Co,[5] which held that a union ostensibly losing a decertification election remains the established bargaining representative of unit employees until the certification of results issues and any unilateral changes made before the certification issues violate Section 8(a)(5)

The Respondent argues that the complaint should be dismissed It asserts that *Dow* and *Presbyterian* should be overruled and that the rule applied in *Mike O'Connor Chevrolet-Buick-GMC*[6] should be extended to decertification situations *Mike O'Connor* held that absent compelling economic circumstances for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an initial certification election are pending If the union is later certified, the employer's unilateral changes are found to have violated Section 8(a)(5) The Respondent relies on the Fifth Circuit's denial of enforcement in *Dow Chemical* The court disapproved *Presbyterian Hospital* and applied the *Mike O'Connor* rule in the decertification context

B *The Unilateral Changes Before Contract Expiration*

As noted, the Respondent has admitted that two of its unilateral changes, i e , its refusal to contribute to the Union's supplemental retirement and disability fund and its coincident extension of coverage under the company pension plan to unit employees, were made while the parties' collective-bargaining agreement was in effect In *Sisters of Mercy Health Corp*,[7] the Board stated, "It is well established that a union enjoys an irrebuttable presumption of majority status during the term of a collective-bargaining agreement" Therefore, we find that these unilateral actions violated Section 8(a)(5) and (1) of the Act

C *The Unilateral Changes After the Contract Expired*

It is well established that election results are not final until the certification is issued [8] Such a rule promotes stability and certainty during the transition period when, due to the existence of objections or determinative challenges, the employees' choice of representative is in doubt [9] *Mike O'Connor* created a narrow "act at your own peril" exception to this general rule in the initial certification context Allowing an employer to proceed with impunity until the issuance of a certification could undermine the union's status as the employees' representative when the certification issues The Board noted that to "hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending"[10] We note that an employer in an organizational campaign has no preexisting obligation to bargain with the Union The status quo for such an employer is to act unilaterally Thus, to the extent that an employer is free to act at its peril, the *Mike O'Connor* rule allows an employer to maintain the status quo until a certification issues [11]

For the reasons stated below, we decline to extend the *Mike O'Connor* "at risk" rule to decertification situations Accordingly, we adhere to *Presbyterian Hospital* and find that in the decertification context the change in the basic relationship between the parties and in the parties' obligations to bargain should not be effective until the date the certification issues This view is consistent with the status quo approach of *Mike O'Connor* Thus, any unilateral changes made before the issuance of the certification of results violate Section 8(a)(5) and (1) of the Act

In refusing to enforce *Dow Chemical*, the Fifth Circuit stated, inter alia, that it saw no basis in law or justice for distinguishing between initial representation and decertification elections [12] We respectfully disagree and find a substantial basis on which to draw a distinction between the rules applied to initial representation elections and those applied to decertification elections That basis is the difference in the relationships among the employer, the employees, and the union at the time the two types of petitions are filed

Before an initial representation petition is filed, the employer has no obligation to consult with a union and is free to take unilateral action with regard to its employees' terms and conditions of employment By contrast, after the initial certification year an incumbent union is presumed to have

[5] 250 NLRB 756 (1980), enf denied 660 F 2d 637 (5th Cir 1981)

[6] 209 NLRB 701 (1974), enf denied on other grounds 512 F 2d 684 (8th Cir 1975)

[7] 277 NLRB 1353 at 1353 (1985)

[8] See *Trico Products Corp*, 238 NLRB 1306 (1978), *Albert Van Luit & Co*, 234 NLRB 1087 (1978), enfd 597 F 2d 681 (9th Cir 1979)

[9] At the outset, we must disagree with our dissenting colleague's view that our professed goal of stability in industrial relations is "speculative" We adhere to the settled view of the Board and courts that industrial stability is an important and appropriate goal of Board decisions

[10] *Mike O'Connor*, supra at 703

[11] Contrary to our dissenting colleague's view that an election tally is dispositive of the employer's postelection obligation to bargain, an ostensible union victory in an initial certification election does not activate an employer's duty to bargain with a union An 8(a)(5) violation resulting from an employer's postelection unilateral changes, once the union is certified, is actually an exception to the rule that election results are final on certification, an exception used solely to safeguard a union's future bargaining position

[12] *Dow Chemical Co v NLRB*, 660 F 2d at 654

retained majority status and an employer may not withdraw from the bargaining relationship unless the union has actually lost its status as majority representative or the employer has a reasonable doubt of the union's continuing majority status [13] Thus, following a union's initial certification year, there is a presumption, albeit rebuttable, that the status quo should be maintained As the Board stated in *RCA Del Caribe, Inc* [14]

