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The *Gissel* Bargaining Order: Is Time a Cure-All?

The National Labor Relations Act (the "NLRA" or the "Act") was enacted to protect and legitimize unionization among the American workforce.[1] The heart of the Act is section 7 which grants workers the right to engage in, or refrain from engaging in, concerted activities for the purpose of collective bargaining.[2] The underlying premise upon which the NLRA rests is that of free choice and majority rule for workers deciding whether or not to unionize.[3] There are, however, instances where these time honored principles, the very underpinnings of our national labor policy, are minimized or blurred beyond recognition. A prime example of such an instance is the imposition of an order to bargain: a National Labor Relations Board ("Board") or court enforced remedial mandate that effectively thrusts unionization on both the employer and worker, at times, without regard to ascertaining the true wishes of the majority at the time the order issues.[4]

The landmark case dealing with bargaining orders is *NLRB v. Gissel Packing Co.*,[5] where the United States Supreme Court ap-

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1. National Labor Relations Act, 49 Stat. 449 (1935) as amended by Pub. L. No. 101, 80th Cong., 1st Sess., 1947 and Pub. L. No. 257, 86th Cong., 1st Sess., 1959, 29 U.S.C. §§ 151-68, F.C.A. 29 §§ 151-88. (the "NLRA"). The purpose of the NLRA is found in § 1, entitled "Findings and Policies," and provides, in pertinent part: "[T]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. . . ." *Id.*

2. Section 7 of the NLRA provides:

> "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 and 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 § 8(a)(3)."

Id.

3. Gourmet Foods, Inc., 270 N.L.R.B. 578 (1984). "Our own review of the statute, its legislative history, Board and court precedent, and legal commentary have convinced us that the majority rule principle is such an integral part of the Act's current substance and procedure that it must be adhered to. . . ." *Id.* at 583.

4. *See, e.g.*, NLRB v. L.B. Foster, Co., 418 F.2d 1 (9th Cir. 1969); NLRB v. Wilhow Corp., 666 F.2d 1294 (10th Cir. 1981).

5. 395 U.S. 575 (1969).

proved the utilization of a remedial bargaining order in situations where an employer refuses a union demand for voluntary recognition based on signed authorization cards and conducts itself in such a manner that the Board's election process is contaminated and the holding of a fair election is unlikely.[6] According to *Gissel*, "the key to the issuance of a bargaining order is the commission of serious [employer] unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election."[7] The *Gissel* Court defined and delineated its reference to "serious unfair labor practices" by setting forth three distinct levels of employer misconduct categorized according to severity.[8] Level I misconduct, the most severe, is found "in exceptional cases marked by outrageous and pervasive unfair labor practices."[9] Of less severe nature is Level II misconduct which exists "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process."[10] Finally, Level III misconduct is defined as "minor or less unfair labor practices [which have] minimal impact on the election machinery. . . ."[11] If an employer is found to have committed unfair labor practices rising to either Level I or Level II, the issuance of a bargaining order is appropriate, despite the fact that the union may have lost the representation election.[12] However, if the misconduct

6. *Id.* at 614-15. The bargaining order is an appropriate remedial tool where the Board "finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that the employee sentiment once exposed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . . ." *Id.*

7. *Id.* at 594.

8. *Id.* at 613-15.

9. *Id.* at 613.

10. *Id.* at 614.

11. *Id.* at 614-15.

12. The justification for an order to bargain with a labor union either outside the election process or subsequent to a union loss of an election lies in the language of the NLRA. Section 8(a)(5) of the Act provides: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a)."

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. . . ." (emphasis added).

