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Judicial Enforcement of NLRB Bargaining Orders: What Influences the Courts?

Terry A. Bethel and Catherine A. Melfi***

INTRODUCTION

The basic policy of the National Labor Relations Act (NLRA)¹ is one of majority rule: unions typically acquire the right to represent employees by convincing a majority of them that such representation is in their best interest. Unions then seek voluntary recognition from employers or petition the National Labor Relations Board (NLRB) for an NLRB-conducted election. The campaign period preceding the election is often hotly contested, with both employer and union subjecting employees to speeches, letters, and other forms of propaganda. On occasion, the NLRB finds that an employer's campaign practices threatened employees or otherwise interfered with their ability to exercise free choice. The NLRB's typical remedy is a rerun election and an order to cease and desist from the unlawful campaign practices.²

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¹ The National Labor Relations Act (NLRA), Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. IV 1986)).

² See NLRA § 3 (amended 1947), 29 U.S.C. § 153 (1982) (establishing National Labor Relations Board (NLRB)). The NLRB derives its remedial power from NLRA § 10(c), 29 U.S.C. § 160(c) (1982). This section empowers it to order offenders to cease and desist from their unfair labor practices "and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the] subchapter" *Id.* A detailed review of NLRB regulation of representation

Sometimes, however, the NLRB determines that an employer's unfair labor practices are so severe that they cannot be rectified by the usual remedies, and that despite the order to cease and desist, the coercive atmosphere created by the employer will infect a subsequent election. When the NLRB believes that a fair election cannot be held, it often remedies the employer's unlawful conduct by issuing an order to bargain with the union, commonly called a "*Gissel*³ bargaining order." The Board can issue these orders regardless of whether the union lost a previous election and, until recently, notwithstanding the fact that the union has never had majority employee support.⁴

The NLRB's assumption is that *Gissel* bargaining orders protect employees' rights by denying employers the fruits of their illegal conduct and by establishing the very relationship which the conduct sought to destroy. At this point, one can only speculate about the overall effectiveness of the remedy. However, one effect of the orders is certain: a large number of the cases are reviewed by the courts of appeals.

This finding by itself is not surprising. NLRB remedial orders are not self-executing. If an employer fails or refuses to comply with an order, the Board's only recourse is to petition the appellate courts for enforcement.⁵ The Board is not required to seek enforcement, and in many cases employers comply without further legal proceedings. In bargaining order cases, however, the employer has engaged in unusually serious unfair labor practices. The Board might well believe that judicial enforcement is necessary to encourage employer compliance.

campaigns is beyond the scope of this Article. It is sufficient to note that the Board regulates both the content and the manner of campaign tactics employed by unions and employers, including coercive speech and conduct. See generally R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 132-78 (1976). For a thorough review of NLRB practice, see Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964).

³ The name comes from the Supreme Court's opinion in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), in which the Court upheld the Board's authority to impose remedial bargaining orders.

⁴ The issue in *Gissel* was the NLRB's authority to impose a bargaining order as a remedy for an employer's serious unfair labor practices when the union had once demonstrated majority support through signed authorization cards. In *Conair Corp.*, 261 N.L.R.B. 1189 (1982), *enforcement denied*, 721 F.2d 1355 (D.C. Cir. 1983), the Board claimed authority to issue a bargaining order to remedy particularly egregious employer conduct, even in the absence of a showing of union majority status. *Conair* was overruled by the Board in *Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984). For further discussion of the issues these cases raise, see Bethel, *Recent Decisions of the NLRB — The Reagan Influence*, 60 IND. L.J. 227 (1985).

⁵ See NLRA § 10(e), 29 U.S.C. § 160(e) (1982) (describing appellate procedure).

Similarly, "any person aggrieved" by the issuance of a Board remedial order, such as the employer against whom the order operates, can petition the court for review.⁶ Given the bargaining order's controversial nature and that such orders typically issue only against employers who have fought vigorously against a union, employers might use the review process to avoid, or at least to delay, the bargaining obligation.

This Article examines all reported appellate decisions in bargaining order cases rendered over a four-year period.⁷ Part I begins by explaining appellate courts' standard of review for bargaining order cases. Part II identifies factors affecting courts' likelihood of enforcing the orders. Part III examines data collected from this Article's study to note trends in court enforcement and the variables affecting these trends. Part IV reports the study's results. These results will assist lawyers contemplating judicial review of bargaining order cases by isolating the factors that apparently motivate judicial decisions (and the importance of those factors to particular courts). In addition, the results examine the extent to which judicial opinions actually identify the basis of a decision. Not surprisingly, opinions sometimes discuss issues that appear to have little impact on the result, thus, deliberately or not, masking the real basis of the decision.

I. STANDARD OF REVIEW

Under the NLRA, both the existence of and the remedies for unfair labor practices are matters entrusted primarily to NLRB discretion. As the Supreme Court has said, "Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act[, n]or could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations."⁸ Congress assigned the responsibility both to identify and to redress unfair labor practices to the "Board as one of those agencies presumably equipped or informed by

⁶ See NLRA § 10(f), 29 U.S.C. § 160(f) (1982) (describing standing for aggrieved party).

⁷ The cases in the study period include all those cases in which the Board issued *Gissel* bargaining orders during fiscal years 1979 through 1982. A more comprehensive description of the cases studied is included in Part III of this Article. See *infra* notes 41-53 and accompanying text. Cases were selected on a fiscal rather than a calendar year basis because the NLRB calculates and reports information about cases and caseloads on that basis. Using fiscal years facilitates comparisons between bargaining order cases and other cases. Cases that were several years old were selected to study the effect of the bargaining order relationship over time. Despite their age, some of the cases are still open.

⁸ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

experience to deal with a specialized field of knowledge."⁹ Primarily because of the NLRB's presumed expertise, Congress made the Board's decisions subject to only limited judicial review.¹⁰

By statute, courts of appeals have power to enforce, modify, or set aside Board orders.¹¹ Board findings of fact, if supported by substantial evidence, are conclusive.¹² Moreover, Supreme Court decisions dictate that lower courts give the Board's expertise considerable deference, particularly in formulating remedies. Nevertheless, some courts of appeals have been aggressive in their review of NLRB bargaining orders. These courts often criticize the Board for its inconsistency, its refusal to articulate standards, and its failure to make detailed findings indicating the need for the imposed remedy.

Although many factors might influence judicial decisions, courts refusing to enforce *Gissel* bargaining orders typically identify one or more specific considerations as prompting their actions. The reasons generally include one of three broad categories. Most often, courts criticize the Board for not articulating appropriate general standards justifying the issuance of *Gissel* orders, and for not identifying specific factors warranting the use of the remedy in particular cases.¹³ Also, despite the Board's broad authority to identify and to remedy unfair labor practices, courts sometimes disagree with the Board's unfair labor practice findings or with its conclusion that a bargaining order is the appropriate remedy.¹⁴ Finally, courts sometimes justify nonenforcement by alluding to the "changed circumstances doctrine."

As its name implies, the changed circumstances doctrine takes account of changes between the time the Board's order issues and the time of the court's decision. In cases of significant delay, changes occurring in the interval between the employer's unlawful conduct and the

⁹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

¹⁰ As Justice Frankfurter said in *Phelps Dodge*, "the relation of remedy to policy is peculiarly a matter for administrative competence . . ." *Phelps Dodge*, 313 U.S. at 194.

¹¹ See NLRA § 10(e), 29 U.S.C. § 160(e) (1982).

¹² See *id.*

¹³ See, e.g., *NLRB v. General Stencils, Inc.*, 438 F.2d 894 (2d Cir. 1971), *not enforcing* 178 N.L.R.B. 108 (1969) (discussing colloquy between court and Board). Subsequently, the Board reissued the bargaining order at 195 N.L.R.B. 1109 (1972), only to have the court once again refuse to enforce, *NLRB v. General Stencils, Inc.*, 472 F.2d 170 (2d Cir. 1972); see also *J.J. Newberry v. NLRB*, 645 F.2d 148 (2d Cir. 1981) (case from study period); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980).

¹⁴ See, e.g., *Doug Hartley, Inc. v. NLRB*, 669 F.2d 579 (9th Cir. 1982); *NLRB v. Amber Delivery Serv.*, 651 F.2d 57 (1st Cir. 1981).

Board's order might also influence the courts. Changed circumstances include both employee turnover and the restructuring or replacement of management personnel. In many cases, the passage of time itself influences the courts' decisions.¹⁵

In addition to factors the courts mention, other factors might also contribute to the probability of enforcement. These factors include the overall severity of the employer's unlawful conduct, the types of unfair labor practices committed, the number of employees affected by the unlawful campaign (measured as the size of the bargaining unit), the amount of employee support the union receives, and the identity of the court hearing the appeal.

Any attorney contemplating resort to a court of appeals or any person interested in predicting the probable action of a court must recognize that courts most often frame opinions in standard judicial review language.¹⁶ Courts that enforce Board orders, for example, typically refer to the Board's responsibility to construe the statute in light of its presumed industrial expertise and the limited role of judicial review. Not infrequently, courts note that the issue is not what action the court would have taken *de novo*, but whether the Board's action was reasonable. Similarly, courts that deny enforcement to NLRB orders profess adherence to a limited judicial role. However, they contend that the Board's decision does not deserve deference because the Board did not support its findings with substantial evidence, insufficiently explained its reasoning, or adopted an unreasonable construction of the NLRA. Appellate cases from the study group demonstrate this genre of judicial explanation.

In *United Oil Manufacturing Co. v. NLRB*,¹⁷ for example, the Third Circuit explained its limited role in reviewing bargaining order cases:

The binding precedent of *Gissel* teaches that the choice of remedy for unfair labor practices is an issue vested in the discretion of the Board. We do not suggest that the courts do not have an important review function to perform, but that we must be mindful of its proper scope. It is not relevant whether we would have reached the same conclusion as the Board; it is

¹⁵ See, e.g., *NLRB v. Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984); *NLRB v. Village IX*, 723 F.2d 1360 (7th Cir. 1983); *NLRB v. Marion Rohr Corp.*, 714 F.2d 228 (2d Cir. 1983).

¹⁶ A representative example is the statement of John Marshall: "Judgment for the plaintiff; Mr. Justice Story will furnish the authorities." Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 654 (1932); see also Hutcheson, *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929).

¹⁷ 672 F.2d 1208 (3d Cir.), cert. denied, 459 U.S. 1036 (1982).

'not our function to substitute our judgment for the Board's on the propriety of a bargaining order.'¹⁸

The *Gissel* case undoubtedly influenced the court's view. In *Gissel*, the employer claimed that the Board had sufficient remedies for the employer's wrongful conduct without a bargaining order. The Court said:

It is for the Board and not the courts . . . to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies . . . the Board draws on a fund of knowledge and an expertise all its own, and its choice of remedy must therefore be given special respect by the reviewing courts.¹⁹

In other cases, however, courts have been considerably more demanding. In *J.J. Newberry Co. v. NLRB*,²⁰ for example, the Second Circuit upheld unfair labor practice findings but disagreed with the Board about their effect on the conduct of an election. Criticizing the NLRB for its failure to take mitigating factors into account, including changed circumstances, the court said:

Rather than react in knee jerk fashion to the presence of a hallmark violation, the Board must still analyze the nature of the misconduct and the surrounding and succeeding events in each case in an effort to assess the potential for a free and uncoerced election under current conditions.²¹

Similarly, in *NLRB v. Marion Rohr Corp.*,²² the same court took the Board to task for the paucity of its analysis:

¹⁸ *Id.* at 1213 (citation omitted).

¹⁹ *Gissel*, 395 U.S. at 575, 612 n.32. Despite the clear direction of *Gissel*, other courts have indicated that something less than the usual deference to the Board's administrative expertise is warranted in reviewing remedial bargaining orders. In *United Services for the Handicapped v. NLRB*, 678 F.2d 661 (6th Cir. 1982), for example, the Sixth Circuit said that its usual deference is lessened when reviewing "the strong and less preferred remedy of a bargaining order . . ." *Id.* at 664. In *NLRB v. Valley Plaza, Inc.*, 715 F.2d 237 (6th Cir. 1983), the same court referred to its "more stringent standard" in the review of bargaining order cases. *Id.* at 244; see also *NLRB v. Rexair, Inc.*, 646 F.2d 249 (6th Cir. 1981). Presumably, courts believe that they have more responsibility on review in order to test the Board's conclusion that a bargaining order should be substituted for the ordinary requirement that unions demonstrate majority status through the election process. The increased review, however, does not necessarily mean that courts will not enforce the order. For example, in both *United Services for the Handicapped* and *Valley Plaza*, the courts upheld the Board's choice of remedy despite the courts' assertion that they owed less deference to the Board than in other cases.

