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Bertrand B. Pogrebin

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## NLRB BARGAINING ORDERS SINCE GISSEL: WANDERING FROM A LANDMARK

BERTRAND B. POGREBIN\*

### THE GOOD FAITH DOUBT TEST

The NLRB's abandonment of the good faith doubt test, in refusal to bargain cases, should have been one of those rare moments in the development of the labor law when both labor and management could applaud — and for the same reasons.<sup>1</sup>

That test, as articulated in *Joy Silk Mills, Inc. v. NLRB*,<sup>2</sup> provided that an employer confronted by a union demand for recognition could not refuse to recognize the union unless he held a good faith doubt as to the union's majority status. Further, if, after refusing recognition, the employer committed unfair labor practices, these would be the basis for the "retrospective divination" that his original refusal was not based on good faith doubt but rather was motivated "by a rejection of the collective bargaining principal or by a desire to gain time within which to undermine the union (sic)."<sup>3</sup> Such a finding, coupled with a showing that the union had authorization cards from a majority of the employees at the time of its demand, constituted a refusal to bargain ruling and a bargaining order.<sup>4</sup> This same result could obtain even

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\* A.B., Rutgers University; LL.B., Harvard University. Member, New York and Federal Bars. I am indebted to Joel H. Golovensky and Frederick D. Braid for their assistance in the preparation of this article.

<sup>1</sup> The abandonment of this entrenched Board standard which applied essentially for more than twenty years occurred during oral argument before the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, *reh'g denied*, 396 U.S. 869 (1969).

<sup>2</sup> 85 N.L.R.B. 1263 (1949), *enf'd*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *see* *Artcraft Hosiery Co.*, 78 N.L.R.B. 333 (1948); *Matter of R.J. Lovvorn*, 76 N.L.R.B. 84 (1948); *cf.* *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 868 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

<sup>3</sup> 85 N.L.R.B. at 1264, *quoting* *Artcraft Hosiery Co.*, 78 N.L.R.B. 333, 334 (1948); *accord*, *Aaron Bros. Co.*, 158 N.L.R.B. 1077 (1966).

<sup>4</sup> Section 7 of the National Labor Relations Act (NLRA), as amended, establishes the right of employees to organize and bargain collectively. 29 U.S.C. § 157 (1964). Should a dispute arise as to whether or not an individual is the designated representative of a group of employees, the NLRB's election procedure may be invoked pursuant to section 9(c)(1) of the NLRA, as amended. *Id.* § 159(c)(1). Once there is an employee representative,

though the NLRB had conducted an election which the union lost.<sup>5</sup>

The main objection to the *Joy Silk* test was that it made the employer's state of mind at the time of his refusal to recognize determinative of the employees' right to vote on the issue of representation in a secret ballot election. In defense of this clear subordination of a primary purpose of the NLRA, it was reasoned that to do otherwise would allow the employer to enjoy the fruits of his unfair labor practices and thus encourage such violative tactics. Further, it was advanced, a bargaining order was the only really effective deterrent to such employer unfair labor practices.<sup>6</sup> However, the logic of the good faith doubt test carried its application to situations where the employer committed no unfair labor practices, but revealed, by words or acts that he had no doubt as to the union's majority. Here too, the Board imposed a bargaining order.<sup>7</sup> Moreover, given a literal examination, the *Joy Silk* reasoning was illogical insofar as the occurrence of unfair labor practices following a demand for recognition was just as consistent with a desire to prevent the union from achieving a majority as with a desire

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the employer and employee representative are mutually obligated to bargain in good faith. *Id.* § 158(a)(5) & (b)(3). If either party fails to fulfill this obligation, the Board is authorized to order the delinquent party to bargain *Id.* § 160(c).

The role that authorization cards play in the procedure briefly described above is as follows. For a union to obtain an election on its own petition pursuant to section 9(c)(1), it must establish that it has the support of at least thirty percent of the employees in the unit it is seeking to represent. NLRB RULES AND REGULATIONS § 101.18(a) (1965). Ordinarily, the evidence of such thirty percent support is in the form of cards, solicited from and signed by individual employees, which bear language on their face to the effect that each individual signer authorizes the union to represent him for collective bargaining purposes. If a union obtains cards from a majority of the employees in the unit, it may seek recognition by making a demand therefore to the employer based on its majority card showing.

<sup>5</sup> *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277 (1964). This case reversed the doctrine established in *Aiello Dairy Farms*, 110 N.L.R.B. 1365 (1954), that a union which went the election route to gain representative status and lost, could not later complain of unfair labor practices and seek a refusal to bargain finding. Under *Bernel Foam*, the union can agree to an election and, after losing, seek a bargaining order by filing refusal to bargain charges. This so-called "second bite at the apple" for the union is somewhat qualified by the ruling that a refusal to bargain finding will not issue after an election defeat unless the election is set aside pursuant to valid objections. *Irving Air Chute Co.*, 149 N.L.R.B. 627, *enfd.*, 350 F.2d 176 (2d Cir. 1965); *cf.* *Pure Chem. Corp.*, 192 N.L.R.B. No. 88 (1971) (dissenting opinion of Member Kennedy). Since the crucial period for objectionable conduct, dates from the filing of the election petition through to the date of the election, *Goodyear Tire & Rubber Co.*, 138 N.L.R.B. 453 (1962), *Ideal Elec. & Mfg. Co.*, 134 N.L.R.B. 1275 (1961), unfair labor practices committed prior to the filing of the petition cannot form the basis of a subsequent bargaining order. Thus, a union faced with employer violations prior to the filing of its petition runs the risk of losing them as a basis for an 8(a)(5) charge upon filing for an election where the employer "reforms" and engages in no objectionable conduct during the crucial period; the same is true where the employer files the petition. In the instance of pre-petition violations, the union must, in effect, still make an election of remedies.

<sup>6</sup> See, e.g., Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 137 (1964) [hereinafter Bok].

<sup>7</sup> *Snow & Sons*, 134 N.L.R.B. 709 (1961).

to destroy a majority already believed attained. Indeed, the courts had found that employers who committed unfair labor practices nevertheless had genuine good faith doubts of a union's claimed majority and in such cases they refused to find a lack of good faith doubt.<sup>8</sup> Of course, the bad faith *ab initio* formula left no room for weighing the degree of the unfair labor practices committed. Though the Board subsequently attempted to effect a different result where the unfair labor practices were of a minor nature,<sup>9</sup> the distinctions seemed to be based more on the desired result than the logic of *Joy Silk*. For the extent of the employer's unfair conduct might well be more a matter of the employer's individual style, energy and imagination than a state of mind concerning the validity of the union's claimed majority.

