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## **THE *GISSEL* BARGAINING ORDER, THE NLRB, AND THE COURTS OF APPEALS: SHOULD THE SUPREME COURT TAKE A SECOND LOOK?**

In 1947, Congress declared the labor policy of the United States to be the elimination of “the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . .”<sup>1</sup> The usual procedure by which employees designate their choice of a representative for the purpose of collective bargaining is an election conducted by the National Labor Relations Board (NLRB).<sup>2</sup> Not only is this the usual procedure, it is “from the Board’s point of view, the preferred route”<sup>3</sup> because it is an election supervised by a Board agent in which eligible employees may vote by a secret ballot. If the NLRB determines that, prior to an election, the employer engaged in conduct that created an atmosphere of fear or confusion, the Board may decide that a fair and free election is not possible. In such a case, the NLRB may issue a bargaining order,<sup>4</sup> ordering the employer to recognize the affected representative (usually a union) and to engage in collective bargaining. In this way, the union, which was not selected by the employees as their exclusive representative in a secret ballot election, secures, through another avenue, the right to bargain for them.<sup>5</sup>

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1. Labor Management Relations (Taft-Hartley) Act § 1, 29 U.S.C. § 151 (1970).

2. The procedures for obtaining an election are found in 29 U.S.C. § 159 (1970).

3. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596 (1969)(citing *Aaron Bros.*, 158 N.L.R.B. 1077 (1966)).

4. See generally *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962).

5. Procedurally, to obtain a bargaining order when an election has been held and the union has lost, the union must have the election set aside in a representation proceeding by filing objections to the election within five working days after the service of the tally of ballots. The union must then initiate an unfair labor practice proceeding. *Irving Air Chute*, 149 N.L.R.B. 627 (1964), *enforced*, 350 F.2d 176 (2d Cir. 1965).

## I. THE BARGAINING ORDER IN THE SUPREME COURT

The remedy of the bargaining order was reviewed by the Supreme Court in *NLRB v. Gissel Packing Co.*,<sup>6</sup> a consolidation of four cases—three from the Fourth Circuit<sup>7</sup> and one from the First Circuit.<sup>8</sup> In each case, the organizers of a union campaign had solicited a majority of employees to sign cards that unambiguously authorized the union to represent them in collective bargaining. The NLRB found that the employers had violated sections 8(a)(1) and 8(a)(3) of the Labor Management Relations Act<sup>9</sup> by engaging in coercive activities and by wrongfully discharging employees, and section 8(a)(5)<sup>10</sup> by rejecting the representative's bargaining demand. In each case, the Board issued a bargaining order.

Although the Fourth Circuit sustained the Board's findings of violations of sections 8(a)(1) and (3), it refused to enforce the bargaining orders because "authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of

6. 395 U.S. 575 (1969).

7. *General Steel Prods., Inc. v. NLRB*, 398 F.2d 339 (4th Cir. 1968); *NLRB v. Heck's, Inc.*, 398 F.2d 337 (4th Cir. 1968); *NLRB v. Gissel Packing Co.*, 398 F.2d 336 (4th Cir. 1968).

8. *NLRB v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968).

9. 29 U.S.C. § 158(a)(1), (3) (1970). As provided therein, it is an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

*Id.*

Section 157 defines the rights of employees, commonly referred to as section 7 rights:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

*Id.* § 157.

10. *Id.* § 158(a)(5). This section provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." *Id.*

a certification election."<sup>11</sup>

On similar facts, the First Circuit sustained the Board's findings and enforced the bargaining order in full because the company had made no attempt to establish any facts to show a good-faith doubt of the union's majority status.<sup>12</sup> To resolve the conflict between the circuits on the issue of authorization cards and their effect on the obligation to bargain, the Supreme Court granted certiorari.

First, the Court adopted the doctrine developed by the Board in *Cumberland Shoe Corp.*:<sup>13</sup> cards that unambiguously authorize the union to represent the employees for collective bargaining purposes validly indicate the employee sentiment, unless the employees are "expressly told that their act of signing represents something else,"<sup>14</sup> for example, that the cards will be used only to obtain an election. Thus, authorization cards, "though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded" by certain unfair labor practices of the employer.<sup>15</sup>

The Court then described three categories of unfair labor practices subject to the remedial powers of the NLRB. Two categories were found to impede the election process sufficiently to require a bargaining order. In the first category of "'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices," a bargaining order was held to be appropriate even without proof that the union ever had majority status.<sup>16</sup> With this holding, the Court merely approved the Fourth Circuit's view that in "extraordinary cases . . . a bargaining order might be an appropriate remedy for pervasive violation of § 8(a)(1)."<sup>17</sup>

The Court, however, did not limit the use of bargaining orders to the exceptional cases. It also approved them in a second category of "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to under-

11. NLRB v. Gissel Packing Co., 398 F.2d 336, 337 (4th Cir. 1968).

12. See NLRB v. Sinclair Co., 397 F.2d 157, 161 (1st Cir. 1968).

13. 144 N.L.R.B. 1268 (1963).

14. 395 U.S. at 607.

15. *Id.* at 603.

16. *Id.* at 613.

17. NLRB v. Heck's, Inc., 398 F.2d 337, 339 (4th Cir. 1968); see NLRB v. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967).

mine majority strength and impede the election processes.”<sup>18</sup> The Court required “a showing that at one point the union had a majority,”<sup>19</sup> although the union did not have to show that it was able to maintain the majority status.<sup>20</sup> Further, the Board was required to find prior to issuing a bargaining order that “the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and the employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . . .”<sup>21</sup> A third category of “minor or less extensive unfair labor practices” would not sustain a bargaining order “because of their minimal impact on the election machinery.”<sup>22</sup>

The goal or purpose of a bargaining order in the second category of unfair labor practices is twofold. The Court in *Gissel* described the goals as “effectuating ascertainable employee free choice” and “detering employer misbehavior,”<sup>23</sup> and recognized that both are equally important. Emphasizing one goal or pur-

18. 395 U.S. at 614.

19. *Id.*

20. *Id.* at 610 (citing *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962)).

21. 395 U.S. at 614. Traditional remedies of the NLRB include the following: the issuance of a comprehensive cease-and-desist order; ordering Respondent to post notices in conspicuous places at its plant for 60 consecutive days; . . . ; ordering Respondent to give the Union access to employees at the plant during working hours; . . . ; seeking an injunction against Respondent in Federal district court . . . ; and ordering the Regional Director . . . to conduct a rerun election at Respondent's plant.

Rapid Mfg. Co., 239 N.L.R.B. 465, 468 n.18 (1978). The value of a cease and desist order is twofold. “First, the order will provide added protection against the likelihood of the recurrence of the misconduct, and second, the posting of the order finding the company guilty of unfair labor practices will almost certainly have a favorable impact on the Union's chances for success in the election.” *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 996 n.13 (4th Cir. 1979)(citing *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1121 (7th Cir. 1973)).

22. 395 U.S. at 615.

23. *Id.* at 614. Free choice has been described by one commentator as one made free of any physical intimidation and

free from restrictions that obstruct the flow of relevant information and free from influences that will distort their assessment of the consequences of unionization—from inaccurate representation of material facts, threats of retribution which cannot be carried out . . . . Employees should also be allowed to appraise the consequences of representation in the light of their own preferences and aspirations, however misguided these may appear to the Board.

Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 46-47 (1964).

pose over the other would alter the analysis required to determine whether a bargaining order is an appropriate remedy. The circuit courts have developed different standards of review of *Gissel*-type bargaining orders; the standard selected relates to the court's perception of the purpose of the order.<sup>24</sup>

## II. THE BARGAINING ORDER IN THE CIRCUIT COURTS—THE EXTENT OF ANALYSIS REQUIRED<sup>25</sup>

In the months immediately following the *Gissel* decision, the circuit courts generally did not deny enforcement of a *Gissel*-type, or second category, bargaining order. Appeals either were affirmed with little discussion<sup>26</sup> or remanded to the Board

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24. In the District of Columbia Circuit, the bargaining order is a "remedy for an unlawful refusal to bargain." *Retail Store Employees Local 88 v. NLRB*, 419 F.2d 329, 336 (D.C. Cir. 1969). In the Second Circuit, it is a remedy "to deprive the employer of the fruits of his illegal activity . . ." *NLRB v. Marsellus Vault & Sales, Inc.*, 61 Lab. Cas. ¶ 10,382, at 17,348 (1969), *aff'd on add'l findings*, 431 F.2d 933 (2d Cir. 1970) (A unanimous panel affirmed the earlier majority decision after receiving additional evidence from the NLRB. The evidence showed that the authorization cards were not ambiguous, as originally determined, and were evidence that the union had majority status.). The bargaining order in the Ninth Circuit avoids the added inducement to the employer to indulge in unfair practices in order to defeat the union in an election. *NLRB v. L.B. Foster Co.*, 418 F.2d 1, 3 (9th Cir. 1969). The Seventh Circuit also ruled that the remedy for serious unfair labor practices is "an order which will effectively discourage their repetition" regardless of the actual impact on the election. *NLRB v. Drives, Inc.*, 440 F.2d 354, 366 (7th Cir.), *cert. denied*, 404 U.S. 912 (1971).

Conversely, the Fifth Circuit focuses on safeguarding employee free choice, finding that a bargaining order based on a card majority is an "extraordinary remedy . . . to overcome the polluting effects of the employer's unfair labor practices on the electoral atmosphere. The order is not a traditional punitive remedy, but is a therapeutic one." *NLRB v. American Cable Syss., Inc.*, 427 F.2d 446, 448 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970).

25. The Administrative Procedure Act requires that the decisions of administrative agencies include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; . . ." 5 U.S.C. § 557(c)(3)(A) (1976).

26. *NLRB v. Arrow Specialties, Inc.*, 437 F.2d 522 (8th Cir. 1971); *NLRB v. Gerbes Super Mkts., Inc.*, 436 F.2d 19 (8th Cir. 1971); *NLRB v. Easton Packing Co.*, 437 F.2d 811 (3d Cir. 1971); *Texaco, Inc. v. NLRB*, 436 F.2d 520 (7th Cir. 1971); *Southwest Regional Joint Bd., Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027 (D.C. Cir. 1970); *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45 (9th Cir. 1970); *NLRB v. Int'l Metal Specialties, Inc.*, 433 F.2d 870 (2d Cir. 1970); *NLRB v. V & H Indus., Inc.*, 433 F.2d 9 (2d Cir. 1970); *Snyder Tank Corp. v. NLRB*, 428 F.2d 1348 (2d Cir. 1970); *Amalgamated Clothing Workers v. NLRB*, 419 F.2d 1207 (D.C. Cir. 1969), *cert. denied sub nom. McEwen Mfg. Co. v. NLRB*, 397 U.S. 988 (1970); *NLRB v. Staub Cleaners, Inc.*, 418 F.2d 1086 (2d Cir. 1969); *NLRB v. L.B. Foster Co.*, 418 F.2d 1 (9th Cir. 1969); *NLRB v. Cedar Hills Theaters, Inc.*, 417 F.2d 612 (5th Cir. 1969); *NLRB v. Wylie Mfg. Co.*, 417 F.2d 192

for further consideration in light of *Gissel*.<sup>27</sup> The affirming courts deferred to the Board's expertise in labor matters<sup>28</sup> and "entrust[ed] to the Board almost total discretion to determine when a bargaining order is appropriate."<sup>29</sup>

Such deference was shortlived in the Fifth Circuit. In *NLRB v. American Cable Systems, Inc.*,<sup>30</sup> the court required the Board to justify the issuance of a bargaining order by specific findings that

(a) the union had valid authorization cards from a majority of the employees in an appropriate bargaining unit; (b) the employer's unfair labor practices, although not "outrageous" and "pervasive" enough to justify a bargaining order in the absence of a card majority, were still serious and extensive; (c) "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight;" and (d) employee sentiment can best be protected in the particular case by a bargaining order.<sup>31</sup>

The emphasis is on effectuating employee free choice through a bargaining order, not on deterring employer misbehavior. The test of *American Cable* continues to be the standard in the Fifth Circuit<sup>32</sup> and has provided a model for other courts.

Eighteen months after *Gissel*, in *NLRB v. General Stencils, Inc.*,<sup>33</sup> the Second Circuit directed the Board to develop rules

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(10th Cir. 1969); *NLRB v. S.E. Nichols-Dover, Inc.*, 414 F.2d 561 (3d Cir. 1969); *NLRB v. South Bay Daily Breeze*, 415 F.2d 360 (9th Cir. 1969); *Amalgamated Clothing Workers v. NLRB*, 420 F.2d 1296 (D.C. Cir. 1969).

27. See *NLRB v. Pembek Oil Corp.*, 433 F.2d 308 (2d Cir. 1970); *NLRB v. Production Indus., Inc.*, 425 F.2d 1206 (6th Cir. 1970); *NLRB v. Li'l Gen. Stores, Inc.*, 422 F.2d 571 (5th Cir. 1970); *NLRB v. Henry Colder Co.*, 416 F.2d 750 (7th Cir. 1969); *NLRB v. Easton Packing Co.*, 416 F.2d 256 (3d Cir. 1969); *NLRB v. Mink-Dayton, Inc.*, 416 F.2d 327 (6th Cir. 1969); *NLRB v. American Art Indus., Inc.*, 415 F.2d 1223 (5th Cir. 1969); *Mechanical Specialties Co., Inc. v. NLRB*, 414 F.2d 898 (9th Cir. 1969); *NLRB v. American Cable Syss., Inc.*, 414 F.2d 661 (5th Cir. 1969).

28. For the Supreme Court's acknowledgment of this expertise in *Gissel*, see 395 U.S. at 612 n.32.

29. *NLRB v. Int'l Metal Specialties, Inc.*, 433 F.2d 870, 872 (2d Cir. 1970).

30. 414 F.2d 661 (5th Cir. 1969).

31. *Id.* at 668.

32. *NLRB v. Gibson Paper Prod. Co.*, 494 F.2d 762, 767 (5th Cir. 1974) ("[T]he ultimate inquiry is whether a fair election can be held; . . . ." *Id.* at 768); *NLRB v. WKRGTv, Inc.*, 470 F.2d 1302 (5th Cir. 1973).

33. 438 F.2d 894 (2d Cir. 1971).

which “would reveal at least some of the Board’s thought processes to unions, employers, and reviewing courts, and would bring about a degree of certainty and uniformity . . . .”<sup>34</sup> Absent such rules, the Board should explain in each case “what it considers to have precluded a fair election and why, and in what respects the case differs from others where it has reached an opposite conclusion.”<sup>35</sup> The court emphasized that similar cases should receive similar treatment and that the Board is responsible to explain why it imposes a remedy in one case and not another.<sup>36</sup>

The Second Circuit, as well as the Fifth Circuit, focuses now on the possibility of a fair election, and not, as it had emphasized in an earlier case,<sup>37</sup> on the deterrence of employer misbehavior. To justify a bargaining order, the Board must “attempt to integrate findings of company misconduct with a reasoned analysis of how that misconduct jeopardized the chances for a fair election.”<sup>38</sup> In *General Stencils*, the Board failed to meet the standard on remand, and on a second appeal to the Second Circuit, the court denied enforcement of the order.<sup>39</sup>

In a series of cases, the Seventh Circuit articulated its requirement—a detailed analysis of the causal connection between the unfair labor practices and the unlikelihood of a fair election.<sup>40</sup> The Board must evaluate the continuing impact of the misconduct, the likelihood that it will recur, and the potential effectiveness of traditional remedies.<sup>41</sup> The Board can consider any history of employer antiunion animus and violations of the Labor Management Relations Act, or any affirmative acts by the employer that indicate a spirit of cooperation that could assure a fair election.<sup>42</sup> Consideration of these factors is consistent with

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34. *Id.* at 901.

35. *Id.* at 902.

36. *Id.* at 904-05. See *NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100 (2d Cir. 1979); *NLRB v. M.H. Brown Co.*, 441 F.2d 839, 843 n.2 (2d Cir. 1971).

37. *NLRB v. Marsellus Vault & Sales, Inc.*, 61 Lab. Cas. ¶ 10,382 (2d Cir. 1969).

38. *NLRB v. World Carpets Inc.*, 463 F.2d 57, 62 n.6 (2d Cir. 1972).

