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STRIKE CROSSOVERS AND STRIKER REPLACEMENTS: AN EMPIRICAL TEST OF THE NLRB'S NO-PRESUMPTION POLICY

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I. INTRODUCTION

The United States Supreme Court recently upheld the National Labor Relations Board's (Board) no-presumption policy in *NLRB v. Curtin Matheson Scientific, Inc.*[1] That policy allows an employer to withdraw recognition from a striking union, but only after proving that a majority of the bargaining unit opposes union representation. The Fifth Circuit and Eighth Circuit courts of appeals, however, had a contrary policy of presuming that all workers crossing a picket line oppose union representation. The result of this policy was that employers were allowed to withdraw recognition from, and thereby terminate bargaining relationships with, striking unions when they were able to hire enough replacement workers and induce enough strikers to return to work. This policy, the anti-union presumption, is also called the Gorman presumption because it is based on a generalized and unsupported statement made in a labor law casebook by Professor Robert Gorman that anyone crossing a picket line to work can be assumed to oppose union representation.[2]

The Court's holding in *Curtin Matheson* is significant for two reasons: (1) employer withdrawal of recognition from a striking union is now more difficult than when the Gorman or anti-union presumption was applied, and (2) the Court upheld the Board's view that people who cross a picket line to work

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1. 110 S. Ct. 1542, 133 L.R.R.M. (BNA) 3049 (1990).

2. *See* R. GORMAN, LABOR LAW 112 (1976). *See also infra* note 75 and accompanying text.

do so for a variety of reasons, some that pertain to anti-union sentiments, and some that do not. The Court's holding also removes an employer weapon against unions during an economic strike, and lends support to the Board's presumed labor relations expertise.

This is a review of the development of the Board's no-presumption policy and a test of that policy by surveying 565 union workers in industries and services in eight states. The survey empirically supports the Board's no-presumption policy and controverts the Gorman or anti-union presumption.

II. STRIKES AND STRIKE-BREAKING

A fundamental change in labor-management relations since 1980 is the willingness and ability of employers to continue working through strikes.[3] The United States Supreme Court has legitimized two employer methods to continue operations: hiring permanent replacements for strikers,[4] and offering inducements to strikers to abandon strikes.[5] Yet in the 1980's the Supreme

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3. *See* J. LAWLER, UNIONIZATION AND DEUNIONIZATION 182 (1990), concluding: "In what seems to be an increasingly common scenario, an employer either forces or takes advantage of a strike to secure deunionization. The employer proceeds to operate during the strike using supervisory personnel or replacements" (citations omitted). *See also* A. COX, D. BOK & R. GORMAN, LABOR LAW xxi (1986), remarking: "Established collective bargaining relationships have become shaken by employer demands for give backs, by invocation of the bankruptcy laws to justify rejection of labor agreements, and in some cases by the destruction of bargaining relationships through resort to massive permanent replacement of strikers." In response, Representative William Clay has proposed an amendment to the National Labor Relations Act, making it an unfair labor practice "to offer, or to grant, the status of permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute." H.R. 5 & S. 55, 102d Congress, 1st Sess. (1991).

4. This right was established in NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 2 L.R.R.M. (BNA) 610 (1938). The San Francisco local of the American Radio Telegraphists engaged in an economic strike against Mackay Radio, and the employer filled their positions with eleven replacements. The Board ruled that Mackay committed an unfair labor practice by effectively discharging the strikers who offered to return to work, and the circuit court set aside the Board's reinstatement order. The Supreme Court ruled that the strikers were still employees under the National Labor Relations Act, and were therefore protected against employment discrimination arising out of their union membership. At the same time, the Court ruled that "[a]lthough [the Act] provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the [Act], has lost the right to protect and continue his business by supplying places left vacant by strikers." *Id.* at 345, 2 L.R.R.M. (BNA) at 614. Thus Mackay Radio "was not bound to displace men hired to take the strikers' places in order to provide positions for them," but it was an unfair labor practice to replace these particular strikers "with the purpose to discriminate against those most active in the union." *Id.* at 347, 2 L.R.R.M. (BNA) at 615.

5. *See* Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 130 L.R.R.M. (BNA) 2657 (1989) [hereinafter *TWA*]. TWA continued its operations through the IFFA's strike by hiring 2,350 replacements and inducing an indeterminate number of strikers to abandon the strike and return to work (these former strikers are called crossovers — *see infra* note 21). TWA induced the crossovers by offering them their preference of domiciles when vacancies due to the strike occurred. Under the previously expired contract, domicile assignments were made on the basis of seniority. Thus TWA's strategy was aimed at (1) inducing low-seniority strikers to abandon the strike to win a domicile that otherwise might take years to gain, and (2) inducing high-seniority strikers to abandon the strike to preserve their domicile. TWA announced, as part of its strategy, that strikers whose domicile had been filled would not be able to displace the replacement or crossover, and would have to bid for available domiciles. The Court distinguished TWA's strategy from a similar strategy in NLRB v. Erie Resistor Corp., 373 U.S. 221, 53 L.R.R.M. (BNA) 2121 (1963), which held that the employer engaged

Court curtailed unions' ability to maintain strike discipline.[6] Consequently, unions struck far less often in the past decade than before.[7] Furthermore, a Supreme Court rule allows permanent replacements who are discharged to make way for returning strikers to sue employers for breach of contract under state law.[8] From a union's perspective, an employer's ability to continue working through a strike has become synonymous with strike-breaking.

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in an unfair labor practice by inducing strikers to abandon the strike by offering them twenty years superseniority. TWA's strategy differed by allowing striker seniority to accrue during the strike and by not giving crossovers added superseniority. *Compare* Air Line Pilots Ass'n v. O'Neill, 111 S. Ct. 1127 (1991), holding that the union's strike settlement was within the wide range of reasonableness allowed to unions in negotiating agreements. Continental abrogated its collective bargaining agreement with the union through bankruptcy proceedings, precipitating a strike. The airline hired 1,000 replacement pilots and 400 striking pilots crossed over to return to work. This effectively broke the strike, and consequently, the union negotiated an agreement under intense pressure to save remaining positions for pilots who remained on strike. Unfortunately for the faithful strikers, the agreement did not include displacement of the replacement pilots, and thus some pilots, as a result of the union's agreement, had no positions for which to bid. The significance of this decision is that the Court insulates a union against duty of fair representation claims, even when the settlement is bad for some members of the bargaining unit.

In response to the *TWA* decision, S. 55 and H.R. 5, *see supra* note 3, would create a new unfair labor practice:

> [T]o otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, during a labor dispute over an individual who — (A) was an employee of the employer at the commencement of the dispute; (B) has exercised the right to join, to assist, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization involved in the dispute; and (C) is working for, or has unconditionally offered to return to work for the employer.

6. *See* Pattern Makers League v. NLRB, 473 U.S. 95, 119 L.R.R.M. (BNA) 2928 (1985). The union began an economic strike against several manufacturing firms in Illinois and Wisconsin in May 1977, following the expiration of their labor agreement with the employer association. In September the union membership rejected a proposed contract, but, eleven union members tendered resignations from the union, abandoned the strike, and returned to work. The union refused to accept the resignations, citing a union constitutional rule prohibiting members from resigning during a strike. On December 19 the union reached agreement with the employer association and fined the 11 crossovers in an amount equivalent to the wages they earned as crossovers. The Board found the union's resignation restriction and discipline of the 11 crossovers in violation of section 8(b)(1)(A) of the National Labor Relations Act, and the Seventh Circuit enforced the Board's order. The Supreme Court affirmed the Board and Seventh Circuit, holding that section "(8)(b)(1)(A) properly may be construed as prohibiting the fining of employees who have tendered resignations ineffective under a restriction in the union constitution." *Id.* at 100, 119 L.R.R.M. (BNA) at 2931. The Court reasoned that "the Board was justified in concluding that by restricting the right of employees to resign, League Law 13 impairs the policy of voluntary unionism." *Id.* at 107, 119 L.R.R.M. (BNA) at 2934.

7. Evidence that unions' strike power declined sharply in the 1980's appears in a Bureau of Labor Statistics report, concluding that worker initiated strikes and lockouts were much lower in the 1980's than in the 1970's. The number of strikes or lockouts involving 1,000 or more employees was 96 in 1982, 81 in 1983, 62 in 1984, 54 in 1985, 69 in 1986, 46 in 1987, 40 in 1988, and 51 in 1989. By contrast the number of work stoppages involving 1,000 or more employees was 381 in 1970, 298 in 1971, 250 in 1972, 317 in 1983, 424 in 1974, 235 in 1975, 231 in 1976, 298 in 1977, 219 in 1978, and 235 in 1979. Daily Lab. Rep. (BNA) No. 34, at B-1 (Feb. 20, 1990).

8. Belknap, Inc. v. Hale, 463 U.S. 491, 113 L.R.R.M. (BNA) 3057 (1983). This means that employers who hire permanent replacements "have put (themselves) in a position where it may be economically impossible to agree with the union to reinstate the strikers."

Employers have also benefitted from developments in the 1980's that created a climate more favorable to strike-breaking: declining union membership in the work force,[9] increasing global labor-market competition,[10] increasing management resistance to labor unions,[11] declining living standards among blue-collar workers and less-educated workers,[12] increasing

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Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 555.

9. Wage rates are generally lower in non-union firms; consequently, it is common for employers with unionized work forces to demand unions to be cost-competitive with non-unionized labor. Thus, as the proportion of the union work force shrinks and the non-union work force grows, unionized employers and unions come under increasing pressure. In 1980 the percentage of union members among employed wage and salary workers in the private sector was 20.1%. Adams, *Changing Employment Patterns of Organized Workers*, 108 MONTHLY LAB. REV. 25, 26 (Feb. 1985). By 1989 this rate had fallen to 12.4%. *See* U.S. Bureau of Labor Statistics, 37 *Employment and Earnings* 232 (Table 58) (Jan. 1990). Membership statistics such as these understate the extent of union representation of workers, because numerous workers are covered by collective bargaining agreements but choose not to be union members. For instance, in 1989, 13.7% of employed private sector wage and salary workers were "represented by unions." *Id.*

10. Declining competitiveness has led American employers to pressure unions for productivity gains and unit labor cost reductions. A July 27, 1990 report issued by the U.S. Department of Labor, Bureau of Labor Statistics, found that between 1988 and 1989, U.S. manufacturing productivity grew less and unit labor costs grew more than in either Germany or Japan. The report concluded that U.S. manufacturing productivity gained 2% in the period, a figure exceeded by ten other industrialized nations. By comparison, Norway and Japan registered productivity gains of 6.4% and 5.8%, respectively. Daily Lab. Rep. (BNA) No. 146, at B-31 (July 30, 1990).

11. *See* J. LAWLER, *supra* note 3, at 225, concluding:

> [S]everal trends have been noted in recent years. First, employers have become decidedly more hostile to unions. Second, there is a tendency toward greater centralization of decision making with respect to labor issues. Third, human resource management specialists have become much more influential in the corporate world, often supplanting labor relations specialists, who are not seen as sufficiently antiunion by upper management. Fourth, organizations are emphasizing strategic planning in the human resource management and labor relations areas to a much greater degree. Union avoidance considerations are an increasingly significant component of these plans.

Id. at 174-75 (Table 8.1). Employer deunionization tactics include employer support for decertification committees, employer petitioning for decertification elections, use of striker replacements, lockouts, "hard" bargaining, surface bargaining, employee attitude surveys, surveillance and interrogation of employees, plant closures, disinvestment in union plants and simultaneous reinvestment in nonunion plants, double-breasted operations, outsourcing of union work, avoidance of labor contracts through bankruptcy proceedings, withdrawal of recognition from unions, and reorganization and alter-ego transactions. *Id.* at 174-75 (Table 8.1). *See also* Verma, *Relative Flow of Capital to Union and Nonunion Plants Within a Firm*, 24 INDUS. REL. 395 (1985), linking plant-disinvestment to union avoidance strategies; and T. KOCHAN & R. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 73 (1989), finding that firms open non-union plants that duplicate operations in their unionized plants to transfer work from the union to the nonunion plant.

12. Low-wage and underemployed workers are a likely source for replacement workers. *See* Rosenberg, *The Restructuring of the Labor Market, the Labor Force and the Nature of Employment Relations in the United States in the 1980s*, in THE STATE AND THE LABOR MARKET 63, 67 (S. Rosenberg ed. 1989), concluding: "During the 1980s, there has likely been a proliferation of low-wage jobs. Slow productivity growth and the shift of employment out of manufacturing played a role in generating the relative growth of low wage positions." There is evidence that American industry has increasingly used bargaining to make wage proposals aimed not at the bargaining unit, but at attracting potential strikebreaking replacements who earn low wages. *See infra* note 271.

decertification of unions,[13] deregulation of various industries,[14] and lax enforcement of the National Labor Relations Act (NLRA) (hereinafter Act) by the National Labor Relations Board.[15] Also, employers have blunted unions' representational attribute by institutionalizing various labor-management committees.[16] In addition, employers have benefitted from law and economic theories treating labor as a free-market commodity.[17]

One method to break a strike is to withdraw recognition from a striking union, thereby severing the bargaining relationship. The consequence of such a withdrawal differs little from formal decertification of the union.[18] Employers

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13. Troy, *Will a More Interventionist NLRA Revive Labor?*, 13 HARV. J.L. & PUB. POL'Y 583, 592 (1990) (citing NLRB data showing that 351,000 union members were lost through decertification elections between 1970 and 1988).

14. Among the industries deregulated in the 1980's were air transport, trucking, telecommunications, and financial services. *See* Capelli & Harris, *The Changing System of Airline Industrial Relations*, 1984 INDUS. REL. RES. A. PROC. 37TH ANN. MEETINGS 437 (1985), concluding that the recent deregulation of the air industry led to "an elaborate pattern of union concessions and contract changes aimed at restructuring airline labor costs." *Id* at 437. Former Secretary of Labor John Dunlop observed that deregulation has externalities "in upstream and downstream product markets", and that "deregulation constitute[s] a problem in the analysis of the dynamics of an industrial relations system." J. Dunlop, Deregulation and Industrial Relations: Transportation Issues for the 1980s (May 17 & 18, 1982) (seminar conducted by Villanova Law School Center for Continuing Legal Education) (cited in Kaynard, *Deregulation and Labour Law in the United States*, 6 HOFSTRA LAB. L.J. 1, 15 n.45 (1989)).

15. The Board experienced a great backlog of cases in the 1980's, thereby blunting effective enforcement of the Act. The Board's case backlog reached a record high in February 1984, when 1,647 cases were pending before the Board. By July 1, 1986, the backlog dropped below 1,000 cases, and by July 1, 1988 the backlog dropped to 707 cases, still well above the 400-600 case backlog considered appropriate by Board Chairman James Stephens. Daily Lab. Rep. (BNA) No. 144, at A-4 (July 28, 1989).

16. For orientation to labor-management committees, see Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736 (1985); Comment, *The Saturnization of American Plants: Infringement or Expansion of Workers' Rights?*, 72 MINN. L. REV. 173 (1987); and Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021 (1987).

17. *See* Posner, *Some Economics of Labor Law*, in LABOR LAW AND THE EMPLOYMENT MARKET 44, 46 (R. Epstein & J. Paul eds. 1985), proposing that much of labor law amounts to an effort to cartelize labor markets at the expense of labor market efficiency. A classic statement of the free labor market school appears in P. Nash & J. Mook, Strike Replacement Legislation: If It Ain't Broke, Don't Fix It 7-8 (unpublished manuscript, on file with author), observing:

> The ability of an employer to hire permanent replacements tests ... employee demands in the crucible of the market place. An employer's attempt to operate during a strike by hiring replacements provides an important market check on a union's demands.... [I]f an employer cannot hire permanent replacements for less than seven dollars an hour, then, the "free play of economic forces" will likely be successful in their strike and receive a higher wage. On the other hand, if more than a sufficient number of replacements can be hired at the existing wage of five dollars an hour to fully operate the plant, the same "free play of market forces" will result in the strike proving unsuccessful.

See also G. Cohen & M. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, 1990 PROC. N.Y.U. 43RD ANN. NAT'L CONF. LAB. 110, 111, arguing that "the legal rules governing the replacement of striking workers promote economic efficiency."

18. The equivalence of employer withdrawal of recognition and formal decertification is suggested in A. COX, D. BOK & R. GORMAN, *supra* note 3, at 361: "Under the Board's current doctrine, an employer must prove a 'good faith doubt' about the union's continuing majority

who hire replacements while being struck may withdraw recognition from the union to which they owe a duty to bargain,[19] but only upon showing evidence that the union has lost majority support.[20] Whether to presume that strike-crossovers[21] and striker-replacements[22] support or oppose the union is critically important. The presumption influences the negotiating strategy on both sides of the bargaining table,[23] because it can provide employers a low

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in order to withdraw recognition, or in order to petition for an election, or in order to poll employees regarding their support for the union."

19. This statement applies to the private sector; many public employees do not have the right to strike, mooting the replacement employee issue. *See, e.g.*, Northrup, *The Rise and Demise of PATCO*, 37 INDUS. & LAB. REL. REV. 167 (1984), detailing President Reagan's firing of 11,301 air traffic controllers during the illegal strike in 1981. Yet some public sector workers have a right to strike. *See* Pietrzak, *Some Reflections on* Mackay's *Application to Legal Economic Strikes in the Public Sector: An Analysis of State Collective Bargaining Statutes*, 68 OR. L. REV. 87 (1989); and Schramm, *The Job Rights of Strikers in the Public Sector*, 31 INDUS. & LAB. REL. REV. 322 (1983). Unlike in the private sector, however, the National Guard or some similar labor-replacement equivalent may be called in to work for public sector strikers. *See* Zimmer & Jacobs, *Challenging the Taylor Law: Prison Guards on Strike*, 34 INDUS. & LAB. REL. REV. 531 (1981), detailing New York's use of 12,000 National Guardsmen to replace striking prison guards for seventeen days. In sum, replacement worker and withdrawal of recognition issues in the public sector differ markedly from issues encountered in the private sector.

