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## THE NLRB AND BARGAINING ORDERS: DOES A NEW ERA BEGIN WITH *GISSEL*?

ARNOLD E. PERL†

**T**HE CONTROVERSY over bargaining orders based on card majorities in cases of initial recognition has *not* been put to rest by the Supreme Court in *NLRB v. Gissel Packing Co.*<sup>1</sup> In fact, the controversy very well may be exacerbated! Four cases<sup>2</sup> were presented to the Court in *Gissel*. In three of the cases, the Court of Appeals for the Fourth Circuit denied enforcement of bargaining orders issued by the National Labor Relations Board.<sup>3</sup> In these cases, the Board found that each of the employers had engaged in unfair labor practices<sup>4</sup> in violation of section 8(a)(1)<sup>5</sup> of the National Labor Relations Act<sup>6</sup> and that two of these employers<sup>7</sup> had discharged employees for their union activities in violation of section 8(a)(3)<sup>8</sup> of the Act. Finally, the Board found that all three employers violated section 8(a)(5)<sup>9</sup> of the Act because they had rejected the union's demand for recognition based on authorization cards obtained from a majority of employees in the bargaining unit, and such a refusal was deemed

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1. 395 U.S. 575 (1969).

2. *Heck's, Inc.*, 166 N.L.R.B. Nos. 32, 38, 65 L.R.R.M. 1635, 1639 (June 28, 1967), *enforced as modified*, 398 F.2d 337 (4th Cir. 1968); *Sinclair Company*, 164 N.L.R.B. No. 49, 65 L.R.R.M. 1087 (May 2, 1967), *enforced*, 397 F.2d 157 (1st Cir. 1968); *General Steel Prod., Inc.*, 157 N.L.R.B. 636 (1966), *enforced as modified*, 398 F.2d 339 (4th Cir. 1968); *Gissel Packing Co.*, 157 N.L.R.B. 1065 (1966), *enforced as modified*, 398 F.2d 336 (4th Cir. 1968).

3. *NLRB v. General Steel Products, Inc.*, 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). These cases were consolidated following decision by the Court of Appeals.

In two of these cases — *Gissel* and *Heck's* — no election had been held. In *General Steel Products*, an election had been conducted and won by the employer. However, the Board had set aside this election based on pre-election unfair labor practices committed by the employer.

4. In *Gissel* the employer was found to have coercively interrogated employees about union activities, threatened them with discharge and promised them benefits. In *Heck's* the employer was found to have created the appearance of surveillance, and offered benefits for opposing the union. In *General Steel Products* the employer was found to have coercively interrogated employees and threatened them with reprisals, including discharge.

5. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964).

6. 29 U.S.C. § 151, *et seq.* (1964).

7. *Heck's, Inc.*, 166 N.L.R.B. Nos. 32, 38, 65 L.R.R.M. 1635, 1639 (June 28, 1967); *Gissel Packing Co.*, 157 N.L.R.B. 1065 (1966).

8. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964).

9. National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1964).

to be in bad faith.<sup>10</sup> Accordingly, the Board ordered the employers to bargain, upon request, with the union.

On appeal, the Court of Appeals for the Fourth Circuit in per curiam opinions in each of the three cases sustained the Board's findings with respect to the violations of section 8(a)(1) and (3) of the Act but rejected the Board's findings that the employers' refusal to bargain violated section 8(a)(5) of the Act and denied enforcement of the Board's orders.<sup>11</sup> The Court reasoned that the 1947 Taft-Hartley amendments<sup>12</sup> to the Act withdrew from the Board the authority to order an employer to bargain under section 8(a)(5) on the basis of authorization cards — the cards being characterized by the court as "inherently unreliable."<sup>13</sup> Under the fourth circuit's view, an employer could not be ordered to bargain unless: 1) the employer knows independently of the cards that the union represents a majority of employees in the bargaining unit; or 2) the employer's independent unfair labor practices committed during the representation campaign were so extensive and pervasive that a bargaining order was the only Board remedy available, irrespective of the existence of a card majority.<sup>14</sup> In denying enforcement of the Board's order, the court found that neither of these two conditions existed in the cases presented.<sup>15</sup>

In the fourth case,<sup>16</sup> the Board similarly found that the union had obtained a majority of valid authorization cards from employees in the bargaining unit; that the employer had violated section 8(a)(1) of the Act; and that the employer's refusal to recognize and bargain with the union violated section 8(a)(5) of the Act since it was not based on good faith doubt as to the union's majority status, but, as the section 8(a)(1) violations indicated, the refusal to bargain was motivated by the desire to gain time to dissipate the union's majority status. Accordingly, the Board ordered the employer to bargain, on

10. The Board's conclusion that the employers' refusal to bargain with the union was a product of bad faith was based on the substantial unfair labor practices that the employers committed.

