of law, and an order. The parties agreed that the charge, complaint, the Respondent's answer, the Regional Director's February 10 and March 13, 1997 orders rescheduling hearing, and the stipulation of facts would constitute the entire record in the case.

On May 21, 1997, the Board issued an Order approving the stipulation of facts, granting the motion, and transferring the proceeding to the Board. The General Counsel, the Union, the Respondent, and amici curiae American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) and Chamber of Commerce of the United States of America (Chamber of Commerce) thereafter filed briefs and reply briefs. In addition, the Union filed a supplemental memorandum, and the Respondent filed a supplemental memorandum and a supplemental reply memorandum.[4]

On April 13, 1998, the Board issued a notice and invitation to file briefs to the parties and interested amici in this case and in *Chelsea Industries*,[5] soliciting further briefing. Briefs in response to the Board's invitation were filed by the parties (including those in *Chelsea Industries*), amici AFL–CIO and Chamber of Commerce (joined by the National Association of Manufacturers), and also by amici Georgia Power Company, Michigan Chamber of Commerce, Labor Policy Association, Council on Labor Law Equality, Mercy Hospital and Rehabilitation Center, Fruehauf Trailer Services, Inc., Bridgestone/Firestone, Inc., Overnite Transportation Company, Small Business Survival Committee, J.R. Simplot Company, and Langdale Forest Products Co.[6]

II. FACTS

The Respondent is a corporation with an office and place of business in South San Francisco, California, where it engages in the business of retail furniture sales. During the calendar year ending December 31, 1995, the Respondent, in conducting those business operations, derived gross revenues in excess of $500,000 and purchased and received at its South San Francisco, California facility goods valued in excess of $5,000 which originated from points outside the State of California. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times until about October 18, 1992, Retail Clerks Union, Local 775, Retail Clerks International Association, AFL–CIO (Local 775) was a labor organization within the meaning of Section 2(5) of the Act. At all material times, the Union (the successor to Local 775) has been a labor organization within the meaning of Section 2(5) of the Act.

On August 10, 1973, Local 775 was certified by the Board as the exclusive collective-bargaining representative of employees in the following unit:

> All full-time and regular part-time employees of the Respondent at its 900 Dubuque, South San Francisco, California operation, excluding employees of General Electric Credit Corporation and Merchants Home Delivery, guards and supervisors as defined in the Act.

Since about October 18, 1992, the Union has been the successor to Local 775. The Respondent and the Union were parties to a collective-bargaining agreement that was effective from February 1, 1992, to and including January 31, 1995, and that covered the following unit (the unit):

> All full-time and regular part-time associates of the Respondent at its 900 Dubuque, South San Francisco, California operation, excluding associates of Merchants Home Delivery, guards and supervisors as defined in the Act.

The full-time and regular part-time employees of the Respondent at its 900 Dubuque, South San Francisco, Califor-

[4] On February 11, 1998, the Respondent filed a motion requesting leave to file a supplemental memorandum. Shortly thereafter, as described in text below, the Board invited additional briefing, thus implicitly granting the Respondent's motion.

[5] 331 NLRB No. 184 (2000). In *Chelsea Industries*, the Board reaffirmed that an employer may not withdraw recognition after the year following the union's certification on the basis of evidence of employee dissatisfaction with the union arising during the certification year. The Board overruled *Rock-Tenn Co.*, 315 NLRB 670 (1994), enfd. 69 F.3d 803 (7th Cir. 1995), to the extent it suggested that, on the basis of evidence received during the certification year, an employer may announce that it will withdraw recognition at the end of the certification year. Id.

[6] The Respondent has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties and amici.

nia operation were classified as "associates" during the term of the agreement. There were no employees of General Electric Credit Corporation working at the Respondent's 900 Dubuque, South San Francisco, California operation during the term of the agreement. At no material time have the employees in the Unit voted in a Board election to decertify either the Union or Local 775 as their collective-bargaining representative.

On about December 1, 1994, the Respondent received a petition bearing what it concluded to be the signatures of a majority of the unit employees, stating that they no longer desired to be represented by the Union for purposes of collective bargaining. By letter dated December 2, 1994, the Respondent informed the Union that it had obtained objective evidence that the Union no longer represented a majority of the employees in the unit. The Respondent advised the Union that it would be withdrawing recognition from the Union effective February 1, 1995, but that it would continue to honor the agreement until it expired on January 31, 1995.

By letter dated December 14, 1994, the Union informed the Respondent that it was disputing the Respondent's claim that it had objective evidence that the Union no longer represented a majority of the unit employees. The letter also stated, "To the contrary, we are in possession of objective evidence that Local 101 *does* represent a majority of the bargaining unit employees at the South San Francisco facility. The Union is ready at any time to demonstrate this fact to you." By letter dated December 21, 1994, the Respondent acknowledged to the Union that it had received the Union's December 14 letter, but reiterated that the Respondent had received objective evidence from which it had concluded that the Union no longer represented a majority of the unit. The letter further stated that, except as required by the contract, the Respondent would no longer recognize the Union. At no time did the Respondent examine or request to examine the Union's alleged evidence of majority status. The record does not indicate the nature of the Union's evidence.[7]

The Respondent continued to honor the terms of the contract until it expired on January 31, 1995; the contract was not renewed. When the agreement expired, the Respondent withdrew recognition from the Union as the collective-bargaining representative of the unit employees. Since February 1, 1995, the Respondent has failed and refused to bargain with the Union as the representative of the unit employees.

[7] In its brief, the Union states that "employees then signed a petition in favor of UFCW." That assertion is not part of the stipulated record, nor did the Union say in its letter that it had received an employee petition.

III. CONTENTIONS OF THE PARTIES AND AMICI

The General Counsel and the unions (including amicus AFL–CIO) urge the Board to overrule *Celanese* and to rule that, unless an employer and an incumbent union agree to test the union's majority support by other means, the employer may lawfully withdraw recognition only pursuant to the results of a Board-conducted election. The General Counsel and the unions note that Board elections are the preferred means of establishing whether a union has the support of a majority of the employees in a bargaining unit.[8] They argue, therefore, that an incumbent union whose majority status is under challenge should be able to insist that the issue be resolved in a Board election before the employer may withdraw recognition. Those parties also argue that allowing withdrawal of recognition on the basis of a good-faith reasonable doubt of a union's majority status permits employers to refuse to recognize and bargain even when unions have not, in fact, lost majority support. The unions further note that employees who wish to get rid of an incumbent union may attempt to do so without their employer's assistance, by filing a petition for a decertification election. Finally, the Union contends that Board elections can normally resolve the issue of unions' continued majority status in less time than is required to litigate an unfair labor practices case alleging an unlawful withdrawal of recognition.

The Respondent and the amici employers and employer organizations (collectively, the employers) oppose overruling *Celanese*. They contend that employer withdrawal of recognition enables employees to exercise their free choice by ridding themselves of unwanted unions. This is especially true, the employers argue, since unions can effectively forestall Board elections by filing unfair labor practice charges to prevent the processing of such petitions.[9] The employers also contend that they must be able to withdraw recognition, at least when unions have been shown to lack majority support, in order to avoid violating Section 8(a)(2) by continuing to recognize minority unions.[10] The employers further argue that a union from which recognition has been withdrawn can immediately file a petition and test its majority support in a Board election. Finally, employers contend that, because they are allowed to extend initial recognition to unions

[8] See, e.g., *NLRB v. Gissel Packing Co*., 395 U.S. 575, 602 (1969); *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974).

[9] The Board has long maintained its so-called "blocking charge" policy, under which elections will not be conducted in the face of certain kinds of pending unfair labor practice charges, except under specified conditions. See generally the Board's Casehandling Manual, Part Two, Sec. 11730 et seq.

[10] See, e.g., *Maramont Corp.*, 317 NLRB 1035, 1035–1036 (1995); *Hart Motor Express*, 164 NLRB 382, 384–385 (1967).

without going through a Board election, they should also be able to withdraw recognition without undergoing a Board election.

