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Levitz Furniture Co.: The End of Celanese and the Good-Faith Doubt Standard for Withdrawing Recognition of Incumbent Unions

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LEVITZ FURNITURE CO.: THE END OF *CELANESE* AND THE GOOD-FAITH DOUBT STANDARD FOR WITHDRAWING RECOGNITION OF INCUMBENT UNIONS

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INTRODUCTION

For fifty years, the National Labor Relations Board (the "NLRB") utilized a seemingly straightforward standard to an employer's attempt to withdraw recognition of an incumbent union—whether the employer had a good-faith belief that the union did not enjoy the support of a majority of the employees.[1] In reality, this standard became muddled when the NLRB applied this same good-faith standard to an employer's withdrawal of recognition of an incumbent union, an employer's petition for a Representative Management ("RM") election, and an employer's poll of its employees to determine the union's majority status.[2] As a result, the NLRB often converted the good-faith doubt standard into a higher and more difficult standard to satisfy, and employers were required to demonstrate their "good faith" with objective evidence that a majority of the employees renounced their union.[3]

The United States Supreme Court upheld the good-faith standard in *Allentown Mack v. NLRB*, holding the application of a unitary standard to all three forms of tests to a union's majority status was consistent with the National Labor Relations Act ("the Act").[4] However, the Supreme Court disapproved of the NLRB's use of the words "good faith" when in practice the NLRB was applying a stricter standard.[5] The Court held the NLRB, in the interest of

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1. *See* Celanese Corp. of Am., 95 N.L.R.B. 664, 673 (1951).

2. *See* Maria Fabre Manuel, Comment, *Abolishing the Withdrawal of Recognition Doctrine: Serious Doubts about the Good Faith Doubt Test*, 55 LA. L. REV. 913, 927 (1995).

3. *See* Joan Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 WIS. L. REV. 653, 678 (1991).

4. *See* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 364 (1998). In this article, "the Act" refers to the National Labor Relations Act, 29 U.S.C. § 151 (2000).

5. *See Allentown Mack Sales & Serv.*, 522 U.S. at 376.

judicial review, must adhere to the meaning of generally accepted legal standards.[6] In response, the NLRB issued its decision in *Levitz Furniture Company*.[7]

In *Levitz*, the employer withdrew recognition of the union because of what it believed was evidence of its good-faith doubt of the union's majority status, a petition from a majority of the employees stating the employees no longer wanted to be represented by the union.[8] The NLRB took this opportunity to rectify its unitary good-faith doubt standard and to formally create a more stringent standard to which employers must adhere before withdrawing union recognition.[9]

Pre-*Levitz* opinions created confusion among employers and unions regarding the appropriate response when a question existed about the union's support from a majority of its members. *Levitz* was the NLRB's effort to clear up the confusion and to promote its preferred method to determine a union's status, namely NLRB-controlled elections.[10] In so doing, *Levitz* actually tied the hands of employers, who are now forced to continue recognition of a union that may no longer enjoy majority support. The employer has only one option outside of obtaining actual objective evidence that the union no longer enjoys majority support—petition for an RM election that will be subject to numerous union-initiated blocking charges.[11] The impact of *Levitz* upon labor-management relations remains to be seen, but most likely it will lead to more incidences of employers continuing to recognize a union even though that union does not represent a majority of the employees and to more petitions for RM elections.

Part I of this Comment describes the union decertification process. Parts II and III will discuss and analyze pre-*Levitz* decisions of the NLRB and the Supreme Court's decision in *Allentown Mack*. Part IV will review the *Levitz* decision. Finally, Part V will discuss

6. *Id.* at 376–77.
7. Levitz Furniture Co. of the Pac., Inc., 333 N.L.R.B. No. 105, slip op. (Mar. 29, 2001).
8. *Id.* at 4.
9. *See id.* at 2.
10. *See id.* at 15.
11. *See* Flynn, *supra* note 3, at 654. Blocking charges are charges of unfair labor practices filed by a union or an employee against the employer for violations of the Act. No decertification elections may be held while there are pending unfair labor practice charges. Therefore, it is a common union tactic to file these charges in an effort to delay the election process to provide time for the union to reorganize and rally the support of the employees.

the possible impact of *Levitz* on the future of labor-management relations.

I. THE UNION DECERTIFICATION PROCESS

There are three methods by which a new union is certified and an incumbent union is decertified: withdrawal of recognition, NLRB controlled elections, and polling. First, however, it is necessary to discuss at what point an incumbent union's status may be challenged.

Once a new union is certified, it enjoys an irrebuttable presumption of majority representation for one year, and an employer is required to bargain with the union for the remainder of the collective bargaining agreement, up to three years.[12] Only after these terms have expired, or under extremely unusual circumstances, does the presumption of majority status become rebuttable.[13]

The contract bar rule effectively requires the employer to recognize a union throughout the term of a collective bargaining agreement, up to three years,[14] regardless of the employees' support of the union.[15] Once the presumption of majority status becomes rebuttable, the employer has three choices: withdraw recognition based upon the union's actual loss of majority support, file a petition for an RM election with the NLRB based upon the good-faith uncertainty of the union's majority status, or poll the employees to determine whether there is actual union support.[16] In addition, the employees may file a decertification petition if at least 30 percent of them wish to determine the majority status of the union.[17]

A. Unilateral Withdrawal of Recognition

Prior to *Levitz*, an employer could withdraw recognition of the union once its status became rebuttable.[18] The employer had to show the withdrawal was based upon a good-faith doubt of the union's

12. James M.L. Ferber & R. Scott Ferber, *Withdrawal of Recognition: The Impact of* Allentown Mack *and* Lee Lumbar, 14 LAB. LAW 339, 340 (1998).

13. *See id.* at n.8.

14. NLRB v. Arthur Sarnow Candy Co., 40 F.3d 552, 556–57 (2d Cir. 1994).

15. *See* 1 THE DEVELOPING LABOR LAW 388 (Patrick Hardin et al. eds., 3d ed. 1992).

16. *See* Manuel, *supra* note 2, at 916–17.

17. *Id.* at 916.

