The Successor Employer's Obligation to Bargain: Current Problems in the Presumption of a Union's Majority Status

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The national labor policy guarantees the right of employees to bargain collectively with their employers through an elected collective bargaining representative. This right to bargain collectively is protected by requiring a successor employer in most cases to recognize and bargain with the union after he assumes ownership from the predecessor employer. The successor's bargaining obligation does not stem directly from the National Labor Relations Act (the "Act"), but is purely a creation of the National Labor Relations Board (the "Board") pursuant to its Congressional mandate to


2. The "successor employer" will hereinafter be referred to as a "successor." The term, in itself, carries no implication of an obligation to bargain. The original employer will hereinafter be referred to as the "predecessor."

In order to identify a successor, the Board will look to a wide variety of factors such as (a) percentage of the predecessor's employees in the successor's work force (a majority constitutes strong evidence of a union majority), (b) the personnel policy of the predecessor compared with that of the successor, (c) whether or not there has been a lapse in production between the predecessor's and successor's tenure of ownership, (d) whether there has been a change in products manufactured and (e) whether there has been a change in plant location or internal operations. See Slicker, A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach, 57 Minn. L. Rev. 1051 (1973) [hereinafter cited as Slicker]. See also Morris & Gaus, Successorship and the Collective Bargaining Agreement: Accomodating Wiley and Burns, 59 U. Va. L. Rev. 1359 (1973). For a good discussion of the obligations of successor employers see Note, The Bargaining Obligations of Successor Employers, 88 Harv. L. Rev. 759 (1975) [hereinafter cited as Bargaining Obligations].

3. There are three foundation cases decided by the Supreme Court establishing the duties of the successor to bargain. John Wiley & Sons, Inc., 376 U.S. 543, 550-51 (1964), held that a successor may be required to comply with the duty to arbitrate arising from the predecessor's collective bargaining agreement in circumstances where the successor hired all of the original corporation's employees. NLRB v. Burns Int'l Security Servs., 406 U.S. 272, 281 (1972), held that a successor may be obligated to bargain when the business unit, after the change in employers, is identical to the unit prior to the change and the successor has hired a substantial percentage of its predecessor's employees. Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249, 262-63 (1974) held that a successor employer who purchased the assets of a restaurant and motor lodge, and who expressly did not assume any of the seller's collective bargaining obligations, was not required to arbitrate with the union since there was no substantial continuity of identity in the work force hired by the successor.
expedite national labor policy and objectives. In the successor context, labor policy embodies the often conflicting goals of preserving industrial peace by maintaining rights accrued through collective bargaining and protecting the employees' freedom of choice. The conflict is illustrated by the Board's recognition that if the union's actual majority status vascillated as much as the normal employee's sentiment toward the union, then effective collective bargaining agreements would be prevented and industrial stability would suffer. Consequently, the Board has an interest in reducing the frequency of challenges to the union's majority status through elections. In the process of so doing employees' free choice may be limited.

Although the successor is usually required to bargain with the collective bargaining representative of the predecessor's employees, there are circumstances where he can refuse to do so. If the successor can show (1) an actual loss of the union's majority status or (2) a "good faith doubt" based upon facts which justify a reasonable belief that the union has lost its majority status, he may ignore demands that he bargain. Under these circumstances, labor policy recognizes that when a reasonable good faith doubt is shown by the successor, stable bargaining relationships will be maintained and industrial stability will not suffer. This Note will examine how the current law defining good faith doubt (1) creates the potential for inconsistent decisions, (2) reflects generalizations not based upon empirical fact, and (3) discourages adequate judicial review of decisions made by the Board. Finally, the national labor policy will be reviewed in light of these circumstances. This Note concludes that the policy, as currently interpreted, unreasonably sacrifices the determination of actual employee free choice.

4. See Slicker, supra note 2, at 1053.
7. See Bargaining Obligations, supra note 2, at 761.
8. Band-Age, Inc. v. NLRB, 534 F.2d 1, 3 (1st Cir. 1976); Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1139 (7th Cir.), cert. denied, 419 U.S. 838 (1974); Tom-A-Hawk Transit, Inc. v. NLRB, 419 F.2d 1025, 1026-27 (7th Cir. 1969).
I. The Substantive Law of Good Faith Doubt

A successor must show an actual loss of the union's majority status or a "good faith doubt" based upon facts which justify a reasonable belief that the union has lost a majority status in order to avoid his obligation to bargain. The Board's decision as to whether or not an employer has a reasonable good faith doubt of a union's majority status will depend on combinations of facts. Due to the difficulty of placing these facts into recurring patterns, the Board makes decisions in a case-by-case fashion. Generally, it has been reluctant to enunciate broad principles in order to allow itself maximum discretion. The result of this approach has been to decrease the predictability of Board rulings in similar factual contexts.