20. There is an irrebuttable presumption that a newly certified bargaining representative enjoys majority support during its first year. Ray Brooks v. NLRB, 348 U.S. 96, 98-104, 35 L.R.R.M. (BNA) 2158, 2158-61 (1954). Following the first year the presumption continues but can be rebutted two ways. The employer may show that on the date recognition was withdrawn the union did not in fact enjoy majority support. Alternatively, the employer may present evidence of a sufficient objective basis to establish a reasonable doubt that the union has lost majority support. Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 89 L.R.R.M. (BNA) 2879 (2d Cir. 1975), *enforcing* 210 N.L.R.B. 443, 86 L.R.R.M. (BNA) 1129 (1974); Allied Indus. Workers Local 289 v. NLRB, 476 F.2d 868, 82 L.R.R.M. (BNA) 2225 (D.C. Cir. 1973), *enforcing* 192 N.L.R.B. 290, 77 L.R.R.M. (BNA) 1889 (1971); Terrell Mach. Co. v. NLRB, 427 F.2d 1088, 73 L.R.R.M. (BNA) 2381 (4th Cir. 1970), *enforcing* 173 N.L.R.B. 1480, 70 L.R.R.M. (BNA) 1049 (1969).

21. This term refers to union members who cross over their union's picket line to return to work. Crossovers are often subject to union discipline. *But see supra* note 6.

A strike manual prepared by the Teamsters classifies three types of strikebreakers, including the crossover worker: "First, there are the members of the bargaining unit who are either weak personalities who curry the employer's favor or those who have good jobs (by their reckoning) and who fear the loss of their job." TEAMSTERS LOCAL UNION NO. 115, PHILADELPHIA, PA., HOW TO WIN STRIKES: A UNION STRIKE MANUAL 35 (1979) [hereinafter UNION STRIKE MANUAL]. The manual continues: "Where higher-skilled jobs are concerned, the great danger is that persons in the first category [crossovers] will remain at work or will return to work before the end of the strike." *Id.*

22. This term refers to people hired to work through a strike. Permanent replacements are increasingly hired with the understanding that the employer will continue their employment following the settlement of the strike. *See* J. LAWLER, *supra* note 3; and *MacKay Radio*, 304 U.S. 333, 2 L.R.R.M. (BNA) 610.

A Teamsters strike manual characterizes replacement workers as "the unemployed or underemployed persons who are anti-union and have no quibble about breaking a strike. Finally, there are the unemployed persons who are financially desperate and who are indifferent to unionism." UNION STRIKE MANUAL, *supra* note 21, at 35. The manual continues: "Persons from this last category are a great danger when persons in low-skilled jobs go on strike. It is estimated that 75 percent of all permanent replacements during a strike are unemployed persons." *Id.*

23. The experience of striker Carol Miller, who testified before the Senate Subcommittee on Labor in June 1990, illustrates an employer's strategy. When the company she worked for was sold in 1985, the new owners made new demands, including eliminating

cost mechanism for freeing themselves of a union and a corresponding duty to bargain basic employment matters.

The Board and federal judiciary have used virtually no empirical research as a basis for formulating policy regarding employer withdrawal of recognition from a striking union.[24] Instead, courts and boards have relied on their own industrial relations "expertise,"[25] a methodology that has promoted inconsistent and conflicting public policy.[26]

That the federal courts and the Board have been content to hazard personal guesses about worker attitudes concerning union representation is unfortunate given the consequences of wrong presumptions.[27] Wrongly supposing that crossover and replacement workers favor continued union representation negates their right to refrain from joining a union.[28] On the other hand, wrongly supposing that crossover and replacement workers oppose continued union representation undermines their right to join a union,[29] and also negates the recognition process that brought a union to that workplace.[30] Moreover,

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certain bonuses and cost of living adjustments, and freezing the pensions. Employees were threatened with plant closure, and thus agreed to the demands. In 1988 a new contract was negotiated. This time the company insisted on total elimination of the pension plan and incentive system. In response the entire 370 person local union struck. Miller testified, "The company immediately began running advertisements for replacement workers." She also testified "no serious negotiations" have occurred since then. *Replaced Workers Endure Pain of Lost Jobs, Rights*, AFL-CIO News, June 11, 1990, at 3.

24. *See Curtin Matheson*, 110 S. Ct. at 1556, 133 L.R.R.M. (BNA) at 3058 (Blackmun, J., dissenting): "I am struck, moreover, by the Board's lack of empirical support for its position — a significant point in view of the fact that for 25 years the Board presumed that replacement workers opposed the striking union." Academe has contributed little research upon which the Board might base its public policy formulations. *See* Greenfield, *The NLRB's Deferral to Arbitration Policy Before and After* Olin*: An Empirical Analysis*, 42 INDUS. & LAB. REL. REV. 34, 35 (1988), noting that "[f]ew scholars have chosen to examine empirically the impact of Board policies, rulings, and their underlying assumptions." *But see* J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976), an empirical public policy analysis influencing the Board's adoption of policy in matters of representation elections, and Roomkin & Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75.

25. *See* A. COX, D. BOK & R. GORMAN, *supra* note 3, at 171, questioning whether the Board's "cumulative expertise" is not anything more than "a euphemism for constant change in policy views resulting from changes in politicized Board members?"

26. In his *Curtin Matheson* dissent, Justice Blackmun assailed the Board's flip-flopping presumptions over the past three decades: "[t]he Board may not assert in one line of cases that the interests of a striking union and replacement workers are irreconcilably in conflict, and proclaim in a different line of decisions that no meaningful generalizations can be made about the union sentiments of replacement employees." 110 S. Ct. at 1557, 133 L.R.R.M. (BNA) at 3059.

27. *See* Greenfield, *supra* note 24, at 48. Greenfield developed evidence that contradicted the Board's assumptions about the arbitration-deferral behavior of its own regional offices; she concluded that "[t]hese data can be used to conduct further research on the deferral issue ... to help ensure that national labor policy is not continually made and remade on the basis of assertions uninformed by empirical evidence."

28. Section 7 of the Act states: "[Employees] shall ... have the right to refrain from any or all of such [union] activities." 29 U.S.C. § 157 (1988).

29. Section 7 of the Act states: "Employees shall have the right ... to form, join, or assist labor organizations." 29 U.S.C. § 157 (1988).

30. The Board's election and certification procedures are at section 9(c) of the Act, 29 U.S.C. § 159(c) (1988).

this supposition creates the paradox of a certified union that has continuing duties to represent strikers, but has no employer with whom to bargain.

The Board and federal courts have used three different support-for-striking-unions presumptions since 1959.[31] Most recently, the United States Supreme Court ruled in *Curtin Matheson* that the Board's *Buckley Broadcasting Corp. of California*[32] no-presumption rule is rational and consistent with the NLRA. These inconsistent presumptions have created confusion[33] and have caused substantial expense to employers and unions.[34]

In addition, the Board and courts have presumed, without objective justification, that replacement workers and strike-crossovers have identical attitudes concerning union representation.[35] Although indirect evidence sup-

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31. The first decision employing a presumption was Stoner Rubber Co., Inc. & Int'l Chem. Workers Union, Local No. 629, 123 N.L.R.B. 1440, 44 L.R.R.M. (BNA) 1133 (1959), discussed *infra* at notes 44-52.

32. 284 N.L.R.B. 1339, 125 L.R.R.M. (BNA) 1281 (1987). The Board adopted a new approach for adjudicating an employer claim that it is permitted to withdraw recognition from unions and discontinue bargaining once a majority of the bargaining unit during an economic strike consists of replacement workers or crossovers. The Board stated:

> [W]e can discern no overriding generalization about the views held by strike replacements and therefore we decline to maintain or create any presumptions regarding their union sentiments. Rather, we will review the facts of each case, but will require 'some further evidence of non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status.

Id. at 1344-45, 125 L.R.R.M. (BNA) at 1286 (footnote omitted).

33. In several instances, a circuit court has rejected the Board's presumption. The Board has been reluctant to change its presumption simply because of a circuit court reversal. For example, see the Board's application of its pro-union presumption in Pennco, Inc. & Communications Workers of Am., 250 N.L.R.B. 716, 104 L.R.R.M. (BNA) 1473 (1980), following the Eighth Circuit's rejection of that presumption in National Car Rental Systems, Inc. & Local No. 498, Int'l Bhd. of Teamsters, 237 N.L.R.B. 172, 99 L.R.R.M. (BNA) 1027 (1978). For discussion of Board non-acquiescence to circuit court rulings, see Dotson & Williamson, *NLRB v. the Courts: The Need for an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739 (1987); and Modjeska, *The NLRB Litigational Processes: A Response to Chairman Dotson*, 23 WAKE FOREST L. REV. 399 (1988).

34. Some employers have suffered large backpay awards. *See, e.g.*, Windham Community Memorial Hosp. & Windham Community Memorial Hosp., Registered Nurses Unit 62, 230 N.L.R.B. 1070, 95 L.R.R.M. (BNA) 1565 (1977). Some unions have suffered large membership losses. *See, e.g.*, Randle-Eastern Ambulance Serv., Inc. & Transp. Workers, Local 500, 230 N.L.R.B. 542, 95 L.R.R.M. (BNA) 1332 (1977); S & M Mfg. Co. & Local Union 80-A, Distillery, Rectifying, Wine & Allied Workers Int'l Union, 172 N.L.R.B. 1008, 68 L.R.R.M. (BNA) 1403 (1968); and Jackson Mfg. Co. & Int'l Ass'n of Machinists, Lodge 2009, 129 N.L.R.B. 460, 47 L.R.R.M. (BNA) 1005 (1960).

35. For examples of Board and court decisions treating replacements and crossovers identically for the purpose of presuming that such workers oppose continuing union representation, see *infra* notes 61-66 (discussing *S & M Mfg.*, 172 N.L.R.B. 1008, 68 L.R.R.M. (BNA) 1403); *infra* notes 87-92 (discussing *Randle-Eastern*, 230 N.L.R.B. 542, 95 L.R.R.M. (BNA) 1332); and Curtin Matheson Scientific, Inc. v. NLRB (*Curtin Matheson II*), 859 F.2d 362, 129 L.R.R.M. (BNA) 2801 (5th Cir. 1988). Assumptions that fail to distinguish replacement worker and crossover worker attitudes ignore the realistic possibility that some crossovers support union representation, but disagree with the strike strategy or picket line misconduct. *See* NLRB v. Windham Community Memorial Hosp. (*Windham II*), 577 F.2d 805, 814, 99 L.R.R.M. (BNA) 2242, 2247 (2d Cir. 1978).

ports the proposition that replacement workers oppose union representation,[36] no such evidence exists for crossover workers.

This article puts the Board's three different presumption policies (no-presumption,[37] pro-union presumption,[38] and anti-union presumptions[39]) to an empirical test in order to see which corresponds best to work place reality. This study surveyed 565 union workers from diverse locations,[40] unions,[41] and industries[42] to determine factors associated with their propensity to cross their own union's picket line. The article then offers a public policy analysis grounded in empirical data rather than subjective assumptions about worker attitudes concerning support for unions engaged in economic strikes.[43]

III. LOSS OF MAJORITY SUPPORT: ANTI-UNION PRESUMPTION

The anti-union presumption has assumed that worker support for union representation does not remain constant. Furthermore, the policy assumes

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36. A September 1986 poll conducted by the Washington Post found that 75% of nonunion workers would reject union representation in a secret ballot election. Wash. Post, Sept. 13, 1987, at H1, col. 1. A 1984 Louis Harris poll found that 65% of nonunion workers would vote for a union in a secret ballot representation election. LOUIS HARRIS & ASSOCIATES, INC., A STUDY ON THE OUTLOOK FOR TRADE UNION ORGANIZING 63 (Nov. 1984). Another labor market analyst recently concluded "*all* of the decline in demand for union representation among nonunion workers ... can be accounted for by the increase in the nonunion workers' [job] satisfaction and decrease in perceptions of union instrumentality." H. FARBER, TRENDS IN WORKER DEMAND FOR UNION REPRESENTATION 8-9 (National Bureau of Economic Research Working Paper No. 2857, Feb. 1989). *But see* Daily Lab. Rep. (BNA) No. 82, at A-6 (Apr. 27, 1990), reporting that the union win-rate in representation elections has actually been increasing from 1985 through 1989. The win-rate was 45.9% in 1985; 48.6% in 1988; and 49.8% in 1989, according to NLRB figures. The number of workers in units where representation rights were won rose from 85,499 in 1988 to 91,042 in 1989. In addition, the sectors where labor was most successful in 1989 were finance/insurance/real estate (60% win-rate); services (58.9% win-rate); and health care services (58.9%), suggesting that organized labor is adapting its organizational focus to appeal to high growth sectors.

37. The term no-presumption standard refers to the Board's most recently adopted policy in *Buckley Broadcasting*, 284 N.L.R.B. 1339, 125 L.R.R.M. (BNA) 1281, making no presumption that replacement workers support or oppose union representation, and permitting employers to establish proof that the union has lost majority support.

38. This short-hand term refers to the Board's earlier policy of presuming that replacements continue to favor union representation in the same proportion as the strikers they have replaced, discussed in James W. Whitfield, 220 N.L.R.B. 507, 90 L.R.R.M. (BNA) 1250 (1975).

39. This short-hand term refers to the Board's earlier policy of presuming that replacements oppose union representation since the union presumptively represents opposing interests, discussed in *Stoner Rubber*, 123 N.L.R.B. 1440, 44 L.R.R.M. (BNA) 1133.

40. Respondents worked in Michigan, Indiana, Illinois, Tennessee, Missouri, Iowa, Pennsylvania, and Ohio when they completed the survey.

41. Respondents were members of the American Federation of Grain Millers, Hotel Employees and Restaurant Employees, Retail and Wholesale Workers, and Utility Workers of America.

42. Respondents were drawn from manufacturing and service jobs, and all worked for private employers. The industries and services in which respondents work include grain milling and food processing, power-generating utilities, and hotels and cafeterias.

43. Replacement workers were not surveyed because of the difficulty the author encountered in getting employer approval to survey their replacement workers. Thus, the findings of this survey apply to union workers in private industry, all of whom are potential crossover workers.

that a striking union loses majority support for continued representation when more than fifty percent of the bargaining unit consists of permanent replacement workers and crossovers during a strike. The policy is based on the simplistic notion that anyone crossing a picket line must oppose union representation.

When first faced with the issue whether employers could withdraw recognition from unions after hiring replacements during a strike, the Board ruled that employers could do so. The Board first presumed that a union had lost majority support during a strike where the employer hired replacements and crossovers in *Stoner Rubber Co., Inc. and International Chemical Workers Union, Local No. 629*.[44] The union had been certified after winning a narrow majority, thirty-two to twenty-seven, in May 1956.[45] After many unsuccessful negotiations, bargaining unit employees voted to strike in February 1957.[46] In July, the employer unilaterally raised pay for all employees, claiming it had no duty to bargain the pay raise because the union presumptively lost its majority support.[47] The Board set forth a new test whereby an employer could rebut the presumption that the union retained majority support, thereby shifting the burden of proof to the Board's General Counsel to show that the union continued to enjoy majority support.[48] The Board reasoned that because eighteen original strikers had abandoned the strike to work and eighteen replacements had been hired, "serious doubt is cast upon the union's continued representation of a majority of employees in the appropriate unit."[49] In addition, the Board noted "[i]f this appearance is deceptive and the union did represent a majority on the critical date, it should have no difficulty in presenting evidence of that fact."[50] In reaching its conclusions, the Board assumed that both the replacement and crossover workers would be decidedly anti-union.[51] Dissenting members Fanning and Jenkins

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44. 123 N.L.R.B. 1440, 44 L.R.R.M. (BNA) 1133.

45. *Id.* at 1442, 44 L.R.R.M. (BNA) at 1133.

46. *Id.*

47. *Id.*

48. The Board concluded that an employer cannot 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 continuing majority status.

Id. at 1445, 44 L.R.R.M. (BNA) at 1135. *Cf. infra* notes 264 & 266 and accompanying text.

49. *Stoner Rubber*, 123 N.L.R.B. at 1445-46, 44 L.R.R.M. (BNA) at 1135.

50. *Id.* In fact, the union would have great difficulty making this proof. First, with bargaining unit members on strike and not receiving paychecks, the union could not offer as proof dues-deductions occurring contemporaneously with the withdrawal of recognition. Second, the union would have to poll workers about their interest in representation months after the date recognition was withdrawn.

Members Jenkins and Fanning in dissent remarked that the majority decision encourages employers to manufacture doubts about the incumbent union's majority support, and "casts an impossible burden on the certified union of being perpetually prepared after the certification year, without notice, to furnish independent documentary proof of its majority as of any given moment selected by the employer." *Id.* at 1450, 44 L.R.R.M. (BNA) at 1137.