18. *See* 1 THE DEVELOPING LABOR LAW, *supra* note 15, at 571; *see also* Manuel, *supra* note 2, at 921.

majority status at the time recognition was withdrawn.[19] Until *Levitz,* an employer could legally withdraw recognition of an incumbent union without actual proof of the lost majority status, relying instead on only a good-faith doubt of the lost status.[20]

Employers obviously preferred to withdraw recognition over the other methods because, as long as they could convince the NLRB their withdrawal was in good faith, they could lawfully discontinue bargaining with the union.[21] The other methods, petitioning for election and polling, were considerably more cumbersome and time consuming, and required the employer to continue to negotiate with the union, possibly allowing the union time to regain support from the employees.[22] *Levitz* would turn the tables on employers and blatantly advance the NLRB-favored method of determining a union's status, NLRB-controlled elections.[23]

B. Petitioning for an RM Election

Before *Levitz*, employers were permitted to submit a petition for an RM election based upon the same good-faith doubt standard applied to the unilateral withdrawal of recognition.[24] While the NLRB favored an election process that it controlled because of the drawn-out process and the likelihood of the union's filing unfair labor practice charges, employers did not favor the RM election.[25] If an employer petitioned for an RM election and the NLRB determined that the petition was based upon a good-faith doubt of the union's majority status, it conducted a carefully orchestrated election to encourage maximum employee participation and accurate election results.[26] While an RM election did produce accurate results, it also required the employer to bargain with the union. Therefore, many employers simply decided to forego the RM election and withdraw recognition of a union.[27] After all, the same good-faith doubt stan-

19. Manuel, *supra* note 2, at 921.

20. *Id.*

21. Comment, *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 DUKE L.J. 718, 732 (1981).

22. *See id.* at 730–31.

23. Levitz Furniture Co. of the Pac., Inc., 333 N.L.R.B. No. 105, slip op. at 15 (Mar. 29, 2001).

24. *Id.* at 14.

25. *See* Flynn, *supra* note 3, at 654.

26. *Id.*

27. *Id.*

dard applied to both the withdrawal of recognition as well as the petition for an RM election.

C. Employer Polling

Employer-conducted polling is the NLRB's least-favored decertification instrument.[28] Polling allows an employer to quickly determine the actual employee support for a union.[29] However, the results of polls have been deemed by the NLRB to be unreliable and fraught with unfair labor practices.[30] NLRB-controlled elections are conducted under tight watch and anything less than these controls invites unfair labor practices charges.[31]

D. Employee Decertification

Finally, employees may file a decertification ("RD") for an election upon showing 30 percent of the employees desire to withdraw from the union.[32] This petition is therefore most useful when the employees are well organized and knowledgeable.[33] Since the employees file the RD petition, there is no showing necessary of the employer's good-faith doubt. *Levitz* had no impact on the RD petition and it continues to be a viable method of union decertification.

II. RELEVANT DECISIONS PRIOR TO *LEVITZ FURNITURE CO.*

Over the years, the NLRB has developed and extended the good-faith doubt standard to the withdrawal of incumbent union recognition, petitions for RM elections, and polls of employees.[34] This Section will discuss the relevant cases and doctrine leading up to

28. *See id.* at 663.

29. *Id.* at 665.

30. *Id.* at 664. In *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1063 (1967), the NLRB held that employer polls would constitute an unfair labor practice unless: the poll is to determine whether the validity of a union's claims to majority status; this purpose is told to the employees; employees are assured that there will be no reprisal; the poll is conducted by secret ballot; and the atmosphere is not coercive.

31. *See* Flynn, *supra* note 3, at 665–66.

32. *See* 29 U.S.C. § 159(c) (2000); *see also* 1 JOHN D. FEERICK ET AL., NLRB REPRESENTATION ELECTIONS: LAW, PRACTICE & PROCEDURE 191 (3d ed. Supp. 1989).

33. *See* Comment, *supra* note 21, at 730.

34. *See infra* Part II.A–C.

Levitz: *Celanese Corp.* (good-faith doubt standard is applied to employer's withdrawing recognition of a union);[35] *U.S. Gypsum* (good-faith doubt standard is applied to employer's petition for an RM election);[36] and *Texas Petrochemicals Corp.* (good-faith doubt standard is applied to employer's polling of employees).[37]

A. Celanese *and the Good-faith Doubt Standard*

In 1951, the NLRB set the standard for employers to withdraw recognition from unions that the employer believed no longer represented a majority of the employees. In *Celanese Corp. of America*,[38] the NLRB decided the employer only needed a good-faith belief that a majority of the employees no longer supported the union to withdraw recognition.[39] The *Celanese* decision guided NLRB decisions for the next fifty years and paved the way for the development of a method for employers to withdraw union recognition.

Celanese Corporation ("Celanese") opened a plant in Texas in 1945, and several months later a union was certified as the bargaining representative of the employees.[40] In 1948, Celanese and the union entered into negotiations; however, they reached an impasse over wage rates, broke off the negotiations, and the union called a strike that completely shut down the plant.[41] After two months, Celanese decided to reopen its plant and offered any employee who returned to work a raise equivalent to what had been offered to, and rejected by, the union.[42] Eventually all of the positions were filled at the Celanese plant, and employees hired outside the plant replaced any striking employees who did not return to work.[43] The union requested renewed bargaining; however, Celanese responded that it was operating at full capacity and that "to the best of our [Celanese's] knowledge and belief, the Union does not represent any of the employees now working in this plant."[44] Although the trial examiner

35. *See infra* Part II.A.
36. *See infra* Part II.B.
37. *See infra* Part II.C.
38. 95 N.L.R.B. 664 (1951).
39. *See id.* at 671.
40. *Id.* at 668.
41. *Id.*
42. *Id.*
43. *Id.* at 669.
44. *Id.* at 670. In actuality, Celanese was operating at full capacity but with only approximately 50% of the original number of employees. The NLRB held that this workforce

held the union had represented a majority of the employees hired back in 1948, the lapse of three years since the last certification rebutted the presumption of continued majority support.[45]

The NLRB agreed with the trial examiner's decision that Celanese had not violated section 8(a)(5) of the Act, but disagreed with the trial examiner's rationale and changed the method by which employers could withdraw union recognition.[46] The NLRB changed the question presented by the trial examiner from "whether there was sufficient evidence to rebut the presumption of continued majority status or to demonstrate that the Union in fact did not represent the majority of the employees" to "*whether the Employer in good faith believed that the Union no longer represented the majority of the employees*."[47] The NLRB further stated that the good-faith issue could not be determined through a formula, but rather by taking into account all circumstances of the decision to withdraw recognition.[48]

