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Enforcement of Collective Bargaining Orders in the Third Circuit: The Rise and Fall of the Armcor Standards

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ENFORCEMENT OF COLLECTIVE BARGAINING ORDERS IN THE THIRD CIRCUIT: THE RISE AND FALL OF THE *ARMCOR* STANDARDS

I. INTRODUCTION

The use of the election and certification procedures of the National Labor Relations Board (Board) is the most common and the preferred method for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees.[1] There are, however, limited circumstances in which the Board may recognize a union as the employees' bargaining representative and require the employer to bargain in good faith even if the union has never won an election.[2] Under the Supreme Court's decision in *NLRB v. Gissel Packing Co.*,[3] the Board has the discretion to issue a bargaining order based on its determination that employer unfair labor practices have seriously dimmed the prospect of a fair election, or that such practices have undermined the union majority, thereby rendering a completed election invalid and casting doubt as to the fairness of a rerun election.[4] The purpose of the bargaining order is to ensure that a union which had enjoyed majority status, usually evidenced by authorization cards, is not precluded from becoming the exclusive bargaining representative because of unfair labor practices committed by the employer.[5]

Failure to comply with a bargaining order issued by the Board may result in the filing of a petition for enforcement with a circuit court of appeals.[6] The circuit courts have generally been willing to enforce bar-

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1. NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969). In many instances, unions which demonstrate majority support through the use of authorization cards or a strike may be voluntarily recognized by the employer. R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 93 (1976). An employer may, however, refuse to recognize the union and force the union to petition for an election. Linden Lumber Div., Sumner & Co. v. NLRB, 419 U.S. 301 (1974). For the election and certification procedures utilized by the Board, *see* 29 U.S.C. § 159(c) (1976).

2. For circumstances in which a bargaining order may issue, *see* note 4 and accompanying text *infra*.

3. 395 U.S. 575 (1969).

4. *Id.* at 610-15. Employer unfair labor practices may have the effect of "undermining a union's strength and destroying the laboratory conditions necessary for a fair election." *Id.* at 612.

5. *Id.* at 614-15. A bargaining order should not issue, however, simply because it serves to deter employer misconduct; the Board must also conclude that the employees' free choice will be best effectuated by forcing recognition of the union. *Id.* at 614. For a discussion of these policy considerations with respect to Board procedure, *see* notes 21-23 and accompanying text *infra*.

6. *See* 29 U.S.C. § 160(e) (1976). Section 10(e) provides in pertinent part:

> The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein [the violator] resides or transacts business, for the enforcement of [its bargaining] order. . . . Upon the filing of such petition [and serving of notice], the court shall have jurisdiction of the proceeding . . . and shall have power . . . to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

Id.

gaining orders issued under *Gissel*, deferring to the Board's expertise in such matters.[7]

In *NLRB v. Armcor Industries, Inc. (Armcor I)*,[8] the United States Court of Appeals for the Third Circuit refused to enforce a Board bargaining order pending "further analysis and findings on the necessity for a bargaining order."[9] In short, the court required the Board to "make 'specific findings' as to the impact of the unfair labor practices on the election process and clearly explicate the basis for its decision to issue a bargaining order."[10] Following a second remand to the Board, however, the Third Circuit, sitting en banc, evenly divided in its reconsideration of the panel decision and issued no opinion.[11] As a result, the present state of the law in the Third Circuit is uncertain as to 1) whether the Board is required to make specific findings and to set forth a reasoned analysis consistent with the teaching of *Gissel*; 2) whether the Board on remand is required to consider changed circumstances at the job site; and 3) whether the Board can simply adopt the findings and conclusions of the Administrative Law Judge (ALJ), rather than engaging in an independent analysis of its own.[12]

This comment will examine *Gissel*'s approval of the issuance of bargaining orders by the Board when employer unfair labor practices are found to have undermined the union's majority.[13] The approach of the circuit courts in dealing with petitions for enforcement of bargaining orders will then be considered.[14] The focus, however, will be on the Third Circuit's interpretation of the requirements of *Gissel*,[15] culminating in an in-depth analysis of the *Armcor* litigation.[16] It will be suggested 1) that the court ought clearly to re-adopt its holding in *Armcor I* requiring the Board to make specific findings as to the impact of the unfair labor practices on the election process and to explain its decision to issue a bargaining order; 2) that the Board ought to consider changed circumstances on remand; and 3) that it is sufficient for the Board to adopt the findings and conclusions of the ALJ.[17]

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7. *See, e.g.*, Bandag v. NLRB, 583 F.2d 765 (5th Cir. 1978); C&W Supermarkets, Inc. v. NLRB, 581 F.2d 618 (7th Cir. 1978); Great Chinese Am. Sewing Co. v. NLRB, 578 F.2d 251 (9th Cir. 1978); NLRB v. Woodline, Inc., 577 F.2d 463 (8th Cir. 1978). *See generally* NLRB v. Gissel Packing Co., 395 U.S. at 612 n.32.

8. 535 F.2d 239 (3d Cir. 1976), *remanded*, 98 L.R.R.M. 2441 (3d Cir. May 1, 1978), *aff'd on rehearing*, 588 F.2d 821 (3d Cir. 1978) (en banc). For a discussion of *Armcor I*, *see* notes 65-76 and accompanying text *infra*.

9. 535 F.2d at 246.

10. *Id.* at 245.

11. *See* NLRB v. Armcor Industries, Inc., 588 F.2d 821 (3d Cir. 1978). The effect of the court's even split was to refuse enforcement of the Board's bargaining order. *Id.*

12. *See* notes 119-67 and accompanying text *infra*.

13. *See* notes 24-39 and accompanying text *infra*.

14. *See* notes 40-60 and accompanying text *infra*.

15. *See* notes 61-118 and accompanying text *infra*.

16. *See* notes 65-76 & 107-18 and accompanying text *infra*.

17. *See* notes 125-73 and accompanying text *infra*.

II. BACKGROUND

Not all unfair labor practices rise to the level of seriousness required for the issuance of a bargaining order.[18] In less egregious situations, the Board will typically order the offending employer to cease and desist, and, if the unfair labor practices involved unlawful discharge, the Board will order reinstatement and back pay.[19] The Board is also empowered to direct that a secret ballot election, or rerun election, be held.[20]

In those situations where a bargaining order is determined to be the only effective remedy, however, authorization cards play an important role as evidence of a union's majority status at some point in time prior to the election.[21] So long as the card itself states unambiguously on its face that the signer authorizes the union to represent him for collective bargaining purposes, the card will be considered valid for that purpose and included in the count of union support.[22] If the solicitor of the card, however, verbally informs the signer that the *sole* purpose of the card is to enable the union to petition for an election, then the apparent designation of the union as bargaining representative will be overcome.[23]

A. *The* Gissel *Decision*

In *Gissel*, the Supreme Court approved the Board's use of bargaining orders to remedy the effect of employer unfair labor practices on the elec-

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18. *See* notes 28-32 and accompanying text *infra*.

19. *See* 29 U.S.C. § 160(c) (1976); THE DEVELOPING LABOR LAW 851 (C. Morris ed. 1971). Section 10(c) provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

29 U.S.C. § 160(c) (1976).

20. *See* 29 U.S.C. § 159 (1976). The remedies of an election, a cease-and-desist order, and reinstatement for improperly discharged employees are considered "traditional" remedies. *See* 395 U.S. at 614.

21. *See* 395 U.S. at 614.

22. *Id.* at 606-07. If the card, however, only authorizes a request for an election, it is not considered the designation of a bargaining representative and it will not be counted for union support. R. GORMAN, *supra* note 1, at 95 (1976).

23. 395 U.S. at 606. On the other hand, if the card on its face explicitly and solely designates the union as exclusive bargaining agent, then "an employee signature on that card will count toward a valid union majority, and will not be undermined by statements made by the card solicitor that the card will no doubt be used if the union wishes to secure an election." R. GORMAN, *supra* note 1, at 95. As the *Gissel* Court explained:

> There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. Elections have been, after all, and will continue to be, held in the vast majority of cases; the union will still have to have the signatures of 30% of the employees when an employer rejects a bargaining demand and insists that the union seek an election.