51. The Board speculated:

> On July 29, the plant was operating with a complement of 18 permanent replacements for the strikers and 18 former strikers.... In view of the fact that 27 em-

criticized the Board for its "conjectural examination of numbers of union adherents."[52]

In *Jackson Manufacturing Co. and International Association of Machinists*,[53] the union and company failed to agree on a first contract[54] after the company voluntarily recognized the union.[55] The union struck on October 8, 1957 and soon thereafter, the company notified the strikers that it considered them to have quit their jobs, which were thus terminated.[56] Subsequently, some strikers returned to work and were reinstated.[57] On June 7, 1958 the union unconditionally ended its strike, though the company refused to reinstate the stalwart strikers.[58] In addition, the company cited the ten month lapse since the last bargaining occurred and its doubts that a majority of the existing bargaining unit continued to support the union, due to the numerous replacements hired.[59] The Board upheld a settlement agreement that effectively terminated the company's continuing obligation to bargain.[60]

The employer in *S & M Manufacturing Co. & Union Local 80-A, Distillery, Rectifying, Wine & Allied Workers International Union*[61] substantially increased its workforce during a strike. As a consequence, the bargaining unit reached a point where fewer than half of its members were found by the Board to be union adherents.[62] At the time of the strike the employer had forty-seven employees; at the time the employer withdrew recognition during the strike, it had sixty-five full time employees.[63] The Board reversed its

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> ployees had voted against the Union it was not unreasonable for the [company] to assume that few if any of the 18 early returning strikers were Union adherents; nor was it unreasonable to assume that none of the 18 permanent replacements were Union adherents.

Id. at 1443-44, 44 L.R.R.M. (BNA) at 1134.

52. *Id.* at 1448, 44 L.R.R.M. (BNA) at 1136. They continued that the Board's opinion was "no more than a fiction of rationalization.... It ignores not only the existence of the union's incumbency but the indisputable fact of the union's continuing claim giving rise to a question of representation which only a Board election could resolve." *Id.* at 1450, 44 L.R.R.M. (BNA) at 1137.

53. 129 N.L.R.B. 460, 47 L.R.R.M. (BNA) 1005 (1960).

54. *Id.* at 469, 47 L.R.R.M. (BNA) at 1005.

55. *Id.* at 466, 47 L.R.R.M. (BNA) at 1005.

56. *Id.* at 471, 47 L.R.R.M. (BNA) at 1006.

57. *Id.*

58.. *Id.* at 471-72, 47 L.R.R.M. (BNA) at 1006.

59. *Id.* at 473, 47 L.R.R.M. (BNA) at 1006.

60. In dissenting, Member Jenkins reasoned that the company committed an unfair labor practice when supervisors urged bargaining unit employees to quit the union; consequently, the economic strike converted to an unfair labor practice strike. Thus, "the Union's majority status could not ... be impaired by [the company's] replacement of the strikers." *Id.* at 463, 47 L.R.R.M. (BNA) at 1007. According to Jenkins, the company was left by the Board to "emerge without any obligations ... while employees who have been discriminatorily denied employment are left jobless ... and the Union with which [the company] unlawfully refused to bargain is left without a bargaining order, to wither away at [the company's] plants." *Id.*

61. 172 N.L.R.B. 1008, 68 L.R.R.M. (BNA) 1403 (1968).

62. *Id.* at 1009, 68 L.R.R.M. (BNA) at 1404.

63. *Id.* at 1008, 68 L.R.R.M. (BNA) at 1404.

earlier finding that the employer had failed to bargain with the union,[64] and concluded

> [a]s the only employees then working were returning strikers who had resigned from the union or newly hired employees who had crossed the picket line to go to work and who are not shown to have manifested their support for the union, it cannot be found that there were any union adherents among the employees working on June 16.[65]

Member Fanning dissented, concluding that because the union enjoyed 100% striker support at the beginning of the strike, the presumption of pro-union support still remained.[66]

In *National Car Rental System, Inc. & Local No. 498, International Brotherhood of Teamsters*[67] the Board had found that the employer committed an unfair labor practice when it withdrew recognition from a striking union.[68] The local union, consisting of ten garage attendants, had all of its membership on economic strike March 29, 1977.[69] On May 20, the employer notified striking employees by registered mail of its intent to hire permanent replacements.[70] No strikers returned to work, the employer hired new employees for the strikers, and notified the union that it doubted that the union retained majority support within the unit.[71] The Board adopted the presumption established in *Windham Community Memorial Hospital & Windham Community Memorial Hospital, Registered Nurses Unit 62 (Windham I)*[72] regarding replacement worker attitudes. The decision assumed that replacements favored the union in the same proportion as the striking

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64. *Id.* In its previous ruling, 165 N.L.R.B. 663, 65 L.R.R.M. (BNA) 1350 (1967), the Board held that ten strikers who resigned their employment at S & M should be counted toward their union's majority because they remained faithful to the strike and resigned their employment only to seek alternative employment. The Board concluded that these ten economic strikers would have to be placed on a preferential reinstatement list at the conclusion of the strike, and should therefore be counted as part of the bargaining unit. In reversing itself, the Board counted *only* the number of people actively working at the time the company withdrew recognition from the union. *S & M Mfg.*, 172 N.L.R.B. at 1008, 68 L.R.R.M. (BNA) at 1403. *But cf.* Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 107 L.R.R.M. (BNA) 1784 (1st Cir. 1981), where the Board counted *both* replacements and idled strikers as members of an expanded bargaining unit.

65. *S & M Mfg.*, 172 N.L.R.B. at 1008-09, 68 L.R.R.M. (BNA) at 1404.

66. Member Fanning elaborated:

> The strike was 100 percent effective. Thereafter, some replacements were hired, some employees took other jobs, others crossed the picket line, [and] the Company's normal complement of employees was swollen to almost twice its size.... In these circumstances, I would not require the General Counsel to establish affirmatively that the Union at all times had a continuing majority. Nor would I infer that a Union long established as a bargaining representative has lost its majority merely because the Company hired replacements and, as in all strikes, some employees sought and found other employment while the strike was in progress.

Id. at 1009, 68 L.R.R.M. (BNA) at 1404.

67. 237 N.L.R.B. 172, 99 L.R.R.M. (BNA) 1027 (1978).

68. *Id.* at 172, *summarized*, 99 L.R.R.M. (BNA) at 1027.

69. *Id.* at 173, *summarized*, 99 L.R.R.M. (BNA) at 1027.

70. *Id.*

71. *Id.*

72. 230 N.L.R.B. 1070, 95 L.R.R.M. (BNA) 1565 (1977).

members. In *National Car Rental System, Inc. v. NLRB*,[73] however, the Eighth Circuit denied enforcement to the Board's bargaining order, strongly rebuking the Board for adopting the *Windham I* presumption.[74] In support of its view that replacements cannot be presumed to support a striking union, the court relied upon a generalized and unsupported statement appearing in Professor Robert Gorman's labor law casebook: "[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Union and that he ought not to be counted toward a Union majority."[75]

The most conclusive record indicating that a union had lost majority support was presented in *Peoples Gas Systems, Inc. & Teamsters Union Local 769*.[76] The Board ruled that the employer did not commit an unfair labor practice when it filed a representation petition with the Board on April 23, 1973 and discontinued bargaining with the union.[77] The Board based its ruling on three separate factual developments after the union's certification six years earlier: (1) the percentage of bargaining unit employees signing dues check-off authorizations had dropped very substantially,[78] (2) the union's bargaining position for a new contract changed sharply, from authorizing a strike to agreeing to accept *any* contract offered by the employer,[79] and (3) the bargaining unit changed very substantially, being comprised of forty percent permanent replacements from a previous strike and seventeen percent of a unit-accretion resulting from the employer's purchase of another company.[80] The Board concluded "[i]n the totality of these circumstances, we cannot say that [the company] did not have an objective basis for a reasonably based doubt as to the Union's continued majority status."[81]

The Court of Appeals for the District of Columbia reversed the Board's *Peoples Gas* ruling in *Teamsters Local Union 769 v. NLRB*.[82] The court

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73. 594 F.2d 1203, 100 L.R.R.M. (BNA) 2824 (8th Cir. 1979).

74. The court observed:

> If this presumption were ... employed here [it] would reach the ridiculous result of presuming that all of the ten new employees favored representation by the union even though they had crossed the union's picket lines to ... work.... This presumption ... is not specifically authorized by statute and is so far from reality ... that it does not deserve further comment.

Id. at 1206, 100 L.R.R.M. (BNA) at 2826.

75. *Id.* (citing R. GORMAN, LABOR LAW 112 (1976)). Ironically, in citing Professor Gorman, the court made a presumption not specifically authorized by statute.

76. 214 N.L.R.B. 944, 87 L.R.R.M. (BNA) 1430 (1974).

77. *Id.*, 87 L.R.R.M. (BNA) at 1431.

78. In 1970, 76% of all bargaining unit employees, including probationary employees, signed authorization cards; yet in 1973 only 39% of all bargaining unit employees, including probationary employees, signed cards. *Id.* at 944, 87 L.R.R.M. (BNA) at 1433.

79. *Id.* at 945, 87 L.R.R.M. (BNA) at 1432. As to the union's complete and sudden reversal in its bargaining posture, the Board concluded: "We think it was not unreasonable of [the company] to regard these developments as evidencing a very considerable lack of confidence by the Union in the strength of the support which the membership would afford it." *Id.* at 947, 87 L.R.R.M. (BNA) at 1433.

80. *Id.* The Board also found probative the fact that the employer had a 36% turnover in its workforce in the period September 1972 to April 1973 — an annualized turnover rate of 61%.

81. *Id.*

82. 532 F.2d 1385, 92 L.R.R.M. (BNA) 2077 (D.C. Cir. 1976).

found as speculative the Board's inference that lack of majority support for the union was evidenced by sharply declining numbers of dues authorization check-offs.[83] The court suggested that the Board further develop the record to ascertain precisely why dues-authorizations had dropped.[84] In addition, the court admonished the Board for failing to articulate why it relied on an employee head-count that included large numbers of probationary employees, and placed no controlling weight on the fact that fifty-one percent of non-probationary employees continued to authorize dues deductions.[85] In reversing the Board, the court remanded the case for reconsideration and rearticulation of its decision.[86]

In *Randle-Eastern Ambulance Service, Inc. & Transport Workers, Local 500*,[87] 166 out of 177 ambulance drivers and medical technicians joined an economic strike on March 31, 1976 after protracted bargaining failed to produce a new agreement.[88] On June 7, the employer withdrew recognition from the union, citing objective evidence that it had hired forty-seven replacement workers, reinstated forty-six of the strikers who abandoned the strike, received resignations from ten strikers, discharged five strikers for picket line violence, and heard from the local president that twenty-five to fifty percent of the strikers were never going to return to the employer.[89] The Board found that the employer unlawfully withdrew recognition, but in *NLRB v. Randle-Eastern Ambulance Service, Inc.*,[90] the Fifth Circuit reversed the Board's ruling. Like the Eighth Circuit in *National Car System*, the court rejected the Board's presumption that new employees support the union in the same proportion as employees they replace.[91] The court concluded that the totality of factors relied upon by the employer "do not translate readily into a precise numerical estimate of the Union's strength" but "[t]he Company need not have conclusive proof that a majority of employees do not support the Union."[92]

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83. The court observed: "[A]n employee's decision not to submit an authorization card does not necessarily mean he opposes the union.... Decisions to submit or not withdraw authorizations may be attributable to confusion, ignorance, peer pressure, and in cases of failure to withdraw, to procrastination or inertia." *Id.* at 1389-90, 92 L.R.R.M. (BNA) at 2080.

84. *Id.* at 1390, 92 L.R.R.M. (BNA) at 2080-81.

85. *Id.*, 92 L.R.R.M. (BNA) at 2080.

86. The court expressed concern that the Board accorded full probative value to hearsay assertions of fact that the Administrative Law Judge (ALJ) admitted but gave no weight. The court reminded the Board of its statutory duty to conduct hearings "as far as practicable ... in accordance with the rules of evidence." *See id.* at 1392 n.30, 92 L.R.R.M. (BNA) at 2082 n.30 (citing 29 U.S.C. § 160(b) (1970)).

87. 230 N.L.R.B. 542, 95 L.R.R.M. (BNA) 1332 (1977).

88. *Id.* at 544-49, *summarized*, 95 L.R.R.M. (BNA) 1332.

89. *Id.* at 548, *summarized*, 95 L.R.R.M. (BNA) 1332.

90. 584 F.2d 720, 99 L.R.R.M. (BNA) 3377 (5th Cir. 1978).

91. The court stated that the Board's presumption that new hires continue to support the union applies when "the employer has experienced high turnover and is trying to escape his bargaining obligation," but does not apply "where the 'turnover' results from replacement of strikers." *Id.* at 728, 99 L.R.R.M. (BNA) at 3384. The court relied on Gorman's assertion that striker-replacements do not support the union as do strikers. *Id.*

92. *Id.* at 729, 99 L.R.R.M. (BNA) at 3385. The court noted that "the only way that [the company] could have garnered such proof was by an employee poll, but that is forbidden unless the employer has 'objective evidence to support a good faith doubt of majority status.'" *Id.*

In *Soule Glass & Glazing Co. & Glaziers Local 1516, International Brotherhood of Painters & Allied Trades*,[93] the union engaged in an economic strike on April 12, 1976.[94] The company hired twenty-nine replacements for twenty-two strikers and on March 25, 1977, withdrew recognition from the union, citing doubts about the union's continuing majority support.[95] In *Soule Glass & Glazing Co. v. NLRB*,[96] the First Circuit reversed the Board's finding that the economic strike had converted to an unfair labor practice strike,[97] and concluded that "the company's unfair labor practices ... cannot be said to have *caused* the union's loss of majority. Rather, the strike and the company's lawful hiring of permanent strike replacements did so."[98] The court's analysis of the employer's withdrawal of recognition was distinctive insofar as it strictly used hiring numbers — twenty-nine replacements for twenty-two strikers — rather than the totality of circumstances to conclude that the union lost its majority.[99]

IV. CONTINUATION OF UNION MAJORITY: PRO-UNION PRESUMPTION

Just as the anti-union presumption simplistically assumes that all replacement workers and crossovers are necessarily opposed to union representation, the pro-union presumption has its own simplistic assumptions. A key assumption is that as the bargaining unit changes over time due to ordinary turnover, newcomers support the union in the same proportion as the original unit did when it first acquired union representation. The pro-union presumption also assumes that replacement workers and crossovers are not opposed to union representation, but are simply crossing the union's picket line out of financial necessity.

The Board's presumption that a union retains majority support through a strike developed from a non-strike situation in which an employer withdrew recognition from a union. In *National Plastic Products Co. & International Chemical Workers Union*,[100] the employer defended its withdrawal of

93. 246 N.L.R.B. 792, *summarized*, 102 L.R.R.M. (BNA) 1693 (1979).
94. *Id.* at 796, *summarized*, 102 L.R.R.M. (BNA) 1693.
95. *Id.* at 801, *summarized*, 102 L.R.R.M. (BNA) 1693.
96. 652 F.2d 1055, 107 L.R.R.M. (BNA) 2781 (1st Cir. 1981).
97. *Id.* at 1105-06, 107 L.R.R.M. (BNA) at 2811-12. The Board had found several employer unfair labor practices pre-dating the company's withdrawal of recognition, including granting a wage increase to nonstriking employees on the first day of the strike, reneging on a previously settled wage issue with the union, and failing to bargain over a warehouse closing during the strike.
98. *Id.* at 1111, 107 L.R.R.M. (BNA) at 2816 (emphasis in original).
99. *Id.* In determining the size of the bargaining unit, the Board usually, though not always, counts strikers *and* replacements. The presumption that replacements oppose union representation encourages employers to hire excess replacements simply to achieve a presumptive majority that opposes union representation. In *Curtin Matheson* the employer hired 29 replacements for 22 strikers. 110 S. Ct. at 1547, 133 L.R.R.M. (BNA) at 3051. In *S & M Mfg.* the employer's workforce grew from 47 before the strike to 65 during the strike and the Board counted *only* presently working replacements, hires for new positions created during the strike, and strike crossovers, and failed to count strikers and strikers who resigned to look for alternative employment. 172 N.L.R.B. at 1008, 68 L.R.R.M. (BNA) at 1403.
100. 78 N.L.R.B. 699, 22 L.R.R.M. (BNA) 1268 (1948).

recognition on the grounds that the bargaining unit experienced high turnover; consequently, the new employees could not be presumed to support the union.[101] The Board rejected this argument, noting that "[m]ere substantial turnover ... can certainly not be regarded as an indication that the Union's previously established majority was thereby impaired; on the contrary, the reasonable presumption is that, throughout the changes in personnel in the unit, the Union maintained the same proportion of adherents."[102]

The Board first imported the presumption of majority support for the union when replacements supplant strikers in *James W. Whitfield*.[103] Four employees struck the employer after the employer failed to agree to a pattern-setting contract.[104] The company operated with three replacement workers and a store supervisor (who crossed the picket line), and thus believed that the union had lost its majority support.[105] The company argued that when it challenged the union's majority support, and filed a representation petition, exactly fifty percent of its workforce consisted of replacement workers or an anti-union crossover employee.[106] As to the issue of presuming that replacements reject union representation, the Board concluded that the company "produced no evidence to indicate their voting preferences.... Furthermore, there is no presumption that an employee has rejected the union ... when the employee elects not to support the strike."[107]

In *Arkay Packaging Corp. & New York Printing & Graphic Communications Union*,[108] three unions struck the employer simultaneously. The unusual aspect of *Arkay Packaging* is that the strike occurred while a contract was in effect.[109] In its decision, the Board made no specific reference to adopting the pro-union presumption espoused a year earlier in *James W. Whitfield*.[110] The Board found, however, that the company rebutted the presumption that the union continued to enjoy majority support throughout the strike, and thus ruled that the employer committed no unfair labor practice when it withdrew recognition and refused to continue negotiations. The Board

