ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: NATIONAL LABOR RELATIONS BOARD,

Petitioner V. CURTIN MATHESON SCIENTIFIC, INC.

CASE NO: 88-1685

PLACE: Washington, D.C.

DATE: December 4, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD, :

Petitioner :

v. : No. 88-1685

CURTIN MATHESON SCIENTIFIC, INC. :

Washington, D.C.

Monday, December 4, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

DAVID L. SHAPIRO, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JAMES V. CARROLL, III, ESQ., Houston, Texas; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 88-1685, the National Labor Relations Board v. Curtin Matheson Scientific, Inc.

Mr. Shapiro.

ORAL ARGUMENT OF DAVID L. SHAPIRO

ON BEHALF OF THE PETITIONER

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court:

The facts of the issue of this case may be simply stated. On July 20, 1979, four days after the end of an economic strike, the employer withdrew recognition from the duly certified union. At that time, the bargaining unit consisted of 49 employees; 25 of these employees were permanent replacements who had been hired by the employer during the economic strike, and who had crossed the picket line to get to work.

The National Labor Relations Board said that that fact, coupled with certain other facts -- i.e., the record -- did not suffice to create an objective basis to establish a good faith doubt on the employer's part that the union still enjoyed majority support. Therefore, the withdrawal of recognition was an unfair labor practice, a failure to bargain in good faith under Section 8(a)(5).

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The Court of Appeals for the Fifth Circuit denied enforcement of this order. The key to the court of appeals opinion was its determination that the Board was required to adopt the so-called Gorman presumption, that it was compelled to infer that the permanent replacements who had been hired during the strike would not -- did not and would not support the union, that therefore there was a sufficient objective basis to support the employer's withdrawal of recognition.

QUESTION: Mr. Shapiro, do you think that the Board could have given any evidentiary value to the fact that it was replacement workers who were working? Maybe not required to. Do you think the Board could give some evidentiary weight to that fact?

MR. SHAPIRO: Your Honor, I think two things are clear. One is that the Board does not exclude that evidence as irrelevant. It is part of the situation on which the Board makes its judgment. And there are indeed cases where that factor along with other significant factors have counted. But what the court of appeals --

QUESTION: Do you think it should count for something?

MR. SHAPIRO: The fact that replacements have been hired?

QUESTION: Yes.

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MR. SHAPIRO: I think it is a relevant fact, and that in certain circumstances it may well make a difference, but that it has --

QUESTION: What else is necessary?

MR. SHAPIRO: Well, there is, at the moment, I think, an ongoing dialogue between the Board and the courts of appeals on exactly what is required. Two significant cases during the 1980s were the IT Services case and the Stormer case in the Board, in which there had been significant number of permanent replacements hired. Some of those replacements had individually expressed opposition to the union. There had been a significant amount of violence on the picket line. There had been insistent union demands that the replacements be themselves fired and that the strikers be reinstated. There -- those were situations in which the Board held that a good faith doubt had been established.

QUESTION: Mr. Shapiro, I can under -- it is the Board's rule that a good faith doubt suffices. Now, I can understand the Board saying we no longer want that rule. But the Board has adhered to that rule, that a good faith doubt suffices. That is a matter of law. But I don't see how whether or not a good faith doubt reasonably must be thought to exist is a question of law. I mean, it's a question of fact. I find it difficult to believe that

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when you have a union striking, demanding that their people be brought back and that the scabs, which they refer to them as, that the employer has hired, be dismissed, it seems -- how can you possibly say that the employer doesn't have a good faith doubt whether these scabs want to join the union? It boggles the mind. If you want to abolish the good faith doubt rule, that is one thing.

MR. SHAPIRO: Your Honor, I think I would like to do two things in response to that question. First of all, to note that it is not always true that unions are demanding right up to the point that recognition be withdrawn, that the replacements themselves be discharged. I (inaudible) of the Dold case, which is one of the cases recently decided by the Board. At the time the employer withdrew recognition from the union, the union had acknowledged that, I think, something like 170 of the 200 replacements were entitled to the jobs, were not to be replaced. So that situation varies from case to case.

In this case there is no record whatever of a union demand that the replacements be fired. There was simply an offer to return to work, an unconditional offer to return to work. But I think there is --

QUESTION: They wanted their members rehired, didn't they?

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MR. SHAPIRO: I think they would have liked that.

QUESTION: Well, it's very hard to get your members rehired if the people that have been brought in to replace them are not told to leave.

MR. SHAPIRO: Well, in many situations, as Judge Williams pointed out in the dissent below, the accommodation that is reached is for the employer to take back many or most of the strikers, although some have been gone -- may have gone on to other jobs, to take back many or most of the strikers, but to retain many or most of the replacements, and then to rely on a process of attrition, if the business is not expanding, to bring the work complement back to what it was. Those situations do vary from case to case and from strike to strike.

QUESTION: Not very much. In fact, the Board itself has said, hasn't it, that "strike replacements" can reasonably foresee that if the union is successful the strikers will return to work and the strike replacements will be out of a job. Isn't that the -- you're talking about the existence of a reasonable doubt on the part of the employer. This involves probabilities, doesn't it?

MR. SHAPIRO: Your Honor, I don't -- but the question here, I think, is not whether a Board decision to adopt a presumption of this kind is correct and entitled

to deference. The question is whether the Board's decision, for both reasons of policy and what it regards as industrial realities, that, to regard such a presumption as required, is reasonable and entitled to deference. I think perhaps it is the -- the good faith doubt test is absolutely critical, I think, to an understanding of this case. I think it is important to understand what the nature of that good faith doubt test is and how it originated.