To accomplish this, the NLRB held that two prerequisites were essential to finding the employer acted in good faith in withdrawing recognition of a previously certified union.[49] First, the employer must have possessed reasonable grounds for believing the union no longer enjoyed majority support.[50] Second, the withdrawal of recognition based on the lack of majority support could not have occurred during times of other unfair labor practice violations or antiunion activities intended to undermine union support.[51] The NLRB in *Celanese* held the record did not indicate any reason for finding that the company had not acted in good faith.[52] Since Celanese acted in good faith, there was no need to decide whether or not the union actually represented a majority of the employees.[53]

reduction resulted from the hiring of an independent contractor to handle much of the plant maintenance and the improved operating methods that were implemented during the strike. The NLRB held that these workforce reductions were lawful. *Id.*

45. *Id.* at 671.
46. *Id.*
47. *Id.* (emphasis added).
48. *Id.* at 673.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 675.

B. United States Gypsum *and the Standard for Petitions for Elections*

In the 1966 decision *United States Gypsum Co.*, the NLRB held when a certified union requests recognition, the employer must prove it has reasonable grounds for doubting the majority status of the union to request an RM election.[54] The extension of the good-faith doubt standard to RM petitions was an effort to protect incumbent unions from repeated election petitions that employers tended to bring at the end of contracts or whenever a company was sold.[55] The NLRB's decision rested on the goal of protecting the rights of the employees through continuity and stability in the bargaining of the employer and the incumbent union.[56]

This decision involved U.S. Gypsum's purchase of a quarry, lime plant, and mine from United Cement Company.[57] U.S. Gypsum temporarily closed operations and upon reopening rehired all but three of United Cement's former employees.[58] However, U.S. Gypsum refused to check off union dues as required under the union contract with United Cement.[59] After the union filed a grievance, U.S. Gypsum withdrew recognition of the union.[60] U.S. Gypsum then filed a petition for a representation election.[61] The NLRB decided this matter could be decided on a more fundamental principle, namely, whether U.S. Gypsum could, in good faith, doubt the continued majority representation of the union and therefore be entitled to an RM election.[62]

The employer's good-faith doubt of majority status was not questioned upon the filing of a petition for an RM election.[63] Previous NLRB decisions had held that if an employer filed a petition for an election to determine the standing of a union that claimed to represent the employees, and the employer declined to recognize the

54. U.S. Gypsum Co., 157 N.L.R.B. 652, 656 (1966).
55. *Id.* at 655.
56. *See id.* at 655–56.
57. *Id.* at 653.
58. *Id.* Two of the employees did not pass the physical examination and one of the employees resigned. *Id.* at n.1.
59. *See id.* at 653–54.
60. *Id.* at 654.
61. *Id.*
62. *Id.*
63. *Id.* at 654–55.

union, a question concerning representation had been raised.[64] However, in evaluating the petitions, the NLRB had not questioned the good faith of the employer's withdrawal of recognition; furthermore, when the employer was a new owner, the NLRB consistently granted the petitions for election.[65] The NLRB in *U.S. Gypsum* held a new owner could not justify refusing to bargain with a certified union by relying solely upon its new ownership.[66]

The NLRB looked to the legislative history of section 9(c)(1)(B) of the Act to decide when an employer could petition for a representation election.[67] The NLRB's analysis of the section did not find a unilateral right for employers to question a union's majority status.[68] Rather, it found Congress' underlying purpose was to permit elections when employers had "reasonable grounds for believing" that the union no longer represented a majority of the employees.[69] Thus, the NLRB concluded Congress required a good-faith doubt for an employer to question the majority status of a union and to request an RM petition.[70]

The decision in *U.S. Gypsum* stood for the proposition that when an employer wished to file a petition for election, it needed objective evidence to support its reasonable belief for doubting the union's majority status.[71] This decision, while seeming to clear up the confusion over whether a petition for an RM election should be granted, effectively created additional confusion by employing the same standard used for an employer seeking to withdraw union recognition.[72]

The NLRB's attempt to restrain employers from constantly petitioning for election by requiring good-faith doubt clearly backfired. Instead of petitioning for election, the employers withdrew recognition of the union and refused to bargain based upon the same good-faith doubt that would have permitted a certification election.[73] To quell this effect, the NLRB began interpreting the good-faith doubt

64. *Id.* at 654 (citing Westinghouse Elec. Corp. X-ray, 129 N.L.R.B. 846, 847 (1960); Andrews Indus., Inc., 105 N.L.R.B. 946 (1953)).

65. *Id.* at 654–55.

66. *Id.* at 655.

67. *See id.* at 655–56.

68. *Id.* at 656.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See* Flynn, *supra* note 3, at 654.

73. *See id.* at 678.

requirement in such a way as to make the requirement increasingly difficult to meet.[74] This would result in the United States Supreme Court decision in *Allentown Mack Sales and Service, Inc. v. NLRB*.[75] Before the *Allentown Mack* decision, however, the NLRB would also apply the good-faith doubt standard to employee polling.

C. Texas Petrochemicals *and the Polling Standard*

Employers who wished to poll their employees regarding their support for the incumbent union would also be required to demonstrate good-faith doubt. In 1989, the NLRB issued its decision on the matter in *Texas Petrochemicals*.[76] The administrative law judge ("ALJ") found the employer violated sections 8(a)(5) and (1) of the Act[77] by conducting its own poll of its employees, without notifying the union in advance, to determine whether there was continued majority support of the union.[78] The decision came after several circuits refused to extend the "reasonable doubt" standard to polling.[79] The NLRB stated that the reasonable doubt standard was appropriate for polling because "[t]he similarity of purposes and potential consequences of employer-conducted polls and employer-initiated, NLRB conducted RM elections suggests that we apply similar standards for determining when such polls and elections may be conducted."[80] This analysis neglected to consider that the employer may withdraw recognition of a union based upon this same standard, and that poll results are inherently less reliable than an NLRB-conducted RM election.[81] The NLRB's decision in *Texas Petrochemicals* created the quagmire that eventually led to the problem presented in *Levitz*.