²⁰ 645 F.2d 148 (2d Cir. 1981).

²¹ *Id.* at 153. For a discussion of the hallmark violations to which the court refers, see *infra* note 48.

²² 714 F.2d 228 (2d Cir. 1983).

We write once again on this subject only to make clear our unwillingness to enforce a bargaining order in the absence of a reasoned factual analysis by the Board as to why a fair election cannot be held The listing of unfair labor practices followed by the conclusory statement that a fair election is no longer possible does not satisfy the Board's responsibility to analyze the attending circumstances.²³

It is also possible to find cases that display judicial impatience with the Board's work and less than faithful adherence to a limited standard of review. In *NLRB v. Pace Oldsmobile*,²⁴ for example, the court twice refused to enforce a bargaining order imposed as a remedy for an employer's unfair labor practices. The violations included promises and grants of benefits, interrogation, threats of discharge,²⁵ and discriminatory layoffs.²⁶ The court harshly criticized the Board for its failure to explain the basis of its remedial order²⁷ and for failing to determine the

²³ *Id.* at 230-31. For other cases in which the courts of appeals disagree with the NLRB's assessment of either the severity of the employer's unfair labor practices or their effect on the likelihood of a free and fair election, see *NLRB v. Loy Food Stores*, 697 F.2d 798 (7th Cir. 1983); *Doug Hartley, Inc. v. NLRB*, 669 F.2d 579 (9th Cir. 1982); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263 (2d Cir. 1981).

²⁴ 739 F.2d 108 (2d Cir. 1984). The first Board order is reported at 256 N.L.R.B. 1001 (1982). The second order is reported at 265 N.L.R.B. 1527 (1982).

²⁵ Such conduct is typically thought to violate NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982), which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title." NLRA § 7, 29 U.S.C. § 157 (1982), details the protection provided to employees under the Act:

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 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 158(a)(3) of this title.

Id. A full review of employer unfair labor practices and Board procedures for correcting them is beyond the scope of this Article, which is limited to judicial review of a specific unfair labor practice remedy.

²⁶ This action would typically violate NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982).

²⁷ The court considered the case twice. In its initial review, the court refused enforcement, saying that the conclusion of the administrative law judge (ALJ) that a fair election was impossible "was not preceded by the kind of analysis [required] before enforcing so drastic an order." *NLRB v. Pace Oldsmobile, Inc.*, 681 F.2d 99, 101 (2d Cir. 1982). The court remanded the case, directing the Board to determine the potential for a fair and free election, especially in view of significant changes in the composition of the bargaining unit. *Id.*

actual effect of the employer's unfair labor practices:

The Board made no attempt to determine if the unfair labor practices continued to have an *actual* effect on the possibility of a fair and free election . . . relying instead on unsupported speculation about the impossibility of conducting an election free from the lingering coercive effects of [the employer's] unfair labor practices.²⁸

Close examination of the opinion reveals that the court was guilty of the same sin for which it condemned the Board. Although the Second Circuit scolded the Board for its "unsupported assumptions" about the effects of the employer's unfair labor practices on employees and criticized it for failing to point to any specific evidence of effect, the court itself engaged in similar speculations. Thus, it justified its refusal to enforce the Board's bargaining order, in part, by referring to the ability of the union to initiate a strike following the commission of the employer's unfair labor practices.²⁹

Despite the court's contrary assertion, this observation is not specific evidence that the employer's conduct had no effect. Instead, the observation is merely an inference drawn by the court from the Board's factual findings. The fact that such an inference might be logical, or even

On remand, the Board reimposed the order. *Pace Oldsmobile*, 265 N.L.R.B. 1527 (1982). It reviewed the circumstances leading to the unfair labor practice findings and concluded that the likely effect of the employer's conduct was "to instill in employees the fear that union representation would be detrimental to their continued employment, and that such fear would continue to be operative even in the event of a second election." *Id.* at 1529. The Board found that the employer's egregious conduct, which included discharge of a leading union activist, demonstrated the "lengths to which it would go to stifle the employees' right of self-organization." *Id.*

The Second Circuit was not impressed. In its second decision, it again refused to enforce the Board's bargaining order. *Pace Oldsmobile*, 739 F.2d 108 (2d Cir. 1984). Quoting from its previous opinions, some of which are also cases included in the study period, the court said that "drastic" remedies like bargaining orders are not favored. *Id.* at 110. They could be justified "only [when] there is a substantial danger that the employees will be inhibited by the employer's conduct from adhering to the union." *Id.* (citing *J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 154 (2d Cir. 1981)). The court criticized the Board for engaging in a "superficial and conclusory analysis" and for relying on "unsupported assumptions" to justify the bargaining order. *Id.* at 111-12.

²⁸ *Pace Oldsmobile*, 739 F.2d at 112 (emphasis in original).

²⁹ The Board had considered that fact, but had observed that at the conclusion of the strike the employer had refused to reinstate three of the strikers and had reinstated a fourth to a less desirable position. The Board said that this action, affecting nearly 20% of the bargaining unit, was a further demonstration of the employer's "determination not to accept its employees' union activities passively," which was likely to have a chilling effect on both old and new employees. *Pace Oldsmobile, Inc.*, 265 N.L.R.B. 1527, 1529 (1982).

“right,” is not the appropriate consideration. Rather, the question is whether the Board’s inferences, drawn from the same facts, are wrong. If they are supportable (which does not necessarily mean “right”), then the Board’s order is entitled to judicial deference.³⁰

Apparently, the court thought that the Board’s inferences were not supportable because there was no specific evidence of actual effect. It is not entirely clear what sort of evidence the Board could muster. The Board has long excluded from the evidentiary hearing testimony of employees about their reaction to employer campaign tactics.³¹ That rule is easily justified, especially given the credibility problems inherent in such evidence and the questionable ability of employees, testifying several months after the fact, to portray accurately the effect of previous conduct.

Indeed, Getman, Goldberg, and Herman found that an employee’s union sympathies usually influenced her reaction to employer conduct during an election campaign.³² Union supporters were much more likely than union antagonists to report coercion from unlawful (and even lawful) conduct.³³ Probably the most the Board can do, then, is to consider evidence about what the employer did and to make assumptions about the likely effect of that conduct on employees.³⁴

³⁰ In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), the Court said that the requirement that NLRB findings must be enforced if based on substantial evidence did not mean that “a court may displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.”

³¹ See, e.g., Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465, 1467 (1975).

³² J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 121-22 (1976).

³³ *Id.*

³⁴ Although the issue before the Court was somewhat different, the same problem was addressed in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). In discussing the Board’s role in the identification of unlawful conduct (as opposed to devising remedies for their violation), the Court noted the “statutory plan for an adversary proceeding” and said:

Such procedure strengthens assurances of fairness by requiring findings on known evidence. . . . *Such a requirement does not go beyond the necessity for the production of evidential facts, however, and compel evidence as to the results which may flow from such facts.* . . . An administrative agency . . . may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based on the facts proven. One of the purposes which led to the creation of such boards is to have decisions based upon evidential facts . . . made by experienced officials with an

As Getman, Goldberg, and Herman have noted, there is some question about the validity of many NLRB behavioral assumptions. In *Pace Oldsmobile*, however, the Second Circuit did not deny enforcement because it believed that the employer's unfair labor practices had no effect on employee rights. It merely disagreed about what that effect was and substituted its judgment for the Board's.

The same phenomenon can be observed in the Seventh Circuit's opinion in *NLRB v. Loy Food Stores*.³⁵ Writing for the court, Judge Posner refused to enforce a Board bargaining order entered in response to the discriminatory discharge of two teenage employees during an organizational campaign. No one disputed that the teenagers were not good employees. The Board, however, adopted the conclusion of the administrative law judge (ALJ) that the teenagers' deficiencies had been tolerated until they joined the union and that the reasons advanced for the discharges were merely pretextual. The Board found that the employer knew about the employees' union activity — a finding that may have been unnecessary in view of the Board's small plant doctrine.³⁶ The Board also found that the timing of the discharge, particularly following threats made by the employer, would have a coercive impact on the remaining employees. In contrast, Judge Posner characterized the employees as "teenage goof-offs" whose "discharge was unlikely to throw fear into the adult workforce."³⁷ As did the Second Circuit in *Pace*, Judge Posner looked at the same evidence viewed by the Board but simply disagreed with the Board's conclusions and substituted his own view of what the facts established.³⁸

Despite the apparent attention courts pay to the specificity with which the Board addresses either its choice of remedy, the effect of employer conduct, or its conclusion that the election process has been destroyed, this Article will not attempt to measure this effect on the

adequate appreciation of the complexities of the subject which is entrusted to their administration.

Id. at 799-800 (citation omitted) (emphasis added).

³⁵ 697 F.2d 798 (7th Cir. 1983).

³⁶ In order to establish a violation of section 8(a)(3), the Board typically requires a showing of anti-union animus, with knowledge of an employee's union activity an essential element of the burden. The small plant doctrine infers the requisite knowledge in small establishments. For a general discussion, see 1 C. MORRIS, *THE DEVELOPING LABOR LAW* 194-95 (2d ed. 1983).

³⁷ *Loy Food Stores*, 697 F.2d at 800.

³⁸ In addition to *Pace* and *Loy*, other cases in which the court ignored the Board's findings in favor of its own assessment of unlawful effect include *NLRB v. Amber Delivery Serv.*, 651 F.2d 57 (1st Cir. 1981); *J.J. Newberry Co. v. NLRB*, 645 F.2d 148 (2d Cir. 1981); see also *supra* note 23.

probability of enforcement. Such explanations are subjective. It is difficult to test a court's assertion that it was motivated by the Board's explanation rather than by some other criterion. At the very least, not all courts require the same degree of specificity,³⁹ and, perhaps more im-

³⁹ For example, in contrast to the Second Circuit's opinions in *J.J. Newberry*, 645 F.2d at 148, and *NLRB v. Marion Rohr Corp.*, 714 F.2d 228 (2d Cir. 1988), the Third Circuit adopted a comparatively lenient standard in *NLRB v. Permanent Label Corp.*, 657 F.2d 512 (3d Cir.), *cert. denied*, 455 U.S. 940 (1981). Initially, a three judge panel refused to enforce the bargaining order, criticizing the Board for relying on a "conclusory statement" of the administrative law judge. 106 L.R.R.M. (BNA) 2211, 2216 (3d Cir. 1981). The Board had held that a bargaining order was necessary because the unfair labor practices could not be remedied through traditional measures. *Id.* Saying "we need more," the panel remanded the case for "specific findings" justifying its choice of remedy. *Id.*

Subsequently, the Third Circuit heard the case *en banc*, vacated the panel decision, and enforced the NLRB's bargaining order. 657 F.2d at 518-20. The court noted that the requirement of the NLRB to specify the reasons for imposing a bargaining order was not to limit the availability of the remedy. *Id.* at 521-22. Rather, the requirement existed in order to facilitate judicial review and to add "predictability and stability" to the Board's practice. *Id.* at 521. In this case, the administrative law judge had written a 53-page opinion describing and discussing the employer's unfair labor practices. *Id.* at 519. In justifying a bargaining order remedy, the court said that the ALJ did not act "conclusorily." *Id.* at 521. Instead, the ALJ detailed several factors, including the breadth of the unlawful conduct and the status of the wrongdoers, which warranted an extraordinary remedy. *Id.*

Although the ALJ made no specific findings that traditional remedies would not suffice, an omission found determinative by the three judge panel, the full court found that fact unavailing:

We do not believe enforcement should be denied merely because the ALJ did not write down the inescapable inference he made in recommending that a bargaining order issue — that merely ordering the Company to refrain . . . would not erase the effects of these threats . . . and thus that the possibility of a fair rerun election was slight.