The act itself imposes an obligation on employers to recognize a duly certified union that has won an election. The act makes it clear that that obligation ceases if there is a decertification election, at which time the union loses its majority support. The act, however, says nothing about whether there are circumstances in which an employer may lawfully and unilaterally, without an election, withdraw recognition from the union. So the Board, over a period of some 50 years, has considered the question whether there are circumstances in which an employer may lawfully, unilaterally, without an election, withdraw recognition from a duly certified union.

The Board has said that there are such circumstances, but that in the interests of industrial peace, continuity of labor relations and stability, an

employer may not do so if the union, the employer and the bargaining unit still exist, may not do so during the first year after certification, may not do so during the normal term of a collective bargaining agreement, and may not do so at other times, unless the employer may -- can establish, as a matter of fact, that the union has lost its majority or that there is a sufficient objective basis for a good faith doubt.

Now, that last rule is sometimes referred to as the rebuttable presumption of continuing majority support. That has been in existence for over 50 years, and which the courts, the lower courts and this Court, have unanimously endorsed.

QUESTION: Well, it couldn't have existed for 50 years, if the Board's old rule used to be that if the bargaining unit now contains a majority of replacements, that that establishes a good faith doubt.

MR. SHAPIRO: Your Honor, I was backtracking to the underlying rule that said that -- that still says that an employer may withdraw recognition only if he can establish that the union no longer has a majority, or that there is a sufficient objective basis for a good faith doubt. Now --

QUESTION: Well, didn't the Board used to say that if a majority of the bargaining unit consists of

replacements that --

MR. SHAPIRO: Until --

QUESTION: -- there is a good faith doubt?

MR. SHAPIRO: Yes. Until --

QUESTION: That rebuts the presumption.

MR. SHAPIRO: Until the mid-1970s.

QUESTION: If there is one.

MR. SHAPIRO: Until the mid-1970s.

QUESTION: Well, I see in your footnote in your brief you say the Board's current position is based on its evolving understanding of industrial reality. Now, have they had some really -- experience with the fact that these replacements just love the union? Or that they want to join the union?

MR. SHAPIRO: The Board's decision --

QUESTION: Do they claim that they have had that experience or not?

MR. SHAPIRO: That they support the union? No. No. There is not strong empirical evidence that replacements uniformly or as a general rule support the union. But what the Board was saying is that they had seen a wide variety of cases over the years involving very different situations in terms of the nature of the strike, in terms of the degree of hostility between the union and the replacements, in terms of the nature of the picket

line, in terms of the kinds of demands the unions were making.

Justice White, I think that the position of the Board from the very beginning has been, indeed going back to 1939 and '40, that the existence of employee turnover is not in itself sufficient to rebut the presumption of continued majority support. What the Board did in the mid-1970s was --

QUESTION: Do you categorize replacements during the strike as sort of personnel turnover?

MR. SHAPIRO: A kind of personnel turnover, yes, sir. Yes, sir.

QUESTION: That's a remarkable type of turnover.

MR. SHAPIRO: What the Board had consistently said was that the policy reasons that underlie the presumption of continued majority support are not dissipated as a result of employee turnover. Now, with respect to --

QUESTION: Excuse me, how do you suppose the employer would establish some objective evidence? Is he permitted to go around and poll the workers?

MR. SHAPIRO: There is a disagreement between the Board and the courts of appeals on the basis on which an employee can conduct a specific poll with respect to employee preference. But what an employer can do, and the

Board agrees on that, is to talk to workers, including replacements, about the general conditions of employment, something that the employer did do here, indeed talked to 15 of the replacements, and only one of them indicated that he did not support the union as his representative.

So that the Board, it seems to me --

QUESTION: I know, but he -- he was just saying how do you like it here and things like that?

MR. SHAPIRO: This was a general discussion about working conditions and about the nature of the job.

QUESTION: But he is not supposed to say are you in favor of the union?

MR. SHAPIRO: The Board's rule is that an employer may not conduct a poll under conditions in which it does not have --

QUESTION: Well, he's not even supposed to ask one worker, is he?

MR. SHAPIRO: Not supposed to conduct a poll of an individual worker.

QUESTION: A poll -- he can't even poll one person.

QUESTION: Well, if this is a factual question, what is the basis for the Board's rule preventing employer inquiry?

MR. SHAPIRO: The basis for the Board's rule, it

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was, I think, fully explained this year in the Texas Petrochemical case. This is an issue in which the Board and the courts of appeals have differed. But the Board's rule, which says that you cannot poll the employees in situations where you don't have a sufficient basis to petition for an election, is based on its view that it should not be easier for the employer to conduct an informal election, with all the potential disruptions that that involves, than it would be for the Board to conduct a formal election, where it consists -- insists on a substantial showing of --

QUESTION: Well, if -- I suppose the Board then would say the employer would not be -- he might be -- he might petition for an election, but the Board, without any more evidence than he has got, wouldn't order a new election, would they?

MR. SHAPIRO: On the present record, the Board would not have ordered an election. Because the Board's rule essentially is that an election may be held, a decertification election, either on the petition of 30 -- 30 percent of the employees, and no such petition was filed here, or on an employer petition when there is a sufficient objective basis to raise a good faith doubt.

QUESTION: Am I correct that in no event may that election be held within 12 months of the previous

election, or is that incorrect?

MR. SHAPIRO: Of the previous election or the previous certification, yes.

QUESTION: Well then maybe the unions who filed the amicus brief are correct in saying that there should just be a 12-month period during which the union represents the employees, period. Is there anything really adverse to allowing the union to represent the employees, whether or not the majority then supports the union, given Vaca v. Sikes and the duty of the union to protect the interests of the employees at all times?

