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Remedial Collective Bargaining Orders: Compelling Employers Recognition Where the Union Has Never Attained a Majority, 15 J. Marshall L. Rev. 649 (1982)

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COMMENTS

REMEDIAL COLLECTIVE BARGAINING ORDERS: COMPELLING EMPLOYER RECOGNITION WHERE THE UNION HAS NEVER ATTAINED A MAJORITY

INTRODUCTION

American workers have a fundamental protected right to representation by the labor union of their choice. The National Labor Relations Act[1] (the Act) provides guidelines for the determination of a labor work unit's[2] choice of representative; these guidelines are binding on the employer when negotiating a collective bargaining agreement.[3] The legislative history of the Act[4] makes clear that Congress mandated collective bargaining to promote industrial peace and insure a collective voice for the laborer.[5]

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1. 29 U.S.C. §§ 151-169 (1976).

2. Only those employees having a substantial mutuality of interest in wages, hours, and working conditions should be grouped in a single unit. 14 NATIONAL LABOR RELATIONS BOARD ANNUAL REPORT 32-33 (1949).

3. Section 8(d) defines collective bargaining as a mutual obligation of the employer and the representative of the employees to confer in good faith "with respect to wages, hours, and other terms and conditions of employment." 20 U.S.C. § 158(d) (1976). To bar other unions seeking to represent the work unit, an agreement must be in writing and contain substantial terms and conditions of employment sufficient to stabilize the bargaining agreement. *See* Appalachian Shale Prod. Co., 121 N.L.R.B. 1160 (1958). A contract for a fixed term will bar a petition by a rival union for only three years even if the term of the agreement is longer. General Cable Corp., 139 N.L.R.B. 1123 (1962).

4. The Act was synthesized in three stages: the Wagner Act of 1935, the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959. R.A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 1 (1976).

5. *Hearings on S. 2926: Hearings Before Senate Committee on Education and Labor*, 73d Cong., 2d Sess. (1934), *reprinted in* LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT at 27 (1935). In his opening statement Senator Wagner stressed that:

> [t]hose who have been interested in avoiding industrial strife and bringing about industrial peace and industrial democracy have advocated some board of mediation, conciliation, and arbitration when both parties submit. The only way that the worker will be accorded the freedom of contract to which, under our theory of government, he is entitled, is by the intrusion of the government to give him that right, by protecting collective bargaining.

Id. at 47.

Before collective bargaining can begin, the representative of the work unit must be selected. Under section 9 of the Act,[6] the National Labor Relations Board (Board) may conduct representation elections to determine the employees' choice of representative, upon a showing of substantial support by the petitioning union. Such a showing is generally made by union authorization cards signed by the employees and checked against the employer's payroll records by a Board representative. The Board, however, generally will not proceed to an election on a petition filed by the union unless the petition demonstrates support by at least 30 percent of the employees in the work unit to be represented.[7]

In exceptional circumstances, the employer's duty to bargain[8] may arise absent a Board-certified election. Under the original Wagner Act,[9] the Board could certify unions by secret ballot elections or by "any other suitable method."[10] Authorization card checks were often used as an alternative to the holding of an election.[11] In *Cudahy Packing Co.*,[12] however, the Board departed from its former policy of certification without an election and concluded that the policies of the Act would best be effectuated by elections. As a result, in 1947 the Act was amended to exclude the phrase "any other suitable method" and the election process became the only codified method for certification. Nevertheless, the card check has continued to hold its prominence in unfair labor practice proceedings where it is

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6. 29 U.S.C. § 159 (1976).

7. Employer petitions are not subject to this requirement. 29 U.S.C. § 159(c)(1) (1976). If the petition is filed by an employer, neither the employer nor the union is required to show that a given number of employees have designated the union. *See also* B. MELTZER, LABOR LAW CASES, MATERIALS, AND PROBLEMS 290 (2d ed. 1977).

8. 29 U.S.C. § 158(a)(5) (1976).

9. 29 U.S.C. § 151 (1958).

10. Section 9(c) of the Wagner Act stated:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing, upon due notice, either in conjunction with a proceeding under Section 10 [29 U.S.C. § 160] or otherwise, and may take a secret ballot of employees, or utilize *any other suitable method* to ascertain such representative.

THE DEVELOPING LABOR LAW 246 (C.J. Morris ed. 1971) (emphasis added).