Id. The court said that it was sufficient for the ALJ "to provide an extensive list of factors" that influenced his decision to recommend an order to bargain: "If we were to require that the ALJ also specifically state each inference drawn from these factors, no matter how obvious it is from the opinion, we would elevate form over substance and overstep the appropriate limits of judicial review of the Board's choice of remedy." *Id.*

The same theme was sounded by the court in its subsequent decision in *NLRB v. Eastern Steel Co.*, 671 F.2d 104 (3d Cir. 1982). In this case, the court again responded to the employer's assertion that the Board should deny enforcement because of the ALJ's failure to articulate specific reasons justifying her choice of remedy. *Id.* at 107. The court said that such action would accomplish only two things: (1) it would delay the collective bargaining obligation for the time necessary to rewrite the opinion and subject it to a second court review; and (2) it would "teach the administrative law judge a lesson in grammar." *Id.* at 109. The court said that neither effect supported a decision to deny enforcement. *Id.* The Court further asserted that the ALJ's reasoning was

portant, some courts do not apply any consistent standard.⁴⁰

II. FACTORS AFFECTING THE PROBABILITY OF ENFORCEMENT

To the extent that courts accept a more or less detailed explanation of the Board's decision in different cases, their decisions might be influenced by matters other than the Board's opinion. One such factor may be the changed circumstances doctrine.

A. *Changed Circumstances*

Courts have often refused to enforce NLRB bargaining orders not only because they question the Board's explication of motives or its analysis of effects, but also because of the Board's failure to consider subsequent events. Often, courts refer to changes in the composition of the workforce or in the identity of management officials which come

adequate for purposes of review and noted that "we are not . . . running a clinic in legal writing." *Id.* For a discussion of the more stringent standard applied by the Sixth Circuit in bargaining order cases, see *supra* note 19.

⁴⁰ During the study period, for example, the Sixth Circuit at least twice refused to apply the changed circumstances doctrine. See *Exchange Bank v. NLRB*, 732 F.2d 60 (6th Cir. 1984); *Coil A.C.C., Inc. v. NLRB*, 712 F.2d 1074 (6th Cir. 1983). In 1981, however, without citing any of its previous cases, the same court refused to enforce a bargaining order in *NLRB v. Frederick's Foodland*, 655 F.2d 88 (6th Cir. 1981), in part because of an increase in number of bargaining unit employees and the passage of time since the election.

The Seventh Circuit's opinion in *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074 (7th Cir. 1981), is even more interesting. As previously noted, the Seventh Circuit has been particularly demanding in its review of bargaining order cases. Nevertheless, in enforcing the bargaining order in *Justak*, the court said:

Elaborate explanations are not essential; indeed, scientific accuracy in estimating the impact of unfair labor practices is impossible. Rather, we only require that the Board delineate the factors that it considers in its estimation, and describe how these factors have been weighed. . . . Once the Board has spelled out the basis for its issuance of a bargaining order, this court's review is limited to whether the Board abused its discretion.

Id. at 1081-82. In response to the employer's claim that employee turnover should render the order inappropriate, the court said that it would not apply the changed circumstances doctrine because allowing an employer to commit unfair labor practices and then avoid the bargaining order by delay would be a "perversion of the Act's purpose." *Id.*

The Seventh Circuit reviewed eight orders during the study period. It enforced only two of those eight. In several of the cases the court criticized the Board's analysis of the factors leading to the issuance of the order and, in at least two of the cases, was influenced by changed circumstances. For discussion of the court's analysis, see *infra* note 41 and accompanying text.

after the unfair labor practices but before the bargaining order issues. The changes may also occur after the bargaining order but before judicial review. The Board usually ignores the time lag, which is an inevitable consequence of the cumbersome administrative and judicial process.⁴¹ Although some courts have deferred to the Board's decisions, others have sharply criticized the Board for failing to consider changed circumstances.⁴²

As stated previously, courts referring to "changed circumstances" usually mean employee turnover both within the bargaining unit and among key management personnel. Some cases do not directly address these changes, referring principally to the delay itself (which can be substantial). In the study period, for example, the average delay was more than three-and-one-half years from the time of demand until court order.⁴³ Even if the process works expeditiously, the entire procedure, from demand to court decision, usually takes at least two years.⁴⁴ During that period one might expect significant turnover, at least among unskilled workers, particularly if the Board's behavioral assumptions are correct. That is, if an employer's unlawful conduct actually has a coercive effect, employees might choose to leave rather than to incur the employer's wrath.

Application of the changed circumstances doctrine, then, might give employers impetus to delay the process as long as possible to avoid the bargaining order merely through the passage of time. In addition, there is some evidence that a significant delay will contribute to the em-

⁴¹ For the 108 appealed bargaining orders issued during the four-year period of this study, the average amount of time between the union's demand for recognition and the issuance of the bargaining order was 26.08 months. The average amount of time between the Board's order and the court of appeals decision was 16.80 months. Finally, the average amount of time between the union's demand for recognition and the court of appeals decision was 42.88 months.

⁴² For decisions in which the changed circumstances doctrine appeared influential in courts' refusals to enforce a bargaining order, see *NLRB v. Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984); *NLRB v. Village IX, Inc.*, 723 F.2d 1360 (7th Cir. 1983); *NLRB v. Frederick's Foodland, Inc.*, 655 F.2d 88 (6th Cir. 1981). For cases in which courts enforced the bargaining order despite an assertion of intervening changes in the bargaining unit, see *Exchange Bank*, 732 F.2d at 60; *Piggly Wiggly v. NLRB*, 705 F.2d 1537 (11th Cir. 1983); *Justak Bros.*, 664 F.2d at 1074.

⁴³ See *supra* note 41.

⁴⁴ The Board's 1986 annual report, the most recent as of this writing, indicates that at the close of the fiscal year (Sept. 30, 1986), the average age of cases pending Board decision was 796 days. See 51 NLRB ANN. REP. app. at 272, table 23 (1986).

ployer's chance of success in the rerun election often imposed in lieu of the bargaining order.⁴⁵

Courts sometimes disagree about the significance of changed circumstances. If changed circumstances is a significant factor in the nonenforcement of bargaining orders, then the greater the time lag, the less likely it is that a court would enforce an order. If, however, changed circumstances does not matter in the determination whether courts will enforce a bargaining order, then the time lag should be irrelevant.

B. Seriousness of the Unfair Labor Practice Campaign

Another pertinent inquiry is whether the seriousness of the employer's infractions influences the courts in bargaining order cases. Although the Board has the primary responsibility both to identify unfair labor practices and to devise remedies for them, courts reviewing the remedy might be more willing to defer to Board judgment if they share its perception of the seriousness of the employer's conduct. This is particularly true in bargaining order cases in which the Board's choice of the "extraordinary" remedy differs from the Act's basic precept of majority rule. It is worthwhile, then, to examine the cases to determine whether the seriousness of an employer's conduct relates to the chance for enforcement.

An initial problem, however, is how to weigh the relative severity of the conduct in each case. One possible way is merely to count the number of unfair labor practices in each case and determine if there is a correlation between the number of offenses and the courts' decisions on review. The sheer number of offenses, however, often is not an accurate indicator of the severity of a particular campaign. Some section 8(a)(1)⁴⁶ violations, for example, are relatively minor and, even when they appear in significant numbers, would not support the issuance of a

⁴⁵ See Pollit, *NLRB Re-Run Elections: A Study*, 41 N.C.L. REV. 209 (1963).

⁴⁶ NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982). This section makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." *Id.* NLRA § 7, 29 U.S.C. § 157 (1982), grants to employees 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. . . ."

Typical NLRA § 8(a)(1) violations include election propaganda that threatens reprisals for employee union activity or promises of benefits to discourage union activity; interrogation of employees about union sympathies; and surveillance of employees engaged in union activity. For a full discussion of § 8(a)(1), see R. GORMAN, *supra* note 2, at 132-78.

bargaining order. In other cases, particularly in small units, the presence of one serious section 8(a)(3)⁴⁷ violation might be sufficient to warrant an order to bargain.

This Article measures severity by testing for the presence of certain unfair labor practices that have been particularly influential in bargaining order cases. These unfair labor practices, which are typically violations of section 8(a)(1), section 8(a)(3), or of both sections, are said to go to the heart of the Act by reinforcing employees' awareness of an employer's control over the employees' economic destiny. This control enables an employer to dictate the employees' actions regarding union organization. These violations, sometimes referred to as hallmark violations, include discriminatory discharge, threat of plant closure, threat of discharge, promise of benefits, grant of benefits, and plant closure.⁴⁸

"Discriminatory discharge" refers to the discharge or layoff of employees in retaliation for the employees' union support. "Threat of plant closure" and "threat of discharge" are overt or implied threats to close a plant or to discharge employees if union activities do not stop. The "promise of benefits" and "grant of benefits" refer to employers offering employees incentives to cease their organizational efforts. Examples of such benefits include wage increases, increased break time, and better holiday and vacation privileges. Finally, "plant closure" refers to an employer's temporary or permanent shutdown, specifically as a reaction to union organizing efforts.⁴⁹

The commission of one or more hallmark violations does not guarantee that the NLRB will issue a bargaining order. Moreover, the Board

⁴⁷ NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization. . . ." In its most common form, NLRA § 8(a)(3) prohibits the discharge of employees on account of union activity, popularly referred to as discriminatory discharge. For further discussion of § 8(a)(3), see R. GORMAN, *supra* note 2, at 209-19, 326-38.

⁴⁸ In *NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100 (2d Cir. 1979), for example, the court noted that "there were no dismissals for pro-union activities, no threats to close down . . . and no actual use of force or physical violence, which usually are the hallmarks in cases where bargaining orders issue." *Id.* at 1104; see also *Hasbro Indus., Inc.*, 254 N.L.R.B. 587 (1981) (granting benefits). Although the threat or use of physical force is sometimes referred to as a "hallmark" violation, few, if any, of the cases in the study group evidenced that conduct.

⁴⁹ All of these violations, except discriminatory discharge, are typically processed as NLRA § 8(a)(1) violations, although they can also violate NLRA § 8(a)(3) if anti-union motivation is proven. A full review of the distinction between § 8(a)(1) and § 8(a)(3) violations is beyond the scope of this Article. For a general discussion, see R. GORMAN, *supra* note 2, at 326-38.

will sometimes issue a bargaining order to remedy unfair labor practices other than hallmark violations. Nevertheless, any hallmark violation indicates a serious employer infraction. These infractions should thus result in a positive effect on the probability of enforcement, except perhaps plant closure. If a firm closes, and the shutdown is not temporary, courts of appeals might be less likely to uphold a bargaining order, since there would be no employer with which to bargain.⁵⁰ On the other hand, these courts might expect employees to take seriously an employer's threat of closure in retaliation for union activity. Such threats, then, should increase the probability of enforcement, at least if courts share the Board's assumption that threats increase an employer's coercive impact. Predicting which of the remaining violations would have the largest impact on the probability of enforcement is difficult.

Discriminatory discharge might produce different effects in different cases. For example, the discharge of leading union advocates or the discharge of a significant percentage of a bargaining unit might chill the remaining employees' organizational interests. The Board ordinarily makes this assumption. In contrast, the court in *NLRB v. Loy Food Stores*⁵¹ thought that the firing of two "teenage goof off" employees was unlikely to intimidate the adult workforce. In short, discriminatory discharges might not produce the same coercive effect in all cases, or the court of appeals' assessment of the effect of a discriminatory discharge might differ from the NLRB's assessment. Still, given the perceived seriousness of the offense, discriminatory discharge is likely to increase the probability that courts will enforce an NLRB bargaining order. The same is true for a threat of discharge.

Similarly, the grant of benefits could have different effects on the probability of enforcement in different cases. A substantial wage increase to all employees, for example, might be more likely to preclude a fair election than would either an insignificant wage increase or the grant of a slight increase in break time. The category "grant of benefits," therefore, includes factors that increase the probability of enforcement with different degrees of impact. The same is true for a promise of benefits.

Threats of discharge or closure and promises of benefits (perceived by the Board as a threat) can be either overt or implied.⁵² Whether

⁵⁰ Even when a plant is closed down, however, employers are obligated to bargain with the union concerning the effect of that action on employees. R. GORMAN, *supra* note 2, at 499.

⁵¹ 697 F.2d 798 (7th Cir. 1983); see also *infra* notes 35-38 and accompanying text.

⁵² See, e.g., *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

threats are implied is a matter of judgment, but the cases studied reveal little disagreement on this issue between the courts and the NLRB.

C. *Unit Size*

Although both the Board and the courts sometimes speculate about the impact of unfair labor practices on small bargaining units, predicting the effect of unit size on the probability of enforcement is not easy. On one hand, unfair labor practices could have a more significant impact on employees in a small bargaining unit. That is, employees in small units might feel more vulnerable than employees in large units. Large unit employees enjoy anonymity and can appeal for support to a larger, and presumably more powerful, group. This consideration should increase the likelihood of enforcement in cases involving small bargaining units.