IV. HISTORICAL DEVELOPMENT OF THE GOOD-FAITH DOUBT STANDARD

The Board's policies concerning extension and withdrawal of recognition are closely related to the core policies of the Act. The Act has always encouraged the practice of collective bargaining and has protected the right of employees to form and join unions and to be represented by unions in their dealings with employers.[11] To enforce the right of employees to engage in collective bargaining, Section 8(a)(5) makes it unlawful for an employer to refuse to bargain with the representative of a majority of his employees.[12] Conversely, an employer has no duty to recognize or bargain with a union that represents less than a majority of the employer's employees. Indeed, the Board has held that an employer violates Section 8(a)(2) by recognizing a union that lacks majority support[13] or by continuing to recognize an incumbent union that it knows has lost majority support.[14]

Although majority status is pivotal to determining employers' statutory duties, the Act does not specify how a union's majority support must be determined. The only provisions that bear on the issue of determining majority status are the provisions for representation and decertification elections found in Section 9(c).[15]

Absent specific statutory direction, the Board has been guided by the Act's clear mandate to give effect to employees' free choice of bargaining representatives. The Board has also recognized that, for employees' choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit and so must not be subjected to constant challenges. Therefore, from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.[16] Except at certain times, however, that presumption is rebuttable.[17] The showing required to rebut the presumption is the subject of this case.

Employers have always been able to rebut the presumption of continued majority status and withdraw recognition by showing that a union has actually lost majority support.[18] A harder question is raised when an employer cannot prove that the union no longer commands majority support but has a good-faith reason to be unsure of the union's majority status.

Under the Wagner Act,[19] an employer who questioned a union's majority support was left to his own devices. At that time, an employer could not petition for a Board election unless two or more unions were vying to represent the same employees. An employer who was unsure of the majority status either of a single union that was demanding initial recognition or of an incumbent union could not petition the Board for an election to decide the issue.[20] Unless the union or the employees filed an elec-

[11] Sec. 1 of the Act provides, in pertinent part, that:

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

Consistent with that policy, Sec. 7 provides, in relevant part, that

> 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 such activities[.]

[12] Sec. 8(a)(5) provides, in pertinent part, that "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Sec. 9(a) provides, in relevant part, that

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.]

[13] *Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 738 (1961). Sec. 8(a)(2) provides that "it shall be 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[.]"

[14] See, e.g., *Maramont Corp.*, supra.

[15] Sec. 9(c)(1)(A) provides for elections petitioned for by employees and unions, either for representation by a union ("RC" petitions) or to decertify an incumbent union ("RD" petitions). Sec. 9(c)(1)(B) provides for elections petitioned for by employers ("RM" petitions).

[16] See, e.g., *United States Stamping Co.*, 5 NLRB 172, 182 (1938). See also *Station KKHI*, 284 NLRB 1339, 1340 (1987), enfd. 891 F.2d 230 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 794 (1990).

[17] Thus, a newly certified union's majority status is not subject to challenge during the year following certification. *Ray Brooks v. NLRB*, 348 U.S. 96 (1954). A voluntarily recognized (but not certified) union is irrebuttably presumed to retain its majority status for a reasonable period of time following recognition. *Keller Plastics Eastern*, 157 NLRB 583, 587 (1966). And a union's majority status may not be questioned during the life of a collective-bargaining agreement, up to 3 years. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996). The Board has also applied the irrebuttable presumption as a remedial matter. See, e.g., *Caterair International*, 322 NLRB 64, 66 (1996), quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705–706 (1944).

[18] See, e.g., *Celanese Corp.*, 95 NLRB at 672.

[19] 49 Stat. 449 et seq. (1935).

[20] P. Hardin, *The Developing Labor Law* 381–383 (3d ed. 1992).

tion petition, the only way for such an employer to have the issue decided was to refuse to bargain and raise the union's lack of majority support as a defense in an unfair labor practice proceeding.

In that context, the Board held that an employer could lawfully refuse to recognize and bargain with either an incumbent union or a union seeking initial recognition, regardless of the union's actual degree of support, if the employer had a good-faith doubt as to the union's majority support and had not engaged in illegal conduct tending to erode the union's support.[21] As we discuss below, that standard lacked a specific statutory basis, and it also allowed employers to refuse to recognize unions that actually had majority support. However, there was then at least some arguable basis for affording employers this means of resolving their uncertainties concerning unions' support, in the absence of any way to secure a Board election.

In 1947, as part of the Taft-Hartley amendments,[22] Congress added Section 9(c)(1)(B), which provides for employer-filed RM petitions.[23] Ever since, employers have had access to the Board's election procedures both when one union demands initial recognition and when employers doubt the majority support of incumbent unions.[24] In early cases under Taft-Hartley, the Board rejected employers' claims that they had withdrawn recognition lawfully, in part because they had not availed themselves of the Board's election procedures. The Board held that the failure to invoke those procedures indicated that the employers' refusals to bargain were not based on doubts raised in good faith, but instead were motivated by a desire to evade their statutory duty to bargain.[25] In fact, the Board even suggested that Board elections were the only acceptable method for resolving employers' doubts concerning unions' majority status:

> The Act also provides the method whereby an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt by filing an employer petition. . . . A duty to bargain with . . . a duly designated representative is not a matter which an employer may or may not grant when and as he chooses. A duty to bargain with such a duly designated representative has been imposed upon him by the Act. The Act also provides the methods whereby such duty may be dissolved.[26]

In 1951, however, despite the Taft-Hartley Act's expansion of Section 9(c) to include RM petitions, the Board in *Celanese* abandoned this approach. Instead, the Board majority adhered to the Wagner Act policy of allowing withdrawals of recognition pursuant to the employer's good-faith doubt of the union's majority support. The majority held that there were two prerequisites to a finding of good faith: that the employer have some reasonable grounds for believing that the union had lost majority status, and that the employer not raise the issue in a context of illegal activities aimed at causing disaffection from the union or indicating that the employer was merely playing for time in which to undermine the union. The majority indicated that the employer's failure to petition for a Board election might be "some evidence of bad faith," but held that the employer was not required to file an RM petition in order to demonstrate its good faith. The majority specifically held that withdrawal of recognition was lawful if done in good faith, regardless of whether the union actually did have majority support.[27]

In applying the good-faith doubt standard, the Board generally required a showing of *disbelief*, not merely uncertainty, regarding a union's majority status. In fact, the Board (and some reviewing courts) used the terms "doubt" and "[dis]belief" interchangeably, sometimes in the same opinions.[28]

For almost 20 years after *Celanese* was decided, the Board followed similar policies with regard to alleged 8(a)(5) violations in both the extension and withdrawal of recognition contexts. Thus, under the "*Joy Silk*"[29] rule, an employer could lawfully deny initial recognition to a union with majority support if it possessed a good-

[21] See, e.g., *Artcraft Hosiery Co.*, 78 NLRB 333, 334 (1948); *E.A. Laboratories, Inc.*, 80 NLRB 625, 683 (1948), enfd. in relevant part 188 F.2d 885 (2d Cir. 1951), cert. denied 342 U.S. 871 (1951). Although *Artcraft Hosiery* and *E.A. Laboratories* were decided after the passage of the Taft-Hartley amendments in 1947 (see discussion in text below), both cases involved conduct that took place under the original Wagner Act.

[22] 61 Stat. 136 et seq. (1947).

[23] Hardin, *The Developing Labor Law* 382–383.

[24] Sec. 9(c)(1)(B) does not explicitly state that employers may petition for elections to test the support of incumbent unions. However, the Board has consistently held that such petitions are appropriate. See, e.g., *Whitney's*, 81 NLRB 75, 77 (1949) (union's request for contract renewal constituted "claim to be recognized" within the meaning of 9(c)(1)(B)).

[25] *United States Gypsum Co.*, 90 NLRB 964, 966 (1950); *Toolcraft Corp.*, 92 NLRB 655, 656 (1950).

[26] *United States Gypsum Co.*, 90 NLRB at 966 (footnote omitted).

[27] 95 NLRB at 672–675.