> [H]aving once achieved the mantle of exclusive bargaining representative, a union ought not to be deterred from its representative functions even though its majority status is under challenge

This presumption is not rebutted by an election that is contested by the filing of objections or by determinative challenged ballots Accordingly, an incumbent union is entitled to be treated as the employees' bargaining representative until a final determination is made that the union is no longer the employees' representative

Before a decertification petition is filed, an employer is required to notify the union of proposed changes in represented employees' terms and conditions of employment and must bargain on request concerning the changes Because the decertification petition is filed in the context of an existing bargaining relationship, the employer in that circumstance does not have the freedom to act unilaterally regarding its employees' terms and conditions of employment Under Board law, the mere filing of a decertification petition does not relieve the employer of its obligation to bargain with the union [15] *Presbyterian Hospital* merely holds that an election-day tally that is subject to determinative challenges or objections (or may become subject to timely filed objections) also does not relieve the employer of its preexisting obligations The crucial change, if any, in the parties' relationship occurs when the certification of results issues [16]

In denying enforcement in *Dow Chemical*, the court stated that the *Presbyterian Hospital* rule "deprive[s] former union members of the right to express their choice in the election from the date of the election to the date on which the board completed its review of the election " 660 F 2d at 654 The court further stated that the *Mike O'Connor* rule immediately honors that choice We do not agree [17]

First, neither the *Mike O'Connor* rule nor the *Presbyterian Hospital* rule affects employee's rights to express their desire regarding representation Where a Board-conducted election is involved, the employees' desire concerning representation is expressed in an uncoerced majority of the ballots If objections to an election are timely filed, whether the tally of ballots reflects *uncoerced* employee sentiment requires an application of representation case law If the Board sustains an objection to an election, that election is set aside and becomes a nullity As long as an election objection is unresolved or one could be timely filed, the tally of ballots cannot be considered reliable evidence of employee sentiment [18] The *Presbyterian Hospital* rule

[13] See *Dresser Industries*, 264 NLRB 1088 (1982)

[14] 262 NLRB 963 at 965 (1982)

[15] *Dresser*, supra In *Dresser*, the Board reaffirmed that the filing of a decertification petition does not provide a reasonable ground for an employer to withdraw recognition from an incumbent union The Board held that "the mere filing of a decertification petition will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union " 264 NLRB at 1089

[16] Although the *Presbyterian Hospital* rule prohibits an employer from relying on the putative outcome of a Board-conducted election in withdrawing recognition from an incumbent union, it does not prohibit the employer from relying on objective evidence that its employees do not support the union As the Board stated in *Atwood & Morrill Co*, 289 NLRB 794 (1988), an outstanding question concerning representation does not prevent an employer from withdrawing recognition based on a good-faith doubt supported by objective considerations

[17] We note that, to the extent that the court's language can be read otherwise, neither the *Presbyterian Hospital* rule nor the *Mike O'Connor* rule has any effect on an employee's right to be a member or refrain from being a member of a union *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), *Pattern Makers League v NLRB*, 473 U S 95 (1985)

[18] In its *Dow Chemical* decision, the Fifth Circuit stated, "It is difficult to perceive, however, of a more firm and logical basis for a reasonable and good faith doubt of a union's majority status than the fact of its having lost a fair decertification election " 660 F 2d at 657 While we agree with the court's assertion generally, we note that the key question in objections cases is whether, in fact, the election was fair This question cannot always be answered solely by reviewing the tally of ballots Until a certification has issued and the parties have had the opportunity to raise and litigate their objections and determinative challenges, an election tally that is subject to objections and challenges does not provide a firm and logical basis to doubt a union's majority status

Contrary to our dissenting colleague, we do not believe that Presbyterian Hospital is inconsistent with other Board decisions clarifying the circumstances under which an employer can withdraw recognition See *Dresser Industries*, supra (decertification petition supported by a majority of unit employees will support a reasonable doubt of majority status), and *Atwood & Morrill*, supra (employer's withdrawal of recognition based on a petition signed by a majority of unit employees during the pendency of a decertification case was lawful) We emphasize that under these latter cases a petition tainted by unfair labor practices or signed by nonunit employees does not constitute objective evidence supporting a reasonable doubt of a union's continuing majority status and will not support a withdrawal of recognition By analogy, objections and/or determinative challenges should prevent the tentative election tally from being used as a defense to an allegation that an employer's unilateral changes are unlawful