Moreover, the Board's test of good faith demanded a ritualized employer response that was more the product of sophisticated advice than of candid expression. For the most part, it can be assumed that non-union employers prefer to remain that way. When confronted by a union demand for recognition based upon a claim of a majority of cards, they are facing the culmination of a campaign that may have lasted for considerable duration and may have been quite intense and was, moreover, completely one-sided. The employer may agree that indeed the union has a majority of *cards*, but for him the real doubt is whether that majority will hold up in a secret ballot election after he has had a chance to tell his side of the story? That feeling — described above — is, for all practical purposes, indistinguishable from the "desire to gain time to dissipate the union's majority." Yet to say to the union, "I have no doubt that you have a majority of the cards, but I would like to have time for the employees to hear my side of the story," could well have resulted in an order to bargain. Thus, sophisticated employers learned to respond in classic expression of disbelief of majority support and to insist on an election. As one commentator wrote at the time,

[t]he need to resolve any latent inconsistency between the acknowledgment of a privilege to rely on a generalized "distrust of

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<sup>8</sup> See, e.g., *NLRB v. River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967). The Board itself would find good faith doubt notwithstanding subsequent unfair labor practices where the employer previously had experience with unions claiming a card majority only subsequently to lose a fair election. See *Shelby v. Williams of Tennessee, Inc.*, 165 N.L.R.B. 737 (1967).

<sup>9</sup> See, e.g., *Clermonts' Inc.*, 154 N.L.R.B. 1397, 1401 (1965).

Although, under the doctrine of *respondere superior*, Respondent is nevertheless responsible for the conduct of these minor supervisors, the incidents themselves are hardly serious enough to support a finding that Respondent had earlier refused to bargain with the Union on request in order to gain time to undermine the Union by unlawful means.

cards" and the denial of an opportunity to see if the employees "might change their minds" has not yet been given recognition in NLRB opinions.<sup>10</sup>

Integral to the dissatisfaction with the test was the necessary reliance on authorization cards as the alternative to an election in establishing majority status. The Board exercises careful and close regulation of election campaign tactics and procedures.<sup>11</sup> For example, there are rules guaranteeing equality of opportunity of expression to assure to the employees the right to make an informed decision by hearing both sides;<sup>12</sup> ballots are printed in the native language of the employee, where necessary;<sup>13</sup> and all parties involved — employees, employer and union — share in the knowledge of the election date, allowing equal opportunity for the employer and the union to shape their campaigns accordingly. Essentially, the Board strives to maintain an election atmosphere conducive to the exercise of employee free choice.<sup>14</sup>

In marked contrast, authorization cards are collected unilaterally under circumstances virtually free from any regulation, short of provable fraud. Cards can be gathered in bars, singly or in groups, without solemnity or ceremony and over an extended period of time.<sup>15</sup> Theoretically, the so-called card majority can be the cumulative number of individual cards collected over an extended period and thus never at any single point in time represent the true wishes of the majority, for the Board counts every validly solicited card that has not been specifically withdrawn prior to the demand.<sup>16</sup> This has been the practice, even where, in one recent case, the signer testified that she spoke about getting her card back.<sup>17</sup>

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<sup>10</sup> Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851, 854 (1967) [hereinafter Lesnick].

<sup>11</sup> See generally Bok, *supra* note 6, for an extended discussion of the Board's regulation of election tactics.

<sup>12</sup> See, e.g., *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), requiring management to prepare a list of names and addresses of all the employees qualified to vote and make them available to the union.

<sup>13</sup> See *NLRB v. River Togs, Inc.*, 382 F.2d 198, 205 n.10 (2d Cir. 1967).

<sup>14</sup> The Board's "laboratory conditions" standard for conducting fair elections was enunciated in *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

<sup>15</sup> Generally, a card must have been executed during the union's current organizing campaign to be counted. *Grand Union Co.*, 122 N.L.R.B. 589 (1958), *enfd.*, 279 F.2d 83 (2d Cir. 1960). Cards signed at some time during a sustained nine-month organizational effort have been upheld. *NLRB v. Greenfield Components Corp.*, 317 F.2d 85 (1st Cir. 1963). Moreover, in an admittedly unusual case, even cards solicited more than two years prior to the demand were upheld. *Northern Trust Co.*, 69 N.L.R.B. 652 (1946).

<sup>16</sup> See *TMT Trailer Ferry, Inc.*, 152 N.L.R.B. 1495 (1965).

<sup>17</sup> *NLRB v. Easton Packing Co.*, 437 F.2d 811 (3d Cir. 1971). It is questionable whether any employee who signs a card upon the representation that it will be used in an election is going to risk the organizer's ire and peer pressures to ask for it back rather than wait for the election to vote against the union. In this connection, the Board recently

In addition, the cards themselves can include declarations both of securing an election and authorizing union representation, plainly adding an element of doubt as to the intentions or understanding of the signer. These so-called dual-purpose cards have been accepted by the Board.<sup>18</sup> Indeed, where the card is single purpose — *i.e.*, it only refers to authorization — but the union solicitor talked about using it for an election, the Board has ruled that the card will be set aside only upon the finding that it was solicited with the express representation that it was *solely* to be used for an election.<sup>19</sup> This rule seemed to call for an unwarranted degree of discernment on the part of employees since it seemed that

a sophisticated and only modestly talented union agent could easily live with such a narrow rule and, leaving out the *bad words* — “sole” and “only” — employ language clearly calculated to lead a woman laundry worker to believe that the holding of an election was all that she signed for.<sup>20</sup>

In the recent years prior to *NLRB v. Gissel Packing Co.*,<sup>21</sup> the basic insufficiency of the good faith doubt test drew increasing criticism of the Board's handling of refusal to bargain cases.<sup>22</sup> The Board itself began to justify using cards rather than a Board election where the “employer has deprived his employees of an opportunity for a fair election by an illegal campaign of interference, restraint and coercion expressly calculated to frustrate their free choice.”<sup>23</sup> The test was

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has even held a card valid where the employee upon signing it stated that he would vote against the union in the election. The Board held that such an uncontroverted indication of the signer's misunderstanding of the effect of the card did not negate the clear language of the card! *Essex Wire Corp.*, 188 N.L.R.B. No. 59 (Feb. 2, 1971).

<sup>18</sup> See, e.g., *Brandenburg Tel. Co.*, 164 N.L.R.B. 825 (1967); *Lenz Co.*, 153 N.L.R.B. 1399 (1965). But see note 72 and accompanying text *infra* for a more recent Board view.

<sup>19</sup> *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963), *enfd*, 351 F.2d 917 (6th Cir. 1965).

<sup>20</sup> *Bryant Chucking Grinder Co.*, 389 F.2d 565, 569 (2d Cir. 1967) (Friendly, J., concurring) *enfg* 160 N.L.R.B. 1526 (1966) and *quoting* *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609, 620 (6th Cir. 1967).

<sup>21</sup> 395 U.S. 575, *reh'g denied*, 396 U.S. 869 (1969).