[28] Indeed, the Board did so in both *Celanese*, 95 NLRB at 671–673, and *U.S. Gypsum*, 157 NLRB at 655–656. See also *Laystrom Mfg. Co.*, 151 NLRB 1482, 1484 (1965), enf. denied on other grounds 359 F.2d 799 (7th Cir. 1966); *Montgomery Ward & Co.*, 210 NLRB 717 (1974); *T.L.C. St. Petersburg*, 307 NLRB 605 (1992), enfd. mem. 985 F.2d 579 (11th Cir. 1993); *Harter Tomato Products v. NLRB*, 133 F.3d 934, 937 (D.C. Cir. 1998); *NLRB v. Holiday Inn of Dayton*, 474 F.2d 328, 331-332 (6th Cir. 1973).

[29] *Joy Silk Mills*, 85 NLRB 1263 (1949), enfd. in relevant part 185 F.2d 732 (D.C. Cir. 1950), cert. denied 341 U.S. 914 (1951). See also Hardin, *The Developing Labor Law* at 526–527.

faith doubt of the union's majority status. And under *Celanese*, an employer likewise could lawfully withdraw recognition pursuant to a good-faith doubt of the union's majority status, even if the union actually enjoyed majority support.[30] An employer acting in good faith, in other words, could require a union seeking initial recognition to prove its majority status via a Board election, as well as require an incumbent union to reestablish its majority status through an election.

By 1969, the Board had all but abandoned the good-faith requirement in the initial recognition context. As the Supreme Court observed in *NLRB v. Gissel Packing Co.*,[31] the Board had come to view good-faith doubt as "largely irrelevant," and would order an employer to bargain with a union that had not won a Board election only if the employer had committed serious unfair labor practices that interfered with the election process and tended to preclude a fair election. Soon after *Gissel*, the Board explicitly abandoned the good-faith doubt requirement. The Board held that, in the absence of serious unfair labor practices or an agreement to test the union's support by other means (e.g., a card check), an employer could lawfully refuse to extend initial recognition on any basis other than the results of a Board election.[32] In sum, a union with undoubted majority support had no entitlement to initial recognition absent an election. At the same time, an employer's good-faith doubt of majority support for the union permitted him to withdraw recognition, even without an election.

Although the Board abandoned the good-faith doubt standard in the initial recognition setting some 30 years ago, it continued to adhere to that standard (as set forth in *Celanese*) in the withdrawal of recognition context.[33] The standard came under criticism because it was the same standard that the Board required employers to meet in order to petition for an RM election and to poll their employees concerning their support for unions.[34] Some commentators argued that applying the same standard to all three kinds of conduct would tend to discourage employers from petitioning for elections (since they could withdraw recognition on the same showing that was required to obtain an election), and that this was inconsistent with the Board's preference for elections as the optimal means of testing employees' support for unions.[35] Employers also criticized the Board's application of the standard. They contended that the Board erroneously refused to consider certain kinds of evidence tending to establish good-faith doubt, and even suggested that the Board had, sub silentio, abandoned the good-faith doubt standard and in practice required employers to prove actual loss of majority status in order to withdraw recognition.[36]

In *Allentown Mack*, a case involving polling, the Supreme Court addressed those concerns. The Court held that the Board had not acted irrationally in adopting a "unitary standard" for polling, withdrawal of recognition, and petitioning for RM elections,[37] although it indicated that the Board could have adopted a more stringent standard for either withdrawing recognition or polling.[38] However, the Court agreed with several of the criticisms of the Board's application of the good-faith doubt standard. Initially, the Court held that, having enunciated the standard in terms of good-faith *doubt*, the Board must interpret the standard to mean *uncertainty*, not *disbelief*.[39] Second, the Court found that under that standard, the employer, which had refused to bargain and conducted a

[30] See, e.g., *Bartenders Assn. of Pocatello*, 213 NLRB 651, 653 fn. 19, 654 fn. 21 (1974); *Arkay Packaging Corp.*, 227 NLRB 397, 398 (1976), rev. denied 575 F.2d 1045 (2d Cir. 1978); *AMBAC International*, 299 NLRB 505, 506 (1990).

For a time, a competing view gained some currency. In *Stoner Rubber Co.*, 123 NLRB 1440, 1445 (1959), two members of the Board (Members Rodgers and Bean) indicated that an employer could rebut the presumption of majority status by producing evidence sufficient to cast serious doubt as to the union's majority support; the General Counsel could then prevail by presenting evidence that, at the time the employer refused to bargain, the union actually did have majority support. Several courts endorsed that view; see, e.g., *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974); *Orion Corp. v. NLRB*, 515 F.2d 81 (7th Cir. 1975); *Dalewood Rehabilitation Hospital v. NLRB*, 566 F.2d 77 (9th Cir. 1977). In *Automated Business Systems*, 205 NLRB 532, 535 (1973), remanded 497 F.2d 262 (6th Cir. 1974), however, the Board explicitly repudiated the Rodgers and Bean view in *Stoner Rubber* as inconsistent with *Celanese*.

[31] 395 U.S. 575, 594 (1969).

[32] *Linden Lumber Division*, 190 NLRB 718, 721 (1971), approved in *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974).

[33] The Board's approach to cases involving alleged violations of Sec. 8(a)(2) was quite different. It has long been established that an employer that recognizes a minority union violates 8(a)(2), even if the employer believed in good faith at the time of recognition that the union had majority support. *Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. at 738–739.

[34] See *Texas Petrochemicals Corp.*, 296 NLRB at 1059. The Board initially held that an employer was not required to make any evidentiary showing concerning the degree of employee support for the union in order to file an RM petition. See *Whitney's*, 81 NLRB at 77. In *United States Gypsum*, 157 NLRB 652 (1966), however, the Board overruled its "bare petition" rule and held that an employer could obtain an RM election only if it demonstrated that it had a good-faith belief that the union had lost majority support. Id. at 656.

[35] See J. Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 Wis. L. Rev. 653, 654.

[36] See J. Ferber & R. Ferber, *Withdrawal of Recognition: The Impact of Allentown Mack* and *Lee Lumber*, 14 Lab. Law. 339, 343 (1998); Comment, "Application of the Good-Faith Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions," 1981 Duke L.J. at 722–723.

[37] 522 U.S. at 364.

[38] Id. at 373–374.

[39] Id. at 367.

private poll of its employees (which the union lost), had harbored a genuine, reasonable uncertainty about the union's continued majority support.

The court's decision in *Allentown Mack* had a significant impact on the Board's long established scheme. As a result of that decision, employers may now withdraw recognition from unions based on reasonable uncertainty, a less stringent standard than the Board's disbelief standard. At the same time, the court indicated that the Board has substantial flexibility in this area to devise a scheme that promotes the Act's policies of promoting stable collective bargaining and employee free choice. Thus, we read the Court as permitting us to depart from our historic unitary standard and to impose a more stringent requirement in withdrawal of recognition cases. Indeed, we believe that this is consistent with the Court's earlier decision in *Ray Brooks v. NLRB,*[40] which approved the *Celanese* standard but did not find it compelled by the Act. Rather, the Court stated that the good-faith doubt rule was only "a matter appropriately determined by the Board's administrative authority."[41]

V. ANALYSIS

A. New Standards for Withdrawing Recognition and Filing RM Petitions

Under *Allentown Mack*, we are faced with two basic questions. First, should we continue to apply a "unitary" standard or adopt different standards for withdrawals of recognition, filing RM petitions, and polling? Second, what standard should be applied in each context?

We recognize that there are a multitude of options, each with supporters and critics. We have carefully considered those numerous possibilities in light of the Act's text and policies. In our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost. Accordingly, we shall no longer allow an employer to withdraw recognition unless it can prove that an incumbent union has, in fact, lost majority support.

While adopting a more stringent standard for withdrawals of recognition, we find it appropriate to adopt a different, more lenient standard for obtaining RM elections. Thus, we emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions.[42] For that reason, we find it appropriate to abandon the unitary standard for withdrawing recognition and processing RM petitions. Instead, we shall allow employers to obtain RM elections by demonstrating reasonable good-faith *uncertainty* as to incumbent unions' continued majority status.

Because polling raises concerns that are not presented here, we shall leave to a later case whether the current good-faith doubt (uncertainty) standard for polling should be changed.