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

12. 61 Stat. 136 (1947). These amendments, *inter alia*, permitted the Board to resolve representation disputes by certification under section 9(c) only by secret ballot election.

13. Actually, the court was merely reiterating views which it had previously set forth in prior decisions. *See*, *NLRB v. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967); *NLRB v. Sehon Stevenson & Co.*, 386 F.2d 551 (4th Cir. 1967); *Crawford Mfg. Co. v. NLRB*, 386 F.2d 367 (4th Cir. 1967).

14. To arrive at this two-fold test the Fourth Circuit evaluated the factors set forth in the cases cited in note 13 *supra*.

15. *NLRB v. General Steel Products, Inc.*, 398 F.2d 339, 340 (4th Cir. 1968); *NLRB v. Heck's, Inc.*, 398 F.2d 337, 339 (4th Cir. 1968); *NLRB v. Gissel Packing Co.*, 398 F.2d 336, 337 (4th Cir. 1968).

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

request, with the union.<sup>17</sup> On appeal, the First Circuit Court of Appeals enforced the Board's findings and orders, squarely rejecting the rationale of the fourth circuit urged by the employer that the inherent unreliability of authorization cards automatically entitled an employer to insist upon an election unless the employer knew independently of the cards that no representation dispute in fact existed.<sup>18</sup>

In *NLRB v. Gissel Packing Co.*,<sup>19</sup> the Supreme Court affirmed the judgment of the Court of Appeals for the First Circuit and reversed the judgments of the Court of Appeals for the Fourth Circuit insofar as they declined enforcement of the Board's order to bargain.<sup>20</sup> Though it is true the Supreme Court clearly held that authorization cards could be used to establish a union's majority status,<sup>21</sup> the Court's holding was far less definitive with regard to the question of remedy under section 8(a)(5) refusal to bargain violations where an employer has committed independent unfair labor practices. The Court only held:

In fashioning a remedy in the exercise of its discretion . . . the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds 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 that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.<sup>22</sup>

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17. Specifically, the Board had found that the employer's communications with its employees, when considered as a whole, "reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers." *Id.* at 158. Thus, the Board set aside the election which had previously been won by the employer.

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

19. 395 U.S. 575 (1969).

20. The Court remanded those three cases to the Board for further proceedings consistent with its opinion.

21. It is equally true that the Court foreclosed broadside attacks on authorization cards based on alleged misrepresentations made by a solicitor since the Court adopted the Board's limiting *Cumberland Shoe* doctrine. *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963), *enforced*, 351 F.2d 917 (6th Cir. 1965). Under the *Cumberland Shoe* doctrine, if the card itself is unambiguous, *i.e.*, states on its face that the signator designates the union as his collective bargaining representative and authorizes the union to represent him for collective bargaining purposes, and there is no reference to an election on the card, it will be counted unless it is proved that the employee was told that the card was to be used *solely* or *only* for the purpose of obtaining an election.

22. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-15 (1969). At the same time, the Court sanctioned the Board's policy of issuing a bargaining order in the absence of a section 8(a)(5) violation or even a bargaining demand where the Board concluded that the employer had engaged in such "substantial" unfair labor practices that their effect could not be eliminated by traditional remedies. *Id.* at 615.

In the past, some reviewing courts have denied enforcement of bargaining orders in these cases unless the employer's conduct is found to be "so flagrantly hostile to the organizing efforts of a union that a secret election has undoubtedly

Prior to *Gissel*, the approach traditionally utilized by the NLRB in cases involving refusal of initial recognition of a union coupled with employer misconduct had been known as the *Joy Silk* doctrine. In 1950, in *Joy Silk Mills v. NLRB*,<sup>23</sup> the Court of Appeals for the District of Columbia upheld a bargaining order against an employer which had committed independent unfair labor practices contemporaneous with its refusal to recognize and bargain with the union. The Court held that an employer may refuse recognition to a union and insist upon an election when motivated by a *good faith doubt* as to that union's majority status. "When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a)(5) of the Act."<sup>24</sup> To this end, the Board had relied on evidence of an employer's independent unfair labor practices as proof of a lack of good faith doubt. Thus, the Board summarized its practice in its decision in *Aaron Brothers*:<sup>25</sup>