Therefore, since a labor union can obtain exclusive representation status under the Act by being designated as such by the majority, outside the election process, an order to bargain with the union is simply a confirmation of the majority rule principle as once expressed through signed authorization cards. 395 U.S. at 597.

at issue is limited to Level III, the use of traditional remedies is the proper course rather than the imposition of an order to bargain.[13]

The remedial aspects of a bargaining order are axiomatic. Severe acts of employer misconduct, such as widespread discharges for union activity, plant closings and the like, have the effect of negating the probability of a fair election or injecting into the election process a high degree of fear and intimidation so as to distort the results of any election.[14] Therefore, as long as the union is able to show that it did, in fact, possess signed authorization cards from the majority of the employees in the bargaining unit which designated it as the exclusive representative, the bargaining order merely fulfills the wishes of that majority.[15] As a result, the bargaining order acts retrospectively to grant the wishes of the then majority in total disregard of the employer's acts of misconduct and the effect of those acts. However, a retrospective bargaining order also ignores events that may have transpired between its issuance or enforcement and the point in time at which the employer misconduct occurred. Therein lies the crux of the controversy that has divided the circuit courts of appeals.

This comment will explore judicial treatment of the effect of events subsequent to an employer's unfair labor practices as they pertain to the propriety of a retrospective bargaining order and the principle of majority rule inherent in statutory and decisional labor law. The critical inquiry will focus upon subsequent events which may tend to lessen the significance of authorization cards signed by a former majority, improve the probability of holding a fair election, or which may force unionization upon employees, the majority of whom may not wish such representation.

Serious concerns arise with the use of retrospective bargaining orders. For instance, given the administrative and judicial maze of hearings, counterclaims, findings and appeals,[16] is it proper for a

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13. *Id.* at 615.

14. *See supra* note 4.

15. *See supra* note 12. *But see* Conair Corp., 261 N.L.R.B. 1189 (1982), where the National Labor Relations Board interpreted *Gissel* not to require a preliminary showing of majority strength prior to the issuance of a bargaining order for Level I misconduct. However, the District of Columbia Circuit Court denied enforcement. 114 L.R.R.M. 3169 (1983). The Board subsequently reversed its stance in *Conair* by holding in *Gourmet Foods* that a preliminary showing of majority strength was required before a bargaining order would issue regardless of the level of misconduct involved. 270 N.L.R.B. at 583.

16. Section 10(e) of the NLRA grants the Board the power to petition the appropriate court of appeals for enforcement of its orders. Section 10(f) of the NLRA allows "[A]ny person aggrieved by a final order of the Board" to petition the appropriate court of appeals to modify or set aside such order.

court to enforce an order to bargain where the misconduct at issue occurred two or three years in the past? Moreover, if the particular unit has experienced significant employee turnover during protracted litigation, does enforcement of an order to bargain actually fulfill the wishes of the new majority or, in effect, is the order forcing unionization on employees who neither signed authorization cards nor participated in the organizational campaign? If the employer misconduct stemmed from the actions of a particular supervisor, would the subsequent termination of that supervisor tend to make the holding of a fair election likely and thus, militate against the use of a bargaining order?

Since the Supreme Court's decision in *Gissel*, there have been a myriad of cases requiring answers to these questions. However, the issue of subsequent events is unsettled and remains a topic upon which courts are divided.[17] The Board, however, has consistently taken the position that the propriety of issuing a bargaining order is to be determined as of the time of the unfair labor practices and that subsequent events such as those listed above are entirely irrelevant to that determination; moreover, the Board has called upon the Supreme Court to "resolve the conflict."[18]

Ostensibly, the *Gissel* opinion seems to approve Board policy in this regard. In validating the use of bargaining orders, the *Gissel* Court stated: "We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order . . . even where it is clear that the union, which once had possession of cards from the majority of the employees, represents only a *minority* when the bargaining order is entered."[19]

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17. *See, e.g.*, NLRB v. Willow Corp., 666 F.2d at 1304; NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 120 (1st Cir. 1978).

18. Chandler Motors, Inc. & Amalgamated Local Union 355, 236 N.L.R.B. 1565 (1978). In *Chandler Motors*, the Board issued a retrospective bargaining order while, at the same time, acknowledging the split between Board policy and the policy of various circuit courts.