11. Until 1939, the Board relied extensively on authorization cards to make union certifications. For a discussion of this early history, *see* MILLER & BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY, 133-34 (1950). *See also* THE DEVELOPING LABOR LAW 359 (C.J. Morris ed. 1971).

12. 13 N.L.R.B. 526 (1939).

found that a fair election is unlikely.[13] It is a well established policy of the Board to rely on a card-supported union majority in issuing an order to bargain without an election. Thus, an employer may be required to engage in collective bargaining with a "representative" who does not have the elective support of a majority of employees.[14]

The refusal of an employer to bargain with a union demonstrating majority support may give rise to an unfair labor practice charge. This comment will analyze an employer's lawful alternatives to bargaining absent or pending a Board-conducted election. Specifically, the comment will criticize the loopholes which permit an employer to commit unfair labor practices without effective employee remedy, and will analyze the viability of the Board's recent issuance of a bargaining order where the union had not attained a card majority.[15] Finally, a discussion of the majoritarian principle of the National Labor Relations Act will demonstrate the obstacles the NLRB will face should it, in the future, attempt to issue a bargaining order in the absence of a showing of majority support for the union.

THE DUTY TO BARGAIN UPON SHOWING OF MAJORITY SUPPORT

After the Taft-Hartley amendment in 1947, which made elections the only codified method for certification, the use of authorization-card checks to determine majority support declined sharply.[16] Employers, however, were allowed to recognize and bargain with a union claiming to possess authorization cards from a majority of employees.[17] Acceptance of the union's claim

13. Section 8(a) of the Act states that it is an unfair labor practice for an employer, *inter alia*, to interfere with an employee's section 7 rights, to interfere with the formation or administration of any labor organization, to discriminate on the basis of union involvement, or to refuse to bargain collectively with the representative of his employees. 29 U.S.C. § 158(a) (1976). *See also* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (union authorization cards are reliable enough generally to provide a valid alternate route to majority status).

14. United Dairy Farmers Coop., 107 L.R.R.M. (BNA) 1577 (1981).

15. *Id.*

16. THE DEVELOPING LABOR LAW 247 (C.J. Morris ed. 1971).

17. This decision was not without risk. In International Ladies Garment Workers Union v. NLRB, 366 U.S. 731 (1961), an employer violated § 8(a)(2) and § 8(b)(1)(A) of the Act by recognizing a union claiming majority support when the union did not have that support. Further, the employer's good faith belief that the union represented a majority in the unit was *not* a defense, especially where no attempt was made to verify the claim by checking cards against payroll records. International Ladies Garment Workers Union, 122 N.L.R.B. 1289, 1292, *aff'd*, 366 U.S. 731 (1961). The Board found, and the Supreme Court affirmed, that the union's execution of the collective bargaining agreement was a direct deprivation of the nonconsenting employees' organizational and bargaining § 7 rights and ordered the em-

was not mandatory, and an employer who in good faith doubted the union's majority status could refuse to bargain pending a Board-conducted election.[18] The employer's refusal to bargain had to be based in fact upon this good faith belief, and not on a desire to buy time in which to undermine the union's majority status prior to an election.[19]

If an employer refused to bargain, and the union claiming majority support lost the subsequent election due to employer unfair labor practices, the NLRB could rely on the card authorization despite the lack of statutory mandate. The initial inquiry should ask whether there was a majority in fact when the employer refused to bargain,[20] and whether the cards were valid.[21] The latter requirement is easily satisfied, since the only fact which will invalidate a card is a statement to the signer that the card will only be used to obtain an NLRB election.[22] If the

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ployer to withhold all recognition from the union. 366 U.S. at 737. *But see* NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966) (NLRB finding of unlawful assistance by employer was unsupported by evidence, court of appeals denied enforcement without remanding as the alleged unfair labor practice was three years old and the offending contract had expired).

18. NLRB v. Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949). This good-faith doubt requirement is known as the *Joy Silk* Doctrine.

19. Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 741 (D.C. Cir. 1950). The General Counsel must prove want of a good-faith doubt as to the union's majority. Aaron Bros., 158 N.L.R.B. 1077 (1966).

> Whether an employer is acting in good faith or bad faith in questioning the union's majority is a determination which . . . must be made in light of all the relevant facts of the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct.

