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Conair Corp. v. NLRB: Limits on the Power of the NLRB to Remedy Employer Unfair Labor Practices

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RECENT CASES

CONAIR CORP. V. NLRB: LIMITS ON THE POWER OF THE NLRB TO REMEDY EMPLOYER UNFAIR LABOR PRACTICES

In 1935 Congress enacted the National Labor Relations Act (NLRA or Act) to stimulate collective bargaining and provide a forum for the peaceful resolution of industrial disputes.[1] The NLRA guaranteed workers the right to form unions and deemed employer interference with those rights an unfair labor practice.[2] The Act established the National Labor Relations Board (NLRB or Board) to administer the Act and gave the Board broad remedial powers to "take such affirmative action as will effectuate the policies of the Act."[3] The NLRA gave the Board the exclusive power to adjudicate

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1. The National Labor Relations (Wagner) Act guarantees workers the right to form unions and prohibits employer interference with those rights. 29 U.S.C. §§ 151-169 (1982). In 1947, the Labor Management Relations (Taft-Hartley) Act amended the NLRA to guarantee workers the right to refrain from unionizing and to prohibit certain union activities such as employee coercion and refusing to bargain in good faith. *Id.* §§ 141-196. The NLRA was further amended in 1959 by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act which set forth financial reporting requirements and further limited union activities with respect to boycotts and picketing. *Id.* §§ 401-531.

2. Section 7 of the NLRA provides in pertinent part:

> 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. . . .

Id. § 157.

Section 8 provides in relevant part:

> (a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
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> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ;
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Id. § 158(a)(1)-(3).

3. *Id.* § 160(a). Section 10(a) of the NLRA sets forth the powers of the NLRB to prevent persons from engaging in unfair labor practices. *Id.* Section 10(c) provides the Board with the power to issue

> an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

Id. § 160(c). This section later served as a model for the remedial powers granted to the courts under the Civil Rights Act. 42 U.S.C. § 2000(e)(5)(g) (1982). *See* Note, *NLRB Bargaining Orders*

unfair labor practices.[4] The formulation of remedies for violations of the Act has been held to be "peculiarly a matter of administrative competence."[5] Once the Board determines the proper remedy, it is empowered to issue an order to that effect. If the parties dispute the order, the Act provides the Board with the power to petition the federal courts of appeal for enforcement.[6] Traditionally, decisions of the Board have been subject to limited judicial review.[7]

In *Conair Corp. v. NLRB*,[8] the Court of Appeals for the District of Columbia severely restricted the power of the NLRB to remedy pervasive unfair labor practices. The court held that when a union enjoys less than full card majority,[9] the NLRB is not empowered to issue a bargaining order against an employer who has engaged in massive anti-union conduct.[10] In its decision, the court refused to follow the Supreme Court's dictum in *NLRB v. Gissel Packing Co.*[11] which indicated that the Board could issue a bargaining order without a showing of majority support when the employer's misconduct was so pervasive as to preclude a fair election. The *Conair* court's decision denying the Board authority to issue a non-majority bargaining order

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in the Absence of a Union Majority: Time to Enforce Gissel, 26 N.Y.L. SCH. L. REV. 291, 293 n.17 (1981) (citing Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975)) [hereinafter cited as Note, *Time to Enforce* Gissel].

4. Employer unfair labor practices are defined in § 8(a)(1)-(5) which deems it an unfair labor practice for employers: to interfere with employees' right to organize; to dominate or interfere with any labor organization; to discriminate against employees because of union membership; to discharge or discriminate against any employee who files charges with the Board; or to refuse to bargain with employee representatives. 29 U.S.C. § 158(a)(1)-(5) (1982). Union unfair labor practices are defined in § 8(b) and provide an extensive list of prohibited activities including: coercing employees either to join a union or to engage in a strike, refusing to bargain collectively, and picketing to enforce bargaining demands. *Id.* § 158(b)(1)-(7).

5. *See* Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943) (Board's order cannot be overturned unless outside the purposes of the Act); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) (remedies under the NLRA are a matter of administrative expertise).

6. Section 10(e) provides the Board with the power to petition the courts of appeal for enforcement. 29 U.S.C. § 160(e) (1982). Once a disputed order is enforced by the court, it becomes similar to an injunction; thus, violation of the order is punishable by contempt. *See, e.g.*, NLRB v. J.P. Stevens & Co., 563 F.2d 8 (2d Cir. 1977) (employer held in contempt for continued violations of court enforced Board orders); Oil, Chem., & Atomic Workers v. NLRB, 547 F.2d 575 (D.C. Cir. 1976) (company held in contempt for failure to effectuate Board ordered remedies), *cert. denied*, 431 U.S. 966 (1977).

7. *See* Ford Motor Co. (Chicago Stamping Plant) v. NLRB, 441 U.S. 488, 497 (1979) (although the judgment of the Board is subject to judicial review, if the Board's construction of the statute is reasonably defensible, it should not be rejected merely because the court prefers another view); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953) (the remedial power of the Board is broadly discretionary and one that the Board, not the courts, must wield); NLRB v. Gullett Gin Co., 340 U.S. 361, 362-63 (1951) ("We must not, however, be more mindful of the limits of the Board's discretion than we are of our own limited function in reviewing Board orders.").

8. 721 F.2d 1355 (D.C. Cir. 1983).

9. For a discussion of the function of a card majority in the election process, see *infra* note 22.

10. 721 F.2d at 1384.

11. 395 U.S. 575 (1969).

was contrary to the decision reached by the Third Circuit in *United Dairy Farmers Cooperative Association v. NLRB,*[12] and thus created a conflict among the circuits.

The *Conair* decision severely limits the power of the NLRB to remedy pervasive unfair labor practices committed by an employer. By interpreting majority rule[13] as an overriding policy consideration, the court set new limits on the scope of the remedies available to the Board. Because the current Board has not sought review of the *Conair* decision, the Board is in apparent agreement with the circuit court's view of the limits on its powers. While the *Conair* decision may survive the present Board's term, the Supreme Court should resolve the issue to settle the conflict among the circuits.

BACKGROUND

The proper remedy for unfair labor practices committed by an employer during a union organizing campaign is determined according to the seriousness of the misconduct and the perceived impact of the misconduct on the electoral process.[14] If the unfair labor practices are not pervasive, the Board will simply order the employer to cease the practices and hold a rerun election.[15] If the unfair labor practices are serious, the Board will order the employer to bargain with the union.[16] The rationale underlying the issuance

12. 633 F.2d 1054 (3d Cir. 1980).

13. The principle of majority rule is embodied in § 9(a) of the NLRA, 29 U.S.C. § 159(a) (1982). *See infra* note 93.

14. *See, e.g.,* NLRB v. Village IX, Inc., 723 F.2d 1360 (7th Cir. 1983) (bargaining order is not proper unless unfair labor practices were so serious that employees would be intimidated from voting their true preference in a new election); NLRB v. Jamaica Towing Co., 632 F.2d 208 (2d Cir. 1980) (determination of whether or not a bargaining order is a proper remedy is dependent upon the effect of the employer's misconduct on employees' freedom of choice); Peerless of Am. v. NLRB, 484 F.2d 1108 (7th Cir. 1973) (bargaining order not warranted where employer interrogations of employees did not intimidate employees and union campaign was not stifled); Daisy's Originals v. NLRB, 468 F.2d 493 (5th Cir. 1972) (employer's conduct not sufficiently grave to show that it impaired employee freedom of choice); NLRB v. World Carpets, 463 F.2d 57 (2d Cir. 1972) (bargaining order not warranted where employer misconduct was minimal). *See generally* Carson, *The* Gissel *Doctrine: When a Bargaining Order Will Issue,* 41 FORDHAM L. REV. 85 (1972) (under *Gissel,* the totality of circumstances must be considered in order to determine whether or not a fair election can be held).

15. In a rerun election, the Board sets aside the original election and orders a new election. 1 THE DEVELOPING LABOR LAW 410-11 (C. Morris 2d ed. 1983) [hereinafter cited as THE DEVELOPING LABOR LAW]; *see, e.g.,* Paul Distrib. Co., 264 N.L.R.B. 1378 (1982) (where unfair labor practices were not grave and produced no lingering effects, a fair election was not precluded); Schultes I.G.A. Foodliner, 241 N.L.R.B. 855 (1979) (bargaining order not proper when unfair labor practices were not serious and did not affect employees' perception of their ability to vote in a future election); Rensselaer Polytechnic Institute, 219 N.L.R.B. 712 (1975) (even though employer granted benefits in violation of the Act, a free election could still be conducted).