Withdrawals of recognition. The fundamental policies of the Act are to protect employees' right to choose or reject collective-bargaining representatives, to encourage collective bargaining, and to promote stability in bargaining relationships. If employees' exercise of the right to choose union representation is to be meaningful, their choices must be respected by employers. That means that employers must not be allowed to refuse to recognize unions that are, in fact, the choice of a majority of their employees. It also means that collective-bargaining relationships must be given an opportunity to succeed, without continual baseless challenges. These considerations underlie the presumption of continuing majority status:

> The presumption of continuing majority status essentially serves two important functions of Federal labor policy. First, it promotes continuity in bargaining relationships. . . . The resulting industrial stability remains a primary objective of the Wagner Act, and to an even greater extent, the Taft-Hartley Act. Second, the presumption of continuing majority status protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and to prevent an employer from impairing that right without some objective evidence that the representative the employees have designated no longer enjoys majority support.[43]

Where unions continue to enjoy majority support, promoting stability in bargaining relationships and insuring employee free choice are one and the same.

In view of these considerations, we are persuaded that *Celanese* and its progeny do not further important statutory goals insofar as they hold that an employer may lawfully withdraw recognition on the basis of good-faith doubt (either uncertainty or disbelief) concerning the union's continued majority support. We find no basis in either the language or the policies of the Act to warrant

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[40] 348 U.S. 96 (1954).

[41] Id. at 104. Indeed, the Court also noted that "[t]he Board has on several occasions intimated that . . . the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief." Id., fn. 18 (citations omitted).

[42] See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *Underground Service Alert*, 315 NLRB 958, 960 (1994); *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1078 (8th Cir. 1992).

[43] *Pennex Aluminum Corp.*, 288 NLRB 439, 441 (1988), enfd. 869 F.2d 590 (3d Cir. 1989) (citation omitted).

withdrawing recognition from a union that has not actually lost majority support. Indeed, we find that allowing withdrawal of recognition from unions that enjoy majority support undermines the Act's policies of both ensuring employee free choice and promoting stability in bargaining relationships.

To begin, the *Celanese* rule is not compelled by the text of the Act. There is no suggestion in the text that an employer may ever, even in good faith, withdraw recognition of an incumbent union that actually enjoys majority support. Indeed, nothing in the Act indicates that an employer's uncertainties or beliefs concerning majority status—whether or not held in good faith—have any relevance to its bargaining obligation under Sections 8(a)(5) and 9(a) of the Act.

Allowing employers to withdraw recognition from majority unions undermines central policies of the Act.[44] It wrongfully destroys the parties' bargaining relationship and, as a result, frustrates the exercise of employee free choice. It deprives employees of their chosen representative and disrupts the bargaining relationship until the union reestablishes its majority status in an election. Even if and when the union wins an election, its attention has been diverted from its representational functions and its stature as the employees' representative has been weakened.

Nor is unilateral withdrawal of recognition based on the employer's good-faith disbelief or uncertainty as to the union's majority status necessary to give effect to other policies under the Act. Such withdrawals are not necessary to ensure that employees can freely reject an incumbent union.[45] If a majority of the unit employees present evidence that they no longer support their union, their employer may lawfully withdraw recognition. Even absent such a showing, if 30 percent of unit employees are unhappy with their union, they can file a decertification (RD) petition and the Board will determine in a secret ballot election whether the union will continue as their representative—all without any assistance from the employer. And, under our ruling, an employer who has evidence creating an uncertainty whether his employees still support an incumbent union can now obtain an RM election in which the union's support will be tested.

Nor is it necessary that employers be able to withdraw recognition on the basis of a good-faith doubt in order to avoid continuing to recognize unions that have actually lost majority support. Under Board law, if a union actually has lost majority support, the employer must cease recognizing it, both to give effect to the employees' free choice and to avoid violating Section 8(a)(2) by continuing to recognize a minority union.[46] But an employer violates Section 8(a)(2) only by continuing to recognize a union that it knows has *actually* lost majority support, not one whose majority status is merely in *doubt*.[47] And, as we explain below, even an employer that has evidence of actual loss of majority support will not violate Section 8(a)(2) if it files an RM petition and continues to recognize the union while election proceedings are ongoing.

The *Celanese* rule illustrates the inconsistency between the Board's historic treatment of employers who unilaterally withdraw recognition and of those who voluntarily recognize minority unions. Under *Celanese*, an employer who *withdraws* recognition in the good faith but mistaken belief that the union has lost majority support does not violate Section 8(a)(5). But an employer who *extends* recognition in the good faith but mistaken belief that the union has majority support violates Section 8(a)(2). As the Supreme Court has explained, the employer's good faith in the 8(a)(2) context is irrelevant:

> To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives. . . . The act made unlawful by Section 8(a)(2) is employer support of a minority union. . . . More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.[48]

We believe that the same reasoning should govern withdrawals of recognition. Section 8(a)(5) requires an employer to bargain with the union that represents a ma-

[44] The Board majority in *Celanese* stated that withdrawing recognition pursuant to the employer's good-faith doubt as to the union's majority status was a direct corollary of withdrawing recognition pursuant to a showing that the union had actually lost majority support. 95 NLRB at 672. As the dissenting Board members pointed out, however, that simply is not true. Id. at 675.

[45] Employers' invocation of employee free choice as a rationale for withdrawing recognition has, with good reason, met with skepticism. As the Supreme Court observed in *Auciello Iron Works v. NLRB*, "The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." 517 U.S. at 790. See also *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d at 1078 ("unilateral withdrawal is based on the subjective belief of an inherently biased party").

[46] *Maramont Corp.*, 317 NLRB at 1035–1036; *Hart Motor Express*, 164 NLRB 382, 384–385 (1967).

[47] See *S.M.S. Automotive Products*, 282 NLRB 36, 41 (1986).

[48] *Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. at 738–739 (footnotes omitted).

jority of its employees. An employer who withdraws recognition from a majority union, even in good faith, invades his employees' Section 7 rights every bit as much as an employer who unwittingly extends recognition to a minority union. Consequently, an employer who *withdraws* recognition from an incumbent union, in the honest but mistaken belief that the union has lost majority support, should be found to violate Section 8(a)(5). The employer's good faith should no more be a defense in the 8(a)(5) context than in the 8(a)(2) setting.

For all of these reasons, we hold that an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit. We overrule *Celanese* and its progeny insofar as they hold that an employer may lawfully withdraw recognition on the basis of a good-faith doubt (uncertainty or disbelief) as to the union's continued majority status.

We emphasize that an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).[49]

We think it entirely appropriate to place the burden of proof on employers to show actual loss of majority support.[50] First, the general rule is that the party raising an affirmative defense—e.g., that an incumbent union has lost its majority status, as a defense to an 8(a)(5) charge—has the burden of establishing that defense. Second, placing the burden on employers is not unfair. Employers are not without access to evidence on this issue. For example, the Respondent here was presented with the unsolicited views of employees regarding representation matters. Indeed, had the Union not asserted that it had contrary evidence, the Respondent would have had a good case, based on the petition it received from a majority of the unit employees, that the Union had, in fact, lost majority support. Third, for the reasons stated above, if the employer cannot meet the burden of proof, it is in no legal jeopardy by continuing to recognize the union, because of the presumption of continuing majority support. In any event, unless an employer has proof that the union has actually lost majority support, there is simply no reason for it to withdraw recognition unilaterally.

As indicated above, the General Counsel and the unions argue that the Board should go further and forbid employers to withdraw recognition except pursuant to the result of Board elections. They contend that, having abandoned the *Joy Silk* rule with regard to extensions of initial recognition, the Board should follow an analogous course with respect to withdrawals of recognition. Under *Linden Lumber*, when a union seeks to change the status quo ante by demanding recognition, the employer may insist that the union prove its majority status in a Board election, irrespective of the employer's good faith. By analogy, the General Counsel and the unions urge that, when an employer seeks to change the status quo ante by withdrawing recognition, the union should be entitled to insist that its majority support first be tested in a Board election, again regardless of the employer's good faith.