MR. SHAPIRO: I think the union's proposal in this case, the amicus brief, is a stronger proposal, which would be to eliminate altogether the ability of the employer to withdraw recognition unilaterally. So that --

QUESTION: But what about just, if it were just limited to a 12-month period?

MR. SHAPIRO: Well, of course the union proposal is much stronger than that. And I would say limiting the union's ability to represent the employees to a 12-month period would go against the indication of the act that the union is normally entitled to continue representing the employees until and unless they lose a decertification election. And the act also makes it clear that decertification elections are not to be held without a

substantial showing. The -- the --

QUESTION: Mr. Shapiro, you said in your brief and you mentioned here as well, that the Board has decided, that the policy reasons for keeping the union in place are not dissipated by reason of the strike and replacement. That may well be, but that's an evolution of its perception as to what the law should be, not an evolution of its perception as to what the facts are. It seems to me that if the Board has that new policy perception it could abandon its -- its current rule that the employer need not continue to recognize the union if he has a reasonable doubt. Either adopt the procedure that Justice Kennedy was talking about or adopt some other procedure.

But I don't see how the Board -- the Board can prescribe facts. It can prescribe law, but not facts. It seems to me that replacement of strikers either creates a reasonable doubt or it doesn't create a reasonable doubt, and if the Board says no it doesn't make it any less true.

MR. SHAPIRO: I think, Your Honor, that what has happened over the past 10 to 15 years is that, first of all, the problem came to the fore in the 1970s. There had been occasional cases before that in which permanent replacements had been hired constituting 50 percent or more of the work force. The Board had developed the rule

that that was sufficient to show the existence of a good faith doubt. I think those cases began to multiply in the mid-1970s. The variety of those cases began to be revealed; the underlying policy considerations became clearer. And in the course of that development the Board articulated, in cases like Pennco back in 1980 and KKHI more recently, both empirical and policy grounds for refusing to draw the inference on the basis of the hiring of permanent replacements alone.

The Board had seen a variety of situations in which permanent replacements were hired. Some of them, like IT Services and Stormer, involved considerable violence, involved significant union demands for firing of the replacements, involved other factors that indicated strongly to the Board that a good faith doubt had been shown.

Cases, however, arose in which there were no other facts at all, in which, in some of those cases, the replacements themselves were union members. In which, as in this case, there was very little activity on the picket line, which dwindled practically to nothing, in which the employer withdrew recognition not during the period of the strike, but four days after the strike was over. In which union demands, if they were made at all for firing the replacements, were made only in terms of an offer of the

strikers to return to work. Cases in which union had long since demand -- abandoned any demand for firing of all or most of the replacements.

And so, having seen this wide variety of cases, and having considered the policy reasons, which I think are very significant in this case, the Board said that its growing understanding of both, led it not to form any presumption. And that what --

QUESTION: Well, I agree there is a wide variety of cases. Did the Board do any assessment of what percentage of this wide variety of cases the hired strike breakers favored the union? Did they do any assessment of that? Do they find out in this wide variety of cases, 90 percent didn't favor the union, or 40 percent, or what?

MR. SHAPIRO: Well, I think there --

QUESTION: Simply to point to a wide variety of cases is just not very intellectually satisfying.

MR. SHAPIRO: But, to the extent that a significant number of cases are involved in which permanent replacements are strongly opposed to the union, one would expect -- and where those permanent replacements constitute a significant percentage of the work force, as they do here, one would expect a significant number of decertification petitions coming from those employees, followed by elections in which, in fact, union was

rejected.

To my knowledge, although I don't have the statistics, since the amendment of the Taft-Hartley Act in 1959, such elections have not routinely been held. What has happened instead is that, as soon as enough replacements come on the job, the employer will try to withdraw recognition on the basis of that fact alone. And I think the Board, in both the Pennco case and the KKHI case, has pointed to the very adverse policy effects of that kind of a decision.

QUESTION: You mean the Board is relying on the fact that a strike breaker, who was already in enough trouble with the union and the people on the picket line, relying on the fact that the first thing he does -- that he does not, as soon as he gets on the job, immediately file a petition to decertify the union? Sort of sticking his thumb in the union's eye. Not only breaking the strike, but seeking to decertify it?

MR. SHAPIRO: It's situation --

QUESTION: Isn't it rather absurd to expect that to happen?

MR. SHAPIRO: I think the employees can be expected to protect their own interests, yes, Your Honor.

I think what is happening here, and what has happened in many cases of this kind, is that the employee

is -- the employer is putting itself forward as the protector of the employee interest, not waiting for the employees, who the act and the Board assumes can protect themselves. The employee is putting itself forward as the protector of the employees' interests. This Court, I think, has continually expect -- expressed --

QUESTION: But, Mr. Shapiro, that might be a reason for abolishing the good faith doubt rule, which would justify an employer from withdrawing recognition, but I don't see it's an -- it's a reason for restricting the factual inquiry, if the good faith doubt rule does exist.

MR. SHAPIRO: Your Honor, I think the Board should and does have several options, one of which is to curtail much more drastically than it has done the employer's ability to withdraw recognition unilaterally without a decertification election. Indeed, it may well be that the Board could eliminate that ability entirely as a matter of its authority under the act. The Board has not chosen to do that, because it might well lead to situations where unions have in fact significantly lost support, and yet employers are obligated to continue to bargain.

So the union -- the Board has continued with its existing rule, which does acknowledge that an employer can

withdraw if he can make either a showing of loss or sufficient basis to establish a good faith doubt. I don't think the Court should insist that the Board must go the whole way and abolish the good faith doubt test, rather than, as it has done, to set up a rigorous standard under which that good faith doubt is established.