<sup>22</sup> In addition to criticism of the good faith doubt test, coming both from the courts, see *NLRB v. River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1968), and legal commentators, e.g., Lesnick, *supra* note 10, there was a disparity of judicial opinion as to the validity of the Board's *Cumberland* rule. The Second, Fourth and Fifth Circuits rejected it. See, e.g., *NLRB v. Gissel Packing Co.*, 398 F.2d 336 (4th Cir. 1968); *NLRB v. S.E. Nichols Co.*, 380 F.2d 438 (2d Cir. 1967); *Engineers & Fabricators, Inc. v. NLRB*, 376 F.2d 482 (5th Cir. 1967). The First, Sixth, Seventh, Tenth and District of Columbia Circuits adopted the rule for the most part, but not without criticizing the Board's tendency to apply it too mechanically and, in some cases, even refusing to enforce the Board's application of the rule. See, e.g., *NLRB v. Dan Howard Mfg. Co.*, 390 F.2d 304 (7th Cir. 1968), *denying enforcement in part* 158 N.L.R.B. 805 (1966); *NLRB v. Swan Super Cleaners*, 384 F.2d 609 (6th Cir. 1967), *denying enforcement in part* 152 N.L.R.B. 163 (1965); *Furrs, Inc. v. NLRB*, 381 F.2d 562 (10th Cir. 1967); *NLRB v. Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851 (1st Cir. 1967).

<sup>23</sup> *Dan Howard Mfg. Co.*, 158 N.L.R.B. 805, 807 n.5 (1966), *enfd in part*, 390 F.2d 304

further diluted by the Board ruling in *John P. Serpa, Inc.*,<sup>24</sup> that henceforth the General Counsel had the burden of affirmatively showing bad faith. Thus, an employer no longer had to state or show any grounds for doubt when asked for recognition. He could merely state his preference for an election, and, absent unfair labor practices or circumstances showing independent knowledge of a majority, there would be no finding of bad faith.

The Board was, therefore, already in the process of discarding the *Joy Silk* test of good faith doubt before its oral argument in *Gissel*. It had not yet admitted it, but was to have that opportunity when the Fourth Circuit, in a series of cases capping their dissatisfaction with cards, ruled that no bad faith could be found in a refusal to recognize based upon a claim of cards since cards were per se unreliable and therefore grounds for doubt.<sup>25</sup>

#### NLRB v. GISSEL PACKING CO.: A NEW TEST FOR BARGAINING ORDERS

In *Gissel*, the Court passed upon essentially similar situations brought before it in four separate cases. Three of the cases were consolidated following separate per curiam decisions in the Fourth Circuit;<sup>26</sup> the fourth case emanated from the First Circuit.<sup>27</sup> In each of the cases, the employers had refused to recognize unions whose demands were based upon a majority of single-purpose authorization cards and had engaged in vigorous anti-union campaigns characterized by numerous unfair labor practices. In each of the cases the Board had issued bargaining orders to remedy the employer's refusals to bargain, which were found to be violative of section 8(a)(5) inasmuch as they had manifested desires to dissipate the unions' majority status and thus demonstrated an absence of a good faith doubt as to that status.<sup>28</sup> The Fourth Circuit upheld the Board's independent unfair labor practice findings but refused to find any refusals to bargain. Concerning these, the circuit court's position was that

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(7th Cir. 1968). Significantly, in *River Togs*, the Second Circuit justified its enforcement of a refusal to bargain finding in *Gotham Shoe Mfg. Co.*, 359 F.2d 864 (2d Cir. 1966), on the grounds that the employer had made a free election impossible.

<sup>24</sup> 155 N.L.R.B. 99 (1965), *order set aside sub nom.*, *Retail Clerks Local 1179 v. NLRB*, 376 F.2d 186 (9th Cir. 1967); *accord*, *Aaron Bros. Co.*, 158 N.L.R.B. 1077 (1966).

<sup>25</sup> *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).

<sup>26</sup> *Id.*

<sup>27</sup> *NLRB v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968). *Sinclair* also presented a first amendment question not pertinent to the present discussion.

<sup>28</sup> 395 U.S. at 580-89.

cards themselves were so inherently unreliable that their use gave an employer virtually an automatic, good faith claim that . . . a [representation] dispute existed, for which a secret election was necessary.<sup>29</sup>

In the fourth case, the First Circuit enforced the Board's bargaining order, specifically rejecting the position of the Fourth Circuit.

At the oral argument before the Supreme Court, the Board abandoned its good faith rhetoric and asserted a look-at-what-we-do — not-what-we-say rule that elaborated on its *Aaron Brothers Co.*<sup>30</sup> rationale and now clearly asserted that what the Board had *really* been doing was weighing the effects of the employer's unfair labor practices on the election process. In this view

an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election.<sup>31</sup>

In adopting the Board's newly stated view, the Supreme Court first laid to rest the long-running controversy over the statutory basis for ordering bargaining without an election. It held that the legislative history of the Taft-Hartley amendments to the NLRA clearly allowed for bargaining orders based upon majority status established by means other than an election.<sup>32</sup>

Next, the Court turned to the use of cards as an alternative to the election. Here the Court affirmed the superiority of the election procedure as the means of ascertaining employee choice but approved the Board's *Cumberland* rule on single-purpose cards, stating that

employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.<sup>33</sup>

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<sup>29</sup> *Id.* at 585-86.

<sup>30</sup> 158 N.L.R.B. 1077 (1966). *Aaron Bros.* is generally considered as having codified the modifications to the original *Joy Silk* test, including the previously mentioned shift in Board position announced in *Serpa*, requiring an affirmative showing of employer bad faith before a card-based bargaining order could issue.

<sup>31</sup> 395 U.S. at 594. The Court noted that "largely irrelevant" referred to the cases where an employer committed no independent violations but clearly had no doubt of the union's card majority and a bargaining order issued despite the high probability of a fair election. The Court specifically noted that it was not passing upon the validity of these cases since the issue was not involved in any of the cases before the Court. *Id.* at 601 n.18.

<sup>32</sup> *Id.* at 595-600.

<sup>33</sup> *Id.* at 606.

While there is little to argue with in that statement, it does not necessarily support the law of *Cumberland* that *only* the words "only" or "solely" clearly cancel the plain



The Court specifically rejected any subjective inquiry into the employee's motivation as "unreliable." Ostensibly, the determination was to be made from the totality of objective circumstances.<sup>34</sup>

The Court then turned to the final issue, namely whether a card-based bargaining order is the appropriate remedy for a section 8(a)(5) violation where an employer commits independent unfair labor practices that tend to dissipate the union's card majority and to preclude the holding of a fair election. Considering the Board's practice, the Court distinguished three types of situations where a refusal to recognize was accompanied by independent unfair labor practices. In the first group of "exceptional" cases characterized by "outrageous" and "pervasive" unfair labor practices, the Court approved of the Board's "policy of issuing a bargaining order, in the absence of a section 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices."<sup>35</sup> In then considering what has become known as "category two" violations, the Court noted that its holding in *Gissel* merely approved "the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes," provided there is a showing that the union had achieved majority status at one point.<sup>36</sup> In this event, the Court set forth the criteria for the Board to use in determining whether to issue a bargaining order, stating that

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>37</sup>

In addition, the Court noted that there was "a third category of minor or less extensive unfair labor practices, which, because of their minimal

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language of the card. Obviously such a rule would be far too restrictive an application of that statement. The Court seemed to recognize this, for immediately upon stating its support for *Cumberland*, it cited the Board's decision in *Levi Strauss Co.*, 172 N.L.R.B. No. 57 (June 28, 1968) to caution that *Cumberland* should not be applied mechanically, but that reliance should be on substance not form and the impression given from the "totality of circumstances." 395 U.S. at 607-08.