While we acknowledge the logic of this argument, as well as the possibility that the suggested approach might minimize litigation, we decline to adopt such a rule at this time. We agree with the General Counsel and the unions that Board elections are the preferred means of testing employees' support. But we anticipate that as a result of our decision today, employers will be likely to withdraw recognition only if the evidence before them clearly indicates that unions have lost majority support. Similarly, by adopting a "good-faith uncertainty" standard for processing RM petitions, we are lowering the showing necessary for employers to obtain elections and reducing the temptation to act unilaterally. Accordingly,

[49] An employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer's evidence. If the General Counsel does present such evidence, then the burden remains on the employer to establish loss of majority support by a preponderance of all the evidence.

[50] We recognize that some courts have indicated to the contrary. For example, the Sixth Circuit in *Automated Business Systems v. NLRB*, 497 F.2d 262, 270–271 fn. 7 (1974), quoted approvingly from the opinion of Members Rodgers and Bean in *Stoner Rubber Co.*, 123 NLRB 1440, 1445 (1959):

> An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with *evidence* that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit.

As we have noted, however, that view was not held by a majority of the Board, and the Board repudiated it in its decision in *Automated Business Systems*, 205 NLRB 532, 535 (1973). See fn. 30, above.

we believe that the interests of employees and incumbent unions will be adequately protected by our ruling today. If future experience proves us wrong, the Board can revisit this issue.

Our concurring colleague would not overrule *Celanese*, and would continue to allow employers to withdraw recognition on a showing of good-faith uncertainty concerning unions' majority support. We find none of his reasons persuasive.

First, our colleague cites the principle of stare decisis, which serves the values of stability, predictability, and certainty in the law. In his view, those values must give way in the labor law context only if existing law is contrary to statutory principles, disruptive to industrial stability, or confusing. We have no quarrel with those general principles. However, we have shown that, by allowing employers to withdraw recognition from majority unions, *Celanese* is contrary to the Act's fundamental principles of encouraging collective bargaining and effectuating employee free choice, and is clearly disruptive of industrial stability. And, as *Allentown Mack* demonstrates, the law as applied under *Celanese* was confusing as well. Accordingly, the otherwise salutary principle of stare decisis is no impediment to our ruling today.

We also reject our colleague's contention that our new standard somehow frustrates employee free choice by forcing unwanted unions on nonconsenting employees. Our new standard *promotes* free choice by allowing employers to withdraw recognition from unions that have lost majority support, but not from those whose majority status is intact. Indeed, it is our colleague's approach that would frustrate employee free choice by continuing to allow employers to withdraw recognition from unions that continue to enjoy majority support.

Our colleague objects that our new standard puts employers in a no-win situation. Thus, he contends, an employer must withdraw recognition if it has evidence that the union has lost majority status, in order to avoid violating Section 8(a)(2), yet will violate Section 8(a)(5) if it cannot prove that the union had, in fact, lost majority support. That dilemma, however, is more apparent than real. An employer with evidence of actual loss of majority status can petition for an RM election rather than withdraw recognition immediately;[51] we would not find that the employer violated 8(a)(2) by failing to withdraw recognition while the representation proceeding was pending.[52] With such a safe harbor available, an employer who withdraws recognition anyway can hardly claim that it was forced to do so for fear of committing an 8(a)(2) violation.

Our colleague argues that RM petitions are an ineffectual substitute for unilateral withdrawals of recognition because unions can file blocking charges that delay or prevent elections. He also notes that, even absent blocking charges, a union that loses an election can delay the outcome of the proceeding by filing objections or challenges. As our colleague puts it, "the RM road can be a long and difficult one," and while the parties travel that road, the employer must continue to recognize the union. Better, he asserts, for the employer to withdraw recognition, even if it is merely *uncertain* as to the union's majority status, and let the union petition for an RC election (which is unlikely to be delayed by blocking charges).

We cannot agree. We have already rejected our colleague's approach because it allows withdrawal of recognition even from majority unions. Moreover, contrary to his suggestion, an ousted majority union will not necessarily be quickly reestablished as the bargaining representative, even if it wins an RC election. To paraphrase our colleague, the RC road can be long and difficult as well. Although blocking charges may be less likely to delay RC elections, employers, like unions, can file objections and challenges when they lose. And unlike unions, employers can impose further delay by refusing to bargain and testing unions' certification in unfair labor practice proceedings, first before the Board and then in the courts of appeals. During the course of these often lengthy proceedings, the employees are deprived of desired union representation.

In the end, our dispute with our colleague is over whether an incumbent union should continue to be the bargaining representative while its support is being tested in a Board election. He would allow an employer to oust the union on a showing of good-faith uncertainty, and thus to avoid a bargaining obligation until RC election proceedings have run their course. Under our approach, the union remains the bargaining representative, and the

[51] Indeed, as we discuss below, we are lowering the standard for processing RM petitions, thus making it easier for employers to test unions' majority support in Board elections.

[52] We would follow the same approach regardless of the type of petition filed. Thus, an employer who is presented with an RD petition supported by a majority of bargaining unit employees, or with a petition for an RC election in which the incumbent union will appear on the ballot, will not violate Sec. 8(a)(2) if it continues to recognize the incumbent union. In each instance, the incumbent union's status will be determined in a Board election, the preferred method of testing unions' majority support. No statutory policy would be furthered by requiring such employers to withdraw recognition unilaterally in order to avoid violating Sec. 8(a)(2). In this context, continued recognition promotes stability in industrial relations, without frustrating employee free choice. Cf. *RCA del Caribe, Inc.*, 262 NLRB 963 (1982). To the extent that *Maramont Corp., Hart Motor Express*, and other decisions are inconsistent with our holding here, they are overruled.

employer's bargaining obligation continues, while the RM (or RD) election proceedings are underway.

We think that our approach is more faithful to the Act's core policies. While election proceedings are ongoing, it is not known with certainty whether a majority of the employees support the union; thus, the policy of effectuating employee free choice does not weigh in favor of either approach. However, the remaining policies—encouraging collective bargaining and (especially) promoting stability in bargaining relationships—clearly support retaining the union as the bargaining representative until the election results are known.

Finally, we find no merit in our colleague's contention that RD petitions are not a realistic substitute for unilateral withdrawal of recognition. In particular, we reject his suggestion that "employees are sometimes not sufficiently well-organized, knowledgeable, and enterprising to pursue this course." The same could be said for RC petitions, which our colleague favors, and which also carry the risk of employer retaliation against employees who solicit support for them. In any event, the selection or rejection of union representation unavoidably requires some degree of effort and organization on the part of employees, regardless of the type of petition (including those that are simply presented to employers and are not filed with the Board). That the process involves effort, organization, and sometimes even risk is no reason to allow employers to make the employees' choice for them by withdrawing recognition from majority unions.

RM elections. Historically, the Board has employed the same standard for processing RM petitions as for allowing employers to withdraw recognition unilaterally: that the employer harbor a good-faith reasonable doubt, based on objective evidence, of the union's continued majority status.[53] As we have discussed, the Supreme Court in *Allentown Mack* held that "doubt" can only mean "uncertainty," contrary to the Board's understanding of "doubt" as meaning "disbelief."[54] Until the Supreme Court held otherwise in *Allentown Mack*, the Board's position was that an employer could neither withdraw recognition nor petition for an RM election unless it had a good-faith reasonable belief, grounded in objective considerations, that the union no longer enjoyed the support of a majority of the unit employees. And, as found by the Court, requiring a showing of such a belief is a significantly higher standard than requiring only a showing of uncertainty concerning the union's majority status.

Given our ruling above regarding withdrawals of recognition, we think it appropriate to reconsider the showing that we shall require for holding employer-requested elections. After careful consideration of all the options, we have decided to adopt the lower—uncertainty—standard. The Board and the courts have consistently said that Board elections are the preferred method of testing employees' support for unions.[55] And we think that processing RM petitions on a lower showing of good-faith uncertainty will provide a more attractive alternative to unilateral action. By contrast, were we to require employers to demonstrate a higher showing of good-faith *belief* of lost majority support in order to obtain an RM election, as in *United States Gypsum*, we might encourage some employers instead to withdraw recognition rather than seeking an election. An employer who has enough evidence to establish a good-faith belief, though not necessarily enough to show loss of majority status, may be tempted to withdraw recognition in the hope of being able to make that showing in an unfair labor practice proceeding (and, in any event, ousting the union while the proceeding is pending). Thus, by liberalizing the standard for holding RM elections, we are promoting both employee free choice (by making it easier to ascertain employees' support for unions via Board elections) and stability in collective-bargaining relationships (which remain intact during representation proceedings).