The policy reasons --

QUESTION: Mr. Shapiro, are you saying that the Board in this case has the option under the statute of either adopting its most recent presumption or its present rule?

MR. SHAPIRO: The most recent presumption, you mean --

QUESTION: Well, it's most recent presumption was a presumption of support.

MR. SHAPIRO: That existed until --

QUESTION: Does it have the option of going back to that presumption?

MR. SHAPIRO: I think that the question whether a presumption of the kind that the Board followed until the mid-1970s, whether that is within the Board's power, and of course is not the question here, but I think a very strong argument could be made that a Board decision to adopt such a presumption would be valid and should be sustained by --

QUESTION: Well, I guess another way to frame my question is, is it the government's position that this is the correct interpretation of the act, or that the Board has some choices?

MR. SHAPIRO: We believe very strongly that the Board has a range of choices.

QUESTION: Well, should the Board be given deference in its choices, when it has changed 180 degrees in its interpretation of the act? They had a presumption one way and then a presumption in the other way. Are they entitled to deference in light of that administrative history of interpretation?

MR. SHAPIRO: I don't think it switched from one presumption to another, Your Honor. The underlying presumption, which I tried to state at the beginning, has always been the presumption of continuing majority support. That has never changed. Until the mid-1970s the Board did in fact presume that -- that permanent replacements did not support the union. The Board abandoned that presumption in the mid-1970s, and has abandoned it ever since. It has not adopted a contrary presumption.

The question before this Court is whether it should defer to the Board's refusal to adopt -- to return to its former presumption. There is no operative

presumption with respect to replacements as such. The policy reasons for that are rooted in the Board's conviction that if such a presumption were adopted, it would be far too easy for employers to bargain to impasse, to precipitate a strike, to hire enough replacements to justify the withdrawal of recognition, and then to leave the employees without representation at the most critical period of labor relations, during an economic strike as it is coming to an end, and in trying to deal with its aftermath. It is for that reason that the Board has insisted on a more substantial showing.

And there are cases, Justice O'Connor, to return to your question at the outset, in which the Board has held that such a showing has been made even though there has been no actual head count of employees.

QUESTION: Well, is there a difference between having no presumption and allowing a reviewing court to consider as some evidentiary inference the fact of replacement workers?

MR. SHAPIRO: Yes, Your Honor, absolutely.

QUESTION: Is there a difference there?

MR. SHAPIRO: Yes. The only question before this Court is whether the court of appeals was correct in compelling the Board to adopt the presumption. The question on remand, if this Court reverses, is whether the

facts of this case, including the hiring of permanent replacements, constitutes sufficient objective evidence to support a good faith doubt.

If I may, I'd like to reserve the rest of my time for rebuttal.

QUESTION: Thank you, Mr. Shapiro.

Mr. Carroll, we'll hear now from you.

ORAL ARGUMENT OF JAMES. V. CARROLL, III

ON BEHALF OF THE RESPONDENT

MR. CARROLL: Thank you, Mr. Chief Justice, and may it please the Court:

Perhaps the most glaring defect in the Board's Station KKHI rule is its failure to come to grips with the evidence in this case that Curtin Matheson hired a new work force of permanent replacement employees who never, by word or deed, have expressed any interest whatsoever in the incumbent union. This, coupled with the inherent conflict, which the Board has recognized for decades to exist in this situation, condemns as irrational the Board's position in this case.

As Justice Scalia observed in the, in one of the cases in our brief, Leveld Wholesale, the Board acknowledged that the replacement employees may reasonably foresee that, if the union is successful, they are going to be fired to make room for the returning strikers. This

is a general proposition which the Board accepts. It is not a fact-finding in a specific case, it is a given. It is an industrial reality that we deal with in these situations.

QUESTION: Well, I gathered from Mr. Shapiro's presentation that the Board would not agree with your statement, Mr. Carroll, that they find a number of different situations and they say it is not always true.

MR. CARROLL: Well, Your Honor, that is true, and the Board cites two cases, IT Services and Stormer, in its brief, footnote 12. Those cases were decided during the Pennco rule reign, not during the rule in question before this Court. Those cases were decided in '82 and '84, respectively. And this decision emanated in 1987, three years later. That -- those cases do not stand for the proposition that the Board's present application of this rule represents a reasoned evaluation of evidence, because a different rule pertained then.

QUESTION: Yes, but it doesn't necessarily follow from the fact that the union would like to get the replacements replaced, that if they aren't replaced, the replacements that are going to stay on would not vote for the union.

Let's assume that the employer -- let's assume there was an election. I think it is probably

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conceivable, maybe even reasonable to think that the replacements would vote to have a union represent them, as long as they've still got their job.

MR. CARROLL: Your Honor, in the first place, the Station KKHI rule is a rule that pertains both to pre-strike end situations, in other words withdrawals of recognition which occur during the strike. And in roughly half of the cases decided since Station KKHI that has been the case; the rule is applied in those circumstances. So that -- so that whether or not in the future at some point in time the parties may kiss and make up is really not relevant to an understanding of the Board's role for the KKHI rule. And in any case you --

QUESTION: Well, don't you think it is fair to ask well, would the replacements like to have the -- have a union representation, as long as they have got their jobs?

MR. CARROLL: Absolutely, Your Honor. I think it is fair to ask the question. I wish the employer could. The Board imposes a rule, the no polling rule, which, in direct response to your question, Justice White --

QUESTION: I know, but the -- but the Board refuses to infer, just from the fact that they are replacements, that they would not vote for a union.

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MR. CARROLL: That is correct, and we think that is --

QUESTION: And if they -- I don't know, that --

QUESTION: Is that correct, Mr. Carroll? I thought that the Board is assuming that they will vote for this union. Is that all that the issue is, whether the new employees want a union, or is it whether they want this union?