16. *See, e.g.,* Montgomery Ward & Co., 267 N.L.R.B. No. 143, 1983 NLRB Dec. (CCH) § 15,905 (1983) (bargaining order is appropriate when employer committed 29 separate § 8(a)(1) violations); Greg Bunker, 267 N.L.R.B. No. 65, 1983 NLRB Dec. (CCH) § 15,940 (1983) (numerous and flagrant unfair labor practices warranted a bargaining order); Pay n' Save Corp., 247 N.L.R.B. 1346 (1980), *enforced,* 641 F.2d 697 (9th Cir. 1981) (discriminatory discharges

of a bargaining order is that the pervasiveness of the employer's anti-union conduct precludes the possibility of a fair rerun election.[17] In the past, the Board issued bargaining orders only when the union had shown previous majority support.[18]

The confusion surrounding the issuance of non-majority bargaining orders is the result of the Supreme Court dictum in *NLRB v. Gissel Packing Co.*[19] The *Gissel* decision intimated that the NLRB had the authority to issue a non-majority bargaining order when the employer had committed pervasive unfair labor practices.[20] In each of the cases consolidated in *Gissel,*[21] the

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warranted a bargaining order); Mideast Consolidation Warehouse, A Div. of Ethan Allen, 247 N.L.R.B. 552 (1980) (bargaining order proper where employer discriminatorily discharged employees, granted benefits during the critical pre-election period, and threatened plant closure); Nevis Indus., 246 N.L.R.B. 1053 (1979) (bargaining order proper where employer discharged entire department to stifle unionization).

17. *See, e.g.,* Atlas Microfilming, 267 N.L.R.B. No. 114, 1983 NLRB Dec. (CCH) § 15,883 (1983) (bargaining order warranted where employer's pervasive misconduct made a fair election impossible); Ohio New & Rebuilt Parts, Inc., 267 N.L.R.B. No. 66, 1983 NLRB Dec. (CCH) § 15,831 (1983) (lingering effects of employer's unfair labor practices made a fair election unlikely; cards were thus a more reliable indicator of employee choice); Chromalloy Mining & Minerals, 238 N.L.R.B. 688 (1978), *enforced in part,* 620 F.2d 1120 (5th Cir. 1980) (when a card majority is shown, flagrant unfair labor practices that impede the election process warrant a bargaining order); Electrical Prod. Div. of Midland-Ross Corp., 239 N.L.R.B. 323 (1978), *enforced,* 617 F.2d 977 (3d Cir. 1980) (bargaining order is proper when unfair labor practices undermine the union majority and make a fair election unlikely); Montgomery Ward & Co., 220 N.L.R.B. 373 (1975), *enforced as modified,* 554 F.2d 996 (10th Cir. 1977) (bargaining order is proper when the union had a majority and the possibility of a fair rerun election is slight).

18. *See, e.g.,* Loray Corp., 184 N.L.R.B. 557 (1970) (although employer unfair labor practices were outrageous and pervasive, Board will not issue a bargaining order absent a showing of majority support for the union); International Union of Elec., Radio, & Mach. Workers (Scott's Inc.), 159 N.L.R.B. 1795 (1966) (bargaining order cannot be issued without a showing that the union at one time had attained a majority); H.W. Elson Bottling Co., 155 N.L.R.B. 714 (1965), *enforced as modified,* 379 F.2d 223 (6th Cir. 1967) (policies of the NLRA will not permit a bargaining order when majority status is not shown).

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

20. *Id.* at 613-14. The suggestion that non-majority bargaining orders may be proper is contained in the following excerpt:

> [T]he actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." NLRB v. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967); *see also* NLRB v. Heck's, Inc., 398 F.2d 337, 338 (4th Cir. 1968). The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.

395 U.S. at 613-14.

21. The four cases consolidated in *Gissel* include: General Steel Prods., Inc. v. NLRB, 398

union had obtained a valid card majority and demanded recognition.[22] The companies refused to bargain, asserting that cards were not a valid indicator of employee choice.[23] The Board found the refusal to bargain a violation of section 8(a)(5) of the NLRA and ordered the employers to bargain.[24] The courts of appeal in three of the four cases had declined to enforce the bargaining order, holding that cards were not a valid indicator of majority choice.[25] On appeal, the Supreme Court held that the Board could issue a bargaining order on the basis of a card majority when serious unfair labor practices committed by an employer made a fair election unlikely.[26]

To determine when a bargaining order should be issued, the *Gissel* Court divided employer misconduct into three categories.[27] When the employer's misconduct is exceptionally outrageous and pervasive (category I), the Court indicated that a bargaining order may be issued "without need of inquiry into majority status."[28] In less serious episodes of misconduct (category II),

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F.2d 339 (4th Cir. 1968); NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968); NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968); NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968).

22. 395 U.S. at 580, 587. For a discussion of the election process, see generally J. GETMAN, LABOR RELATIONS: LAW, PRACTICE AND POLICY 60-63 (1978). A union that has obtained signed authorization cards from a majority of employees indicating support for the union can demand recognition from the employer as the exclusive bargaining representative. *Id.* at 60. If the employer denies recognition, the union must petition the NLRB for certification, showing at least a 30% card majority. *Id.* at 61. The NLRB can then direct an election. *Id.* If the union prevails in the election, it becomes certified as the exclusive bargaining representative and is protected from challenges to its majority status for a period of one year. *Id.* at 62. Once a collective bargaining agreement is negotiated, contract bar rules further prohibit challenges to the majority status of the union during the period of the agreement (up to three years). *Id.* at 62.

23. 395 U.S. at 580, 587; *see also* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 310 (1974) (the Court resolved an issue left open by *Gissel* and held that an employer who has not committed independent unfair labor practices does not violate the Act by refusing to recognize authorization cards as evidence of union majority status).

24. 395 U.S. at 610. Section 8(a)(5) prohibits an employer from refusing to bargain with the employees' chosen representative. 29 U.S.C. § 158(a)(5) (1982).

25. Only the First Circuit enforced the bargaining order in NLRB v. Sinclair Co., 397 F.2d 157, 162 (1st Cir. 1968). The Fourth Circuit in each case declined to enforce the bargaining orders on the basis of a card majority, holding that the Taft-Hartley amendments withdrew NLRB authority to order bargaining on the basis of cards. *See* General Steel Prods., Inc. v. NLRB, 398 F.2d 339, 340 (4th Cir. 1968); NLRB v. Gissel Packing Co., 398 F.2d 336, 337 (4th Cir. 1968); NLRB v. Heck's, Inc., 398 F.2d 337, 338 (4th Cir. 1968).

26. 395 U.S. at 610. By affirming the use of cards as valid indicators of employee choice, the Court endorsed what is known as the *Cumberland Shoe* doctrine. *Id.* at 584 (citing Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963)). Under the *Cumberland Shoe* doctrine, when a card on its face explicitly authorizes the union to represent the employees, and does not simply authorize the union to request an election, it can be used as a valid indication of support for the union. *Id.* at 584.

27. *Id.* at 614-15.

28. *Id.* at 613-14. This dictum has been characterized as dictum supporting dictum because the language used by the Court is taken from the Fourth Circuit's opinion in NLRB v. Heck's Inc., 398 F.2d 337, 338 (4th Cir. 1968). The Fourth Circuit in turn had taken this language from its prior decision in NLRB v. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967). The language in *Logan Packing* was based on comments in Bok, *The Regulation of Campaign*

the Court held that a bargaining order can be issued only upon a showing of a previous card majority.[29] When the employer's unfair labor practices are minimal (category III), the Court stated that the Board cannot issue a bargaining order.[30] Because a card majority had been established in each of the consolidated cases, the Court's holding was limited to category II cases,[31] and the Court did not decide the question of whether the NLRB had the power to issue non-majority bargaining orders. The rationale underlying the *Gissel* decision, however, was that the more egregious the employer's conduct, the less likely an election would be to provide an accurate reflection of employee sentiment regarding unionization.[32]

In the decisions immediately following *Gissel,* the NLRB consistently refused to follow the Court's distinction between the three categories of misconduct to determine whether a bargaining order should be issued.[33] Board orders were often conclusory and contradictory.[34] One court observed that the Board appeared to issue bargaining orders automatically on the basis

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Tactics in Representation Elections Under the National Labor Relations Act, 78 HARV. L. REV. 38, 132-39 (1964). *See* Note, *Time to Enforce* Gissel, *supra* note 3, at 305.

29. 395 U.S. at 614. The Court stated that where the Board found that the probability of ensuring a fair election was slight and that employee sentiment, as expressed by cards, would be better protected by the issuance of a bargaining order, one should be issued. *Id.* at 614-15.

30. *Id.* at 615. The Court reasoned that minimal violations have little impact on the election process. *Id.*

31. *Id.* at 580.

32. *Id.* at 614; *see also* Note, *Representative Bargaining Orders: A Time for Change,* 67 CORNELL L. REV. 950, 954 (1982) (bargaining orders are issued under *Gissel* when unfair labor practices interrupt the free flow of information, thereby distorting employee perceptions and foreclosing the preferred election method) [hereinafter cited as Note, *Representative Bargaining Orders*].