39. See *NLRB v. General Stencils, Inc.*, 472 F.2d 170 (2d Cir. 1972).

40. *E.g.*, *New Alaska Dev. Corp. v. NLRB*, 441 F.2d 491 (7th Cir. 1971); *NLRB v. Kostel Corp.*, 440 F.2d 347 (7th Cir. 1971).

41. *Self-Reliance Ukrainian Am. Coop. Ass’n v. NLRB*, 461 F.2d 33, 39 (7th Cir. 1972).

42. *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973). See note 122 *infra*.



the circuit's earlier emphasis on the bargaining order as a remedy to discourage the repetition of serious unfair labor practices.<sup>43</sup> In *Walgreen Co. v. NLRB*,<sup>44</sup> the Seventh Circuit summarized the criteria necessary to support a *Gissel*-type bargaining order:

- (1) Did the Union have majority support in an appropriate unit prior to the impact of Company unfair practices?
- (2) Did Company unfair practices cause the Union to lose its majority?
- (3) Will lesser remedies be insufficient to overcome the impact of past unfair practices or to deter similar future conduct, so that a fair election could not be held within a reasonable time?<sup>45</sup>

The second criterion, that the unfair practices cause the union to lose its majority, is not entirely consistent with the *Gissel* language that approved the bargaining order in those cases in which the unfair practices "have the *tendency* to undermine majority strength and impede the election process."<sup>46</sup> Actual loss of majority status was not required. If the Board failed to make the required findings, the courts of this circuit have made the detailed findings in recent cases, rather than prolong the proceedings by remanding to the Board.<sup>47</sup> The specific findings required by the Seventh Circuit in *Walgreen* are also required by the Tenth Circuit<sup>48</sup> and the Sixth Circuit.<sup>49</sup>

The Eighth Circuit declines to make these detailed findings and will enforce a bargaining order if the evidence in the record establishes that the violations did undermine the union major-

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43. *NLRB v. Drives, Inc.*, 440 F.2d at 366.

44. 509 F.2d 1014 (7th Cir. 1975).

45. *Id.* at 1017 n.2. The need for a detailed analysis is heightened when a bargaining order is issued solely on the basis of § 8(a)(1) violations. *First Lakewood Assocs. v. NLRB*, 582 F.2d 416, 424 (7th Cir. 1978).

46. 395 U.S. at 614 (emphasis added).

47. *First Lakewood Assocs. v. NLRB*, 582 F.2d 416 (7th Cir. 1978)(bargaining order denied: "a new election will more effectively promote the policy of employee free choice." *Id.* at 424.); *C & W Super Mkts., Inc. v. NLRB*, 581 F.2d 618 (7th Cir. 1978)(bargaining order enforced).

48. *See NLRB v. Miller Trucking Serv., Inc.*, 445 F.2d 927 (10th Cir. 1971).

49. *See NLRB v. Essex Wire Corp.*, 496 F.2d 862 (6th Cir. 1972)(mem.). The court critically referred to the Board's reasoning as "'a litany, reciting conclusions by note without factual explication.'" *Id.* at 863 (quoting *NLRB v. American Cable Syss., Inc.*, 427 F.2d 446, 449 (5th Cir. 1970)).

ity.<sup>50</sup> In *Arbie Mineral Feed Co. v. NLRB*,<sup>51</sup> the court denied enforcement because the evidence affirmatively indicated "that the unfair practices did not tend to undermine a union majority; in fact, the unfair practices preceded the union's most successful card signing period."<sup>52</sup> But in an extraordinary invitation to the Board not to make any analysis relating to the impact of unfair labor practices, the court held that if "the record is silent concerning the actual impact of the employer's unfair practices, we defer to the Board's exercise of discretion and grant enforcement . . . ."<sup>53</sup> This is an unique standard among the circuits and is still law in the Eighth Circuit,<sup>54</sup> although there has been dissent.<sup>55</sup>

The District of Columbia Circuit, as well as the Eighth Circuit, defers to the expertise of the Board, noting that *Gissel* "does not require a finding that no other remedy could suffice, only that the bargaining order better protects employees' expressed union preference."<sup>56</sup>

In 1976, the Third Circuit, following the majority of circuits, ruled in *NLRB v. Armcor Industries, Inc.*<sup>57</sup> that the Board must set forth a reasoned analysis to justify the remedy of a bargaining order. This analysis is necessary to "'guarantee the integrity of the administrative process,'"<sup>58</sup> to contribute to the growth and predictability of this area of labor law, and to serve "as a prophylaxis against an arbitrary exercise of the Board's

50. See *Drug Package, Inc. v. NLRB*, 570 F.2d 1340 (8th Cir. 1978)(citing *Arbie Mineral Feed Co. v. NLRB*, 438 F.2d 940, 945 (8th Cir. 1971)).

51. *Arbie Mineral Feed Co. v. NLRB*, 438 F.2d 940 (8th Cir. 1971).

52. *Id.* at 944.

53. *Id.* at 945.

54. See *Drug Package, Inc. v. NLRB*, 570 F.2d 1340, 1344-45 (8th Cir. 1978)("[T]he record is largely silent on the actual impact of the Company's unfair labor practices upon the employees' support for the Union." *Id.* at 1344. Following the holding in *Arbie Mineral Feed*, the court granted enforcement.).

55. See *Tipton Elec. Co. v. NLRB*, 621 F.2d 890 (8th Cir. 1980)(Gibson, C.J., dissenting). The Chief Judge, who did not participate in *Arbie Mineral Feed* or *Drug Package*, observed that the Board's finding that unfair labor practices were committed "rests upon tenuous evidence" and that "accepting that determination as the basis for a bargaining order perverts the duty of the Board and this court to protect employee free choice." *Id.* at 900.

56. *Amalgamated Clothing Workers v. NLRB*, 527 F.2d 803, 807 (D.C. Cir. 1975).

57. 535 F.2d 239, 244 (3d Cir. 1976).

58. *Id.* at 245 (quoting *Atchison, Topeka & Santa Fe R.R. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973)).

power.”<sup>59</sup> The court enforced this requirement in subsequent cases<sup>60</sup> and added that the Board must provide its own analysis, not merely adopt the findings of the administrative law judge.<sup>61</sup> “The rationale undergirding the *Armcor* ruling is that because these coercive effects must exist in order for the bargaining order to be an appropriate remedy, the Board should be required to explain with specificity the results of the unfair practices and, in particular, the unlikelihood of a fair election.”<sup>62</sup> By requiring the Board to provide its own analysis, the court hoped to guarantee that the evidence would be considered by the Board, not just by the administrative law judge.<sup>63</sup>

The Third Circuit reconsidered this requirement<sup>64</sup> following the Supreme Court’s decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,<sup>65</sup> which the circuit court understood to express “the basic philosophy that agencies should be relatively free to establish their own procedures and mechanisms for decision-making on subjects within the scope of their expertise.”<sup>66</sup> The Third Circuit, therefore, no longer requires a separate Board opinion as long as the Board specifically adopts the findings of an administrative law judge who had fully set forth his reasoning.<sup>67</sup>

The Third Circuit, however, does not automatically defer to the Board’s evidentiary findings. In *Rapid Manufacturing Co.*,<sup>68</sup> the Board first determined that the unfair labor practices “undermined the majority strength of the Union, eroded the laboratory conditions necessary for the effectuation of a fair and meaningful election, and effectively thwarted the proper functioning of the Board’s election processes.”<sup>69</sup> Second, the Board determined whether alternative remedial measures would not be likely to erase the harmful effects of the unfair labor practices

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59. 535 F.2d at 245 (citing *Walgreen Co. v. NLRB*, 509 F.2d 1014 (7th Cir. 1975)).

60. See *Hedstrom Co. v. NLRB*, 558 F.2d 1137 (3d Cir. 1977); *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160 (3d Cir. 1977).

61. *NLRB v. Craw*, 565 F.2d 1267 (3d Cir. 1977).

62. *Id.* at 1272.

63. See *Kenworth Trucks, Inc. v. NLRB*, 580 F.2d 55, 60 (3d Cir. 1978).

64. See *id.* at 61-63 (opinion on rehearing).

65. 435 U.S. 519 (1978).

66. 580 F.2d at 62.

67. *Id.* at 62-63.

68. 239 N.L.R.B. 465 (1978).