On the other hand, employee turnover during the delay between the demand for recognition and judicial review can result in a higher replacement rate of employees in a small unit than in a large one. High employee turnover is one of the changed circumstances that might detract from the likelihood of enforcement of a bargaining order. Thus, the effect of unit size on the probability of enforcement is uncertain, a priori, and depends on which aspect of unit size has the stronger influence.

D. *Union Strength*

In bargaining order cases, a union need only have, at some point, majority support of the bargaining unit's employees. However, the size of the union majority may influence the appellate courts. If majority size is a factor in courts of appeals decisions, then higher employee support should result in a higher probability that a bargaining order will be enforced. Elections were not conducted in all of the studied cases, and the elections that were held were "tainted" (and therefore do not accurately measure employee support for the union). Because of these factors, this Article measures strength of employee support by constructing the ratio of the number of employees in the bargaining unit who sign authorization cards to the number of employees in the bargaining unit.

E. *Administrative Law Judge Recommendation*

Almost all unfair labor practice cases heard by the Board have first been tried before an administrative law judge. The ALJ, functioning in

a quasi-judicial capacity, conducts a formal hearing and typically recommends an order. The NLRB is bound by neither the ALJ's factual findings nor her assessment of the impact of allegedly unlawful conduct. Ordinarily, however, the Board gives ALJ findings significant deference.⁵³ Even so, in some cases, the Board will issue a bargaining order when the ALJ has not recommended one.

In the sample studied, the Board issued a bargaining order despite no ALJ recommendation in relatively few cases. The cases that do exist are not consistent. The Board sometimes disagrees about whether unfair labor practices exist, upholding as violations allegations the ALJ had dismissed.⁵⁴ In other cases, the Board disagrees with the ALJ about the seriousness of an employer's unfair labor practices and the practices' likely effect on employee free choice.⁵⁵ Finally, the Board sometimes disagrees with the ALJ about the union's majority status, usually by counting as valid, authorization cards that the ALJ had invalidated.⁵⁶ In these cases, the Board typically independently assesses the effect of the employer's unlawful actions on employees, since the ALJ, not having found majority status, never reached the issue.

If ALJ determinations influence the courts, enforcement should be less likely when the ALJ did not recommend a bargaining order. In these cases she may have found no unfair labor practices or may have questioned the serious effect of the employer's unlawful activity. Likelihood of enforcement should increase when both the ALJ and the Board felt that a bargaining order was appropriate and also when the ALJ did not recommend a bargaining order due to the lack of majority support for the union. To reflect accurately the effect of an ALJ's negative decision, this Article used the reasons for the ALJ's recommendations in constructing this variable.

F. Identity of the Court

Not all courts apply the same standards to bargaining order cases. Differentiating among the circuits captures circuit-specific effects such as whether any particular circuits are either tougher or more lenient than others in the treatment of NLRB-issued bargaining orders. Circuit courts' opinions in bargaining order cases suggest that the Second and Seventh Circuits have a much lower enforcement rate than other circuits. No circuits appeared to be noticeably lenient in the cases stud-

⁵³ See R. GORMAN, *supra* note 2, at 9.

⁵⁴ See, e.g., Doug Hartley, Inc., 255 N.L.R.B. 800 (1981).

⁵⁵ See, e.g., Piggly Wiggly, 258 N.L.R.B. 1081 (1981).

⁵⁶ See, e.g., Zero Corp., 262 N.L.R.B. 495, 499-500 (1982).

ied. Thus, the Second and Seventh Circuits should be less likely than other circuits to enforce bargaining orders.

This Part has described important factors in considering whether a court will enforce a bargaining order. The studied cases utilize these factors in our examination. In the next Part, this Article describes the process used to integrate these variables into conclusions.

III. DATA COLLECTION

The NLRB issued 176 bargaining orders during fiscal years 1979 through 1982.⁵⁷ Of that number, the courts of appeals reviewed 108 of those orders.⁵⁸ Of the 108 appeals, the bargaining order was not enforced in 32 cases. Twenty-seven of the 76 enforced bargaining orders were enforced by memorandum decisions.⁵⁹ The following information was collected for the firms and unions involved in the 108 appealed bargaining order cases: unit size (number of employees in the bargaining unit); NLRB region⁶⁰ in which the firm was located; the percentage of employee support for the union at the time the union demanded recognition (or filed a petition);⁶¹ whether the administrative law judge recommended a bargaining order (if not, the reason why); the time (in months) between the date of demand for recognition and the date the NLRB issued the bargaining order; the time (in months) between when the NLRB issued the bargaining order and the date of the court of

⁵⁷ This study period runs from October 1, 1978, through September 30, 1982. Fiscal years are used rather than calendar years because the NLRB's records and statistics are maintained according to fiscal years.

⁵⁸ For a list of these cases, see Appendix B.

⁵⁹ A memorandum decision usually denotes an unpublished order, the results of which are merely noted in the Federal Reporter. Sometimes, no official report of the court's action exists. In those instances, the authors gathered data either from unofficial case reports (such as the Labor Relations Reference Manual) or from NLRB records that are available to the general public.

⁶⁰ The NLRB is a federal administrative agency headquartered in Washington, D.C. The Board maintains more than 30 regional offices throughout the United States. These offices are under the supervision of the General Counsel, who acts as prosecutor in unfair labor practice cases. The primary activity of the regional offices is the investigation and prosecution of unfair labor practices and the holding of elections in representation cases.

⁶¹ This variable was measured as the proportion of employees who had signed authorization cards, designating the union as their bargaining representative. For a discussion of the use of authorization cards as an indication of employee support for a union, see Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumptions Underlying the Supreme Court's Gissel Decision*, 79 NW. U.L. REV. 87 (1984).

appeals decision; the circuit and the outcome of the appellate case; and any unfair labor practices committed by the employer.

The information on unit size, region, unit strength, administrative law judge recommendation, time between demand for recognition and bargaining order date, and unfair labor practices was all collected from the NLRB cases.⁶² The remaining information was obtained from the courts of appeals opinions. Names and definitions of, and descriptive statistics on, the variables used appear in Table 1.

The variable, ENFORCE, represents the answer "yes" or "no" to the question whether the court enforced the bargaining order. The mean of this variable, 0.70, indicates that the courts of appeals enforced 70% of bargaining orders in the sample.

Table 1
Summary of Data

Variable (definition)	Sample Proportion or Mean	Standard Deviation	Range
ENFORCE (1=enforced, 0=not enforced)	.70	--	0 or 1
USTRENGTH (% authorization cards signed)	65.53	14.13	46.0-100.0
SIZE (# employees in bargaining unit)	76.57	123.57	2-1000
ALJNO (1=bargaining order not recommended, 0=recommended)	0.11	--	0 or 1
DEM-ORD (# months between demand for rec. and date of bargaining order)	25.96	10.12	10.5-63.0
ORD-APP (# months between bargaining order and appellate decision)	16.48	6.60	6.0-43.0
DEM-APP (# months between demand for rec. and appellate decision)	42.44	12.94	23.5-92.0
DISCHG (1=discriminatory discharge, 0=none)	0.59	--	0 or 1
THRCLS (1=threat of plant closure, 0=none)	0.47	--	0 or 1
THRDIS (1=threat of discharge, 0=none)	0.54	--	0 or 1
GRNTBEN (1=grant of benefits, 0=none)	0.44	--	0 or 1
PROMBEN (1=promise of benefits, 0=none)	0.49	--	0 or 1
CLOSE (1=plant closure, 0=none)	0.03	--	0 or 1

⁶² LEXIS (a computer assisted legal research service) and the NLRB's Classified Index to Decisions were used to identify all bargaining order cases within the study period.

The percentage variable, USTRENGTH, is used to indicate employee union support. The variable represents the number of authorization cards signed by employees in the bargaining unit (at the time of demand for recognition), divided by the total number of employees in the bargaining unit (SIZE). This percentage constituted a majority (*i.e.*, between 50% and 100%) in all except 2 cases.⁶³ Seven of the 108 observations showed complete (100%) union support. Since *Gissel* only requires that the union demonstrate majority support, how the level of employee support should affect the probability of enforcement is unclear. However, this effect should be positive if courts believe that a union election loss after high initial employee support was the result of employer coercion rather than simply lack of employee interest.

One important insight stems from a 1984 study by Professor Laura Cooper in which she examined the use of authorization cards to measure employee union support.⁶⁴ Cooper found that majority employee support, as measured using authorization cards, does not guarantee a union victory in an NLRB-conducted election. Instead, she found that unions with a bare majority of authorization cards were more likely to lose than to win an election.⁶⁵ This conclusion demonstrates that the percentage of authorization cards signed *overstates* the level of employee union support. The average level of union support for cases in this present Article was 65.53%. This percentage is very close to the percentage at which Cooper found unions to have a 50-50 chance of winning an election.⁶⁶

In order to examine the effect of unit size on the probability of enforcement, the variable, SIZE, measures the number of employees in the bargaining unit. This number often changed during the time between the union's demand for recognition and the court of appeals decision. When this occurred, the unit size at the date of the union's demand was used,⁶⁷ since the union's majority status is usually measured

⁶³ The two cases in which bargaining orders were issued even though there was never any indication of majority support for the union are *United Dairy Farmers Coop. Ass'n*, 257 N.L.R.B. 772 (1981), and *Conair Corp.*, 261 N.L.R.B. 1189 (1982). The Board overruled *Conair* and disclaimed its authority to issue nonmajority bargaining orders in *Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984).

⁶⁴ See Cooper, *supra* note 61.

⁶⁵ *Id.* at 119.

⁶⁶ *Id.* at 137.

⁶⁷ This measurement of unit size was also used in the denominator of the variable representing strength of employee support for the union. See *infra* note 64 and accompanying text.

as of the time of demand.⁶⁸ Unit sizes ranged from 2 to 1,000, with 76.57 employees as the average size. This number is close to the average size of bargaining units in all NLRB elections.⁶⁹

The variable ALJNO is defined to equal "1" if the administrative law judge did *not* recommend a bargaining order (for reasons other than lack of majority support) and "0" if she did. When a case did not involve an ALJ (e.g., the Board imposed a bargaining order in a summary judgment), ALJNO was set equal to "0". This arrangement allows measurement of the effect on the probability of enforcement of a *nonrecommendation* by the ALJ. A nonrecommendation should decrease the likelihood that courts of appeals will enforce a bargaining order. One should note from Table 1 that the ALJ recommended bargaining orders in 89% of the cases studied.

The variables, DEM-ORD, ORD-APP, and DEM-APP, represent the effect of a delay on the probability of enforcement. DEM-ORD is the number of months (to the nearest one-half month) between the union's demand for recognition (or, if no demand was made, the filing of a petition) and the NLRB decision. ORD-APP is the number of months (to the nearest one-half month) between the date of the NLRB decision and the court of appeals decision. DEM-APP is the number of months (to the nearest one-half month) between the union's demand for recognition and the court of appeals decision. If a long time lag reduces the probability of a bargaining order's enforcement, then employers should be eager to appeal the Board's decision to cause further delay.⁷⁰ As Table 1 demonstrates, several months (or years) can elapse between a union's demand for recognition and a court of appeals final decision.

The variables DISCHG, THRCLS, THRDIS, GRNTBEN, PROMBEN, and CLOSE represent hallmark violations. The unfair labor practices corresponding to these six variables, respectively, are:

⁶⁸ NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1982) forbids an employer from recognizing a union lacking majority support. In bargaining order cases, the union's strength at the time it requests recognition (*i.e.*, the demand) is of particular importance. If the Board subsequently issues a bargaining order and determines that the union, in fact, had majority status at the time of demand, the bargaining obligation will ordinarily be retroactive and be made effective as of the demand date. *See, e.g.*, Trading Port, Inc., 219 N.L.R.B. 298 (1975).

⁶⁹ In fiscal 1983, for example, the average number of employees per election unit was 41, compared with 50 in fiscal 1982. About three-fourths of all 1983 elections involved fewer than 60 employees. 48 NLRB ANN. REP. 15 (1986).

⁷⁰ The delay inherent in the review process provides employers with an incentive to appeal bargaining order decisions, even if there is little chance of success. *See supra* notes 44-45 and accompanying text.

discriminatory discharge (or layoff), threat of plant closure, threat of discharge, granting of benefits, promise of benefits, and plant closure. In some cases, the NLRB or the ALJ or both found that an employer committed one or more of these hallmark violations, but the court of appeals disagreed. In those instances, the NLRB's findings were used since those findings initially prompted the order's issuance. The court disagreed with the Board's unfair labor practice findings in very few cases. When the Board and court did disagree, their differing assessment of the employer's motives or the strength of the employer's economic justifications was simply a matter of discretion. Although motive is relevant in cases of discriminatory discharge and plant closings, the General Counsel does not have to prove motive to establish violations based on threats.⁷¹ The Board's assumption is that hallmark violations tend to undermine union support. The presence of such employer conduct, then, should mean that courts are more likely to enforce a bargaining order.