Where a company has engaged in substantial unfair labor practices calculated to dissipate union support, the Board . . . has concluded that employer insistence on an election was not motivated by a good-faith doubt of the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union.<sup>26</sup>

Until the Board's decision in *Aaron Brothers*, it was not entirely clear whether the burden was on the employer to affirmatively establish its good faith or whether the burden was on the union and/or the General Counsel to establish the employer's bad faith.<sup>27</sup> In *Aaron Brothers*, however, the Board made it very clear that it had shifted the burden to the General Counsel to affirmatively show bad faith.<sup>28</sup>

Traditionally, an employer's bad faith has also been established through a course of conduct which does *not* involve unfair labor practices: The classic example being where the Board issued a bargaining order after broadly stating that an employer could not refuse a bargaining demand and seek an election instead "without valid ground

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been corrupted as a result of the employer's militant opposition." *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965). "Outrageous or Aggravated" conduct has also been viewed as sufficient to warrant the issuance of a bargaining order. *NLRB v. Arkansas Grain Corp.*, 390 F.2d 824, 831 (8th Cir. 1968).

23. *Joy Silk Mills v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

24. *Id.* at 741.

25. *Aaron Brothers Co.*, 158 N.L.R.B. 1077 (1966).

26. *Id.* at 1079.

27. *See Snow & Sons*, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962). *See also Gary Steel Products Corp.*, 144 N.L.R.B. 1160 (1963).

28. *Aaron Brothers Co.*, 158 N.L.R.B. 1077, 1079 (1966).

therefor."<sup>29</sup> Later, however, in *Aaron Brothers*, the Board sharply withdrew from this position<sup>30</sup> stating:

An election by secret ballot is normally a more satisfactory means of determining employees' wishes, although authorization cards signed by a majority may also evidence their desires. Absent an affirmative showing of bad faith, an employer, presented with a majority card showing and a bargaining request, will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority.<sup>31</sup>

Under the *Aaron Brothers* restatement, a "mere absence of good-faith doubt of the majority, an unsupported expression of doubt, or a 'no opinion' attitude toward its existence, does not require the employer to accept the cards as proof of [the majority]."<sup>32</sup> Thus, the union in *NLRB v. Gissel Packing Company*<sup>33</sup> argued that an employer's right to insist on an election should be more circumscribed. But the Court was not required to reach this contention since in each of the cases presented the employer's refusal to recognize the union was accompanied by unfair labor practices.

Despite the fact that the Court did not decide under what circumstances, if any, a bargaining order is appropriate where *no* employer misconduct is involved, the effect of its decision on cases involving employer misconduct appears to constitute a significant departure from the past. The Board will no longer be sheltered by the mechanical application of the good faith-bad faith test under which a bargaining order was automatically issued once it was decided that an employer's refusal to recognize the union was motivated by bad faith.<sup>34</sup> A bargaining order, under the Court's approach, may not be appropriate or even warranted despite the fact that an employer has committed independent unfair labor practices which exceed the category of "minor" violations.<sup>35</sup> Indeed, the Supreme Court emphasized that the election process was superior to authorization cards in order to ascertain employee free choice.<sup>36</sup> Since elections are admittedly superior, and since the Board's orders pursuant to its remedial power must effectuate

29. *Snow & Sons*, 134 N.L.R.B. 709, 710-11 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962). In that case the employer reneged on his agreement to bargain after a previously agreed upon card check revealed the existence of the union's majority.

30. The view expressed in *Snow & Sons* has not been entirely discredited. See *H. & W. Construction Co.*, 161 N.L.R.B. 852 (1966).

31. *Aaron Brothers Co.*, 158 N.L.R.B. 1077, 1078 (1966).

32. *Id.* at 1080-81.

33. 395 U.S. 575, 594 (1969).

34. See *Joy Silk Mills v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

35. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969).

36. *Id.* at 603.

the Act,<sup>37</sup> before a bargaining order is issued by the Board it should be clearly apparent that the Board's traditional remedies would not sufficiently erase the employer's prior unfair labor practices to produce a fair election or rerun in the future.