Although good faith doubt must be based upon "objective criteria," these considerations have never been satisfactorily illustrated. Clearly, an employer's good faith sincerity or other purely subjective evidence is not enough to justify a reasonable good faith doubt, although such evidence may contribute to the proof of a reasonable good faith doubt. Certain criteria have been recognized as distinctly relevant to the successor's reasonable doubt of a union's majority status. Successors have often relied on the following changes in the company as evidence of changing employee sentiments toward the union: the extent to which the business is reduced in size; corporate structural change; the fact that employees were

9. See cases cited in note 8 supra.
11. See notes 49-56 infra and accompanying text. NLRB v. Gen. Stencils, Inc., 438 F.2d 894, 905 (2d Cir. 1971). The court noted that the Board issued a bargaining order with a "lack of intelligible explanation of apparently differing results in other cases where the case for a bargaining order was at least as strong." Id.
12. Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1139 (7th Cir.), cert. denied, 419 U.S. 838 (1974). The court noted that the Board issued a bargaining order with a "lack of intelligible explanation of apparently differing results in other cases where the case for a bargaining order was at least as strong." Id.
13. Orion Corp. v. NLRB, 515 F.2d 81, 85 (7th Cir. 1975).
15. NLRB v. Armato, 199 F.2d 800 (7th Cir. 1952). There, the court enforced a bargaining order from the Board where the successor retained only eight of the predecessor's twenty-five employees. Although "the work force was considerably reduced, that factor alone does not justify the refusal to bargain." Id. at 803.
16. International Ass'n of Machinists v. NLRB, 414 F.2d 1135 (D.C. Cir.), cert. denied,
once represented by a different union;\textsuperscript{17} changes in the employee complement of the successor;\textsuperscript{18} accretion of the predecessor into the successor;\textsuperscript{19} the fact that a new union was inappropriate to the requirements of the employees;\textsuperscript{20} and written and oral statements by employees.\textsuperscript{21}

The law governing the obligations of the successor has borrowed the notion of good faith doubt from the factual context of the "incumbent employer."\textsuperscript{22} Certain general principles are clearly understood about good faith doubt in the context of an incumbent. The employer must produce clear and "convincing evidence" of the loss of majority status based upon objective considerations.\textsuperscript{23} These "objective criteria" must be "unambiguous."\textsuperscript{24} Without additional facts indicating the identity and number of employees no longer favoring the union, the following criteria do not satisfy the definition

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\item \textsuperscript{17} NLRB v. Downtown Bakery Corp., 330 F.2d 921 (6th Cir. 1964).
\item \textsuperscript{18} Western Distributing Co. v. NLRB, 102 L.R.R.M. 2510 (10th Cir. 1979); NLRB v. Bachrodt Chevrolet Co., 468 F.2d 963, 968 (7th Cir. 1972). But note that employee turnover without other evidence does not validate good faith doubt. \textit{Id.}
\item \textsuperscript{19} International Ass'n of Mach. & Aero. Wkrs. v. NLRB, 498 F.2d 680 (D.C. Cir. 1974). Forty-one of the "distinct and functionally separate operation of mailing and distributing items" were joined by "accretion" to a much larger, pre-existing bargaining unit "without opportunity for expression of assent or objection on the part of the 41 persons thus added." \textit{Id.} at 683. This case may question the notion that a rebuttable presumption of the union's majority status exists after an "accretion" of one business into another, stating that "[f]or a duty to bargain with the Union to survive [a takeover] there should be some significant indication that a majority of the employees concerned desired that the Union bargain for them collectively." \textit{Id.} at 682.
\item \textsuperscript{20} Emerald Maintenance, Inc. v. NLRB, 464 F.2d 698 (5th Cir. 1972). In this case, the court upheld the Board's rejection of a successor's contention that the execution of multiple employment contracts covering individual segments of one originally certified unit constituted an improper division of the unit originally determined to be appropriate. The court found that: neither the predecessor nor the successor was in a position to bargain with the original unit; and the employer never expressed a doubt of the original unit's appropriateness when it rejected the union's bargaining demands.
\item \textsuperscript{21} Wallace Co., 174 N.L.R.B. 416 (1969).
\item \textsuperscript{22} Any employer who may have a good faith doubt of the pro-union sentiments of his employees for reasons not connected with a change in ownership of the business will be referred to herein as an "incumbent employer."
\item \textsuperscript{23} J. Ray McDermott & Co., v. NLRB, 571 F.2d 850, 858 (5th Cir. 1978); Nazareth Regional High School v. NLRB, 549 F.2d 873, 880 (2d Cir. 1977).
\item \textsuperscript{24} NLRB v. Colonial Knitting Corp., 464 F.2d 949, 952 (3d Cir. 1972).
\end{itemize}
of "objective criteria": an employee's knowledge of "overwhelming sentiment" against the union reported to the employer;\textsuperscript{25} the filing of a union decertification petition by thirty percent of the employees;\textsuperscript{26} manifestations of mere dissatisfaction or lack of interest in the union on the part of the employees;\textsuperscript{27} or the employers' "frame of mind" based upon employee turnover.\textsuperscript{28} Other facts, such as employee turnover,\textsuperscript{29} employees' failure to join a strike or their subsequent abandonment thereof,\textsuperscript{30} or less than majority support for union decertification\textsuperscript{31} may support the employer's subjective view that the union has lost majority status but do not alone justify the logical inference that his employees no longer want the union to represent them. The "objective criteria" must explicitly indicate a change in the employees' choice. Often facts which may support some justifiable doubt on the part of the employer of the union's majority status are not sufficiently "objective" to warrant the finding of reasonable good faith doubt.\textsuperscript{32}