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101. *Id.* at 706, 22 L.R.R.M. (BNA) at 1268.
102. *Id., summarized*, 22 L.R.R.M. (BNA) at 1268.
103. 220 N.L.R.B. 507, 90 L.R.R.M. (BNA) 1250 (1975).
104. *Id.* at 508, 90 L.R.R.M. (BNA) at 1252.
105. *Id.*, 90 L.R.R.M. (BNA) at 1253.
106. *Id.*
107. *Id.* at 509, 90 L.R.R.M. (BNA) at 1253. In addition, the Board rejected the employer's argument that the filing of an election petition by the replacement employees constitutes evidence of loss of the union's majority support. The Board concluded that "the mere filing of a petition for an election is insufficient evidence to establish either that [the company] acted in good faith or that it acted upon objective considerations in withdrawing recognition." *Id.*
108. 227 N.L.R.B. 397, 94 L.R.R.M. (BNA) 1197 (1976).
109. *Id.*, 94 L.R.R.M. (BNA) at 1198.
110. 220 N.L.R.B. 507, 90 L.R.R.M. (BNA) 1250. The Board's decision appeared to use the pro-union presumption when it adopted the ALJ's finding that "'[h]aving had status as the recognized bargaining agent for the employees in its respective unit, each Union had a rebuttable presumption of continued majority status.'" *Arkay Packaging*, 227 N.L.R.B. at 397, 94 L.R.R.M. (BNA) at 1197. The Board contradicted itself, however, when it cited the proposition that it is not unreasonable for a company "'to infer that the degree of union support among those employees who [choose] to ignore a Union-sponsored picket line might well be somewhat weaker than the support offered by those who ... [engage] in concerted activity on behalf of

based its ruling on the fact that the unions made no contact with the employer for six months during the strike and that strikers made no effort to contact the employer, raising the presumption that they had sought alternate employment.[111] In dissent, member Jenkins explained that the employer had the burden of rebutting the presumption that the union enjoyed continuing majority support;[112] that the employer withdrew recognition while a contract was in effect rather than after its expiration;[113] and that the unions made timely requests for bargaining before the contracts expired, thereby controverting the employer's assertion that the union had abandoned the bargaining unit.[114]

In *New York Printing Pressmen & Offset Workers Union v. NLRB*,[115] the Second Circuit denied the union's petition to reverse the *Arkay Packaging* ruling.[116] The court concluded "that evidence of complete lack of activity by the Unions for a period of seven to nine months is an objective factor which, in the circumstances of this case, would clearly support a reasonable doubt that the replacements desired representation by the Unions."[117]

In *Windham I*,[118] the Board viewed union abandonment of the bargaining unit as a very limited exception to the pro-union presumption.[119] Fifty-seven bargaining unit nurses initially struck their employer after negotiations on economic issues failed to produce a new contract.[120] Nine nurses returned to

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Union-sponsored objectives.'" *Id.* at 398 n.3, 94 L.R.R.M. (BNA) at 1198 n.3 (citing *Peoples Gas*, 214 N.L.R.B. at 947, 87 L.R.R.M. (BNA) at 1434).

111. The Board determined that after "many months of silence by both the striking employees and the Unions and without any expression or claim by the Unions of support by the strikers or an indication that those employees ... had any interest in further employment ... cannot be regarded as an assurance ... by the Unions of their representative status." *Id.* at 397, 94 L.R.R.M. (BNA) at 1198. In addition, the Board distinguished this situation from one where the rule of Laystrom Mfg. Co., 151 N.L.R.B. 1482, 58 L.R.R.M. (BNA) 1642 (1966), applies. The *Laystrom* rule presumes that new employees replacing employees in a situation of ordinary, non-striking turnover, support the union in the same proportion as exiting employees. The Board concluded "it would be wholly unwarranted and unrealistic to presume ... that, when hired, the replacements for the union employees who had gone out on strike favored representation by the Unions to the same extent as the strikers." *Arkay Packaging*, 227 N.L.R.B. at 397-98, 94 L.R.R.M. (BNA) at 1198.

112. Member Jenkins stated: "[I]t is one thing to say that a presumption of majority status has been successfully rebutted and quite another to suggest, as do my colleagues, that the Union was not even entitled to the benefit of the presumption in the first place." *Id.* at 399, 94 L.R.R.M. (BNA) at 1200.

113. Jenkins observed that at the time of withdrawal of recognition, none of the three contracts had expired. "Thus, during this time each Union was entitled to a rebuttable presumption of continued majority status. Such a midterm withdrawal of recognition establishes a *prima facie* case of unlawful 8(a)(5) misconduct." *Id.* at 398, 94 L.R.R.M. (BNA) at 1199 (citations omitted).

114. *Id.* at 399, 94 L.R.R.M. (BNA) at 1199.

115. 575 F.2d 1045, 98 L.R.R.M. (BNA) 2389 (2d Cir. 1978).

116. *Id.* at 1050, 98 L.R.R.M. (BNA) at 2389.

117. *Id.* at 1049, 98 L.R.R.M. (BNA) at 2392.

118. 230 N.L.R.B. 1070, 95 L.R.R.M. (BNA) 1565.

119. The Board explained that it declined to follow the general rule of pro-union presumption "only because of the unique circumstance that the union had apparently abandoned the bargaining unit." *Id.*, 95 L.R.R.M. (BNA) at 1566.

120. *Id.* at 1073, *summarized*, 95 L.R.R.M. (BNA) at 1566, and reported specifically by the Second Circuit at 99 L.R.R.M. (BNA) 2242 (1978).

work and the employer hired forty-two replacements.[121] After the start of the strike on April 21, 1976, the number of picketers gradually decreased to the point of ineffectiveness, and the union terminated picketing in August.[122] The employer argued that because striker enthusiasm for picketing had completely subsided notwithstanding the union's efforts to maintain a picket line, there was an objective basis for concluding that the union had lost its majority support.[123] The Board rejected the employer's argument, and affirmed the ALJ's finding that the employer illegally withdrew recognition from the striking union.[124] In *NLRB v. Windham Memorial Hospital (Windham II)*,[125] the Second Circuit affirmed the Board's ruling and rejected the hospital's argument that the Board erred in failing to apply the anti-union presumption.[126] The court also reasoned that it is especially inappropriate to presume that nonstriking nurses are necessarily opposed to union representation.[127]

In *Pennco, Inc. & Communications Workers of America*,[128] the union won a certification election by a vote of 114 to 62 on October 21, 1976.[129] After failing to get a contract, 109 workers struck on May 18, 1977, and were replaced.[130] Pennco hired additional workers, swelling the work force from 173 before the strike to 257 at the time it withdrew recognition November 3, 1977.[131] The Board employed a "presumption of continuing majority status",[132] and concluded that Pennco "failed to meet its burden of establishing a good faith doubt based on objective considerations of the Union's majority status as of the time it withdrew recognition from the union."[133] The Board rejected the presumption that replacements disfavor continuing union

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121. *Id.*

122. *Id.*

123. *Id.* In its response to the company's appeal of the Board's decision, the union argued that an inference of non-support for the union could not be drawn simply from the declining number of picketers, citing "summer vacations, family responsibilities engendered by school vacations, and the strikers' feeling that additional picketing was no longer necessary." *Windham II*, 577 F.2d at 808, 99 L.R.R.M. (BNA) at 2243.

124. The Board's decision affirmed the ALJ's rulings but modified the ALJ's application of *Arkay Packaging*. The Board concluded that "the Administrative Law Judge correctly found that nonstrikers may not be presumed not to support the union." *Windham I*, 230 N.L.R.B. at 1070, 95 L.R.R.M. (BNA) at 1566.

125. 577 F.2d 805, 99 L.R.R.M. (BNA) 2242.

126. The court reasoned:

> [t]he Hospital must prove, by affirmative evidence, that ... the Union did not in fact enjoy majority support.... Instead of providing such proof, however, the Hospital merely formulates a presumption of its own: that no replacement employee supports the Union. This presumption is equally, if not more assailable than the NLRB's; many workers might well be pro-Union but might need the job.

Id. at 813, 99 L.R.R.M. (BNA) at 2247.

127. The court concluded that "[i]t cannot be presumed that repudiation of a strike or the willingness to cross a picket line is also repudiation of the union as a bargaining agent. This is especially true in employment which is so closely involved with health and safety; many nurses consider strikes completely improper." *Id.* at 814, 99 L.R.R.M. (BNA) at 2247.

128. 250 N.L.R.B. 716, 104 L.R.R.M. (BNA) 1473 (1980). This decision supplemented Pennco., Inc. & Communications Workers of America, 242 N.L.R.B. 467, 101 L.R.R.M. (BNA) 1195 (1979).

129. 242 N.L.R.B. 467 n.1, 101 L.R.R.M. (BNA) 1196 n.1.

130. 250 N.L.R.B. at 716, 104 L.R.R.M. (BNA) at 1474.

131. *Id.*

132. *Id.* at 716, 104 L.R.R.M. (BNA) at 1475.

representation. It reasoned that such a policy is inconsistent with the Act's policy of promoting continuing collective bargaining,[134] that workers who cross a picket line do not necessarily oppose the union conducting the strike,[135] and that permitting the employer to withdraw recognition from the striking union places an undue handicap on workers' exercise of their right to strike.[136]

In *NLRB v. Pennco, Inc.*,[137] the Sixth Circuit enforced the Board's bargaining order but declined to adopt the Board's pro-union presumption.[138] Pennco argued "that it is appropriate for it to conclude that the original employees who had all along crossed the picket line, and the employees who replaced the strikers, would not support a union which fomented violence on a picket line they had to cross each morning."[139] The Board argued for its presumption that replacements support the union in the same percentage as strikers they replace.[140] The court declined to adopt either the pro-union or anti-union presumption,[141] and concluded that "the evidence demonstrated by Pennco is sufficient only to put the parties in equipoise. Yet equipoise is not enough for Pennco to demonstrate by objective evidence a good faith doubt as to the union's majority status."[142] The court continued: "Pennco would need some further evidence of union non-support ... to shift the burden to the Board to prove the union in fact had majority status on the critical day."[143]

V. NO PRESUMPTION CONCERNING UNION SUPPORT

The Board and federal courts, in employing the anti-union presumption, have assumed that replacements and crossovers oppose continuing union representation because they cross picket lines;[144] because employee turnover

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133. *Id.* at 718, 104 L.R.R.M. (BNA) at 1476.

134. The Board observed: "The presumption of continuing majority status essentially serves two important functions of Federal labor policy. First, it promotes continuity in bargaining relationships.... Second [it] protects the express statutory right of employees to designate a collective bargaining representative of their choosing, and to prevent an employer from impairing that right." *Id.* at 716-17, 104 L.R.R.M. (BNA) at 1475.

135. The Board noted "that an employee's return to work during a strike does not provide a reasonable basis for presuming that he has repudiated the union as his bargaining agent. Absent supporting evidence, it may mean no more than he was forced to return to work for financial reasons." *Id.* at 717, 104 L.R.R.M. (BNA) at 1476.

136. The Board reasoned that the company sought to add to the worker's risk of permanent replacement "the potential additional loss of the employees' collective bargaining representative based solely on a presumption." *Id.*

137. 684 F.2d 340, 111 L.R.R.M. (BNA) 2821 (6th Cir. 1978).

138. *Id.* at 342, 111 L.R.R.M. (BNA) at 2823.

139. *Id.*, 111 L.R.R.M. (BNA) at 2822.

140. *Id.*

141. *Id.* at 342-43, 111 L.R.R.M. (BNA) at 2823. The court reasoned that "the picket line violence ended approximately three and a half months before the withdrawal of recognition. Thus, it is impossible to attribute to those who crossed the picket line an anti-union animus on November 3, 1977." The court also reasoned "[o]f the 257 replacements, at most 109 would lose their job if the strike was settled. There is no indication that any particular persons in that work force of 257 knew that they would be replaced by a returned striker." *Id.* at 342, 111 L.R.R.M. (BNA) at 2823.

142. *Id.* at 343, 111 L.R.R.M. (BNA) at 2823.

143. *Id.*

144. *See Peoples Gas System*, 214 N.L.R.B. at 947, 87 L.R.R.M. (BNA) at 1434, in which the Board observed:

erodes union support;[145] because violence by picketers vitiates support for the union;[146] because a narrow majority at the time of initial certification means that the loss of a few union adherents automatically results in a loss of majority support (not accounting for the possibility that the union gained adherents who initially voted against the union);[147] and because strikers who resign their employment do so freely, and therefore freely choose to forego employment carrying union representation.[148] The presumption glosses over

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> While it is of course possible that the replacements ... might nevertheless have favored union representation, it was not unreasonable for [the company] to infer that the degree of union support among these employees who had chosen to ignore a union-sponsored picket line might well be somewhat weaker than the support offered by [strikers].

See also Curtin Matheson Scientific, Inc. v. NLRB, 859 F.2d 362, 367, 129 L.R.R.M. (BNA) 2801, 2804 (5th Cir. 1988), observing:

> Over eighty percent of the bargaining unit work force ... was replaced on June 25, 1979. Where such a substantial percentage of the bargaining unit employees is replaced ... and the striker replacements cross a picket line ... each day, the company is justified in counting the striker replacements as employees whom they doubt support the union.

145. The Board at one point was willing to draw a distinction between continuing support for the union when turnover is gradual, and non-support by new hires when turnover is rapid (as in a strike). The Board created this fine distinction, even though there is no special evidence indicating that new hires in a gradual turnover situation favor unions as much as the workers they replace, nor that permanent replacements hired in a rapid turnover (i.e., strike) situation oppose union representation. *See Arkay Packaging*, 227 N.L.R.B. at 397, 94 L.R.R.M. (BNA) at 1198, stating:

> As for the 11 striker replacements, we would not ... charge [the company], in fact or in law, with a belief that they desired representation by the Unions. The dissent would do so on the theory that 'the Board has long held that new employees will be presumed to support a union in the same ratio as those whom they have replaced.' This presumption has been held to obtain in the normal turnover situation.... *But in the strike situation present in this case, it would be wholly unwarranted and unrealistic to presume as a matter of law that, when hired, the replacements for the union employees who had gone out on strike favored representation to the same extent as the strikers* (emphasis added).

146. Ironically, the anti-union presumption has been applied when no picket line violence occurred; and the pro-union presumption has been applied when picket line violence occurred. The *Randle-Eastern* court only vaguely referenced the occurrence of picket line violence, reciting the company president's affidavit alleging that some of the replacements "had been victims of picket line violence." *Randle-Eastern*, 584 F.2d at 727, 99 L.R.R.M. (BNA) at 3383. However, in the court's detailed recounting of the record there is no specific mention of picket line violence. *See id.* at 722-24, 99 L.R.R.M. (BNA) at 3379-81. *Compare Pennco*, 250 N.L.R.B. at 716, 104 L.R.R.M. (BNA) at 1473-74, where picket line violence occurred and a restraining order was issued. The *Pennco* Board used a pro-union presumption and, notwithstanding the record of violence, ruled that the union enjoyed a presumption of support by the replacements who had been harassed by picketers.

147. *See Stoner Rubber*, 123 N.L.R.B. 1440, 44 L.R.R.M. (BNA) 1133, where the union won an election by five votes and was later presumed to have lost its majority when the employer hired 18 replacement workers.

148. This argument ignores the fact that some strikers resign their employment because their unemployment benefits may be denied while they strike; consequently, seeking other employment may have had nothing to do with withdrawing support from the striking union. *See* Lyng v. Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of Am., 485 U.S. 360, 127 L.R.R.M. (BNA) 2977 (1988). Section 109 of the Omnibus Budget Reconciliation Act of 1981 disqualifies a striker from federal food stamp assistance, *see* 7 C.F.R. § 273.1(g) (1987), but 7 C.F.R. §§ 272.7 (n)(1)(i), (vi) (1987) provide that people who voluntarily quit their jobs shall not be ineligible to receive assistance, provided that they quit for

the possibility that "employees who are 'replaceable,' most often the unskilled or semi-skilled, cannot exert real pressure on their employers and tend to see unionization as futile and possibly a prelude to job loss."[149] The anti-union presumption has prevailed even though the Act provides that replaced strikers have a right to vote in a representation election following their displacement by replacement workers.[150] At a practical level, there is evidence that employers have exploited the presumption by hiring excess replacements simply to inflate the bargaining unit, thereby creating an artificial majority opposing union representation.[151]

At other times, the Board and federal courts assumed that after a union's certification, a union enjoys majority support unless objective evidence to the contrary is presented;[152] that replacements and crossovers are not anti-union, but are merely in great economic need;[153] that crossovers do not necessarily oppose the union as a representative, but merely disagree with the union's strike tactic;[154] and that additions to the bargaining unit support the union in the same proportion as those who initially voted for union representation.[155] In making pro-union and anti-union presumptions, the Board and courts ignored empirical evidence upon which it based its representation election policies concerning the ability of individual workers to decide matters of union representation for themselves.[156]

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good cause. The Court in *Lyng* held that section 109 does not impair strikers' first amendment rights of free association and free expression, nor their rights under the Equal Protection Clause. *But see Lyng*, 485 U.S. at 378-79, 127 L.R.R.M. (BNA) at 2984 (Marshall, J., dissenting): "[M]any of the businesses that continue to operate during a strike hire permanent replacements for striking workers. In this situation ... a striker no longer has the option of returning to work.... [A] number of appellees were denied food stamps even though they had been permanently replaced by their employers."

149. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 364-65 (1990).

150. Section 159(c)(3) of the Act provides that "[e]mployees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote ... in any election conducted within twelve months after the commencement of the strike." 29 U.S.C. § 159(c)(3) (1988).

151. *See supra* note 99.