33. *See, e.g.,* Fuqua Homes, Mo., Inc., 201 N.L.R.B. 130 (1973) (Board refused to issue a bargaining order even though the employer engaged in extensive unfair labor practices); Loray Corp., 184 N.L.R.B. 557 (1970) (employer's misconduct was outrageous and pervasive yet the Board refused to issue a bargaining order). Decisions such as these have led to a great deal of debate among commentators as to the ability of the Board to make the detailed analysis necessary to support the issuance of a bargaining order. *See generally* Getman & Goldberg, *The Myth of Labor Board Expertise,* 39 U. CHI. L. REV. 681, 682 (1972) (Board does not have the ability to assess the impact of employer misconduct because it has never empirically determined what type of conduct has a coercive impact).

34. Many circuit courts have refused to enforce Board bargaining orders because of the Board's failure to provide a clear analysis utilizing the *Gissel* categories. *See, e.g.,* NLRB v. Village IX, 723 F.2d 1360 (7th Cir. 1983) (court refused to enforce bargaining order because the Board did not make adequate findings to show why a fair rerun election could not be held); Hedstrom Co. v. NLRB, 558 F.2d 1137 (3d Cir. 1977) (case remanded to the Board to provide clear reasons for issuing a bargaining order); Automated Business Sys. v. NLRB, 497 F.2d 262 (6th Cir. 1974) (case remanded to the Board because lack of clear analysis made it unlikely that the Board could have properly concluded that the employer's misconduct had an effect on the election results). Commentators have suggested various solutions to alleviate the Board's difficulty in applying the *Gissel* analysis. *See* Pogrebin, *NLRB Bargaining Orders Since* Gissel: *Wandering from a Landmark,* 46 ST. JOHN'S L. REV. 193, 208-09 (1971) (Board should utilize its rule-making authority to determine standards for applying *Gissel*); Comment,

of any unfair labor practice, a policy clearly not in line with *Gissel*.[35] Yet, the Board refused to issue bargaining orders where no proper union majority was shown, regardless of the outrageousness of the employer's misconduct.[36]

Ten years after *Gissel*[37] a plurality of the Board in *United Dairy Farmers Cooperative Association* (*United Dairy I*) indicated that the issuance of non-majority bargaining orders was within the Board's discretion.[38] The Board, however, was unable to reach the majority needed to issue a bargaining order and the case was appealed.[39] The Third Circuit held that the Board had the power to issue a non-majority bargaining order when an employer's outrageous and pervasive misconduct precluded the possibility of a free, uncoerced election.[40] Because the Board had not determined whether the employer's conduct was within *Gissel*'s category I, the court remanded the case.[41]

A Reappraisal of the Bargaining Order: Toward a Consistent Application of NLRB v. Gissel Packing Co., 69 NW. L. REV. 556, 586 (1974) (Board should divide category II misconduct into two levels: one in which outrageous misconduct would per se support a bargaining order and one in which a detailed analysis would be required); Note, *Representative Bargaining Orders, supra* note 32, at 973 (Board should delineate unfair labor practices that will trigger a bargaining order, and thereby create a rebuttable presumption that a bargaining order is proper).

35. *See* Red Oaks Nursing Home v. NLRB, 633 F.2d 503, 509 (7th Cir. 1980); *see also* Peerless of Am. v. NLRB, 484 F.2d 1108, 1118 (7th Cir. 1973) (Board acts "as if any interrogations, threats, promises of benefits and solicitations of whatever intensity, whenever, however, and in whatever context made were the equivalent of all others imaginable").

36. *See, e.g.*, F.W.I.L. Lundy Bros. Restaurant, Inc., 248 N.L.R.B. 415 (1980) (although employer's misconduct was outrageous and pervasive, Board cannot issue a bargaining order absent a showing of majority support); Sambo's Restaurant, Inc., 247 N.L.R.B. 777 (1980) (Board does not have the authority to issue non-majority bargaining orders), *enforced,* 641 F.2d 794 (9th Cir. 1981); Haddon House Food Prod., Inc., 242 N.L.R.B. 1057 (1979) (Board refused to issue a bargaining order where there was no evidence of majority support), *enforced,* 640 F.2d 392 (D.C. Cir.), *cert. denied,* 454 U.S. 827 (1981).

37. 242 N.L.R.B. 1026 (1979).

38. *Id.* at 1027 n.5, 1038. The case involved an organizing drive among a group of truck drivers working for the Cooperative. *Id.* at 1046. Employer misconduct included discriminatory discharges, coercive interrogations, threats of plant closure, and granting bonuses. *Id.* at 1051-52. The employer also converted all the drivers to independent contractor status to prevent unionization. *Id.* at 1049-51. Two members of the Board held that the NLRB had the authority to issue a bargaining order. *Id.* at 1038. Two other members indicated that the Board may have such power. *Id.* at 1027 n.5. The fifth member maintained that the Board had no such authority. *Id.* at 1038. Although four members found that the Board may have the power to issue a non-majority bargaining order, a majority of the Board did not agree to issue an order in this case. *Id.* at 1028.

39. United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980).

40. *Id.* at 1068. The court reasoned that a bargaining order would better protect employee free choice when the employer's misconduct had seriously undermined the election process. *Id.* The court further stated that denying the Board the authority to issue non-majority bargaining orders would deprive unions of recognition because of an employer's misconduct when, absent the misconduct, the unions would have obtained majority support. *Id.* The court noted that to hold otherwise would create incentives for an employer to engage in misconduct to prevent the emergence of a card majority. *Id.*

41. *Id.* at 1070.

On remand, the Board found the employer's misconduct sufficiently egregious to constitute category I conduct and therefore issued a non-majority bargaining order.[42] The Board also articulated standards for determining when employer misconduct qualified as *Gissel*'s category I misconduct. According to the Board, four factors must be considered: the gravity, the extent, the timing, and the repetition of the violations.[43] The Board concluded that a bargaining order should be issued when there is a reasonable basis to conclude that but for the employer's misconduct, the union would have enjoyed majority support.[44]

THE *CONAIR* DECISION

Facts and Procedural History

In March 1977, the International Ladies Garment Workers Union began an organizing campaign among production and maintenance employees at Conair Corporation's New Jersey plant.[45] In response to the drive, the company held a series of meetings in which employees were promised a variety of benefits and threatened with plant closure should the union prevail.[46] Upon learning of these meetings, the union called an unfair labor practice strike.[47] Two days later, the union, claiming majority support, petitioned the NLRB

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42. United Dairy Farmers Coop. Ass'n (United Dairy II), 257 N.L.R.B. 772, 775 (1981).

43. *Id.* The Board noted the gravity and extent of the employer's misconduct in discharging union activists, attempting to convert the drivers to independent contractors and threatening to close the plant. *Id.* at 774. Further, the impact of this misconduct was aggravated by the swiftness of the employer's reaction to the organizing campaign. *Id.* at 773. Finally, the Board noted the numerous repetitions of violations that continued even after the election had been held. *Id.* at 774.

44. *Id.* at 775. Although the Board noted that the risk of imposing a minority union in this case was slight because the union lost the election by only two votes, the Board concluded that a close election would not be a prerequisite for the issuance of a bargaining order. *Id.* at 775 n.22. The Board reasoned that such a requirement may cause an employer to escalate his misconduct to achieve an overwhelming election victory. *Id.*

45. 721 F.2d at 1360. The proposed bargaining unit was composed of 300 employees, a majority of whom were Spanish-speaking. *Id.*

46. *Id.* at 1361 n.8. The benefits included improved wages and benefits, the hiring of a bi-lingual personnel director, and expansion of cafeteria facilities. *Id.* The company also informed employees that if unionized, only non-union employees could participate in profit sharing. *Id.* at 1361 n.7.

47. *Id.* at 1361-62. For a discussion of the distinctions between an unfair labor practice strike and an economic strike, see R. GORMAN, BASIC TEXT ON LABOR LAW 339-353 (1976). A strike in protest of an employer's violations of the NLRA is characterized as an unfair labor practice strike. *Id.* at 341. In contrast, a strike called to press bargaining demands, for example, is an economic strike. *Id.* at 340. Although neither an economic striker nor an unfair labor practice striker can be discharged, they have different rights to reinstatement when the strike is ended. *Id.* at 341. Once unfair labor practice strikers unconditionally offer to return to work, they have an unqualified right to be reinstated in their original positions. *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). Economic strikers can be permanently replaced and have no right to reinstatement. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

for certification as the bargaining representative.[48] The union and the employer entered into a stipulation to hold an election, and an election was later scheduled.[49] In the intervening months, the company sent notices to the strikers stating that they would be deemed to have quit their jobs unless they unconditionally accepted the company's offer to return to work.[50] The company in the meantime implemented numerous benefits promised to the employees at earlier meetings.[51] After five months of concerted action, the union decided to end the strike and made an unconditional offer to return to work.[52] The company accepted the offer but refused to immediately reinstate the strikers.[53]

Two weeks prior to the election, the company repeatedly informed employees that the plant would close if unionized.[54] The union lost the election by a vote of 136-69 and challenged the election results.[55] In March 1978, the NLRB filed a complaint against Conair, consolidating the union's challenge to the election results with the previous unfair labor practice charges.[56]

The Administrative Law Judge (ALJ) found that the company's conduct violated sections 8(a)(1) and 8(a)(3) of the NLRA[57] and determined that the violations were sufficiently grave to characterize the company's conduct as

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48. 721 F.2d at 1362. *See generally supra* note 22 (discussing procedures for obtaining certification as the bargaining representative).