\textsuperscript{25} Allied Indus. Workers v. NLRB, 476 F.2d 863, 881 (D.C. Cir. 1973).
\textsuperscript{26} Retired Persons Pharmacy v. NLRB, 519 F.2d 466, 490 (2d Cir. 1975).
\textsuperscript{27} Id.
\textsuperscript{28} NLRB v. King Radio Corp., 510 F.2d 1154, 1156 (10th Cir. 1975).
\textsuperscript{29} Id.
\textsuperscript{30} Retail, Wholesale and Dep't Store Union v. NLRB, 466 F.2d 380, 394 (D.C. Cir. 1972).
\textsuperscript{31} 519 F.2d at 490.
\textsuperscript{32} NLRB v. Gallaro, 419 F.2d 97, 101 (2d Cir. 1969). In Gallaro an employee petition was circulated by the employees themselves and signed by seventy percent of the unit, thus justifying the employer's alleged good faith doubt. The issue, therefore, is whether any difference really exists between showing an actual majority against the union, and showing an employer's reasonable good faith doubt that the union retains its majority status. The two alternatives which result in a rejection of the predecessor's collective bargaining representative should not require the same criteria for proof, i.e., that a majority of employees must sign a decertification petition at their own instigation. Although it has been stated that a reasonable good faith doubt does not require actual proof that a majority of employees do not support the union, an employer cannot satisfy his burden of proof by resting exclusively on unreliable employee assertions. NLRB v. Cornell of Calif., Inc., 577 F.2d 513, 517 (9th Cir. 1978).

Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131 (7th Cir.), cert. denied, 419 U.S. 838 (1974), offers a thorough background to the law of good faith doubt. \textit{Id.} at 1139-42. Certification of a union by the Board after an election creates an almost conclusive presumption of continued majority status for a reasonable period of time, usually one year. Thereafter, there exists a rebuttable presumption of majority representation. This presumption does not prevent the incumbent employer from petitioning the Board for a new election. \textit{See} NLRB v. Laystrom Mfg. Co., 359 F.2d 798 (7th Cir. 1966); nor does it affect the employees' statutory right to seek a decertification election upon a showing of substantial interest. \textit{See} 29 U.S.C. § 159(c)(1)(A)(ii) (1976). The effect of the presumption is merely to require the employer to
An incumbent employer’s good faith doubt of the union’s majority status arises under different circumstances than the good faith doubt of a successor. In the context of a successor, the need for stability in labor-management relations may be greater than under normal circumstances. The period which follows a change in company ownership may be a time when the employees most need and want union representation to protect themselves against extreme changes in working conditions and loss of rights accrued under past collective bargaining. On the other hand, a change in the company ownership might also change the employees’ perception of their employer and consequently their sentiments toward the union. This would, therefore, engender a need for flexibility in the law’s prerequisites for finding a reasonable good faith doubt. Unfortunately, neither cases nor commentators on the subject have ever distinguished between the “objective criteria” needed for the reasonable good faith doubt of an incumbent employer, and that needed for a successor. The identity of the successor may be relevant to the employees’ changing sentiments. On the other hand, the identity of the incumbent employer, who questions the union’s majority status, has not changed, and thus, is not a factor in the employees’ changing sentiments. As a result, a presumption of the employees’ continuing support for the union may be weakened by a change in business ownership. This is especially true when the employees have an option to work elsewhere and choose not to do so.

The kind of evidence which has been accepted by the Board to overcome a rebuttable presumption of the union’s majority support usually involves employees’ written expressions in an election bargain with the union that represented the predecessor unless (1) the union has in fact lost its majority status or (2) reasonable grounds exist for good faith doubt as to the continuing majority support for the union. Because there is some risk involved if the employer refuses to bargain, it is the better practice for the employer to continue to bargain while petitioning for a new election. 495 F.2d at 1139. However, a successor is not required to file a petition for a representation election to demonstrate good faith doubt as to the majority status of the union. NLRB v. Downtown Bakery Corp., 330 F.2d 921, 926 (6th Cir. 1964).

See note 22 supra. See Bargaining Obligations, supra note 2, at 762. Id. at 763.

Middleboro Fire Apparatus, Inc., 234 N.L.R.B. No. 139 (1978). The Administrative Law Judge included these facts in his opinion, although the First Circuit did not consider them on appeal. 590 F.2d 4 (1st Cir. 1978).

After a union is certified by election as the bargaining representative, there is a
because they are the most reliable indication of free choice.\textsuperscript{38}

Oral expressions of other employees' dissatisfaction have never been trusted as sufficiently indicative of the majority's free choice. Statements by a minority of unit employees that a majority are against the union have never justified an incumbent employer's doubt of union majority status without reasonable supporting evidence.\textsuperscript{39} On the other hand, statements by a majority of employees to be employed by the successor against the union had not been considered as independent evidence of reasonable good faith doubt until \textit{NLRB v. Middleboro Fire Apparatus, Inc.}.\textsuperscript{40}

II. The Ramifications of \textit{Middleboro}

A. Facts and Policy

In \textit{NLRB v. Middleboro Fire Apparatus, Inc.},\textsuperscript{41} a manufacturer of custom-made fire-fighting vehicles, decided to liquidate its service department and a successor company was formed to perform the function of the defunct department. The new company's work force was composed of seven unionized employees of the predecessor's service department, and three recently hired employees who were not members of the union.\textsuperscript{42} The Board held,\textsuperscript{43} and the First Circuit Court of Appeals affirmed, that the successor failed to establish a reasonably based good faith doubt of the union's majority status even though the findings of the Administrative Law Judge (ALJ)

\textsuperscript{38} National Cash Register Co. v. NLRB, 494 F.2d 189 (8th Cir. 1974). There, reasonable good faith doubt was evidenced by a thirty percent vote of employees supporting decertification combined with other indicia of anti-union sentiment. These included the fact that fewer employees elected to have union dues checked off than had done so the year previously, an increase in employee turnover and an increase in union resignations. \textit{Id.}

\textsuperscript{39} NLRB v. Cornell of Calif., Inc., 577 F.2d 513, 516 (9th Cir. 1978).