> "With all deference to the court, we believe that the administration of the Act, for which we are responsible, requires that we await a final disposition by the Supreme Court of the issue in order to resolve the conflict with other circuits on this important issue. We wish to make it clear that our adherence is intended as nothing more than respectful disagreement with the view of the Third Circuit on the matter [in NLRB v. Armcor, Ind., 535 F.2d 239 (3rd Cir. 1976)] and an attempt to protect, until the conflict is resolved by the Supreme Court, what we consider to be a substantial legal issue."

Id at 1566 n.8.

19. 395 U.S. at 610.

However, crucial to the resolution of this precise issue is whether the *Gissel* Court, by its use of the word "minority", contemplated only a unit consisting of the original card signers whose vigor and manifestation of union support has dissipated, or whether the word also embraces a unit of new employees who were not a part of the initial organizational effort. If the term is limited to only the original unit, a bargaining order would satisfy the desires of the then majority once expressed through authorization cards, but which may now be suppressed by employer intimidation. However, if the term also extends to a unit consisting of a new majority by virtue of employee turnover, genuine issues are raised with respect to the principle of majority rule.

The *Gissel* Court held that if traditional remedies could erase the past effects of employer misconduct and ensure a fair election, a bargaining order should not issue.[20] Those who oppose the Board's belief that subsequent events are irrelevant argue that if the unit consists of a new majority, untouched by the employers past unfair labor practices, traditional remedies are appropriate.[21] Proponents of Board policy, however, maintain that without the forcefulness of a bargaining order, the effects of the employer's past misconduct would linger to the point where the new majority, even if it desired union representation, would not risk the consequences of supporting organizational efforts.[22] Additionally, proponents argue that without the bargaining order, an employer would be free to meet future organizational attempts with the very same types of misconduct that poisoned the prior attempt, thereby creating a perpetual cycle of union avoidance.[23]

The Ninth Circuit has repeatedly upheld the Board's policy that subsequent events are irrelevant in determining the propriety of a bargaining order. In *NLRB v. L.B. Foster, Co.*,[24] the court upheld the Board's setting aside the election results and imposing a bargaining order, issued after the union lost the representation election.[25] The employer argued that the order should not be enforced because three years had passed since the misconduct and employee turnover

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20. *Id.* at 614.
21. *See Pilgrim Foods*, 591 F.2d at 120.
22. *See Willow Corp.*, 666 F.2d at 1305.
23. *See L.B. Foster, Co.*, 418 F.2d at 5. *See also* The Exchange Bank v. NLRB, 732 F.2d 60 (6th Cir. 1984).
24. 418 F.2d 1 (9th Cir. 1969).
25. *Id.* at 4.

had significantly changed the voting unit.[26] The court conceded that the voting unit may be entirely new, but noted that "[T]o appraise the problem in light of subsequent events is wholly unrealistic."[27] Thus, in enforcing the Board order to bargain, the Ninth Circuit held: "We do not think that these facts permit us to refuse to enforce the Board's order. The delay is not the fault of the union; if it is anyone's fault, it is that of the employer."[28] The court then noted that *Gissel* did not mandate consideration of subsequent events and that to require such consideration would allow an employer to avoid its duty to bargain by continually creating new sets of facts for adjudication.[29]

The Seventh Circuit was another early proponent of Board policy. In *New Alaska Development Corp. v. NLRB*,[30] the court expressly rejected differing viewpoints and aligned itself with the Ninth Circuit.[31] However, more recent opinions of the Seventh Circuit indicate a willingness to at least consider subsequent events in limited instances. For exanple, in *Peerless of America, Inc., v. NLRB*,[32] the court reversed a Board finding of Level II misconduct and held the employer's unfair labor practices rose only to Level III in severity.[33]

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26. *Id.* The employer showed that nine of the eighteen workers employed on October 31, 1966 had been *lawfully* terminated prior to December 20, 1966, the date of the election. Moreover, only five of the remaining nine workers voted in the election which the union lost by a vote of 3 to 2. *Id.*

27. *Id.* at 4-5.