74. *Id.* at 678–79.

75. See infra Part III.

76. Tex. Petrochem. Corp., 296 N.L.R.B. 1057 (1989).

77. 29 U.S.C. § 158(a)(5) makes it an unfair labor practice to refuse to bargain collectively with employees' representatives. 29 U.S.C. § 158(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of" their rights under 29 U.S.C. § 157 (giving employees the right to bargain collectively, among others).

78. *See Tex. Petrochem. Corp.*, 296 N.L.R.B. at 1058.

79. *See id.* at 1059. (citing Forbidden City Rest. v. NLRB, 736 F.2d 1295 (9th Cir. 1984); Thomas Indus. v. NLRB, 687 F.2d 863 (6th Cir. 1982); NLRB v. A.W. Thompson, Inc., 651 F.2d 1141 (5th Cir. 1981)).

80. *Id.* at 1060.

81. *See* Flynn, *supra* note 3, at 660.

In 1984, Texas Petrochemical Corporation purchased the Petro-Tex Chemical Corporation, which had 103 union members.[82] The President of the company spoke with several employees who said that the union did not enjoy majority support.[83] Over the next several weeks, company supervisors reported twenty-three different employees who expressed unhappiness with the union.[84] The company decided that there was sufficient uncertainty to warrant a poll, which resulted in thirty-five votes in favor of the union and fifty votes in opposition.[85] The company then notified the union that the employees had voted to discontinue union representation and that the company would no longer recognize the union.[86]

The NLRB held the company had violated sections 8(a)(5) and (1) of the Act for lack of sufficient evidence to constitute a reasonable doubt of the majority status of the union to conduct a poll.[87] The NLRB applied a reasonable doubt standard to polling, contrary to the decisions of three circuits.[88] The NLRB disagreed with the analysis of the circuit courts and decided that employers may withdraw recognition of unions with the support of poll results that reflect a loss of majority status because a proper poll was the same as if an NLRB election had occurred.[89] For this reason, the NLRB felt similar standards should be applied to each method of determining whether a union had maintained majority support.[90] In fact, the NLRB suggested that employer-conducted polls should face higher standards since the polls were conducted outside of the watchful eye of the NLRB, unlike the "strict procedural formality of Board-conducted RM elections."[91] The NLRB's apparent distrust of the results of employer polls did not lead it to abandon this procedure, but rather to bolster the standard to conduct such a poll.[92] While the NLRB recognized the employer's right to poll and that such polls did not

82. *Tex. Petrochem. Corp.*, 296 N.L.R.B. at 1057.
83. *Id.* at 1057.
84. *Id.* at 1057–58.
85. *See id.* at 1058. Out of the 103 eligible employees, eighty-six votes were submitted; one vote was void. There was no explanation provided for the other seventeen eligible employees. *Id.* at n.7.
86. *Id.* at 1058.
87. *Id.*
88. *Id.* at 1059.
89. *See id.* at 1059–60.
90. *Id.* at 1060.
91. *Id.*
92. *See id.* at 1061.

need to be conducted with the stringent formalities of the RM elections, it also held unions must be notified in advance of a poll and that the employer should adhere to the procedural safeguards of *Struksnes Construction Co*.[93]

Because polling, RM elections, and withdrawal of recognition could all possibly result in the employees' loss of representation and the union's loss of recognition, the NLRB reasoned that the same standard should be applied to each method.[94] It noted it favored Board-conducted RM elections over polling, but recognized employers' right to poll.[95]

The rationale of *Texas Petrochemicals* is curious. On the one hand it said that the reasonable doubt standard is sufficient to petition for an RM election, polls, or even withdrawal of union recognition altogether. However, it also indicated that the NLRB clearly preferred the RM elections and distrusted employer polling, while not even discussing unilateral withdrawal of recognition.

> Rather than permit an employer unilaterally to subject a collective-bargaining representative to an in-house test of strength under circumstances where the Board itself would refuse to conduct such a test, the Board requires at least as stringent an evidentiary loss-of-support predicate for an employer-conducted in-house election as that which is required for a Board-conducted election.[96]

After the NLRB established a unitary standard, employers were left to decide whether their information regarding the majority status of a union was sufficient enough to meet the good-faith doubt standard. The NLRB's interest in promoting industrial stability, which led to the good faith doubt standard, resulted in a unitary standard that actually encouraged employers to unilaterally withdraw recognition of a union.[97] Consequently, employers would forego the petition or polling route and withdraw recognition of the union based upon their good faith doubt.

This unitary standard clouded the meaning of the good-faith doubt test.[98] The NLRB stated that employers did not need objective proof that a majority of the employees did not support the union, but

93. *Id.*; *see also* Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967).
94. *See Tex. Petrochem. Corp.*, 296 N.L.R.B. at 1066.
95. *Id.* at 1061.
96. *Id.* at 1060–61.
97. *See* Flynn, *supra* note 3, at 661.
98. *See id.* at 654.

that multiple factors could support good-faith doubt.[99] However, after the *Texas Petrochemicals* decision, it became increasingly evident that the NLRB was requiring objective proof that would support the employer's good faith doubt.[100] This continued until *Allentown Mack* was decided in 1998.[101]

III. *ALLENTOWN MACK*: THE SUPREME COURT'S ATTEMPT TO SETTLE THE GOOD-FAITH DOUBT TEST

In 1998, the United States Supreme Court attempted to settle once and for all the meaning of the good-faith doubt standard. The Court in *Allentown Mack Sales & Service, Inc. v. NLRB* determined that the good-faith reasonable doubt standard was consistent with the Act.[102] However, the Court took exception with the NLRB's definition of good faith.[103] Although the NLRB had argued doubt meant disbelief, the Court disagreed, stating "[t]he Board's finding to the contrary rests on a refusal to credit probative circumstantial evidence, and on evidentiary demands that go beyond the substantive standard the Board purports to apply."[104] The Court was attempting to put to rest the problems that had developed with the good-faith doubt test, namely that the NLRB was actually requiring objective proof that the union no longer enjoyed majority support, rather than simply a good-faith doubt by the employer.[105]