152. *See* Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 89 L.R.R.M. (BNA) 2879 (2d Cir. 1975), *enforcing* 210 N.L.R.B. 443, 86 L.R.R.M. (BNA) 1129 (1974); Allied Indus. Workers, Local 289 v. NLRB, 476 F.2d 868, 82 L.R.R.M. (BNA) 2225 (D.C. Cir. 1973), *enforcing* 192 N.L.R.B. 290, 77 L.R.R.M. (BNA) 1889 (1971); Terrell Mach. Co. v. NLRB, 427 F.2d 1088, 73 L.R.R.M. (BNA) 2381 (4th Cir. 1970), *enforcing* 173 N.L.R.B. 1480, 70 L.R.R.M. (BNA) 1049 (1969).

153. *See Pennco*, 250 N.L.R.B. at 717-18, 104 L.R.R.M. (BNA) at 1476.

154. *See id.* at 718, 104 L.R.R.M. (BNA) at 1476, remarking that a crossover "may disapprove of the strike in question, but would support other union initiatives." *See also Windham II*, 577 F.2d at 814, 99 L.R.R.M. (BNA) at 2247.

155. *See, e.g.*, NLRB v. Washington Manor, 519 F.2d 750, 89 L.R.R.M. (BNA) 3044 (6th Cir. 1975), *enforcing* 211 N.L.R.B. 324, 87 L.R.R.M. (BNA) 1355 (1974); King Radio Corp., 208 N.L.R.B. 578, 85 L.R.R.M. (BNA) 1118 (1974); Laystrom Mfg. Co., 151 N.L.R.B. 1482, 58 L.R.R.M. (BNA) 1624 (1965).

156. Research in J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 24, at 72, controverted the Board's "assumption that the pre-campaign intent of most employees is tenuous and easily changed by the [election] campaign. The data indicate ... that employees have strong and stable predispositions to vote for or against union representation." Based on this research, the Board in Shopping Kart Food Mkt., 228 N.L.R.B. 1311, 94 L.R.R.M. (BNA) 1705 (1977), set a policy that it would "no longer probe into the truth or falsity of the parties' cam-

The Board's no-presumption policy assumes that replacement workers and crossovers have diverse motivations for crossing a picket line. It assumes that some people may cross a picket line for financial reasons only, while others who cross may be manifesting their opposition to the union. The presumption does not assume that replacement workers and crossovers support the union in the same proportion as previous bargaining unit workers, however, it requires an employer to provide proof that the newly constituted unit no longer contains a majority who support the union.

The Board first articulated its no presumption policy when it overruled the *Pennco* pro-union presumption in *Buckley Broadcasting*.[157] All five NABET union employees struck over the employer's bargaining proposal to combine radio engineering and announcing responsibilities (which would have reduced jobs in the bargaining unit);[158] thereafter the employer assigned this work to employees represented by another union.[159] NABET then challenged the jurisdiction of the second union, AFTRA, over these jobs in an AFL-CIO jurisdictional dispute proceeding, and eventually prevailed.[160] On October 30, 1980 NABET wrote the company requesting new bargaining in light of the changed circumstances caused by the AFL-CIO's ruling.[161] The company replied, however, that the AFL-CIO's jurisdictional proceeding was not binding on the company and the company was therefore withdrawing recognition from NABET.[162]

The Board reviewed its *Pennco* policy, and observed that legal presumptions should arise only when "proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved."[163] Using this evidentiary standard the Board found its *Pennco* presumption unsupported because "permanent replacements are typically aware of the union's primary concern for the striker's welfare, rather than that of the replacements"[164] and "incumbent unions and strikers have sometimes shown hostility toward permanent replacements."[165] The Board also declined to invoke the presumption that a replacement employee fails to support the union,

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paign statements," *id.*, but would instead rely on workers "as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." *Id.* at 1311, 94 L.R.R.M. (BNA) at 1707. The Board's reliance on this research raises this question: workers about to vote in a representation election have well-formed opinions about union representation based on their workplace experience, why presume that newly hired replacement workers with no workplace experience have pro-union or anti-union sentiments?

157. 284 N.L.R.B. 1339, 125 L.R.R.M. (BNA) 1281 (1987). *Compare Pennco*, 684 F.2d at 342, 111 L.R.R.M. (BNA) at 2823, in which the Sixth Circuit concluded: "We expressly decline to adopt either presumption for neither is justified under this set of stipulated facts." The Sixth Circuit's failure to adopt the pro-union and anti-union presumption appears to have presaged the Board's formulation of its no-presumption policy in *Buckley Broadcasting*.

158. *Buckley Broadcasting*, 284 N.L.R.B. at 1339, 125 L.R.R.M. (BNA) at 1281-82.

159. *Id.*, 125 L.R.R.M. (BNA) at 1282.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1344, 125 L.R.R.M. (BNA) at 1286 (quoting MCCORMICK ON EVIDENCE § 343, at 807 (E. Cleary 2d ed. 1972)).

164. *Id.*

165. *Id.*

noting that she "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire representation."[166] The Board cited a public policy reason for declining to revert to the presumption that replacements fail to support the union: "adoption of this presumption would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of being the bargaining representative."[167]

The Ninth Circuit affirmed the Board's no-presumption rule, as well as its application, in *NLRB v. Buckley Broadcasting*.[168] The employer argued that the Board exceeded its authority by invalidating a rule that the employer had relied on in withdrawing recognition,[169] and alternatively, that the imposition of a bargaining order was improper in view of the passage of time and loss of support for the union.[170] The court noted that "[t]here is no possibility of an inequitable result from retroactive application of the Board's new standard",[171] and concluded that because "there is no question that the union enjoyed majority status at least until the strike was called ... it follows that under *Gissel Packing* the proper remedy was a bargaining order."[172]

In *Tile, Terrazzo & Marble Contractors Association & Tile, Terrazzo & Marble Finishers & Shopmen, Local 167*,[173] the Administrative Law Judge (ALJ) ruled that the contractors' association unlawfully withdrew recognition and refused to bargain with the union at the conclusion of a strike.[174] The ALJ, however, had relied on the *Pennco* pro-union presumption; consequently, the Board affirmed the ALJ's ruling, but based its ruling on its new no-presumption policy.[175] The Board concluded that the association had "not proffered sufficient evidence concerning their employees' expressed desire to repudiate the Union as their bargaining representative to support a good-faith

166. *Id.*
167. *Id.*
168. 891 F.2d 230, 133 L.R.R.M. (BNA) 2175 (9th Cir. 1989).
169. *Id.* at 232, 133 L.R.R.M. (BNA) at 2177.
170. *Id.*
171. *Id.* at 234, 133 L.R.R.M. (BNA) at 2178, applying the analysis of Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers, 861 F.2d 1124, 1137-38, 129 L.R.R.M. (BNA) 3073, 3082 (9th Cir. 1988).
172. *Id.* at 234, 133 L.R.R.M. (BNA) at 2179. In NLRB v. Gissel Packing Co., 395 U.S. 575, 71 L.R.R.M. (BNA) 2481 (1975), an employer committed several unfair labor practices, including failing to bargain. The Board imposed a bargaining order on the employer, which was appealed eventually to the United States Supreme Court. The *Buckley Broadcasting* court cited *Gissel Packing*, 395 U.S. at 613-16, for the proposition that "the Board is not limited to a cease and desist order .... If the Board could enter only a cease and desist order ... it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain.'" *Id.* at 610 (quoting Franks Bros. Co. v. NLRB, 321 U.S. 702, 704, 14 L.R.R.M. (BNA) 591 (1943)). In addition, the *Buckley Broadcasting* court rejected Buckley's argument that the passage of time and employee turnover should be weighed as factors supporting the withdrawal of bargaining, noting that if Buckley's argument were accepted, "an employer could benefit from causing excessive delays in the appellate process." 891 F.2d at 235, 133 L.R.R.M. (BNA) at 2179.
173. 287 N.L.R.B. 769, *summarized*, 130 L.R.R.M. (BNA) 1107 (1987).
174. *Id.* at 785.
175. *Id.* at 769 n.2.

doubt of majority status and that the respondents therefore [had] not rebutted the overall presumption of continuing majority status."[176]

In *Dold Foods, Inc. & United Food & Commercial Workers, Local 340*,[177] the employer hired 201 replacement workers during the union's economic strike.[178] The ALJ found that Dold Foods had rebutted the *Pennco* presumption that the union had lost majority support, citing evidence that replacement workers knew that the union was negotiating for the return of strikers;[179] that some of the replacement workers approached the president about getting rid of the union;[180] and that incidents including flattening tires of replacement workers were attributable to the union.[181] In applying its newly articulated no-presumption policy, the Board reversed the ALJ, noting that the union had considerably softened its position that strikers be reinstated at the expense of replacement workers.[182] The Board also noted that striker misconduct was too moderate and isolated to justify the conclusion that replacement workers would necessarily oppose union representation.[183]

In *Curtin Matheson Scientific, Inc. & Teamsters Local 968 (Curtin Matheson I)*,[184] the employer made a final offer on May 25, 1979 to reach agreement for a new labor contract.[185] The union rejected the May 25 offer, and on June 13 commenced an economic strike.[186] The strike lasted until July 16, when the union unconditionally offered to return to work and accept the May 25 offer.[187] The employer, however, responded to the union by stating that the May 25 offer was no longer on the table and that it was

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176. *Id.*
177. 289 N.L.R.B. 1323, 129 L.R.R.M. (BNA) 1174 (1980).
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*, 129 L.R.R.M. (BNA) at 1175. Dold Foods argued that, because the union demanded that replacement workers be displaced in favor of strikers, replacement workers would not favor continuing union representation. The Board, however, noted that the union's reinstatement position had softened to the point of allowing all replacement workers to continue working except those not meeting the probationary requirement. In effect, the union's negotiating position had shifted from representing all strikers to representing all non-probationary replacement workers.
183. *Id.* at 1324, 129 L.R.R.M. (BNA) at 1175. Dold Foods argued that because the picket line violence was directed at replacement workers, those workers would not favor union representation. The Board, however, noted that the misconduct was far less extreme than alleged, consisting of twelve nails being placed in the company's driveway; and no proof existed that the union was responsible for this action.
184. 287 N.L.R.B. 350, 127 L.R.R.M. (BNA) 1114 (1987).
185. *Id.*, 127 L.R.R.M. (BNA) at 1115. In a companion case, Bickerstaff Clay Prods., Co. & Laborers Local 246, 286 N.L.R.B. 295, 127 L.R.R.M. (BNA) 1118 (1987), the Board affirmed the ALJ's finding that the employer had no objective basis for doubting the striking union's continuing majority support. It based its ruling, *inter alia*, on evidence that picket line misconduct was minimal and occurred five months before the employer withdrew recognition and that change in union leadership during the strike was unrelated to employee dissatisfaction with the union.
186. *Curtin Matheson I*, 287 N.L.R.B. at 350, 127 L.R.R.M. (BNA) at 1115.
187. *Id.* at 351, 127 L.R.R.M. (BNA) at 1116.

withdrawing recognition from the union because it doubted that the union enjoyed majority support.[188] While the strike was on, the company hired twenty-nine replacements and employed five employees who abandoned or never joined the strike.[189] There were twenty-two strikers.[190] Among that number, four individuals contacted management during the strike to express their lack of support for the strike,[191] and in some instances, lack of support for the union.[192]

The Board reversed the ALJ's finding that the company did not commit an unfair labor practice by withdrawing recognition from the union.[193] Basing its decision on its *Buckley Broadcasting* no-presumption rule, the Board concluded, with respect to the replacement workers, that "the apparently peaceful picket line the replacements crossed and the union's failure to contact them during the strike do not provide a basis for inferring their union sentiments."[194] Consequently, the Board did not count the twenty-nine replacements against the union's majority.[195] In addition, with respect to the six strikers who variously expressed lack of support for the strike or the union, the Board concluded: "It may be that some of [their] statements constituted rejections of the union as a bargaining representative; the import of others, however, appears ambiguous."[196] Consequently, the Board ordered the employer to bargain with the union,[197] to provide the union the information it requested, to execute the collective bargaining agreement on the terms of the company's last offer, and to give retroactive effect to the agreement.[198]

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188. *Id.* This particular aspect of the employer's conduct is an illustration of aggressive bargaining. *See* Hendricks Mfg. Co., 287 N.L.R.B. 310, 127 L.R.R.M. (BNA) 1097 (1987); and J. LAWLER, *supra* note 3, at 181-83.

189. *Curtin Matheson I*, 287 N.L.R.B. at 350, 127 L.R.R.M. (BNA) at 1116.

190. *Id.*

191. *Id.*, 127 L.R.R.M. (BNA) at 1115-16.

192. *Id.*

193. *Id.*, 127 L.R.R.M. (BNA) at 1115.

194. *Id.* at 352, 127 L.R.R.M. (BNA) at 1117.

195. One replacement expressed to management his negative views of unions; the Board found this as "the only affirmative evidence" that any of the replacements did not support the union, and concluded that "Schneider was one replacement employee, speaking for himself, of a total of 25." *Id.* (four replacements of the original 29 had left, leaving 25). The Board observed that where replacement employees are hired, the Board counts both the replacements and the original members of the bargaining unit in the "new" bargaining unit. *Id.* at 352 n.10, 127 L.R.R.M. (BNA) at 1116 n.10. *Cf. Soule Glass*, 652 F.2d at 1111, 107 L.R.R.M. (BNA) at 2816.

196. *Curtin Matheson I*, 287 N.L.R.B. at 353, 127 L.R.R.M. (BNA) at 1117. The Board concluded that "[e]ven attributing to them the meaning most favorable to the [employer], it would merely signify that 6 employees of a total bargaining unit of approximately 50 did not desire to keep the union as the collective bargaining representative." *Id.*

197. The employer argued that once its May 25 offer was rejected, the offer expired, citing basic contract law. The Board rejected this argument: "Technical rules of contract law do not necessarily control the making of collective bargaining agreements. Generally, a complete collective bargaining proposal remains viable, even if previously rejected, and on acceptance, must be executed." *Id.* at 354, 127 L.R.R.M. (BNA) at 1118.

198. The full extent of the Board's order is summarized in the appellate decision, Curtin Matheson Scientific v. NLRB, 859 F.2d 362, 129 L.R.R.M. (BNA) 2801 (5th Cir. 1988). In addition, according to the Fifth Circuit, the Board ordered the company to "make the bargaining unit employees whole for any losses they suffered as a result of the Company's refusal to sign the agreement." *Id.* at 364, 129 L.R.R.M. (BNA) at 2801. Approximately 20 strikers were

In *Curtin Matheson Scientific v. NLRB (Curtin Matheson II)*,[199] the Fifth Circuit reversed the Board's finding that the employer illegally withdrew recognition from the union.[200] The court disagreed with the Board that "*Station KKHI [Buckley Broadcasting]* establish[ed] a new standard because operationally the *Station KKHI* standard has the same effect as the presumption that striker replacements support the union in the same ratio as the employees they replace."[201] The court continued, "under either standard, the Company is required to have objective evidence regarding the striker replacements' non-support in order to count them as employees whom the Company doubts support the union."[202] The court, instead, adopted the Gorman presumption[203] (the anti-union presumption) and, finding that eighty percent of the workforce had been replaced, held "that the company was justified in doubting that the striker replacements supported the Union in this context."[204] Judge Jerre Williams strongly dissented, noting that under the Act strikers were still employees and therefore should be counted in their support for the union, notwithstanding their replacement status.[205] Judge Williams also challenged the court's power to substitute a legal standard reserved for the Board's special labor relations competence,[206] and questioned the court's use of the Gorman presumption.[207]

In *NLRB v. Curtin Matheson Scientific (Curtin Matheson III)*,[208] the Supreme Court reversed the Fifth Circuit and held that the NLRB's no-presumption policy is rational and consistent with the Act.[209] However, in doing so, the Court engaged in a speculative analysis concerning the sentiments of

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adversely affected by the employer's unlawful withdrawal of recognition; thus, the Board's backpay order for a seven year-plus period would be large. (The Board's decision was rendered December 16, 1987, over seven years after the company's unlawful withdrawal of recognition from the union on July 20, 1979.)

199. 859 F.2d 362, 129 L.R.R.M. (BNA) 2801 (5th Cir. 1988).

200. *Id.* at 364, 129 L.R.R.M. (BNA) at 2801.

201. *Id.* at 367, 129 L.R.R.M. (BNA) at 2804.

202. *Id.*

203. *See id.*, 129 L.R.R.M. (BNA) at 2804 n.1 (citing R. GORMAN, LABOR LAW 112 (1976)): "'[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Union and that he ought not to be counted toward a union majority.'"

204. *Id.* at 367, 129 L.R.R.M. (BNA) at 2804.

205. Judge Williams observed: "[T]he statutory definition of employee ... includes 'any individual whose work has ceased as a consequence of or in connection with, any current labor dispute.'" *Id.* at 368, 129 L.R.R.M. (BNA) at 2805 (Williams, J., dissenting) (citation omitted).

206. Judge Williams observed: "A great degree of deference is owed to the Board's policy choices, even when 'the Board might have struck a different balance from the one that it has.'" *Id.* (citing Charles D. Bonanno Linen Serv. v. NLRB, 454 U.S. 404, 109 L.R.R.M. (BNA) 2257 (1982)). He continued: "[T]he Board is entitled to change its views, and the same deference must be shown to any new policy. *Id.* (citing NLRB v. Ironworkers Local 103, 434 U.S. 335, 97 L.R.R.M. (BNA) 2333 (1978)).

207. *See id.* at 371, 129 L.R.R.M. (BNA) at 2808 n.4: "I expect that Professor Gorman would be among the first to disavow that policy under the National Labor Relations Act is to be made by single-author textbook or even by the courts rather than the NLRB itself."