<sup>34</sup> 395 U.S. at 607-08.

<sup>35</sup> *Id.* at 614.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 614-15.

impact on the election machinery, will not sustain a bargaining order."<sup>38</sup>

Applying these criteria to the specific cases before it, the Court affirmed the First Circuit's enforcement of the Board's bargaining order. Although the Board had found a section 8(a)(5) refusal to bargain violation, it also found that the employer's section 8(a)(1) violations (consisting of threats of reprisal) were so coercive as to warrant a bargaining order absent an 8(a)(5) violation. Thus it was placed in the first category of "exceptional" cases where the Court sanctioned the Board's practice of issuing orders absent even a union demand to bargain on the basis of a majority showing. With respect to the Fourth Circuit cases, the Court noted that there was no indication by the Board that it had analyzed the section 8(a)(1) and (3) violations under the new test requiring an evaluation of their effect on the election process and therefore, remanded them to the Board for proper findings in accordance with the new standards.

#### THE POST-GISSEL EXPERIENCE

If the Court in *Gissel* seemed to have helped the Board rid itself of its rhetorical burden of good faith and its concomitant arcane divination of the employer's mind by placing the bargaining remedy on the scales of reliability to be measured against the election process, the Board seemed not to have noticed. Prior to *Gissel*, the Board's decisions would recite the unfair labor practices found and then state in conclusory fashion that such did or did not indicate bad faith and that a bargaining order should or should not issue. There was no analysis to bridge the facts to the conclusion. After *Gissel*, the Board recited the unfair labor practices found and then stated that such tended "to destroy the employees' free choice by frightening them into withdrawing their allegiance (sic) from the Union and were of such a nature as to have a lingering effect and make a fair or coercion-free election quite dubious, if not impossible."<sup>39</sup> There was no analysis to bridge the facts to the conclusion.

Thus, in some seventy Board opinions immediately following *Gissel* there were only seven cases in which the Board was somehow, for some unspecified reason, able to conclude that the preferred election procedure could be effectively utilized.<sup>40</sup> Four of the seven involved

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<sup>38</sup> *Id.* at 615.

<sup>39</sup> *General Stencils, Inc.*, 178 N.L.R.B. 108, 109 (1969), *enf'd in part*, 438 F.2d 894 (2d Cir. 1971).

<sup>40</sup> *Bill Pierre Ford, Inc.*, 181 N.L.R.B. No. 155 (Aug. 3, 1970); *J. A. Conley Co.*, 181 N.L.R.B. No. 20 (Feb. 12, 1970); *Blade-Tribune Publishing Co.*, 180 N.L.R.B. No. 56 (Dec.

8(a)(1) violations so minor as to approach *de minimis*.<sup>41</sup> Two cases involved violations of an aggravated nature,<sup>42</sup> and the seventh case, though roughly comparable, involved what could be termed serious violations.<sup>43</sup> There is no attempt to rationalize the apparent inconsistencies in its holdings. There is no explanation of why the *Blade Tribune Publishing Co.* employees, who had been subjected to illegal interrogation and promises of benefits and an instance of a discriminatory job assignment, were nonetheless ready for a fair election, while the *General Stencils, Inc.* employees, a limited number of whom had endured interrogation and threats of loss of benefits, could no longer express themselves freely.

Nowhere in these cases does the Board disclose, much less analyze, the particular factual basis for its finding that a fair election cannot be conducted. It does not begin to manifest a careful weighing of the alternative probabilities in the circumstances of the case. The employer's violations are nowhere discussed in terms of their "past effect" or "likelihood of recurrence."<sup>44</sup> No analysis is presented as to which, if any, of the employer's unfair labor practices would be likely to have a "lingering effect."<sup>45</sup> No discussion is devoted to the importance (or lack of importance) of the existing employer-employee relationship, to the average tenure of the employees, to the activities of the union. No consideration is revealed concerning possible alternative remedies—either traditional or extraordinary.<sup>46</sup>

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16, 1969); *Arcoa Corp.*, 180 N.L.R.B. No. 5 (Dec. 12, 1969); *Schrementi Bros.*, 179 N.L.R.B. 853 (1969); *Seymour Transfer, Inc.*, 179 N.L.R.B. 26 (1969); *Stoutco, Inc.*, 180 N.L.R.B. No. 11 (Dec. 15, 1969).

<sup>41</sup> *Seymour Transfer Inc.* (isolated single interrogation concerning information that the employee had previously volunteered he had); *Arcoa Corp.* (technical violation of Board's *Struksnes* polling rule—a "borderline" violation); *J. A. Conley Co.* (employer, who subsequently became vocal pro-union activist, spoke against union with employer encouragement, conveying "Respondent's keen displeasure about their union affiliation," and Board found that no threats, acts or incidents of coercion, interrogation, or discharges were undertaken by the employer); *Bill Pierre Ford, Inc.* (Board found violation so minor that it declined even to issue a cease and desist order).

<sup>42</sup> *Blade-Tribune Publishing Co.* (activities included interrogation of 13 of the 22 unit employees by the editor in his office, section 8(a)(3) discrimination against active union adherent designed to cause him to quit, promise and award of benefits, etc.); *Schrementi Bros.* (including physical assaults against non-employee union organizer in view of employees, interrogation).

<sup>43</sup> *Stoutco, Inc.* (concerned repeated threats of retaliation by foreman, "suggestion" by company president that union activist quit, and prediction that he would be gone after election).

<sup>44</sup> Has the employer a past history of similar violations? Have there been elections in the past unaccompanied by any violations? Is the violation likely to be repeated; e.g., is it an ad hoc response to a unique situation or is it a premeditated attempt to coerce?

<sup>45</sup> An act that the employees will remember, e.g., a discharge or a wage increase.

<sup>46</sup> See *Loray Corp.*, 184 N.L.R.B. No. 57, (July 20, 1970) where in the face of "outrageous and pervasive" violations of section 8(a)(1) and (3), the Board nevertheless declined

The Board seemed to be doing exactly what it had once chastized a trial examiner for doing, *i.e.*, making "mere broad conclusions . . . without setting forth the relevant evidence supporting these conclusions and without an analysis of the evidence . . . to show how he arrived at his conclusions."<sup>47</sup> Significantly, the Board's decisions in these cases appear to violate the mandate of the Administrative Procedure Act that it state "its findings and conclusions, and the reasons or basis therefor on all the material issues of fact or law presented on the record."<sup>48</sup> The failure to articulate its grounds for decisions in these cases has resulted in apparently inconsistent determinations. Further, it leaves the reviewing courts with no basis for review since there is no indication of the Board's bases for decision.<sup>49</sup>

Moreover, *Gissel* requires that the Board carefully weigh the alternative prior to issuing a bargaining order — a remedy which aborts the normal course of a secret ballot election and which, for all practical purposes, locks both the employer and the individual employees into the mandatory, exclusive and institutionalized machinery of collective representation for at least one year. Where the employer's actions are sufficiently serious to permanently taint the election and deprive it of its normal protections and reliability, the Board, lacking a better alternative, is authorized to invest the union-solicited cards with the

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to issue a bargaining order in the absence of proof of a majority. The Board, while not disowning the authority to issue such an order, concluded,

we have devised special remedies for the aggravated and pervasive 8(a)(1) and (3) violations which in our opinion will enable employees freely to exercise their Section 7 rights to choose whether or not they wish to be represented by the Union.