We also do not agree that the *Presbyterian Hospital* rule discourages resort to the Board's processes by "realistic employees " Even assuming that a Board-conducted election is always the preferred route for employees questioning the majority status of their representative, Board law provides analytically and practically different routes for employees seeking to end their union representation Each of these alternatives offers unique advantages Specifically, employees who petition the Board for an election may achieve a resolution of the union's status on a showing of interest of less than a majority of employees in the unit A Board-conducted election also clarifies beyond question the union's status and results in a yearlong period during which elections are barred On the other hand, employees who choose to approach their employer directly

Continued

merely encourages stability in the parties' relationship *while* the Board determines whether the apparent employee choice was freely made and discourages the employer from acting prematurely based on that unreliable tally

Second, contrary to the court's implication, the *Mike O'Connor* rule has neither the purpose nor the uniform or necessary effect of giving early expression to employee choice in elections As noted above, the Board's purpose in prohibiting unjustified unilateral changes in employees' terms and conditions of employment in the period between an initial representation election and the certification of the union as the employees' bargaining representative is to discourage employers from "bypassing, undercutting, and undermining the union's status" as the employees' representative " 209 NLRB at 703 The rule is directed at a narrow range of employer conduct and has only incidental impact on the prompt effectuation of employees' desires Where an employer refrains from unilateral changes, the rule does not at all affect when the employees' desires become reality Where an employer relies on an ostensible union loss to make unilateral changes before results are certified, the "at risk" rule actually *delays* the effectuation of employee choice if the election is set aside and the union wins a rerun election, for in that situation, even though the union has been the majority representative throughout, the unilateral changes are not remedied until after the union is certified and the unilateral changes are litigated

In finding that the *Mike O'Connor* rule meets the needs of certainty and industrial relations stability that support the *Presbyterian Hospital* rule, the Fifth Circuit referred to the requirement that the employer must bargain retroactively with the union if it is certified as the employees' representative [19]

The court implied that bargaining over unilaterally imposed changes after the fact would adequately remedy the effect of the employer's unilateral dealings with employees We do not agree In our view, bargaining after the fact over changes made on the assumption that the union no longer plays a role in setting terms and conditions of employment would not encourage stability nearly as effectively as maintaining the bargaining relationship until the union's status is resolved Rather, unilateral changes under an "at risk" rule during this period would have the same tendency to undermine an incumbent union's future effectiveness and status in employees' eyes as bypassing the bargaining representative under other circumstances In finding direct dealing with employees unlawful, the Board and the courts have often expressed awareness of the real-world impact of bypassing the union on its effectiveness as a bargaining agent "Such tactics are inherently divisive they subvert the cooperation necessary to sustain a responsible and meaningful union leadership "[20] In the initial organizational context, by contrast, the employees have not yet developed expectations of the union's ability to represent them Thus, the fact that the union was unable to prevent the employer from making unilateral changes is not likely to have as lasting an effect on the employees' view of the effectiveness of their as yet uncertified bargaining representative

We recognize that our decision to adhere to *Presbyterian Hospital* may be an imperfect solution to a difficult problem Our dissenting colleague relies on statistics showing that a small percentage of cases in which a union loses a decertification election and files objections results in ultimate union victories He finds these few instances a poor basis for a presumption of a union's continuing majority status during the objections period We disagree We willingly grant that our decisions cannot ignore what happens in the workplaces in which our policies are played out, but we base our recognition of workplace realities on a wider and firmer ground than a survey of election outcomes for a limited period Our ultimate objective in fashioning any policy in representation cases is to ensure the freedom of choice of employees To that end, we recognize that when a union files meritorious objections—signifying that employees have been denied the opportunity for uncoerced choice—its chances of prevailing in a rerun election are diminished, possibly beyond repair, if the employer institutes unilateral changes To permit the legality of such self-serving changes to hinge on the outcome of that second election would, in our view, have real-world consequences—it would weaken the objections procedure in the decertification context and thus impair employee access to uncoerced elections Thus, we strongly believe that our primary mission is best effectuated by maintaining the presumption of majority status until election results issue, and that this policy is preferable regardless of the numbers of cases resulting in union victory or defeat Further, we believe as a policy matter that the stability resulting from our adherence to the *Presbyterian Hospital* rule outweighs its disadvan-

with evidence from a majority of unit employees that they no longer wish to be represented may well enjoy practical advantages such as those outlined by our dissenting colleague However, we see no legal or practical reason these two routes available to employees should be identical to each other in all respects