49. 721 F.2d at 1362. The election was postponed until December pending the resolution of unfair labor practice charges filed by both the company and the union. *Id.* at 1364.

50. *Id.* The union filed an unfair labor practice charge following this action alleging that the notices threatened discriminatory discharge. *Id.* at 1363 n.24. The company also notified the strikers that it had informed the company's medical and life insurance carriers that the strikers no longer worked for Conair. *Id.* at 1363.

51. *Id.* The benefits included job bidding procedures for promotions, expansion of cafeteria facilities, the establishment of an employee credit union, and improved plant safety. *Id.* at 1364 n.30. Conair, however, did not increase wages as originally promised and told employees that it would be illegal for them to do so prior to the resolution of the dispute. *Id.*

52. *Id.* at 1364.

53. *Id.* Thirteen strikers were never reinstated. *Id.* Conair refused to reinstate five strikers who had been arrested for misconduct during the strike. *Id.* at 1364 n.34. The company refused to reinstate another five strikers who originally accepted the offer to return to work but later rejoined the strike. *Id.* Three other employees never received offers of reinstatement due to administrative errors that Conair refused to correct. *Id.* Finally, three strikers were reinstated but were later discharged when they took authorized leaves. *Id.*

54. *Id.* at 1364. The company also warned employees that they would not receive a Christmas bonus in the event of a union victory. *Id.* The company was also implicated in the distribution of raffle tickets that stated in pertinent part: "WIN AN EXCITING ALL EXPENSE PAID TRIP TO CONAIR'S NEW FACILITIES IN BEAUTIFUL HONG KONG. DONATION: ONE UNION VOTE." *Id.* at 1365 n.37.

55. *Id.* at 1365. Forty-one ballots were challenged. *Id.*

56. *Id.*

57. *Id.* Section 8(a)(1) prohibits employer interference with employees' exercise of their right to organize. 29 U.S.C. § 158(a)(1) (1982). Section 8(a)(3) prohibits an employer from discriminatorily discharging employees to discourage union membership. *Id.* § 158(a)(3).

"outrageous and pervasive."[58] The ALJ's recommended order included a cease and desist order and extraordinary notice and access remedies.[59] He declined, however, to issue a bargaining order because the union had never obtained a card majority.[60]

The NLRB agreed with the ALJ's finding that the company had engaged in extensive unfair labor practices.[61] Citing the gravity, extent, timing, and constant repetition of the violations, the Board held that the conduct fell into *Gissel*'s category I misconduct.[62] In addition, the Board concluded that but for the company's unfair labor practices, the union would have obtained a card majority.[63] The Board reasoned that the risk of imposing a non-majority union upon employees for a limited period of time was preferable to denying their right to self-representation indefinitely.[64] The Board, therefore, issued a bargaining order.[65]

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58. 721 F.2d at 1365. The Administrative Law Judge (ALJ) concluded that the conduct fell within *Gissel* category I.

59. *Id.* at 1365-66. Extraordinary notice and access remedies were first instituted as an alternative to non-majority bargaining orders in H.W. Elson Bottling Co., 155 N.L.R.B. 714 (1965), *enforced as modified,* 379 F.2d 223 (6th Cir. 1967). *See* Golub, *The Propriety of Issuing* Gissel *Bargaining Orders Where the Union has Never Attained a Majority,* 29 LAB. L.J. 631, 634 (1978). These remedies include union access to the company plant. *See* F.W.I.L. Lundy Bros. Restaurant, Inc., 248 N.L.R.B. 415 (1980); Sambo's Restaurant, Inc., 247 N.L.R.B. 777 (1980), *enforced,* 641 F.2d 794 (9th Cir. 1981). Union access to company bulletin boards has also been ordered. *See* Betra Mfg. Co., 233 N.L.R.B. 1126 (1977), *enforced,* 624 F.2d 192 (9th Cir. 1980); Oil, Chem. & Atomic Workers, 176 N.L.R.B. 1037 (1969), *enforced,* 445 F.2d 237 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1039 (1972). Finally, public notice reading of the cease and desist order has been required. *See* Haddon House Food Prods., Inc., 242 N.L.R.B. 1057 (1979), *enforced,* 640 F.2d 392 (D.C. Cir.), *cert. denied,* 454 U.S. 837 (1981); United Supermarkets Inc., 261 N.L.R.B. 1291 (1982).

60. 721 F.2d at 1366. At the time of the ALJ's decision the Board had never issued a non-majority bargaining order. *Id.* The union's 138 cards represented 46% of the employees. *Id.* at 1366 n.45.

61. *Conair Corp.,* 261 N.L.R.B. 1189, 1190 (1982). The violations of the Act noted by the Board included numerous threats of plant closure, discharges and loss of benefits, promises and grants of new benefits, solicitation of employee grievances, creating the impression of surveillance, and the failure to reinstate the strikers. *Id.*

62. *Id.* at 1192-93. In regard to the gravity of the unlawful conduct, the Board cited numerous discriminatory discharges and threats of plant closure. *Id.* at 1192. The pervasive extent of the conduct was indicated by the coordinated company-wide plan ensuring that every employee was aware of the threats. *Id.* at 1193. The repeated threats and discharges were found to have a long-term coercive impact. *Id.* Finally, the timing of the unlawful conduct, from early in the organizing drive through the election, "underscored [the employer's] enduring resolve to oppose unionization by any means. . . ." *Id.*

63. *Id.* at 1194. The Board stated that the 46% card majority and the closeness of the election lessened the risk that a minority union would be imposed. *Id.* The Board, however, further stated that a bargaining order would not necessarily be withheld in the absence of these factors. *Id.*

64. *Id.*

65. *Id.* Two members dissented in part to the issuance of a non-majority bargaining order. *Id.* at 1195 (Van de Water, Chairman, concurring in part and dissenting in part), 1198 (Hunter, Member, concurring in part and dissenting in part). Chairman Van de Water maintained that the principle of majority rule was an overriding policy of the NLRA that limited the Board's

The Court's Rationale

The District of Columbia appellate court refused to enforce the Board's non-majority bargaining order.[66] The court agreed with the Board's finding that Conair's conduct was outrageous and pervasive.[67] Nevertheless, it held that the NLRB did not have the authority to issue a non-majority bargaining order.[68] The court acknowledged the dilemma posed by this issue—refusing to allow a non-majority bargaining order to be issued denies the Board its most potent remedy for employer misconduct; however, allowing the order may force a minority union upon employees.[69] The court noted that *Gissel* was limited to category II cases, which require a showing of majority support.[70] The court thus reasoned that the holding in *Gissel* was based on the doctrine of majority rule.[71] In category I cases, where employee preference is unknown, the court concluded that the dictum in *Gissel* did not provide a sound basis for allowing the Board the power to issue non-majority bargaining orders.[72]

Instead, the court looked to the legislative history of the NLRA and determined that the doctrine of majority rule was the touchstone of the Act.[73] The court noted that the amendments to the Act also supported this conclusion.[74] In the court's interpretation, the Taft-Hartley amendments indicated Congress' determination that the NLRB not impose its choice on employees.[75]

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remedial authority. *Id.* at 1195 (Van de Water, Chairman, concurring in part and dissenting in part). Member Hunter agreed that the issuance of a non-majority bargaining order was proscribed by the Act. *Id.* at 1198 (Hunter, Member, concurring in part and dissenting in part); *see also* Hunter, Conair: *Minority Bargaining Orders Usher in 1984 at the NLRB*, 33 LAB. L.J. 571 (1982) (an elaboration of Member Hunter's dissenting opinion in *Conair*).

66. 721 F.2d at 1384. The court also overruled the Board's finding that the notices sent to strikers constituted actual, rather than threatened, discharge. *Id.* at 1368-69. This latter holding was reversed on procedural grounds because the complaint adjudicated by the ALJ did not assert that the notices had constituted actual discharge. *Id.* at 1370-73.

67. *Id.* at 1373-75. The court cited numerous cases acknowledging the gravity of threats to close a plant, reprisals against union activists, and the participation of high corporate officials in the anti-union conduct. *Id.* at 1374. The court also relied on *United Dairy II* as additional support for its conclusion that Conair's conduct was extremely grave. *Id.* at 1375 n.66.

68. *Id.* at 1384.

69. *Id.* at 1378.

70. *Id.* at 1380.

71. *Id.* at 1381.

72. *Id.* The court quoted from the dissent in United Dairy Farmers Coop. Ass'n (United Dairy I), 242 N.L.R.B. 1026 (1979), where Member Penello stated that all that could fairly be said of the *Gissel* dictum was that the Court left open the question of whether the Board had the authority to issue a non-majority bargaining order. *Id.* (citing *United Dairy I*, 242 N.L.R.B. at 1040.).