Id. at 1079. *See also* Converters Graveire Serv., Inc., 164 N.L.R.B. 379 (1967). For a critical analysis of the "good faith" requirement and an alternate proposal, *see* Welles, *The Obligation to Bargain on the Basis of a Card Majority*, 3 GA. L. REV. 349 (1969).

20. Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434 (1965). The date of the employer's refusal to bargain has been held to be either the date the employer receives the union's letter seeking recognition, *see, e.g.*, Allegheny Pepsi Cola Bottling Co. v. NLRB, 312 F.2d 529 (3d Cir. 1962), *enforcing* 134 N.L.R.B. 388 (1961), or the date of the employer's letter denying recognition, *see, e.g.*, Burton-Dixie Corp., 103 N.L.R.B. 880 (1953), *enforced*, 210 F.2d 199 (10th Cir. 1954).

21. For explanation and criticism of the Board's approach to the validity of authorization cards, *see* Rains, *Authorization Cards as an Indefensible Basis for Board-Directed Union Representation Status: Fact and Fancy*, 18 LAB. L.J. 226 (1967); Comment, *Refusal-To-Recognize Charges Under Section 9(a)(5) of the NLRB: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 389 (1966); Note, *Union Authorization Cards*, 75 YALE L.J. 805 (1966).

22. Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963), *enforced*, 351 F.2d 917 (6th Cir. 1965). Under the *Cumberland Shoe* doctrine, if the card itself is unambiguous, *i.e.*, states on its face that the signer authorizes the union to represent him for collective bargaining purposes and not to seek an election, it will be counted unless it is shown that the employee was told that the card was to be used solely to secure an election. If the card states "for election only" it may still be counted if it is found that statements by the

Board finds that the employer engaged in unfair labor practices, *i.e.*, refused in bad faith to bargain and subsequently undermined the union's majority support prior to the election, it would rely on the only proof of actual employee choice: the authorization cards. The Board would issue a bargaining order despite the union's failure to win majority support in the election.[23]

Because of the difficulty of proving the employer's state of mind, the Board altered its position in 1971. Regardless of his reasons, an employer could refuse to bargain when confronted with a card majority, provided he committed no unfair labor practices prior to an election.[24] If the union ultimately lost the election, it was precluded from using unfair labor practice proceedings to obtain a Board-issued bargaining order. Thus, an employer could legally avoid bargaining with a union which had in fact attained the majority status needed to impose a duty to bargain under the Act.[25]

The Board's new position was affirmed by the United States Supreme Court in *Linden Lumber Division, Summer & Company v. NLRB*.[26] Employers faced with demands for recognition refused to bargain absent an election. The unions filed unfair labor practice charges, claiming the refusals were unfair labor practices under section 8(a)(5).[27] The Board held that the employers did not violate section 8(a)(5) solely by refusing to accept anything short of an election as evidence of majority sta-

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union organizer completely negate what the card says on its face. The trial examiner in *Cumberland Shoe* found that seventeen employees were told by fellow employees that the purpose of the cards was to secure an election. The Board counted the cards anyway, since the employees were not told that to secure an election was the *only* purpose of the cards. Id. at 1278. Employees may have believed that the only purpose was to obtain an election, but the Board will count such cards if the employees were not solicited on that basis. Bannon Mills, Inc., 141 N.L.R.B. 611 (1964).

23. Bryant Chucking Grinder Co., 160 N.L.R.B. 1526 (1966) (employer ordered to bargain based on card majority after dissipating the majority through unfair labor practices).

24. Linden Lumber Div., Summer & Co., 190 N.L.R.B. 718 (1971).

25. An employer confronted with a demand for recognition is under no duty to file a petition for an election. 29 U.S.C. § 9(c)(1)(B) (1976). He can merely sit back, allow the union to do so, 29 U.S.C. § 9(c)(1)(A) (1976), and hope that the time prior to the election will provide a "cooling off" period for his employees and dissipate the union's majority status. Even if the union ultimately prevails, the employer is in no worse position than if he had voluntarily recognized the union at the time of the union's demand. In fact, he has bought time to prepare, both financially and strategically, for collective bargaining negotiations.

26. 419 U.S. 301 (1974).