\textsuperscript{40} 590 F.2d 1, 9 (1st Cir. 1978). \textit{See} notes 41-48 \textit{infra} and accompanying text.

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} From the Administrative Law Judge's finding of fact, it is not clear when union certification originally took place nor is it clear when the predecessor signed its most recent union contract.

\textsuperscript{43} 234 N.L.R.B. No. 139 (1978).
indicated the following: (1) six out of seven of the employees who had been associated with the predecessor orally expressed approval of the successor's intention to be a non-union shop; (2) the successor had been director of the predecessor's service department and knew each employee personally; hence, interviews where the employees expressed their opinions were conducted on an informal basis at the employees' homes and at a bar, both individually and in groups; (3) the purpose of the interviews was not to discuss the employee-union affiliation, but to discuss employment possibilities with the successor; (4) in each case, the employees initiated discussion about the union; and (5) the successor gave all former employees of the predecessor the option to work for the new company, seek work elsewhere, or "bump" into the main plant. Although the court questioned the viability of these bumping rights, four other employees successfully bumped into the main plant instead of going with the successor.

In Middleboro, the court affirmed the Board's order that the successor bargain, despite the fact that a majority of the predecessor's employees told the successor that they agreed with his position against the union. The decision can be criticized for two reasons. First, whether or not the court's conclusion is consistent with na-

44. In a conversation with the predecessor's employees, the potential (successor) employer in Middleboro said "[w]e don't have any agreement with anybody and don't think we have any obligation to deal with anybody." Two employees then responded by laughing and exclaiming "good." Three more employees responded "in words to the effect that [they were] glad the way things were going to happen." One employee expressed concern about the status of the predecessor's pension program which the successor did not intend to continue.

The successor eventually hired all these employees. In addition, he hired three employees, two of which had worked for the predecessor at one time or another, and one who had not.

45. The fact that an employee is given the opportunity to "bump" into the main plant means that he can remain employed with the company from which Middleboro Fire Apparatus separated to become a "successor."

46. 590 F.2d at 9.

47. The Middleboro court implies that the bumping rights were not useful because there were facts supporting the contention that the predecessor was in financial trouble and may not have been able to stay in operation, thus making it impractical to stay with the predecessor's unionized organization. Even if this contention were proven to be true, the option of bumping into the main plant probably represented a more secure future than entering into an entirely untested business with the successor. Hence, it is probably inaccurate to suggest that the successor's offer to let all employees bump into the main plant was not a realistic alternative.
tional policy, it is based upon an inflexible generalization not grounded in empirical fact, and may be inconsistent with the goal of employee free choice. Second, the decision was affirmed by the court without requiring the Board to adequately justify its conclusion with supporting facts.

B. Potential For Inconsistent Decisions

Middleboro is representative of a trend in the Board's decisions regarding an employer's good faith doubt of the union's majority status, and has ramifications for all representation proceedings. The primary fear in accepting employee assertions as legitimate "objective criteria" of an employer's good faith doubt is that they are unreliable if spoken in the presence of an overbearing, anti-union employer. The Board appears to require corroborating evidence of the fact that the employees initiate the anti-union comment of their own free will. Admittedly, the exact meaning of employee assertions is not ascertainable because it is impossible to understand precisely the nuances of an employee's discussions with other employees and with his employer. In arriving at this conclusion, the Board apparently responds by treating all employee assertions to a prospective employer as the product of coercion, absent

48. This generalization was made in the Board's opinion in Middleboro:
Statements made by employees during the course of an interview with a prospective employer that they approve of his unqualified position that he has no contract and is not obligated to bargain with the union claiming to represent them are not voluntary, uncoerced expressions of employee sentiment upon which their employer can rely in asserting a good faith doubt of an incumbent union's majority status. 234 N.L.R.B. at 894. The court notes that this reads like a conclusion of law and, if intended as such, would be erroneous because "statements are objective, identifiable acts on which other things being equal, an employer ought to be able to rely." 590 F.2d at 9 n.8.

49. All the cases previously discussed assume that free choice must be exhibited, at least in part, by objective acts initiated by the employees themselves. The court in Middleboro assumes free choice cannot be objectively made in an interview with a prospective employer despite the fact that employee assertions are "objective identifiable acts." 590 F.2d at 9. Even though as a matter of law, the court believes the Board's decision may have been unwarranted, it accepted the factual findings of the Administrative Law Judge, which were adopted by the Board, as determinative of the fact that there was no free choice. Id.

50. Questions of representation can arise whenever an incumbent employer refuses to bargain with the union because of a good faith doubt of union majority status or where a successor expresses a similar doubt.

corroborating evidence to the contrary. 52 This inclination is motivated by the need for predictability in an area of law otherwise defined only by the many diverse fact patterns presented to the Board.