208. 110 S. Ct. 1542, 133 L.R.R.M. (BNA) 3049 (1990).

209. The Court concluded that it "has accorded Board rules considerable deference.... We will uphold a Board rule as long as it is rational and consistent with the Act, even if we

striker replacements: "Although replacements often may not favor the incumbent union, the Board reasonably concluded, in light of its long experience in addressing these issues, that replacements may in some circumstances desire union representation despite their willingness to cross the picket line."[210] The Court assumed, without citing evidence to support its reasoning, that "[e]conomic concerns ... may force a replacement employee to work for a struck employer even though he otherwise supports the union."[211] It also noted that "a replacement, like a nonstriker or a strike crossover, may disagree with the purpose or strategy of the particular strike ... while still wanting that union's representation at the bargaining table."[212] The Court was persuaded that the no-presumption rule also accorded with the Act's policy of fostering collective bargaining by continuing the bargaining relationship between employer and union, regardless of the composition of the work force.[213]

VI. TESTING THE NLRB'S PUBLIC POLICY PRESUMPTIONS: RESEARCH METHODOLOGY

Employer efforts to induce crossovers to return to work can cripple a union's strike.[214] Nevertheless, the Board has made presumptions about crossover support for or opposition to union representation without empirical support.[215] In making such sweeping presumptions, the Board has overlooked research on workers' attitudes that indicates that desire for union

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would have formulated a different rule had we sat on the Board." *Id.* at 1549, 133 L.R.R.M. (BNA) at 3053 (citations omitted).

210. *Id.* at 1550, 133 L.R.R.M. (BNA) at 3054. The reference to the Board's long experience in these matters overlooks the paradox of the Board having first adopted an anti-union presumption, then a pro-union presumption, and finally a neutral presumption. The Board has made every possible presumption and has contradicted prior presumptions, thus its newest policy is more likely attributable to the changing subjective values of the Board's membership and not its "long experience", as Justice Marshall states.

211. *Id.*

212. *Id.*

213. The Court concluded that "[r]estricting an employer's ability to use a strike as a means of terminating the bargaining relationship serves the policies of promoting industrial stability and negotiated settlements." *Id.* at 1553, 133 L.R.R.M. (BNA) at 3056.

214. Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 WIS. L. REV. 1, 137 n.392, observing "[t]here is also the problem of defection during the course of a long strike. For most workers, there is a breaking point after which one more day without pay appears intolerable." This problem is likely to be exacerbated by the recent *TWA* ruling. *See TWA*, 489 U.S. 426, 130 L.R.R.M. (BNA) 2657. *See also* Schmidt, *Introducing a New Economic Weapon into the Labor Law Arena*, 38 KAN. L. REV. 1061, 1083 (1989), noting "it is clear that the crossover policy can be a powerful weapon in the employer's arsenal of self-help weapons, one that could alter the balance of power between the employer and the union."

215. The Board's present no-presumption policy might be better labeled the status-quo presumption because the Board will presume that workers desire continuing union representation unless evidence to the contrary is presented. The Board's *Buckley Broadcasting* decision prompted Charles Fried to comment that "government bureaucracies administering the labor laws view their institutional mandate as requiring not neutrality but a discernible bias in favor of unionization.... What else can explain the presumption — that can only be described as fatuous ... — that strikebreakers will support the union ... they came in to break ... ?" Fried, *Forward*, 13 HARV. J.L. & PUB. POL'Y 435, 437 (1990).

representation depends on the worker's job characteristics,[216] pay adequacy,[217] degree of job-hazard,[218] work autonomy,[219] and a variety of demographic characteristics.[220] The Board has overlooked research indicating that satisfaction with union representation is a complex phenomenon, including not only the union's success on "bread and butter issues" such as wage and benefits bargaining,[221] but the worker's length of employment.[222] In addition, the Board has overlooked research relating strike activity to the stake workers have in their jobs,[223] collective bargaining objectives,[224] worker attitudes (and militancy in particular),[225] demographic characteristics,[226] economics,[227] particular social and political settings,[228] and psychological costs of striking.[229]

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216. *See* Hills, *The Attitudes of Union and Nonunion Male Workers Toward Union Representation*, 38 INDUS. & LAB. REL. REV. 179, 192 (1985), finding that support for unionization among nonunion male workers is 25 to 28% higher in the public sector than in manufacturing.

217. *See* Kochan, *How American Workers View Labor Unions*, 102 MONTHLY LAB. REV. 23, 28 (Apr. 1979), concluding that "[p]ro-union white-collar workers were ... more concerned with pay inequities and fringe benefits problems than with the absolute levels of their wages." *See also* Hills, *supra* note 216, at 190-91.

218. *See* Robinson, *Workplace Hazards and Workers' Desires for Union Representation*, 9 J. LAB. RES. 237 (1988), finding that workers exposed to hazardous work conditions favor unionization; Duncan & Stafford, *Do Union Members Receive Compensating Wage Differentials?*, 70 AM. ECON. REV. 355 (1980); and Hirsch & Berger, *Union Membership Determination and Industry Characteristics*, 50 S. ECON. J. 665 (1984), concluding that hazardous and unpleasant jobs are more likely to be unionized than those with more desirable working conditions.

219. *See* V. JENSEN, HERITAGE OF CONFLICT: LABOR RELATIONS IN THE NON-METAL FERROUS INDUSTRY UP TO 1930 (1950), concluding that technology leading to reduced job-autonomy led to greater unionization; and Hills, *supra* note 216, at 191.

220. *See* Martin, *Employee Characteristics and Representation Election Outcomes*, 38 INDUS. & LAB. REL. REV. 365 (1985), concluding that gender race, age and seniority can be used to predict for which union workers will vote. *See also* Hills, *supra* note 216, at 192, finding that among nonunion male workers, blacks are 19% more likely than whites to favor union representation. *But see* Kochan, *supra* note 217, at 27, concluding that "there were no specific [demographic] subgroups, with the exception of nonwhite workers, that appeared to be willing to join unions as a matter of course."

221. *See* Fiorito, Gallagher & Fukami, *Satisfaction with Union Representation*, 41 INDUS. & LAB. REL. REV. 294 (1988), finding that worker satisfaction with union representation depends on the unions success with "bread and butter issues" such as wages and benefits.

222. *See id.* at 304, finding that length of employment is inversely related to worker satisfaction with their union representation.

223. *See* Snarr, *Strikers and Nonstrikers: A Social Comparison*, 14 INDUS. REL. 371 (1975), finding that strikers were significantly more likely than strike crossovers to be male and married and to have non-working spouses and higher incomes, and concluding that willingness to strike was associated with a high stake in one's job.

224. *See* Martin, *Predictors of Individual Propensity to Strike*, 39 INDUS. & LAB. REL. REV. 214 (1986), and Schutt, *Models of Militancy: Support for Strikes and Work Actions Among Public Employees*, 35 INDUS. & LAB. REL. REV. 406 (1982), finding that the propensity to strike is related to particular strike goals. Martin observed that "the decision whether to support a strike appears to rest on a complex interaction of several factors: a desire to support the union, an interest in maintaining certain pay differentials, and consideration of the cost to the household of losing the worker's pay check.... [A]n employee would take ... costs into consideration, and that the higher the personal strike costs, the less strike support there would be." Martin, *supra*, at 218.

225. *See* Cole, *Teachers' Strike: A Study of the Conversion of Predisposition into Action*, 74 AM. J. SOC. 506 (1969); Fox & Wince, *The Structure and Determinants of*

In this study, union workers were surveyed about their attitudes concerning their support for union representation, their willingness to engage in an economic strike, their willingness to walk and honor picket lines, and their financial ability to endure a strike.[230] It is important to note that this study does not survey potential replacement workers; it surveys only working union members, all of whom are potential crossovers (in theory). These questions were aimed at determining factors that are related to union worker propensity to their own union's picket line (i.e., to become strike crossovers).[231]

All the respondents were employed and members of unions when they completed the survey. The survey was administered between October and December 1990. 565 respondents completed all or part of the survey.

Occupational Militancy Among Public School Teachers, 30 INDUS. & LAB. REL. REV. 47 (1976); and Schutt, *supra* note 224.

226. *See* Schutt, *supra* note 224, at 419, finding that "[b]lack members are much more likely to support a strike than whites, and strike support varies inversely with age."

227. *See* Kaufman, *The Determinants of Strikes in the United States, 1900-1977*, 35 INDUS. & LAB. REL. REV. 473 (1982), and Shalev, *Trade Unionism and Economic Analysis: The Case of Industrial Conflict*, 1 J. LAB. RES. 133 (1980), finding that the incidence of strikes rises during wage inflation. *See also* Ashenfelter & Johnson, *Bargaining Theory, Trade Unions, and Industrial Strike Activity*, 59 AM. ECON. REV. 35 (1969), and Skeels, *The Economic and Organizational Basis of Early United States Strikes, 1900-1948*, 35 INDUS. & LAB. REL. REV. 491 (1982), finding that strikes occur more often in times of low unemployment. *But see* strike data for 1985-1989, a period of low unemployment, *supra* note 7.

228. *See* Snyder, *Institutional Setting and Industrial Conflict: Comparative Analyses of France, Italy and the United States*, 40 AM. SOC. REV. 259 (1975), and Stern, *Intermetropolitan Patterns of Strike Frequency*, 29 INDUS. & LAB. REL. REV. 218 (1976), concluding that degree of favorableness of community toward unions is related to strikes; and T. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS (1980), suggesting that political factors are especially important in public sector strikes.

229. *See* R. WALTON & R. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS 32-33 (1965).

230. Union workers were asked to respond to the statement: "I'm glad to have the union as a bargaining representative." They were also asked to respond to four questions: (1) Suppose your union authorized a strike to improve economic terms in the collective bargaining agreement. Would you join the strike?; (2) If your union were to strike for improved economic terms in the collective bargaining agreement, would you join the picket line?; (3) If your union were to strike to improve economic terms in the collective bargaining agreement, would you look for another job?; (4) If your union were to strike to improve economic terms in the collective bargaining agreement, would you cross a picket line to return to work? The range of responses for the foregoing questions was (1) definitely not, (2) probably not, (3) unsure, (4) probably yes, and (5) definitely yes. In addition, respondents were asked how long they would be willing to go without work, whether they hold or have held union office, whether they are the primary income producer in their household, their years of union membership, seniority, job classification, hourly wage, age and sex.

231. The methodology of this study is similar to one employed by the U.S. Government Accounting Office in attempting to measure the frequency that striker replacements have been used. The problem in studying worker replacement phenomena was stated in a GAO report: "In extensive discussions with representatives of the Bureau of Labor Statistics, The National Labor Relations Board, FMCS, several unions, and members of academia, we discovered that no comprehensive data are available on the use of permanent replacements for striking workers." Trends in the Number of Strikes and Use of Permanent Strike Replacements in the 1980s, at 3 (June 6, 1990) (statement of Franklin Frazier) [hereinafter Frazier] (on file with the Institute of Labor and Industrial Relations, University of Illinois). The GAO interviewed 442 management and union individuals involved in strikes in 1985 and 1989 to develop attitudinal data about use of replacement workers.

Respondents were assured that their responses would be anonymous.[232] Respondents were comprised of members of the American Federation of Grainmillers, Utility Workers of America, Retail and Wholesale Workers, and Hotel Employees and Restaurant Employees. They were carefully selected to reflect diverse work experiences, and were drawn from plants that manufacture Gatorade, granola bars, cereal, and pet food; from motels, hotels, restaurants, and cafeterias in plants that make large earth-moving equipment; and from nuclear and coal fuel power plants. Their jobs included pallet loaders, syrup line operators, mechanics and electricians, millwrights, maids, waitresses, cooks, food-servers, janitors, meter readers and nuclear plant operators. Respondents were drawn from a wide geographic area.[233]

VII. RESULTS

Table 1[234] summarizes the respondents' demographic characteristics. Respondents' median hourly wage was $12.86. Their median seniority was 15 years. Their median age was 40. 67.5% of the respondents were male. Table 1 also summarizes attitudinal characteristics of union worker respondents. The respondents were first asked to respond to the statement, "I'm glad to have the union as a bargaining representative." 77.0% expressed definite agreement with this statement; 16.0% expressed probable agreement; 5.0% were unsure; and 2.0% expressed probable or definite disagreement.

Respondents were then asked several questions based upon a hypothetical scenario in which their union would be striking over economic terms.[235] One question asked: "If your union were to strike to improve economic terms in the collective bargaining agreement, would you cross a picket line to return to work?" A large majority (77.2%) stated they definitely would not; 15.3% stated they probably would not. The significance of the latter group is that they expressed a measure of uncertainty about their determination to resist crossing the picket line. In addition, 5.3% of respondents stated they were unsure whether they would cross the picket line. It is fruitless to speculate how many of the respondents of these two groups would actually cross a picket line. It is clear, however, that these two groups appear more vulnerable than the majority group to employer strategies to replace them or induce them to work. Thus, if the survey sample comprised a workplace, 116

232. The survey printed the following statement on its cover page to allay respondents' fear that the survey was either a management or union instrument: "The purpose of this survey is to understand union workers' attitudes about strikes. Your answers will be combined with answers by union workers throughout the country. Your answers will have no bearing on your work situation.... Do not put your name on the survey." Also, the survey printed this author's name and phone number to answer respondent concerns. In fact, several respondents called to verify the independence of the survey.

233. *See supra* note 40.

234. *See* appendix, *infra*.

235. A strike that is caused or prolonged by an employer's unfair labor practices is called an unfair labor practice, whereas a strike unaffected by an employer's unfair labor practices is called an economic strike. Generally, economic strikers may be permanently replaced, but unfair labor practice strikers must be reinstated once they unconditionally offer to return to work (even at the expense of discharging replacement workers). *See* THE DEVELOPING LABOR LAW 1006-15 (C. Morris ed. 1983).

respondents (20.6% of 565) would start off with an equivocal attitude about resisting the economic temptation to cross the picket line.

In addition to the 20.6% of respondents who expressed some openness to crossing a picket line, an additional, small percentage (2.2%) of respondents stated they would probably or definitely cross the picket line. This small percentage demonstrates the great extent to which union workers are inclined to respect their own picket lines, and is consistent with anecdotal strike data. Even though their numbers are small, 12 workers in this sample of 565 were moderately to strongly predisposed to cross the picket line.

One must be careful not to extrapolate beyond these limited data. First, the data indicate that union workers are not uniformly committed to respecting their own picket lines. Second, the data indicate that a small but non-trivial percentage of union workers harbor varying degrees of doubt about respecting their own picket line. Presumably, these workers would pose the greatest problem for the union's strike discipline and would serve as a target for employer strikebreaking strategies. Third, these data must be placed in context. In the context of employer withdrawal of recognition when the anti-union presumption has been employed, the issue has rarely been whether fifty percent of the union workforce crossed the picket line. The issue has tended to be whether the sum total of replacement workers *and* union crossovers exceeds fifty percent of the bargaining unit. Thus, even when a relatively small percentage of union workers decides to crossover, if their number pushes the total over the fifty percent threshold, then the employer would be permitted to withdraw recognition from the union indefinitely. In sum, a small number of crossovers can play a pivotal role.[236] This is irrespective of the demoralizing and polarizing effect that occurs when even small numbers of workers break ranks with their union brethren.[237]

Tables 2-4[238] summarize data about the respondents attitudes concerning a hypothetical economic strike. The data in these tables show relationships between the respondents' willingness to cross their unions' picket line and the respondents' (1) wage level, (2) seniority, (3) support for union

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236. Even small numbers of crossovers severely test strike solidarity; *see infra* note 237. The debilitating effect of crossovers is illustrated by the conduct in *TWA*, 489 U.S. 426, 130 L.R.R.M. (BNA) 2657.

237. A lengthy strike manual published by the Teamsters emphasizes the necessity of maintaining group cohesion during a strike:

> It is essential that the union continually provide activities which keep strikers in the mainstream of the group activities, and therefore, in the mainstream of group sentiment. The object is to create an atmosphere where the individual who might be thinking of returning to work, feels it would be a terrible thing to do. The disapproval of the group can only affect the worker if the group really means something to him.

UNION STRIKE MANUAL, *supra* note 21, at 34. The manual continues: "Nothing destroys the morale of those on strike more than the sight of persons crossing the lines who are going to their job." *Id.* at 35. Another strike preparation manual urges local unions on strike to make "[s]pecial efforts ... to bring inactive strikers to regular strike meetings.... All inactive strikers should be contacted before the meeting to make sure they are coming. If necessary, they should be picked up and brought to the meeting." UNITED ELECTRICAL, RADIO, AND MACHINE WORKERS OF AMERICA, PREPARING FOR AND CONDUCTING A STRIKE: A UE GUIDE 10 (1989).

238. See appendix, *infra*.

representation, (4) status as a union officer, (5) years as a union member, (6) willingness to forego employment during a strike, and (7) willingness to find alternate employment.[239]

Table 2 presents data showing a statistically significant relationship between the respondents' wage level and their willingness to cross a picket line to return to work. This conclusion can be easily grasped by comparing the row percentages for high-wage and low-wage respondents. A high percentage of respondents making between $4.80 and $13.50 (73.8%) answered that they would definitely not cross a picket line to return to work. However, a significantly higher percentage of respondents making an hourly wage between $13.51 and $22.00 (85.7% of this group) answered that they definitely would not cross a picket line to return to work. Among low-wage respondents, a very small percentage (1.6%) answered that they would definitely cross a picket line to return to work, but a much smaller percentage (0.6%) of the high-wage group answered that they would cross a picket line to return to work. Thus, even though most of the respondents in both the high and low wage groups stated they definitely would not cross a picket line to return to work, the two groups showed significant differences. Put in plain terms, high wage earners were more likely than low wage earners to state they would not cross a picket line to return to work: thus, a respondent's wage level and her propensity to be a strike crossover were related.[240]

Table 2 shows a statistically significant relationship between the respondents' seniority level and their willingness to cross a picket line to return to work.[241] This conclusion can be easily grasped by comparing the row percentages for high-seniority respondents (those with ten or more years seniority) and low-seniority respondents (those with less than ten years seniority). Many low-seniority respondents (68.8%) answered that they would definitely not cross a picket line to return to work. But a significantly higher percentage of high-seniority respondents (81.0% of this group) answered that they definitely would not cross a picket line to return to work. A much higher percentage (21.8%) of the low-seniority group stated they probably would not cross the picket line, compared to 12.4% of the high-seniority group.