This, however, has not been the approach taken by the Board since *Gissel*. Thus, in *V & H Industries, Inc.*,<sup>38</sup> the extent of the Board's analysis, exclusive of citations, consisted of two sentences buried in a footnote:

We agree with the Trial Examiner that Respondent's conduct, which included threats to the employees, interrogation, and discriminatory layoffs, all of which occurred subsequent to the demand for recognition and the filing of the election petition, has undermined the union's majority strength and impeded the election process. Therefore, a bargaining order is warranted.<sup>39</sup>

Despite these broad, sweeping statements, the Board acknowledged elsewhere that the Respondent had *not* waged a wide-scale campaign of section 8(a)(1) threats and mass discharges.<sup>40</sup> It would seem that in these circumstances, the application of the Board's traditional remedies, which consist of the cease and desist order, reinstatement with back pay, and a Notice to Employees, would have cured the effects of these unfair labor practices and ensured a fair election in the future.<sup>41</sup> At a very minimum, the Board should have considered the question of traditional remedies and articulated its reasons supporting its ultimate conclusion.<sup>42</sup> If the policy of the Act is to ensure

37. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

38. 177 N.L.R.B. No. 118, 71 L.R.R.M. 1549 (July 17, 1969).

39. *Id.* at 1550. Although an election was held in this case which the union lost, the Board in *Bernel Foam Products Co.*, 146 N.L.R.B. 1277 (1964), overruled *Aiello Dairy Farms*, 110 N.L.R.B. 1365 (1954), and provided that a union could proceed to an election without waiving its right to seek a bargaining order based on its pre-election majority (evidenced by authorization cards) in the event it lost the election. Under *Aiello*, a union was required upon knowledge of the pre-election unfair labor practices to decide whether to participate in the election or file a section 8(a)(5) charge. However, under the *Bernel Foam* doctrine, a union gets a second bite at the apple, assuming objections to the election are timely filed and found meritorious. See *Kolpin Bros.*, 149 N.L.R.B. 1378 (1964); *Irving Air Chute*, 149 N.L.R.B. 627 (1964).

40. *V & H Industries, Inc.*, 177 N.L.R.B. 118, 71 L.R.R.M. 1549, 1550 (July 17, 1969).

41. See *NLRB v. Pembeck Oil Corp.*, 404 F.2d 105 (2d Cir. 1968), *vacated*, 395 U.S. 828 (1969). This question seems particularly pertinent since there was no evidence that the prior unfair labor practices were likely to recur.

42. See also *William L. Bonnell Co.*, 170 N.L.R.B. No. 14, 67 L.R.R.M. 1439 (Mar. 11, 1968). Here, the Board found that the employer violated sections 8(a)(1) and (3) of the NLRA by, *inter alia*, the discriminatory layoff of an employee and unlawful interference, including threats, with employees' union activities. The Board held that these unfair labor practices were *not* so "aggravated" so as to warrant unusual remedial action, even when considered against the employer's background of prior unfair labor practices. If such conduct, which is seemingly no less coercive than the employer misconduct in *V & H Industries* did not warrant any remedial action beyond the traditional notices, why would not traditional remedies be any less effective in *V & H Industries* in erasing employer coercion?

employee free choice, it would seem logical that the Board would have at least considered ordering a rerun election since the remedy of a bargaining order certainly does not guarantee that employee free choice is achieved. By not considering a rerun election the Board would seem to have failed to lay a proper foundation for departing from "traditional remedies" as commanded by *Gissel*.<sup>43</sup>

Also, it seems questionable whether most Board members are even intent in applying the mandate of *Gissel*. Thus, in *Texaco, Inc.*<sup>44</sup> a panel majority of members Fanning and Brown found that the employer's refusal to recognize the union violated section 8(a)(5) of the Act and ordered the employer to bargain with the union even though the extent of the employer's misconduct consisted of soliciting employee complaints and taking corrective action on some of them. In attempting to justify issuance of its bargaining order, the Board majority, in a slightly exaggerated manner, stated:

We can conceive of no conduct which is more calculated to undermine the Union and dissipate its majority than where the employer, as here, solicits and adjusts employees' grievances and engages in collective bargaining with them while conducting a [lawful] campaign against unionization. . . .<sup>45</sup>

Following this diatribe of the employer's misconduct, the Board majority concluded:

*We cannot assume* in the face of Respondent's misconduct, that if we were to issue our customary cease-and-desist order and direct an election, the pervasive effect of that misconduct would be erased and the employees would be able to express their true sentiments in respect to the selection of a bargaining agent.<sup>46</sup>

Member Zagoria, agreeing with the majority that the employer violated section 8(a)(1) of the Act, dissented from the Board's finding that the employer violated section 8(a)(5) of the Act and its order requiring the employer to recognize and bargain with the union. He stated:

The Respondent's sole infraction of the law was to inquire into its employees' grievances, and, in several minor respects, to satisfy

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43. The Board's remedial power in connection with the prevention of unfair labor practices is derived from section 10 of the National Labor Relations Act, 29 U.S.C. § 160(a) (1964), which empowers it "to prevent any person from engaging in unfair labor practices" as listed in section 8. Under Section 10(c) of the NLRA, 29 U.S.C. § 160(c) (1964), the Board is further empowered to issue cease and desist orders from unfair labor practices, and "to take such affirmative action . . . as will effectuate the policies of this Act." Under the latter, the Board has the authority to issue bargaining orders.