The most frequently observed hallmark violation was discriminatory discharge, which 59% of employers committed. This trend may indicate that employers perceive the discharge of employees for union activity to be an effective campaign tactic.⁷² Threat of discharge is similarly used. Fifty-four percent of employers committed this hallmark violation. The least frequently used (and arguably the most drastic) hallmark violation was plant closure. Only 3 out of the 108 employers closed down, although 47% (51 employers) threatened to close. Finally, about half of employers promised benefits to employees to discourage union support, and 44% of employers actually granted benefits to employees for that purpose.

Table 2 summarizes the appellate courts decisions according to the circuits in which the appeals were heard. The average enforcement rate for all circuits was 70.4%. The Table also indicates that the Second and Seventh Circuits' enforcement rates were significantly lower than the average. The Second Circuit enforced only 45.5% of the orders it reviewed, and the Seventh Circuit denied enforcement in three-quarters of its bargaining order cases. These figures imply that the Second and

⁷¹ J. GETMAN & B. POGREBIN, *LABOR RELATIONS, THE BASIC PROCESSES, LAW AND PRACTICE* 49 (1988).

⁷² See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983). Weiler refers to discriminatory discharge as "the most powerful weapon in the employer's arsenal." *Id.* at 1779. Weiler adds that "the dismissal of key union adherents gives a chilling edge to the warning that union representation is likely to be more trouble for the employees than it is worth." *Id.* at 1778.

Seventh Circuit cases have a lower probability of enforcement than that in other circuits, *ceteris paribus*.

Table 2
Summary of Appellate Court Decisions

Circuit	No. of Cases (out of 108)	No. Enforced (out of cases in Cir.)	No. Not Enforced (out of cases in Cir.)
1	6 (5.6%)	4 (66.7%)	2 (33.3%)
2	11 (10.2%)	5 (45.5%)	6 (54.5%)
3	14 (13.0%)	12 (85.7%)	2 (14.3%)
4	7 (6.5%)	4 (57.1%)	3 (42.9%)
5	3 (2.8%)	3 (100%)	0 (0.0%)
6	19 (17.6%)	15 (78.9%)	4 (21.1%)
7	8 (7.4%)	2 (25.0%)	6 (75.0%)
8	13 (12.0%)	11 (84.6%)	2 (15.4%)
9	15 (13.9%)	11 (73.3%)	4 (26.7%)
10	2 (1.9%)	2 (100%)	0 (0.0%)
11	3 (2.8%)	2 (66.7%)	1 (33.3%)
DC	7 (6.5%)	5 (71.4%)	2 (28.6%)
Totals:	108 (100%)	76 (70.4%)	32 (29.6%)

IV. FINDINGS

This Part discusses how the factors mentioned in Part III affected the courts of appeals decisions in bargaining order cases. The results appear in accompanying tables and graphs. In addition, this Part estimates a probit regression model⁷³ to examine and to test hypotheses about the individual impacts the factors had on the probability that a bargaining order would be enforced by a court of appeals.

A. *Changed Circumstances*

As previously mentioned, some courts of appeals invoke the changed circumstances doctrine to justify nonenforcement of bargaining orders. Specifically, courts observe actual or surmised changes in employee composition of the bargaining unit, turnover in management personnel, business reorganization, and other factors affecting the structure or constitution of the bargaining unit. All of these factors are more likely to occur as time passes from the date unfair labor practices occur or the date on which the bargaining order issues to the date of the appellate

⁷³ For a presentation of this model, see Appendix A.

court's decision.

To examine the influence of this doctrine in bargaining order cases, the length of time between a union's demand for recognition and the court of appeals decision was compared in each circuit against cases that were and cases that were not enforced. The same comparisons were made using the time lag between the NLRB's issuance of bargaining orders and the court of appeals decisions. Figures 1 and 2 (on the next page) indicate that these time lags were not significantly different between enforced and nonenforced cases.⁷⁴ Thus, courts appear no more likely to deny enforcement of bargaining orders in cases of significant time lag than in cases of expeditious resolution. Given the relationship between delay and the factors most often mentioned when invoking the changed circumstances doctrine, this finding suggests that the doctrine may not be as significant as the courts' opinions claim.

This implication is particularly striking in the Second and Seventh Circuits, which enforce bargaining orders less often than any other circuits. Both circuits frequently refer to changed circumstances to justify their nonenforcement. Based on the study's results, however, one questions whether changed circumstances really motivated these decisions. This Article's findings indicate that the time lapse, measured two different ways, does not present a reliable method to predict whether the Second and Seventh Circuits will enforce a bargaining order. In the Second Circuit, for example, 4 of the 6 unenforced cases had shorter time lags from bargaining order to appeals court decision than enforced cases. In addition, 1 of the 6 unenforced bargaining orders involved a shorter total time lag (from demand for recognition to court of appeals decision) than in the enforced cases. The data are even more revealing for the Seventh Circuit. In that circuit, 5 of the 6 unenforced cases had shorter time lags from order to court decision than the enforced cases. Additionally, 3 of the 6 unenforced cases had shorter time lags from demand to court decision than the enforced cases.

Even if time lag does not influence judicial decisions, delays inherent in the review process still furnish employers some advantages and provide some incentive to seek review, regardless of the merits of a case. Besides simply delaying the bargaining obligation, evidence suggests that delay also causes a more significant effect. In some appealed cases, a substantial number of union supporters left the workforce during the delay between the order and judicial enforcement. At the time of the

⁷⁴ The Fifth and Tenth Circuits enforced all of their bargaining orders in the sample, so no comparison can be made for these circuits.

Figure 1
Average Length of Delay for Each Circuit

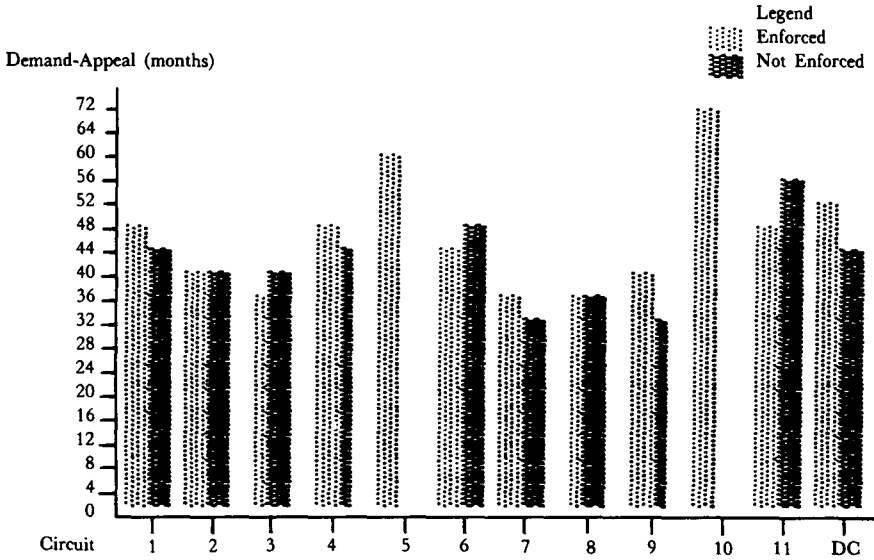
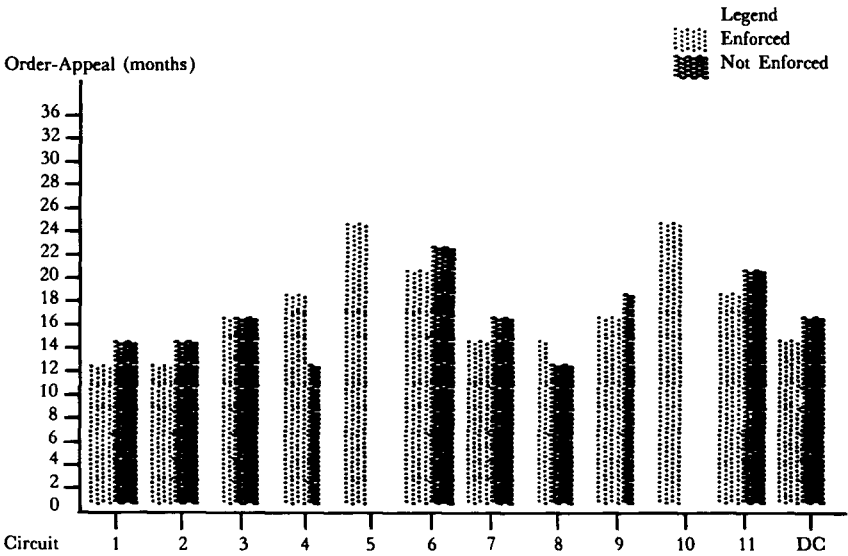


Figure 2
Average Length of Delay for Each Circuit



court's order, then, the bargaining unit is comprised of many employees who were not working for the employer at the time of the union's organizing campaign. This fact affects employee support for the union when the court finally enforces the Board's order and the obligation to bargain becomes binding. Some unions claim that they abandoned the bargaining relationship because of this diminution in employee support.⁷⁵ Thus, even though the passage of time does not affect the chance for enforcement, it may reduce the union's chances of successful negotiations with an employer. This factor could influence an employer's decision to seek review, thereby gaining an advantage through additional delay.

B. *Size of Unit*

To determine if bargaining unit size influences enforcement decisions, the bargaining units in the sample were divided by size into four groups. The proportion of cases in which the NLRB issued bargaining orders was then determined for each size category. The first two columns of Table 3 present these figures. The next two columns show the proportion of cases courts of appeals reviewed for each size category. The similarity of these proportions to the numbers of cases in each category indicates that bargaining unit size does not seem to influence a decision by the parties to seek judicial review. The last two columns of Table 3 detail the proportion of cases in which courts enforced the bargaining order. As these columns indicate, the distribution of cases among the size categories still does not significantly change. Thus, the proportion of cases in which courts enforced the order in each size category is roughly parallel to the proportion of cases selected for review. This finding suggests that courts of appeals do not consider the size of the bargaining unit alone to be a significant factor in bargaining order cases.

⁷⁵ This evidence is based on preliminary data collected for a project which examines bargaining order unions and compares them to unions that were elected during the same time period. Many of the bargaining order unions have abandoned their bargaining relationship with the employer. The unions often cite lack of employee support that stems from substantial employee turnover as the reason prompting their action. See results on file with *U.C. Davis Law Review*.

Table 3
Effect of Unit Size

Size of Bargaining Unit	Bargaining Orders		Appealed		Enforced	
	N	%	N	%	N	%
2-9	28	16.2%	14	13.1%	11	14.5%
10-19	40	23.1%	21	19.4%	16	21.1%
20-99	75	43.4%	48	44.4%	33	43.4%
100+	30	17.3%	25	23.1%	16	21.1%
TOTALS	173	100%	108	100%	76	100%

One should not infer from these data, however, that unit size has no influence over judicial decisionmaking. As noted earlier, certain unfair labor practices may have more impact in small units than in large ones. This statement warrants two considerations. First, are the severity of the unfair labor practices and unit size at all related? For instance, if an employer's campaign was replete with unfair labor practices, is a court more likely to grant enforcement when the bargaining unit is small than when it is large? Second, do courts believe that certain kinds of unfair labor practices have more impact on smaller units?

As Part II observed, measuring the overall severity of a particular unlawful campaign is not easy. However, identifying the existence of hallmark violations and the variety that occur in each case is possible. While this measure of severity is admittedly imperfect, it furnishes at least some index of the overall seriousness of infractions.

Table 4

Size vs. Number of Different Hallmark Violations Committed

SIZE (# cases)	0		1		2		3		4		5		6	
	N	%enf	N	%enf	N	%enf	N	%enf	N	%enf	N	%enf	N	%enf
2 - 9 (14)	0	--	7	86%	5	80%	2	50%	0	--	0	--	0	--
10 - 19 (21)	0	--	3	67%	6	67%	8	75%	3	100%	1	100%	0	--
20 - 39 (24)	0	--	6	83%	6	83%	7	86%	2	100%	2	50%	1	100%
40 - 99 (24)	1	0%	2	50%	10	50%	6	50%	3	100%	2	100%	0	--
100+ (25)	1	0%	2	100%	7	57%	6	50%	7	71%	2	100%	0	--
All Cases (108)	2	0%	20	75%	34	65%	29	66%	15	87%	7	86%	1	100%

Table 4 reports the results of this survey of cases. That Table counts the different types of hallmark violations, ranging from 0 to 6, committed in each case. On average, employers committed between 2 and 3 types of hallmark violations, with the modal (most frequently observed) number being 2, a phenomenon observed in 34 cases. The distribution of these numbers for all cases is recorded in the bottom row of Table 4. Only 2 cases included no hallmark violations (but did include other employer unfair labor practices), and the court did not enforce the bargaining order in either case. The court enforced the order in the only case that included all 6 hallmark violations.