395 U.S. at 606-07.

tion process.[24] The Court indicated that the Board is invested with the discretion to determine whether the employer's practices undermined majority support for the union, and to gauge the potential effect of these practices on a future election.[25] By exercising this function, the Board can decide whether traditional remedies are inadequate,[26] and may order the employer to bargain with the union on the basis of the card majority it possessed at some point prior to the election.[27]

The *Gissel* Court separated employer unfair labor practices impacting the election process into three categories.[28] The practices in the first category require the issuance of a bargaining order regardless of the presence or absence of a majority showing on authorization cards.[29] It consists of "exceptional" cases which are marked by unfair labor practices that can be characterized as "outrageous" and "pervasive."[30] Under the second category, once the existence of a valid card majority has at some point been shown, a bargaining order may issue "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process."[31] The third

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24. 395 U.S. at 614. The *Gissel* decision, which consolidated four cases, dealt with election campaigns in which the employers committed unfair labor practices prior to an election. *Id.* at 579-82, 587-89. In two of the cases, the Board ordered an employer's election victory set aside, while in the other two cases elections had not yet been held. *Id.* at 580-82, 589. In each case, the Board directed the employer to bargain on the basis of a valid card majority which had been undermined by the employer unfair labor practices. *Id.* at 582-85, 589.

25. *Id.* at 614. For the role of authorization cards in determining union majority, *see* notes 21-23 and accompanying text *supra*.

26. *See* note 20 *supra*.

27. 395 U.S. at 614-15. The *Gissel* Court stated "that a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct." *Id.* at 612. The Court reasoned that the traditional remedies of a cease-and-desist order followed by an election, or rerun election, would not be sufficient, since once "an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity." *Id.* The Court recognized that once the damage has been done, the only way in which to right the wrong fairly is, through the vehicle of the bargaining order, to put the employees in the position they would likely have occupied but for the employer's unfair labor practices. *Id.*

28. *See id.* at 613-15.

29. *Id.* at 613.

30. *Id.* In such a case, the bargaining order is the appropriate remedy if the unfair practices are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *Id.* at 614, *quoting* NLRB v. Logan Packing Co., 386 F.2d 562, 570 (4th Cir.1967). It should be noted that, prior to *Gissel*, the Board had long had a history of issuing bargaining orders when it was the only available, effective remedy for unfair labor practices. 395 U.S.at 614, *citing* United Steelworkers of America v. NLRB, 376 F.2d 770 (D.C. Cir. 1967); J.C. Penney Co. v. NLRB, 384 F.2d 479, 485-86 (10th Cir. 1967).

It has been observed that from the time *Gissel* was decided through 1974, the Board had never issued a bargaining order without first determining that the union had attained majority status. *See* THE DEVELOPING LABOR LAW 144 (Supp. A. Bioff, L. Cohen & K. Hanslawe eds. 1971-1975). Furthermore, the Board has yet to issue a bargaining order on the ground that the employer's unfair labor practice was an "exceptional," first category offense. Thus, the effect of *Gissel* was to approve the Board's use of bargaining orders in *less extraordinary* situations. *See* 395 U.S. at 614. *See also* note 31 and accompanying text *infra*.

31. 395 U.S. at 614. If the Board determines that the possibility of eradicating the coercive effects of past unfair labor practices is slight, and that employee sentiment expressed through

category consists of "less extreme" or "minor" unfair labor practices which, because of their "minimal impact on the election machinery," do not necessitate the issuance of a bargaining order.[32]

The employers in *Gissel* argued that a bargaining order was unduly harsh and punitive.[33] It was their position that a cease-and-desist order followed by a secret-ballot election would eliminate any taint on the election process,[34] and that the Board had further remedies with which to deal with employer unfair labor practices.[35] The Court, however, made it clear that "[i]t is for the Board and not the courts . . . to [determine the necessity for a bargaining order] based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity."[36]

Although recognizing that bargaining orders serve to both effectuate "ascertainable employee free choice"[37] and deter employer misconduct,[38] the Court emphasized the "superiority of the election process" in ensuring employee free choice, stating "that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[39]

B. *Judicial Response to the Board's Procedure In Issuing Bargaining Orders*

When presented with a refusal to bargain subsequent to a *Gissel* bargaining order, the judiciary has generally affirmed the Board's decision and enforced the order.[40] A number of circuit courts, however, have refused enforcement and, in addition, have chastised the Board for its failure to

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the use of authorization cards would be best protected by a bargaining order, then an order should be issued. *Id.* at 614-15. *See, e.g.*, Ludwig Fish & Produce, Inc., 220 N.L.R.B. 1086 (1975); Montgomery Ward & Co., 220 N.L.R.B. 373 (1975); Dallas Ceramic Co., 219 N.L.R.B. 582 (1975); Two Wheel Corp., 218 N.L.R.B. 486 (1975); Zim Textile Corp., 218 N.L.R.B. 269 (1975); Vernon Devices, Inc., 215 N.L.R.B. 475 (1974).

32. 395 U.S. at 615. *See, e.g.*, Rennselaer Polytechnic Inst., 219 N.L.R.B. 712 (1975); Sands Indus., Inc., 218 N.L.R.B. 461 (1975); Beckett Aviation Corp., 218 N.L.R.B. 238 (1975); Lasco Indus., 217 N.L.R.B. 527 (1975); Colony Knitwear Co., 217 N.L.R.B. 245 (1975); Treadway Inn, 217 N.L.R.B. 51 (1975).

33. 395 U.S. at 612.

34. *Id.* at 612 n.32.

35. *Id.* at 611-12. The employers asserted that the Board could order the companies "to mail notices to employees, to read notices to employees during plant time and to give the union access to employees during working time at the plant," or, as a last resort, the Board could seek an injunction under 29 U.S.C. § 160(j) (1976). 395 U.S. at 611-12.

36. 395 U.S. at 612 n.32. As a corollary, the Court noted that there is "no *per se* rule that the commission of any unfair practice will automatically result in . . . an order to bargain." *Id.* at 615.

37. *Id.* at 614.

38. *Id.*

39. *Id.* at 602.

40. *See, e.g.*, Bandag, Inc. v. NLRB, 583 F.2d 765 (5th Cir. 1978); C&W Supermarkets, Inc. v. NLRB, 581 F.2d 618 (7th Cir. 1978); Great Chinese Am. Sewing Co. v. NLRB, 578 F.2d 251 (9th Cir. 1978); NLRB v. Woodline, Inc., 577 F.2d 463 (8th Cir. 1978). *See generally* R. Gorman, *supra* note 1, at 98.

properly discharge its duty as set forth in *Gissel* to issue bargaining orders only when traditional remedies are inadequate.[41]

Seeking to bring "a degree of certainty and uniformity" to the Board's decisions to issue bargaining orders,[42] the United States Court of Appeals for the Second Circuit, in *NLRB v. General Stencils, Inc.*,[43] recommended that the Board articulate its position with respect to the issuance of such orders by adopting one of three suggested methods.[44] Of these three alternatives, the court favored the exercise of the Board's rulemaking powers to synthesize general principles upon which employers, unions, and reviewing courts could rely for an indication of the type of employer activity which would result in a bargaining order as opposed to a traditional remedy.[45] Alternatively, the court envisioned that, in the context of a particular case, the full five-member Board should articulate "how it meant to apply its *Gissel*-given authority."[46] Finally, the court was willing to accept an explanation by the Board "in each case [of] 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."[47]

Whereas the *General Stencil* court would have preferred general rules or guidelines,[48] several circuit courts have merely sought specific findings

41. *See, e.g.*, First Lakewood Assoc. v. NLRB, 582 F.2d 416 (7th Cir. 1978); Peerless of America, Inc. v. NLRB, 484 F.2d 1108 (7th Cir. 1973); New Alaska Dev. Corp. v. NLRB, 441 F.2d 491 (7th Cir. 1971); NLRB v. Kostel Corp., 440 F.2d 347 (7th Cir. 1971); General Stencils, Inc., 438 F.2d 894 (2d Cir. 1971); NLRB v. American Cable Sys., Inc., 414 F.2d 661 (5th Cir. 1969), *enforcement denied on rehearing*, 427 F.2d 446 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). *See* notes 42-60 and accompanying text *infra*.