Another reason for adopting the "uncertainty" standard is that sometimes, as in this case, employers are presented with conflicting evidence concerning employees' support for unions. The Respondent was given a petition, apparently signed by a majority of the unit employees, stating that they no longer wanted to be represented by the Union. Two weeks later, the Union proffered evidence which, it claimed, showed majority support. It would be difficult to contend that the Respondent, faced with such conflicting evidence, *believed* in good faith that the Union had lost its majority status. But it would be just as hard to argue that the Respondent could not, under those circumstances, harbor *uncertainty* regarding the Union's majority status. We think it is justifiable for an employer in those circumstances to seek an RM election to resolve that uncertainty, yet under the good-faith *belief* standard, it would be unable to do so. Under the standard we adopt today, employers who are faced with such contradictory evidence will be able to obtain elections.

We recognize that, by lowering the standard for RM elections, we risk the disruption of collective-bargaining

[53] See, e.g., *Texas Petrochemicals Corp.*, 296 NLRB at 1059.
[54] See *U.S. Gypsum,* 157 NLRB at 656.

[55] See fn. 42, above.

relationships that such elections entail. For example, while election procedures are underway, contract negotiations may be unproductive. But unilateral withdrawal of recognition completely severs the collective-bargaining relationship, and often results in employees' losing desired union representation while unfair labor practice charges are being processed. By contrast, while an RM petition is being processed, the union continues to represent the employees.

We reject, however, the argument that, absent serious unremedied unfair labor practices, there should be no showing necessary to obtain RM elections. Such a rule would enable even an employer who had no doubt whatsoever of his employees' support for an incumbent union to force the union to prove its majority repeatedly, as often as once a year.[56] It would have the anomalous effect of allowing employers to obtain elections when the employees themselves could not, because of an insufficient showing of interest. It is well to bear in mind, after all, that it is the *employees'* Section 7 right to choose their bargaining representatives that is at issue here. Strictly speaking, employers' only statutory interest is in ensuring that they do not violate Section 8(a)(2) by recognizing minority unions. That interest obviously is not implicated when an employer has no reason even to be uncertain about his employees' support for their union. We find that nothing in the text of the Act warrants affording employers, but not employees, access to the Board's election processes under such circumstances.[57]

B. Evidence Required to Establish Good-Faith Reasonable Uncertainty

We turn now to the kinds of evidence that employers may present to establish good-faith reasonable uncertainty. Clearly, antiunion petitions signed by unit employees and firsthand statements by employees concerning personal opposition to an incumbent union could contribute to employer uncertainty.

Prior to *Allentown Mack*, the Board consistently declined to rely on certain kinds of evidence to establish a good-faith doubt. For example, the Board did not consider employees' unverified statements regarding other employees' antiunion sentiments to be reliable evidence of opposition to the union.[58] Similarly, the Board viewed employees' statements expressing dissatisfaction with the union's performance as the bargaining representative as not showing opposition to union representation itself.[59] The Board's treatment of such evidence was consistent with the good-faith disbelief standard that the Board applied. But, as the Court held in *Allentown Mack*, the Board's good-faith doubt standard could only mean good-faith *uncertainty*, and either of those kinds of statements could contribute to such uncertainty.

We therefore hold that statements of the type described above should be considered by the regional offices when processing RM petitions.[60] The regional offices should take into account all of the evidence which, viewed in its entirety, might establish uncertainty as to unions' continued majority status.

Some examples from decided cases may be helpful in determining the evidentiary showing that will, and will not, establish good-faith uncertainty. In *Allentown Mack*, 7 of 32 unit employees made statements indicating their personal dissatisfaction with the union, and another stated that he was dissatisfied with the representation he was getting from the union. Another employee told the employer that the entire night shift opposed the union. A union steward told the employer that he felt that the employees did not want a union and that if a vote was taken, the union would lose. The Supreme Court found that that evidence, taken together, would establish good-faith uncertainty.[61]

By contrast, in two recent decisions, the Board found that, even under *Allentown Mack*, employers had not established good-faith uncertainty. In *Henry Bierce Co.*,[62] only one employee made an even arguably antiunion statement. The Board found that the other factors

[56] See Sec. 9(c)(3).

[57] Contrary to the arguments of some employers, we find no persuasive reason for abandoning or substantially modifying the Board's longstanding "blocking charge" rule as a means of expediting RM elections. Blocking charges receive priority investigation by the regional offices, and the regional directors have discretion to proceed with elections in certain circumstances even when blocking charges are pending. Importantly, the reason for the Board's blocking charge policy is that "if, in fact, unfair labor practices have been committed, any election conducted before they have been remedied will not be a fair one." B. Subrin, "The NLRB's Blocking Charge Policy: Wisdom or Folly?" Labor Law Journal, October 1988, 651, 661. In other words, it is immaterial that elections may be delayed or prevented by blocking charges, because when charges have merit, elections *should* be prevented.

[58] See, e.g., the Board's decision in *Allentown Mack Sales*, 316 NLRB 1199, 1208 (1995), enfd. 83 F.3d 1483 (D.C. Cir. 1996), revd. 522 U.S. 359 (1998).

[59] Id. at 1206.

[60] One factor that we shall continue to disregard, however, is turnover among employees in the bargaining unit. We adhere to the established presumption that newly hired employees support the union in the same proportion as the employees they have replaced. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990). We shall also disregard indications of union inactivity, such as failing to appoint stewards or to file grievances, unless they are the subject of employees' complaints as indicated in text above. As the Board has stated, a union "is not answerable to an employer's 'dissatisfaction' with its efforts on the employees' behalf." *Henry Bierce Co.*, 328 NLRB 646,647 (1999), enfd. in relevant part (mem.) 234 F.3d 1268 (6th Cir. 2000).

[61] 522 U.S. at 368–371.

[62] 328 NLRB 646.

that the employer relied on in withdrawing recognition – newly hired employees' failure to join the union, some employees' failure to authorize dues checkoff, and the union's failure to file grievances (absent knowledge of the employer's breaches of contract), appoint a steward, or submit a tentative agreement to the employees for ratification—were insufficient to engender a good-faith uncertainty.[63] In *Scepter Ingot Castings, Inc.*,[64] the Board found that an employee's statements that she "felt" that (1) the union had no standing, (2) the employees no longer wanted the union as their representative, and (3) the union's status was a "gone issue" were too vague to constitute objective evidence warranting withdrawal of recognition. The Board also found that employee turnover, relied on by the employer, was insufficient to create good-faith uncertainty.[65]

In RM cases, then, the regional offices should determine whether good-faith uncertainty exists on the basis of evidence that is objective and that reliably indicates employee opposition to incumbent unions – i.e., evidence that is not merely speculative. The specific types of evidence that are probative of such uncertainty, and the weight to be afforded each type under the circumstances, will be decided on a case-by-case basis.

C. Prospective Application

Having ruled that employers may withdraw recognition unilaterally only by showing that unions have actually lost majority support, we must decide whether to apply the new rule retroactively, i.e., in all pending cases, or only prospectively. The Board's usual practice is to apply all new policies and standards to "all pending cases in whatever stage."[66] The propriety of retroactive application, however, is determined by balancing any ill effects of retroactivity against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[67]

We find that there would be "ill effects" from retroactivity and that they outweigh other concerns. *Celanese* was the law for nearly half a century. Employers clearly relied upon it in assessing whether it was lawful to withdraw recognition.[68] That standard was significantly more lenient than the one we have announced in this decision. Under *Celanese*, employers did not have to show that unions had, in fact, lost majority support. Nor could they, prior to *Allentown Mack*, obtain an election on a showing short of good-faith disbelief as to unions' majority support. Employers who withdrew recognition in reliance on *Celanese* and thereafter unilaterally changed the terms and conditions of employment for unit employees could be liable for significant amounts of make-whole relief if we were to apply our new standard in pending cases. Under the Supreme Court's decision in *Allentown Mack*, many of those employers may have met the "good-faith uncertainty" standard, and if they did, their conduct would have been perfectly lawful at the time.