Although one might speculate that employees in smaller bargaining units should be more susceptible to employer coercion, and that the likelihood of enforcement should increase in proportion to the severity of a campaign, the data in Table 4 do not support this assumption. Courts generally enforced bargaining orders in cases with 4 or more varieties of hallmark violations, regardless of the bargaining unit's size. In addition, bargaining unit size was not a factor in cases with 3 or fewer hallmark violations. The enforcement rate was somewhat higher for units with 10-19 employees and for units with 20-39 employees. Nevertheless, the enforcement rate was almost the same for very small units (2-9 employees) and large units (40-99 and over 100 employees). While one cannot conclude that severity and size are unrelated, it is at least clear that the cases studied revealed no consistent enforcement pattern.

The same conclusion does not apply, however, when the effect that specific unfair labor practices have on enforcement is observed by unit size. Table 5 reports the results of this observation, with specific hallmark violations identified and the results of court enforcement decisions recorded by unit size. The numbers of cases reported in the Table do not sum to the number of cases in each size category because Table 5's columns are not mutually exclusive. Thus, a single case can include more than one hallmark violation and be included in more than one category. The bottom row shows the overall results of all cases and merely restates Table 7.

Table 5
Size vs. Types of Hallmark Violations Committed

SIZE (# cases)	Hallmark Violations											
	Discrim. Discharge		Threat of Closure		Threat of Discharge		Grant of Benefits		Prom. of Benefits		Plant Closure	
	N	%enf	N	%enf	N	%enf	N	%enf	N	%enf	N	%enf
2 - 9 (14)	11	73%	3	100%	2	50%	3	100%	4	50%	0	--
10 - 19 (21)	17	76%	6	100%	12	83%	9	78%	12	75%	0	--
20 - 39 (24)	11	82%	12	92%	15	67%	11	82%	12	83%	2	100%
40 - 99 (24)	11	82%	14	64%	11	73%	13	54%	12	67%	1	100%
100+ (25)	14	64%	16	69%	18	67%	11	73%	13	69%	0	--
All Cases (108)	64	75%	51	78%	58	71%	47	72%	53	72%	3	100%

To test the correlation, if any, between bargaining unit size and specific unfair labor practices, one should consider each column in Table 5 separately. If the enforcement rate for cases which include a particular violation tends to be higher for small bargaining units, this tendency would indicate that courts consider the hallmark violation in that column to have a larger impact in small bargaining units. At the very least the tendency indicates that courts are more likely to enforce a bargaining order when a particular unfair labor practice occurs in small bargaining units than when the same violation occurs in larger units. The most striking evidence of this pattern is seen in the second column, corresponding to the hallmark violation of threat of plant closure. When that violation was present the courts enforced all but 1 of the 21 cases

in the three smallest unit size categories (*i.e.*, 2-9 employees, 10-19 employees, and 20-39 employees). The enforcement rate is much lower, however, for cases in which the same hallmark violation occurred in larger units.

These raw data cannot accurately predict judicial action in every case. Nevertheless, courts could perceive a threat of plant closure to have a more coercive impact in small bargaining units. The courts may therefore be more likely to enforce NLRB bargaining orders based on these threats. Conversely, courts are less deferential as the bargaining unit size increases.

This trend can also be observed in grant of benefits cases in which, again, enforcement is more likely in small units than in large ones. Interestingly, unit size does not influence cases containing either discriminatory discharge, thought by some to be the most egregious employer unfair labor practice, or the threat of discharge. One might speculate that these actions should produce more anxiety in small units than in large ones and, therefore, be deemed a more serious violation warranting a more extraordinary remedy. Although the lowest enforcement rate for discriminatory discharge occurred in the largest units (over 100 employees), courts demonstrated no consistent size-related pattern for either discharge or threat of discharge. Thus, while courts generally defer to Board decisions in discriminatory discharge cases, unit size plays little or no role in the decision to enforce. Some unaccounted for factor, such as a discharged employee's identity or her status within the union, may be influential. If some unaccounted for factor is the cause, size of the unit could also be a factor. However, this conclusion cannot be drawn from the assembled data.

C. Union Strength

The interpretation of Table 6 is analogous to Table 3's, except that Table 6 considers strength of employee union support instead of unit size. As previously stated, the union had majority support in all but 2 of the study period cases. Since current Board doctrine precludes a nonmajority union from obtaining a bargaining order, those 2 cases were not included in Table 6.

Table 6
Effect of Employee Support for the Union

% Authorization Cards Signed (USTR)	Bargaining Orders		Appealed		Enforced	
	N	%	N	%	N	%
50 < USTR ≤ 60	74	43.0%	52	48.6%	33	43.4%
60 < USTR ≤ 70	41	23.8%	24	22.4%	20	26.3%
70 < USTR ≤ 80	30	17.4%	14	13.1%	10	13.2%
80 < USTR ≤ 90	12	7.0%	8	7.5%	5	6.6%
90 < USTR ≤ 100	15	8.8%	9	8.4%	8	10.5%
TOTALS	172	100%	107	100%	76	100%

Columns 1 and 2 indicate the level of employee union support in the cases studied, including both absolute numbers and the proportion to the entire group. Columns 3 and 4 indicate the proportion by level of employee support of cases for which review was sought. The only significant finding is a slightly higher incidence of parties seeking review for cases in which support for the union was relatively low. This finding could relate to bargaining unit turnover discussed in Part II. Since unions sometimes abandon a bargaining relationship because of high turnover (and the resulting lack of support) even after obtaining enforcement, employers who initially know that a union has weak support might be more willing to request review. These employers thereby gain the advantages of additional delay.

Columns 5 and 6 depict the results of court review. These results indicate that appellate courts tend to enforce cases with high employee union support more readily than cases with less employee support. For example, courts enforced bargaining orders in only about 60% of 52 cases in which employee support was between 50% and 60%. On the other hand, courts enforced the orders in all but 1 case in which employee support was between 90% and 100%. Thus, stronger employee union support increases the probability that courts will enforce bargaining orders.

Why the level of employee union support should increase a court's willingness to enforce a bargaining order is not clear. *Gissel* requires only that the union demonstrate majority support. The critical inquiry is not the level of support (assuming it is at least a majority), but rather the effect of the employer's unlawful conduct. A court may, however, be more willing to defer to Board assumptions about the effect of an employer's coercive actions when the union has had substantial support. Thus, a court might be more willing to accept the Board's conclusion

that a union's election loss was caused by coercion (rather than merely a loss of interest) when the union previously had garnered significant employee support.

D. *Hallmark Violations*

Table 7 compares the overall enforcement rate of the study period cases with the enforcement rates for cases in which each of the hallmark violations occurred. For example, discriminatory discharge was present in 64 of the cases. Of these 64 cases, the courts enforced 48, representing an enforcement rate of 75%. This rate is higher than the overall percentage for enforced cases of 70.4%. Similarly, courts enforced orders in 78.8% of cases in which the employer threatened to close. This figure is, again, a higher enforcement rate than the overall rate.

Cases involving threats of discharge, grants of benefits, and promises of benefits all display enforcement rates very close to or equal to the overall enforcement rate. This finding suggests that none of these three hallmark violations significantly affects the probability that courts of appeals will enforce a bargaining order. The results for the final hallmark violation, the actual closing of a plant, must be considered with caution. Because of the small sample size, drawing inferences on the basis of these cases would be improper. Specifically, employers closed down in only three of the cases. Interestingly, in all three of these cases, courts enforced the bargaining order. Although one may assume, as the Board does, that plant closure has a deleterious effect on employee rights, not much is gained by imposing an order to bargain on an employer that is already out of business.⁷⁶

⁷⁶ Such orders are not entirely useless. It is clear, for example, that employers must bargain with unions that represent their employees about the effect on the employees of the business' closure. *See, e.g., First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Presumably, however, a union would have little leverage to extract concessions (such as severance pay) from an employer who had already ceased operations.

Table 7
Effect of Hallmark Violations

Hallmark Violation	Enforced		Not Enforced	
	N	%	N	%
Discriminatory Discharge	47	74.6%	16	25.4%
Threat of Closure	41	78.8%	11	21.2%
Threat of Discharge	41	70.7%	17	29.3%
Grant of Benefits	34	70.8%	14	29.2%
Promise of Benefits	38	70.4%	16	29.6%
Plant Closure	3	100.0%	0	0.0%

It is not surprising that the most consequential hallmark violations are discriminatory discharge and threat of plant closure. The Board often asserts that these unfair labor practices go to the heart of the Act. The findings, however, do not necessarily mean that courts defer to NLRB decisions concerning the effect of unfair labor practices. Thus, while Table 7's results support the inference that courts defer to NLRB discretion, the results may also mean that courts have independently judged the effect of the employer's actions and have merely agreed with Board conclusions.

E. Probit Model

In addition to the foregoing analysis of raw data, the Authors estimated a probit model to obtain numerical measures of the effects of various factors on the probability of enforcement. Appendix A contains a detailed report of these estimation results. This report contains important findings, with some especially noteworthy.

In general, the probit regression results confirm the observations made earlier in this Part. Stronger employee union support increases the probability of enforcement by a small but statistically significant amount. The different time lags involved in the various cases did not facilitate predicting the probability of enforcement. This conclusion

confirms the earlier observation that the changed circumstances doctrine appears to be applied inconsistently to bargaining order cases. The failure of the administrative law judge to recommend a bargaining order was also insignificant in predicting the probability of enforcement. This Article had speculated that this failure might reduce the probability of enforcement.

The most significant hallmark violations were the threat of closure, discriminatory discharge, and the granting of benefits, all of which increase the likelihood of enforcement. Threat of closure raises the probability of enforcement by an estimated 0.2465. In other words, courts are nearly 25% more likely to enforce bargaining orders for cases in which the employer threatened to close the plant than for similar cases in which no such threat occurred. The presence of discriminatory discharge increases the likelihood of enforcement by 0.1706, and the granting of benefits raises the probability of enforcement by 0.1573. The remaining hallmark violations, threat of discharge, promise of benefits, and plant closure did not have a significant effect on the probability of enforcement.

Not surprisingly, the most significant predictors of the probability of enforcement are whether the Second or Seventh Circuits decided the case. These two predictors impact more than any of the other significant factors, and they are also the most statistically significant. The probit model results show that cases reviewed by the Second Circuit have a 0.4042 lower probability of enforcement than similar cases reviewed by other circuits. Cases heard by the Seventh Circuit have a 0.5022 lower probability of enforcement. These factors imply that a case having a high (close to 1.0) probability of enforcement by another circuit has only about a 0.60 chance of being enforced by the Second Circuit, and only a 0.50 chance of being enforced by the Seventh Circuit. Given the much lower enforcement rates of these two circuits as noted in Table 2, this result was expected.

CONCLUSION

Courts often complain that they are unable to enforce NLRB remedial bargaining orders because of the Board's failure to explain adequately the reasons for its action. That assertion is accurate in some cases. Given the NLRA's endorsement of majoritarian principles, the Board has the burden of explaining why an employer must bargain with a union despite the lack of an election or of the employer's having won an election. Nevertheless, the Board's efforts at elucidation do not explain all cases. Nor should one expect judicial enforcement decisions

to be influenced only by the quality of the NLRB's writing. Bargaining orders are extraordinary remedies that have provoked controversy even within the Board. Courts, then, should be influenced not only by the form of the Board's decision, but also by the substance that motivated it.

One must not exaggerate this project's findings. Predicting accurately whether a court will enforce a bargaining order in a given case is certainly not possible. However, one can estimate the *probability* that a particular circuit will enforce a case with certain measurable characteristics. That information should prove useful to both union and employer attorneys (and NLRB lawyers) contemplating appellate review in bargaining order cases.

For example, some courts are much more likely to deny enforcement of bargaining orders than others. In addition, the changed circumstances doctrine is of dubious importance in courts' decisions, despite their repeated references to it. Since the changed circumstances doctrine does not appear to affect appellate decisions, and because the sufficiency of the Board's explanation as a factor is uncertain, one legitimately questions what factors *do* influence judicial decision making in bargaining order cases. While definite answers are unclear, some factors can be identified as influential.