42. NLRB v. General Stencils, Inc., 438 F.2d 894, 901 (2d Cir. 1971).

43. 438 F.2d 894 (2d Cir. 1971).

44. *Id.* at 901-02.

45. *Id.* at 901. The court recognized the Board's distaste for using its rulemaking powers, and the difficulty of constructing a rule to cover all the variations of employer unfair practices, but was of the opinion that a rule based on one or more hypothetical situations would at least give notice of the Board's outlook. *Id.*

46. *Id.* at 902. The court maintained that an opinion by the full Board in a *Gissel* bargaining order case would furnish a framework of consistency for the three-member panels to which the Board usually delegates authority. *Id.*

47. *Id.* On remand, the Board failed to adopt any general principles, and simply found, on the basis of the facts of the particular case, that a bargaining order was required. General Stencils, Inc., 195 N.L.R.B. 1109, 1111 (1972). Then-Chairman Miller dissented, finding that under the general principles he had proposed there was an insufficient showing of dissemination of the employer's threats. *Id.* at 1114 (Miller, Chairman, dissenting). Pursuant to Miller's formulation, employer misconduct could be divided into two categories—action and threats. *Id.* at 1112-13 (Miller, Chairman, dissenting). Employer action, Miller indicated, was sufficient to justify per se imposition of a bargaining order when it included 1) the grant of significant benefits, or 2) repeated "reassignment, demotion, or discharge of union adherents." *Id.* at 1112 (Miller, Chairman, dissenting). *See* 29 U.S.C. §§ 158(a)(1), (3). Threats by employers, though never per se justification for a bargaining order, could serve as the basis for an order to bargain, according to Miller, contingent upon the answers to three questions: "(1) What actions were threatened?; (2) Were the threats under all circumstances, likely to be seriously regarded?; (3) How widely were the threats disseminated among the employee group?" 195 N.L.R.B. at 1113 (Miller, Chairman, dissenting). On petition for enforcement of the Board's reissued order, the Second Circuit indicated that it agreed with Chairman Miller and refused enforcement of the bargaining order due to lack of support on the record. NLRB v. General Stencils, 472 F.2d 170, 172-75 (2d Cir. 1972).

48. *See* 438 F.2d at 901-02; notes 34-35 and accompanying text *supra*.

and detailed reasons for the Board's decisions to issue bargaining orders in the particular cases.[49] These courts have objected to the Board's failure to articulate the insufficiency of traditional remedies, and have questioned the Board's reasoning in deciding that the "laboratory conditions" essential for a secret ballot election were not present.[50]

For example, in *NLRB v. American Cable Systems, Inc. (American Cable I)*,[51] the United States Court of Appeals for the Fifth Circuit interpreted *Gissel* strictly, requiring Board determinations a) that there was a valid card majority in the unit; b) that the unfair labor practices of the employer were "serious and extensive"; c) that there was only a slight possibility that conventional remedies would insure a fair election; and d) that employee sentiment would best be served by an order to bargain.[52] In remanding the case a second time (*American Cable II*), the court further remarked that bargaining orders issued under *Gissel* on the basis of card majority are extraordinary and must be based on *present* need.[53] The court rejected the Board's conclusory statement of findings, requesting specific information in order to satisfy the test of *American Cable I*.[54]

49. *See, e.g.*, First Lakewood Assocs. v. NLRB, 582 F.2d 416 (7th Cir. 1978); Peerless of America, Inc. v. NLRB, 484 F.2d 1108 (7th Cir. 1973); New Alaska Dev. Corp. v. NLRB, 441 F.2d 491 (7th Cir. 1971); NLRB v. Kostel Corp., 440 F.2d 347 (7th Cir. 1971); NLRB v. American Cable Sys., Inc., 414 F.2d 661 (5th Cir. 1969), *enforcement denied on rehearing*, 414 F.2d 661 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). For a discussion of these cases, *see* notes 50-60 and accompanying text *infra*.

50. *See* cases cited note 49 *supra*. According to the Board, its function in election proceedings is to establish conditions "as nearly ideal as possible" in order to determine the employees' true desires, and to ascertain whether these conditions have been fulfilled. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). *See also* note 4 and accompanying text *supra*.

51. 414 F.2d 661 (5th Cir. 1969), *enforcement denied on rehearing*, 427 F.2d 446 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970).

52. 414 F.2d at 668-69.

53. NLRB v. American Cable Systems, Inc., 427 F.2d 446, 448-49, *cert. denied*, 400 U.S. 957 (1970). According to the Fifth Circuit, *Gissel* bargaining orders are not "the type of remedy which is automatically entitled to enforcement at *any* time after the occurrence of the unfair labor practice." 427 F.2d at 448 (emphasis added). The court criticized the Board for failing to consider the circumstances existing at the time it reissued its bargaining order following the first remand:

> [T]he Board refused to look at the contemporary necessity for such an order, satisfying itself with a jejune regurgitation of the Company's 1965 waywardness. We deem such findings insufficient under the teachings of *Gissel* to justify a 1970 bargaining order. *Gissel* does not apply a nunc pro tunc principle, giving the then sins of the Company a now application. . . . Industrial democracy should be allowed to work its will if the present conditions are sufficiently antiseptic for an election.

Id. at 448-49.

54. 427 F.2d at 449. The court stated:

> The response which we received was a litany, reciting conclusions by rote without factual explication. We believe that the questions involved in this area of labor law are far too important for such formalistic and perfunctory treatment. Since *Gissel* teaches us that authorization cards are not as trustworthy as ballots all concerned must be particularly careful lest the principles of majoritarianism in union representation be unnecessarily frustrated by the cavalier use of bargaining orders.

Id. The Fifth Circuit has continued to apply the four-pronged test it set out in *American Cable I*, requiring the Board to make specific findings in each area supported by substantial evidence prior to its enforcement of a bargaining order issued by the Board. *See, e.g.*, Bandag, Inc. v. NLRB, 583 F.2d 765, 770-71 (5th Cir. 1978); NLRB v. Gibson Prod. Co., 494 F.2d 762, 764-66 (5th Cir. 1974). For the *American Cable I* test, *see* text accompanying note 52 *supra*.

The United States Court of Appeals for the Seventh Circuit has similarly criticized the Board for not meeting the standard of "precise analysis required by *Gissel*,"[55] noting that the Board's attention must be focused on the "causal relationship between the unlawful practices and the election process."[56] Mere recital of the employer's unfair labor practices and conclusory statements that its prior conduct rendered the holding of a fair election unlikely were not considered to constitute sufficient compliance with *Gissel*.[57]

In *Peerless of America, Inc. v. NLRB*,[58] the Seventh Circuit clearly enunciated its position that *Gissel* requires the Board to make " 'specific findings' as to the immediate and residual impact of the unfair labor practices on the election process."[59] According to the *Peerless* court, the Board must undertake a "detailed analysis" of the possibility of conducting a fair election, taking into account the effect of continuing misconduct, the potential for future misconduct, and the potential effectiveness of traditional Board remedies.[60]

III. *GISSEL* BARGAINING ORDERS IN THE THIRD CIRCUIT

A. *The Third Circuit's Decision in* Armcor I

Prior to its decision in *Armcor I*,[61] the Third Circuit had enforced bargaining orders issued by the Board pursuant to the Supreme Court's opinion in *Gissel* "without explicitly requiring the Board to support its decision with a statement of findings and conclusions."[62] In these cases, the Third Circuit apparently based its decisions to enforce on both a) its policy of defer-

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55. New Alaska Dev. Corp. v. NLRB, 441 F.2d 491, 494 (7th Cir. 1971). *See also* NLRB v. Kostel Corp. 440 F.2d 347, 351 (7th Cir. 1971). In *New Alaska*, the Board had found past threats to be of such a nature as to preclude the possibility of a fair election. *Id.* In rejecting this analysis as insufficient, the Seventh Circuit articulated which determinations it sought from the Board: 1) the extensiveness of threats and impact on the election; 2) the chance of recurrence of the illegal practice; 3) the possibility that impact could be erased by traditional remedies, thus enabling a fair election to be held; and 4) the likelihood that, on balance, employee sentiment expressed in the prior card majority would be better protected by a bargaining order. *Id.*

56. NLRB v. Kostel Corp., 440 F.2d 347, 351 (7th Cir. 1971).

57. *Id.*

58. 484 F.2d 1108 (7th Cir. 1973).