The Supreme Court indicated in *Allentown Mack* that the Board could create higher standards of evidentiary proof either by rule or by explicit announcement in adjudication, *assuming adequate warning*.[69] In our view, the Respondent and other similarly situated employers did not have adequate warning that the Board was about to change its standard for withdrawing recognition at the time of the events in the pending cases. Therefore, we shall decide all pending cases involving withdrawals of recognition under existing law: the "good-faith uncertainty" standard as explicated by the Supreme Court in *Allentown Mack*.

VI. RULING ON THE MERITS

We now turn, at last, to the merits of this case. As noted above, the Respondent and the Union were parties to a collective-bargaining agreement that expired on January 31, 1995. On December 1, 1994, the Respondent received a petition that was apparently signed by a majority of the unit employees, stating that they did not wish to be represented by the Union. On December 2, the Respondent informed the Union that it had received objective evidence that the Union had lost majority support and that it would withdraw recognition effective February 1, 1995, but that it would honor the contract until it expired.

On December 14, the Union informed the Respondent that it had objective evidence of its majority status and was ready at any time to demonstrate that fact. The Union did not describe its evidence, and the stipulated record does not indicate the nature of that evidence.

On December 21, the Respondent acknowledged the Union's claim, but repeated that it had objective evidence that the Union had lost majority support and stated that, except as required by the contract, it would no longer recognize the Union. The Respondent never examined

[63] Id. at 647. As the Board found, some of the factors relied on by the employer were the direct result of its own unlawful failure to apply the union contract to new employees or to inform the union about new hires. Id.

[64] 331 NLRB (2000).

[65] Id.

[66] *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958).

[67] *John Deklewa & Sons*, 282 NLRB at 1389, quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

[68] See generally *Dresser Industries*, 264 NLRB 1088, 1089 (1982).

[69] 522 U.S. at 368 fn. 2 (emphasis added).

or requested to examine the Union's alleged evidence of majority status. The Respondent honored the contract until it expired on January 31, 1995. When the contract expired, the Respondent withdrew recognition and since then has refused to bargain.

The complaint alleges that the Respondent violated Section 8(a)(5) by withdrawing recognition on February 1. There is no allegation that the Respondent acted unlawfully when it informed the Union on December 2 that, on the basis of objective evidence indicating that the Union had lost majority support, it would withdraw recognition effective February 1.[70] The General Counsel and the Union argue that, on the latter date, the Respondent could not have had a *good-faith* doubt of the Union's majority support without asking to inspect the Union's claimed evidence to the contrary. They cite several decisions in which the Board and the courts treated employers' failure to consider unions' proffered evidence of majority support as tending to indicate bad faith.[71]

We have considered the arguments of the General Counsel and the Union, but we find that the withdrawal of recognition was not unlawful. The Respondent could not lawfully withdraw recognition effective immediately on receipt of the petition, because the Agreement did not expire until January 31, 1995. But the Respondent did not withdraw recognition immediately. Instead, it announced that it would withdraw recognition when the contract expired, and that in the meantime it would continue to apply the terms of the contract. The parties have stipulated that the Respondent did continue to observe the terms of the contract and that it did not withdraw recognition until after the contract expired.

We find that the Respondent has demonstrated that it had a good-faith uncertainty as to the Union's continued majority status when it withdrew recognition on February 1. The Respondent had previously received a petition, apparently signed by a majority of the unit employees, stating that they no longer wished to be represented by the Union. The Union later offered to prove that it still had majority support. But even if the Respondent had inspected the Union's claimed evidence, and even if that evidence had supported the Union's assertion, it would simply have produced a conflict with the earlier petition. Thus, the Respondent could still reasonably have been *uncertain* about the Union's majority status. Under *Allentown Mack*, then, the Respondent was warranted in withdrawing recognition.

Contrary to the General Counsel and the Union, we do not think that the Respondent's failure to inspect the Union's proffered evidence requires a different result. The decisions they rely on do indicate that an employer's refusal to consider a union's evidence of majority support is strong evidence that any doubt is not held in good faith.[72] But those decisions, which predate *Allentown Mack*, were based on the Board's interpretation of the good-faith reasonable doubt standard as meaning a *disbelief* of the union's majority status. Under that standard, an employer who formed a "belief" based solely on evidence favorable to its own position, while refusing to consider unfavorable evidence, could be found to be acting in bad faith. But under *Allentown Mack*, we must interpret "doubt" to mean only *uncertainty* regarding the union's majority status. As we have observed, conflicting evidence would tend to produce good-faith uncertainty. We therefore find that the withdrawal of recognition did not violate Section 8(a)(5), and we shall dismiss the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent did not violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on the expiration of the collective-bargaining agreement.

ORDER

The complaint is dismissed.

MEMBER HURTGEN, concurring.

Under previously established principles of law, an employer can withdraw recognition from an incumbent un-

[70] An employer may not lawfully withdraw recognition while a collective-bargaining agreement is in effect, because an incumbent union enjoys a conclusive presumption of majority status during the life of the contract (up to 3 years). *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996). However, under *Allentown Mack*, if an employer establishes a good-faith doubt (uncertainty) as to the union's continued majority support within a reasonable time before the contract expires, the employer may lawfully refuse to negotiate a successor contract and announce that it will not recognize the union when the contract expires, provided that it complies with the existing agreement. *Abbey Medical/Abbey Rents, Inc.*, 264 NLRB 969 (1982), enfd. mem. 709 F.2d 1514 (9th Cir. 1983); *Burger Pits, Inc.*, 273 NLRB 1001, 1001–1002 (1984), enfd. 785 F.2d 796 (9th Cir. 1986); cf. *Chelsea Industries*, 331 NLRB No. 184.

[71] *Rock-Tenn Co.*, 315 NLRB 670, 672-673 (1994), enfd. 69 F.3d 803 (7 th Cir. 1995), overruled on other grounds in *Chelsea Industries*, supra; (2000); *NLRB v. LaVerdiere's Enterprises*, 933 F.2d 1045, 1053 (1st Cir. 1991); *Terrell Machine Co.*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088, 1090–1091 (4th Cir. 1970), cert. denied 398 U.S. 929 (1970).

[72] See fn. 70.

ion if the employer has a good-faith uncertainty as to the union's majority status.[1]

In the decision issued today, my colleagues overrule this principle. Hereafter, an employer can withdraw recognition only if the employer correctly determines that the union has lost majority status. A good-faith uncertainty as to whether the union has majority status, and indeed even a good-faith belief that the union has lost majority status, will not be a defense to the allegation of an unlawful withdrawal of recognition. In addition, as discussed infra, my colleagues overrule precedent which holds that an employer violates Section 8(a)(2) by continuing to recognize a union even after the employer knows that the union has lost majority support.

I disagree. As my colleagues recognize, they are reversing legal principles which go back half-a-century. Indeed, in recognition of that sharp reversal, my colleagues apply previously extant law to this case and dismiss the complaint.[2]

In my view, there are values that are inherent in the doctrine of *stare decisis*. These values include stability, predictability, and certainty of the law. In the context of labor relations law, these values are outweighed only upon a clear showing that extant law is contrary to statutory principles, disruptive to industrial stability, or confusing. That showing has not been made. Although there are references to industrial stability, there are no empirical data to support these references. Moreover, the invocation of industrial stability as a determinative criterion is highly problematic in situations which are the subject of this decision. Where there is objective evidence of uncertainty as to a union's loss of majority without employer misconduct leading up to it, the representation of the employees is already significantly destabilized. Disallowance of employer withdrawals of recognition in these circumstances may simply further aggravate that destabilization by forcing continued representation when it may no longer be desired.