27. "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees." 29 U.S.C. § 158(a)(5) (1976).

tus.[28] The Supreme Court agreed, pointing out that a union faced with a refusal to bargain has the burden of taking the next step and invoking the Board's election procedure. While recognizing that the union has the alternative of pressing unfair labor charges, the Court stated that because the ultimate goal is industrial peace, a policy of encouraging secret elections is most favored under the Act.[29] The Court further agreed with the Board that an employer, after refusing to bargain, is not required by section 8(a)(5) to file an election petition himself.[30]

The problem with the rules and procedures outlined above is that they failed to close a loophole available to employers determined to prevent union organization. Though a collective bargaining order could issue if an employer dissipated a majority through unfair labor practices, no corrective action was available when an employer, through coercive behavior, prevented the union from attaining a card majority or even the requisite amount of support to warrant an election.[31] In 1969, however, the United States Supreme Court in *NLRB v. Gissel Packing*

28. Linden Lumber Div., Summer & Co., 190 N.L.R.B. 718, 721 (1971). The Board noted that the record did not contain evidence of independent unfair labor practices which would justify issuing a bargaining order. *Id.*

29. The Court acknowledged, however, that this alternative "promises to consume much time." In the cases involved in this ruling, the time between filing the charge and the Board's ruling was about 4 ½ years and 6 ½ years respectively. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 306 (1974).

30. In contrast, the Court expressly stated that the union has the burden, when faced with a rejection of authorization cards, of petitioning for a Board-conducted election. *Id.* at 310. *But see* Snow & Sons, 134 N.L.R.B. 709, *enforced*, 308 F.2d 687 (9th Cir. 1962) (employer violates § 8(a)(5) by rejecting card majority after express agreement to abide by showing of majority status by means other than elections). *See also* GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 106 (1976) (refusal after agreement to accept authorization cards constitutes violation of § 8(a)(5)).

At one time, the Board refused to entertain post-election refusal-to-bargain charges by a defeated union on the theory that the union had to choose between proving its majority by filing an election petition or by filing refusal-to-bargain charges. Aiello Dairy Farms, Co., 110 N.L.R.B. 1365 (1954). In 1964, however, the Board decided that henceforth it would entertain refusal-to-bargain charges filed after the union lost the subsequent election based on the employer's failure to recognize the union prior to the election. Bernel Foam Products Co., 146 N.L.R.B. 1277 (1964). If the union loses, it may still file a charge based on the employer's pre-election conduct, but it will not get a bargaining order unless there are objections to the election in the representation case and the employer misconduct warrants setting aside the election. Irving Air Chute Co., 149 N.L.R.B. 627 (1964), *enforced*, 360 F.2d 176 (2d Cir. 1965).

31. The Board generally will conduct an election upon a showing of support from 30% of the work unit. 29 U.S.C. § 9(c)(1)(A) (1976). In reality, however, a union will normally not seek an election unless it has obtained authorization cards from at least 50% of the unit it seeks to represent.

Co.[32] redefined an employer's duty to bargain. In addition, *Gissel* established through dictum a new category of employer unfair labor practice which would warrant a collective bargaining order absent *any* showing of majority status. This dictum eventually emerged as Board law.

GISSEL AND ITS APPLICATION

In 1969, the Supreme Court consolidated four cases for decision:[33] *NLRB v. Gissel Packing Company, Inc.*,[34] *NLRB v. Heck's, Inc.*,[35] *General Steel Products, Inc. v. NLRB*,[36] and *NLRB v. Sinclair Company*.[37] In *Gissel* and *Heck's*, the Board found unfair labor practices, including violations of section 8(a)(5), and ordered recognition without an election.[38] In *General Steel*, an election was held; the union lost. The Board, however, set aside the election and issued a bargaining order because the employer had committed pre-election unfair labor practices.[39] In each case, the union had valid authorization cards from a majority of the employees and the employer's refusal to bargain was motivated not by a "good faith doubt of the union's majority status, but by a desire to gain time to dissipate the status."[40] In all three cases, the Court of Appeals for the Fourth Circuit[41] rejected the Board's finding of a section 8(a)(5) violation and refused to enforce the Board's collective bargaining orders. The court held that authorization cards were so inherently unreliable that their use afforded an employer a presumption of good faith when refusing to bargain. In effect, the Board's only avail-

32. 395 U.S. 575 (1969).

33. Because of the factual similarities, the Court disposed of the four cases together. *Id.* at 579 (1969).

34. 398 F.2d 336 (4th Cir. 1968).

35. 398 F.2d 337 (4th Cir. 1968).

36. 398 F.2d 339 (4th Cir. 1968).