69. *Id.* at 468.

and restore the laboratory conditions. Because both conditions were met, a bargaining order was deemed appropriate.<sup>70</sup> The Third Circuit challenged the Board's findings in the initial determination concerning impact and refused enforcement of the order.<sup>71</sup> The thorough dissection of the Board's findings in *Rapid Manufacturing* is contrary to previous holdings that the court should defer to the Board's expertise in labor matters.<sup>72</sup> This inconsistency does not contribute to the growth and predictability of labor law, an articulated goal of the Third Circuit.<sup>73</sup>

The first mention of a required analysis in the First Circuit occurred in 1978. If a case lacks "reasoning that we can evaluate, we may feel obliged to remand to the Board for further proceedings."<sup>74</sup> The analysis must consider the impact of the unfair labor practices on election conditions and the potential for recurrence of the unfair labor practices and must "go beyond semantics and give specific examples and precise reasons for this extreme remedy."<sup>75</sup>

To justify "so stern a step as the imposition of the bargaining order," the Fourth Circuit requires that a card majority had existed at one time and that "conduct potentially impairing the Union's majority" had occurred.<sup>76</sup> The Third Circuit rule is followed: there must be a detailed analysis in which the continuing effect of misconduct and the potential effectiveness of traditional remedies are assessed in determining whether a fair election could be held.<sup>77</sup>

### III. CIRCUMSTANCES REQUIRING A BARGAINING ORDER

#### A. *Unfair Labor Practices*

Underlying the requirement of a specific analysis by the

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70. *Id.*

71. *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144, 151 (3d Cir. 1979). "We would be remiss in our judicial functions if, on a record as sparse as this one, we were to enforce a bargaining order . . . ." *Id.*

72. See notes 64-67 and accompanying text *supra*.

73. See *NLRB v. Armcor Indus., Inc.*, 535 F.2d 239, 245 (3d Cir. 1976).

74. *NLRB v. Matouk Indus., Inc.*, 582 F.2d 125, 130 (1st Cir. 1978).

75. *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 119 (1st Cir. 1978).

76. *Schulman's Inc. v. NLRB*, 519 F.2d 498, 501 (4th Cir. 1975) (citing *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973)).

77. *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 997 (4th Cir. 1979).

Board is an assumption that the Board has particular expertise enabling it to determine the impact of employer conduct on the employees' ability to make a free, uncoerced choice about unions. Some commentators suggest that a specific determination is not possible<sup>78</sup> and that "the most that can be asked for is a reasoned explanation of the Board's conclusions, taking into account what is known about voting behavior."<sup>79</sup> A study by Getman, Goldberg, and Herman<sup>80</sup> of the impact of certain employer conduct on the results of elections directly contradicts some of the Board's assumptions that are significant in determining the need for a bargaining order.<sup>81</sup>

The Supreme Court in *Gissel* did not specify those unfair labor practices it considered to have an impact on election conditions. Only two were mentioned—threats by the employer to close or transfer plant operations and threats to eliminate benefits or refuse to deal with the union if elected.<sup>82</sup> The Court indicated that threats to close the plant would likely have a significant impact,<sup>83</sup> citing a study that showed the union won only twenty-nine percent of rerun elections in those situations.<sup>84</sup> Threats to eliminate benefits were "less irremediable."<sup>85</sup> This study has been sharply criticized for its analytic methods, which failed to consider other variables that might have influenced the rerun elections.<sup>86</sup>

Getman and Goldberg indicate that the Board usually issued a bargaining order when the unfair labor practice was viewed as "deliberate" or "calculated" to interfere with em-

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78. See Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681, 682 (1972); Bok, *supra* note 23.

79. Getman & Goldberg, *supra* note 78, at 698.

80. J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976).

81. For example, concerning the assumption that employees are attentive to the campaign and that the campaign changes votes, the authors' data indicate that employees have strong and stable predispositions and that the average employee remembers only 10% of the issues presented by the company and only 7% of those presented by the union. *Id.* at 72, 109.

82. See 395 U.S. at 611 n.31.

83. *Id.* at 611.

84. *Id.* at 611 n.31 (citing Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C.L. REV. 209 (1963)).

85. *Id.* (citing Pollit, *supra* note 84). In these cases, the union won 75% of the rerun elections.

86. See Getman & Goldberg, *supra* note 78, at 693.

ployee free choice<sup>87</sup> or when there were promises to correct the grievances that had led to the interest in unionization.<sup>88</sup>

1. *Violations of Sections 8(a)(1) and 8(a)(3).*—The constellation of unfair labor practices that usually leads to a bargaining order includes violations of sections 8(a)(1) and (3) of the National Labor Relations Act. Typical section 8(a)(1) violations are coercive interrogation of employees about union activity; surveillance or the appearance of surveillance of union meetings or activity; promises of increased benefits if employees abandon the union; and threats of economic reprisals, discharge, or plant closure. The violations of section 8(a)(3) usually include dismissals for prounion activity. These violations and the actual use of force or physical violence are “the hallmarks in cases where bargaining orders issue.”<sup>89</sup>

Although bargaining orders are sometimes enforced in the absence of any violations of section 8(a)(3), the case for enforcement is stronger when these violations are present. Violations of only section 8(a)(1) frequently fail to provide an adequate showing of the need for a bargaining order<sup>90</sup> because generally, “§ 8(a)(1) violations are less serious and have less residual impact than other unfair labor practices such as § 8(a)(3) violations . . . .”<sup>91</sup> Discriminatory discharges in violation of section 8(a)(3) have been described as the employer’s “ultimate weapon in thwarting employees’ exercise of § 7 rights”<sup>92</sup> and the “surest

87. *Id.* at 688 (citing *G.T.E. Automatic Elec., Inc.*, 196 N.L.R.B. 902 (1972)).

88. *Getman & Goldberg, supra* note 78, at 689 (citing *International Harvester Co.*, 179 N.L.R.B. 753 (1969)). “There are few unfair labor practices so effective in cooling employees’ enthusiasm for a union than the prompt remedy of the grievances which prompted the employees’ union interest.” 179 N.L.R.B. at 753-54.

89. *NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100, 1104 (2d Cir. 1979).

90. *See NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 998 (4th Cir. 1979) (solicitation of grievances by psychologist employed by employer, announcement of improved benefits, and threatening interrogations of employees were “simple 8(a)(1) violations [which] do not provide an adequate showing for a bargaining order in the absence of any credible findings” that the misconduct might recur or that a fair election could not be held); *NLRB v. Lloyd Wood Coal Co.*, 585 F.2d 752, 757 (5th Cir. 1978) (interrogations, effort to create impression of surveillance, threats to close mine, and actual shutdown not shown to be for discriminatory motives were not “so serious and extensive as to support a *Gissel*-type order”).

91. *First Lakewood Assocs. v. NLRB*, 582 F.2d 416, 424 n.5 (7th Cir. 1978). In describing § 8(a)(3) violations, this circuit had previously commented that “[n]o conduct more drastic, or more likely to have lingering, ineradicable effects can be imagined.” *NLRB v. Townhouse T.V. & Appliances, Inc.*, 531 F.2d 826, 830 (7th Cir. 1976).

92. *Ludwig Fish & Produce, Inc.*, 220 N.L.R.B. 1086, 1087 (1975).

method of undermining a union's majority or impeding an election process."<sup>93</sup>

Actual plant closure or discharge of the work force are violations most often remedied by a bargaining order because by "destroying the bargaining unit, the unfair labor practices have made a fair election, or any election at all, impossible."<sup>94</sup> The closing of a plant is "the penultimate threat for an employee, and its psychological effect is at least as likely not to dissipate as other unfair labor practices we have held to justify" a bargaining order under *Gissel*.<sup>95</sup>

The Supreme Court in *Gissel*<sup>96</sup> affirmed the First Circuit's enforcement of the bargaining order in *Sinclair*.<sup>97</sup> In *Sinclair*, the only unfair labor practice was the threat of plant closure. A recent Board decision<sup>98</sup> focused on the unfair practices that it considered to have a serious impact—the discharge of employees and the threat of plant closure. "Because such a threat suggests possible loss of livelihood, a long-term coercive influence is again inevitable."<sup>99</sup>

These assumptions regarding the impact of section 8(a)(3) violations have been disputed by some commentators, however. Professor Bok has stated that the discharge of union sympathizers "can often frustrate a union drive," but "any experienced organizer knows that a discriminatory discharge may rally the voters against the employer instead of frightening them into submission."<sup>100</sup> The study by Getman, Goldberg, and Herman found that although union supporters viewed these discharges as

93. *NLRB v. Sitton Tank Co.*, 467 F.2d 1371, 1372 (8th Cir. 1972). See *Florsheim Shoe Store Co. v. NLRB*, 565 F.2d 1240 (2d Cir. 1977); *NLRB v. Coast Delivery Serv., Inc.*, 437 F.2d 264 (9th Cir. 1971).