MR. CARROLL: The question is whether they want this particular union.

QUESTION: That's what I thought.

QUESTION: Exactly. Exactly.

MR. CARROLL: The incumbent union. Exactly.

QUESTION: I agree with that.

MR. CARROLL: And in truth, and in fact, the Board's so-called no presumption rule is not a no presumption rule at all. The way the rule works, and we submit the only way that it can work under these circumstances, is for a choice to be made by the Board as to the initial way in which it is going to evaluate replacement evidence. You can either, as the Board does, assume that replacement employees support the union, unless the union -- unless the company proves otherwise. And that is the way this rule works, has worked since the Pennco case. Or you must assume, as the employer

contends, and as the Fifth Circuit found, that replacement employees will not support the union, unless the union or the Board establishes facts which dispel that reasonable doubt that the employer professes.

QUESTION: Mr. Carroll, did the court below articulate a presumption, do you think, that the Board has to consider that the replacements workers will not support this union?

MR. CARROLL: Your Honor --

QUESTION: Did it -- or, is it open to treat it as an evidentiary inference, if it is justified?

MR. CARROLL: Well, as I read the Fifth Circuit's opinion, it did rely on Professor Gorman's statement from his treatise, which merely reflected the 25-year history of the Board's dealing with this evidence. Then the Fifth Circuit went on to say that under the facts of this case, we find the employer could reasonably doubt that replacement employees support the union. And that was the real holding of the court.

QUESTION: Because there does seem to be a difference in whether there has to be a presumption one way or another, and what will suffice for meeting a burden of proof by a preponderance.

MR. CARROLL: Justice O'Connor, I believe, as I was saying earlier, there are really only one, only two

choices for the board when replacements are hired. The Board approaches the question of determining good faith doubt based on a numerical evaluation. And this is right, because the doubt has to run as to a majority of the employees, not merely as to some of the employees.

The Board begins by aggregating cross-overs, there were five in our case; strikers, there were 19 in our case; and replacement employees, 25 in our case, for a total of 49. They start from the premise that we must prove doubt as to 25, that is a simple majority of the 49. The Board then analyzes the evidence, piece by piece, and as to any employee with respect to whom the employer has established fair doubt, that name is removed from the union support column and put into the good faith doubt column. Piece by piece, employee by employee, the Board goes through this process. And at the end of the day the Board determines whether or not fair doubt has been raised with respect to a majority.

In this case, the CMS case, at page 34a -- excuse me, page 75 -- page 34a of the Petitioner's appendix, where we find the CMS case reprinted, the Board found that the employer had only raised a doubt as to six of 49. You see, that because 49 remains the denominator in this case, and we must bring into doubt 25, there is an operative presumption that these people support the union,

unless we produce evidence sufficient to bring those people into doubt.

QUESTION: Well, I suppose the Board would say that's the operation of the underlying presumption of continuing majority support.

MR. CARROLL: Well, undoubtedly they would, Mr. Chief Justice. But, in Celanese the Board ordained, after a careful balancing of the competing interests, that the good faith doubt test was in and of itself an adequate rebuttal to the presumption of continuing majority. There is no overlay. The Board -- the Board overworks the continuing presumption in this case, because it applies it twice. It applies it as the Board did in Celanese, to articulate the dual standard, minority in fact, good faith doubt.

But then the Board brings that presumption of continuing majority across the line again, and applies it as an evidentiary yard stick to discount and to disqualify evidence offered by the employer to establish doubt, and therein lies the problem.

QUESTION: Mr. Carroll, are you arguing for a presumption, or are you arguing for the ability of the employer to say that in a particular case the fact that these are re-hires from a strike can be taken into account to determine that there is a reasonable doubt?

MR. CARROLL: Your Honor --

QUESTION: Or do you say it must always lead to the conclusion of reasonable doubt?

MR. CARROLL: We argue two, for two results. Position A is that in all cases where replacements are hired, an employer may reasonably doubt that the replacements support the union, unless the Board or the union comes forward with evidence which tends to undermine that doubt.

QUESTION: Two years after the strike is over, and two years after the replacements have been there?

MR. CARROLL: Well, I would not make that argument, no, Sir.

QUESTION: Well, then you are not saying that it's -- that it's a uniform presumption. You're just saying that one may, in the proper circumstances, conclude from the re-hiring, or from the replacement.

MR. CARROLL: And specifically under the facts of this case, where the persons were hired during the course of the strike, and recognition was withdrawn at the time that the union requested reinstatement, a few days after that time. Certainly there is nothing that has happened in the intervening several days which would dispel the, we believe the required evaluation of this evidence. That based upon the replacement employees'

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knowledge that the incumbent union seeks their ouster and is going to try to get them fired in order to make room for the returning strikers, that no rational replacement under those circumstances --

QUESTION: I'm not sure we're talking about presumptions here. I think we may be talking about the fact that you assert that the rehiring -- that the hiring of a strike breaker may be considered relevant. And the Board seems to be saying it may not be considered relevant.

MR. CARROLL: The Board has a rule -- our second position, Position B, Justice Scalia, is that the Board's rule forecloses the evidentiary weight of this evidence. Because the Board now ordains -- this, by the way, is not included in my brief, and I want to bring to the Court's attention three cases. They are all cited in our briefs, but not for this proposition.