37. 397 F.2d 157 (1st Cir. 1968).

38. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

39. *Id.*

40. *Id.* at 583. The Board found that all three employers had engaged in restraint and coercion of employees in violation of § 8(a)(1). In *Gissel*, the employer had interrogated employees about union activities, threatened them with discharge and promised them benefits. In *Heck's*, the employer had interrogated employees, threatened reprisals, created the appearance of surveillance, and offered benefits for opposing the union. In *General Steel*, the employer had interrogated the employees and threatened them with discharge. In addition, the employers in *Gissel* and *Heck's* had wrongfully discharged employees for engaging in union activities, in violation of § 8(a)(3). Because the employers had rejected the card-based majority in bad faith, the Board found all three in violation of § 8(a)(5). *Id.* at 584.

41. NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968); NLRB v. Heck's, 398 F.2d 337 (4th Cir. 1968); General Steel Prod., Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968).

able remedy was to conduct a secret ballot election.[42]

The facts in the fourth case, *Sinclair*, were essentially the same: the union's card majority was rejected by the employer.[43] The First Circuit, however, upheld the Board's finding of unfair labor practices in actions other than the refusal to bargain[44] and affirmed the Board order requiring the employer to recognize and bargain with the union.[45]

The Supreme Court, in considering these four cases, decided that: (1) there may be a duty to bargain absent a Board election;[46] (2) generally, union authorization cards are reliable enough to be used as an alternative to an election;[47] and (3) the Board may issue a bargaining order when an employer rejects a card majority and commits unfair labor practices which make a fair election unlikely.[48]

Most importantly, the Court differentiated among degrees of employer misconduct in determining whether a bargaining order was justified. The opinion defines three categories which have been relied on in subsequent decisions. The first category represents those cases marked by "outrageous and pervasive" employer unfair labor practices. In such cases a bargaining order may be imposed "*without need of inquiry into majority status* on the basis of cards or otherwise."[49] The second category includes those cases where the unfair labor practices are "less pervasive" but would nonetheless impede the election process.[50] The cases before the Court in *Gissel* were of this type. The third category represents those minor unfair labor practices which do

42. The Fourth Circuit did, however, sustain the Board's finding of § 8(a)(1) and § 8(a)(3) violations.

43. NLRB v. Gissel Packing Co., 395 U.S. 575, 587 (1968).

44. The trial examiner found, *inter alia*, that the employer violated § 8(a)(1) by threatening the employees' job security, orally and through pamphlets, after refusing to bargain in bad faith. The Board agreed that these communications, when considered as a whole, reasonably caused employees to believe that if the union won the election the company would close its plant or transfer the weaving production, with resultant loss of jobs to the wire weavers. The Board further agreed that the employer's activities "also interfered with the exercise of a free and untrammeled choice in the election" and "tended to foreclose the possibility of holding a fair election." *Id.* at 589.

45. NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968).

46. NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969). The Court specifically approved the use of a bargaining order where the employer's practices have a tendency to undermine majority strength and impede the election process.

47. *Id.* at 601-10. The Court held that, despite the superiority of the election process, cards may surpass that reliability when employer unfair labor practices make the holding of a fair election impossible. *Id.* at 603.

48. *Id.* at 614.

49. *Id.* at 613.

50. *Id.* at 614.

not render a fair election impossible, but may warrant setting the election aside without the issuance of a bargaining order.[51]

Thus, it is immaterial whether the Board places the employer's unfair labor practice within the first or second category. If the violation is either outrageous and pervasive or sufficiently coercive, the Board may exercise the same remedial action: the issuance of a bargaining order. The major difference is the degree of inquiry into the status of union employee support. The Court in *Gissel* stated that the Board, in category I cases, has the power to issue a bargaining order without any inquiry into whether the union had ever attained a majority status.[52] Because the cases in *Gissel* were not of this type, this suggestion was pure dictum, and for the twelve years subsequent to *Gissel*, the courts treated it as such. While the Board referred to its power to issue a bargaining order to remedy outrageous unfair labor practices absent a majority, it repeatedly refused to exercise the power.[53]

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51. *Id.* at 615. In such cases, the Board will conduct a second or "re-run" election when conditions have stabilized. For a critical discussion of re-run elections and the abuse of the right of the union and employer to file objections to an election, *see* Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C.L. REV. 209 (1963). Pollitt's analysis is discussed in Getman & Goldberg, *The Myth of Labor Law Expertise*, 39 U. CHI. L. REV. 681, 691-94 (1972).