59. *Id.* at 1118.

60. *Id.* That the Seventh Circuit continues to require specific findings consistent with its decision in *Peerless* is demonstrated by its holding in First Lakewood Associates v. NLRB, 582 F.2d 416 (7th Cir. 1978). The *First Lakewood* court maintained that the Board had failed to consider the future impact of the employer unfair labor practices, had been silent as to whether the employer's conduct was likely to recur, and had not discussed the efficacy of holding an election. *Id.* at 423.

61. 535 F.2d 239 (3d Cir. 1976).

62. *Id.* at 244 n.8, *citing* NLRB v. Juniata Packing Co., 464 F.2d 153 (3d Cir. 1972); NLRB v. Colonial Knitting Corp., 464 F.2d 949 (3d Cir. 1972); NLRB v. Easton Packing Co., 437 F.2d 811 (3d Cir. 1971). The court noted that the opinions in those prior cases "do not indicate whether the Board decisions contained sufficient supporting statements, nor do the opinions indicate that the lack of such statements was raised as an issue." 535 F.2d at 244 n.8.

rence to the Board's "broad discretionary remedial powers,"[63] and b) *Gissel*'s mandate calling for a limited scope of judicial review.[64]

In *Armcor I*, however, the Third Circuit remanded for "specific findings" and a "reasoned analysis justifying a bargaining order under *Gissel*."[65] When issuing the bargaining order, the Board had articulated only that the union had a card majority and that the employer had engaged in various unfair labor practices.[66]

Although recognizing that the reviewing court is not to substitute its judgment for that of the Board in areas of Board expertise,[67] Judge Rosenn, writing for the majority, noted that "deference to the Board's expertise does not require abdication of [the court's reviewing function]."[68] The court intended that the requirement of a "reasoned analysis" from the Board would ensure informed judicial review of the Board's bargaining orders[69] and protect against "arbitrary exercise of the Board's power."[70]

More specifically, the court would have had the Board estimate the actual impact of the unfair labor practices in light of the particular facts of the case, and assess the potential for recurring misconduct on the part of the employer.[71] Further, the court sought an appraisal of the possibility of curing prior unfair labor practices through the use of traditional remedies.[72]

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63. *See, e.g.*, NLRB v. Easton Packing Co., 437 F.2d 811, 814 (3d Cir. 1971). For a discussion of the *Gissel* Court's limitation on the function of the reviewing court, *see* note 36 and accompanying text *supra*.

64. NLRB v. Easton Packing Co., 437 F.2d 811, 814-15 (3d Cir. 1971). *See also* NLRB v. Juniata Packing Co., 464 F.2d 153, 156 (3d Cir. 1972); NLRB v. Colonial Knitting Corp., 464 F.2d 949, 952 (3d Cir. 1972).

65. 535 F.2d at 244.

66. Armcor Indus., Inc., 217 N.L.R.B. 358, 359 (1975). The Board's consideration of the propriety of issuing a bargaining order was limited to the following:

> We have found that on or about May 28, and at all times thereafter, a majority of the Respondent's employees in an appropriate unit signed authorization cards designating the union as their representative for purposes of collective bargaining. Thereafter the Respondent, by its agents and supervisors, engaged in acts and conduct of an extensive and egregious nature, including discriminatory charges, all of which was designed to interrupt, thwart, and destroy the employee's support of the union, and make the holding of a fair election impossible. We therefore find that the circumstances of this case require a bargaining order as the only appropriate remedy for the Respondent's misconduct.

Id. In response to the union organizational campaign, Armcor had discharged two employees, one of whom was considered to be the instigator of the union activity, while the other was among those who had signed union authorization cards. 535 F.2d at 243. In addition, the employer had interrogated various employees regarding their union sympathies, threatened serious economic consequences if a union was to come in, and indicated the opportunity for additional benefits if the union was kept out. *Id.* at 242.

67. 535 F.2d at 245. For the *Gissel* Court's teaching on this issue, *see* note 36 and accompanying text *supra*.

68. 535 F.2d at 245, *citing* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Also sitting on the panel were Circuit Judges Gibbons and Forman. *Id.* at 240. Judge Gibbons filed a separate opinion dissenting in part. *See* notes 75-76 and accompanying text *infra*.

69. *Id.* at 245.

70. *Id.*, *quoting* Walgreen Co. v. NLRB, 509 F.2d 1014, 1018 (7th Cir. 1975).

71. 535 F.2d at 245, *citing* Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1118 n.16 (7th Cir. 1973).

72. 535 F.2d at 245, *citing* Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1118 n.16 (7th Cir. 1973).

This appraisal was to be accomplished by a Board examination of the employer's past misconduct and his subsequent efforts to rectify his misconduct or otherwise ensure a fair election.[73] On remand, the Board was instructed to determine the necessity of a bargaining order in light of the conditions existing at the plant at the time of the remand.[74]

Although agreeing that the employer had committed unfair labor practices and that the Board should be required to undertake a reasoned analysis justifying the issuance of a bargaining order, Judge Gibbons dissented in part from the majority's decision in *Armcor I*.[75] In his view, the reasons set forth by the Board were sufficient and, thus, the bargaining order should have been enforced.[76]

B. *The Rise of the* Armcor I *Doctrine*

The standards developed in *Armcor I* were subsequently applied and elaborated upon in other decisions of the Third Circuit.[77] In *NLRB v. Eagle Material Handling, Inc.*,[78] for example, the court reviewed the Board's bargaining order under the *Armcor I* standards and granted the petition for enforcement.[79] After a careful examination of the findings of both the Board and the ALJ,[80] the Board was found to have rendered an adequately detailed analysis—albeit minimally sufficient—to comply with *Armcor I*.[81]

Again emphasizing the need for a "specific findings," the Third Circuit, in *Hedstrom Co. v. NLRB*,[82] remanded the case for further proceedings because the Board had not, in accordance with *Armcor I*, provided a "detailed analysis" of the possibility of a fair rerun election, nor an assessment of the

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73. 535 F.2d at 245, *citing* Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1118 n.16 (7th Cir. 1973).

74. 535 F.2d at 246. The court instructed the Board to consider whether present conditions at the plant were "still so contaminated as to warrant a bargaining order." *Id. See also* note 53 *supra*. Further, the court indicated its preference for secret ballot elections. 535 F.2d at 246, *citing* NLRB v. Gissel Packing Co., 395 U.S. at 602. *See also* note 39 and accompanying text *supra*.

75. 535 F.2d at 246 (Gibbons, J., dissenting in part).

76. *Id.* Judge Gibbons stated: "I do not share Judge Rosenn's doubt that the unfair labor practices found here would detract from the integrity of the electoral process." *Id.*

77. *See* notes 78-86 and accompanying text *infra*.

78. 558 F.2d 160 (3d Cir. 1977).

79. *Id.* at 166-68.

80. *Id.* at 167. The court noted: "In *Armcor*, unlike this case, the findings of the ALJ affirmed by the Board added nothing to the findings mentioned in the decision of the Board itself. The Board and the ALJ provided identical statements in support of the necessity for a bargaining order." *Id.* at 167 n.10.

81. *Id.* at 167. Although noting that the Board's analysis "lacks the lucidity we would prefer," *id.*, the court explained:

> The bargaining order in the instant case was entered before we rendered our decision in *Armcor*. We mention this not because pre-*Armcor* bargaining orders are subject to less searching review than post-*Armcor* orders, but rather to explain why the Board's findings and analysis are not more complete. This case displays what we consider to be *minimally* sufficient compliance with *Armcor*.

Id. at 167 n.11 (emphasis in original).