The Board's inclination in this regard is understandable. However, in the few cases that include consideration of direct assertions by employees against the union wherein the successor's good faith doubt was held justifiable, the corroborating evidence usually had little bearing on employee free choice. In one case, 53 four of seven employees asked the employer to disassociate himself from the union. The corroborating evidence presented was that three out of seven employees had left the successor for unknown reasons. In another case, 54 twenty-five of forty-seven employees informed the successor that they did not favor the union; additional evidence showed that the successor filed a petition for an election and an employee supervisor complained she wanted no part of the union. In a third case, 55 the Board established the existence of good faith doubt when all employees expressed dissatisfaction with the union to their supervisors. Corroborating evidence showed that the successor had bargained with the union in three sessions after adopting the union contract, and had filed a petition for election with the Board after the employees had expressed their dissatisfaction. In none of these three illustrative cases can one reasonably conclude that the corroborating evidence was determinative of the employees' unen-

52. In Middleboro the court so stated. 590 F.2d at 9 n.7. Also see NLRB v. Cornell of Calif., Inc., 577 F.2d 513, 517 (9th Cir. 1978), where the court admits that employee assertions might be sufficient to prove good faith doubt if accompanied by "special indicia of reliability." It is interesting to note, however, that Phil-Mode, Inc., stated that "ordinarily evidence that employees reported or communicated to supervisors that they . . . wished to withdraw from the Union, absent any contemporaneous unfair labor practices, warrants a finding of good-faith doubt as to majority." 159 N.L.R.B. at 959. In addition, Middleboro stated that "[c]ertainly an employee's statement can form the basis for an employer's doubt as to that employee." 590 F.2d at 8. The court's characterization of these employee assertions as "objective identifiable acts" makes the Board's finding that statements made during the course of an interview with a prospective employer are not reliable expressions of employee free choice seem unreasonable in light of the fact that the successor's president had worked as a department head of those prospective employees in the predecessor's company and knew them personally.

cumbered free choice. Yet, without apparent good reason, the Board required additional evidence as an indication of free choice.

Where, in addition to proof of employees' oral expressions, other corroborating evidence of employee free choice is required, it is not sound legal method for a court to hold that an employer's good faith doubt was justified on the basis of such token evidence of the alleged free choice. If the corroborating evidence is relevant, it should reflect the Board's policy to insure employee free choice of a bargaining representative. Otherwise, this type of analysis leaves room for inconsistent judgments. The process of legal analysis used in the cases previously mentioned is unpredictable because the result is dependent on combinations of facts. These cases illustrate the extent to which this type of approach can produce an unjustified result which is not necessarily consistent with employee free choice.

C. Generalizations Not Based Upon Empirical Fact

The Board reasons that an employer has a reasonable good faith doubt if the objective considerations justifying his belief are so convincing as to indicate that he has not violated the employees' right to freedom of choice. In Middleboro, the Board held that employee assertions to a prospective employer are not reliable indicators of unencumbered free choice because their meaning is ambiguous. However, where the meaning of employee assertions to an employer is ambiguous to an impartial observer, such assertions may, in fact, be truly representative of employee preferences for several reasons evident in Middleboro. First, the employees spoke up against the union and it is probably improper to discount all their remarks. If only one half of the employee assertions were truly uncoerced, it is arguable that a majority of the ten employees eventually hired by

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56. An example of inconsistency in the context of good faith doubt is contained in Houston Shopping News Co., 233 N.L.R.B. No. 24 (1977). There, only 12 out of 31 employees told the employer that they were against the union. The Administrative Law Judge noted that the Board had stated in other decisions that there is no necessary correlation between membership and the number of union supporters, since no one will know how many employees who favor the union do not become or remain members thereof. In the same case, however, the ALJ inferred that four other employees were against the union because they were not members, thereby giving a majority to the employees who opposed unionization and making the employer's good faith doubt reasonable.

57. NLRB v. Cornell of Calif., Inc., 577 F.2d 513, 515-17 (9th Cir. 1978).
the successor did not favor the union. Second, as the predecessor's employees they were forced to join the union under a union-security clause. Third, the option to bump into the predecessor's plant was apparently a viable one, yet a majority of the employees in the predecessor's service department did not exercise this option. If the employees opposed the union, why did they not file a decertification petition with the Board or present a similar written expression of discontent to the successor? One plausible reason is that they were not aware of this alternative, being fire truck repairmen and not attorneys. The absence of such a petition, for whatever reason, should not justify the presumption of majority status with the presence of employee assertions to the contrary.

The result of Middleboro illustrates the extent to which the principle of employee free choice has been subordinated to the goal of maintaining stable and continuing bargaining relationships by restricting representational challenges to the union's majority status. There are two devices used by the Board to reduce the number of representational challenges and promote the union's ability to effectively represent its employees. One device, the "certification-bar," has already been described. The second device, known as the "contract-bar," prevents any representational challenge to a union within three years after the employer has recognized the exclusive bargaining representative. A successor who acquires the predecessor's company during that three year period need not abide by the terms of the contract, but has a duty to bargain unless he can show reasonable good faith doubt of the union's majority status.

In Middleboro, the length of the predecessor's outstanding con-

58. Of the six employee assertions made to the prospective employer (successor), three may be hypothesized as uncoerced. In addition, three new employees were eventually hired for which there can be no reasonable presumption of pro-union sentiments. In this hypothetical situation, six employees (a majority of those who would eventually work for the successor), cannot be presumed to favor the union.