94. *Great Chinese Am. Sewing Co. v. NLRB*, 578 F.2d 251, 256 (9th Cir. 1978). See *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979).

95. *Electrical Prods. Div. of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987 (3d Cir. 1980).

96. 395 U.S. at 619-20.

97. *NLRB v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968).

98. *Wright Plastic Prods., Inc.*, 247 N.L.R.B. No. 101 (Jan. 28, 1980).

99. *Id.* at 3 (citing *Kurz-Kasch, Inc.*, 239 N.L.R.B. 1044 (1978)). See *Rapid Mfg. Co.*, 239 N.L.R.B. 465, 466 (1978) ("The Board has consistently viewed outright threats of plant closure as coercion of a most serious nature when made by an employer as a penalty for unionization."). But see J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 80, at 130 (authors found that discharge of union supporters did not cause other union supporters to vote against union).

100. Bok, *supra* note 23, at 41.

discriminatorily motivated, this view did not result in their voting against the union.<sup>101</sup> Yet, the Board and the courts continue to base their decisions on these assumptions.

Threats to close the plant, decrease the number of employees, shorten the work week, and discharge employees who spoke about unionization were sufficient to support a bargaining order in the Ninth Circuit.<sup>102</sup> "Even had every employee testified that the employer's anti-union actions did not influence his vote, we would have been hesitant to deny enforcement to a Board bargaining order on the record before us."<sup>103</sup> The participation of senior company officials in the threatening behavior is often determinative when bargaining orders based on threats are enforced.<sup>104</sup> Depending on the facts of the case, however, the disavowal of threats by important company officials has been found to mitigate the effects of some serious misconduct sufficiently to avoid a bargaining order.<sup>105</sup>

In a case in which the Tenth Circuit found that the unfair labor practices comprised a first category situation (outrageous and pervasive), the unfair practices included threats of dismissal, reprisal and business shutdown, an offer of reward to an employee if the union lost, discharge of five union adherents, intimidation and discharge of an employee, persistent interrogation, and surveillance of employees.<sup>106</sup> Since the union had had a "bare majority," however, the bargaining order was also "justified under the second category of *Gissel*."<sup>107</sup>

101. J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 80, at 130.

102. See *NLRB v. Bell Mfg. Div., Di Giorgio Leisure Prods., Inc.*, 483 F.2d 150 (9th Cir. 1973).

103. *Id.* at 153.

104. See *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144, 149 (3d Cir. 1979) (bargaining order not enforced because threats did not emanate from officials or members of bargaining team, but from relatives of officials). See *Electrical Prods. Div. of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987 (3d Cir. 1980).

105. See *NLRB v. Chatfield-Anderson Co.*, 606 F.2d 266, 269 (9th Cir. 1979). But see *NLRB v. Scholer's, Inc.*, 466 F.2d 1289 (2d Cir. 1972) (threats not cured by letter, leaflet, or employer's speech assuring employees that there would be no reprisals).

106. *NLRB v. Okla-Inn*, 488 F.2d 498, 508 (10th Cir. 1973).

107. *Id.* To date, the circuit courts have not reviewed a bargaining order that had been issued by the Board in the absence of a showing that the union had majority status at one point in time. In *United Dairy Farmers Coop. Ass'n v. NLRB*, Nos. 79-1807, 79-1883, (3d Cir. Oct. 30, 1980), however, the court remanded to a sharply divided Board to consider whether the unfair labor practices were sufficiently outrageous and pervasive to warrant a bargaining order in the absence of a card majority.



Sheer numbers of unfair labor practices have been found to require a bargaining order,<sup>108</sup> but among the circuits the cases again are not consistent. In one case which concerned the interrogation of one employee, the grant of vacation benefits to part-time employees, and the discharge of three employees who participated in the union effort, the Sixth Circuit did not require the remedy of a bargaining order because the interrogation was “marginal” and without continuing impact, and the discharged employees were offered reinstatement.<sup>109</sup> Yet, in the Third Circuit, the grant of a wage increase and interrogation of one employee were found “sufficiently coercive” to support a bargaining order.<sup>110</sup>

Interrogations of employees are found in the majority of cases in which bargaining orders are issued. The assumption is that, depending on the surrounding circumstances,<sup>111</sup> interrogations can be coercive and restrain employees in the exercise of their section seven rights. This assumption also is disputed by the Getman, Goldberg, and Herman study, which found that employees generally are not sensitive to interrogations.<sup>112</sup> “Of those union voters who believed the employer knew of their sympathies, a substantial majority had told the employer themselves.”<sup>113</sup> Any determination of the impact of interrogations is necessarily subjective; many employees, for example, might not admit to having been intimidated by interrogations because they might appear cowardly.

2. *Violations of Section 8(a)(5).*—Although *Gissel* referred to the bargaining order as “a remedy for a § 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely,”<sup>114</sup> a violation of section 8(a)(5) is no longer required to

108. See *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62 (3d Cir. 1978); *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996 (10th Cir. 1977).

109. See *NLRB v. East Side Shopper, Inc.*, 498 F.2d 1334, 1336 (6th Cir. 1974). Cf. *NLRB v. Lloyd Wood Coal Co.*, 585 F.2d 752 (5th Cir. 1978) (supervisor's telling mine employees that mine would close if they signed union cards did not warrant issuance of *Gissel*-type order).

110. See *NLRB v. Colonial Knitting Corp.*, 464 F.2d 949, 952 (3d Cir. 1972).

111. See *Blue Flash Express, Inc.*, 109 N.L.R.B. 591 (1954).

112. See J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 80, at 130.

113. *Id.*

114. 395 U.S. at 610.

issue a bargaining order.<sup>115</sup> An employer does not violate section 8(a)(5) when he refuses to recognize a union that presents evidence of majority status obtained in ways other than by Board conducted election.<sup>116</sup> The Supreme Court has held that "unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union . . . has the burden of taking the next step in invoking the Board's election procedure."<sup>117</sup> The Board has added that a violation of section 8(a)(5) occurs when an employer refuses to recognize a union with majority status *and* commits unfair labor practices that undermine union majority and prevent a fair election.<sup>118</sup> Further, by committing unfair labor practices, the employer forfeits his right to demand an election.<sup>119</sup>

### B. Other Relevant Considerations

Actual violations of the law are one aspect of *Gissel* bargaining orders. Also relevant to the determination of whether a bargaining order should issue is a consideration of the totality of the circumstances in each case. The weight to be given to these circumstances reveals, again, the tension between the goals or purposes of the bargaining order and the policies of labor law generally.<sup>120</sup>

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115. See *First Lakewood Assocs. v. NLRB*, 582 F.2d 416, 423 (7th Cir. 1978); *Steel-Fab, Inc.*, 212 N.L.R.B. 363 (1972).

[I]t distorts our analysis to predicate bargaining orders on 8(a)(5) violations, and it is desirable for the Board to concentrate solely on a careful examination of the employer's 8(a)(1) conduct and its impact upon the holding of a fair election. Henceforth, in these *Gissel*-type situations, we shall dispense with finding an 8(a)(5) violation and instead determine only whether or not a bargaining order is necessary to remedy the employer's 8(a)(1)'s.

*Id.* at 365.

116. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

117. *Id.* at 310.

118. See *Trading Port, Inc.*, 219 N.L.R.B. 298 (1975), cited in *NLRB v. Solboro Knitting Mills, Inc.*, 572 F.2d 936 (2d Cir. 1978).

119. *NLRB v. Prineville Stud Co.*, 578 F.2d 1292 (9th Cir. 1978). In *Trading Port*, the Board developed the retroactive bargaining order, retroactive to the bargaining demand. "Our main concern in granting bargaining orders has been, and is, to correct and give redress for an employer's misconduct and to protect the employees from the effects thereof." 219 N.L.R.B. at 301.