82. 558 F.2d 1137 (3d Cir. 1977).

effectiveness of traditional remedies.[83] Conclusory statements that the unfair labor practices had been "numerous and extensive" were considered inadequate.[84]

Shortly thereafter, in a per curiam opinion in *NLRB v. Craw*,[85] the Third Circuit indicated that it expected the Board itself to engage in the "independent analysis" required by *Armcor I*, rather than to simply adopt the findings of the ALJ.[86]

C. Kenworth Trucks—*The Turning Point*

In *Kenworth Trucks of Philadelphia, Inc. v. NLRB*,[87] the court initially reiterated its determination in *Craw*,[88] finding that the Board itself "should undertake to articulate independently the basis of a bargaining order that it will seek to have this Court enforce, and not merely adopt the ALJ's findings and conclusions."[89] The Board had contended that, since the ALJ is an agent of the Board, the Board's adoption of his findings was tantamount to its having made the findings itself.[90] This argument was rejected by the court on the basis of precedent,[91] and on the ground that it is the Board, rather than the ALJ, which is considered the ultimate authority.[92]

The panel in *Kenworth* granted a rehearing[93] in light of a recent Supreme Court decision which cautioned reviewing courts against imposing their conception of proper procedures upon administrative agencies.[94] Al-

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83. *Id.* at 1152. The Board had reversed the ALJ's decision that a bargaining order was unnecessary, but did not issue specific findings of its own. Hedstrom Co., 223 N.L.R.B. 1409, 1410 (1976). The case arose in the context of a union challenge to an election it had lost in one of the employer's plants. *Id.* The challenge was based on the union's contention that the employer's election-eve speech to a "captive audience" of employees constituted an unfair labor practice. *Id.*

84. 558 F.2d at 1150.

85. 565 F.2d 1267 (3d Cir. 1977). The unfair labor practice at issue was the employer's prediction that there could be layoffs, a wage freeze, and drawn-out bargaining if a union was successfully organized. *Id.* at 1268.

86. *Id.* at 1271. The court concluded that, under the doctrine of *Armcor I*, it was impermissible for the Board to simply adopt the findings and conclusions of the ALJ because a bargaining order is an extraordinary remedy requiring "the *Board* . . . to explain with specificity the results of the unfair labor practices, and, in particular, the unlikelihood of a fair election." 565 F.2d at 1272 (emphasis added).

87. 580 F.2d 55, *enforced on rehearing*, 580 F.2d 61 (3d Cir. 1978).

88. *Id.* at 59. For a discusson of *Craw*, *see* notes 85-86 and accompanying text *supra*.

89. 580 F.2d at 61.

90. *Id.* at 59.

91. *Id.* For a discussion of the cases serving as precedent for the court's opinion, *see* notes 65-86 and accompanying text *supra*.

92. 580 F.2d at 60. The court stated that "[w]hat is warranted is some guarantee that the *NLRB* . . . has carefully considered and sifted the evidence of unfair practices in determining whether the remedy of a bargaining order is needed." *Id.* (emphasis added).

93. *Id.* at 61.

94. *Id.*, *citing* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 525 (1978). In *Vermont Yankee*, the Supreme Court reversed a decision of the District of Columbia Circuit which had held that the Atomic Energy Commission had applied inadequate procedures in deciding to issue a license, even though such procedures were in compliance with the Administrative Procedures Act. 435 U.S. at 535.

though continuing to require a detailed explanation for the decision that a bargaining order is necessary,[95] the Third Circuit retreated somewhat from its *Armcor I* standards,[96] holding that the Board need not supply an independent explanation if it specifically adopts the findings and reasoning of the ALJ.[97]

D. *The Decline of* Armcor I

What remained of the *Armcor I* doctrine suffered a heavy blow in *Frito-Lay, Inc. v. NLRB*.[98] In *Frito-Lay*, the court upheld a bargaining order issued by the Board,[99] without discussion of the *Armcor I* doctrine.[100] Apparently yielding to the "experienced judgment" of the Board,[101] the court found substantial evidence to support the Board's conclusion that the unfair labor practices were sufficiently egregious to undermine the union's majority status and to preclude the possibility of a fair rerun election.[102] In a subsequent decision, *NLRB v. Daybreak Lodge Nursing and Convalescent Home, Inc.*,[103] the court considered the dictates of *Armcor I*,[104] but, relying on *Kenworth*,[105] simply indicated that "[t]he ALJ's findings and conclusions which the Board adopted were sufficient to meet the standard of analysis and elucidation set by *Armcor I*."[106]

Two years after its decision in *Armcor I*, the Third Circuit was asked again to enforce the Board's bargaining order against Armcor Industries as issued following the Board's reconsideration on remand.[107] *Armcor II* arose

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95. 580 F.2d at 62.

96. *See* notes 65-86 and accompanying text *supra*.

97. 580 F.2d at 62-63. The court specifically limited its holding to those instances "where the ALJ has provided a rational statement of the reasons for a bargaining order and the NLRB has adopted such a statement." *Id.* at 63 n.6.

98. 585 F.2d 62 (3d Cir. 1978). While *Kenworth* left intact the basis of the *Armcor I* doctrine—*i.e.*, the requirements of "specific findings" and "a detailed analysis" to support the bargaining order—it removed the requirement that the Board itself must undertake the findings and analysis. *See* notes 93-97 and accompanying text *supra*.

99. Frito-Lay, Inc., 232 N.L.R.B. 753, 754-55 (1977). The employer in *Frito-Lay* was charged with implementing a raise, threatening shutdown of the plant, and coercing individual employees in response to union organizational activity. *Id.* at 755. The union, which was subsequently defeated in the election, objected on the basis of the employer's unfair labor practices, culminating in the plant's shutdown. *Id.* at 754-55.

100. 585 F.2d at 63-69. Moreover, the *Frito-Lay* court failed to discuss any of the relevant cases subsequent to *Armcor I*. *Id.* For a discussion of these cases, *see* notes 77-97 and accompanying text *supra*.

101. 585 F.2d at 68-69, *citing* NLRB v. Juniata Packing Co., 464 F.2d 153, 156 (3d Cir. 1972).

102. 585 F.2d at 68-69.

103. 585 F.2d 79 (3d Cir. 1978).

104. *Id.* at 81-82.

105. *Id.* at 81. For a discussion of *Kenworth*, *see* notes 87-97 and accompanying text *supra*.

106. 585 F.2d at 81.

107. NLRB v. Armcor Indus., Inc. (Armcor II), 98 L.R.R.M. 2441 (3d Cir. 1978). The *Armcor I* court had "remanded the case to the Board for 'further analysis and findings on the necessity for a bargaining order,' and instructed the Board to 'consider whether present conditions at the plant are still so contaminated as to warrant' such an order." *Id.* at 2442, *quoting* NLRB v. Armcor Indus., Inc., 535 F.2d at 246. *See also* notes 65-74 and accompanying text *supra*.

out of the Board's petition for enforcement of this reissued bargaining order.[108] In its reconsideration, the Board had disregarded the court's instruction to consider the present conditions at the job site,[109] analyzing, instead, the effect of the employer's conduct at the time of the unfair labor practices.[110] The *Armcor II* court again remanded,[111] requiring the Board to fully consider the changed circumstances now existing at the plant.[112]

Dissenting in *Armcor II*, Judge Higginbotham stated that he would have enforced the bargaining order based on the Board's finding that the employer's past practices could have had a sufficiently serious present impact.[113] He did not, however, require the Board to do anything more than speculate as to the present conditions at the plant, nor did he clearly opine whether the Board must consider changed circumstances following a remand.[114] Further, he criticized the majority for "disregard[ing]" the Supreme Court's "admonition" against imposing upon the Board what the court considers to be the proper procedure.[115]

Armcor II was subsequently reheard en banc (*Armcor III*),[116] and, after reconsideration of the case, was affirmed without opinion.[117] The court,

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108. 98 L.R.R.M. at 2441-42.

109. *Id.* at 2442, *citing* NLRB v. Armcor Indus., Inc., 535 F.2d at 246. The *Armcor II* court stated:

> When we remanded the case to the Board, we specifically instructed it to justify the bargaining order in light of the conditions existing at Armcor at the time of the remand and the preference for a free election. . . . Instead the Board has given us an elaborate explanation of why the *initial* bargaining order would have been necessary at the time of the unfair labor practices.

98 L.R.R.M. at 2442 (emphasis by the court), *citing* NLRB v. Armcor Indus., Inc., 535 F.2d at 246.

110. Armcor Indus., Inc., 227 N.L.R.B. 1543, 1545 (1977).

111. 98 L.R.R.M. at 2444-45.