*Id.* at 3. The Board ordered the following remedies: (a) Company's owner, president and chief perpetrator to sign the required notice. (b) Company to mail copies to each employee's home in addition to the required posting. (c) Company to afford union three months' access to the company's bulletin boards. (d) Company to arrange for a one hour, paid meeting on the company premises at which the union can address its employees. (e) In the event of future employer speeches on the subject of the union, the company is to provide equal paid time at a mutually agreeable hour for the union to address the employees. (f) Company to supply union with names and addresses of current employees should the union so request within a year's time. (g) Board announced that it will waive thirty percent requirement for election petitions should the union file a petition within thirty days of the company's compliance with the above.

See also *NLRB v. Elson Bottling Co.*, 379 F.2d 223 (6th Cir. 1967).

<sup>47</sup> *Funkhauser Mills*, 132 N.L.R.B. 245, 247 (1961). But cf. *Swan Super Cleaners, Inc.*, 152 N.L.R.B. 163 (1965).

<sup>48</sup> 5 U.S.C. § 557(c)(3)(A) (1970).

<sup>49</sup> See *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965), where the Supreme Court in reviewing Board unit determinations complained that

[d]ue to the Board's lack of articulated reasons for the decisions in and distinctions among these cases, the Board's action here cannot be properly reviewed. When the Board so exercises the discretion given to it by Congress, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it."

*Id.* at 442-43.

respectability and efficacy of an election. Where, however, other Board remedies can, with reasonable probability, reestablish the election machinery's reliability, the Board is precluded from issuing a bargaining order. For, as the Supreme Court pointed out in *Gissel*,

[t]he Board itself has recognized and continues to do so here, that secret elections are generally the most satisfactory — indeed the preferred — method of ascertaining whether a union has majority support.<sup>50</sup>

This process of weighing the alternatives would of necessity involve the Board in rationalizing and reconciling its determinations. In short, it would really be exercising the expertise with which it has been credited<sup>51</sup> rather than asserting it in defense of its unexplained conclusions.

The Board's failure to rationalize its application of *Gissel* standards to the facts in each case has led to a wide disparity in the treatment of its bargaining orders by reviewing courts. Thus, the Fifth Circuit rejected a Board decision where the Board had merely reworded a pre-*Gissel* decision to conform to the new language, branding it no more than a "litany reciting conclusions by rote without factual explanation."<sup>52</sup>

The Second Circuit in *General Stencils* pointed out that the Board's failure precisely to analyze the impact of each of the unfair labor practices in terms of their impact on an election left the court with no guide as to the Board's views on the possibility of a fair election should the court vacate, as it did in that case, one or more of the section 8(a)(1) findings. The court also pointed out that it was troubled by the inconsistency of the Board in three other cases where the Board had declined to issue a bargaining order despite unfair labor practices that appeared to involve far graver consequences for a subsequent election than those in the immediate case.<sup>53</sup>

Of interest is that the court itself made some of the analysis *Gissel* assigns to the Board. The court noted that employer threats to eliminate benefits were cited by the Supreme Court in *Gissel* as having statistically less effect on rerun elections than threats of plant closures. The

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<sup>50</sup> 395 U.S. at 602.

<sup>51</sup> See *id.* at 612 n.32.

<sup>52</sup> NLRB v. American Cable Systems, 427 F.2d 446, 449 (5th Cir. 1970).

<sup>53</sup> 438 F.2d at 903-04, citing *Stoutco*, *Schrementi*, and *Blade-Tribune*. The latter was particularly ironic because the Board reversed the trial examiner's pre-*Gissel* finding that the employer was guilty of a refusal to bargain, and, in *General Stencils*, the Board reversed the same trial examiner's pre-*Gissel* findings that the employer was not guilty of such violation (emphasis added).

court doubted, therefore, that the employer's threats in *General Stencils* to eliminate free doughnuts and to enforce a no-smoking rule could be the basis for a bargaining order. On the other hand, the court accepted the fact that a threat of plant closure was sufficiently severe to preclude a fair election. However, the court found no evidence that such a threat had traveled further than one employee, and under such circumstances, the threat would not preclude a fair election.<sup>54</sup>

The court, per Judge Friendly, also stated its prescription for some degree of consistency in future cases in the area.

Despite the Board's aversion to utilizing its rule-making powers and the conceded impracticability of framing a rule that would cover every possible variation of employer misconduct, this is a situation where Professor Davis' proposal of a rule "limited to resolving one or more hypothetical cases, without generalizing," 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 that, as will appear below, does not seem to have been attained. Failing that, there could be an opinion by the full Board illuminating how it meant to apply its *Gissel*-given authority—a course particularly important for an agency that is forced by the press of business so often to delegate its authority to three-member panels<sup>[55]</sup> . . . Failing that, the Board should explain in each case just 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. Detailed explication of this sort is peculiarly necessary because of the possibility, which has here become an actuality, that a reviewing court will vacate one of the § 8(a)(1) findings on the "totality" of which the Board relied to justify a bargaining order, and the consequent possible need for a remand unless the court can be satisfied that the error did not affect the command to bargain.<sup>56</sup>

*In General Steele Products Inc. v. NLRB*,<sup>57</sup> one of the original

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<sup>54</sup> *Id.* at 902 n.11.

<sup>55</sup> Although the Board consists of five members, it is authorized to delegate its powers to three members and usually does so. 29 U.S.C. §37(a) & (b) (1964). Indeed, Judge Friendly's suggestion in this regard is supported by the actual occurrences in the cases just considered inasmuch as each was decided by a different three member panel; e.g., *General Stencils* (McCulloch, Fanning, Brown); *Schreimenti* (McCulloch, Fanning, Jenkins); and *Blade-Tribune* (McCulloch, Brown, Zagoria). In fact, a case may be heard by any one of the six possible three-member panels.

<sup>56</sup> 438 F.2d at 901-02 (footnotes omitted).