120. For a discussion of the relevance of events that occur subsequently to the unfair practices, see Note, "After All Tomorrow Is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?, 31 STAN. L. REV. 505 (1979) (footnote omitted).

1. *Subsequent Events.*—The Board has opposed the consideration of events that occurred subsequent to the commission of the unfair labor practices that occasioned a proceeding.<sup>121</sup> The courts of appeals disagree on whether and when to consider subsequent events.

If the purpose of the *Gissel* bargaining order is to deter unfair labor practices, only the unfair labor practices themselves are relevant. If the purpose is to insure a free and fair election of a bargaining representative, it is relevant to consider such factors as the passage of time, employee turnover, changes in management, and additional employer misconduct.<sup>122</sup> Yet, to permit consideration of subsequent events may give employers “a great incentive to refuse to recognize a bona fide bargaining demand in hopes that a delay would terminate the difficulty”<sup>123</sup> and would “allow an employer to benefit from purposefully protracting litigation as long as possible.”<sup>124</sup>

It has been suggested that the goal of deterrence is “necessary not because of any inherent value in punishing employers, but because deterring the employer from committing unfair labor practices itself allows the employees to decide whether to unionize or not.”<sup>125</sup> For this and other practical reasons,<sup>126</sup> the Board initially should not be required to consider subsequent events. When a case is remanded to the Board for independent reasons, however, the Board should consider subsequent events. Significantly, more time will have elapsed and employee turnover may have increased; deterrence will continue to be served

121. *Bandag, Inc.*, 228 N.L.R.B. 1045, 1045 n.1 (1977), *enforced*, 582 F.2d 765 (5th Cir. 1978).

122. Subsequent unfair labor practices are always considered by the Board, *see, e.g.*, *CBS Records Div.*, 223 N.L.R.B. 709 (1976), with the approval of the courts. *See, e.g.*, *Chromalloy Mining and Minerals, Alaska Div. v. NLRB*, 620 F.2d 1120, 1131 n.8 (5th Cir. 1980). Subsequent unfair practices “are always relevant because they demonstrate that the employer is still opposed to unionization.” *Id.* (citing *J.P. Stevens & Co. v. NLRB*, 441 F.2d 514, 520 n.11 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971)). *See NLRB v. Drives, Inc.*, 440 F.2d 354, 367 (7th Cir.), *cert. denied*, 404 U.S. 912 (1971). *See Hedstrom Co. v. NLRB*, Nos. 78-1800, 78-1801 (3d Cir. Aug. 6, 1980).

123. *NLRB v. Tri-State Stores, Inc.*, 477 F.2d 204, 207 (9th Cir. 1972).

124. *NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148, 1153 (9th Cir. 1977).

125. Note, *supra* note 120, at 522.

126. *Id.* The effects of unfair labor practices are usually more pervasive at the initial Board hearing. It would be difficult for the Board to weigh objective factors, such as the turnover of employees, against subjective factors, such as the impact of the unfair practice. *Id.* at 523.

since subsequent events could be considered, if at all, only on remand.<sup>127</sup>

Events that occur during a delay caused by the administrative proceedings are not relevant if the delay is not the fault of the union or the employees.<sup>128</sup> If the rule were otherwise, "instead of a deterrent, the administrative process would provide a reward for employer misconduct."<sup>129</sup>

When a delay is "Board-occasioned,"<sup>130</sup> subsequent events sometimes become relevant to the review of a bargaining order.

The thrust and philosophy of the Act is that employees be represented by a bargaining agent of their choice and in this situation which fails to reflect the selection of an agent by the employees sought to be affected, and where the period for personnel turnover has been extended by Board-occasioned delay, we conclude that it would be contrary to the intent of the Act to order enforcement.<sup>131</sup>

Board-occasioned delay includes the delay caused when a case is remanded because the Board did not make adequate findings. In such a case, the Board is generally required on remand to consider all available evidence.<sup>132</sup> "*Gissel* does not apply a nunc pro tunc principle. . . . It requires contemporaneity—a present view, albeit with an historical perspective. Industrial democracy should be allowed to work its will if the present conditions are sufficiently antiseptic for an election."<sup>133</sup>

In the Fifth Circuit, the normal time for determining the appropriateness of the bargaining order is the time at which the case is before the Board, not the time at which it is before the court for enforcement.<sup>134</sup> The Board must consider events occur-

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127. *Id.* at 524-25. See *L'Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1353 (9th Cir. 1980).

128. See *NLRB v. International Van Lines*, 473 F.2d 1036, 1037 (9th Cir. 1973).

129. *NLRB v. Drives, Inc.*, 440 F.2d 354, 366 (7th Cir.), *cert. denied*, 404 U.S. 912 (1971).

130. *Clark's Gamble Corp. v. NLRB*, 422 F.2d 845, 847 (6th Cir.), *cert. denied*, 400 U.S. 868 (1970).

131. *Id.* But see *NLRB v. Staub Cleaners, Inc.*, 418 F.2d 1086 (2d Cir. 1969).

132. *NLRB v. American Cable Syss., Inc.*, 427 F.2d 446 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970), followed in *NLRB v. Gibson Prods. Co.*, 494 F.2d 762 (5th Cir. 1974). See *Hedstrom Co. v. NLRB*, 558 F.2d 1137 (3d Cir. 1977) (remanded because Board did not consider effect of passage of time).

133. *NLRB v. American Cable Syss.*, 427 F.2d at 449.

134. *J.P. Stevens & Co., Gulistan Div. v. NLRB*, 441 F.2d 514, 525 n.16 (5th Cir.

ring between the election and the administrative law judge's hearing but need not consider events between the hearing and the Board's review of the hearing.<sup>135</sup> When the Board fails to make adequate findings, however, the appropriateness of a *Gissel* bargaining order is to be decided at the time the Board makes adequate findings and enters a proper order rather than "as of an earlier time when it made an inadequate and abortive order."<sup>136</sup> This reasoning suggests that the courts are penalizing the Board for failing to make the findings, and it is questionable whether this action has any tendency to effectuate the policies of the Act.

This rule was adopted by the Fourth Circuit when it reconsidered *General Steel Products, Inc. v. NLRB*.<sup>137</sup> The court held that the Board "should receive proof of any material fact occurring up to the date of the new hearing bearing upon a determination whether or not a fair election could be held."<sup>138</sup> A material fact in *General Steel* was a complete change in the ownership and management of the company, which indicated that a fair election might be possible because the new employer had not committed unfair labor practices.<sup>139</sup> One judge, who dissented, would not have required the Board to receive new proof because then "employers could hope to commit unfair labor practices and then frustrate the Board's petition to enforce a bargaining order by a hasty housecleaning, to the detriment of both finality of proceedings and the deterrent effect of *Gissel*."<sup>140</sup> Another judge would have enforced the order if the evidence was only of employee turnover, rather than the complete change in ownership.<sup>141</sup> When both the guilty employer and the employees who were exposed to the unfair labor practices were

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1971).

135. *Bandag, Inc. v. NLRB*, 583 F.2d 765, 771-73 (5th Cir. 1978).

136. *Id.* at 772 n.9. See *Curlee Clothing Co. v. NLRB*, 607 F.2d 1213, 1216 n.4 (8th Cir. 1979) (When "findings of fact are insufficient to support a *Gissel* bargaining order, the Board on remand must consider whether conditions permit a fair rerun election.").

137. 445 F.2d 1350 (4th Cir. 1971). This case was before the circuit court following remand to the Board by the Supreme Court in *Gissel*.

138. *Id.* at 1356.

139. *Id.* See *NLRB v. American Cable Syss., Inc.*, 427 F.2d at 448.

140. 445 F.2d at 1359 (Winter, J., dissenting).

141. *Id.* at 1357 (Haynsworth, C.J., concurring) (If employee turnover were relevant, litigation could involve "extensive factual controversy over the possible relation of employment terminations to unfair labor practices charged or uncharged.").

no longer present, an unbiased election was considered possible and necessary.<sup>142</sup>

The Board is usually required to consider evidence of employee turnover if a case is remanded;<sup>143</sup> whether it should be considered at the initial hearing, however, is a separate question. The Board has historically presumed that new employees support the union in the same ratio as the employees whom they replace.<sup>144</sup> If this presumption prevailed, employee turnover would be irrelevant. The courts of appeals generally have not accepted this presumption and, instead, focus on the possibility of an uncoerced atmosphere for a fair and free election. When the unfair labor practices are not outrageous, courts apparently presume that new employees are not influenced by the employer's past misconduct.<sup>145</sup> Thus, a fair election can be held, avoiding the imposition of a union on employees who were hired after the union's organizing campaign and who may not support or want a union.