[19] *Dow Chemical Co v NLRB*, 660 F 2d at 655

[20] *NLRB v General Electric Co*, 418 F 2d 736, 755 (2d Cir 1969), cert denied 397 U S 965 (1970)

tages *Presbyterian Hospital* does not impose any new obligation or burden on the parties involved The employees have only to continue the relationship with the union that they earlier chose and the employer need only continue to recognize the union until the union's status is resolved [21] We believe this is not a heavy burden and is a small price to pay for stability in labor relations

For the foregoing reasons, we find that the unilateral changes made by the Respondent before the issuance of the certification of results violated Section 8(a)(5) and (1) of the Act Accordingly, we grant the General Counsel's Motion for Summary Judgment

CONCLUSION OF LAW

By making unilateral changes in employees' terms and conditions of employment on March 9, 1983, while the parties' contract was in effect, and on May 18 and 31, 1983, before the certification of results in Case 26–RD–590 was issued, without prior notice to or negotiations with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act

We shall order the Respondent to make whole the unit employees by making all GAIU Supplemental Retirement and Disability Fund contributions, as provided for in the collective-bargaining agreement effective from April 26, 1981, to April 30, 1983, which have not been paid[22] and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make such required payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn 2 (1980), enfd mem 661 F 2d 940 (9th Cir 1981) Nothing here, however, shall be interpreted as requiring the Respondent to reduce any benefit or wage

ORDER

The National Labor Relations Board orders that the Respondent, W A Krueger Co, Senatobia, Mississippi, its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of unit employees by refusing to contribute to the GAIU Supplemental Retirement and Disability Fund or extending coverage to unit employees under the W A Krueger Co Pension Plan while a collective-bargaining agreement with the Union representing the unit employees is in effect

(b) Unilaterally granting unit employees a wage increase, increasing the amounts payable to employees under the health plan and short-term disability plan, or extending coverage under its long-term disability plan to employees who were not already covered, or implementing a new grievance procedure prior to the final resolution of a question concerning the continuing representation of Local 532, Graphic Arts International Union, AFL–CIO The appropriate unit is

> All production and maintenance employees employed by Respondent at its Senatobia, Mississippi, facility, including permanent part-time employees, and janitor-watchmen but excluding all other employees, including all office clerical (non-exempt salaried) employees, guards and supervisors as defined in the Act

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act

2 Take the following affirmative action necessary to effectuate the policies of the Act

(a) Make whole unit employees by paying all contributions to the GAIU Supplemental Retirement and Disability Fund as required by the April 26, 1981, to April 30, 1983 collective-bargaining agreement, which have not been paid and by reimbursing them for any expenses ensuing from the Respondent's unlawful refusal to make such contributions, in the manner set forth in the remedy section of this decision

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the

[21] Contrary to our dissenting colleague, the Presbyterian Hospital rule does not require an employer to bargain with a "minority" union under any analysis Until the Board resolves the objections, the incumbent is not a "minority" union Further, the logical outcome of our colleague's reasoning would result in the issuance of 8(a)(2) complaints against an employer that continued to consult with a union while awaiting the Board's official clarification of the union's status The *Mike O'Connor* rule would countenance no such result Ironically, by referring to the confusion that can exist over a union's status and an employer's corresponding obligations, our colleague has inadvertently highlighted a compelling reason for establishing a date certain for a losing union's change in status

[22] We leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy *Merryweather Optical Co*, 240 NLRB 1213 (1979)

amount of backpay due under the terms of this Order

(c) Post at its Senatobia, Mississippi plant copies of the attached notice marked "Appendix"[23] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply

MEMBER OVIATT, concurring in part and dissenting in part

I concur in my colleague's decision to find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing during the term of the collective-bargaining agreement to contribute to the GAIU Supplemental Retirement and Disability Fund while at the same time unilaterally extending its coverage under the the W A Krueger Co Pension Plan [1] I disagree, however, that the Respondent violated Section 8(a)(5) by making unilateral changes in the terms and conditions of employment after the contract expired and the Union had lost a decertification election

The precise legal issue is whether an employer may rely on the results of a decertification election as an objective basis for withdrawing recognition while nonmeritorious objections to the election are pending The broader, pragmatic issue is whether employees must suffer continued representation by a union they do not want as the price of stabilizing collective-bargaining relationships The price is real, the goal speculative I find the price too dear