73. 721 F.2d at 1381-82. The court quoted Senator Wagner who stated that democracy in industry, like democracy in government, must be based on majority rule. *Id.*

74. *Id.* at 1382.

75. *Id.* The court quoted from a House report which stated that the Taft-Hartley amendments meant to insure that employees could refrain from exercising their right to organize and that the NLRB would be prevented from compelling employees to exercise this right. *Id.* (citing H.R. REP. No. 245, 80th Cong., 1st Sess. 27 (1947)).

Because Congress had made an explicit exception to the majority rule doctrine in a later amendment concerning construction industry pre-hire agreements, the court reasoned that Congress intended the doctrine to apply in all other instances.[76] Thus, the court determined that unless explicitly excepted by Congress, the majority rule doctrine was an implicit overriding policy of the Act.

The court concluded that national labor policy was designed to promote employee free choice. Thus, absent a showing of majority support, the NLRB does not have the power to issue a bargaining order.[77] The issuance of a non-majority bargaining order, the court added, simply substituted one injustice for another.[78] The court noted that the Board remained divided on this issue and that the only Supreme Court decision on this point was unclear.[79] The court concluded that absent clear direction from Congress, issuing non-majority bargaining orders was not within the remedial powers of the Board.[80]

A strong dissent was voiced by Judge Wald.[81] She found it inconceivable that the majority could find that the employer had engaged in massive misconduct, and yet, deny the Board the only remedy likely to restore employee free choice.[82] According to Judge Wald, the *Gissel* Court's dictum could not be "so easily dismissed."[83] She interpreted the dictum as not requiring Board inquiry into majority status in category I cases.[84] She further disagreed with the majority conclusion that the policy of the Act was limited to the principle of majority rule. The deterrence of employer misconduct, she stated,

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76. 721 F.2d at 1382-83. The exception provided in § 8(f) allows construction industry employers to sign a collective bargaining agreement with a union prior to hiring its workforce. *Id.* (citing 29 U.S.C. § 158(f) (1976)).

77. 721 F.2d at 1383.

78. *Id.* The court stated that the dissent "would substitute for the coercion Conair imposed an opposing coercive force imposed by the government." *Id.*

79. *Id.* at 1384. The court noted that two out of five Board members resolutely maintained that the imposition of a non-majority bargaining order was contrary to the policies of the NLRA. *Id.* (citing Conair Corp., 261 N.L.R.B. 1189, 1197 (1982) (Van de Water, Chairman, concurring in part and dissenting in part), 1199 (Hunter, Member, concurring in part and dissenting in part)).

80. Id. at 1384.

81. *Id.* at 1387 (Wald, J., dissenting). Judge Ginsburg, who wrote most of the majority opinion, dissented as to the order requiring that the extraordinary notice remedy be read by the company president. *Id.* at 1401 (Ginsburg, J., dissenting). She argued that it was foreign to the American system of justice to require what amounted to "public confession of sins." *Id.* (Ginsburg, J., dissenting). Judge Wald, writing for the majority with respect to the notice reading order, concluded that the extraordinary notice remedy was proper where the president had personally taken part in the unfair labor practices and was committed to taking whatever actions were necessary to defeat the union. *Id.* at 1386-87 (Wald, J., dissenting).

82. *Id.* at 1387 (Wald, J., dissenting).

83. *Id.* at 1392 (Wald, J., dissenting).

84. *Id.* (Wald, J., dissenting). Judge Wald stated that the *Gissel* Court's articulation of the *Sinclair* case could be interpreted as evidence that the Court did not find it necessary to inquire into majority status where pervasive anti-union conduct rendered a fair election impossible. *Id.* (Wald, J., dissenting).

was of equal importance.[85] The effect of the decision, in Judge Wald's estimation, was to elevate the employee's right to reject collective bargaining over the right to choose it.[86] She concluded that the Board had the power to issue a bargaining order without inquiry into majority status when the employer's pervasive unfair labor practices precluded a fair election.[87]

ANALYSIS

The underlying premise of the *Conair* court's decision to rely on the doctrine of majority rule, rather than the *Gissel* dictum, was the questionable assumption that employer unfair labor practices do not necessarily affect employee free choice.[88] The *Conair* court thus implicitly rejected the rationale underlying *Gissel:* that pervasive employer misconduct precludes any possibility for employees to freely choose representation.[89] Even though the court agreed that Conair's conduct fell into the "most egregious" category established in *Gissel,* it refused to rely on the dictum in *Gissel* that supported the issuance of non-majority bargaining orders when serious misconduct precludes a fair election.[90] Although only one other circuit had squarely faced this issue prior to *Conair,* nearly every other circuit had implied sup-

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85. *Id.* at 1398, 1400 (Wald, J., dissenting). Judge Wald also criticized the reasoning of the majority in regard to the § 8(f) exception, stating that this was merely a recapitulation of the employer's argument and had no bearing on the Board's remedial powers. *Id.* at 1396 (Wald, J., dissenting).

86. *Id.* at 1399 (Wald, J., dissenting). She noted that the amicus briefs submitted by the Chamber of Commerce urged this premise, stating that "unionization imposed major burdens on personal liberty that most Americans refused to accept" and that the Act required that those burdens be imposed only upon a showing of majority support. *Id.* at 1399-1400 n.23 (Wald, J., dissenting).

87. *Id.* at 1400-01 (Wald, J., dissenting). Judge Wald analogized the Board's remedial power to that of the courts' in ordering race conscious remedies. *Id.* at 1397 (Wald, J., dissenting). She noted that under *Bakke,* a state imposed racial quota may violate the fourteenth amendment. *Id.* (Wald, J., dissenting) (citing University of Cal. Regents v. Bakke, 438 U.S. 265 (1978)). But once a constitutional violation is shown, courts have the power to order race conscious remedies. She concluded that the same principle was true under the NLRA, where an employer would be in violation of the Act if he bargained with a union that had lost an election. The Board, however, could order the employer to bargain in this situation once a violation of the Act was shown. *Id.* (Wald, J., dissenting).

88. The court relied on an unpublished dissertation cited in Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV. L. REV. 1769 (1983). 721 F.2d at 1378 n.79. The study found that unions would have won only 46% of the elections studied had the employer campaigned fairly. *Id.* at 1378 (citing Weiler, *supra,* at 1786). The dissent noted that the same study had concluded that pro-union votes were reduced by 15% where employer unfair labor practices took the form of retaliation against union supporters. *Id.* at 1390 n.4 (citing Weiler, *supra,* at 1781-86). Indeed, Weiler found that the odds today are one in twenty that a union supporter will be discharged for exercising his rights and that the decline in union membership is to a great extent directly attributable to employer coercion. *See* Weiler, *supra,* at 1781.

89. *See Gissel,* 395 U.S. at 614.

90. *See supra* notes 27-32 and accompanying text.

port for the issuance of non-majority bargaining orders in category I cases.[91] These circuits have relied on the dictum in *Gissel* as support for this conclusion.[92] The *Conair* court's dismissal of the *Gissel* dictum is thus contrary to the support expressed by a majority of circuits and is a rejection of the *Gissel* rationale.

Instead, the court based its decision on the doctrine of majority rule embodied in section 9(a) of the NLRA.[93] The court's interpretation of the NLRA as having an overriding policy in favor of the majority rule doctrine is unsupported by the legislative history. A close reading of the congressional reports indicates that the principle of majority rule was adopted for a more limited purpose. First, the principle of majority rule was developed to prevent employers from recognizing a minority, company-dominated union when there was majority support for a competing union.[94] Second, the doctrine was intended to resolve the administrative problems that would occur when more than one agreement covered a single unit of employees.[95] The majority rule doctrine was thus viewed as a practical method of promoting

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91. For cases where courts have indicated in dicta that a non-majority bargaining order could be issued in a category I case, see Chromalloy Mining & Minerals Alaska Div., Chromalloy Am. Corp. v. NLRB, 620 F.2d 1120, 1129 (5th Cir. 1980); NLRB v. Appletree Chevrolet, Inc., 608 F.2d 988, 1000-01 (4th Cir. 1979); NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 119 (1st Cir. 1978); NLRB v. Montgomery Ward & Co., 554 F.2d 996, 1002 (10th Cir. 1977); Arbie Mineral Feed Co. v. NLRB, 438 F.2d 940, 943 (8th Cir. 1971). *But see* Teamsters Local 115 (Haddon House) v. NLRB, 640 F.2d 392, 397 (D.C. Cir.) (imposition of a non-majority bargaining order may not be within the Board's power), *cert. denied,* 454 U.S. 827 (1981); NLRB v. Roney Plaza Apts., 597 F.2d 1046, 1051 (5th Cir. 1979) (because union lacked a card majority, the court refused to inquire whether the seriousness of the employer's misconduct warranted a bargaining order).

92. *See* cases cited *supra* note 91.