Allentown Mack arose from this disagreement over the meaning of good-faith doubt. In 1990, Allentown Mack purchased a factory branch of Mack Trucks.[106] Near the time of the sale, several Mack employees told Allentown Mack that they no longer supported the incumbent union.[107] After the sale, the union requested that Allentown Mack recognize their representation of the employees.[108] The company responded that it had a good-faith doubt that the union still represented a majority of the employees, and that the company would be conducting a secret poll of the employees to determine if there was

99. *See id.* at 679–80
100. *See id.*
101. Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359 (1998).
102. *Id.* at 380.
103. *Id.* at 367.
104. *Id.* at 368.
105. *See id.* at 372–73.
106. *Id.* at 362.
107. *Id.*
108. *Id.*

majority support.[109] The poll was conducted and the union lost nineteen to thirteen.[110] The ALJ decided that the Company had violated sections 8(a)(5) and (1) because the Company conducted a poll and withdrew recognition of the union without an "objective reasonable doubt" of the union's majority status.[111] The court of appeals upheld the judge's decision.[112]

The Supreme Court recognized that "[c]ourts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act.'"[113] While ruling that the use of a unitary standard is not inconsistent with the Act, the Court decided that the evidence did not support the NLRB's finding that Allentown Mack did not have a reasonable doubt.[114]

The Court first discussed Allentown Mack's contention that the NLRB's unitary standard made it irrational for an employer to conduct a poll, thus making polls useless, since the same standard was required for the employer to withdraw recognition of a union.[115] The Court rejected this argument, stating situations exist when an employer might choose to simply poll the employees, rather than make the more drastic decision to unilaterally withdraw recognition.[116] An employer that has a good-faith doubt may choose to poll its employees to gain conclusive evidence of the fact that the union no longer enjoys majority status.[117] Since the NLRB argued that polling should require a more rigorous standard because of its obvious preference for the RM election, a counter argument existed that would require a less stringent standard for polling.[118] The Court noted a union that lost a poll could request an election, but a union that lost an election could not seek another election for one year.[119] To settle this dispute, the Court found it not irrational to "split the difference" and required the same standard for both polls and elections.[120]

109. *Id.*
110. *Id.* at 362–63.
111. *Id.* at 363.
112. *Id.*
113. *Id.* at 364 (quoting Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987)).
114. *Id.* at 380.
115. *Id.* at 364.
116. *See id.* at 365.
117. *Id.* (citing *Tex. Petrochem. Corp.*, 296 N.L.R.B. at 1063).
118. *See id.* at 365–66.
119. *Id.* at 366.
120. *Id.*

The Court held the unitary good-faith doubt standard was rational, but decided that the application of the standard by the NLRB to the facts of the case was not.[121] The NLRB's definition of "doubt" in the polling standard only meant "disbelief" and not "uncertainty."[122] The Court took exception to this "linguistic revisionism" and held that a reasonable jury could have found Allentown had a reasonable uncertainty (not disbelief) that the union no longer represented a majority of the employees.[123] The Court reasoned the NLRB's standard of disbelief demanded the Company provide more evidence than the substantive standard actually required.[124]

Later in the opinion, the Court discussed the Administrative Procedure Act and the NLRB's decision-making authority.[125] The Court noted reasoned decision-making required the uniform application of judicial standards,[126] and consistently requiring a different standard than the pronounced standard did not achieve this goal.[127] The Court chided the NLRB:

> Reviewing courts are entitled to take those standards to mean what they say, and to conduct substantial-evidence review on that basis. Even the most consistent and hence predictable Board departure from proper application of those standards will not alter the legal rule by which the agency's fact-finding is to be judged.[128]

The Court noted that the NLRB possessed the power to adopt substantive law; however, in this case the NLRB consistently discounted some evidence and amplified what the evidence must prove.[129] To create substantive law, the NLRB needed to act consistently with "clearly understood legal standards."[130]

Allentown Mack was the Court's effort to restrain the NLRB's adjudicating authority. The opinion required the NLRB to conform to the legal standards of the judiciary system so that, in judicial review, courts could understand the rule of law that the NLRB had set in place.[131] The NLRB read this decision as an opportunity to

121. *Id.* at 380.
122. *Id.* at 367.
123. *Id.* at 367–68.
124. *See id.* at 368.
125. *Id.* at 374. The Administrative Procedure Act governs the proceedings of administrative agencies and related judicial review. *Id.* (citation omitted).
126. *Id.* at 374.
127. *See id.*
128. *Id.* at 376–77.
129. *Id.* at 378.
130. *Id.* at 376.
131. *See id.*

promulgate new legal rules that conformed to the Supreme Court's "legal standards" and overturned a fifty-year-old precedent in *Levitz Furniture.*

IV. *LEVITZ FURNITURE*

On March 29, 2001, the NLRB issued its decision in *Levitz Furniture Co. of the Pacific*.[132] The NLRB held that employers could no longer permissibly withdraw recognition of a union based upon a good-faith belief that a majority of the employees no longer support the union.[133]

A. Facts

Levitz Furniture Company of the Pacific ("Levitz") was a retail furniture sales company located in San Francisco, California.[134] Levitz received a petition from a majority of the employees asserting they no longer wished to be represented by the union in upcoming negotiations.[135] Levitz promptly notified the union that, pursuant to the petition, it would no longer recognize the union after its current contract expired.[136] The union responded two weeks later stating it had proof it continued to enjoy the support of a majority of the employees, although it did not provide the nature of the evidence and Levitz did not request it.[137] Nonetheless, Levitz withdrew recognition of the union at the expiration of the collective bargaining agreement, relying on the petition from the employees, which it felt supported its good-faith belief that the union no longer represented a majority of the employees.[138]

B. Unfair Labor Practice Charges

Upon the withdrawal of recognition of the union by Levitz, the union filed charges with the NLRB alleging Levitz violated sections 8(a)(5) and (1) of the Act.[139] Section 8(a)(5) makes it an unfair labor

132. 333 N.L.R.B. No. 105, slip op. (Mar. 29, 2001).
133. *Id.*at 4.
134. *Id.* at 9.
135. *Id.* at 11.
136. *Id.*
137. *Id.* at 11–12.
138. *See id.* at 12–13.
139. *Id.* at 5–6.

practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ."[140] Section 8(a)(1) prohibits employers from impeding employees in exercising their section 7 rights.[141] Section 7 guarantees all employees the opportunity to engage in collective bargaining through labor organizations.[142] The union's charges resulted from Levitz's decision to withdraw recognition of the union at the expiration of its collective bargaining agreement.[143]