44. 178 N.L.R.B. No. 72, 72 L.R.R.M. 1146 (Sept. 17, 1969).

45. *Id.* at 1149.

46. *Id.* (emphasis added).



them. In my view, the effects of these unfair labor practices can readily be dissipated by our usual cease and desist order, and the posting of a remedial notice.<sup>47</sup>

It is apparent that the Board is prepared, contrary to *Gissel*, to issue a bargaining order in every case where an employer commits an independent unfair labor practice and simultaneously refuses to recognize and bargain with a union. Even if this were permissible, the Board should not be permitted to substitute presumptuous assumptions in lieu of cogent analysis. Such an approach wholly fails to adequately demonstrate the need for a bargaining order.

It would thus appear that the Board disregards the rerun election as an effective remedy and as a viable alternative to a bargaining order to rectify employer coercion caused by unfair labor practices which exceed "minor violations." It is submitted that the Board's attitude in this regard is inimical to its professed expertise, since statistics show and eminent commentators acknowledge, that the Board's traditional remedies, including the election or rerun, will usually be sufficient to overcome employer coercion.<sup>48</sup>

Indeed, the Board's own election statistics corroborate these findings. For example, in fiscal 1965, the results of the rerun election were different in 42.1 percent of all the cases.<sup>49</sup> In view of the fact that during this same year unions won on the average only 60 percent of all elections conducted,<sup>50</sup> it follows a fortiori that rerun elections in conjunction with the Board's traditional remedies have been effective in erasing the effect of prior unlawful conduct by an employer. Similarly, in fiscal 1966, the results of the rerun were different in 36.8 percent of all the cases.<sup>51</sup> In fiscal 1967, the results of the rerun were again different in 36 percent of all cases.<sup>52</sup> Admittedly, the relative effectiveness of the traditional Board remedies in conjunction with an election or rerun in each case will necessarily depend upon several criteria. These would seem to include: the type of unfair labor practice committed; the extensiveness of the employer's misconduct; the employer's representative committing the violation; and the nature of the voting unit.

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47. *Id.* at 1150.

48. Drotning, *NLRB Remedies For Election Misconduct: An Analysis of Election Outcomes and Their Determinants*, 40 U. CHI. BUS. J. 137, 145 (1967); Pollit, *NLRB Rerun Elections: A Study*, 41 N.C.L. REV. 209, 224 (1962); Comment, *Employer Pre-Election Coercion*, 115 U. PA. L. REV. 1112, 1117 (1967).

49. 30 NLRB ANN. REP. 195 (1965).

50. *Id.* at 18.

51. 31 NLRB ANN. REP. 204 (1966). During 1966, unions won 61% of all elections conducted. *Id.* at 20.

52. 32 NLRB ANN. REP. 236 (1967). During 1967, unions won only 59% of all elections conducted. *Id.* at 11. The Board's Annual Report for fiscal year 1968 was not available at the time this article was written.

With regard to the type of unfair labor practice involved, a distinction must be drawn between coercive unfair labor practices which seemingly linger and unfair labor practices which are not particularly coercive or do not have a lasting effect. Thus, for example, although interrogation is an unfair labor practice, it is not "the kind of unfair labor practice that necessarily would preclude an employee from exercising a free choice in a Board-conducted secret ballot election."<sup>53</sup> Consequently, even intensive interrogation unaccompanied by threats would not seem to foreclose the real possibility of a fair and free election in the future.<sup>54</sup> Similarly, threats made by an employer to eliminate benefits or refuse to deal with the union if elected do not appear to have a lasting effect as evidenced by the fact that in cases studied where the election was set aside based on this conduct, the union won the rerun election 75 percent of the time.<sup>55</sup> In addition, other unfair labor practices such as surveillance, granting of benefits prior to an election, or promising benefits to prospective voters conditioned on the union losing the election, do not seem to have a lasting effect.<sup>56</sup> In these types of cases, the justification for a bargaining order seems negligible.