28. *Id.* at 4. *Accord* NLRB v. Tri-State Stores, Inc., 477 F.2d 204 (9th Cir. 1972). In enforcing the Board's order to bargain as of the time of the unfair labor practices, the court said that "employers would gain a great incentive to refuse to recognize a bona fide bargaining demand in hopes that a delay would terminate the difficulty." *Id.* at 207.

29. 418 F.2d at 5. In NLRB v. Pacific Southwest Airlines, 550 F.2d 1148 (9th Cir. 1977), the court held that passage of time, *per se*, was insufficient to warrant a new election. In enforcing a bargaining order for misconduct that had occurred five years prior, the Ninth Circuit stated: "the appropriate time for determination of the propriety of a bargaining order relates back to the time when the case arose before the Board." *Id.* at 1153. However, with respect to subsequent employee turnover, the Ninth Circuit has retreated somewhat from such a rigid approach.

In NLRB v. Western Drug, 600 F.2d 1324 (9th Cir. 1979), the court held that a "perfunctory conclusion" that a bargaining order should issue may operate to deny present employees a freedom of choice in representation status and, therefore, the impact of employee turnover in the voting unit should be considered relevant in determining the appropriateness of a bargaining order. *Id.* at 1326.

30. 441 F.2d 491 (7th Cir. 1971).

31. *Id.* at 493.

32. 484 F.2d 1108 (7th Cir. 1973).

33. *Id.* at 1119.

Therefore, the bargaining order did not issue because Level III misconduct is substantively insufficient to support such an order.[34] However, in dictum, the Seventh Circuit noted that substantial employee turnover in the voting unit may be relevant in determining the propriety of a bargaining order.[35] Then, in *NLRB v. Century Moving & Storage, Inc.*,[36] the Seventh Circuit denied enforcement of a Board order to bargain because the employer had offered reinstatement to discharged employees.[37] Although not central to its holding, the court also cited significant employee turnover in the voting unit as support for its decision.[38]

The Tenth Circuit has also adopted the Board policy concerning the irrelevancy of subsequent events. In *NLRB v. Wilhow Corp.*,[39] the court upheld a bargaining order based on Level II misconduct.[40] The court focused primarily upon the "potentially lingering effects" of the employer's discharge of leading union activists.[41] The court stated that it would view an order to bargain as the appropriate remedy wherever a discharge for union activity was found.[42] Thus, even though only one of the original twelve card signers was still employed in the voting unit at the time of enforcement, the Tenth Circuit assessed the propriety of the bargaining order solely at the time of the misconduct and in consideration of its lingering effects.[43]

The District of Columbia Circuit has likewise followed Board policy. In *St. Francis Federation of Nurses & Health Professionals*

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34. *Id.*

35. *Id.* at 1121. "Since it is the present workforce that stands to be deprived of exercising its free choice in the preferred election process, the fact that it is substantially different from the one which existed at the time of the misconduct militates against issuance of a bargaining order where, as here, that drastic remedy is not otherwise clearly warranted." *Id.*

36. 683 F.2d 1087 (7th Cir. 1982).

37. *Id.* at 1097.

38. *Id.* at 1094. "Bolstering our decision that the bargaining order is not appropriate is the fact that of the five employees who signed Union cards, [one] quit his employment with the Company and [another] is deceased. Changes in the employee complement may be relevant to the determination of the proper remedy." *Id.*

39. 666 F.2d 1294 (10th Cir. 1981).

40. *Id.* at 1305.

41. *Id.* "The loss of employment due to union activity . . . has a residual effect on employees and taints the possibility of a free election." *Id.*

42. *Id.* at 1304.