59. This fact is not significant in itself. Most collective bargaining agreements have this provision. However, it is relevant that the predecessor's employees were obligated to join the union within a certain time after the commencement of work regardless of their desire to do so.

60. See note 47 supra and accompanying text.

61. See note 37 supra.


63. 406 U.S. at 291.
tract was not an issue in the case. If the successor had refused to bargain either during the term of the contract, or within a three year period of the last election if the contract was more than three years in duration, then the "contract-bar" rule would have precluded the successor from petitioning for an election to determine actual majority status. Nevertheless, in Middleboro it is arguable that the employees' right of free choice was impinged upon to the extent that the Board refused to consider employee assertions as evidence of a successor's reasonable good faith doubt of the union's majority status. Perhaps it would serve the national labor policy better to conduct an election as an objective measure of union status in the successor context, despite the benefits of the "certification-bar" and "contract-bar" rules.64

D. The Problem of Judicial Review

1. Background

In Middleboro, the court recognized that statements by employees are "objective identifiable acts" on which "other things being equal an employer ought to be able to rely."65 The Board, however, was recognized as having a "seasoned feeling for the meaning of events in the labor-management setting,"66 and therefore the court deferred to the Board's decision that these employee assertions did not justify the successor's reasonable good faith doubt. Admittedly, the court does not possess the same ability as the Board to review the facts of cases in the labor context, nor to interpret their meaning.67 Courts have frequently expressed dismay, however, at the Board's disinclination to explain the reasoning behind its decisions in representation proceedings.68 This hampers the court's ability to

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64. Requiring an election before a successor's duty to bargain would eliminate doubt about the union's continuing majority status which may surface from a change in employers.
65. 590 F.2d at 9.
66. Id.
67. NLRB v. Matouk Indus., 582 F.2d 125, 128 (1st Cir. 1978). The court notes that statutory law gives the ultimate responsibility of resolving labor disputes to the Board, citing 29 U.S.C. § 160(c). Id. For background on the power of the Board to resolve labor disputes and the courts' ability to review those decisions, see Universal Camera Corp. v. NLRB., 340 U.S. 474, 492 (1951).
68. See, e.g., NLRB v. General Stencils, Inc., 438 F.2d 894, 901 (2d Cir. 1971); NLRB v. Kostel Corp., 440 F.2d 347, 352 (7th Cir. 1971).

The procedural process leading to judicial review should be described. A party may com-
intelligently review those decisions in order to insure the integrity of the administrative process.  

Commentators have long noted the dilemma caused by the inherent difficulty in reviewing federal administrative decisions, especially in the labor context. The problem of balancing the need for the Board to pursue an independent labor policy with the concomitant need for protection of private parties given by judicial review has been expressed. The courts have been reluctant to disagree with determinations made by the Board. Yet in *Universal Camera Corp. v. NLRB*, the Supreme Court noted that the Administrative Procedure Act and the Taft-Hartley Act direct the courts to assume more responsibility for the reasonableness of Board decisions. "Reviewing courts must be influenced by the feeling that they are not to abdicate the conventional judicial function."

Board decisions often involve an incumbent employer who commits unfair labor practices which affect the outcome of future elections or the atmosphere in which they can be held. In this context, bargaining orders issued by the Board have often been denied en-

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69. Peerless of America v. NLRB, 484 F.2d 1108, 1118-19 (7th Cir. 1973).
76. 340 U.S. at 488-90.
77. *Id.* at 490.
78. *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). There, the Court required that the Board make "specific findings" as to the impact of unfair labor practices on the election process, and that it also make a detailed analysis assessing the possibility of holding a fair election. *Id.* at 610-16.
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forcement, 79 or remanded for "specific findings" of fact and legal analysis, 80 because the Board's conclusions were not supported by an adequate factual basis or cogent legal argument. 81 The reasons for the courts' requirement of "specific findings" from the Board are three-fold. First, the requirement serves to limit administrative arbitrariness. 82 Second, the "substitution of conclusion for explanation does not permit the reviewing court to do its job."

83 Finally, the requirements of "specific findings" and detailed analysis 84 contribute to the goal of predictability in labor law.

The role of the judiciary in controlling the discretion with which the Board can make its decisions is limited. The scope of judicial review fits into two identifiable categories: (a) questions of fact as to which the scope of review is limited and (b) questions of law as to which the scope of review is independent, thus not dependent on the decision of the administrative agency. 85 Thus, whether a court may alter the decision of the Board hinges on a determination of whether that decision is based upon a question of law or fact.

The decision-making process of the Board is such that it gathers "basic" 86 facts from which it will infer "ultimate" 87 facts which express a conclusion. Upon review, the court requires "substantial evidence" 88 to support the Board's finding. The "basic" facts must

79. See, e.g., Peerless of America v. NLRB, 484 F.2d 1108 (7th Cir. 1973).
80. See, e.g., NLRB v. Armcor Indus., Inc., 535 F.2d 239, 244 (3d Cir. 1976).
81. In Peerless of America v. NLRB, 484 F.2d 1108 (1973), the Seventh Circuit Court of Appeals attempted to explain its interpretation of the requirement of "specific findings": [W]e hardly mean that the Board must determine how many employees actually were caused to abandon the Union. We mean only that it estimate the impact, taking into account the factors in the particular case which are indicative of actual effect or which plausibly, in the light of existing knowledge, would contribute to or detract from an actual impact. This is, after all, what the courts which have made their own analyses have done.