93. Section 9(a) provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

29 U.S.C. § 159(a) (1982). For a discussion of how the Board determines what is an appropriate bargaining unit, see generally THE DEVELOPING LABOR LAW, *supra* note 15, at 413-86. The Board looks to several factors including the similarity of duties, skills, and interests of employees in determining the appropriateness of the unit. *Id.* at 414.

94. *See* H.R. REP. No. 972, 74th Cong., 1st Sess. 18 (1935). The House report stated that:

> As a necessary corollary [to the majority rule principle] it is an act of interference (under 8(a)(1)) for an employer, after representatives have been so designated by the majority, to negotiate with individuals or minority groups on subjects of collective bargaining . . . . [If the employer bargained with a minority group or individuals,] the agreement probably would not command the assent of the majority and would not have the stability which is one of the chief advantages of collective bargaining.

Id.

95. *See* S. REP. No. 573, 74th Cong., 1st Sess. 13 (1935). According to the Senate report concerning § 9(a),

> [s]ince it is wellnigh . . . impossible to apply two or more sets of agreements to one unit of workers at the same time, . . . the making of agreements is imprac-

stable bargaining relationships rather than as an overriding policy consideration.[96] There is no evidence that this policy was intended to be superior to other policies embodied in the Act.[97] The deterrent policies of the Act set forth in section ten refer only to the remedial powers of the Board.[98] The legislative history makes no reference to majority rule as a limit upon the Board's enforcement powers.[99] The *Conair* court's elevation of the doctrine of majority rule over the deterrent policies of the Act simply is not supported by the legislative history.

The court's argument that the Taft-Hartley amendments indicate congressional intent to restrict the power of the NLRB also is not persuasive. While the amendments limited the powers of both the Board and the unions, the purpose of the amendment was to remedy specific problems facing management in 1947.[100] By prohibiting unfair labor practices by unions, the amendments guaranteed employees the right to refrain from engaging in union activities.[101] Thus, Congress sought to equalize the right to refrain from

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> ticable in the absence of majority rule. . . . [It is] more conducive to harmonious labor relations to negotiate with representatives chosen by the majority rather than with numerous warring factions.

Id.

96. For a discussion of the premise that the doctrine of majority rule cannot be the primary focus of the NLRA in terms of remedies, see generally Lankford, *Non-Majority Bargaining Orders: A Study in Indecision, 46* ALB. L. REV. 363, 394 (1982) (remedy cannot focus on what employee sentiment would have been but must instead focus on creating the proper atmosphere to allow it to surface in the future); Note, *Time to Enforce* Gissel, *supra* note 3, at 337 (Board remedies must preserve employees ability to make an uncoerced choice, not merely to determine majority sentiment).

97. *See* H.R. REP. No. 972, 74th Cong., 1st Sess. 14 (1935). The primary purpose of the Act was to promote industrial peace by redressing an inequality of bargaining power. *Id.* Forbidding employer interference with the development of employee organizations was seen as the most effective means to remove "one of the issues most provocative of industrial strife." *Id.*

98. The legislative history notes only that the Board has exclusive jurisdiction to prevent and redress unfair labor practices and delineates some of the traditional remedies included in this power. *See* S. REP. No. 573, 74th Cong., 1st Sess. 15 (1935); H.R. REP. No. 972, 74th Cong., 1st Sess. 21 (1935).

99. The House reports indicate only that the remedial orders must be adapted to the individual. *See* H.R. REP. No. 972, 74th Cong., 1st Sess. 21 (1935). The House noted that the remedies can include orders to refrain from dealing with a minority union, orders to recognize a union chosen by the majority, and reinstatement of discriminatorily discharged workers. *Id.*

100. *See generally* F.R. DULLES, LABOR IN AMERICA: A HISTORY 337-69 (1966). The Taft-Hartley amendments were a response to the increasing militancy of unions reflected in post-war strikes that threatened the nation's economy. *Id.* at 355. At the beginning of 1946, it was estimated that two million workers in major industries were simultaneously on strike. *Id.* at 349. The Taft-Hartley amendments sought to safeguard management rights and equalize the perceived imbalance of bargaining power between employers and unions. *Id.* at 357. The bill was hotly debated and finally passed over President Truman's veto. *Id.* Labor attacked it as a "slave labor bill" and declared that its purpose was to destroy the labor movement. *Id.* at 357-60.

101. *See* H.R. REP. No. 245, 80th Cong., 1st Sess. 6-41 (1947). The amendments sought to protect non-union members from union coercion. *Id.* at 11. These amendments outlawed closed

unionizing with the right to unionize.[102] The amendments also separated the Board's prosecutorial function from its adjudicative function in order to create a neutral Board.[103] The remedial powers of the Board were actually broadened by the addition of injunctive relief to the Board's arsenal of remedies.[104] By interpreting the Taft-Hartley amendments as prohibiting the Board's issuance of non-majority bargaining orders, the court elevated the right to refrain from unionizing over the right to unionize.[105] This was not the intent of the Taft-Hartley amendments. The court ignores the fact that when it is impossible to determine what an uncoerced majority would favor, the risk of imposing minority preference is as great when a bargaining order is withheld as when it is issued.[106] The court in *Conair* in effect held that in such cases all doubts must be resolved in favor of non-unionization.

The court's reliance on section 8(f) as a clear indication that any intended exceptions to the majority rule doctrine were explicitly stated by Congress is also unsupported by legislative history. The section 8(f) amendments were drafted to meet the special needs of the construction industry, where employ-

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shop agreements which required union membership as a condition of employment, and designated as unfair labor practices union coercion of employees to join a union or engage in a strike, union refusal to bargain collectively, and union organized strikes to coerce recognition from an employer. *Id.* at 7-24.

102. For an argument that the Taft-Hartley amendments were ill conceived in elevating the right to refrain from unionizing to be on par with the right to unionize, see A. Cox, LAW & THE NATIONAL LABOR POLICY 49 (1960). Cox argues that the amendments resulted in a widespread belief that unions were so powerful that legislative action was required to restore employer's rights. *Id.* at 49. While these assumptions may have had some validity in regard to established unions, Cox contends it has no place in determining the rights of unorganized workers. *Id.* Cox concludes that the Taft-Hartley amendments failed to address the need to strengthen unions during organizing campaigns and should have sought to control only those unions with established power. *Id.*

103. *See* H.R. REP. No. 245, 80th Cong., 1st Sess. 6-41 (1947). Prior to the amendments, the Board functioned as prosecutor, judge, and jury. *Id.* at 6. It was not limited by the rules of evidence. The Board rendered a number of controversial decisions, particularly on the issue of what constituted "good faith bargaining." *Id.* at 41. The amendments sought to remedy these problems by creating a new labor board in which the prosecutorial function was delegated to the General Counsel and the adjudicative function delegated to the Board. *Id.* at 39-40. The amendments also sought to define "good faith bargaining" and required the Board to base its decisions upon findings of fact to which the rules of evidence would apply. *Id.* at 41.

104. The amendments added injunctive remedies under § 10, 29 U.S.C. § 160(j) (1982), that had been forbidden in labor disputes since the passage of the Norris-LaGuardia Act in 1932, 29 U.S.C. §§ 101-105 (1982). *See generally* T. KAMMHOLZ & S. STRAUSS, PRACTICE & PROCEDURE BEFORE THE NLRB 99-109 (1980). Under § 10(j) the General Counsel has the discretion to seek injunctive relief only upon the actual issuance of a complaint charging unfair labor practices. *Id.* at 105. In contrast, under § 10(l) the General Counsel is required to seek immediate injunctive relief when there is reasonable cause to believe that a union is engaging in unfair labor practices in violation of § 8(b). *Id.* at 100.

105. 721 F.2d at 1399 (Wald, J., dissenting); *see also supra* note 102.

106. *See United Dairy I,* 242 N.L.R.B. at 1032; *see also* Bok, *supra* note 28, at 135 ("In the last analysis those who would resist this remedy [non-majority bargaining orders] in the name of employees must answer for the employees whose free choice is currently impaired by the lack of adequate remedies").

ment relationships are too brief to allow a representation election to be held.[107] The congressional reports indicate that Congress considered the amendments to be consistent with majority rule rather than an exception to it. Because construction industry employers generally hire from union halls where a majority are union members, majority support would still exist.[108] Thus, by enacting section 8(f), Congress did not create exceptions to the majority rule doctrine. Section 8(f) amendments, therefore, cannot be interpreted as evidence of congressional intent to legislate only narrow exceptions to this policy.

Contrary to the *Conair* court, other courts have not regarded the majority rule doctrine to be an absolute.[109] In fact, these courts often rendered decisions that in effect created exceptions to majority rule. For example, in category II cases, a number of courts have issued bargaining orders where the majority had dissipated and the union lost the election.[110] While a majority

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107. *See supra* note 76 and accompanying text.