The collective-bargaining agreement between the parties expired on April 30, 1983 On March 9, 1983, the Union had lost a decertification election On April 25, 1983, the Regional Director recommended overruling the Union's objections to the election, and the Union filed exceptions After the Regional Director recommended overruling the objections, but while the Union's exceptions were pending, the Respondent, on May 18, unilaterally granted unit employees a wage increase and expanded disability coverage,[2] and, on May 31, implemented a new grievance procedure Nearly a year after the decertification election, on February 21, 1984, the Board affirmed the Regional Director and certified the results

No one disputes that, had there been no collective-bargaining relationship, the Respondent lawfully could have made unilateral changes in the terms and conditions of employment while the Union's objections to an election were pending Once the Union's objections were rejected, the election tally would have been an accurate indicator of the employees' choice and the Respondent would have had no duty to bargain This result would have been permitted under the Board's longstanding rule permitting an employer to act at its peril in that circumstance, reaffirmed in *Mike O'Connor Chevrolet-Buick-GMC*, 209 NLRB 701, 703 (1974) See *Staub Cleaners*, 148 NLRB 278, 296 (1964), set aside on other grounds 357 F 2d 1 (2d Cir 1966), *Louisville Chair Co*, 161 NLRB 358, 376 (1966), enfd 385 F 2d 922 (6th Cir 1967), cert denied 390 U S 1013 (1968) The touchstone in these cases for determining the union's majority status and the employer's concomitant duty under Section 8(a)(5) is the election tally If it is the result of the employees' free choice, the Board's vote count is dispositive of the employer's postelection obligation to bargain, even during the pendency of objections

Decertification elections are quite another matter according to the majority Relying on the Board's decision in *Presbyterian Hospital*, 241 NLRB 996, 997–998 (1979), the majority finds that valid decertification election results showing that the employees had rejected the Union cannot justify a postelection good faith doubt of the Union's majority status In the name of "certainty and stability" (id at 998), *Presbyterian Hospital* requires that an employer await completion of the Board's review of the union's objections to a decertification election that it has lost, however frivolous those objections may be—no matter that the objections ultimately may be found to be without merit and the results certified If, prior to final resolution of the objections, the employer unilaterally changes the terms and conditions of employment, without antiunion animus and in aid of its own economic (and perhaps the employees') interests, it violates Section 8(a)(5) of the Act under *Presbyterian Hospital*

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"

[1] Under Sec 8(d)(2) of the Act, an employer cannot unilaterally change the terms of its current collective-bargaining agreement

[2] In its response to the General Counsel's summary judgment motion, the Respondent explains that its regional competitors had recently made upward adjustments in their wage/benefit packages The Respondent argues that it could not have risked waiting until the Board ruled on the Union's exceptions given the Respondent's commitment to retaining qualified personnel

The two circuit courts that have had an opportunity to review the *Presbyterian Hospital* rule have refused to follow it Particularly critical was the Fifth Circuit Court of Appeals, in *Dow Chemical Co v NLRB*, 660 F 2d 637, 653–657 (5th Cir 1981) Viewing the Act as requiring "an even-handed application of the same rules of the game to all elections and to both sides" (id at 654), the Fifth Circuit found *Presbyterian Hospital* "clearly out of line with the statutory design" (id at 655 fn 14) The court made the following points, among others (1) the *Presbyterian Hospital* rule ignores the employees' uncoerced vote to reject the union and thus disregards the employees' Section 7 rights (id at 656), (2) *Presbyterian Hospital* conflicts with the longstanding general rule that an employer having a good-faith doubt of a union's majority status is under no obligation to bargain (id at 657), (3) *Presbyterian Hospital* reaches an impractical result because the Board's Order that the employer cease unilaterally changing the terms and conditions of employment is at odds with the Board's decertification of the union (id at 654), and (4) applying the *Mike O'Connor* rule where the union loses a decertification election does not reward the employer for its unfair labor practices because the employer's freedom to make unilateral changes while objections are pending is conditional, and is subject to a bargaining order (id at 656) [3]

I agree with the Fifth Circuit, and offer the following additionalreasons for not relying on *Presbyterian Hospital* in this case

I *Presbyterian Hospital* is at odds with precedent permitting an employer to withdraw recognition if presented with a majority petition indicating that the employees no longer want the union to represent them, and actually discourages resort to the Board's election procedures