Id. at 1118 n.16.
82. Id. at 1119.
84. 535 F.2d at 245.
85. W. GELLIHORN, C. BYSE & P.L. STRAUSS, ADMINISTRATIVE LAW, CASES AND COMMENTS 251 (7th ed. 1979) [hereinafter cited as GELLIHORN].
86. Saginaw Broadcasting Co. v. FCC, 96 F.2d 554, 559-60 (D.C. Cir. 1938).
87. Id.
88. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might
provide relevant evidence which a "reasonable mind might accept as adequate to support a conclusion." Thus, although the court may disagree with the Board’s interpretation of “basic” facts presented, it will defer to the Board’s conclusion as long as the inference from “basic” to “ultimate” fact is reasonable. This method of review “in theory, tells a judge not to weigh evidence, determine credibility of witnesses, or choose from among various reasonable inferences or between conflicting testimony.”

2. Judicial Review in Middleboro

Given the above description of the scope of judicial review, the issue becomes whether the Board’s declaration that “statements made by employees during the course of an interview with a prospective employer . . . are not voluntary, uncoerced expressions of employee sentiment . . .” is reasonable. As a factual inference from the “basic” facts of this situation, the Board’s conclusion is reasonable only because employee free choice is ambiguous. Thus, the inference is considered reasonable because it is plausible. The court noted, however, that this conclusion “with its general language, reads like a conclusion of law . . . If it were so intended it would be wrong for the reasons explained in the text. Ordinarily, in such a case we would feel compelled to remand to the Board to make a finding of fact under the correct standard of law.” In deference to the Board’s decision, however, the court stated that the decision should not be further delayed “since the conjunction of

89. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). “Accordingly, ‘it must do more than create a suspicion of the existence of the fact to be established . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.’” 340 U.S. at 477 (citing Labor Bd. v. Columbian Enameling and Stamping Co., 306 U.S. 292, 300 (1939)). “Review under the substantial-evidence test is authorized only when the agency action taken pursuant to a rulemaking provision of the Administrative Procedure Act itself . . . or when the agency action is based on a public adjudicatory hearing.” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971).
90. 340 U.S. at 477.
91. Id. at 9 n.8. There were no clear reasons given in the text of the opinion explaining why the Board’s conclusion would be wrong if intended as a conclusion of law. The court may be referring to the notion that uncoerced employee assertions are considered to be the most reliable examples of “objective criteria” used to show a reasonable good faith doubt, and would thus be reliable even if made to a prospective employer. Id.
several detailed circumstances listed in the ALJ's conclusion enables us, with some straining, to treat it as a factual finding."\(^{92}\)

The ALJ's findings indicated no causal connection between the "detailed circumstances" listed in his conclusion and the employees' coercion presumed by the Board. The court only referred to the Board's alleged expertise in judging the impact of such fact situations upon employee free choice.\(^3\) The Board based its decision on a general principle, akin to a rule of law, rather than articulating specifically how it made an inference from "basic" facts. If the Board's inference was actually a conclusion of law, the court should have been able to exercise its prerogative to review the inference independent of the Board's determination.

Although the court's holding in Middleboro may have properly given deference to the Board's discretion under current standards of administrative law,\(^4\) the decision leaves the impression that the court did not require a detailed analysis of the relationship between the "basic" facts (the successor's actions) and the Board's inference from those facts (that the employees were unable to express their free choice). There are at least three reasons why the scope of judicial review should be enlarged in the successor context when employee free choice is unquestionably ambiguous.\(^5\)

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92. Id.

93. Id.

94. In considering the scope of judicial review of an administrative agency's decision, both the statute governing the conduct of the agency in question and the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1977), must be consulted. One authority has noted that there are two "threshold questions" when considering the scope of review: (a) What is the alleged error the complaining party contends the agency has committed? (b) What is the scope of the power or discretion which the legislature has delegated to the agency? GELLHORN, supra note 85, at 251. The analysis of the proper scope of judicial review will vary according to whether or not the agency is interpreting a fact situation which involves a "statutory term." If a statutory term is interpreted, Judge Friendly's opinion in NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961), provides an interesting analysis. In Middleboro, interpretation of a statutory term was not involved, so the question to be addressed is whether the Board's conclusion was one of law or fact. For an excellent discussion of the scope of review of an agency's factual finding see GELLHORN, supra note 85, at 251-56.

95. For an excellent discussion of the need to expand the scope of judicial review see Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 HARV. L. REV. 436 (1954). Schwartz suggests four reasons why the judiciary should be given more authority in the process of review: (a) Judges are more pragmatic in their outlook than administrative commissioners, (b) the work of judges is subject to closer public scrutiny than that of their administrative counterparts, (c) judges have
First, by not holding the Board responsible for an explanation of its findings of the impact of a successor's conduct upon employee free choice, the court is encouraging administrative arbitrariness.\(^9\) The issue in most unfair labor practice proceedings is whether the employer's conduct has a tendency to interfere with an employee's statutory rights.\(^{7}\) If the Board's decision is cast in specific terms (e.g., the employees' right to free choice of a bargaining representative or to collective action has been inhibited based upon specific facts), the court can disagree with the Board's conclusions or remand for further specific findings to support the conclusion, without questioning the Board's discretion regarding the impact of employer conduct upon employee free choice.\(^9\) The Board's decision, however, was made in general terms\(^\text{99}\) (e.g., employee assertions to prospective employers are unreliable \textit{per se}); thus, the Board was given a measure of independence from judicial review.