108. *See* S. REP. No. 187, 86th Cong., 1st Sess. 28 (1959). The report found:

> A substantial majority of the skilled employees in the construction industry constitute a pool of help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt that under these circumstances that the union will in fact represent a majority of the employees eventually hired.

Id.; *see also* Note, *Pre-hire Agreements and § 8(f) of the NLRA: Striking a Proper Balance Between Employee Freedom of Choice and Construction Industry Stability*, 50 FORDHAM L. REV. 1014, 1018 (1982). Most construction workers are organized into union hiring halls. *Id.* at 1014. An employer contracts with the union and then hires through the union hiring hall. *Id.* Because members of the hiring hall are generally union members, majority support for the union is implied. *Id.* at 1018.

109. *See generally* Bok, *supra* note 28, at 133 (courts have ordered bargaining in the absence of § 8(a)(5) violations); Golub, *supra* note 59, at 637 (non-majority bargaining orders are issued in category II cases under *Gissel* where a majority formerly existed but has dissipated).

110. *See, e.g.*, Electrical Prods. Div. of Midland-Ross Corp. v. NLRB, 617 F.2d 977 (3d Cir. 1980) (bargaining order proper on the basis of a previous card majority where the union lost the election); J.P. Stevens & Co., Gulistan Div. v. NLRB, 441 F.2d 514 (5th Cir. 1971) (bargaining order proper where unfair labor practices were calculated to dissipate the union majority and in fact did so); NLRB v. Delight Bakery, 353 F.2d 344 (6th Cir. 1965) (when unfair labor practices cause dissipation of majority, a bargaining order is proper).

There is, however, considerable debate as to whether subsequent events such as the passage of time and employee turnover should be considered in determining the propriety of a bargaining order. *Compare* NLRB v. Maidsville Coal Co., 718 F.2d 658 (4th Cir. 1983) (bargaining order proper even though the Board did not determine if unfair labor practices had any residual impact after the passage of time); Coil-A.C.C., Inc. v. NLRB, 712 F.2d 1074 (6th Cir. 1983) (where bargaining order proper, the Board can refuse to reopen record to admit evidence of employee turnover); NLRB v. Keystone Pretzel Bakery, 696 F.2d 257 (3d Cir. 1982) (bargaining order proper to overcome lingering effects of employer misconduct even if a majority of employees no longer support the union due to the passage of time) *with* NLRB v. Heads & Threads Co., 724 F.2d 282 (2d Cir. 1983) (court refused to enforce bargaining order because the Board did not make findings as to the effects of subsequent events on union support); NLRB v. Village IX, Inc., 723 F.2d 1360 (7th Cir. 1983) (bargaining order improper where the Board did not articulate the reasons for its issuance and failed to consider subsequent events). *See generally* Note, *"After All, Tomorrow is Another Day": Should Subsequent Events Affect the Validity*

union at one time existed in these cases, the decisions in effect established a minority union as the exclusive bargaining representative.[111] If the majority rule doctrine were viewed as an absolute, none of these remedies would be within the Board's power.[112] The court in *Conair* thus overlooked a significant body of case law that indicates that the policy of deterring employer misconduct is equally important as the doctrine of majority rule.

The *Conair* court also ignored the limits imposed on unions by a bargaining order. Unlike an elected union, the non-majority union imposed by a bargaining order does not enjoy statutory protection from decertification.[113] The union, therefore, is likely to be sensitive to the will of the majority of workers it represents.[114] Although a bargaining order cannot impose union membership,[115] the union is bound to represent all employees in the unit, regardless of union membership.[116] Thus, any fear that employees will be forced to acquiesce to the presence of a union that does not fairly represent them is unfounded.

The court in *Conair* disregarded the factors enunciated in *United Dairy Farmers Cooperative Association* (*United Dairy II*)[117] that could provide a

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of Bargaining Orders?, 31 STAN. L. REV. 505, 508 (1979) (arguing that the conflict over the consideration of subsequent events reflects the tension between the competing goals of labor law, the deterrence of misconduct and the effectuation of employee free choice).

111. *See* cases cited *supra* note 110.

112. The Board also has the power to revoke the certification of a union that represents a majority when the union engages in illegal conduct. *See, e.g.*, Abilene Sheet Metal Inc. v. NLRB, 619 F.2d 332 (1st Cir. 1980) (certification revoked for failure to process employee grievance); NLRB v. Union Nacional de Trabajadores (Carborundum of Puerto Rico), 540 F.2d 1 (5th Cir. 1976) (certification revoked where union engaged in a pattern of coercion and violence), *cert. denied*, 429 U.S. 1039 (1977); Hughes Tool Co., 147 N.L.R.B. 1573 (1964) (certification revoked where union executed racially discriminatory contracts).

113. Decertification procedures are described in 29 C.F.R. § 101.17 (1981). A petition for decertification requires only 30% of the employees' signatures to trigger a new election. *Id.* *See generally* THE DEVELOPING LABOR LAW, *supra* note 15, at 379. A union is statutorily protected from decertification only by becoming the certified bargaining representative. *Id.* This can only be accomplished through a secret ballot election conducted by the NLRB. *Id.* Unlike elected unions, unions voluntarily recognized by an employer or imposed under a bargaining order are not entitled to the one year protection against challenges under 29 U.S.C. § 159(c)(3) (1982). *Id.*

114. *See generally* Bok, *supra* note 28, at 135 (the union will be motivated to negotiate a contract that will satisfy the majority when it knows it must win employee support to survive a threat of decertification).

115. The only way union membership can be imposed is when the union successfully negotiates a union security clause in the contract, an unlikely event where the employer strenuously opposes unionization. *See id.*

116. Section 9(a) provides that the chosen bargaining representative is the exclusive representative for all employees in the bargaining unit. 29 U.S.C. § 159(a) (1982); *see also* Vaca v. Sipes, 386 U.S. 171, 177 (1967) (the exclusive bargaining representative has a statutory duty to serve the interests of all members of the bargaining unit fairly); Steele v. Louisville & N.R.R., 323 U.S. 192, 200 (1944) (bargaining representative must represent all employees within the unit regardless of union membership). The union, however, can make reasonable distinctions among employees. *See* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (union can agree to a contract clause giving new employees credit for time spent in the military service even though it lowered the seniority rating of other workers).

117. 257 N.L.R.B. 722, 775 (1981); *see supra* notes 43-44 and accompanying text.

workable standard for determining when the Board can issue a non-majority bargaining order. Under the *United Dairy II* standard, an evaluation of the gravity, extent, timing, and number of violations committed by an employer provides a quantitative measure of the severity of employer misconduct.[118] If the conduct is grave enough to meet the category I standards, a bargaining order should be issued without the need for demonstrating majority status. Employee freedom of choice cannot be effectuated when the remedial powers of the Board are strictly limited. In eliminating non-majority bargaining orders from the Board's arsenal, the court in *Conair* ignored the rationale of *Gissel:* that a bargaining order is designed as much to remedy past election damages as it is to deter future misconduct.[119]

IMPACT

The *Conair* decision, if followed by the Board, will severely limit the scope of remedies available to deter pervasive anti-union conduct. The Board is limited by this decision to traditional remedies and extraordinary notice remedies even when the employer's misconduct is outrageous and pervasive.[120] It is questionable whether these remedies are sufficient to restore an uncoerced atmosphere to a union organizing campaign. By ignoring the Act's policy of deterring unfair labor practices, the court in *Conair* provides incentives for employers to engage in anti-union conduct to prevent the emergence of a card majority.[121] The sanctions of extraordinary notice and access are

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118. The Board has continued to utilize these factors in determining the propriety of issuing a non-majority bargaining order. *See* Paul Distrib. Co., 264 N.L.R.B. 1378, 1378 (1982); United Supermarkets, Inc., 261 N.L.R.B. 1291, 1293 (1982).

119. *See Gissel*, 395 U.S. at 612.

120. Traditional remedies include cease and desist orders, reinstatement of discharged employees, and notices posted in the workplace signed by the employer which state that the employer will cease infringing upon the employees' rights. *See* Note, *Time to Enforce* Gissell, *supra* note 3, at 293-94. For a discussion of extraordinary notice and access remedies see *supra* note 59. Even extraordinary notice and access remedies have not received full support from the courts. *See, e.g.,* United Steelworkers of Am. v. NLRB, 646 F.2d 616 (D.C. Cir. 1981) (Board must substantiate its conclusion that corporate-wide union access is necessary to offset the effect of employer misconduct); Teamsters Local 115 (Haddon House) v. NLRB, 640 F.2d 392, 404 (D.C. Cir.) (court refused to enforce public notice reading by company president), *cert. denied,* 454 U.S. 827 (1981); J.P. Stevens & Co. v. NLRB, 380 F.2d 292 (2d Cir.) (court refused to grant union access to bulletin boards where the Board made no finding that access was necessary to bring union's message to employees), *cert. denied,* 389 U.S. 1005 (1967).