It is settled that, in the absence of circumstances that would bar an election, an employer presented with a valid petition from a majority of its employees, stating that the employees no longer desire to be represented by the incumbent union, has a sufficient objective basis to withdraw recognition of the union *Carolina American Textiles*, 219 NLRB 457, 463 (1975), *Wilshire Foam Products*, 282 NLRB 1137, 1138, 1149 (1987), *Bil-Mar Foods*, 286 NLRB 786, 795–796 (1987), *Hotel & Restaurant Employees Local 19 v NLRB*, 785 F 2d 796 (9th Cir 1986), enforcing sub nom *Burger Pits, Inc*, 273 NLRB 1001 (1984) Relying on the employees' petition, an employer may withdraw recognition even while a decertification petition is pending before the Board *Atwood & Morrill Co*, 289 NLRB 794 (1988) Where the employer already has objective evidence of the union's loss of majority support, it can conduct and rely on its own noncoercive poll of employee sentiment as the basis for withdrawing recognition *White Castle System*, 224 NLRB 1089, 1090 (1976), *Boaz Carpet Yarns*, 280 NLRB 40, 44–45 (1986), see also *NLRB v A W Thompson, Inc*, 651 F 2d 1141, 1145 (5th Cir 1981), *Forbidden City Restaurant v NLRB*, 736 F 2d 1295 (9th Cir 1984) [4] Thus, the employer need not wait for the final results of a Board-conducted election to withdraw recognition of an incumbent union The good-faith employer may do so immediately on the basis of objective considerations

Most importantly for our case, where an employer withdraws recognition based on objective considerations during the pendency of an unfair labor practice complaint alleging that those "objective considerations" are tainted by unlawful employer conduct, the employer does not violate Section 8(a)(5) if the unfair labor practice complaint is ultimately dismissed See, e g, *Wilshire Foam Products*, supra, *Carolina American Textiles*, supra, *American Express Reservations*, 209 NLRB 1105, 1120 (1974) Mark you, an employer relying on objective considerations as a basis for withdrawing recognition does so at its peril if there are unresolved unfair labor practice allegations If the Board finds that the unfair labor practices tainted the "objective" factors relied on by the employer, then the withdrawal of recognition violates Section 8(a)(5) See, e g, *Guerdon Industries*, 218 NLRB 658, 660–662 (1975) This, in essence, is the *Mike O'Connor* approach

Contrast the use of the *Mike O'Connor* approach when an employer is presented with an uncoerced petition from a majority of its employees with *Presbyterian Hospital's* rejection of that same approach of reliance on a decertification tally that is equally uncoerced [5] I find this distinction inexplicable, for,

[3] The Seventh Circuit also appears to have followed a *Mike O'Connor* approach to an employer's bargaining obligation after a decertification election that the union lost See *Weather Shield Mfg v NLRB*, 890 F 2d 52, 60 fn 5 (7th Cir 1989), decision on remand 299 NLRB No 3, slip op at 2 fn 5 (July 13, 1990)

[4] The Board's requirement that the employer must first have objective evidence of the union's loss of majority status before conducting its own poll has been seriously questioned *Johns-Manville Sales Corp v NLRB*, 906 F 2d 1428, 1431 (10th Cir 1990) I need not, and do not, comment on that issue here

[5] The majority contends that *Presbyterian Hospital* is not at all inconsistent with those Board decisions permitting an employer to withdraw recognition and engage in unilateral conduct based on an uncoerced employee petition The majority reasons that, because, if the petition is tainted by unfair labor practices it will not support withdrawal of recognition, by "analogy, objections should prevent the tentative election tally from being used as a defense to an allegation that an employer's unilateral changes are unlawful" This "analogy" is beside the point The question *is not* what the employer is precluded from doing during the pendency of objections when the objections (like the unfair labor practices that tainted

Continued

as the Fifth Circuit stated in *Dow Chemical Co* "It is difficult to perceive a more firm and logical basis for a reasonable and good faith doubt of a union's majority status than the fact of its having lost a fair decertification election" 660 F 2d at 657

I agree A Board election tally is at least as reliable as are employee petitions and letters In the election situation, the union and employer know that the union's representative status is in question and are alert to interference with employee free choice In contrast, where an employer is presented with an employee petition and withdraws recognition, neither the union nor the employer has necessarily had occasion to be watchful for obstacles to free choice The election, typically, also is a more reliable indicator of employee wishes because employees have time to consider their options, to ascertain critical facts, and to hear and discuss their own and sides will not necessarily be available to an employee confronted with a request to sign a petition rejecting the union No one disputes that a Board-conducted election is much less subject to tampering than are petitions and letters