Since Station KKHI was decided, and since the CMS case was decided, three cases have been decided by the Board. Now, I am not talking about ALJs, administrative law judges, but by the Board itself, in which the Board has now articulated the standard under the KKHI rule to be the employer must prove that the replacement employees -- excuse me, must prove the replacement employees' expressed desires to repudiate the union. And that is a quote,

expressed desires to repudiate the union. That formulation of the evidentiary burden we now have, in order to be able to rely upon evidence that replacement employees --

QUESTION: Mr. Carroll, that's not what Mr. Shapiro said today, is it?

MR. CARROLL: It is not, and all I can do is ask the Court please to -- review those authorities, because they are there for the world to see. In fact --

QUESTION: Tell us which ones they are.

MR. CARROLL: Tile, Terrazo Contractors, at footnote 2.

QUESTION: Of what?

MR. CARROLL: Tile, Terrazo Contractors is a case --

QUESTION: Footnote 2 of what?

MR. CARROLL: Of the NLRB's opinion, which we cite in our brief. All of the parties, or, excuse me, all of the two amici and we, cite these three cases.

QUESTION: Is there a page in a particular brief that is filed in this case where we find the citation?

MR. CARROLL: You will find the citations in the table of cases of several of the briefs, Your Honor.

QUESTION: Okay.

MR. CARROLL: Tube Craft, at footnote 2. And

Johns-Manville, at about page 5 in the slip opinion. In each of those cases the Board says that, as a consequence of the KKHI rule, the employer must prove the expressed desires of the replacements to repudiate the union. In footnote 12 of the Board's reply brief, it says, in trying -- in answering the 15 pages we wrote on the reasons why the Station KKA -- KKHI test abolishes the good faith doubt test, they have three sentences. One of those sentences says, the good faith doubt test is alive and well, and it is different from the minority in fact test because it admits circumstantial evidence.

And I ask the Court to consider whether the test articulated by the Board, expressed desires to repudiate the union, it sounds like a circumstantial evidence test. It is not, it is manifestly not a circumstantial evidence test. It only is satisfied by direct evidence. And this is the Board's standard.

Now, inexplicably, after having explained its standard in that fashion, the Board goes on to talk about the evidence in those cases, but it always comes to the same conclusion. Regardless of whether there is violence, regardless of whether there are hostile bargaining demands to fire the replacements, the Board always finds that there is inadequate basis for good faith doubt. And we submit that the Board has in effect emasculated the good

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faith doubt standard. It professes to hold to that standard. It proclaims that that standard governs these cases, but in fact the Board does not apply the standard.

QUESTION: Well, what if the Board tomorrow were to simply abolish the good faith doubt test? Would that be beyond its power?

MR. CARROLL: It may or may not be, Your Honor. It would be for this Court to decide. But the law is clear, in Atchison, Topeka & Santa Fe Railroad case, for instance, holds that if the Board is going to depart from its prior norms it must so state. It must advise the Court that it is departing from the prior rule, and it must provide its reasons. It must articulate its reasons, so that you can do your supervisory jobs of determining whether the court's decision -- the Board's decision is both rational and consistent with the act.

QUESTION: I suppose there are some limits upon the court's ability to require an employer to continue to bargain with a union that there is no reasonable basis to believe is the choice of the employees.

MR. CARROLL: Absolutely. Absolutely, Justice Scalia. And in 1951, when Celanese was adopted, the Board struck a careful balance that took into account the fact that we may have a new group of employees -- in that case there were 108 replacements hired -- a new group of

employees who -- who have a right as a consequence of being the majority in the work force, to say whether bargaining will occur with the incumbent union, with a separate union of their own choosing to which the loyalty runs. In other words, the new union would have its loyalties to the replacement employees, not to the strikers, which is certainly most probable as to those two choices, or to choose to remain union free, which is the choice guaranteed to the majority under Section 7 of the act. It expressly recognizes that the majority has the right to choose to refrain from collective bargaining if that is its wish, and this Court's decision in International Ladies' Garment Workers' Union, decided in 1961, so holds.

QUESTION: Mr. Carroll, can I ask you a question? Is it your -- you are basically saying that under the Board's rule the union always wins? And, as I understand it though, under your rule, if the company hires one more than 50 percent of the unit, the company will always win?

MR. CARROLL: Well, that's an argument that the Board makes. This is the doomsday scenario.

QUESTION: It doesn't actually say who is right, but isn't that fairly accurate?

MR. CARROLL: No, Your Honor, it is not, because

all --

QUESTION: In your view, how can the Board win it?

MR. CARROLL: Well, the union can win. The good faith doubt test, as established in Celanese, took account of the fact that the Board may -- excuse me, the employer may, although having a good faith doubt, simply be incorrect. The union may have its majority. And in that case the Board, excuse me, the union need do nothing more than proceed to the NLRB, file a petition for an election, I am sure the Board, with the due regard that it is giving to the rights of the union in this circumstance, will conduct an immediate election, and it should. I don't see why it should take any more than a few days, a week maybe, determine whether or not the majority wants the union. If they do, the union is reinstated, the bargaining obligation resumes, the parties move on down the road --

QUESTION: Yes, but you will win the unfair labor practice proceeding.

MR. CARROLL: Well, there wouldn't be one, Your Honor, because if the union files a petition for an election to resolve this question once and for all, there would be no need for an unfair labor practice case.

QUESTION: Yes, but supposing they file a refusal to bargain charge?

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MR. CARROLL: Well, if they did that, and -- it would act as a blocking charge to prevent the election. But that is within the Board's -- excuse me, within the --

QUESTION: But I am saying any such case you would win by hiring one more than half of the bargaining unit, under your view.

MR. CARROLL: No, Justice Stevens, because the union should and would remain as bargaining agent, if it continues to be supported by a majority. The only thing it needs to do is file a petition, have an election and resolve the issue. And there is no permanency to a breach in bargaining on the basis of a withdrawal of recognition if that is true, that is to say, if the union has its majority. If it doesn't have its majority, of course, then it shouldn't serve as bargaining agent, and that is what the decisions of this Court have held for decades.