112. *Id.* at 2442. The panel consisted of Circuit Judges Rosenn and Higginbotham, and District Judge Van Artsdalen, sitting by designation. *Id.* at 2441. Judge Rosenn, again, wrote the opinion for the majority. *See* note 68 and accompanying text *supra*.

113. 98 L.R.R.M. at 2445 (Higginbotham, J., dissenting). Judge Higginbotham deferred to the Boards's "careful analysis" of the impact of the employer's conduct. *Id.* at 2446 (Higginbotham, J., dissenting). Although submitting that the Board's order was in compliance with "the standards set forth in Armcor I," Judge Higginbotham indicated that he did not necessarily support the rationale of that decision, stating: "If I were obliged to *in banc* reevaluate the rationale of Armcor I, I might be inclined to find the dissent of Judge Gibbons more persuasive." *Id.* at 2446 n.1 (Higginbotham, J., dissenting), *citing* 535 F.2d at 246 (Gibbons, J., dissenting in part).

114. *See* 98 L.R.R.M. at 2446 (Higginbotham, J., dissenting). For the majority's holding regarding changed circumstances, *see* text accompanying note 112 *supra*.

115. 98 L.R.R.M. at 2446, *citing* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 525 (1978). *See* note 94 and accompanying text *supra*.

116. 588 F.2d 821 (3d Cir. 1978). *See* FED. R. APP. P. 35(a). Rule 35(a) provides:

> A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decision, or (2) when the proceeding involves a question of exceptional importance.

Id. For an indication of the split in the Third Circuit regarding the issues raised in the *Armcor* litigation, *see* 535 F.2d at 246 (Gibbons, J., dissenting in part); 98 L.R.R.M. at 2446 n.1 (Higginbotham, J., dissenting); notes 75-76 & 113-15 and accompanying text *supra*.

117. 588 F.2d 821 (3d Cir. 1978).

in issuing no opinion or rulings, effectively refused enforcement of the bargaining order.[118]

IV. AN EVALUATION OF THE ALTERNATIVES PRESENTED BY THE EN BANC DECISION OF THE THIRD CIRCUIT IN *ARMCOR III*

As a result of the court's even split in *Armcor III*,[119] what is expected of the Board in issuing *Gissel* bargaining orders remains undecided in the Third Circuit. It is suggested that the *Armcor I* requirements, by which the Third Circuit compelled the Board to be more responsive to the teachings of *Gissel*,[120] may have been eviscerated.[121] The following issues, which remain open because of the en banc court's failure to arrive at a majority, will continue to plague the Third Circuit: 1) whether the Board should be required to make specific findings and to "set forth a reasoned analysis justifying a bargaining order under *Gissel*";[122] 2) whether the Board, on remand, will be required to confront, in a meaningful way, the changed circumstances existing at the time of the remand;[123] and 3) whether it is sufficient for the Board to adopt the findings and conclusions of the ALJ, rather than engaging in an independent analysis.[124]

A. *The Board Should Be Required to Make Specific Findings and Provide a Reasoned Analysis in Order to Justify a* Gissel *Bargaining Order*

The degree of detail ultimately required of the Board in justifying the issuance of a *Gissel* bargaining order is key to the Board's burden of proof in seeking enforcement of its order. In light of the fact that the Board's failure to provide a "detailed analysis" was the basis for the court's remand in *Armcor I*,[125] and considering that the *Armcor II* dissent agreed with Judge Gibbons' position in *Armcor I* that the Board's statement of reasons *was* sufficient,[126] it is likely that this was an issue which subsequently divided the Third Circuit sitting en banc. It is submitted that the effect of Judge Gibbons' position would be to enforce bargaining orders in virtually every case, since the Board's statement of reasons, which he found satisfactory, constituted nothing more than conclusory boiler plate.[127]

Arguably, the Supreme Court's caution against judicial intrusion into agency procedures[128] suggests that reviewing courts ought not require more

118. *See* 588 F.2d at 821.
119. *See* notes 116-18 and accompanying text *supra*.
120. *See* notes 65-86 and accompanying text *supra*.
121. *See* notes 125-27 and accompanying text *infra*.
122. *See* notes 65-73 and accompanying text *supra*.
123. *See* notes 74 & 109-14 and accompanying text *supra*.
124. *See* notes 85-92 & 97 and accompanying text *supra*.
125. *See* notes 65-74 and accompanying text *supra*.
126. 98 L.R.R.M. at 2446 n.1 (Higginbotham, J., dissenting), *citing* 535 F.2d at 246 (Gibbons, J., dissenting in part). *See* notes 75-76 and accompanying text *supra*; note 113 *supra*.
127. For the Board's statement of reasons in *Armcor I*, *see* note 66 *supra*.
128. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 525 (1978); note 94 and accompanying text *supra*.

of the Board than the Board itself considers sufficient.[129] In asking the Board for a detailed analysis in place of conclusory assertions, however, the *Armcor I* court did not substitute its conception of proper procedures for the judgment of the Board.[130] Although the requirement for "specific findings" might further burden the Board and indirectly affect its operational procedures, the courts have a recognized need for detailed records on which to base their review.[131] In fact, in the same opinion in which the Supreme Court reminded the courts to accord deference to agency procedures, the Court indicated that a matter must be remanded when an agency finding cannot be sustained on the record made in agency proceedings.[132] It is suggested that the "specific findings" requirement of *Armcor I*[133] is more akin to requiring an adequate record than to imposing additional, unwanted procedures upon the Board.

A second criticism of the *Armcor I* rule might be that requiring "specific findings" and a "reasoned analysis" usurps the Board's function in derogation of the *Gissel* Court's clear admonition that deference and respect be accorded the Board's choice of remedy.[134] Arguably, so long as the Board appears to have acted reasonably, a reviewing court should defer to the Board's expertise in determining whether a bargaining order is warranted. However, as one commentator has stated: "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 under the guise of 'expertise.' "[135] Similarly, the *Armcor I* court pointed out that the courts are charged with a reviewing function, and deference to the Board does not mandate "abdication of that function."[136] It is submitted that requiring a reasoned analysis so that the courts can undertake informed judicial review in no way usurps the Board's authority or intimates that its choice of remedy is not respected.

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129. Note that *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* dealt with the relationship between administrative agencies and courts in general, and was not a labor-related case involving the Board. *See* 435 U.S. 519, 538-58 (1978); note 94 *supra*.

130. The court did not suggest or impose procedures by which the Board was to make its determinations, but simply required the Board to document the process which it used. 535 F.2d at 245.

131. *See* notes 67-69 and accompanying text *supra*. In remanding to the Board, the *Armcor I* court manifested its view that certain minimum findings must be made by the Board in order for the court to be able to accurately determine whether the Board acted correctly in deciding to issue a bargaining order under *Gissel*. 535 F.2d at 245.

132. 435 U.S. at 549, *quoting* Camp v. Pitts, 411 U.S. 138, 143 (1973). The Court stated: "If that [agency] finding is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [it] for further consideration." 435 U.S. at 549, *quoting* Camp v. Pitts, 411 U.S. 138, 143 (1973).

133. *See* note 131 *supra*.

134. *See* notes 24-27 & 36 and accompanying text *supra*.

135. Perl, *The NLRB and Bargaining Orders: Does a New Era Begin with Gissel?*, 15 VILL. L. REV. 106, 117 (1969).

136. 535 F.2d at 245, *citing* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951). *See also* 29 U.S.C. § 160(e).

It is further contended that the failure of the Board to make "specific findings" and to undertake "a detailed analysis," together with the failure of courts to impose such requirements on the Board, undermine the twin goals of *Gissel*—*i.e.*, deterrence of employer misconduct and effectuation of employee free choice.[137] Free choice, the paramount principle of our national labor policy,[138] is advanced by thorough and complete evaluation of the impact of the employer's unlawful conduct on the employees. Imposition of a bargaining order without considering whether the employees would be able to express their free choice despite the employer's unfair labor practices renders the bargaining order punitive rather than remedial.[139] In order to avoid denying employees the freedom to choose their bargaining representative, if any, it is essential that the Board consider the effectiveness of traditional remedies.[140] Since election is the preferred method for ascertaining whether a union has attained majority status,[141] a *Gissel* bargaining order ought not to issue until the Board has considered, and found impossible, the holding of a fair election. It is suggested that the court in *Armcor I* did no more than require the Board to fulfull its functions as delineated by the Supreme Court in *Gissel*.[142]

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137. *See* 395 U.S. at 614.