The anomaly created by *Presbyterian Hospital*, and its rigid requirement that good-faith business judgment and necessity along with realization of employee wishes must stand hostage to the final disposition of meritless objections, is not just illogical—it is also inimical to the policy favoring secret-ballot elections that is embedded in the Act Secret-ballot elections "are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support" *NLRB v Gissel Packing Co*, 395 U S 575, 602 (1969) (footnote omitted) Employees who no longer want the incumbent union to represent them have a choice they can file a decertification petition with the Board and get the "preferred" Board-conducted election or they can present their employer with objective evidence of their dissatisfaction [6] Realistic employees will be discouraged from taking the Board election route if, even after a majority vote of "no union," the employer must continue to recognize the union and to bargain about changes in their conditions of employment while nonmeritorious union objections are under what is sometimes lengthy review That stands in stark contrast to the results from a valid petition presented to their employer Their employer can withdraw recognition immediately and may well do so Its alternative is to file its own petition with the Board that will require an election whose final results may not be known for many months That is the unfortunate result of *Presbyterian Hospital*

II Countervailing policy considerations derived from Sections 7 and 8(a)(2) of the Act and the realities of the workplace more than offset whatever benefits arguably flow from *Presbyterian Hospital's* presumption of continuing majority status

The majority relies on a presumption of the union's continuing majority status as encouraging stability in collective-bargaining relationships I agree that the presumption should not be disregarded, but, in my view, both policy and practical considerations strongly militate against continuing to apply the presumption in these circumstances First, there is the "overriding policy [embodied in Section 7] that employees be free to choose whether to engage in concerted activities," *Pattern Makers League v NLRB*, 724 F 2d 57, 60 (7th Cir 1983), affd 473 U S 95 (1985), and the "majority rule principle of the Act" *Chemical Workers Local 1 v Pittsburgh Plate Glass Co*, 404 U S 157, 176 (1971) The only situation that actually divides us is that involving a losing union's meritless objections Applying *Presbyterian Hospital* delays employee choice, perhaps for a substantial period In this case, for example, if the Respondent had followed *Presbyterian Hospital*, effectuation of the employees' choice would have been delayed for almost a year—from the date of the election, March 9, 1983, until February 21, 1984, when the Board certified the results Like justice, choice delayed is choice denied

Second, *Presbyterian Hospital* thwarts the policy undergirding Section 8(a)(2) by requiring an employer to continue to recognize and to bargain with a union its employees undeniably do not want—a minority union See *Ladies Garment Workers v NLRB*, 366 U S 731, 738–739 (1961) A minority union violates the Act by bargaining with the employer, even if that union believes in good faith that it has majority status (ibid) Yet, *Presbyterian Hospital* confers majority status on a union that has lost a valid decertification election, and requires the employer to bargain with it simply because that union objects to having lost Thus, *Presbyterian Hospital* places in the hands of the losing union, the entity that has the most to gain by delay, "the power [by filing meritless objections] to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far

---

the petition) have merit The issue is what an employer may do when the objections do *not* have merit The correct analogy, therefore, is to changes made during the pendency of an unfair labor practice complaint that ultimately is dismissed In that situation, under current Board law, as discussed above, the employer does not violate Sec 8(a)(5) In the case of a decertification election under the *Presbyterian Hospital* rule, however, the employer violates the Act if it makes unilateral changes while there are pending objections, even if the objections are without merit In my view, these contradictory results have no sound basis in law or policy

[6] The employer cannot withdraw recognition of the incumbent union solely on the basis of the filing of a decertification petition with the Board *RCA Del Caribe Inc*, 262 NLRB 963 (1982), *Dresser Industries*, 264 NLRB 1088 (1982)

to assure freedom of choice and majority rule in employee selection of representatives" *Ladies Garment Workers*, supra at 738–739 (footnote omitted)

Third, whether *Presbyterian Hospital* encourages stability in the parties' bargaining relationship, I doubt that application of *Presbyterian Hospital* results in a stable labor relations environment in the broad sense Employees who have voted out the incumbent union only to find that their employer is continuing to recognize and bargain with it, perhaps for months, will likely become disaffected, not only with the union, but also with the election process Morale in the workplace, a significant factor in stable labor relations, is likely to suffer Unable to act on the fact that the union is no longer wanted by the majority, an employer may simply postpone decisions that would otherwise deserve immediate action, possibly to the direct detriment of its employees and almost certainly to that of the business and, thus, indirectly to the employees These might include, for example, matching its competitors' wage increases, as the Employer did in this case