<sup>57</sup> — F.2d — (4th Cir. 1971). The court was careful to distinguish the immediate case, where the changed facts had occurred before the initial Board hearing, from the situation where the changed facts occur after a Board order and prior to enforcement. In this regard, the court cited with favor the Fifth Circuit's decision in *American Cable*, that *Gissel* required that the Board take into consideration the current circumstances before issuing a bargaining order. The Second Circuit indicated some approval of this approach

cases of the *Gissel* quartet, the Fourth Circuit found that the Board, on remand from the Supreme Court, had merely reworded its original decision in *Gissel* language. The Board had refused to reopen the record to consider the fact that prior to the initial hearing before a trial examiner the ownership of the employer had changed. The court noted that the evidence was not introduced originally since it was not relevant under the good faith doubt test. Here again, the Board ignored the basic test of the *Gissel* doctrine, for the fact that the employer who had committed the unfair labor practices is no longer on the scene is certainly relevant to a determination concerning any "lingering effect" of the violation and the "likelihood that such would recur." Apparently in agreement, the Court remanded the case to allow for the consideration of such evidence.

The Seventh Circuit has also recognized the Board's failure to "show by analysis of the factual situation 'that the possibilities 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.'"<sup>58</sup> In one recent case, it vacated a bargaining order and remanded for the necessary Board findings.<sup>59</sup> In three others, however, the Court made the analysis itself rather than prolonging the already lengthy time span in resolving the dispute.<sup>60</sup> In each case they found justification for a bargaining order.

The Eighth Circuit, after reviewing a number of cases, announced

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in *General Stencils*. 438 F.2d at 905. The Board itself rejects this formulation, reasoning that these cases justify no exception from the settled rule that the loss of majority or other events occurring after the commission of unfair labor practices should not be considered in fashioning a remedy since to do otherwise would allow the employer to profit from his wrongdoing. The Board's reasoning appears persuasive, but only in situations where the change in circumstances or the delay is due to the employer's acts. For example, in situations where the employer has changed, the employer is not profiting by his misdeeds and the employees might well feel free enough under the new management to vote freely. In such circumstances, viewing the election possibility at the time of the order would seem proper.

<sup>58</sup> *New Alaska Development Corp. v. NLRB*, 441 F.2d 491 (7th Cir. 1971).

<sup>59</sup> *Id.*

<sup>60</sup> In *NLRB v. Henry Colder Co.*, 447 F.2d 629 (7th Cir. 1971), the court singled out a discriminatory discharge, threats of blacklisting, and promises of benefits as likely to linger long in the employee's memory. In *NLRB v. Drives, Inc.*, 440 F.2d 354 (7th Cir. 1971), the court held that (1) promises of benefit would be viewed in their historical context and would be considered relatively unimportant; and (2) a Board order for disestablishment of an illegally assisted advisory board would erase its effect on a fair rerun; but (3) the vague preelection threats of discharge made real by post election discharges were serious enough to necessitate a bargaining order. In *NLRB v. Kostel Corp.*, 440 F.2d 337 (7th Cir. 1971), the court found that the employer's threats and interrogation of three out of five employees together with the subsequent discriminatory discharge of two, when viewed in the context of the small city location, made it unlikely that the present employees and even potential future employees would be able to vote freely.

guidelines of its own in evaluating whether independent unfair labor practices would warrant a bargaining order. They are as follows:

- 1) Where the underlying facts affirmatively show that the unfair labor practices have in fact undermined a union majority, typically evidenced by the union losing an election or the employees seeking to withdraw from the union following the occurrence of the conduct in question, we grant enforcement.
- 2) Where the record is silent concerning the actual impact of the employer's unfair labor practices, we defer to the Board's exercise of discretion and grant enforcement; and
- 3) Where the evidence establishes that the unfair labor practices produced little or no impact upon the employees' allegiance to the union, we deny enforcement.<sup>61</sup>

The court applied these guidelines to deny a bargaining order despite a discriminatory discharge. It found that since the union obtained eleven of its fourteen cards after the discharge (and other unfair labor practices), the violations did not in fact undermine the union's majority and an election could be held. The problems with the guidelines are manifest. Under its rules, the Eighth Circuit precludes the possibility of having a rerun election since in the context of any employer interference a rerun implies an initial election lost by the union and hence a clear indication that the majority was undermined. The court, however, is misreading *Gissel* when it makes the undermining of the majority determinative of the issue of whether a free election can subsequently be held. Obviously, the fact that a majority of employees signed cards after a discharge is an indication that the employees, or a great majority of them, still felt free to exercise their choice. However, the converse does not necessarily follow, *i.e.*, that after losing an election and the imposition of traditional Board remedies, a fair rerun election cannot be held.

The Eighth Circuit's initiative, as with that of the Second, Fourth, Fifth and Seventh, is understandable, if unfortunate, in light of the Board's abdication of its responsibility to make the necessary analysis and develop a coherent approach to these cases.

#### APPLYING THE TEACHING OF *GISSEL*: IMPROVING THE RELIABILITY OF AUTHORIZATION CARDS

Basic to the Board's position before the Supreme Court in *Gissel* was the contention that its reliance on authorization cards in the event of employer unfair labor practices was justified where, in view of the

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<sup>61</sup> *Arbie Mineral Feed Co. v. NLRB*, 438 F.2d 940 (8th Cir. 1971); see *Dawson Metal Prods., Inc. v. NLRB*, — F.2d — (8th Cir. 1971).



tainted atmosphere, the cards were the more reliable indicator of employee sentiment. The Court found, as noted earlier, that the Board had statutory authority for using cards to support a bargaining order and it approved its *Cumberland* rules on solicitation.<sup>62</sup> However, the fact that the Supreme Court upheld the Board's card practices as a matter of law is no justification for continuing the practice as a matter of policy. The Board, having justified the use of cards on the basis of comparative reliability has an obligation to ensure that they are as accurate an indication of employee sentiment as possible.<sup>63</sup>

Unfortunately, the Board in its post-*Gissel* cases manifests little inclination to do so. Thus, in *Essex Wire Corp.*,<sup>64</sup> the Board counted the cards of (1) an employee who was told that the reason for the card was "just to bring in a vote," (2) an employee who was told that the only purpose of the card was for an election, (3) an employee who questioned the card's use and was told that it was so he could vote in the election for the union, (4) an employee who was told that the card's purpose was "to bring it to an election" as had been the case in previous years, (5) an employee who had signed the card saying he would not vote for the union, (6) an employee who stated that she did not want to sign because she was not sure she would vote for the union only to be told that she should sign since it was not for the union but to get an election, and (7) a woman who was visited at her home and told that the card was to show that the solicitor had been there so that no one else would come and see her.<sup>65</sup>

It would seem grossly mechanistic to hold that these employees intended to authorize the union to represent them by signing the cards. Ironically, it would seem that these problems can be easily solved. For it seems a relatively simple matter for the Board to prescribe in precise form what an authorization card should say if it is to be used as proof of majority status. This could be accomplished either by exercise of the Board's rule-making powers or, as it has seen fit to do on

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<sup>62</sup> See notes 33-34 and accompanying text *supra*.

<sup>63</sup> Indeed, if the employer has made a free election impossible, but the cards are rejected because of ambiguity or misrepresentation, the employees might well be deprived of any means of effectively exercising their choice.

<sup>64</sup> 188 N.L.R.B. No. 59 (Feb. 2, 1971).