The NLRB decided Levitz had demonstrated a good-faith uncertainty as to the majority support of the union.[144] However, in doing this, the NLRB overruled precedent and significantly changed the good-faith doubt standard for employers who wish to withdraw recognition of an incumbent union.[145] For fifty years, *Celanese* had permitted employers to withdraw recognition of a union based upon "whether the Employer in good faith believed that the Union no longer represented the majority of the employees."[146] However, *Levitz* ended the good-faith doubt test as applied to the unilateral withdraw of recognition and instead extended this standard to employers who wished to obtain an RM election.[147]

V. ANALYSIS AND COMPARISON OF PRECEDENT TO *LEVITZ FURNITURE CO.*

At first blush the NLRB's decision to overrule *Celanese* seemed to be a blow to employers who, just two years before, were at least partially victorious in the Supreme Court's decision in *Allentown Mack*. In applying the good-faith doubt standard to situations in which majority union representation was in question, *Levitz* is not far from what the NLRB had actually been doing for years.[148] While purporting to rely on a good-faith doubt standard, the NLRB had been requiring far more, going so far as to require actual objective evidence that the employees did not wish to be represented by the

140. *See* 29 U.S.C. § 158(a)(5) (2000).
141. 29 U.S.C. § 158(a)(1).
142. *See* 29 U.S.C. § 157.
143. *Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 4.
144. *Id.* at 19.
145. *See id.* at 21.
146. Celanese Corp. of Am., 95 N.L.R.B. 664, 671 (1951) (emphasis omitted).
147. *See Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 2.
148. Martha B. Pedrick, *Withdrawal of Recognition: NLRB Toughens, Loosens Standards*, 52 LAB. L.J. 166, 171 (2001).

union before the employer's decision could have been made in good faith.

A. Actual Loss of Majority Status Required for Withdrawal of Union Recognition.

Celanese established the good-faith doubt standard for withdrawing recognition of a union that no longer represented a majority of the employees.[149] Over the years, the NLRB grew uncomfortable with this standard as it afforded the employer too much control over union recognition. It felt good faith was not a difficult standard to meet, and under the guise of industrial stability and protecting employees' rights to representation, made it increasingly difficult to satisfy.[150] For example, Joan Flynn, a former field attorney for the NLRB, has noted that "high employee turnover, a small or declining number of union members or employees authorizing union dues deductions, employee disinterest in union activity, inactivity on the union's part . . . and employee statements regarding other employees' opposition to the union" did not warrant a good-faith doubt.[151] The NLRB had taken the good-faith doubt standard and run with it.

The NLRB converted the good-faith doubt standard over the years to require positive proof of the union's loss of majority support.[152] The NLRB's actions had functionally overruled *Celanese* by using the good-faith disbelief test instead of the good-faith uncertainty as set out in *Allentown Mack*.[153] As a result, the *Levitz* decision formally articulated how the NLRB had acted for several years. In *Allentown Mack* the Supreme Court warned the NLRB not to establish a good-faith doubt standard while holding employers to something more.[154] The NLRB corrected this by changing the standard to meet its requirement that an employer should not be able to

149. *Celanese Corp. of Am.*, 95 N.L.R.B. at 671.

150. Flynn, *supra* note 3, at 679.

151. *Id.* at 678–79.

152. *See* Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359, 372 (1989). The NLRB answered this accusation by stating that it did not require a "strict head count." The Court disagreed stating that the NLRB "regularly rejected similarly persuasive demonstrations of reasonable good-faith doubt." *Id.*

153. *See id.* at 367.

154. *See id.* at 378.

withdraw recognition of a union without the union's actual loss of majority support.[155]

In *Levitz*, the NLRB began its analysis by dealing with the *Allentown Mack* decision.[156] In light of the Supreme Court's finding that the NLRB could establish more stringent evidentiary burdens provided that there was sufficient notice, the NLRB stated: "In our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost."[157]

1. Requirements in the Language of the Act

The NLRB noted that the language of the Act did not mention anything about an employer's doubt of the union's majority status.[158] *Celanese* had decided that, after the one-year certification period in which union representation could not be challenged, the presumption of majority support was rebuttable and the employer could refuse to bargain with a union that the employer in good faith believed no longer represented a majority of employees.[159] In *Levitz*, the NLRB opined that it was under no obligation from the text of the Act to extend such a good-faith doubt standard.[160] In addition, the NLRB held that the policy behind of the Act (and *Celanese*) also did not support an employer's unilateral withdrawal of recognition of a union.[161]

2. The Policy of the Act

The policy behind the Act is well established: promotion of stability in bargaining relationships, protection of the employees' right to select representation, and encouragement of collective bargaining.[162] The *Levitz* decision rested upon the theory that continued union majority status is important to each of these policies.[163] Industrial

155. *See* Levitz Furniture Co. of the Pac., Inc., 333 N.L.R.B. No. 105, slip op. at 2 (Mar. 29, 2001).
156. *See id.* at 9.
157. *Id.*
158. *Id.* at 10.
159. Celanese Corp. of Am., 95 N.L.R.B. 664, 672 (1951).
160. *See Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 10.
161. *See id.*
162. *Id.* at 9.
163. *See id.*

stability is protected because employers may not continually refuse to bargain with a union simply because of a good-faith doubt.[164] Collective bargaining is encouraged because the employer must continue to bargain with the union until the union has actually lost support of a majority of the employees, and in that regard the employees' right of representation is protected because an employer may not unilaterally withdraw recognition.[165]

These policy reasons were also considered by the *Celanese* Board, but it decided these policies were served through other protections, such as the presumption of majority status for one year after certification, the contract bar rule, and the requirement that the employer must bargain with the union unless it in good faith doubts the union's continued majority status.[166] The NLRB recognized Celanese Corporation's consistent efforts to promote collective bargaining prior to its development of the good-faith doubt.[167] Essentially, since in the past the employer promoted collective bargaining, its withdrawal of recognition must have been in good faith.[168] The *Levitz* Board was not willing to extend its faith in the employers in such a broad manner.