On the other hand, the cases studied revealed that when an election was set aside due to an employer's threat to close or transfer plant operations, the union won the rerun election only 29 percent of the time.<sup>57</sup> From such statistics, one can reasonably infer that extensive threats to close or transfer plant operations, particularly where made by top management as distinguished from a low ranking supervisor, may well have a lingering effect, and therefore, could *conceivably* serve to impede the election process in the future.<sup>58</sup> Yet, in evaluating the lasting effects of threats to close the plant or the discharge or layoff of union sympathizers, one should be cautious of the inference that this ipso facto weakens the union's support and has a lasting effect on the employees which cannot be overcome through the use of the Board's traditional remedies. Indeed, as an eminent commentator has observed, threats and other appeals to fear and emotion which seem plainly coercive may have a completely unin-

53. Wells, *The Obligation To Bargain On The Basis of A Card Majority*, 3 GA. L. REV. 349, 358 (1969).

54. See NLRB v. Ralph Printing & Lithographing Co., 379 F.2d 687, 690 (8th Cir. 1967).

55. Pollit, *supra* note 48, at 215.

56. See Pollit, *supra* note 48, at 215.

57. Pollit, *supra* note 48, at 215.

58. It is noted that the Supreme Court in *Gissel* enforced the Board's bargaining order in *Sinclair* where the Court found the employer, through top management, conveyed the message to the employees that the union would or could result in the closing of the plant. 395 U.S. 575, 618 (1969).

tended effect. A discriminatory discharge, for example, "may rally the voters against the employer instead of frightening them into submission."<sup>59</sup> Similarly, one researcher after interviewing a number of voters concluded: "Of workers whose minds were not in favor of the union, the threats [by the employer were] indicated as a major factor in influencing their vote for *the union*."<sup>60</sup>

Even assuming *arguendo* that the employer's coercion produced the intended effect, the nature of the voting unit may be such that the Board's traditional remedies in conjunction with the election or rerun can provide a fair and free election in the future. Thus, it has been found that rerun elections produce a different result more often when the voting unit consists of blue collar workers than when it consists of white collar employees.<sup>61</sup> Also, it would appear that the literacy of employees in the bargaining unit would be an operative factor in determining whether an employer's coercion could be erased by the Board's traditional remedies or some variation thereon.<sup>62</sup> In short, the effects of coercion will vary just as standards of decorum vary. As the Board has previously recognized, "the waterfront is not Park Avenue."<sup>63</sup>

Still proceeding under this assumption, it would seem that a bargaining order is not warranted unless it is established that employee sentiment can best be determined, on balance, through previously signed authorization cards.<sup>64</sup>

The fact that a union has obtained authorization cards from 50.1 percent of the unit does not mean that, absent unfair labor practices, it would receive the same percentage of the votes in an election. *The "relationship between union-authorization cards and voting is not one-to-one."*<sup>65</sup> Indeed, statistics show that in elections studied involving all size units, where a union's card majority was less than 60 percent,<sup>66</sup>

59. Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 HARV. L. REV. 38, 41 (1964). For this reason, as the commentator points out, some union organizers seek to provoke such a discharge while many management attorneys caution against the practical — as well as the legal — effect of a discriminatory discharge because it may assist the union in making a martyr of the discharged union supporter. See also M. GITELMAN, *UNIONIZATION ATTEMPTS IN SMALL BUSINESSES*, § 4.05, at 70 (1963).

60. D. Butler, *Factors Affecting Trade Union Organizing of Manufacturing Firms in Iowa 1946-1957*, 104 (1959) (unpublished thesis in Univ. of Wisconsin Library).

61. Pollit, *supra* note 48, at 218.

62. See Texas Electric Cooperatives, 160 N.L.R.B. 440, 462 (1962). The Board, due to the low literacy of employees, in addition to requiring the standard notice, required the employer to read the notice to the employees.

63. New York Shipping Association, 108 N.L.R.B. 135, 139 (1954).

64. NLRB v. Gissel Packing Co., 395 U.S. 575, 614-15 (1969).

65. Drotning, *supra* note 48, at 143 (emphasis added).

66. The NLRA requires a union filing a representation petition under Section 9(c) to support its petition by at least a 30% showing of interest of the employees

the union lost more than 50 percent of the elections.<sup>67</sup> And in units of 81 employees or more, unions won only 50 percent of the elections in cases where they enjoyed card majorities of 60–69 percent.<sup>68</sup> In these circumstances, it would appear largely irrelevant to attempt to ascertain employee sentiment on the basis of authorization cards where the union's card majority is less than 70 percent.<sup>69</sup> Moreover, the 70 percent figure is not infallible because there may be circumstances which mitigate against according significant weight to the cards.