As observed in Part I, any student of judicial opinions could discern that some courts have little respect for the NLRB's presumed expertise and are willing to substitute their judgment for the Board's, as to both the likely effect of employer unfair labor practices and the remedies needed to correct them. One can draw the same inference from this study's empirical data.

This Article's findings indicate that courts are more likely to enforce bargaining orders when certain unfair labor practices are committed against small bargaining units. Other data indicate that, in making enforcement decisions, courts are influenced by the size of the union's majority. Finally, bargaining orders are more likely to be enforced if premised on discriminatory discharge or threat of closure than if imposed to remedy other types of unfair labor practices.

These findings are consistent with the conclusion that, rather than deferring to the Board, courts are making their own assessment of the impact of employer conduct. Integral parts of this assessment include the type of violation, the size of the unit, and the union's strength. This conclusion is also buttressed by data indicating that courts are not influenced by the presence of hallmark violations other than discriminatory discharge and threat of closure. Thus, even though the Board regards other hallmark violations as highly significant, their presence in a

case is not that significant to courts. To the contrary, the courts seem content to make their own estimation of the coercive impact of the employer's unfair labor practices. This mode of review is inconsistent with the standard of review established by the Supreme Court, which assigns to the NLRB the primary responsibility for choosing a remedy to effectuate the NLRA's policy.

This Article questions, then, whether the courts provide the proper measure of respect for and deference to NLRB decisions to impose bargaining orders. Courts might question whether the Board's assumptions about either the effect of unlawful conduct or the measures necessary to remedy it, are accurate. However, one must also ask whether similar assumptions made by a court, based solely on its review of an appellate record, are of any greater value.

Finally, this Article addresses the efficacy of the *Gissel* order itself. The Court premises *Gissel* orders on the supposedly informed judgment of the NLRB (and, apparently, the courts of appeals) about the impact of wrongful employer conduct. Since the work product of this activity may endanger the Act's majoritarian principles, one must question not only the validity of assumptions (as Getman, Goldberg and Herman have done), but also whether the remedy itself is having the desired effect. Do cases chosen for *Gissel* orders lead to productive collective bargaining relationships? Are the employees whose rights have been threatened adequately protected by the imposition of a bargaining agent? Does judicial enforcement enhance the union's chance for success in bargaining, or are the courts' standards so demanding that, ironically, they enforce bargaining orders only in cases so egregious that any chance of meaningful bargaining has been destroyed. At the present time, no one has sought to answer these questions. They will be addressed in the next phase of the study.

APPENDIX A — PROBIT MODEL

The Authors estimated a probit model as a more systematic means of examining the individual effects of factors that influence courts in reviewing bargaining orders. The results of this estimation allow us to assess the impact of certain factors as well as their significance on the probability of enforcement.

In general, the results of the probit regression confirm observations made from informal analysis of the data. Table A summarizes the results of this estimation. The response variable is the probability (ranging from 0 to 1) that a court of appeals will enforce a bargaining order. The numbers reported in Table A indicate the impact of each of the predictors listed on the probability that a bargaining order will be enforced, when all other predictors are held constant.¹ Thus, for example, the value of 0.1706 corresponding to discriminatory discharge indicates that cases which include discriminatory discharge as one of the unfair labor practices have a 0.17 higher probability of being enforced than similar cases in which no discriminatory discharge occurred. Negative numbers imply that the corresponding predictor lowers the probability of enforcement. Table A's significance levels imply statistical significance of the estimated effects, with smaller significance levels (0.01 for example) indicating stronger evidence that the predictor truly affects the response variable.

Table A does not contain the size (number of employees) of the bargaining units. When size was included as a predictor, it had little or no effect on the probability of enforcement. Furthermore, the inclusion of this factor along with strength of employee support for a union (percentage of signed authorization cards) adversely affected the predictive ability of the equation because of the strong correlation between these two factors.²

Employee support for the union had a small, but significant, positive effect on the probability of enforcement. The value of 0.0085 in Table A indicates that a 1% increase in signed authorization cards increases

¹ For a thorough, easy-to-follow explanation of the interpretation of probit estimation results, see Becker & Waldman, *The Probit Model*, in *ECONOMETRIC MODELING IN ECONOMIC EDUCATION RESEARCH* 135-40 (1987).

² The number of employees in a bargaining unit and the percentage of authorization cards signed have a strong inverse relationship, with smaller bargaining units tending to have a larger percentage of signed authorization cards than larger units. All of the units having 100% employee support ranged in size from 2 to 7 employees. This correlation causes multicollinearity when the two predictors are included together in the estimating model.

the probability of enforcement by .0085, or, equivalently, a 10% increase in authorization cards signed leads to a 0.085 (8.5%) increase in the probability of enforcement. Again, this is the effect of stronger employee support for the union, holding all other factors fixed. These findings agree with the analysis of the figures in Table 6.

In order to estimate the effect of the changed circumstances doctrine, the authors used the length of time between the union's demand for recognition and the court of appeal's decision to predict the probability of enforcement. Confirming the prior analysis of Figure 1's data, the length of this time lag was not a significant predictor of the probability of enforcement. The same was true when we used the time lag as measured in Figure 2 (time between the NLRB's order and the court of appeals decision).

The failure of the administrative law judge to recommend a bargaining order was also found to be insignificant in predicting the probability of enforcement. Around 11% of the cases in the study period fall into this category. Typically, these decisions were cases in which the unfair labor practices were not particularly egregious. As noted earlier, the courts speculatively would be less likely to enforce bargaining orders in these cases because they would be influenced by the ALJ's conclusion that, after seeing the witnesses and weighing the evidence, the employer's conduct had not precluded the possibility of a fair election. Although it is not clear why the ALJ's failure to recommend a bargaining order has no significance to the courts of appeals, the failure may indicate that the courts are simply not impressed by administrative agency determinations at that level.

The most significant hallmark violations were found to be the threat of closure, discriminatory discharge, and grant of benefits, all of which increase the likelihood of enforcement. Threat of closure raises the probability of enforcement by an estimated 0.2465. In other words, cases in which the employer threatened to close the plant are approximately 25% more likely to be enforced than similar cases in which no such threat occurred. As mentioned above, the presence of discriminatory discharge increases the likelihood of enforcement by 0.1706, and the grant of benefits raises the probability of enforcement by 0.1573. The remaining hallmark violations, threat of discharge, promise of benefits, and plant closure were found not to have a significant effect on the probability of enforcement.

Not surprisingly, the most significant predictors on the probability of enforcement are having the cases decided by the Second and Seventh Circuits. These two predictors have the largest impact of all other significant factors, and they are also the most statistically significant. The

results in Table A show that cases reviewed by the Second Circuit have a 0.4042 lower probability of enforcement than similar cases reviewed by other circuits. Seventh Circuit cases have a 0.5022 lower probability of enforcement. This implies that a case that has a high probability (close to one) of enforcement by another circuit has only about a 0.60 chance of being enforced by the Second Circuit, and only a 50-50 chance of being enforced by the Seventh Circuit. This finding was expected, given the much lower enforcement rates of these two circuits as noted in Table 2.

Table A
Probit Regression Results

Predictor Variable	Effect on Probability of Enforcement
% Authorization Cards Signed (Employee Support)	+0.0085***
Non-Recommendation of Bargaining Order by ALJ	-0.0371
Length of Time Between Demand for Recognition and Court of Appeals Decision	-0.0015
Discriminatory Discharge	+0.1706**
Threat of Plant Closure	+0.2465***
Threat of Discharge	+0.0020
Grant of Benefits	+0.1573*
Promise of Benefits	-0.0026
Plant Closure	+1.5208
Case Heard in Second Circuit	-0.4042***
Case Heard in Seventh Circuit	-0.5022***

* = significant at 10% level
 ** = significant at 5% level
 *** = significant at 1% level

APPENDIX B — OFFICIAL CASE CITATIONS FOR APPELLATE DECISIONS

- Advanced Mining Group, 260 N.L.R.B. 486 (1982), *enforced*, No. 82-1434 (D.C. Cir. Jan. 28, 1983).
- Agricom Oilseeds, Inc., 245 N.L.R.B. 616 (1979), *enforced*, No. 80-7026 (9th Cir. Jan. 15, 1981).
- Ahrens Aircraft, Inc., 259 N.L.R.B. 839 (1981), *aff'd*, 703 F.2d 23 (1st Cir. 1983).
- Air Prods. & Chems., Inc., 263 N.L.R.B. 341 (1982), *aff'd*, 717 F.2d 141 (4th Cir. 1983).
- Alumbaugh Coal Corp., 247 N.L.R.B. 895, *modified*, 635 F.2d 1380 (8th Cir. 1980).
- Amber Delivery Serv., Inc., 250 N.L.R.B. 63 (1980), *modified*, 651 F.2d 57 (1st Cir. 1981).
- American Chain Link Fence Co., 255 N.L.R.B. 692 (1981), *modified*, 670 F.2d 1236 (1st Cir. 1982).
- Arrow Molded Plastics, Inc., 243 N.L.R.B. 1211 (1979), *modified*, 653 F.2d 280 (6th Cir. 1981).
- Artra Group, Inc., 262 N.L.R.B. 4 (1982), *enforced*, No. 82-1727 (10th Cir. March 15, 1984).
- Axton Candy & Tobacco Co., 241 N.L.R.B. 1034 (1979), *modified*, 645 F.2d 555 (6th Cir. 1981).
- Berger Transfer & Storage, Inc., 253 N.L.R.B. 5 (1980), *aff'd*, 678 F.2d 679 (7th Cir. 1982).
- Brooks Cameras, Inc., 250 N.L.R.B. 820 (1980), *modified*, 691 F.2d 912 (9th Cir. 1982).
- Burlington Indus., Inc., 257 N.L.R.B. 712 (1981), *modified*, 680 F.2d 974 (4th Cir. 1982).

- Cas Walker's Cash Stores, 249 N.L.R.B. 316 (1980), *aff'd*, 659 F.2d 79 (6th Cir. 1981).
- Century Moving & Storage, Inc., 251 N.L.R.B. 671 (1980), *modified*, 683 F.2d 1087 (7th Cir. 1982).
- Chester Valley, Inc., 251 N.L.R.B. 1435 (1980), *modified*, 652 F.2d 263 (2d Cir. 1981).
- Circo Resorts, Inc., 244 N.L.R.B. 880 (1979), *modified*, 646 F.2d 403 (9th Cir. 1981).
- Coating Products, Inc., 251 N.L.R.B. 1271 (1980), *aff'd*, 648 F.2d 108 (2d Cir. 1981).
- Coil-ACC, Inc., 262 N.L.R.B. 76 (1982), *aff'd*, 712 F.2d 1074 (6th Cir. 1983).
- Conair Corp., 261 N.L.R.B. 1189 (1982), *modified*, 721 F.2d 1355 (D.C. Cir.), *cert denied*, 467 U.S. 1241 (1983).
- Curlee Clothing Co., 240 N.L.R.B. 355, *aff'd*, 607 F.2d 1213 (8th Cir. 1979).
- Dadco Fashions, Inc., 243 N.L.R.B. 1193 (1979), *aff'd*, 632 F.2d 493 (5th Cir. 1980).
- Davis, 243 N.L.R.B. 837 (1979), *aff'd*, 642 F.2d 350 (9th Cir. 1981).
- DeQueen Gen. Hosp., 264 N.L.R.B. 480 (1982), *enforced*, No. 82-2247 (8th Cir. Sept. 18, 1984).
- Digital Paging Sys. of Toledo, Inc., 249 N.L.R.B. 127 (1980), *aff'd*, 659 F.2d 725 (6th Cir. 1981).
- Discotron Equip., Inc., 250 N.L.R.B. 123 (1980), *enforced*, No. 81-4043 (2d Cir. Oct. 9, 1981).
- Doug Hartley, Inc., 255 N.L.R.B. 800 (1981), *enforcement denied*, 669 F.2d 579 (9th Cir. 1982).