138. *See* 29 U.S.C. § 157 which states:

> 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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Id. (emphasis added).

139. *See* NLRB v. American Cable Systems, Inc. (*American Cable II*), 427 F.2d 446, 448 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). The *American Cable II* court stated: "The [bargaining] order is not a traditional punitive remedy, but is a therapeutic one. It is not, therefore, the type of remedy which is automatically entitled to enforcement at any time after the occurrence of the unfair labor practice." *Id.*

140. For a discussion of the traditional remedies, *see* notes 19-20 & 39 and accompanying text *supra*.

141. *See* text accompanying note 39 *supra*.

142. *Compare* NLRB v. Gissel Packing Co., 395 U.S. at 614-15 *with* NLRB v. Armcor Indus., Inc., 535 F.2d at 244-45. In *Gissel*, the Supreme Court expected "specific findings" from the Board, anticipating an analysis, for example, of "the extensiveness of the employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." 395 U.S. at 614. Further, the Court required the Board to consider "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" before it issues a bargaining order. *Id.* at 614-15.

As read and applied by the Third Circuit in *Armcor I*,

> *Gissel* itself contemplates that the Board "must make 'specific findings' as to the immediate and residual impact of the unfair labor practices on the election process and that the Board must make a 'detailed analysis' assessing the possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of ordinary remedies.

535 F.2d at 244, *quoting* Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1118 (7th Cir. 1973).

B. *The Board, on Remand, Should Consider Changed Circumstances Existing at the Time of the Remand*

In *Armcor I*, the Third Circuit asked the Board to consider the changed circumstances existing at the plant at the time of the remand, requiring the Board to evaluate whether the disruptive effect of the employer's unfair labor practices persisted to such a degree that a fair election was still impossible.[143] It is suggested that, because this was precisely the issue upon which the outcome of *Armcor II* turned, the *Armcor III* court must have considered, and may have been divided over, this same question in its rehearing en banc.[144]

An evaluation of the treatment to be accorded changed circumstances on remand must take into account the decision of the United States Court of Appeals for the Ninth Circuit in *NLRB v. L.B. Foster*.[145] In this case, the employer argued that circumstances had drastically changed between the time the Board had issued its order to bargain and the time the court considered the Board's petition to enforce.[146] The Ninth Circuit's position, which the Board subsequently adopted,[147] was that consideration of present conditions would prolong final disposition of a case by providing an incentive for employers to continue litigation for as long as possible.[148] Therefore, the court concluded that changed conditions should not be considered in such a situation.[149]

Admittedly, circumstances continually change, and if these changes were to be considered in every enforcement decision, Board bargaining orders would be difficult to enforce. Significantly, however, the position of the Ninth Circuit and the Board is distinguishable from that of the Third Circuit, since the *Armcor* litigation involved a remand for additional findings, while the Ninth Circuit case merely involved a delayed petition for enforcement.[150] The importance of this distinction will be made apparent by considering a Fifth Circuit case which was similar to the *Armcor* situation.

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143. *See* 535 F.2d at 246. *See also* note 74 and accompanying text *supra*.

144. *See* 98 L.R.R.M. at 2442. *See also* note 112 and accompanying text *supra*.

145. 418 F.2d 1 (9th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

146. 418 F.2d at 4. The Ninth Circuit enforced the bargaining order because it did not wish to encourage employers to prolong litigation by refusing to abide by Board orders and then asserting that circumstances had changed at the time the case reached the appellate court for enforcement. *Id.*

147. *See* Armcor Indus., Inc., 227 N.L.R.B. at 1545.

148. 418 F.2d at 4. *See* note 146 *supra*.

149. 418 F.2d at 4.

150. *Compare* NLRB v. Armcor Indus., Inc., 98 L.R.R.M. at 2442 *with* NLRB v. L.B. Foster Co., 418 F.2d at 4. The *Armcor II* court stated:

> We do not hold that the Board must always consider present conditions at the plant of every labor law infractor ordered to bargain by the Board. We only hold that present conditions become relevant after a remand caused by inadequate justification by the Board for its initial order. . . . After a remand . . . the parameters have changed. The critical question becomes whether the employees at the plant at the time of the remand would *still* be unable to participate in a fair election.

Like the *Armcor* cases, *NLRB v. American Cable Systems, Inc. (American Cable II)*,[151] involved a remand to the Board for additional findings in light of *Gissel*.[152] It is submitted that the approach of the Fifth Circuit, echoed by the Third Circuit in *Armcor I*, provides the proper procedure under the Supreme Court's opinion in *Gissel*. Since the delay in final disposition of the case results from the Board's failure to make the specific findings which the court requires, it is reasonable to order the Board to evaluate the changed circumstances at the time of the remand. Consideration of the subsequent circumstances will not encourage abuse by the employer in the litigation process since the employer cannot precipitate a remand by failing to adhere to a bargaining order.[153] It is suggested that failure to determine the likelihood of a fair election on remand is to ignore what ought to be one of a *Gissel* bargaining order's most significant goals—the effectuation of employee free choice.[154]

C. *Rather Than Engaging in an Independent Analysis, It Is Sufficient for the Board to Adopt the Findings and Conclusions of the ALJ*

The rule adopted by the Third Circuit in *Armcor I* required the *Board* to justify the issuance of a bargaining order by specifically indicating the impact of the employer's unfair labor practices on the election process, and providing a detailed analysis of the possibility of holding a fair election.[155] In *Craw*, the court held the Board itself responsible for finding the specific facts, and asserted that this duty could not be discharged, in compliance with *Armcor I*, through a perfunctory adoption of the ALJ's findings.[156] This principle was abandoned upon rehearing in *Kenworth*[157] in which the panel ruled that if the ALJ had satisfied the *Armcor I* requirements of a

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Id. (emphasis in original). *See also* NLRB v. American Cable Systems, Inc., 427 F.2d 446, 448 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). In distinguishing *L.B. Foster*, the *American Cable II* court stated:

> The *Foster* case is distinguishable because although it was decided after *Gissel* it did not involve a remand in light of that case to the Board for additional findings. In the instant case, . . . [t]he Board's original findings were inadequate under the teachings of *Gissel* and the case had to be remanded to the Board for further findings.

427 F.2d at 448.

151. 427 F.2d 446 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). For a discussion of the *American Cable* cases, *see* notes 51-54 and accompanying text *supra*.

152. *Compare* NLRB v. Armcor Indus., Inc., 98 L.R.R.M. at 2442 n.1 *with* NLRB v. American Cable Sys., Inc., 427 F.2d at 448. For the *Armcor* and *American Cable* courts' consideration of the fact that the bargaining orders had been remanded, *see* note 150 *supra*.

153. *See* Note, *"After All, Tomorrow Is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?*, 31 STAN. L. REV. 505, 524-25 (1979).

154. *See* note 37 and accompanying text *supra*. *Gissel* was clear in indicating that the goal of effectuating employee free choice was as important as deterring employer misconduct. *Id.* The failure to consider changed circumstances on remand may effectively punish the employer by reaffirming the bargaining order, but this may occur at the expense of employee free choice which may better be served by an election.

155. 535 F.2d at 245-46. *See* notes 65-74 and accompanying text *supra*.

156. 565 F.2d at 1270. *See* notes 85-86 and accompanying text *supra*.

157. 580 F.2d at 61. *See* note 97 and accompanying text *supra*.

"detailed analysis," and the Board had specifically adopted the ALJ's findings and conclusions, it would be unnecessary for the Board to make specific findings of its own.[158]

It is suggested, that this issue most likely did not divide the Third Circuit in its rehearing of *Armcor* en banc, since by that time the *Armcor I* requirement of independent Board findings had been modified and already applied as modified.[159] Furthermore, this issue was not directly before the court; in its consideration of the case on remand, the Board had itself engaged in discussion of the case without reliance on the opinion of the ALJ.[160] In light of the *Armcor III* court's failure to explicitly approve or disapprove the *Armcor I* requirement of an independent analysis by the Board, however, discussion of the competing policy considerations may be useful for future allocation of the responsibility should the Third Circuit readopt that requirement.