<sup>65</sup> It should be noted that the Board did reject seven other cards on the basis of misrepresentation, but found a majority of 182 out of 345 employees. It would appear that, as Chairman Miller pointed out in his dissent, in circumstances where there are clear misrepresentations made in the solicitations in a number of instances and less clear indications of misrepresentation in others, it is likely that there are other cards which were obtained in the same manner, and the Board should therefore view the reliability of all the cards in that light. Moreover, in view of the standard Board presumption that employees will carry employer threats to others, it is no less probable that they would carry union misrepresentations.

other occasions, in the context of a comprehensive Board decision on the issue.

The Board has been repeatedly criticized by commentators for its refusal to exercise its rule-making powers.<sup>66</sup> The exhausting card-by-card litigation made necessary by the present ad hoc determinations prompted Judge Friendly to remark that

[w]hat would truly ease the administrative problem both for the Board and for the courts would be for the Board to use its long neglected rule-making power and specify what a union authorization card should say and how.<sup>67</sup>

Alternatively, should the Board continue in its reluctance to issue rules as such, it could detail its specifications in the context of a decision, as it has done, for example, in prescribing acceptable union-security clauses<sup>68</sup> and union hiring halls.<sup>69</sup>

Indeed, there seems to be no reason why the Board should not declare that henceforth it will use as evidence of a majority only cards that (1) state clearly the employee's authorization of the union to "act as my collective bargaining agent with the company for wages, hours and working conditions,"<sup>70</sup> and (2) which further state in bold letters the following:

CAUTION: THIS CARD MAY BE USED TO SECURE BARGAINING RIGHTS WITHOUT AN ELECTION

It would seem that there should be little objection to the Board's prescription of such a card. There is virtually no valid interest in preserving the present variations in the language of the card and much to be said for uniformity. Variations can only serve to mislead and confuse

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<sup>66</sup> See, e.g., Davis, *Failure of Agencies to Make Substantive Rules That Ought to be Made*, 1 K. DAVIS, ADMIN. LAW TREATISE § 6.13 (1965). Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Peck, *Critique of the National Labor Relations Board's Performance in Policy Formation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254 (1968).

<sup>67</sup> *Bryant Chucking Grinder Company v. NLRB*, 389 F.2d 565, 570 (2d Cir. 1967) (footnotes omitted), *cert. denied*, 392 U.S. 908 (1968).

<sup>68</sup> *Keystone Coat and Apron Co.*, 121 N.L.R.B. 880, 885 (1958).

<sup>69</sup> *Mountain-Pacific*, 119 N.L.R.B. 883 (1957).

<sup>70</sup> This was the language of the card approved by the Board in *John S. Barnes Co.*, 180 N.L.R.B. No. 139 (Jan. 23, 1970). See also *Snyder Tank Corp. v. NLRB*, 428 F.2d 1348 (2d Cir. 1970). The Board should give serious consideration to requiring authorization cards to be notarized. This would lend some dignity and solemnity to the occasion and impart to the employees a sense of the significance of the act of signing a card. While the rule would probably spawn a huge number of organizer-notaries, the effects could only serve to make cards a more reliable measure of intent and reduce, at least to some extent, the marked difference in circumstances surrounding voting in a secret ballot election.

the signer, whereas uniformity would tend to create a general understanding by employees of what authorization cards are all about. Further, the caveat on the card in boldface would help lay to rest the confusion surrounding these cards as to whether the cards were signed for reasons other than to signify support for the union. A literate employee could not complain of assuming that the card would only be used for an election in the face of the clear warning on the card's face.<sup>71</sup>

Possible union objections to such a warning on the card as inhibiting the securing of such authorizations must be rejected, for the warning would only be stating precisely the card's purpose and possible effect. Obviously, the same cards could be used to satisfy the Board's thirty percent showing of interest requirement in support of a union petition for an election. On the other hand, if the union resolved only to seek an election and felt that it would be easier to solicit cards limited to that purpose, it could employ a different card. Naturally, this second type card could not be used for purposes of proving majority status.

The Board has already elaborated on *Gissel* by invalidating dual-purpose authorization cards, at least in one case.<sup>72</sup> In *Gissel*, the Court held that a signer should be bound by the clear language of what he signs. If employees of varying sophistication are to be held to statements on cards to which they subscribe, the language ought to be made as plain and clear an expression of that intent as it may ultimately be held to manifest.

#### APPLYING THE TEACHING OF GISSEL:

##### THE ISSUE THE COURT LEFT OPEN

Perhaps nowhere is the Board's failure to absorb the full implications of the *Gissel* rationale clearer than in its treatment of cases where the employer has committed no unfair labor practices.

The Court in *Gissel* expressly left open the issue as to whether an employer can insist on an election as long as he has committed no unfair labor practices.<sup>73</sup> The Court noted that it was not passing on whether a bargaining order was ever appropriate where there were no unfair labor practices. Thus, the Court ostensibly took no position on the Board's *Snow & Sons, Inc.* line of cases. The Board, however,

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<sup>71</sup> Naturally, an employee who cannot read should not be held to his card unless its meaning was clearly explained. *Gate of Spain Restaurant*, 192 N.L.R.B. No. 161 (—).

<sup>72</sup> *John S. Barnes Co.*, 180 N.L.R.B. No. 139, (Jan. 23, 1970). Inasmuch as each of the cases before the *Gissel* Court involved single-purpose cards, the Court made no decision concerning dual-purpose cards. See 395 U.S. at 583 n.4, 601 n.18 & 606.

<sup>73</sup> 395 U.S. at 601 n.18.

should have had little difficulty in applying the *Gissel* principles to this area. As has been shown, the Board had already narrowed the application of *Snow & Sons* by its requirement of affirmative evidence of bad faith.<sup>74</sup> Thus, an employer, even before *Gissel*, could remain silent in the face of a bargaining demand, and so long as he committed no unfair labor practices, the issue would be decided by an election.

Applying the focus of *Gissel*—examining the possibility of a free election rather than the employer's motivations—would seem to provide an easy answer. If the prospects for a free election are good, then the employer's doubts about the union's majority are immaterial. His state of mind should not serve to deprive the employees of their right to decide. Indeed, if the test in the event of employer unfair labor practices is to weigh whether an election or cards are a more reliable means of ascertaining the employees' choice, a fortiori an election would seem more desirable where there are no unfair labor practices and thus no question as to its reliability.