The *Levitz* Board pointed out that allowing employers to unilaterally withdraw recognition of a union violated the fundamental policies of the Act by harming bargaining relationships and taking away the employees' right to representation.[169] What the NLRB neglected to consider, however, were those situations in which the union had actually lost majority status. The new standard requires the employer to continue negotiating with a union that does not represent a majority of the employees until an election can take place.[170] In the past, employers felt they were in a catch-22: by withdrawing recognition they could possibly face charges for refusing to bargain with employee representatives under sections 8(a)(5) and (1); however, by bargaining with a nonmajority union, employers could face charges under section 8(a)(2).[171] *Levitz* curtailed this fear by

164. *See id.* at 10.
165. *See id.* at 9–10.
166. *See* Celanese Corp. of Am., 95 N.L.R.B. 664, 671–72 (1951).
167. *Id.* at 674.
168. *See id.*
169. *Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 10.
170. *See* Pedrick, *supra* note 148, at 172.
171. *See* 29 U.S.C. §§ 158(a)(1), (2), (5) (2000). Section 8(a)(2) makes it an unfair labor practice for a company to dominate or control a labor union, and this has been extended to showing support by bargaining with a minority union. *See also* Flynn, *supra* note 3, at 665.

pointing out that if an employer cannot prove a union has actually lost majority support, it cannot be charged with bargaining with a nonmajority union because of the presumption that the union continues to enjoy majority support.[172]

The good-faith standard, and now the actual loss standard, are ways for employers to rebut the presumption of majority support for a union. Without absolute proof of the union's loss of majority support, *Levitz* holds that employers should not be permitted to withdraw recognition.[173] However, the NLRB, in its avowed interest of protecting employee representation, has bought a union that has lost majority status time to regain employee support through the delay of blocking charges.[174] Prior to *Levitz*, an employer's good-faith belief that its employees no longer wanted to be represented by the union entitled the employer to withdraw recognition and to stop bargaining with that union. The NLRB in *Levitz* felt the protection of union recognition was a greater concern than the employer's concern over bargaining with a nonmajority union.[175]

After taking away employers' ability to withdraw recognition based upon a good-faith doubt, and attempting to clear up any remaining confusion of the good-faith doubt standard, the NLRB also felt it necessary to address the use of the standard in RM elections.[176]

B. The New Lower Standard for Obtaining an RM Election

The NLRB has not concealed its preference for Board-controlled elections to determine employees' union support.[177] It put this preference into action in *Levitz* when it decided to lower the standard for obtaining RM elections. *U.S. Gypsum* determined an employer had to show a good-faith doubt of the majority support of a union before it could petition for election.[178] However, as in the case of withdrawing recognition, this standard had been twisted to require

Section 8(a)(5) makes it an unfair labor practice to refuse to bargain with employee representatives.

172. *See Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 12.

173. *Id.*

174. *See* Pedrick, *supra* note 148, at 167.

175. *See generally* Memorandum from Arthur F. Rosenfeld, General Counsel, National Labor Relations Board, to All Regional Directors, Officers-in-Charge and Resident Officers (Oct. 22, 2001), *available at* http://www.nlrb.gov/gcmemo/gc02-01.html [hereinafter Rosenfeld].

176. *Levitz Furniture,* 333 N.L.R.B. No. 105, slip op. at 15.

177. *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).

178. *See supra* Section II.B.

objective evidence of the loss of majority support.[179] Again, the NLRB was called upon to clarify the meaning of good-faith doubt.[180]

The NLRB clearly wanted to promote the use of RM elections as an alternative to the unilateral withdrawal of recognition.[181] The NLRB even pointed out an obvious contradiction: employers who have a good-faith doubt of the union's majority status would rather withdraw recognition and hope to make a showing of the fact when responding to unfair labor practice charges, rather than petition the NLRB and wait for the results of an RM election.[182] Therefore, with regards to RM petitions, the NLRB decided to adopt the good-faith uncertainty standard set out in *Allentown Mack* instead of the previously required good-faith disbelief, which required a higher burden of proof.[183]

Policy considerations again influenced the NLRB's decision-making process.[184] By making the standard for obtaining an RM election lower than that required to withdraw recognition of a union, the NLRB hoped to promote employee freedom of choice and industrial stability.[185] A lower standard for RM elections will assist those employers who have a good-faith uncertainty of the employees' support of the union, but may not have actual proof of the union's loss of majority status.[186] Furthermore, bargaining stability is promoted because incumbent unions cannot lose recognition without absolute proof of the employees' repudiation.[187] The NLRB recognized that permitting more RM elections could actually interfere with collective bargaining negotiations.[188] However, the NLRB would rather the negotiations be temporarily disrupted, while the results of the RM elections are determined, than permanently ended through an employer's unilateral withdrawal of recognition.[189]

179. *See* Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359, 379 (1998).

180. *See Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 15.

181. *See* Pedrick, *supra* note 148, at 167.

182. *See Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 15.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *See id.* at 18. This lower standard for RM elections assumes that in the future the NLRB will adhere to its new definition of good-faith uncertainty and not revert to the former "strict head count" procedure. *Id.*

188. *See id.* at 15.

189. *See id.*

The RM election after *Levitz* will likely be more useful. The employer now must show a good-faith doubt of the continued majority status of the union as defined by the Supreme Court in *Allentown Mack*.[190] However, a major drawback to the RM election process is the use of the blocking charge.[191] Representation elections may not be held in the presence of unfair labor practices.[192] Therefore, as soon as an RM petition for election is filed, the union will file an unfair labor practice charge in an effort to stall the election process.[193] However, now that *Levitz* has limited an employer's ability to withdraw recognition to cases in which the employer has actual proof the union has lost majority status, the RM petition or polling may be the only remaining choices. That being said, the Board in *Levitz* chose to "leave to a later case whether the current good-faith doubt (uncertainty) standard for polling should be changed."[194] Therefore, even after *Levitz*, in order to conduct a poll, an employer must have a good-faith doubt as to the majority status of the union.