In sum, a significantly greater proportion of high-seniority respondents were concentrated in the "definitely would not cross the picket line" group as compared to low-seniority respondents. The latter group had a significantly greater percentage of respondents in the group expressing some degree of

239. A statistical technique of crosstabulating joint frequency distributions was used. For example, in Table 2 the respondents as grouped by wage level (high or low) were tabulated against their responses concerning their willingness to cross a picket line to return to work. The joint frequency distributions were analyzed by a test of statistical significance. The resulting chi-square statistic tells whether a relationship exists between the respondents' wage level and their willingness to cross a picket line to return to work. Chi-square statistic increases thus signify an increasing probability that two variables are related. *See* N. NIE, C. HULL, J. JENKINS, K. STEINBRENNER & D. BENT, SPSS: STATISTICAL PACKAGE FOR THE SOCIAL SCIENCES 218-30 (1975).

240. The chi-square statistic of 9.80 with 4 degrees of freedom means that there is a 4 in 100 chance that a relationship between a respondent's wage level and willingness to cross a picket line to return to work has been erroneously inferred.

241. The chi-square statistic of 14.19 with 4 degrees of freedom mean that there is a 7 in 1,000 chance that a relationship has been erroneously inferred.

doubt about not crossing a picket line. The respondents' seniority, therefore, was related to their willingness to cross a picket line to return to work.[242]

Table 2 shows a statistically significant relationship between respondents' support for union representation[243] and their willingness to cross a picket line to return to work. Only 50.0% of respondents expressing low union support also stated they definitely would not cross a picket line. By comparison, 79.2% of respondents expressing high union support stated they definitely would not cross a picket line to return to work. In the low-support group 10.5% stated they were unsure whether they would cross a picket line; in contrast, only 5.0% of the high-support group stated they were unsure. These data show that a respondent's general support for union representation is related to his propensity to cross a picket line to return to work.[244]

Table 2 also shows that union officers are less likely to cross a union picket line to return to work than rank and file respondents. 71.0% of non-officers stated they definitely would not cross their picket line to return to work; but a much greater proportion, 89.7%, responded the same way among union officers. 20.2% of non-officers stated they probably would not cross their union's picket line to return to work, yet only 5.4% of the officer group responded the same way.[245]

In addition, Table 2 shows that respondents with greater years as a union member are less likely to cross a union picket line to return to work than union members with fewer years membership. 64.1% of the union members with five or fewer years as a member stated they definitely would not cross their picket line to return to work, but a much greater proportion, 80.5%, answered the same way among respondents with six or more years of membership.[246]

Table 2 also shows that males are less likely to cross their union's picket line to return to work than females. 69.3% of females answered they definitely would not cross their union's picket line to return to work, while 80.9% of males answered the same way. However, the data do not make clear why females are more disposed to cross their union's picket line than males. Because most females have less seniority compared to males, due to their more recent entry into the labor market in large numbers, the data may reflect nothing more than the seniority relationship previously discussed. Or the data may reflect that females are under-represented among union leaders, and therefore have undergone a less complete union-socialization process than

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242. An analysis was performed to determine whether the respondents' age are related to propensity to cross one's picket line. No significant relationship was found.

243. Respondents were asked to respond to the statement, "I'm glad to have the union as a bargaining representative." For this analysis, a high-union supporter was a respondent who agreed or strongly agreed with the above statement. Respondents who were unsure or who disagreed or strongly disagreed with the above statement were grouped as low-union supporters.

244. The large chi-square statistic, 20.94 with 4 degrees of freedom, means there is about a 3 in 1,000 chance that a relationship between general support for union representation and willingness to cross a picket line has been erroneously inferred based on this data.

245. The chi-square statistic of 27.16 with 4 degrees of freedom means that there is a 1 in 1,000 chance that a relationship has been erroneously inferred.

246. The chi-square statistic of 20.56 with 4 degrees of freedom means that there is a 4 in 1,000 chance that a relationship has been erroneously inferred.

males. The data as analyzed here offer no sense of why males and females have significantly different attitudes about respecting their union's picket line during a strike.[247]

Table 3[248] presents data showing a statistically significant relationship between respondents' willingness to forego work during a strike (expressed in number of weeks) and their willingness to cross a picket line to return to work. Compare the rows for respondents willing to forego work 0-4 weeks during a strike and respondents willing to forego work 35 or more weeks. There is a dramatic difference in the distribution of these workers along the strike-crossover continuum. 94.3% of respondents willing to forego work 35 or more weeks stated they definitely would not cross a picket line to return to work. In contrast, only 54.5% of respondents willing to forego 0-4 weeks stated they definitely would not cross a picket line to return to work. 15.2% of this group stated they were unsure whether they would cross a picket line to return to work, while only one respondent in the group willing to forego work 35 or more weeks (0.5%) stated she was unsure. In the intermediate categories for respondents willing to forego work during a strike, 67.2% of the 5-8 week group stated they definitely would not cross a picket line. This percentage increased with the weeks respondents were willing to forego work. 74.6% of the 9-16 week group stated they would definitely not cross a picket line to return to work; 81.6% of the 17-34 weeks group gave the same response.[249] In sum, as respondents were more willing to forego work during a strike, they expressed greater resolve to respect their picket line.

Table 4[250] presents data showing a statistically significant relationship between respondents' willingness to find alternate employment during a strike and their willingness to cross a picket line to return to work. Compare the rows for respondents stating they definitely would *not* seek a new job and those who stated they definitely would seek a new job. There is a great difference in the distribution of these workers along the crossing-picket-line continuum. 92.6% of respondents of the *non*-job seekers also stated they definitely would *not* cross a picket line to return to work. By comparison, only 69.7% of *job-seeker* respondents also stated they definitely would *not* cross a picket line to return to work. 12.1% of the *job-seekers* stated they were unsure whether they would cross a picket line to return to work, and 3.0% of this group stated they definitely would cross a picket line. Yet, among the *non*-job seekers, only 0.8% stated they were unsure about crossing a picket line to return to work, and only 1.6% stated they probably or definitely would cross a picket line to return to work. Thus, as respondents expressed more certainty that they would seek a job during a strike, they expressed more uncertainty about respecting their union's picket line. The data strongly sug-

247. The chi-square statistic of 10.95 with 4 degrees of freedom means that there is a 3 in 1,000 chance that a relationship has been erroneously inferred.

248. See appendix, *infra*.

249. The large chi-square statistic, 97.57 with 12 degrees of freedom, means there is less than a one in 1,000 chance that a relationship between willingness to forego work, and willingness to cross a picket line has been erroneously inferred.

250. See appendix, *infra*.

gest that job-seekers during a strike would be more likely to weigh the option of returning to their job along with seeking new employment.[251]

VIII. PUBLIC POLICY IMPLICATIONS

The data in Tables 2-4 provide strong support for the Board's no-presumption policy. Support for the union as a bargaining representative depends on the several factors identified above, and perhaps many more not measured by this survey. These data illustrate the folly in making any blanket presumption about worker support for unions during a strike, absent specific information about the union sentiments of individuals involved in a strike setting.

The relationship between low support for union representation and increased propensity of a union worker to cross a picket line provides partial support for the anti-union presumption: clearly, a greater proportion of the respondents indicating a willingness to crossover came from the low-union support group. But the data also show that a large proportion of low-union support respondents stated they definitely would not cross their union picket line. Even more revealing, a small but clearly measurable percentage of respondents expressing high support for union representation nevertheless would crossover. The data in Table 2 do not explain why this is so. The vital point, however, is that it is empirically incorrect to assume that no crossovers would express high support for union representation (as the anti-union presumption assumes). It is also empirically incorrect to assume, as the pro-union presumption does, that crossovers support the union in the same proportion as continuing strikers. The data show that a respondent's initial attitude concerning support for union representation, particularly if it is low, is related to her propensity to cross the union's picket line.

The data in Tables 2-4 also take up where the Board's hypothetical reasoning in *Buckley Broadcasting* left off.[252] The positive relationship between a propensity to cross the picket line and (1) a propensity to seek alternate employment and (2) a propensity to return to work soon after the strike begins is indirect, but very suggestive evidence, that crossovers are economically motivated, as the pro-union presumption assumes. The relationship observed between respondents' seniority and propensity to crossover suggests a dynamic that neither the pro-union nor anti-union presumption explicitly considered: perhaps as respondents were acculturated to union norms, their increased exposure to union solidarity and fraternity may have resulted in an increased level of respect for the union picket line. The fact that no relationship was observed between age and propensity seems to indicate that a union worker socialization process was captured in this analysis.

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251. The large chi-square statistic, 33.57 with 16 degrees of freedom, means there is a 6 in 1,000 chance that a relationship between willingness to seek alternate employment during a strike, and willingness to cross a picket line has been erroneously inferred.

252. In *Buckley Broadcasting*, the Board pronounced that "[j]ust as there is no articulated basis in reason or policy for a presumption that strike replacements support the union in the same ratio as the striking employees they replace, so too is there no evidentiary or empirical basis for such a presumption." 284 N.L.R.B. at 1344, 125 L.R.R.M. (BNA) at 1286. "On the other hand, we find the contrary presumption equally unsupportable. Thus, the hiring of per-

The utility of a no-presumption policy is that it frees the Board to adjudicate strike-representation disputes without pre-determining a finding.[253] Adjudication is far preferable to any presumptive policy. First, neither the pro-union nor anti-union presumption corresponds to workers' heterogeneous attitudes concerning union representation. Second, the issue of union representation is too fundamental[254] to be left to a legal presumption that so obviously reflects pro-union or pro-management values of transient Board majorities.[255] It is silly to expect the Board to operate as a politically sterile agency, given the appointment process for Board members.[256] However, the agency is endowed primarily with adjudicatory powers;[257] to let legal presumptions prevail is to undermine the adjudicatory function of the Board.[258] Third, the

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manent replacements who cross a picket line, in itself, does not support an inference that the replacements repudiate the union as collective-bargaining representative." *Id.*

253. The Board possesses fully developed adjudicatory powers. Powers of the Board are enumerated in general terms in the National Labor Relations Act at 29 U.S.C. § 160(a) (1988). The Board's complaint process, notice of hearing requirements, statute of limitations, requirements for the respondent's answer, and applicability of court rules of evidence appear at 29 U.S.C. § 160(b) (1988). The requirement that Board testimony be reduced to writing, and requirements for Board findings and orders appear at 29 U.S.C. § 160(c) (1988).

254. The Act's findings and policies state "[t]he denial by some employers of the right of employees to organize ... lead[s] to strikes and other forms of industrial strife or unrest, which have ... the necessary effect of burdening or obstructing commerce." 29 U.S.C. § 151 (1988). The Act continues: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption ... by encouraging practices fundamental to the friendly adjustment of industrial disputes." *Id.*

255. The Board's adoption of all theoretically possible presumptions in less than 30 years is evidence of shifting political values. The very inconsistency of Board presumptions was sufficient in Justice Blackmun's mind to overturn the Board's present no presumption policy:

> To invalidate the Board's order in the present case, it is not necessary to assert that the decision is based upon an implausible assessment of industrial reality. Rather, it is enough to say that the Board in this case has departed, without explanation, from principles announced and reaffirmed in its prior decisions. The agency has made no effort to explain the apparent inconsistency between the decision here and its analyses in *Service Electric* and *Leveld Wholesale*, and its order is invalid on that basis alone.

Curtin Matheson III, 110 S. Ct. at 1555-56, 133 L.R.R.M. (BNA) at 3058 (Blackmun, J., dissenting).

256. The Act provides that "the Board shall consist of five ... members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153 (1988).

257. Board adjudications must conform to the requirements of the Administrative Procedure Act (APA). 5 U.S.C. §§ 556, 557 (1988). *See also* 5 U.S.C. § 554(a) (1988). In his dissent in *Curtin Matheson III*, Justice Scalia noted that Board adjudication "is even somewhat more judicialized than ordinary formal adjudication" because it combines the adjudication attributes of both the NLRA and the APA. 110 S. Ct. at 1558 (Scalia, J., dissenting). Scalia noted that the NLRA puts Board adjudications on a plane with general civil litigation by requiring proceedings to "be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States." *Id.* (quoting 29 U.S.C. § 160(b) (1982 ed.)). Yet in Board decisions appealed to federal courts, Scalia noted that the APA provides the standard of review, requiring courts to "hold unlawful and set aside agency action, findings, and conclusions found to be ... unsupported by substantial evidence." *Id.* (quoting 5 U.S.C. § 706(2)(E) (1982 ed.)).

258. Even exercising its adjudicatory powers, the Board has long been criticized for mixing politics and case disposition. *See, e.g.*, H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 66 (1950), remarking on criticism "that the Board being its own 'prosecutor, judge, and jury', had prejudged cases before they came up for decision and could

no-presumption policy holds reviewing courts to their duty to ensure that Board rulings are based on substantial evidence,[259] and thus reduces the policy-making functions that courts have too freely exercised in strike-representation disputes.[260]

Nevertheless, the no-presumption policy is flawed in some respects. Justice Blackmun's *Curtin Matheson* dissent faulted the Board's great inconsistency in flip-flopping a presumption so fundamental as whether workers continue to be represented by unions during a strike.[261] Justice Scalia's dissent decried the Board's lack of a deliberative rule-making process in arriving at this policy.[262] Also, the policy raises a thorny new issue: if employers are to prove that replacements and crossovers oppose continuing union representation, how can they make their proof without polling their crossovers and replacement workers? One problem is that the Board has rejected employer arguments that the union lost majority support by providing indirect rather than polling evidence.[263] The employers' problem is confounded by the fact that

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not therefore make a fair decision." Former NLRB chairman Edward Miller noted that administrative law judges assigned to the Board "maintain good relationships with a number of senators and representatives on the Hill." E. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB 55 (University of Pennsylvania (The Wharton School), Labor Relations and Public Policy Series No. 16, 1980). However, it may be unrealistic to expect any adjudicatory institution administering the Act to be free from political value judgments. *See* A. COX, D. BOK & R. GORMAN, *supra* note 3, at 110, remarking that even federal judges are guided in their review of Board decisions only by principles "of a very general nature leaving much to [their] discretion."

259. A reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be ... unsupported by substantial evidence." 5 U.S.C. § 706(2)(E). *But see* Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 489, 89 L.R.R.M. (BNA) 2879 (2d Cir. 1975); Orion Corp. v. NLRB, 515 F.2d 81, 85, 89 L.R.R.M. (BNA) 2135 (7th Cir. 1975); NLRB v. Frick Co., 423 F.2d 1327, 1330-31, 73 L.R.R.M. (BNA) 2889 (3d Cir. 1970); Gulf Mach. Co., 175 NLRB 410, 413, 71 L.R.R.M. (BNA) 1107 (1969), using a clear and convincing evidence standard when employers alleged loss of majority support for a union.

260. The best discussion of this occurs in *Curtin Matheson*, 859 F.2d 362, 368 (Williams, J., dissenting). *See supra* notes 205-07.

261. In dissent, Justice Blackmun noted:

> Rarely will a court feel so certain of the wrongness of an agency's empirical judgment that it will be justified in substituting its own view of the facts. But courts can and should review agency decisionmaking closely to ensure that an agency has adequately explained the bases for its conclusions, that the various components of its policy form an internally consistent whole, and that any apparent contradictions are acknowledged and addressed. This emphasis upon the decisionmaking *process* allows the reviewing court to exercise meaningful control over unelected officials without second-guessing the sort of expert judgments that a court may be ill-equipped to make.

Curtin Matheson III, 110 S. Ct. at 1556, 133 L.R.R.M. (BNA) at 3059 (Blackmun, J., dissenting) (emphasis in original).

262. Justice Scalia observed: "Despite the fact that the NLRB has explicit rulemaking authority, ... it has chosen — unlike any other major agency of the federal government — to make almost all its policy through adjudication." *Curtin Matheson III*, 110 S. Ct. at 1566 (Scalia, J., dissenting) (citation omitted). He continued that the Board "is not entitled to disguise policymaking as factfinding, and thereby to escape the legal and political limitations to which policymaking is subject." *Id.*

263. *See, e.g.*, Burns Int'l Sec. Servs., 225 N.L.R.B. 271, 92 L.R.R.M. (BNA) 1439 (1976), *enforcement denied*, 567 F.2d 945, 97 L.R.R.M. (BNA) 2350 (10th Cir. 1977), in which the Board ruled that the employer's evidence, consisting of its poll of 300 unit employees, was an insufficient basis to permit the employer to withdraw recognition. *See also* Mingtree Restaurant, 265 N.L.R.B. 409, 111 L.R.R.M. (BNA) 1630 (1982) (employer could not with-

one line of Board decisions has held that any polling of workers' union sentiments is inherently coercive and therefore an unfair labor practice, and although the Board now permits polling under limited circumstances, there is no bright-line rule to guide employers wishing to poll to determine the extent of union support.[264] Immediately following the Court's *Curtin Matheson* ruling, employers announced their intention to litigate this issue.[265] Notwithstanding the favorable aspects of the present policy, it places employers in an uncertain legal position to prove through polling that a union has lost majority support during a strike.[266]

A more general criticism notes the paradox that replacement workers still have enormous powers to displace a striking union:

> [T]he conflict of interest between strikers and replacements is palpable. It is an odd doctrine that holds the replacements to be in the bargaining unit, that counts their ballots in any drive to decertify the union, that takes their expressions (or petitions) contrary to the union as objective evidence of lack of union support so to justify the employer's withdrawal of recognition, and that takes the lack of expression by the union of support *from* the replacements—or a lack of effort to 'organize' those it presumptively represents—as evidence to that effect, but that precludes the union from any opportunity to invoke its representative

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draw recognition based on affidavits submitted by managers reflecting the purported antiunion sentiments of bargaining unit members).