43. *Id.* The employer failed to convince the court that the retrospective bargaining order would contravene § 7 of the NLRA because only one of the twelve original signers remained in its employ. *Id.*

v. NLRB,[44] the court reaffirmed its prior adoption of the Ninth Circuit's rationale, albeit not in absolute terms.[45] The court refused to impose "a blanket requirement on the Board that it consider subsequent events before issuing a bargaining order."[46] However, such a blanket requirement would be imposed, the court stated, in exceptional cases such as where the employees have clearly indicated that they do not want union representation.[47]

Despite significant judicial support for the Board's rationale, several circuit courts of appeals have taken a different approach. More specifically, these courts have required findings as to why a fair election could not be held in lieu of the rote imposition of a retrospective bargaining order. For example, in *NLRB v. Pilgrim Foods, Inc.*,[48] the Board issued a bargaining order but failed to make specific findings concerning the impact of the misconduct and whether such misconduct was likely to recur in the future.[49] The First Circuit vacated the Board's bargaining order noting that no bargaining order should issue where "the impact of the unfair labor practices upon the election machinery is minimal."[50] The court held that Board orders to bargain unsupported by reasoned analysis could be remanded, but analyzed the enforcement issue itself since it deemed the Board's findings "inadequate".[51] Turning to the merits of the case, the court noted that the supervisor responsible for the misconduct, as well as four employees from the original voting unit, were no longer employed by Pilgrim Foods.[52] Therefore, the First Circuit held that the residual impact of the unfair labor practices was lessened by subsequent employee turnover, and that the likelihood of recurrence was minimal.[53]

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44. 729 F.2d 844 (D.C. Cir. 1984).

45. *Id.* at 856.

46. *Id.*

47. *Id.* Other such exceptional cases would include extraordinary delays between the refusal to bargain and the determination of the remedy or a high degree of employee turnover in the voting unit. *Id.*

48. 591 F.2d 110 (1st Cir. 1978).

49. *Id.* at 119. The court said the Board must determine that the present employees are so intimidated that they are unable to make a free choice. *Id.* at 120.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* The test applied by the First Circuit in determining the propriety of a bargaining order is rooted in the language of the *Gissel* opinion, where the Supreme Court stated: "In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." 395 U.S. at 614.

The Second Circuit has also required specific findings in regard to subsequent events and the likelihood of a free and fair election. However, the court has developed a somewhat qualified approach. In *NLRB v. General Stencils*,[54] the Second Circuit remanded the case to the Board suggesting that it take "additional evidence with respect to employee turnover . . . or other matter."[55] The court stated that "[w]hile the Board has wide discretion in framing remedies, the agency has a correlative duty to explain its imposition of a remedy. . . ."[56] One year later, the same court was faced with another Board decision lacking specific findings. In *NLRB v. World Carpets of New York, Inc.*,[57] the court denied enforcement of a Board order to bargain for lack of specific findings as to why a fair election could not be held.[58] The Second Circuit admonished the Board in a footnote saying: "We continue to hope that the Board will make a more meaningful attempt to integrate findings of company misconduct with a reasoned analysis of how that misconduct jeopardized the chances of a fair election."[59] Then, in *NLRB v. Eli Gordon*,[60] the Second Circuit reviewed a Board order to bargain relating to a voting unit that had changed completely after the occurrence of misconduct.[61] Although the court considered subsequent events to be relevant, it upheld the bargaining order "because the turnover was caused by the very unfair labor practices sought to be remedied."[62] It is clear that the Second Circuit does not consider subsequent events such as total employee turnover or significant lapse of time to be dispositive of the issue, *per se*, although these factors are considered relevant.[63]

The Third and Fourth Circuits have also considered subsequent events relevant. In *Hedstrom v. NLRB*,[64] the Third Circuit adopted the approach of the Second Circuit in *General Stencils*[65] and remanded