III *Presbyterian Hospital* does not comport with what really happens after a union loses a decertification election

Critical to the *Presbyterian Hospital* rule is the presumption that the union's majority status continues even after a majority of the employees have voted in a secret-ballot election to decertify it, so long as there is the possibility that the election could be set aside and the union ultimately could be selected in a second election In my view, when making policy choices the Board should give considerable weight to what is likely to happen in the real world, not to what is unlikely to take place Were I convinced that, in the majority of cases where objections were filed, the initial decertification results did not accurately reflect an employee decision to reject the union, I would be more disposed to follow *Presbyterian Hospital*

Our statistics show, however, that *Presbyterian Hospital's* presumption of the union's continuing majority status after it loses a decertification election is a legal fiction As described in the Board's last three Annual Reports, the Board overruled objections to decertification elections between 77 percent and 81 percent of the time [7] In the 19 percent to 23 percent of the cases where the objections were sustained and a second election held, the employees chose the union only between 21 percent and 33 percent of the time [8] Thus, when the union loses a decertification election and files objections, the likelihood that the election results ultimately will be overturned is poor indeed [9] The very few cases where the union ultimately wins a second election, perhaps 1 in 20, hardly can be a sound basis for a presumption of the union's continuing majority status Particularly is this so where that presumption runs afoul of two countervailing policies—the employees' right to reject a union and to have that choice promptly recognized,[10] and the Act's directive that the employer not recognize and bargain with a minority union For, when the union loses a decertification election and files objections, an employer following the *Presbyterian Hospital* rule most likely will be recognizing and bargaining with a minority union

For the foregoing reasons, I would not follow *Presbyterian Hospital* I would permit an employer to rely on (and its employees to enjoy) the results of a Board-conducted decertification election that the union has lost and to which it has objected In my opinion, the election tally is an objective basis for withdrawing recognition from the union In this case, I would dismiss that part of the complaint alleging that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union after the contract's expiration

[7] 53 NLRB Annual Report 216 (1988), 52 NLRB Annual Report 218 (1987), 51 NLRB Annual Report 240 (1986) A solid majority of the objections—between 67 percent and 71 percent—were filed by unions

[8] 53 NLRB Annual Report 217 (1988), 52 NLRB Annual Report 219 (1987), 51 NLRB Annual Report 241 (1986)

[9] In those few cases where the union wins a rerun election, the Board's usual remedial order is sufficient to ensure the viability of the bargaining relationship

[10] The majority contends that a *Mike O'Connor* "at risk" rule delays the effectuation of the employees' free choice if the first decertification election is set aside and the union wins the rerun election Presumably this argument concedes the converse if the union loses the first election and its objections are ultimately overruled, an "at risk" rule effectuates the employees' free choice in the election by permitting the employer to withdraw recognition immediately on the basis of the first decertification tally, without awaiting resolution of the objections Because the situation where the union's objections are overruled is common and the situation where the objections are sustained is a relatively rare happening, applying a *Mike O'Connor* rule after a decertification election on balance effectuates the employees' choice Conversely, applying a *Presbyterian Hospital* rule, which requires the employer to wait until after the objections are finally decided, on balance operates to delay the employees' free choice

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

WE WILL NOT unilaterally change the terms and conditions of employment of unit employees by refusing to contribute to the GAIU Supplemental Retirement and Disability Fund or extending coverage to unit employees under the W A Krueger Co Pension Plan while a collective-bargaining agreement with Local 532, Graphic Arts International Union, AFL–CIO representing the unit employees is in effect

WE WILL NOT unilaterally grant unit employees a retroactive wage increase, increase the amounts payable to employees under the health plan and short-term disability plan, or extend coverage under our long-term disability plan to employees who were not already covered, or implement a new grievance procedure prior to the final resolution of a question concerning the continuing representation of Local 532, Graphic Arts International Union, AFL–CIO The appropriate unit is

> All production and maintenance employees employed by us at our Senatobia, Mississippi facility, including permanent part-time employees, and janitor-watchmen but excluding all other employees, including all office clerical (non-exempt salaried) employees, guards and supervisors as defined in the Act

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act

WE WILL make whole unit employees by paying all GAIU Supplemental Retirement and Disability fund contributions required during the term of the April 26, 1981, to April 30, 1983 collective-bargaining agreement with Local 532, Graphic Arts International Union, AFL–CIO, which have not been paid, and WE WILL make our employees whole for any loss for benefits resulting from our failure to honor the collective-bargaining agreement, plus interest

W A KRUEGER CO