Surprisingly enough, this area has proven a great source of difficulty for the Board. In an early post-*Gissel* case<sup>75</sup> where an employer, after carefully checking each card comprising a majority, had then filed a petition for an election, the Board held that a refusal to bargain did not lie since the employer had no knowledge outside of the cards that the union had a majority. Though the result is consistent with the *Gissel* rationale, it was thus reached by viewing the case through the old *Joy Silk* focus on the employer's state of mind. This same result should have been reached by holding that since an election was completely feasible, the employees should have the chance to decide. The failure to apply *Gissel's* meaning to that situation led to unfortunate results in subsequent cases where there were again no employer unfair labor practices, but in addition to a majority of cards, the employees struck.<sup>76</sup> The Board based its decisions on its previous cases and the unfortunate language of the Supreme Court in *Gissel* to the effect that a union could establish its majority status by convincing support for a strike vote or strike. This language appeared in the Court's discussion of precedent holding that an election was not the only means allowed for establishing a majority. It was cited to rebut the argument that Congress intended bargaining rights to be established solely by an

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<sup>74</sup> John P. Serpa, Inc., 155 N.L.R.B. 99 (1965), *order set aside sub nom.*, Retail Clerks Local 1199 v. NLRB, 376 F.2d 186 (9th Cir. 1967); *accord*, Aaron Bros. Co., 158 N.L.R.B. 1077 (1966).

<sup>75</sup> Bill Pierre Ford, 181 N.L.R.B. No. 155 (Aug. 3, 1970).

<sup>76</sup> Wilder Mfg. Co., 185 N.L.R.B. No. 76 (Aug. 27, 1970). Pacific Abrasive Supply Co., 182 N.L.R.B. No. 48 (May 6, 1970).

election. It was not cited, any more than were cards, as an equally sound route to the establishment of a majority. Even assuming, *arguendo*, that participation in a strike *can* signify union support as a matter of sound inference, it is hardly consonant with the purposes of the NLRA to encourage the resolution of questions of representation by strikes.<sup>77</sup> Moreover, it is totally at odds with the broad thrust of *Gissel* that, absent unfair labor practices, an election is the superior way of ascertaining employee choice.

The Board in *Wilder Manufacturing Co.* recognized that its result ran counter to the policy favoring elections and gratuitously added that it would not have ordered bargaining if the employer had "indicated willingness" to utilize the election procedure. There appeared to be no lack of willingness other than the employer's failure to petition for an election. Of course, completely overlooked in the Board's assessment, is the union, which, without any taint on the "laboratory conditions" opted for a strike rather than an election. A policy of encouraging resort to an election is not advanced by punishing the employer who remains silent and rewarding the union that strikes.<sup>78</sup>

The Board—or at least a bare majority of the Board—seems to realize that this concentration on the employer's state of mind was leading back to the "good faith thicket of *Joy Silk*."<sup>79</sup> In *Summer & Co.* (voting three to two), it refused to find an 8(a)(5) violation even though the union had achieved a card majority, a majority of the employees had later struck, and the employer had shown not only an unwillingness to consent to an election, but had also announced its determination

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<sup>77</sup> It hardly needs saying that an employee's joining a strike can be as much the result of social coercion—labeled "scab"—or fear of bucking the picket line, as of support for the union. Indeed, it's hard to square the Board's use of mere participation in a strike as proof of union support with its holding that mere failure to participate in a strike does not evidence rejection of union representation. *Dayton Motels, Inc.*, 192 N.L.R.B. No. 112 (—); see also *Norlee Togs*, 129 N.L.R.B. 14 (1960). A recent Board case seems to support this view, holding that failure to report to work after the establishment of the picket line, did not necessarily manifest support for the union's demand for recognition. *Abraham & Sons*, 193 N.L.R.B. No. 74 (—). See also *Electric Wiring, Inc.*, 193 N.L.R.B. No. 166 ( ).

<sup>78</sup> See *World Carpets of New York, Inc.*, 188 N.L.R.B. No. 10 (Jan. 26, 1971) where the Board found a section 8(a)(5) violation where the union had demanded recognition and had then immediately engaged in picketing with a majority of the employees. The picketing was marked at the outset by violence. The employer's independent unfair labor practices occurred weeks after their picketing and acts of violence. *Gissel* would seem to indicate that a bargaining order should not lie where the union by *its acts* has precluded the possibility of a fair election. The Board, however, employing some novel standard of comparative culpability, found that the union's misconduct was "less grave" and the employer's was such that a fair election could not be held. It ignored completely the fact that the union's misconduct was almost simultaneous with its demand while the employer's occurred weeks later.

<sup>79</sup> *Summer & Co.*, 190 N.L.R.B. No. 116 (June 7, 1971).

to litigate the union's showing of interest despite the election result and had further announced that it would not bargain with the union. However, the employer had committed no unfair labor practices. Recognizing that this squarely presented the issue left unresolved by the Supreme Court in *Gissel*, the Board held that:

The facts of the present case have caused us to reassess the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time he refuses to accede to a union demand for recognition. Unless, as in *Snow & Sons*, the employer has agreed to let its "knowledge" of majority status be established through a means other than a Board election, how are we to evaluate whether it "knows" or whether it "doubts" majority status? And if we are to let our decisions turn on an employer's "willingness" to have majority status determined by an election, how are we to judge "willingness" if the record is silent, as in *Wilder*, or doubtful, as here, as to just how "willing" the Respondent is in fact? We decline, in summary, to reenter the "good-faith" thicket of *Joy Silk*, which we announced to the Supreme Court in *Gissel* we had "virtually abandoned . . . altogether. . . ."

These considerations lead us to the conclusion that Respondent should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election.<sup>80</sup>

Thus, the Board, at least at the time of this writing, is plainly on the path out of the "thicket" marked by *Gissel*. It is unfortunate, however, that the decision is couched in terms of the impracticality of ascertaining the employer's knowledge of majority status or its willingness to have that issue determined by an election. The Board's decision should have been based squarely on the finding that, in view of the absence of unfair labor practices interfering with a fair election, the employees should have the right to decide the issue for themselves through the preferred method.

The two dissenting Board members read *Gissel* as applying its election possibility test only in the event of employer unfair labor practices.<sup>81</sup> For all other purposes, they regard the pre-*Gissel* holdings as still good law and would apply them. Thus, they would find an 8(a)(5) violation in *Summer & Co.* since the employer refused to recognize the union, in the mistaken belief that its majority was tainted by supervisory influence. Since this contention was unrelated to the union's majority status, the refusal to bargain was deemed a violation. The con-

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

clusion implicit in the dissent's reasoning was the classic good faith doubt test that since the employer's assertion was unrelated to the union's majority, the employer had no good faith doubt. The dissent later made this return to *Joy Silk* explicit when it stated "nor was the employer's refusal to bargain at any time based upon an asserted doubt of majority."<sup>82</sup> Thus, the dissent would apply *Gissel's* weighing of alternatives only when employer unfair labor practices make the normally superior election process of questionable reliability. Where there are no unfair labor practices, however, and the election process stands in unquestioned superiority in ascertaining employee choice, the dissenters would inquire into the employer's doubt of the union majority status or its asserted reasons for refusal.

The confusions implicit in the current divergence of views are manifest. *Gissel's* current application is based on a bare majority and grounded on the tenuous rationale of practicality. Under these circumstances we might yet see another Board policy ostensibly "laid to rest . . . only to be resurrected, like the Phoenix, garbed in slightly different plumage."<sup>83</sup>

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<sup>82</sup> *Id.* at 1311.

<sup>83</sup> Bok at 39.