A second reason why the scope of judicial review should be enlarged in the successor context is the Board's lack of empirical data to justify its analysis of the impact of employer conduct upon employee freedom of choice.\(^\text{100}\) The Board has stated that it does not attempt to assess the actual effect of employer conduct on employees, "but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent free formation and expression of the employees' free choice."\(^\text{101}\) Hence, the Board's decisions are based on assumptions not subject to review.

Third, an enlarged scope of judicial review will allow the judiciary to balance the right of individuals to contract and invest in the formation of capital and the right of employees to collectively bargain.\(^\text{102}\) The national labor policy as interpreted by the Board discourages the individual rights of private businessmen in starting

\(^9\) See note 77 supra.


\(^99\) \textit{Id.} at 686.

\(^100\) \textit{Id.}


\(^102\) \textit{See Bargaining Obligations, supra note 2, at 759.}
small businesses from the unionized work force of a larger company such as Middleboro's predecessor. The smaller successor cannot expect to provide financial benefits to his employees similar to those accrued through collective bargaining between the union and the larger, established predecessor company.

Recently, one authority has stated:  

The proper scope of judicial review of governmental agency action can only be stated in general terms . . . .

It must take account of the difference in private interests that may be affected, for example as between infringement of individual rights and the allocation of public goods and services among groups with conflicting interests.

Under the circumstances of Middleboro the court had an opportunity to perform a balancing of the rights of individual successors and employees whose accrued rights through collective bargaining are protected by the national labor policy. The scope of judicial review of administrative decisions does not currently allow this kind of intervention by the court to reverse a factual finding or alter an order to bargain issued by the Board. However, one can argue that, by affirming an order to bargain under the circumstances of Middleboro without requiring an election, the court furthered the employees' right to collectively bargain at the unnecessary expense of their free choice and consequently, the successor's freedom to contract.

III. Conclusion

The successor doctrine is governed by the often conflicting goals of national labor policy: employee free choice and industrial stability through effective collective action. In defining which "objective criteria" are appropriate to justify reasonable good faith doubt of a union's majority status, there are two problems with the Board's analyses and the courts' deference to those decisions.

The first problem is substantive. Good faith doubt is easily de-
fined by cataloging fact situations where doubt has, and has not, been found. In the successor context, however, reasonable good faith doubt should be found where the employees have expressed their unencumbered free choice against the predecessor's collective bargaining representative. If employee assertions seriously cast doubt upon the union's majority status, free choice may be sacrificed to an unjustifiable extent if union representation is allowed to continue without a new election when the factual basis for presuming employee support of the union is changed, and most likely diminished. Giving the successor the ability to avoid the obligation to bargain altogether is an unsatisfactory alternative. Where ambiguity concerning the employees' attitude toward the union exists, an election to determine the status of the union is preferable to a reliance on presumptions.

Apart from the problems incident to employee assertions, there should be an increased effort by the Board to rationalize each of its decisions which center on good faith doubt in the successor context with the goals of national labor policy. The Board has made generalizations such as that in Middleboro based on preconceptions of the impact of employer conduct on employee free choice which are overly broad and leave room for inconsistency. This approach does not adequately balance the goals of employee free choice and industrial stability. The Board appears to require evidence tantamount to actual proof of the employees' free choice to justify a reasonable good faith doubt. In the interest of consistency, actual proof in the form of an election should be required of it to issue a bargaining order to a successor when the factual basis for presuming the union's majority status has been changed.

The second problem is procedural: to what extent should the courts defer to the Board's informed judgment in the successor context? Clearly, they should not affirm an order to bargain without understanding the Board's rationale. If the court defers to the Board's decision based upon variables, the effect of which is not justified or supported in the Board's decision, then it cannot de-

105. See notes 23-32 supra and accompanying text.
106. See note 32 supra.
107. The Board's decision affirmed the Administrative Law Judge's conclusion which is, in effect, a conclusion of law. The court stated that it would ordinarily remand such a case for the Board to make a finding of fact based upon the correct standard of law. However, due
cide whether the Board’s finding is truly based upon “substantial evidence.” It would be preferable that the court remand for further consideration of the factual data.

The ability of a court to understand the Board’s rationale takes on added significance in the successor context. Judicial review can protect private parties from decisions of an administrative agency. Specifically, judicial review can protect the successor’s rights to freedom of contract and to the free movement and formation of capital. To further this goal, the Board should apply more objective means of ascertaining employee free choice, and the courts should insist on more thorough analysis from the Board in order to avoid the type of vague legal argument made in the Middleboro decision.

Peter Blasier

to “several detailed circumstances listed in the ALJ’s conclusion,” which actually stated a conclusion of law, the Board’s decision was treated as a factual finding. The court concluded that “[o]bviously this kind of problem is one easily avoided by more careful expression.”

590 F.2d at 9.

108. Universal Camera Corp. v. NLRB, 340 U.S. 474, 484-85 (1951), noted that:
the substantiability of evidence must take into account whatever in the record fairly detracts from its weight. . . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.

Id. at 488.