54. 438 F.2d 894 (2d Cir. 1971).
55. *Id.* at 905.
56. *Id. Accord* NLRB v. Windsor Industries, 730 F.2d 860 (2d Cir. 1984); NLRB v. Knogo Corp., 727 F.2d 55 (2d Cir. 1984).
57. 463 F.2d 57 (2d Cir. 1972).
58. *Id.* at 62.
59. *Id. supra* note 6.
60. 792 F.2d 29 (2d Cir. 1986).
61. *Id.* at 34.
62. *Id.*
63. *See also* Glomac Plastics, Inc. v. NLRB, 592 F.2d 94 (2d Cir. 1979), in which the Second Circuit enforced a Board order to bargain even though six (6) years had passed since the misconduct occurred. *Id.*
64. 558 F.2d 1137 (3rd Cir. 1977).
65. *See supra* note 54.

the case to the Board to consider the effects of a three year delay on the possibility of a fair election.[66] Such a stance was a reversal of the Third Circuit's prior interpretation of the *Gissel* decision where it had considered subsequent events to be irrelevant.[67] Similarly, the Fourth Circuit in *General Steel Products, Inc. v. NLRB*,[68] conceded that an employer should not profit from protracted delays in litigation, but stated that "the primary purpose of a bargaining order is not punitive; it is to protect the rights of the employees, and to insure that their wishes will be carried out."[69] Thus, the court remanded the case to the Board to consider the effects of the subsequent events.[70]

In the aftermath of *Gissel*, the Fifth Circuit became the leading opponent to Board policy. In *NLRB v. American Cable System*,[71] the court twice remanded the case to the Board to consider the "then existing situation" in regard to the possibility of a free and fair election.[72] Like the Second Circuit, however, the Fifth Circuit views subsequent employee turnover relevant but not a controlling factor when reviewing the appropriateness of a bargaining order. In *Chromalloy American Corp. v. NLRB*,[73] the court held that subsequent events are always relevant, but added that even where substantial employee turnover in the voting unit had occurred, its impact could be offset by the employer's past responses to union activity and existing employee sentiments.[74] Therefore, based upon an employer's past history of union opposition and its perceived residual effects, the court could infer that the likelihood of future misconduct is great and that an order to bargain is warranted despite substantial employee turnover.[75]

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66. 558 F.2d at 1152.

67. *See* NLRB v. S.E. Nichols-Dover, Inc., 414 F.2d 561 (3rd Cir. 1969). The court stated that "employee turnover in the Nichols store since October, 1966 (the time of the refusal to recognize and bargain with the union) would not affect the power of the Board to issue a bargaining order at the present time." *Id.* at 565 n.8.

68. 445 F.2d 1350 (4th Cir. 1971).

69. *Id.* at 1356.

70. *Id.*

71. 427 F.2d 446 (5th Cir. 1970).

72. *Id.* at 448. "We think that on remand the Board should have taken the opportunity to consider the then existing situation at American Cable to determine whether the electoral atmosphere was still so contaminated that a bargaining order was then justified." *Id.*

73. 620 F.2d 1120 (5th Cir. 1980).

74. *Id.* at 1133.

75. *Id.*

Unquestionably, the two sides of the controversy present serious and legitimate concerns, the heart of which touch the very foundation of our national labor policy of free choice granted by Congress in section 7 of the NLRA.[76] The Ninth Circuit recognized the tension created by the *Gissel* opinion in *Western Drug*,[77] where it noted the "delicate balance between (industrial) stability and freedom of choice."[78] Those who consider subsequent events irrelevant point to the time at which the union once possessed majority strength *vis a vis* authorization cards and argue that, but for the employer's unfair labor practices, the employees' free choice would have been expressed in a victorious representation election or, at the very least, their votes would have reflected a free choice regardless of the election results.[79] In essence then, the objective sought to be achieved by the proponents of Board policy is identical to that sought by its opponents. However, while the proponents seek to protect and foster free choice at the time of the misconduct, the opponents seek to protect free choice at the time the remedy is determined. Opponents view the imposition of a bargaining order without consideration of subsequent events as a potential deprivation of the current voting unit's right of free choice.[80] Thus, the two sides appear to be submerged in a dilemma. Complete and unbridled protection of free choice at the time of the misconduct disregards possible expressions of free choice at the time of the remedy, and protection of free choice at the time of the remedy may operate to deny an expression of free choice at the time of the misconduct.