52. NLRB v. Gissel Packing Co., 395 U.S. 575, 613 (1968).

53. Even before *Gissel*, the Board alluded to the possibility of having the power. H.W. Elson Bottling Co., 155 N.L.R.B. 714 (1965). In *Elson*, the union received 11 signed authorization cards from a 23-man unit. The employer immediately embarked upon an intense anti-union campaign. The Board recognized its duty under § 10(c) to fit the remedy to the violation and to re-create the conditions and relationships that would have been had there been no unfair labor practices. *Id.* at 715. The Board was unconvinced that § 9(a) would permit a bargaining order where majority status had not been attained, and instead created a remedy which purported to re-create the atmosphere which existed prior to the unfair labor practices. The employer was ordered to mail copies of the notice to individual employees, give the union access to bulletin boards, provide to the union the facilities for a one hour meeting, and eventually host a re-run election. *Id.* at 717-18. This type of remedial authority attempts to reestablish the *status quo ante*. Seeler v. Trading Port, Inc., 517 F.2d 33, 38-39 (2d Cir. 1975); GPD, Inc. v. NLRB, 430 F.2d 963, 964 (6th Cir. 1970). *Elson* acknowledges the anomaly of punishing an employer for destroying a union majority while virtually ignoring unfair labor acts which prevent formation of a majority. H.E. Elson Bottling Co., 155 N.L.R.B. 714, 715 (1965).

After *Gissel*, in The Loray Corp., 184 N.L.R.B. 557 (1970), the Board refused to issue a bargaining order although the unfair labor practices were found to be of a "pervasive" nature. The union had not attained majority status, and the Board, while alluding to its authority to issue a bargaining order, held that the particular facts of the case did not warrant such a remedy. The Loray Corp., 184 N.L.R.B. 557, 562 (1970). Instead, the Board issued a remedy similar to that in *Elson*, concluding:

> [S]ince we are convinced in the circumstances of this case that the Respondent may have made it impossible for the union to obtain designations from 30% of the employees to support a petition for an election

Finally, in August of 1981, the Board took the step mandated by *Gissel* and issued a bargaining order in *United Dairy Farmers Cooperative Association*,[54] a case in which the union had never attained majority status. An examination of the history of this case is necessary to its discussion. Immediately after organizing activity was initiated among the employees, the employer embarked upon a series of unfair labor practices, including discharges, threats and unprecedented benefits.[55] Although the union never attained majority status, the administrative law judge, citing *Gissel*, recommended the issuance of a bargaining order,[56] reasoning that anything less assured the employer of continued enjoyment of the "fruits of its repeated unfair labor practices."[57]

. . . [w]e shall, upon request of the Union . . . conduct an election in the unit found appropriate.

Id. at 559. *See also* Bandag, Inc., 225 N.L.R.B. 72 (1976), where Chairman Murphy, in his concurring opinion, stated: "As the Supreme Court noted in *Gissel*, there may be some situations in which the employer's unfair labor practices are so severe that a bargaining order may be appropriate notwithstanding the absence of a showing of majority status. This is not such a case." *Id.* at 73 n.7.

54. 107 L.R.R.M. (BNA) 1577 (1981).

55. Respondent employer's president made a series of plant closure threats and its Board of Directors discharged a union-activist driver because of a trucking accident, although such action was unprecedented in accident occurrence at the company. In addition, several weeks prior to the election, the employer distributed an unprecedented cash bonus and, subsequent to the election, supervisors interrogated employees as to how they had voted. *Id.* at 1578.

For examples of when benefits may constitute a violation of § 8(a)(1), *see* NLRB v. Exchange Parts Co., 375 U.S. 405 (1964) (section 8(a)(1) prohibits not only threats or promises, but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice); Sugardale Foods, Inc., 221 N.L.R.B. 206 (1976) (emphasizing the differences in amounts of raises among employees). *But cf.* Russel Stover Candies, Inc., 221 N.L.R.B. 441 (1975) ("an employer, when confronted by a union organizing campaign, must proceed as it would have done had the union not been conducting its campaign"). *See also*, Ingersoll-Rand Co., 219 N.L.R.B. 77 (1975) (addressing the issue of how long an employer must refrain from granting benefits should the union begin an organizing campaign but not file a petition for an election).