QUESTION: But in an unfair labor practice proceeding, evidence of the actual preferences of the members of the bargaining unit would not be allowed, would it?

MR. CARROLL: Absolutely, it would be.

QUESTION: Really?

MR. CARROLL: If we could get it. But of course the employer cannot --

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QUESTION: Well, I know, but let's, let's assume that the union files a refusal to bargain charge, where they are the certified bargaining agent, and the employer won't bargain with us. And the employer says I have a good faith doubt, and furthermore, I'll prove it. And he wants -- he wants to put in evidence of the actual preferences of the members of the bargaining unit, and he wants to call them, every one of them. He won't be allowed to do that.

MR. CARROLL: No, he must be able to present evidence that was at hand.

QUESTION: And also the union -- union would not have to prove that it does have a majority in such proceeding.

MR. CARROLL: The Board's present practice is not to allow the so-called shifting burden doctrine. But, Justice White, back to your initial question, the employer is required to proffer the evidence that was before it on the withdrawal of recognition date which supports its professed good faith doubt.

QUESTION: Which in your -- which I am saying in every case will be that 51 percent of the members of the bargaining unit are replacements workers, and it is rational to assume they are anti-union. That's the whole case, and you win.

MR. CARROLL: It is reasonable for the employer to doubt that they support the union.

QUESTION: Right.

MR. CARROLL: There's a big difference there, Your Honor, but yes, that is the bottom line.

QUESTION: And that's right, and then -- because the employer doesn't have anything else to go on, and that is sufficient to establish a good faith doubt. I am not suggesting, maybe you are right, but it seems to me it's either one rule or the other.

MR. CARROLL: Well, it is one rule or the other, Justice Stevens, but the result is not that the union loses its bargaining agency necessarily. Because once the employer proffers its doubt -- it doesn't have to occur, and it doesn't occur in an unfair labor practice case. I mean, the union can call up and say okay, you are withdrawing recognition. Why? The employer says we've got -- as you well know, we have hired a new work force of replacement employees. Fine. I am going down to the board to petition for an election. I don't see any reason why that doesn't work just fine and dandy. And as a matter of fact, then we will know for sure whether the union in fact has majority support or whether it doesn't. And then we won't be concerned about whether we have denied one party or the other bargaining rights properly

or improperly.

QUESTION: That would not serve the Board's policy of industrial peace, which it has decided is better served by leaving the current union in.

MR. CARROLL: Well, I -- first of all, I differ with that view as to what, whether that is a good policy, given that we have a new majority in the work force whose Section 7 rights should be taken into account, and they are not being taken into account under the Board's present rule, because the Board rules in all cases that replacement employees simply cannot be found to -- doubt -- to oppose the union, based on the way it is applying this rule.

QUESTION: Once again, Mr. Carroll, though, you -- it seems to me you responded to Justice Stevens' question a little too categorically. You're not saying that it is automatic. I mean, you answered my question saying that if two years have gone by you would not apply the presumption.

MR. CARROLL: That is correct. I --

QUESTION: So there may be some other circumstances.

MR. CARROLL: There may be, Your Honor, but under the circumstances of this case, where the recognition was withdrawn immediately after the union had

requested reinstatement for the employees. And this is -- the Board would have it that this is not the same as a demand for ouster of the strike -- of the replacements, but I am not sure they saw it that way. Now, the evidence in this case wasn't litigated on that standard, because we litigated this case under the Pennco rule back in 1980. Nine years ago this case was tried before the ALJ, at a time when the Pennco rule was being followed. And the Board presumed, as a matter of law, that replacement employees support the union. So we weren't concerned with such niceties as this in this particular trial.

I don't doubt that the Board chose this case to bring up to this Court because it does present circumstances that are more benign from the standpoint of withdrawal of recognition than many others, like the cases which we have cited in our brief. The Board, at footnote 4 of its reply brief, acknowledges that in the mid-1970s it began to turn away from its previous view that replacement employees are undoubtedly opposed to the union. And that is what it -- those are the words used in the reply brief.

But the Station KKHI case states that, at page 65a it's reproduced in the Petitioner's appendix, states to the contrary. The Board denies, in Station KKHI, its 25-year history of operating pursuant to this rule. At

page 65a the Board writes, after discussing the Peoples Gas case, we continued to refrain from adopting any presumptions regarding the pro or anti-union sympathies of permanent replacements. And that is flatly wrong. The Board in KKHI denied its history of operating pursuant to this rule for 25 years.

And as a consequence, of course, the Board did not explain, so that the court could assess this history and experience, what was wrong with the rule, if anything, during that 25-year period. What happened during that period to cause the Board to say now that there might be stonewalling of negotiations and the like. The Board offers no explanation whatsoever regarding the history of the application of the rule before the Board.

And further, the Board compounds its error when it, at page 75a of the joint appendix -- excuse me, the Petitioner's appendix, the Board offers its policy support for the rule, and it says that to accept the Gorman presumption would disrupt the balance of competing economic weapons long established in strike situations. That's simply incorrect. The balance of competing economic weapons has been struck, or was struck, for 25 years, precisely the way the Fifth Circuit struck it in this case.

I believe, for these reasons alone, that is the

Board's denial of its 25 year history of operating under the rule and its positioning or supporting its policy grounds on the idea that to accept the Gorman presumption would disrupt the balance of competing economic weapons long established, for these reasons alone it would be virtually impossible to find the Board's decision in KKHI was rational.