121. Several commentators have noted that the refusal to allow non-majority bargaining orders will exacerbate employer misconduct. *See* Note, *Time to Enforce* Gissel, *supra* note 3, at 334 (absence of non-majority bargaining order as a remedy creates incentives for the company to act unlawfully); Recent Case, *Labor Law—Bargaining Order—The National Labor Relations Board Has Authority to Order an Employer to Bargain with a Labor Organization When the Employer Has Committed Egregious Unfair Labvor Practices, Despite the Absence of a Union Card Count Majority or Election Victory.*—United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980), 50 U. CIN. L. REV. 405, 412 (1981) (denial of Board's power to issue non-majority bargaining orders virtually invites unscrupulous employers to engage in misconduct); Note, *The Hazardous Threshold of Non-Majority Bargaining Orders:* Conair Corp., 14

unlikely to deter an employer from misconduct when he knows that disrupting the formation of a card majority can effectively prevent unionization.[122] The *Conair* decision encourages the employer to engage in pervasive unfair labor practices early in the organizing campaign, knowing that possible sanctions for anti-union conduct are extremely limited.

Under the *Conair* decision, the only effective remedy left to the Board to deter employer unfair labor practices is the power to petition the court for injunctive relief.[123] Several commentators have suggested that this remedy is both a more appropriate and more effective means to deter employer misconduct than the issuance of a bargaining order.[124] Reliance on injunctive relief, however, overlooks the court's historic refusal to grant preliminary injunctions to unions, especially during critical organizing campaigns.[125] Injunctive relief is far more readily available to employers than to unions.[126] Indeed, the General Counsel is required to seek an immediate injunction to halt union misconduct; unions have no such statutory protections.[127] Moreover, given the current climate of anti-union sentiment, petitions for

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U. TOL. L. REV. 217, 251 (1982) (non-majority bargaining orders will inhibit unfair labor practices because the employer will know it may result in unionization) [hereinafter cited as Note, *Non-Majority Bargaining Orders*].

122. *See generally* Flannery, *The Need for Creative Orders Under* § 10(c) of the NLRA, 112 U. PA. L. REV. 69, 94 (1963) ("The detection of unfair labor practices means little if the only sanction is social embarrassment.").

123. Section 10(j) provides in relevant part:

> The Board shall have the power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, . . . for appropriate temporary relief or restraining order.

29 U.S.C. § 160(j) (1982).

124. *See* Hunter, *supra* note 65, at 579-80 (use of present remedies, including injunctive relief, is a more effective way to restore employee rights); Ostan, *Bargaining Orders:* Gissel *and* United Dairy Farmers *Revisited,* 8 EMPLOYEE REL. L.J. 198, 214 (1982) (injunctive relief can effectively curb employer unfair labor practices); Note, *Representative Bargaining Orders, supra* note 32, at 970 (the use of extraordinary remedies and injunctive relief can effectively curb employer unfair labor practices).

125. The courts generally issue injunctive relief during organizing campaigns only where a card majority has been shown. *See* Levine v. C & W Mining, 610 F.2d 432 (6th Cir. 1979); Seeler v. Trading Port, Inc., 517 F.2d 33 (2d Cir. 1975); NLRB v. Environmental Waste Disposal, 568 F. Supp. 22 (N.D. Ill. 1983); Seeler v. H.G. Page & Sons, Inc., 540 F. Supp. 77 (S.D.N.Y. 1982); *see also* Note, *The Case for Quick Relief: The Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases,* 56 IND. L.J. 515, 534-35 (1980-1981) (standards required to grant preliminary injunctions to individuals have been incorrectly used by the courts to grant § 10(j) injunctions and require the Board to demonstrate irreparable harm, thereby erecting an insurmountable barrier to obtaining § 10(j) relief).

126. In 1983, the Board received 301 petitions for injunctive relief under § 10(j) and authorized petitions to the courts in only 51 of the cases. *See* 114 LAB. REL. REP. (BNA) 302-04 (Dec. 19, 1983). In contrast, the Board filed 116 mandatory petitions for injunctive relief against unions under § 10(l). *Id.* at 304.

127. *See supra* note 104. It is ironic to note that Conair successfully obtained injunctive relief in this case to limit the size of the picket line. *See Conair,* 721 F.2d at 1362 n.18.

injunctive relief would overburden the federal courts.[128] Finally, because the Board cannot issue an injunction, this solution in effect leaves the only potent remedy to deter anti-union conduct in the hands of the courts rather than the Board.[129] This is clearly contrary to the stated purpose of the Act which created the NLRB to resolve labor disputes.[130]

Although the issue of non-majority bargining orders has not yet been addressed by the current Board,[131] the fact that the Board has not sought review of the circuit court's decision indicates that the present Board's view of its remedial authority is consistent with that of the *Conair* court. The Board's apparent acquiescence to the *Conair* decision thus signals a new trend by the Board to keep its remedies within traditional limits.

Nevertheless, the conflict among the circuits created by the *Conair* decision will lead to problems in the future. By holding that the Board does not have the authority to issue a non-majority bargaining order, the *Conair* court took a position that is contrary to that expressed by the Third Circuit in *United Dairy.*[132] Because the Board prefers to use its own decisions as precedent, the Board can choose not to follow a particular circuit.[133] This, coupled with the fact that the Board can engage in forum shopping for enforcement, will lead to inconsistent decisions.[134] Thus, future Boards can follow either the *Conair* or the *United Dairy* court when deciding whether to issue a non-majority bargaining order and can seek enforcement in the circuit most likely to rule in its favor. Because of the conflict among the circuits, and the importance of the *Conair* decision to national labor policy, the Supreme Court should be called upon to resolve this issue.

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128. *See* Weiler, *supra* note 88, at 1802 (suggesting that the use of injunctive relief as a primary remedy would increase the federal court caseload ten times).

129. *See generally* Note, *The Use of Section 10(j) of the Labor-Management Relations Act in Employer Refusal-to-Bargain Cases,* 1976 U. ILL. L.F. 845, 864 (the use of injunctive relief as a primary remedy would make district courts primary arbiters of unfair labor practices and shift the responsibility for the enforcement of the Act to the court without congressional approval).

130. *See supra* note 3; *see also* J. GETMAN, *supra* note 22, at 31 (the establishment of the NLRB was in part a response to labor's distrust of courts).

131. In the only case decided by the new Board addressing non-majority bargaining orders, the Board summarily dismissed this argument and did not rely on it in their decision. *See* Our Way, Inc., 268 N.L.R.B. No. 61, 1983 N.L.R.B. Dec. (CCH) § 16,003 (1983).

132. *See supra* notes 39-44 and accompanying text.

133. *See* Note, *Non-Majority Bargaining Orders, supra* note 121, at 247-48 n.206. The present Board's views on this policy were recently articulated by Chairman Dodson. *See* 155 LAB. REL. REP. (BNA) 188 (Mar. 5, 1984). He stated that when the courts reject NLRB precedent, the Board should not defy these decisions as they have done in the past. Rather, the Board's recourse must be to the Supreme Court like any other litigant. *Id.*

134. Section 10(e) provides that a petition for enforcement can be filed with the court of appeals in the circuit where the unfair labor practice occurred or in which the respondent resides or transacts business. 29 U.S.C. § 160(e) (1982). A petition for review can also be filed by any party aggrieved by a final order under § 10(f) in any circuit in which the unfair labor practice occurred or in which that party resides or transacts business. *Id.* § 160(f). Section 10(f) also provides an unqualified right to review in the District of Columbia Circuit. *Id.*

CONCLUSION

The *Conair* decision held that the NLRB does not have the power to issue non-majority bargaining orders to remedy pervasive employer misconduct. The principle of majority rule was interpreted by the court to be an overriding policy of the NLRA which limits the remedial power of the Board. This decision ignores the Act's equally important policy of deterring unfair labor practices and creates incentives for employers to prevent the emergence of a card majority. Because this decision is an important interpretation of the NLRA and is contrary to a decision of the Third Circuit, the ultimate resolution of this issue lies with the Supreme Court. When called upon to decide this issue, the Supreme Court must balance the principles of majority rule with the deterrent policies embodied in the NLRA. If employer unfair labor practices prevent the formation of a card majority, the deterrent policies of the Act must prevail over the principle of majority rule and permit the Board to issue a non-majority bargaining order.*

Maureen N. Egan

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* Subsequent to the submission of this Recent Case for publication, a petition for certiorari was filed by the union. Conair Corp. v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983), *petition for cert. filed sub nom.* Local 222, Int'l Ladies Garment Workers Union v. NLRB, 52 U.S.L.W. 3703 (U.S. Mar. 14, 1984) (No. 83-1520). Two months later, the NLRB ruled that non-majority bargaining orders were beyond the scope of their remedial authority. Gourmet Foods, Inc., 270 N.L.R.B. 113 (1984). On June 11, 1984, the Supreme Court denied certiorari. Conair Corp. v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied sub nom.* Local 222, Int'l Ladies Garment Workers Union v. NLRB, 52 U.S.L.W. 3891 (U.S. June 11, 1984) (No. 83-1520).