Thus, the weight accorded to the cards as an expression of employee sentiment should be minimal where the cards have been obtained either before the employer knows of the organizational effort or communicates to the employees, since employees have not yet heard both sides of the story — a condition which the Board considers material in order for an employee to make an informed choice.<sup>70</sup> Thus, in justifying the necessity for its *Excelsior*<sup>71</sup> doctrine, the Board stated :

[A]n employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. . . . [W]ithout a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view.<sup>72</sup>

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in the bargaining unit sought. Many unions will generally not file a petition for an election unless they have over a 50% showing of interest. See Pollit, note 48 *supra*, at 209 n.2.

67. Drotning, *supra* note 48, at 143–44.

68. *Id.* These statistics are corroborated by a study made for the National Labor Relations Board. Thus, in his widely cited statement to the Labor Law Section of the American Bar Association, Board Chairman Frank W. McCulloch admitted that: In 58 elections, the unions presented authorization cards from 30 to 50 percent of the employees; and they won 11 or 19% of them. In 87 elections, the unions presented authorization cards from 50 to 70 percent of the employees; and they won 42 or 52% of them. In 57 elections, the unions presented authorization cards from over 70% of the employees, and they won 42 or 74% of them. ABA LABOR RELATIONS LAW SECTION 17–18 (1962).

69. See *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968). Here the court held, *inter alia*, that in view of the narrowness of the card majority (approximately 54%), a rerun election was the only manner in which the desires of the employees could be reliably determined. *Id.* at 34.

70. In *Gissel*, the Court made the observation that “[n]ormally . . . the union will inform the employer of its organizational drive early . . . .” 395 U.S. 575, 603 (1969). With all due respect to the Court, its observation, wholly unsupported by any statistical data or secondary evidence, is contrary to the realities of most campaigns. Thus, experience indicates that unions generally try to stay “underground” until they have achieved a nucleus of hard core supporters interspersed throughout the plant and are sufficiently strong in number, increasing the likelihood that management will learn of the organizational activity. Only at this point is it to a union's advantage to come out into the open, even to the extent of supplying to an employer a list of the union's in-plant organizing committee to establish “company knowledge” in the event of their subsequent discharge. See GITELMAN, *supra* note 59, at 25.

71. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

72. *Id.* at 1240–41 (citations omitted).

Consequently, where a union obtains all its cards or an overwhelming percentage thereof before the employer has knowledge of or communicates with his employees, it would appear that employee sentiment would be better protected through the use of an election or rerun rather than through reliance on authorization cards which were signed "prematurely."<sup>73</sup>

Another hazardous problem is raised where evidence of coercion or misrepresentation involving some of the signed authorization cards exists. It is the Board's practice *not* to nullify all the authorization cards obtained by a solicitor where there is evidence of "taint" involving one card — only the card affected by the "taint" will be invalidated<sup>74</sup> — and the union is permitted to enjoy a majority based on cards with respect to which there is no direct evidence of misrepresentation or coercion. The Board wholly ignores the real possibility that misrepresentation or coercion directly involving only one employee can spread through that one employee to other employees. Indeed, it is contrary to the Board's recognition that certain kinds of statements made during an election campaign "are the subject of discussion and repetition among the electorate."<sup>75</sup>

Admittedly, the Board's choice of remedy in a given case is entitled to special respect by a reviewing court.<sup>76</sup> Indicative of this approach is the Supreme Court's statement that it is for the Board and not the courts to determine when a cease and desist order with the posting of appropriate notices will eliminate any undue influences upon employees voting in the "security of anonymity."<sup>77</sup> This type of respect should not be interpreted as evidence of an intent to give the NLRB carte blanche authority to substitute presumptuous inferences in place of cogent and objective analysis<sup>78</sup> under the guise of "expertise." The courts should require the Board to provide a complete and cogent rationalization for its decision and if the basis for the Board's order is not sufficiently articulated in a given case, it should not be entitled

73. Significantly, the Court in *Gissel* was careful to point out that in all of the cases except one, the employer was aware of the union's organizing drive almost at the outset and began his anti-union campaign at that time; and in the remaining case, the employer was able to deliver a speech to the employees before the union obtained a majority. 395 U.S. at 603.

74. See *Snow & Sons*, 134 N.L.R.B. 709, 710 (1961).

75. *Standard Knitting Mills*, 172 N.L.R.B. No. 114, 68 L.R.R.M. 1412, 1413 (July 10, 1968). In short, an overall evaluation of "the atmosphere in which employees were asked to register their choice" is most relevant in attempting to assess employee sentiment. See Lesnick, *Establishment of Bargaining Rights Without An NLRB Election*, 65 MICH. L. REV. 851, 857-58 (1967).

76. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

77. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).

78. See *V & H Industries, Inc.*, 177 N.L.R.B. No. 118, 71 L.R.R.M. 1549 (July 17, 1969).

to enforcement.<sup>79</sup> This may be equated to the “. . . indispensable requirement of due process in western countries . . . that the decision maker give reasons, not only for his decisions, but for his orders.”<sup>80</sup> Moreover, where “the review is not of a question of fact, *but of a judgment as to the proper balance to be struck between conflicting interests*, ‘[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.’”<sup>81</sup>

The Supreme Court made it eminently clear in *Gissel* that “effectuating ascertainable free choice becomes as important a goal as deterring employer misbehavior.”<sup>82</sup> Indeed, employee free choice is the *paramount* principle of the national labor policy,<sup>83</sup> and where this principle is improperly subordinated to the bargaining principle, the Board’s order ceases to be valid.<sup>84</sup> Or put another way, where the Board formulates a remedy which would favor union organization beyond what is necessary to effectuate employee free choice, the Board’s remedy becomes punitive rather than remedial.

In this regard, the Supreme Court has cautioned that Congress did not intend “to vest in the Board a virtually unlimited discretion to devise punitive measures. . . .”<sup>85</sup> As the Court emphasized, “[the] authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.”<sup>86</sup> In short, mere deterrence of unfair labor practices is not sufficient justification for an order.

## CONCLUSION

It is submitted that the Board’s traditional remedies in conjunction with the election or rerun can overcome employer coercion, except possibly in cases involving repetitive offenders, and in most

79. See *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

80. Affeldt, *Bargaining Orders Without An Election: The National Labor Relations Board’s “Final Solution,”* 57 Ky. L.J. 151, 206 (1969).

81. *NLRB v. Brown*, 380 U.S. 278, 292 (1965) (emphasis added).

82. 395 U.S. at 614.

83. “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 . . . .” 29 U.S.C. § 157 (1964) (emphasis added).

84. Cf. *Local 57, ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir.), cert. denied, 387 U.S. 942 (1967).

85. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940).

86. *Id.* at 11-12.

cases, will effectuate employee sentiment more fully than reliance on authorization cards. And "[m]ore can be done [with the use of rerun elections] through research, analysis, and the application of new techniques."<sup>87</sup> With some ingenuity by the Board, measures can be taken to correct even those situations where the rerun election is thought to be less than adequate.<sup>88</sup>

The Board has been reluctant to move in this direction. The only cases where the Board has sought to devise new remedies have been in cases where the Board thought itself precluded from issuing a bargaining order, since the union had never obtained a card majority.<sup>89</sup> Even a leading proponent of bargaining orders to remedy refusal to bargain violations has recognized that the Board has paid inadequate attention to the use of rerun elections as a remedy for erasing the effects of past unfair labor practices.<sup>90</sup> According to this commentator, "[b]y explicitly facing up to the question of the adequacy of a rerun election, and the possible development of means of enhancing its adequacy, the justification for a bargaining order in particular types of cases can be more soundly established. . . ."<sup>91</sup> Likewise, through judicious use of the bargaining order, the Board can avoid encouraging an apparent growing cynicism toward the law which is already too prevalent in this area.

If reviewing courts militantly guard against the Board's indiscriminate use of bargaining orders as a remedy, it can be anticipated that the Board will begin to consider new approaches to existing remedies in conjunction with the use of rerun elections. Meanwhile, the Board would do well to reconsider Winston Churchill's eloquent statement:

At the bottom of all tribute paid to a democracy it is the little man, walking into the little booth, with a little pencil, making a little cross, on a little bit of paper . . . no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of that point!<sup>92</sup>

87. Pollit, *supra* note 48, at 224.

88. See, e.g., Pollit, *supra* note 48, at 223.

89. See *Scott's, Inc.*, 159 N.L.R.B. 1795 (1966), *enforced as modified*, 383 F.2d 230 (D.C. Cir. 1967); *J.P. Steven's & Co.*, 157 N.L.R.B. 869 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir. 1967); *Crystal Lake Broom Works*, 159 N.L.R.B. 429 (1966); *H.W. Elson Bottling Co.*, 155 N.L.R.B. 714 (1965), *enforced as modified*, 379 F.2d 223 (6th Cir. 1967).

90. See Lesnick, *supra* note 75, at 860-61.

91. *Id.* at 861.

92. Speech by Sir Winston Churchill, House of Commons, Oct. 31, 1944.