264. The Board originally held that any employer interrogation of worker union sentiments is per se illegal in Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358, 24 L.R.R.M. (BNA) 1575 (1949). But in Blue Flash Express, Inc., 109 N.L.R.B. 591, 34 L.R.R.M. (BNA) 1384 (1954), the Board permitted employer polling if the employer's sole purpose was to ascertain the union's majority status; if the employer informed workers of the purpose of the poll; if the employer assured workers that there would be no reprisal for answering the poll; and if the polling occurred in a atmosphere free of employer hostility toward the union. But the Board had difficulty in enforcing its *Blue Flash* doctrine. *See* Bourne v. NLRB, 332 F.2d 47, 56 L.R.R.M. (BNA) 2241 (2d Cir. 1964), *enforcing as modified* 144 N.L.R.B. 805, 54 L.R.R.M. (BNA) 1158 (1963). Consequently, the Board adopted new guidelines in Struksnes Constr. Co., 165 N.L.R.B. 1062, 65 L.R.R.M. (BNA) 1385 (1967), which added the requirement that polling be conducted by secret ballot. More recently, the Board has found that an employer commits an unfair labor practice by withdrawing recognition based on a poll which does not conform to *Struksnes*. *See* Hohn Indus., Inc., 283 N.L.R.B. No. 13, 124 L.R.R.M. (BNA) 1352 (1987).

265. Mona Zeiburg, representing the United States Chamber of Commerce Litigation Center, stated that "employers' next recourse is to challenge the no-polling rule." Wermeil, *Supreme Court Upholds Policy Barring Tactic Used to Oust a Striking Union*, Wall St. J., Apr. 18, 1990, at A3, col. 2. *Compare infra* note 264.

266. That issue was raised by Chief Justice Rehnquist's concurring opinion in *Curtin Matheson*: "Although the Board's opinion in this case does not preclude a finding of good-faith doubt based on circumstantial evidence, some recent decisions suggest that it now requires an employer to show that individual employees have 'expressed desires' to repudiate the incumbent union in order to establish a reasonable doubt of the union's majority status." *Curtin Matheson III*, 110 S. Ct. at 1555, 133 L.R.R.M. (BNA) at 3057 (Rehnquist, C.J., concurring) (citations omitted). The problem, according to Chief Justice Rehnquist, is that "another of the Board's rules prevents the employer from polling its employees unless it first establishes a good-faith doubt of majority status. I have considerable doubt whether the Board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same

status—to protest an arbitrary discharge or to participate in an in-plant disciplinary interrogation—so as to establish some possibility of support from among the replacements.[267]

IX. CONCLUSIONS

Employer inducement of crossovers to abandon strikes and the hiring of replacements for strikers has occurred within a framework of national labor policy that marginalizes workers' collective bargaining rights.[268] The marginalization of workers' collective bargaining rights has dissipated worker organization[269] and collective action.[270] Recent Board rulings have weakened unions' institutional ability to put economic pressure on employers[271] and have

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time bar the employer from using what might be the only effective means of determining those sentiments. But that issue is not before us today." *Id.*

267. Finkin, *supra* note 8, at 573 (emphasis in original).

268. For a comprehensive analysis of national labor policy as reflected in United States constitutional law, see Gray, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1135 (1987), concluding:

> Since the abolition of slavery, workers and unions have claimed the constitutional rights to strike, boycott, and picket. During this time, the courts have protected rights associated with two systems: the free market economy and the system of representative government.
>
> [M]ost courts have viewed labor protest as too political to be protected as an economic right and too commercial to be protected as a political right. Instead of developing a constitutional doctrine of labor that squarely addresses the problems of labor liberty, the courts have allowed labor's rights to slip into a black hole between the political and commercial systems.

For an analysis that ascribes the entire policy of striker replacements to dictum in *Mackay Radio*, see Finkin, *supra* note 8, at 574, remarking: "What began as dictum has taken on a life of its own, ultimately to eclipse the statutory right it was intended to balance."

269. *See* the seminal work of Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989), arguing that the early American labor movement's failure to develop a class-based political movement was not due to workers' acceptance of free market values nor to their social and economic mobility, but rather to judicial interference with strikes and judicial activism in overturning protective labor legislation. "Ironically, the very intensity of judicial repression, combined with courts' broader institutional and ideological authority, made the language of the law beckon as a framework within which to contend for relief.... [L]abor relinquished a republican vocabulary of protest and reform for a liberal, law-inspired language of rights." *Id.* at 1235. Troy, however, argues that market forces rather than legal impediments have impacted American unionism. Troy argues that "[o]ne of these market forces is *employee* opposition to unionization and such opposition is generally ignored by the 'employer-opposition' school." Troy, *supra* note 13, at 586 (emphasis in original).

270. Rogers concluded that the National Labor Relations Act "limits the range of initial organization, imposes enormous costs on unions during the recognition process, applies an almost purely procedural requirement on bargaining, limits even this requirement to a sharply restricted range of subject matters, [and] restricts the use of economic weapons." Rogers, *supra* note 214, at 143.

271. *See, e.g.*, Hendrick Mfg. Co., 287 N.L.R.B. 310, 127 L.R.R.M. (BNA) 1097 (1987). The employer met over twenty times with the union before the union struck. The employer proposed reducing the scope of the grievance procedure and arbitration, withdrawing the union security clause, eliminating superseniority for union officers who policed the contract for violations, and restricting union officials' access to the workplace. As the employer worked through the strike, the union offered concessions to settle the strike. The company responded with regressive proposals that put settlement further out of reach. The Board reversed the ALJ's finding that the employer failed to bargain in good faith, and placed particular emphasis on the employer's willingness to meet and confer with the union and to explain its proposals. The Board's ruling elevates bargaining-proceduralism to a point that obscures inquiry into whether a

"protect[ed] employee and union rights in a strike setting to a lesser degree than the decisions of prior National Labor Relations Boards."[272] In fact, the collective bargaining rights of American workers have been and continue to be clearly inferior to those rights in other industrialized democracies.[273]

Recent Supreme Court rulings magnify the strategic significance of crossovers and replacement workers in breaking strikes.[274] As a consequence, employers have been more willing to use confrontational tactics such as hiring union-breaking consultants[275] and hiring replacement workers.[276] In recurring instances, employers have subverted the collective bargaining process to displace union workers with cheaper labor.[277] In an extreme case,

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party intended to negotiate to the point of settlement. *See also* Aqua Chem Inc., 288 N.L.R.B. 1108, 128 L.R.R.M. (BNA) 1237 (1988), in which the Board ruled that former strikers are entitled to reinstatement *only* if the Board's General Counsel establishes a prima facie case that a laid-off permanent replacement has departed without a reasonable expectation of recall.

272. Ray, *The Changing Face of Labor-Management Confrontation in the Late 1980s*, 30 B.C.L. REV. 99, 128 (1988). Ray concluded that as a result of recent NLRB rulings striking employees

> are increasingly vulnerable, through replacement, to ... the functional equivalent of discharge.... [I]f regressive post-strike bargaining, discharge of strikers, and maintaining employment of replacements even after layoff are not illegal, then striking employee disaffection or defection caused by these acts ... can help the employer to build a case ... for withdrawing recognition.

273. Finkin observed that "[t]he prohibition on permanent replacement, recognized so widely in countries as diverse as Canada, Germany, France, and Italy, says *something* about the conditions necessary to effectuate a system of collectively bargained labor relations. The right to strike is recognized universally as a component of collectively organized industrial relations systems." Finkin, *supra* note 8, at 570 (emphasis in original).

274. *See* Pattern Makers League v. NLRB, 473 U.S. 95, 119 L.R.R.M. (BNA) 2928 (1985). *See also* Casenote, *The Railway Labor Act Meets the Mackay Doctrine*, 23 CREIGHTON L. REV. 159, 189 (evaluating *TWA*, 489 U.S. 426), observing that "[b]ecause of the strength the Court gives to the employer's rights under the *Mackay* doctrine, and because of its narrow reading of *Erie Resistor*, the majority opinion in *TWA* is not a good sign for labor."

275. *See* Joyce, *Union Busters and Front-Line Supervisors: Restricting and Regulating the Use of Supervisory Employees by Management Consultants During Union Representation Election Campaigns*, 135 U. PA. L. REV. 453 (1987); Bernstein, *Union-Busting: From Benign Neglect to Malignant Growth*, 14 U. CAL. DAVIS L. REV. 1 (1980); Bethel, *Profiting From Unfair Labor Practices: A Proposal to Regulate Management Representatives*, 79 NW. U.L. REV. 506 (1984); BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS CONSULTANTS: ISSUES, TRENDS, AND CONTROVERSIES (1985).

276. In its report to Subcommittee on Labor, Senate Committee on Labor and Human Resources, the GAO concluded "[w]e estimate that employers announced they would hire permanent strike replacements in about one-fourth of the strikes reported to FMCS in 1985 and 1989: about 23% in 1985 and about 30% of the strikes in 1989." Frazier, *supra* note 231, at 5.

277. For example, one striker gave this account of negotiating with the International Paper mill in Jay, Maine:

> [T]he members of Locals 14 and 246 in Jay offered International Paper a one year extension of the current contract.... The company refused the offer.
> We offered a two year extension. The company refused our offer and put forth a concessionary contract. Accepting this concessionary contract would have meant a 15% reduction in our pay, the loss of 40 percent of our jobs through sub-contracting, and a loss of seniority rights. The contract would have forced us to work through Christmas.
> Approximately ten days before the strike began ... [the] company started advertising for and hiring replacement workers.
> The company also erected over seven miles of chain-linked fence topped with barbed wire before contract negotiations.

homeless people were used as strikebreakers.[278] Cumulative Board and court decisions have acted as external factors weakening organized labor.[279]

Against this backdrop, the no-presumption policy has removed an employer incentive to make incursions on the striking bargaining unit for the strategic purpose of escaping its bargaining obligation. This study provides strong empirical evidence in support of the continuation of this policy.[280] The Board's no-presumption policy is not only the most sound policy in terms of its empirical foundations; but compared to its predecessor policies, it is also truer to the aims of the National Labor Relations Act in permitting workers to choose whether or not to have workplace representation.

H.R. 4552 and the Issue of Strike Replacement: Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor, 100th Cong., 2d Sess. 21-22 (1988) (testimony of Roland Samson).

278. The New York Daily News, in November 1990, resorted to hiring homeless people to sell its newspapers after many vendors refused to sell their paper during the strike. The homeless people were employed not as replacement workers, but as street sales people. Professor Kim Hopper noted that the Tribune's use of homeless people echoed an earlier period:

> As early as 1918, Stuart Rice, then super-intendent of the Municipal Lodging House in New York, observed that huge numbers of recently unemployed men had joined the ranks of the homeless. Public shelter, he warned, was fast becoming a makeshift camp for the 'reserve army' of unemployed labor. The shelter's function, then as now, was not only to sustain those without kin to put them up, but to discipline those who had jobs. These 'new poor' were an object lesson in the fruits of 'excessive' demands on the part of labor; they were also a living reminder that there were men who would be only too glad to take even menial, ill-paid work. Marx himself had earlier remarked on the tendency of business to use the 'lumpenproletariat' as strikebreakers.

Hopper, *No 'Solidarity!' For Homeless Workers*, Wall St. J., Nov. 30, 1990, at A15, col. 1.

279. Troy, however, argues that legal impediments have not been responsible for labor's decline; instead, market forces have accelerated the decline. According to Troy, even labor's best efforts to revise the Act cannot obviate labor's decline: "*[I]rrespective of amendments to the NLRA*, private-sector unionism will continue to erode. Because competition and structural changes in labor markets have such powerful effects and because these effects will be felt into the next century, there is no constitutional legislative remedy capable of reviving private-sector unionism." Troy, *supra* note 13, at 584 (emphasis in original).

280. There is nothing in the Court's *Curtin Matheson* holding that prevents a future Board from repudiating this policy; in fact, the majority decision states "a Board rule is entitled to deference even if it represents a departure from the Board's prior policy." 110 S. Ct. at 1549, 133 L.R.R.M. (BNA) at 3053.

APPENDIX

TABLE 1

Attitudinal and Demographic Characteristics of Union Worker Respondents

Variable	Statistic
Percentage of Respondents Glad to Have Union Representation	
Definitely Agree	77.0%
Probably Agree	16.0%
Unsure	5.0%
Probably Disagree	0.9%
Definitely Disagree	1.1%
Percentage of Respondents Willing to Cross Union Picket Line During Economic Strike to Return to Work	
Definitely Agree	1.4%
Probably Agree	0.8%
Unsure	5.3%
Probably Disagree	15.3%
Definitely Disagree	77.2%
Average Number of Weeks Respondent is Willing to Forego Work During Economic Strike	28.67 (Mean) 26.00 (Median)
Percentage of Respondents Who Are Union Officers (Including Local Stewards)	32.7%
Percentage of Respondents Who Are Primary Income Sources For Household	56.7%
Average Number of Respondents' Years As Union Member	14.39 (Mean) 15.00 (Median)
Respondents' Average Seniority (Years)	14.33 (Mean) 15.00 (Median)
Respondents' Average Hourly Wage	$12.21 (Mean) $12.86 (Median)
Respondents' Average Age (Years)	40.77 (Mean) 40.00 (Median)
Percentage of Male and Female Respondents	67.5% Male 32.5% Female

TABLE 2

Union Worker Willingness To Cross Picket Line During Strike by Hourly Wage, Seniority, Union Representation, Union Office, Years in Union, and Sex

	Union Worker Willingness to Cross Picket Line During Strike				
	Definitely Would Not Cross	Probably Would Not Cross	Unsure	Probably Would Cross	Definitely Would Cross
Low Wage	270 73.8%	65 17.8%	22 6.0%	3 0.8%	6 1.6%
High Wage	138 85.7%	16 9.9%	6 3.7%	0 0%	1 0.6%
Low Seniority	117 68.8%	37 21.8%	13 7.6%	2 1.2%	1 0.6%
High Seniority	307 81.0%	47 12.4%	17 4.5%	1 0.3%	7 1.8%
Low Union Support	19 50.0%	14 36.8%	4 10.5%	1 2.6%	0 0%
High Union Support	414 79.2%	72 13.8%	26 5.0%	3 0.6%	8 1.5%
Not Union Officer	267 71.0%	76 20.2%	25 6.6%	3 0.8%	5 1.3%
Union Officer	166 89.7%	10 5.4%	5 2.7%	1 0.5%	3 1.6%
Low Union Years	66 64.1%	25 24.3%	10 9.7%	2 1.9%	0 0%
High Union Years	363 80.5%	59 13.1%	20 4.4%	1 0.2%	8 1.8%
Female	124 69.3%	37 20.7%	14 7.8%	2 1.1%	2 1.1%
Males	305 80.9%	49 13.0%	15 4.0%	2 0.5%	6 1.6%

TABLE 3

Union Worker Willingness to Cross Picket Line
During Strike by Willingness to Forego Work

Union Worker Willingness to Forego Work (Weeks)	Union Worker Willingness to Cross Picket Line During Strike				
	Definitely Would Not Cross	Probably Would Not Cross	Unsure	Probably Would Cross	Definitely Would Cross
Forego Work 0-4 Weeks	54 54.5%	29 29.3%	15 15.2%	1 1.0%	0 0%
Forego Work 5-8 Weeks	41 67.2%	17 27.9%	3 4.9%	0 0%	0 0%
Forego Work 9-16 Weeks	44 74.6%	12 20.3%	2 3.4%	0 0%	1 1.7%
Forego Work 17-34 Weeks	31 81.6%	5 13.2%	1 2.6%	1 2.6%	0 0%
Forego Work 35+ Weeks	199 94.3%	7 3.3%	1 0.5%	0 0%	4 1.9%

(Cell numbers correspond to number of respondents)
(Row percentages are expressed)

TABLE 4

Union Worker Willingness to Cross Picket Line
During Strike by Willingness to Find Alternate Employment

Union Worker Willingness to Find Alternate Employment	Union Worker Willingness to Cross Picket Line During Strike				
	Definitely Would Not Cross	Probably Would Not Cross	Unsure	Probably Would Cross	Definitely Would Cross
Definitely Would Not Seek New Job	113 92.6%	6 4.9%	1 0.8%	0 0%	2 1.6%
Probably Would Not Seek New Job	137 75.7%	35 19.3%	6 3.3%	1 0.6%	2 1.1%
Unsure	110 71.0%	29 18.7%	12 7.7%	2 1.3%	2 1.3%
Probably Would Seek New Job	49 71.0%	11 15.9%	7 10.1%	1 1.4%	1 1.4%
Definitely Would Seek New Job	23 69.7%	5 15.2%	4 12.1%	0 0%	1 3.0%

(Cell numbers correspond to number of respondents)
(Row percentages are expressed)