In the Sixth Circuit, if employee turnover and delay in the proceedings are directly caused by the employer's "own willful and gross violations of the N.L.R.A.," such turnover and delay are not relevant considerations when the case is first before the Board because the goal is to remedy violations "by re-establishing as nearly as possible the status quo ante (*before* the violations took place)."<sup>146</sup> Even when violations are of a less pervasive type, if the employee turnover is caused by the employer's acts (discriminatory discharges, for example), the Board need not consider it on remand.<sup>147</sup>

Initially, the Seventh Circuit followed this rule, reasoning that if "any party should be penalized for the delay, it should be the employer since his misconduct occasioned the proceed-

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142. *NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978). "[A] bargaining order not only is unnecessary, but may even frustrate the policy of allowing employees to pick the representative of their choice that *Gissel* was intended to promote." *Id.* at 895.

143. See notes 130-38 and accompanying text *supra*.

144. *National Cash Register Co.*, 201 N.L.R.B. 1034, 1042 (1973); *Laystrom Mfg. Co.*, 151 N.L.R.B. 1482, 1484 (1965).

145. See notes 151-58 and accompanying text *infra*.

146. *G.P.D., Inc. v. NLRB*, 430 F.2d 963, 964 (6th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

147. *NLRB v. Lou De Young's Mkt. Basket, Inc.*, 430 F.2d 912, 915 (6th Cir. 1970)(limiting the holding in *Clark's Gamble* to Board-occasioned delay).

ing.”<sup>148</sup> In cases with marginal violations of section 8(a)(1), however, the court would “place some, though not controlling, weight on the changed composition of the work force”<sup>149</sup> because the remedy of a bargaining order would not be clearly warranted.<sup>150</sup>

When substantial employee turnover is not caused by any impropriety of the company, some circuit courts have held that the Board should have considered the turnover when the case was first before it.<sup>151</sup> The Eighth Circuit has held employee turnover to be relevant at the initial hearing, but not dispositive because, otherwise, unfair labor practices of employers might not be deterred.<sup>152</sup>

In the Second Circuit, when the violations are not “outrageous” or “pervasive,” that is, when they fall within the *Gissel* second category, turnover is an important consideration because of the “possibility of inflicting what may be a totally unwanted, and even largely unknown, union on a new work force.”<sup>153</sup> The Ninth Circuit adopted this reasoning because the primary objective of the Act is to guarantee the rights of employees to select a bargaining representative and “the Board must not routinely place a premium on deterring employer misconduct” particularly when the conduct is not outrageous.<sup>154</sup> The same policy of guaranteeing free choice for employees has prevailed in the First Circuit.<sup>155</sup>

Employee turnover not only is relevant in the Third Circuit, but also may reverse ordinary presumptions. That circuit has ruled that the Board must consider present conditions *and* must “demonstrate that the present employees are so intimidated

148. *NLRB v. Kostel Corp.*, 440 F.2d 347, 353 (7th Cir. 1971). See *Self-Reliance Ukrainian Am. Coop. Ass’n v. NLRB*, 461 F.2d 33 (7th Cir. 1972); *NLRB v. Copps Corp.*, 458 F.2d 1227 (7th Cir. 1972).

149. *NLRB v. Gruber’s Super Mkt., Inc.*, 501 F.2d 697, 705 (7th Cir. 1974).

150. *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1121 (7th Cir. 1973).

151. See *NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100, 1104 (2d Cir. 1979). This case was remanded to the Board with directions to consider employee turnover. The Board refused to consider this change on remand. As a result, the second petition for enforcement of the bargaining order was denied. *NLRB v. Jamaica Towing, Inc.*, 105 L.R.R.M. 2959 (2d Cir. 1980). See *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434, 443 (D.C. Cir. 1972); *NLRB v. Coca-Cola Bottling Co.*, 472 F.2d 140 (9th Cir. 1972).

152. See *NLRB v. Dixisteel Bldgs., Inc.*, 445 F.2d 1260 (8th Cir. 1971).

153. *NLRB v. General Stencils, Inc.*, 472 F.2d 170, 175 n.5 (2d Cir. 1972).

154. *NLRB v. Western Drug*, 600 F.2d 1324, 1327 (9th Cir. 1979).

155. *NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978).

that they probably cannot make a knowing and free choice in a supervised election."<sup>156</sup> In a very recent case,<sup>157</sup> however, the same circuit has enforced a bargaining order despite substantial employee turnover. "In the last analysis . . . those who would resist this remedy in the name of the employees must answer for the employees whose free choice is currently impaired by the lack of adequate remedies."<sup>158</sup>

Related to employee turnover is substantial reduction in the work force. This problem was addressed, with surprising results, in the Seventh Circuit. A reduction was relevant "not only because the division of sentiment among the remaining employees may be different, but also because employees may view the benefits of unionization in a far different light when the economic plight of their employer has substantially diminished their ranks."<sup>159</sup> This would require the Board to determine if economics—rather than a retaliatory act on the part of the employer, which would violate the Act—were the cause of the diminished ranks. This requirement not only ignores any deterrent effect, but also increases the findings the Board must make.

2. *Characteristics of the Bargaining Unit.*—The size and composition of the bargaining unit have been consistently regarded as relevant considerations in the initial determination of the appropriateness of a bargaining order.<sup>160</sup> Enforcement was granted in the Fourth Circuit when threats were communicated to a substantial percentage of unskilled and unsophisticated employees in a small unit.<sup>161</sup> In the Seventh Circuit an order was enforced when three of five employees were threatened in a small city where the misconduct could create uneasiness among potential as well as actual employees.<sup>162</sup> In addition, the employees were found to be "youthful, unsophisticated or superannuated, unskilled,"<sup>163</sup> and more susceptible to extraneous influ-

156. *NLRB v. Armcor Indus.*, 98 L.R.R.M. 2441, 2444 (3d Cir. 1978).

157. *Hedstrom Co. v. NLRB*, Nos. 78-1800, 78-1801, (3d Cir. Aug. 6, 1980)(6-3 decision)(argued en banc).

158. *Id.* (quoting Bok, *supra* note 23, at 135).

159. *Peerless of America, Inc., v. NLRB*, 484 F.2d 1108, 1121 (7th Cir. 1973).

160. *See NLRB v. Scoler's, Inc.*, 466 F.2d 1289, 1291 n.2 (2d Cir. 1972).

161. *See NLRB v. Kane*, 435 F.2d 1203 (4th Cir. 1970).

162. *NLRB v. Kostel*, 440 F.2d 347, 352 (7th Cir. 1971); *accord*, *Self-Reliance Urkainian Am. Coop. Ass'n v. NLRB*, 461 F.2d 33 (7th Cir. 1972).

163. 440 F.2d at 352. *Accord*, *NLRB v. Copps Corp.*, 458 F.2d 1227, 1230 n.7 (7th Cir. 1972).



ences. The small size of a plant was determinative in the Tenth Circuit in a case in which the evidence of the violations “might seem a bit thin” because, in a larger plant, “the effect of an unfair labor practice might be spent by the sheer numbers involved to the end that a re-run election might be in order.”<sup>164</sup>

3. *Continuing Strength of the Union Drive.*—The Supreme Court in *Gissel* held that for a bargaining order to issue “on a lesser showing of employer misconduct” (second category), the misconduct must have had the “tendency to undermine majority strength and impede the election processes.”<sup>165</sup> A showing of majority status prior to the occurrence of the unfair labor practices is required,<sup>166</sup> but majority status need not exist at the time of the election.<sup>167</sup> Thus, a showing of actual loss of majority status is extremely relevant to any evaluation of a bargaining order since “[a]bsent any showing that the employer’s activities in some way unlawfully undermined union majority strength, the bargaining order cannot be sustained.”<sup>168</sup> The requirement of a showing that the unfair practices undermined the union’s majority strength indicates that the courts do not assume that unfair labor practices always cause the loss of majority status.