C. Stare Decisis and the NLRB Decision-Making Process

As an administrative agency, the NLRB has wide latitude over its rulemaking. Still, the concurring opinion written by Member Hurtgen in *Levitz* disagreed with the major points of the majority decision, stating that it was too quick to overturn a fifty-year-old precedent.[195] "In my view, there are values that are inherent in the doctrine of stare decisis. These values include stability, predictability, and certainty of law."[196] For fifty years, employers and unions alike could count on the three methods of union decertification: withdrawal, elections, and polling. *Levitz* changed the rules even after the Supreme Court in *Allentown Mack* had taken such pains to clear up the confusion. Some argue administrative agencies like the NLRB are not under the same confines of stare decisis as courts and judges.[197] However, there is something to be said for stability and consistency in decisions to provide certainty about the rules of the

190. *See* Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359, 376 (1998).
191. *See* Manuel, *supra* note 2, at 930–31.
192. *Id.* at 931.
193. *Id.*
194. *Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 9.
195. *See id.* at 20 (Hurtgen, concurring).
196. *Id.*
197. *See* Pedrick, *supra* note 148, at 172.

game. Employers and unions are now learning a new set of rules, all of which could be upset by a change in the NLRB membership or a decision overturning *Levitz*.[198]

As discussed above, the NLRB has favored the RM elections for years.[199] It is only natural that when pressed to clarify its rules, the NLRB requires a lesser burden of proof for the preferred method. However, the practical effect of the *Levitz* decision may not accomplish what the NLRB had hoped. Employer-union relations are complicated. The NLRB's hope that every employer, uncertain about the majority support of a union, will simply petition for election and then everyone (employer, union, and employees) will patiently await the result is naive. In reality, the union will file unfair labor practice charges to delay the elections, the employer will refuse to negotiate with the union during the election period, and eventually the employees will become disenchanted with the union, with the employer, or with both. The practical effect of *Levitz* will depend upon future NLRB determinations of its new dual standard.[200]

D. Practical Effect of Levitz Furniture Co.

The effect of the *Levitz* decision remains to be seen as the remaining charges pass through the system under the good-faith doubt test.[201] The method for employers to determine whether a union continues to enjoy majority support has been made more straightforward by the *Levitz* decision, although not necessarily less complicated.

One effect of the *Levitz* decision was to clarify which path the employer wished to take at the time the union's majority status becomes rebuttable. Prior to *Levitz*, the employer had three options with the same standard of proof—good-faith doubt. This burden was much more difficult than the words suggested and employers faced unfair labor practice charges no matter what choice they made. The

198. It remains to be seen how the change from a Democratic to Republican presidency will affect the NLRB's membership.

199. *See* Pedrick, *supra* note 148, at 172.

200. The NLRB in *Levitz* declined to discuss the third use for the good-faith standard, polls, because it was not presented. One can only assume that since the NLRB dislikes employer polling as much as it dislikes employers who unilaterally withdraw recognition, a higher standard for polling could be established as well.

201. The NLRB decided that since it was affecting the evidentiary standard required of employers, the new standard would only be applied prospectively and any current pending case should not be subjected to the new standard. *Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 18.

NLRB promoted the use of RM elections by liberalizing the standard to good-faith uncertainty, and discouraged employers from unilaterally withdrawing recognition by tightening the standard of proof to actual loss of majority status.[202]

The general counsel of the NLRB has now defined actual loss of majority status: actual loss "requires a showing that is greater than both the Board's previous 'uncertainty' standard and disbelief standard. 'Actual loss' requires a showing of an actual numerical loss of a union's majority support."[203] To meet its burden of proof, an employer may show actual loss though "untainted, valid evidence, such as a petition, that establishes that a numerical majority of unit employees no longer desires representation from the incumbent union."[204] The union may then rebut this numerical evidence by showing that it is unreliable or was obtained through unfair labor practices.[205]

Cautious employers would undoubtedly choose the RM election route in an effort to avoid numerous unfair labor practice charges for withdrawing recognition. However, unions will undoubtedly file unfair labor practice blocking charges to halt such elections. Certification elections cannot be held while there are pending unfair labor practice charges.[206] Thus, an employer wishing to avoid unfair labor practice charges for unilaterally withdrawing recognition will face blocking charges and the election will be delayed until the unfair labor practice charge is decided.

On the other hand, an employer who is able to provide proof of the actual loss of union support may withdraw recognition of the union and refuse to bargain. Again, numerous unfair labor practice charges will be filed.[207] The employer will have the burden "to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition."[208] The NLRB felt it necessary to place the burden upon the employer to prove a negative, that the union does not have support, because as an

202. *See id.* at 15.

203. Rosenfeld, *supra* note 175.

204. *Id.*

205. *Id.*

206. Flynn, *supra* note 3, at 699.

207. *See Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 11. Interestingly, the NLRB's decision notes "[i]f the union contests the withdrawal of recognition …." *Id.* Undoubtedly, any union would contest the unilateral withdrawal of recognition. *See* Pedrick, *supra* note 148, at 170.

208. *Levitz Furniture*, 333 N.L.R.B. No. 105, slip op. at 18.

affirmative defense to unfair labor practice proceedings, the employer would have the burden.[209] Furthermore, the NLRB opined that the employers have access to the evidence, the information that was provided to them that they used to decide the union had in fact lost majority support.[210]

Ultimately, an employer who withdraws recognition of a union or files for an RM petition (or even conducts its own poll, which the NLRB did not discuss in *Levitz*) faces unfair labor practice charges. However, the NLRB was trying to alleviate this concern by promoting the use of RM elections. The NLRB's obvious preference for Board-controlled elections will more likely lead to a favorable outcome for the employer who utilizes this procedure. Even an employer who has proof that a union has lost majority status may prefer to file a petition for RM election instead of unilaterally withdrawing recognition. The NLRB's obvious distaste for employers who unilaterally withdraw recognition should caution those who believe they have hard proof of the union's loss of majority status.

CONCLUSION

The NLRB has taken a unitary standard for three different methods of questioning a union's majority status, and converted it into different standards that lead to the same result. Before *Levitz*, if an employer wished to withdraw recognition of a union, the good-faith doubt standard (as then applied) required employers to provide a virtual head count of the employees who no longer supported the union. Today, the NLRB requires such a head count. An employer can choose to rely upon its own proof of the union's loss of majority support, or an employer can choose to petition for an RM election. Either way, the process will be delayed by unfair labor practice charges. Ideally, the policies behind the Act will still prevail, collective bargaining will be encouraged, and employees' freedom of self-organization and designation of representatives will be respected.

209. *See id.* at 12.
210. *See id.*