- Eastern Steel Co., 253 N.L.R.B. 1230 (1981), *aff'd*, 671 F.2d 104 (3d Cir. 1982).
- Ed Chandler Ford, Inc., 254 N.L.R.B. 851 (1981), *enforcement granted in part, denied in part*, No. 82-7351 (9th Cir. May 10, 1983).
- Edward A. Utlaut Found., Inc., 249 N.L.R.B. 1153 (1980), *enforced in part, denied in part*, 657 F.2d 272 (7th Cir. 1981).
- Ely's Foods, Inc., 249 N.L.R.B. 909 (1980), *aff'd*, 656 F.2d 290 (8th Cir. 1981).
- English Bros. Pattern & Foundry, 253 N.L.R.B. 530 (1980), *aff'd*, 679 F.2d 787 (9th Cir. 1982).
- The Exchange Bank, 264 N.L.R.B. 822 (1982), *aff'd*, 732 F.2d 60 (6th Cir. 1984).
- Faith Garment Co., 246 N.L.R.B. 299 (1979), *aff'd*, 630 F.2d 630 (8th Cir. 1980).
- Frederick's Foodland, Inc., 247 N.L.R.B. 284 (1980), *modified*, 655 F.2d 88 (6th Cir. 1981).
- G.E.S., Inc., 258 N.L.R.B. 300 (1981), *aff'd*, 697 F.2d 157 (6th Cir. 1983).
- Garry Mfg. Co., 242 N.L.R.B. 539 (1979), *modified*, 630 F.2d 934 (3d Cir. 1980).
- Gordonsville Indus., Inc., 252 N.L.R.B. 563 (1980), *aff'd*, Nos. 80-2203, 80-2392, 80-2576 (D.C. Cir. Jan. 19, 1982).
- Greyhound Food Mgmt., Inc., 258 N.L.R.B. 1293 (1981), *enforced*, No. 81-1779 (6th Cir. Feb. 24, 1983).
- Hasbro Indus., Inc., 254 N.L.R.B. 587 (1981), *modified*, 672 F.2d 978 (1st Cir. 1982).
- Heads & Threads Co., 261 N.L.R.B. 800 (1982), *modified*, 724 F.2d 282 (2d Cir. 1983).

- Hitchiner Mfg. Co., 243 N.L.R.B. 927 (1979), *aff'd*, 634 F.2d 1110 (8th Cir. 1980).
- Industry Prods. Co., 251 N.L.R.B. 1380 (1980), *aff'd*, 673 F.2d 164 (6th Cir. 1982).
- J.J. Newberry Co., 249 N.L.R.B. 991 (1980), *modified*, 645 F.2d 148 (2d Cir. 1981).
- J.P. Stevens & Co., 244 N.L.R.B. 407 (1979), *aff'd*, 668 F.2d 767 (4th Cir. 1980), *vacated*, 458 U.S. 1118 (1981).
- Jefferson Nat'l Bank, 240 N.L.R.B. 1057 (1979), *enforced*, No. 80-1059 (3d Cir. Sept. 17, 1980).
- Jim Baker Trucking Co., 241 N.L.R.B. 121 (1979), *enforced*, No. 79-7163 (9th Cir. Aug. 8, 1980).
- John Cuneo, Inc., 253 N.L.R.B. 1025 (1981), *aff'd*, 681 F.2d 11 (D.C. Cir. 1982).
- Justak Bros. & Co., 253 N.L.R.B. 1054, *aff'd*, 664 F.2d 1074 (7th Cir. 1981).
- K & K Gourmet Meats, Inc., 245 N.L.R.B. 1331 (1979), *modified*, 640 F.2d 460 (3d Cir. 1981).
- Keystone Pretzel Bakery, Inc., 242 N.L.R.B. 492 (1979), *aff'd*, 696 F.2d 257 (3d Cir. 1982).
- Knogo Corp., 262 N.L.R.B. 1346 (1982), *modified*, 727 F.2d 55 (2d Cir. 1984).
- La Mousse, Inc., 259 N.L.R.B. 37 (1981), *enforced*, No. 82-7198 (9th Cir. Feb. 12, 1983).
- Local 19, Hotel, Motel, etc. Employees Union, 240 N.L.R.B. 240 (1979), *enforcement denied*, No. 80---- (9th Cir. Aug. 27, 1980) (unreported decision; result supplied by NLRB).
- Lockwoven Co., 245 N.L.R.B. 1362 (1979), *aff'd*, 622 F.2d 296 (8th Cir. 1980).

- Loy Food Stores, Inc., 259 N.L.R.B. 305 (1981), *modified*, 697 F.2d 798 (7th Cir. 1983).
- Magnesium Castings Co., 250 N.L.R.B. 692 (1980), *aff'd*, 668 F.2d 13 (1st Cir. 1981).
- Maidsville Coal Co., 257 N.L.R.B. 1106 (1981), *enforced*, 718 F.2d 658 (4th Cir. 1983), *cert. denied*, 465 U.S. 1079 (1984).
- Maietta Contracting, 251 N.L.R.B. 177 (1980), *enforced*, No. 6-CA-1260 (3d Cir. Sept. 22, 1981).
- Marcus J. Lawrence Memorial Hosp., 249 N.L.R.B. 608 (1980), *enforced in part, denied in part*, No. 80-7363 (9th Cir. June 11, 1981).
- Marion Rohr Corp., 261 N.L.R.B. 971 (1982), *modified*, 714 F.2d 228 (2d Cir. 1983).
- Martin-Brower Co., 263 N.L.R.B. 194 (1982), *enforced*, No. 82-2051 (D.C. Cir. May 10, 1983).
- Massey Stores, Inc., 245 N.L.R.B. 1077 (1979), *modified*, 631 F.2d 328 (4th Cir. 1980).
- Medical Investors Ass'n, 260 N.L.R.B. 941 (1982), *enforced*, No. 82-4178 (2d Cir. Feb 2, 1983).
- Modern Mfg. Co., 261 N.L.R.B. 534 (1982), *enforced*, No. 83-1018 (4th Cir. Nov. 22, 1983).
- Montgomery Ward & Co., 253 N.L.R.B. 196 (1980), *enforcement denied*, 668 F.2d 291 (7th Cir. 1981), *aff'd*, 267 N.L.R.B. 900 (1983).
- Motor Inn of Perrysburg, Inc., 243 N.L.R.B. 280 (1979), *modified*, 647 F.2d 692 (6th Cir. 1981).
- Naum Bros., 240 N.L.R.B. 311 (1979), *aff'd*, 637 F.2d 589 (6th Cir. 1981).

- Onan, A Div. of Ona Corp., 261 N.L.R.B. 1378 (1982), *enforcement granted in part, denied in part, and remanded*, 729 F.2d 713 (11th Cir. 1984).
- Pace Oldsmobile, Inc., 256 N.L.R.B. 1001 (1981), *modified on remand*, 739 F.2d 108 (2d Cir. 1982).
- Patsy Bee, Inc., 249 N.L.R.B. 976 (1980), *enforcement denied*, 654 F.2d 515 (8th Cir. 1981), *modified*, 266 N.L.R.B. 635 (1983).
- Pay 'N Save Corp., 247 N.L.R.B. 1346 (1980), *aff'd*, 641 F.2d 697 (9th Cir. 1981).
- Pedro's, Inc., 246 N.L.R.B. 567 (1979), *modified*, 652 F.2d 1005 (D.C. Cir. 1981).
- Penn Color, Inc., 261 N.L.R.B. 395 (1982), *enforced*, No. 82-3430 (3d Cir. June 2, 1983).
- Permanent Label Corp., 248 N.L.R.B. 118 (1980), *aff'd*, 657 F.2d 512 (3d Cir.), *cert. denied*, 455 U.S. 940 (1981).
- Piggly Wiggly, 258 N.L.R.B. 1081 (1981), *aff'd*, 705 F.2d 1537 (11th Cir. 1983).
- Pilgrim Life Ins. Co., 249 N.L.R.B. 1228 (1980), *enforced*, No. 80-2085 (8th Cir. May 21, 1981).
- Precision Graphics, Inc., 256 N.L.R.B. 381 (1981), *enforced*, No. 81-1734 (3d Cir. April 29, 1982).
- Price's Pic-Pac Supermarkets, Inc., 256 N.L.R.B. 742 (1981), *aff'd*, 707 F.2d 236 (6th Cir. 1983).
- Progressive Supermarkets, Inc., 259 N.L.R.B. 512 (1981), *granting petition to review*, No. 82-3088 (3d Cir. Oct. 20, 1982).
- RAI Research Corp., 257 N.L.R.B. 918 (1981), *enforced*, Nos. 81-4184, 81-4214 (2d Cir. March 8, 1982).
- Rapid Mfg. Co., 239 N.L.R.B. 465 (1978), *modified*, 612 F.2d 144 (3d Cir. 1979).

- Red Oaks Nursing Home, Inc., 241 N.L.R.B. 444 (1979), *modified*, 633 F.2d 503 (7th Cir. 1980).
- Rexair, Inc., 243 N.L.R.B. 876 (1979), *modified*, 646 F.2d 249 (6th Cir. 1981).
- Robin Am. Corp., 245 N.L.R.B. 822 (1979), *modified*, 654 F.2d 1022 (5th Cir. Unit B Aug. 1981), *modified*, 667 F.2d 1170 (5th Cir. 1982).
- Roth's IGA Foodliner, Inc., 259 N.L.R.B. 132 (1981), *enforced*, No. 81-7871 (9th Cir. Oct. 29, 1982).
- SMC Restaurant Corp., 261 N.L.R.B. 313 (1982), *enforced*, No. 82-4129, (2d Cir. Jan. 4, 1983).
- Southern Moldings, Inc., 255 N.L.R.B. 839 (1981), *aff'd*, 715 F.2d 1069, *vacated*, 719 F.2d 858 (6th Cir. 1983), *aff'd*, 728 F.2d 805 (6th Cir. 1984).
- Spiegel, 257 N.L.R.B. 230 (1981), *enforced*, No. 82-3049 (3d Cir. Nov. 26, 1982).
- Standard-Coosa-Thatcher Carpet Yarn Div., Inc., 257 N.L.R.B. 304 (1981), *aff'd*, 691 F.2d 1133 (4th Cir.), *cert. denied*, 460 U.S. 1083 (1982).
- Stanley M. Fiel, Inc., 250 N.L.R.B. 1154 (1980), *aff'd*, 674 F.2d 567 (6th Cir. 1982).
- St. Francis Hosp., 263 N.L.R.B. 834 (1982), *aff'd*, 729 F.2d 844 (D.C. Cir. 1984).
- Suburban Ford, Inc., 248 N.L.R.B. 364 (1980), *modified*, 646 F.2d 1244 (8th Cir. 1981). [Case includes 2 bargaining units. Bargaining order enforced in one and not enforced in other.]
- Tartan Marine Co., 247 N.L.R.B. 646 (1980), *enforced in part, denied in part*, No. 80-1072 (4th Cir. Feb. 26, 1981).
- Tipton Elec. Co., 242 N.L.R.B. 202 (1979), *aff'd*, 621 F.2d 890 (8th Cir. 1980).

- Tucker Enter., Inc., 238 N.L.R.B. 1188 (1978), *aff'd*, 651 F.2d 457 (6th Cir. 1980).
- United Oil Mfg. Co., 254 N.L.R.B. 1320 (1981), *aff'd*, 672 F.2d 1208 (3d Cir.), *cert. denied*, 459 U.S. 1036 (1982).
- United Serv. for the Handicapped, 251 N.L.R.B. 823 (1980), *aff'd*, 678 F.2d 661 (6th Cir. 1982).
- Valley Plaza, Inc., 258 N.L.R.B. 537 (1981), *aff'd*, 715 F.2d 237 (6th Cir. 1983).
- Village IX, Inc., 264 N.L.R.B. 908 (1982), *modified*, 723 F.2d 1360 (7th Cir. 1983).
- Warehouse Groceries Management, Inc., 254 N.L.R.B. 252 (1981), *aff'd*, No. 81-7487 (11th Cir. July 6, 1982).
- Washington Beef Producers, Inc., 264 N.L.R.B. 1163 (1982), *enforced*, No. 83-7212 (9th Cir. June 7, 1984).
- Wehrenberg Theatres, Inc., 260 N.L.R.B. 18, *aff'd*, 690 F.2d 159 (8th Cir. 1982).
- Wilhow Corp., 244 N.L.R.B. 303 (1979), *aff'd*, 666 F.2d 1294 (10th Cir. 1981).
- Winco Petroleum Co., 241 N.L.R.B. 1118 (1979), 668 F.2d 973 (8th Cir. 1982).
- Zale Corp., 239 N.L.R.B. 1277 (1979), *enforced*, No. 79-7057 (9th Cir. May 5, 1980).
- Zero Corp., 262 N.L.R.B. 495 (1982), *enforced*, Nos. 82-1561, 82-1711 (1st Cir. Jan. 7, 1983).