As noted, my colleagues mandate continued recognition of the union, even where the employer has a good-faith belief that the union has lost majority status. My colleagues do this in the interest of fostering the collective bargaining process. In this regard, they rely upon the preamble to the Act which states that the policy of the United States is to "encourage the practice and procedure of collective bargaining." However, the Act itself, in its substantive provisions, gives employees the fundamental right to choose whether to engage in collective bargaining or not. The preamble and the substantive provisions of the Act are not inconsistent. Read together, they pronounce a policy under which our nation protects and encourages the practice and procedure of collective bargaining *for those employees who have freely chosen to engage in it*. My colleagues, by relying on the preamble, have diminished the importance of the latter part of this principle. The result, I fear, is to impose a union on nonconsenting employees. I would retain the extant rule which balances the interests of collective bargaining and the Section 7 rights of employees.

In sum, the *extant* rule offers stability in the law and due regard for Section 7 rights. I show below that *the new rule* is imprudent and unfair.

To illustrate my point, let us take the paradigm situation where an employer is presented with a petition in which a majority of the employees say clearly that they do not wish to be represented by a union. The employer withdraws recognition because of a concern that continued recognition would be unlawful under Section 8(a)(2).[3]

Let us assume further that, unbeknownst to the employer, the petition is invalid in some respect (e.g. employees were coerced by other employees; or, by the time of the withdrawal of recognition, employees have been persuaded to change their minds, and the union has retained majority status). Under the view of my colleagues, the withdrawal of recognition is unlawful, notwithstanding the employer's good-faith belief that the petition is valid. In sum, the good-faith employer has violated the Act.

In view of the foregoing, an employer, faced with the aforementioned petition and with my colleagues' rule, would be well advised to continue recognition. However, if it turns out that the petition is valid, the employer's continued recognition would violate Section 8(a)(2) of the Act. That is, the petition clearly shows that a majority of the employees have rejected the union, and yet the employer has continued recognition.

My colleagues state that an employer would not violate Section 8(a)(2) by continuing recognition in such circumstances. In making that statement, my colleagues overrule precedent. See *Maramont Corp.,* 317 NLRB 1035 (1995); *Hart Motor Express*, 164 NLRB 382 (1967). To compel (or even permit) an employer to recognize a known minority union as the representative of

[1] *Celanese Corp.,* 95 NLRB 664 (1951). See also *Allentown Mack Sales & Services v. NLRB*, 522 U.S. 359 (1998).

[2] I agree with the dismissal, and thus, I concur in the result. However, although this opinion is therefore a concurrence, I disagree with much of the substance of the opinion in chief.

In agreeing with the dismissal, I express no view as to the correctness of *Henry Bierce Co.*, 328 NLRB 646 (1999), or *Sceptor Ingot Castings*, 331 NLRB (2000).

[3] I acknowledge also that the employer might well be pleased to operate nonunion but the situations which are the subject of this decision involve an employer acting lawfully as well as in good faith.

employees is contrary to the most basic principles of Section 7. Thus, continued recognition of the minority union would violate Section 8(a)(2).

In sum, my colleagues have subjected employers to a guessing game. If the employer guesses wrongly, the employer violates the Act, notwithstanding his good faith. I prefer that these matters not be the subject of a guessing game. They should be a matter of good faith. If the employer has a good-faith uncertainty as to majority status, the employer can withdraw recognition. If the employer has a good-faith belief of majority status, he can continue recognition.[4]

My colleagues say that there is a way out of the dilemma, viz the employer can file an RM petition and obtain a Board election. And, in this regard, they say that they would permit the processing of an RM petition if there is uncertainty as to the Union's majority status. I agree with this RM standard.[5] However, I do not agree that the RM petition offers a solution to the problem discussed above. That is, it does not obviate the necessity for the extant rule which grants employers the option of withdrawal of recognition on a showing of uncertainty as to the union's majority status. My reasons are set forth below.

RM petitions are subject to the "blocking charge" principle. Faced with an RM petition, unions can file charges to forestall or delay the election. Concededly, in some situations, the Regional Director can dismiss the charges or can decide that the charges, even if meritorious, would not preclude a valid election. However, that determination requires investigatory time. *During that time, the employer must continue recognition of the incumbent Union*.

Further, the Regional Director also has the power to issue complaint, and the authority to conclude that the charges *do* preclude a valid election. The Board has no power to review the former determination, and the Board reviews the latter only under an "abuse of discretion" standard. If the Regional Director so concludes, the charge will block the election for the prolonged period during which the charge/complaint is litigated. Although the employer could settle the case, he may not wish to do so if he believes that he has a valid defense. Further, even if the employer litigates and wins after prolonged litigation, the block will be removed only after that litigation. *In the meantime, the employer must continue recognition of the incumbent*.

In addition, even if there is no blocking charge, or if the block is removed, the election will not necessarily resolve the question concerning representation. In those cases where the union loses the election, the union can file objections and/or challenges. There is often a prolonged period for the litigation of these matters. *The employer must recognize the incumbent during the period of this litigation.*

In sum, the RM road can be a long and difficult one. During this prolonged period, the employer must continue recognition, even though there is good-faith uncertainty as to the union's majority status. In my view, it is far better to resolve the matter by having an RC election. That is, after the employer has withdrawn recognition based on a good-faith uncertainty (a lawful withdrawal in my view), the union can immediately file an RC petition. Although the union could file blocking charges, its interest presumably would be to have a quick election and resume its representation status. Further, the Board correctly gives a high priority to processing such petitions as expeditiously as possible. Thus, I would continue this approach. It comports with current law and procedures, and it is not shown to be deficient.

My colleagues say that the "RC" course is unsatisfactory because the employer can refuse to bargain and test the union's certification. However, inasmuch as the unit is a previously existing one, it is unlikely that the employer could raise issues concerning unit scope and eligibility. And, even if the employer does so, or raises nonmeritorious objections, the refusal to bargain can be enjoined under Section 10(j) and (e).

I also note that the RC petition effectuates employee free choice. That is, if the union is indeed the majority choice, that choice can be registered in such an election.

My colleagues say that RM proceedings, rather than RC proceedings, are the better course because the union remains the representative during the former and not during the latter. However, in my view, the most important goal is to resolve the question concerning representation as quickly as possible. For the reasons set forth above, I believe that RC proceedings fulfill that goal.

My colleagues also mention the possibility of RD petitions. However, they are subject to the same blocking charge problem as RM petitions. In addition, employees are sometimes not sufficiently well organized, knowl-

[4] Even my colleagues agree with the latter proposition. Compare *Garment Workers* (*Bernhard-Altmann)*, 366 U.S. 731 (1961). That case involved a non-incumbent union with no presumption of majority status. If that union in fact lacks majority status, the employer is strictly liable for extending recognition.

[5] The standard comports with extant law. That is, under extant law, an RM petition can be processed if the employer has a good-faith doubt of majority status, and the Supreme Court has equated "doubt" with uncertainty. See *Allentown Mack*, supra.

My colleagues say that they have lowered the bar for RM petition. In truth, the bar had been articulated in terms of "doubt", and the Supreme Court has said that "doubt" means "uncertainty." My colleagues, and I, use the term "uncertainty."

edgeable, and enterprising to pursue this course.[6] Further, employees may not be willing to risk the incumbent union's wrath by filing a petition to oust it as the representative.[7]

Finally, my colleagues argue that their rule is justified by a sense of parity. They note that an employer has a right to an election where the union seeks to become the representative, and thus, a union should be given an election when the employer seeks to terminate the relationship. The argument has no merit. The situations are not parallel. In the former situation, the union is seeking an election as soon as possible, and thus, is reluctant to file blocking charges. In the latter situation, the union is seeking to delay the election as much as possible, and thus, has an interest in filing blocking charges.

Because there are no valid reasons for reversing the extant rule, and because the new rule is imprudent and unfair, I do not embrace the new rule.

[6] My colleagues say that the same can be said about RC petitions. I disagree. The union is the entity which files the RC petition, and my experience is that unions are well-organized, knowledgeable, and enterprising.

[7] Employees can lawfully be expelled from membership for filing an RD petition. *Tawas Tube Products*, 151 NLRB 46 (1965).