From the depths of this dilemma, one absolute should emerge. In all cases, subsequent events should be considered relevant to the determination of an appropriate remedy because the National Labor Relations Act is remedial in nature, not punitive.[81] Failure to assess

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76. *See supra* note 2.

77. 600 F.2d 1324 (9th Cir. 1979).

78. *Id.* at 1326.

79. *See supra* notes 41 and 42.

80. *See supra* note 35. In a statement issued to the *Washington Daily News*, Senator Robert F. Wagner (N.Y.), sponsor of the NLRA was quoted as saying: "The majority of criticisms against the National Labor Relations bill spring from misinformation about its provisions and purposes. First, there is the charge that the measure would regiment men in national unions. On the contrary, the bill gives added protection to workers who wish to exercise their free choice to remain completely unorganized. . . .

81. *See, e.g.*, NLRB v. Limestone Apparel Corp., 705 F.2d 799 (6th Cir. 1982), where a demand for punitive damages was denied; Rayner v. NLRB, 605 F.2d 970 (9th Cir. 1982), where make whole remedies incurred beyond the contract

the significance of natural and uncontrollable subsequent events such as voluntary employee turnover in the voting unit during the course of good faith litigation can be viewed two ways: as the protection of free choice at the time of employer misconduct or as a means to deter future misconduct by either the employer in question or by all other employers. If the motivation to issue a bargaining order contains elements of deterrence, the remedy becomes punitive. This should not occur since the focus at all times should be upon the protection of free choice and not upon deterring misconduct by punitive means.

Therefore, when considering subsequent events in formulating an appropriate remedy, the Board and reviewing courts should adopt a case by case approach where given facts determine the outcome. When there is a significant lapse of time between the misconduct and the remedy due to employer initiated litigation, a threshold inquiry into the subjective motivation of the employer should be undertaken. If it be found that such litigation was intended to delay bargaining and thereby reap the benefits of normal employee turnover and possible dissipation and frustration of majority strength, such a finding should be weighed accordingly in fashioning a remedy. However, if the litigation is grounded in good faith, the inquiry should turn to the employer's subsequent actions, *vis a vis* possible changes in the composition of the voting unit or the removal of the impediments which contaminated the electoral process. If the employer has effectuated changes in the make-up of the voting unit that are causally connected to anti-union motives, such actions are relevant to and supportive of an order to bargain. On the other hand, employee turnover that dissipates majority strength during good faith litigation which is not caused by anti-union motivation should militate against a bargaining order. Likewise, where the specific actions of a supervisor poisoned the electoral process without the employer's knowledge and consent, the fact that the supervisor has left the employer is relevant and should be weighed accordingly.

Support for the relevancy of subsequent events is found in the *Gissel* opinion where the Court stated: "[I]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies,

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termination date were dismissed as punitive; Florida Steel Corp. v. NLRB, 713 F.2d 823 (D.C. Cir. 1983), where remedies were denied because they were punitive and designed to deter future violations as their sole basis.

though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . . .''[82] Without inquiry into subsequent events and regardless of the severity of the employer misconduct, the Board and reviewing courts are unable to fully assess the possibility of a fair election or rerun prior to the final determination of an appropriate remedy. Therefore, to give substance to the language of *Gissel* and to better protect and foster the principle of majority rule, before a bargaining order should issue, subsequent events, in all cases, should be considered relevant.

Robert Kennedy, Jr.

82. 395 U.S. at 614-15.