Arguably, since it is the Board which is considered to have expertise in matters of labor law and which is, therefore, invested with the authority to make policy decisions,[161] the Board itself ought to undertake the required analysis. Further, because bargaining orders are extraordinary remedies,[162] it would seem reasonable to require the Board itself to determine whether such a remedy is appropriate.

Conversely, since the Board is faced with a very large volume of cases, it is customary and reasonable for the Board, rather than engaging in an independent analysis, to simply adopt those findings and conclusions of the ALJ which it finds acceptable.[163] It is submitted that this practice is satisfactory because the Board itself retains ultimate authority in that it must either specifically adopt the findings and conclusions of the ALJ, or engage in its own analysis.[164] In addition, the ALJ is in a better position than the Board to determine whether a bargaining order should issue because he has heard the witnesses and can render a decision based on live testimony rather than on a bare record.[165]

It is suggested that to require the Board to engage in independent analysis in all of the cases would constitute nothing less than mandating that the Board discard its adopted practice and procedure, contrary to the Supreme Court's express directive that reviewing courts should not impose their conceptions of proper procedures for decisionmaking with respect to

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158. 580 F.2d at 62-63. The principle adopted by the panel upon rehearing in *Kenworth* was clearly adhered to by the court in *Daybreak Lodge*. *See* 585 F.2d at 79; notes 103-06 and accompanying text *supra*.

159. *See* notes 157-58 and accompanying text *supra*.

160. *See* 227 N.L.R.B. 1543, 1543-45 (1977).

161. *See* note 36 and accompanying text *supra*.

162. *See* 395 U.S. at 614. Bargaining orders are not to be issued unless traditional conventional remedies have been determined to be inadequate. *Id. See* notes 19-20, 26 & 39 and accompanying text *supra*.

163. *See* R. GORMAN, *supra* note 1, at 8-9.

164. *See id.*

165. *Id.*

subjects within the scope of agency expertise.[166] Furthermore, imposition of such a burden on the Board could foreseeably reduce its productivity, since an in-depth analysis and specific findings would be required in every case concerning the propriety of a bargaining order. It is submitted that the Supreme Court's recently expressed philosophy has so tipped the balance in favor of the government interest in having agencies "free to establish their own procedures,"[167] that if the "detailed analysis" requirement has survived the rehearing of *Armcor* en banc, or alternatively, if it is revived, the Board's adoption of ALJ findings and conclusions should be considered sufficient.

V. CONCLUSION

Upon reconsideration of the issues presented by a petition for enforcement of a *Gissel* bargaining order, the Third Circuit should reinstitute the *Armcor I* requirements of "specific findings" and a "detailed analysis" as to the necessity for the issuance of the order.[168] Protection of employee free choice mandates at a minimum that the Board consider the effect of traditional remedies and articulate the reasons supporting its conclusions. Furthermore, a detailed analysis was required by the *Gissel* Court[169] and would appear to be mandatory if a reviewing court is to perform its function adequately.

It has been suggested that in its rehearing of *Armcor* en banc, the Third Circuit may have split over two issues peripheral to the "specific findings" rule developed in *Armcor I*.[170] With respect to the first issue, the sugges-

166. *See* note 94 and accompanying text *supra*.

167. Kenworth Trucks of Phila., Inc. v. NLRB, 580 F.2d at 62.

168. The post-*Armcor III*, *Gissel* bargaining order cases illustrate that the state of the law on this issue in the Third Circuit remains confused. *Compare* Midland-Ross Corp. v. NLRB, 103 L.R.R.M. 2908 (3d Cir. 1980) *with* Rapid Mfg. Co. v. NLRB, 103 L.R.R.M. 2162 (3d Cir. 1979).

In *Rapid Manufacturing*, the court refused to enforce a bargaining order because the record lacked "substantial evidence that the unfair labor practices in this case were serious enough, or pervasive enough" to dissipate the union's majority and preclude the holding of a fair election. 103 L.R.R.M. at 2166. In essence, although the court did not mention the *Armcor I* requirements, it refused enforcement of the order on the very similar ground of failure by the Board to comply with *Gissel*. *Id.* at 2167. The court stated: "We would be remiss in our judicial functions if, on a record as sparse as this one, we were to enforce a bargaining order which, on every count, cannot even be regarded as colorably in compliance with Gissel." *Id.*

Conversely, in *Midland-Ross*, a 2-1 majority of the court enforced a bargaining order, finding that the reasoning of the Board was supported by substantial evidence without mention of the *Armcor I* requirements. 103 L.R.R.M. at 2915. Judge Weis, however, made reference to the *Armcor I* requirements in his dissent, stating that "acceptance of Board 'expertise' to support conclusory 'boilerplate', without a reasoned analysis does not comport with proper judicial review." *Id.* at 2918 (Weis, J., dissenting), *citing* NLRB v. Armcor Indus., Inc., 535 F.2d 239 (3d Cir. 1976). Moreover, Judge Weis noted that the "[r]outine issuance of bargaining orders after a review of the facts and a conclusory finding that the unfair labor practices were 'egregious', 'pervasive' or 'chilling' is simply unacceptable." *Id.* Judge Weis also noted that the Board failed to assess the efficacy of traditional remedies in ensuring a fair rerun election. *Id.* at 2919 (Weis, J., dissenting).

169. 395 U.S. at 614.

170. *See* notes 143-67 and accompanying text *supra*.

tion has been made that, in light of recent Supreme Court pronouncements, it would be sufficient for the Board to adopt the findings and conclusions of an ALJ whose opinion is sufficiently detailed to satisfy *Armcor I*, without requiring independent analysis by the Board itself.[171] Concerning the second issue in dispute, this comment has suggested that should a court find it necessary to remand to the Board for additional findings, it would be appropriate to require an analysis of the conditions presently existing at the plant—taking into account changed circumstances—in determining whether a bargaining order should issue.[172]

Upon reconsideration of these issues, it is submitted that the failure of the Third Circuit to return to an *Armcor I* requirement of "specific findings" could only be viewed as an abrogation of the court's reviewing function.[173] If the court is not provided with specific findings and a detailed analysis of the necessity for the utilization of the extraordinary remedy of a bargaining order, it will be forced to base its review on the Board's conclusions, support for which is not presented in the record. Board bargaining orders will inevitably be enforced, and the court will function merely as a rubber stamp. Liberal or routine enforcement of Board bargaining orders would counter the crucial teaching of *Gissel* that elections are preferred in order to best effectuate the goal of employee free choice.*

Louis A. Minella

171. *See* notes 155-67 and accompanying text *supra*.
172. *See* notes 143-53 and accompanying text *supra*.
173. *See* notes 132 & 136 and accompanying text *supra*.

* *Editor's Note:* As this Comment went to print, the Third Circuit, sitting en banc, decided Hedstrom Co. v. NLRB (*Hedstrom II*), Nos. 78-1800-01 (3d Cir. Aug. 6, 1980), which resolved the split in the court evidenced in *Armcor III* and settled the issue of the analysis to be required of the Board in issuing a bargaining order in the Third Circuit. For a discussion of the *original* panel decision in Hedstrom (*Hedstrom I*), *see* notes 82-84 and accompanying text *supra*. In a further retreat from the *Armcor I* doctrine, the *Hedstrom II* court exhibited an extremely deferential approach to the Board's determination that a bargaining order was appropriate and refused to consider the issue of whether changed circumstances should have affected the Board's decision. *See* Hedstrom Co. v. NLRB, Nos. 78-1800-01, slip op. at 16 (3d Cir. Aug. 6, 1980). Judge Rosenn—the author of the court's opinions in *Armcor I & II*—joined by Judges Weis and Garth, dissented, concluding that the majority had improperly deferred to the Board which had not provided any evidence demonstrating that a fair rerun election would be impossible and whose presumed expertise is actually "more imagined than real." *Id.* slip op. at 38-39 (Rosenn, J., dissenting). For a discussion of the *Armcor* line of cases, *see* notes 65-84 & 107-18 and accompanying text *supra*.