Evidence of continuing support for the union organizing drive is also relevant. Although there may have been conduct violative of the Act, that misconduct does not automatically require the conclusion that it tended to undermine majority strength. “What may reasonably be thought capable of dampen-

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164. *Ann Lee Sportswear, Inc. v. NLRB*, 543 F.2d 739, 744 (10th Cir. 1976). See *Wright Plastic Prods.*, 247 N.L.R.B. No. 101 (Jan. 28, 1980).

165. *NLRB v. Gissel Packing Co.*, 395 U.S. at 614.

166. If majority status was obtained subsequent to the misconduct, the misconduct obviously was not undermining.

167. 395 U.S. at 610. See *NLRB v. Dixisteel Bldgs., Inc.*, 445 F.2d 1260, 1265 (8th Cir. 1971).

168. *Struthers-Dunn, Inc. v. NLRB*, 574 F.2d 796, 802 (3d Cir. 1978).

[W]e think the determination by the NLRB that the Union continued its status as majority representative up until at least March 25, 1975, due to the failure of the 16 employees to notify the Union of their withdrawal of authorization, fails to accord proper recognition to the free and voluntary expression of opinion by the employees. . . .

. . . .

. . . We fail to see how the unfair practices, found to have commenced on March 25, 1975, could have had a tendency to undermine majority strength which was, at that time, nonexistent.

*Id.* at 801.

ing the exercise of § 7 rights might be far short of what it takes to change an employee's mind about the need for a union."<sup>169</sup> Although support for the union continued after some of the unfair labor practices, when the misconduct was egregious, the Fifth Circuit did not conclude that the election process had not been impeded.<sup>170</sup> This is consistent with *Gissel*: in a first category case characterized by "outrageous" misconduct, the majority status of the union need not be established.<sup>171</sup> The goal of the bargaining order in first category cases seems to be to deter outrageous misconduct, but it has been suggested that the assumption might be that *but for* the misconduct, the union *would* have achieved majority strength, and a bargaining order would serve to effectuate ascertainable employee free choice.<sup>172</sup>

4. *Union Misconduct.*—Union misconduct during the organizing campaign is relevant, and the Board is required to balance the severity of the misconduct of the union against that of the employer.<sup>173</sup> Bargaining orders have not been enforced in the Second Circuit when union misconduct has been so serious that the possibility of fair elections was eliminated.<sup>174</sup> In contrast, union violence that was infrequent and perpetrated by a small number of strikers did not bar the enforcement of a bargaining order in one Second Circuit case because the employer was found to be the more guilty party.<sup>175</sup>

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169. *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1120 (7th Cir. 1973). See *Harper & Row Publishers, Inc. v. NLRB*, 476 F.2d 430 (8th Cir. 1973); *Arbie Mineral Feed Co. v. NLRB*, 438 F.2d 940 (8th Cir. 1971).

170. *NLRB v. Orlando Paper, Inc.*, 480 F.2d 1200, 1201 (5th Cir. 1973). The unfair labor practices included promises of benefits, coercive interrogation concerning union membership, coercive suggestion that an employee committee be formed, coercive solicitation of employees to oppose union activity, instruction to a supervisor to find a pretext for discharging a union activist, and the conditional hiring of new employees based on their willingness to oppose the union. *Id.* at 1201.

171. 395 U.S. at 613.

172. Comments of Thomas R. Haggard, Professor of Law, University of South Carolina School of Law, in Columbia, S.C. (Sept. 12, 1980). See note 24 *supra*.

173. *Laura Modes Co.*, 144 N.L.R.B. 1592, 1596 (1963).

174. See *NLRB v. World Carpets, Inc.*, 463 F.2d 57 (2d Cir. 1972) (union members carried baseball bats on the picket line and threatened nonstrikers; union organizer was charged with criminal assault). *United Mineral & Chem. Corp. v. NLRB*, 391 F.2d 829 (2d Cir. 1968) (Picketers attacked company owner and caused injuries, incapacitating him for five months.).

175. *Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). A bargaining order was justified because the employer's misconduct was more serious than the union's and the following factors were present:

## IV. CONCLUSION

There are many serious obstacles to a uniform application of the remedy of the bargaining order in *Gissel*-type situations. A major problem is the conflict over the purpose of the order—whether it is to insure the free choice of a bargaining representative (with the focus on the *impact* of the misconduct on the election process) or whether it is to deter employer misconduct. Most circuit courts, at this time, focus on insuring free choice.<sup>176</sup>

It is difficult, some say impossible,<sup>177</sup> for the Board to determine the impact of employer misconduct on the behavior of voters. In attempting to do this, the Board relies on a number of assumptions.<sup>178</sup> These assumptions have been criticized as unfounded and as poor bases upon which to regulate conduct in an election campaign.<sup>179</sup> Further, the assumptions are not dealt with in any uniform manner by the courts of appeals, and this fact provides additional evidence of the tremendous problems with “impact determinations.”

While the bargaining order cannot insure the protection of free choice for employees (especially in cases in which the order imposes representation by a union that lost an election), it is likely to deter employers “who might, absent the risk of such an order, engage in wholesale violations of the Act.”<sup>180</sup> Particularly in those situations in which a bargaining order issues for violations of section 8(a)(1), this remedy is the only one that would noticeably affect the employer. The alternative remedy, a cease

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(1) the existence of valid authorization cards from a majority of the employees in the bargaining unit; (2) a substantially supported finding that a fair election would be impossible; (3) a clear causal link between the Company's substantial misconduct and present inability to conduct a free election; (4) the extensiveness of the Company's misconduct both before and after the strike which indicated a likelihood that such conduct would continue if an election were held; and (5) the Union's demonstrated good faith in submitting to the legal process up to the time that the Company refused to recognize the Union's card majority.

*Id.* at 1323.

176. See notes 30-77 and accompanying text *supra*.

177. J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 80; Bok, *supra* note 23.

178. See notes 90-105, 111-13 and accompanying text *supra*.

179. See J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 80, at 140-46. See generally Bok, *supra* note 23; Hedstrom Co. v. NLRB, Nos. 78-1800, 78-1801 (3d Cir. Aug. 6, 1980) (Rosenn, J., dissenting).

180. J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 80, at 154.

and desist order, is a minimal penalty in contrast to the remedies of the reinstatement and backpay for violations of section 8(a)(3). The bargaining order is likely to decrease litigation if it issues upon a finding of the misconduct it was meant to deter, without the detailed impact analysis that the courts have required.<sup>181</sup> It is not likely, however, that this automatic application of the remedy could be sustained legally. The Board's "power to command affirmative action is remedial, not punitive."<sup>182</sup>

The preference for elections to determine the collective bargaining representative could be preserved by limiting the order to one year, restricting any collective bargaining agreement to one year,<sup>183</sup> and forbidding any union security clause in a contract as a condition of the bargaining order.<sup>184</sup>

The issue of bargaining orders reached the Supreme Court because a conflict existed among the circuit courts. More than a decade later, the enforcement of bargaining orders is not uniform, indicating a need for new standards. The NLRB can begin by investigating the type and quality of the bargaining that follows a bargaining order and by considering the frequency with which decertification elections occur in the years following a bargaining order and the results of those elections.

Finally, the Board must reevaluate its assumptions about the impact of unfair labor practices on election processes. The scant data from a few studies contradict the assumptions. The NLRB, with its records and access to employees participating in elections, could devise methods of determining the impact of the misconduct. Questionnaires or interviews could be obtained shortly after the elections are held and the results certified. It would be difficult, but not impossible, to study the impact of misconduct and to assess the value and legitimacy of the bar-

181. *Id.*

182. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). *Accord*, *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961).

183. As early as 1971, the Seventh Circuit included in the bargaining order notice a provision notifying, advising, and informing employees of their independent right to petition for a new election after one year. *See NLRB v. Drives, Inc.*, 440 F.2d at 367. This is now routinely included in the notices. Because of employee turnover, this notice might not be adequate, and it might be more appropriate to provide for an election at some point in the future, absent further unfair labor practices by the employer.

184. *Bok*, *supra* note 23, at 135. "[B]argaining will not necessarily compel the employees to join the union or pay dues." *Id.*

gaining order and the assumptions upon which the order is based.

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