The Board's explanation that an employer may stonewall negotiations and hire replacements and, in effect, kick the union out by this vehicle, is also not supported by any findings or -- in fact that is post hoc rationalization. The Board, in Station KKHI, made no reference to those possibilities, and certainly brought to the court's attention no examples of that kind of problem in the 25 years when the presumption of continuing majority held sway.

But moreover, in our case there certainly were no allegations of any such misconduct. And the Board has ample remedial authority in the act to deal with any situations of that kind. Section 8(a)(5) requires good-faith bargaining. Section 8(d) defines good-faith bargaining to include meeting at reasonable times. You can't stonewall negotiations. There are concepts in the Labor Act as found by the Board which prevent so-called circus bargaining, where the employers engage in

bargaining which is not designed to reach agreement. All of these provisions of the act can come into play to prevent an employer from doing what the Board says could occur if the Gorman presumption is credited.

But probably the most -- one of the most devastating points which undercuts the Board's Station KKHI rule is its inconsistency with not only this inherent conflict which exists between strike replacements and the incumbent union, but the Board's position in the Service Electric line of cases. In that line of cases, we cite this line in our brief, as does the Chamber, the Chamber devotes an entire section to this particular argument, under Service Electric, because of this inherent conflict, the Board has ruled that the union cannot represent the replacement employees during the strike, because it has a conflict of interest. It would like to get them fired. In fact, it is the union's goal, the Board reasons, to get them fired.

And because of this inherent conflict the Board cannot represent the replacement interest, replacement employees during the strike. And yet, the Board would suggest that the replacement employees want this union to represent them. Fatally inconsistent positions. And the Board offers no explanation to reconcile these divergent views. And because of that failure to reconcile its

position in the Service Electric line of cases with its position in Station KKHI, this Court does not owe deference to the Board's decision.

Likewise, the Fansteel line of cases, which is a case from this Court in 1938, and the Board argues that because it is so old it doesn't apply here. But the Board itself has applied that case all the way down through the '70s in the Beacon Upholstery case.

In these cases, the Board holds that it is proper for an employer to withdraw recognition when he hires permanent replacements for strikers who have been lawfully discharged. And one wonders what the -- what conceivable difference it could make if the -- if the strikers on the one hand are discharged and the replacements are brought in for them, or whether the strikers are on strike awaiting reinstatement.

Indeed, I suggest that because the replacements are on -- excuse me, the strikers are on strike and awaiting reinstatement, there is far more reason to believe that, from the replacement standpoint, they are more concerned about having the incumbent union bring these people back than they would be in the case where the strikers have been lawfully discharged. And, again, the Board offers no explanation for these inconsistent results in its Station KKHI decision. And for these reasons,

again, the Board's decision is entitled to no deference.

But it's primary policy ground, that is, the doomsday scenario that it posits, that once the employer hires a sufficient number of replacements to outnumber the strikers and cross-overs, the employer may withdraw recognition and therefore disrupt bargaining stability. That argument overstates the proposition, because all the union needs to do is elect -- rather than file an unfair labor practice charge and become mired in years of litigation, all it has to do is file its petition for an election. The Board, the union only needs 30 percent support in which to do so.

I am sure the Board could very promptly convene an election, determine the question whether the replacement employees want the union, and if they do, then the bargaining obligation attaches and, indeed, the union has one year of protection, because of the one year certification rule which we heard discussed here today, within which to operate without fear of loss of majority. There simply is no terminal point to bargaining as a consequence of an employer raising a good faith doubt. And we believe that the Board's statements to the Court to the contrary are unfounded.

If the Court has no further questions, I relinquish the balance of my time.

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QUESTION: Thank you, Mr. Carroll.

Mr. Shapiro, you have three minutes remaining.

REBUTTAL ARGUMENT OF DAVID L. SHAPIRO

ON BEHALF OF THE PETITIONER

MR. SHAPIRO: Thank you, Mr. Chief Justice.

One point I think is very important to stress. That the question in this case is not whether the Board must consider as relevant the hiring of replacements during an economic strike, nor is it the question of how much probative weight that fact may be entitled to, along with other facts. Those questions are the subject of an ongoing dialogue now between the Board and the courts of appeals in cases like Manville and Bickerstaff.

The question in this case is much narrower. The question in this case is whether a court may properly require the Board to adopt the Gorman presumption. The question whether the Board is required to infer that a permanent replacement hired during an economic strike is by virtue of that fact alone opposed to the union. Therefore, if 50 percent or more of the employees in a unit meet that category --

QUESTION: So, Mr. Shapiro, if the Board excludes a lot of what would otherwise be normal ways of proving a fact, to refuse to adopt a presumption can be much more important than if there were lots of other ways

of proving facts.

MR. SHAPIRO: Your Honor, the Board has adhered to the good faith test, although I think, as several members of the Court have suggested, it may not have to. But it has adhered to that test in the light of a rigorous standard of proof. It does accept objective circumstantial evidence of non support. It does not insist on a head count of employees showing that 50 percent or more are opposed to the union. How much --

QUESTION: Mr. Shapiro, the question is not whether in fact these employees support the union or not. That is not the question under the Board's law. The question under the Board's law is whether the employer in fact has a reasonable belief that they do not support the union. That is a quite different question. And whether you can use it as a presumption for the one is quite different as to whether it necessarily indicates the other. It is very hard to say that an employer who replaces a striking force does not have a reasonable belief that the replacement people don't want to be in the union, that particular one.

MR. SHAPIRO: That question of what is a sufficient objective basis to create a good faith doubt, which is a rule that the Board itself has created, is itself a question of law in which, we submit, the Board's

judgment is entitled to deference. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shapiro. The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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