For guidelines of the Board's attitude toward employee polls by employers, *see* Bourne v. NLRB, 332 F.2d 47 (2d Cir. 1964) (no unfair labor practice absent showing of pattern of employer hostility and discrimination); Strucknes Constr. Co., 165 N.L.R.B. 1062 (1967) (poll lawful because: (a) its sole purpose was to ascertain whether the union represented a current majority; (b) employees given assurances against reprisals; (c) evidence failed to establish employees answered untruthfully out of fear of reprisal; and (d) polling occurred in a background free from hostility toward the union); Blue Flash Express, Inc., 109 N.L.R.B. 591 (1954) (although employees gave false answers, there was no evidence employer threatened them with reprisal).

56. United Dairy Farmers Coop. Ass'n., 242 N.L.R.B. 1026, 1056 (1979).

57. *Id.*

The Board declined to issue a bargaining order because the union had never attained majority support.[58] Although the employer had engaged in "outrageous and pervasive" unfair labor practices, the Board merely ordered remedies akin to those in the earlier case of *Elson Bottling Co.*[59] Two Board members indicated that the Board might have the authority to issue a bargaining order, despite nonmajority union support, but declined to do so because of the risk of imposing a union on nonconsenting employees. A third member concurred with the result, but dissented from the proposal that the Board had statutory authority to issue a bargaining order absent majority support. The two dissenting members, however, urged issuance of a bargaining order under the authority confirmed by *Gissel*. Addressing the issue of the risk of imposing a union on nonconsenting employees, the dissenters suggested that such a risk exists whenever a bargaining order issues after a union has lost an election.[60]

On appeal, the court of appeals enforced the Board's order,[61] but further held that the Board possessed the authority, as stated in *Gissel*, to issue a nonmajority bargaining order in cases marked by "outrageous and pervasive" unfair labor practices which would render a fair election impossible.[62] The court remanded the case to the Board to determine whether the facts warranted such an order. By the time of the remand, the composition of the Board had changed,[63] and the majority held that the facts warranted the issuance of a bargaining order.[64] Therefore, seven and one-half years after the unfair labor practices oc-

58. *Id.* at 1028.

59. H.W. Elson Bottling Co., 155 N.L.R.B. 714 (1965). *See supra* note 53. The Board's order required, *inter alia*, that the employer "mail the notice to employees and include it in company publications, publish the notice in newspapers, have its president . . . sign all notices and read the notice to employees assembled for that purpose, and afford the Board a reasonable opportunity to have an agent in attendance at such reading." The employer was also required to grant the union the right to deliver a pre-election speech during worktime and equal time and facilities to respond to any address by the employer to its employees concerning union representation. United Dairy Farmers Coop. Ass'n, 107 L.R.R.M. (BNA) 1577 n.4 (1981).

60. The Board was similarly divided in Haddon House Food Prods., Inc., 242 N.L.R.B. 1057 (1979), decided on the same day as *United Dairy*.

61. United Dairy v. NLRB, 633 F.2d 1054 (3d Cir. 1980). Both the union and the employer filed petitions for review, and the Board cross-appealed for enforcement of its order.

62. *Id.* at 1069.

63. The two members who authored the original majority opinion and the concurring members were no longer on the Board, which left the two original dissenters and one new member. Hence, the Board's decision on remand was not surprising.

64. United Dairy Farmers Coop. Ass'n, 107 L.R.R.M. (BNA) 1577 (1981).

curred and twelve years after *Gissel*, the Board issued its first nonmajority bargaining order.

What set *United Dairy* apart from less extraordinary cases in which the Board may issue bargaining orders only if a union has obtained a majority showing was the "gravity, extent, timing, and constant repetition" of the violations, which occurred against a background of prior serious misconduct.[65] Finally, in response to the issue of imposing a nonmajority union on the employees, the Board noted that the union lost the election by a margin of only 12-14.[66] Finding that the employer committed its first unfair labor practice on November 21, 1973, the bargaining obligation was deemed effective as of that date.[67]

While *United Dairy* represents the Board's first exercise of authority under *Gissel* category I, it is not the first instance of the Board imposing a nonmajority union upon a work unit. In *Local 57, International Ladies' Garment Workers Union v. NLRB (Garwin Corp.)*,[68] the Board found that the employer, in order to avoid the union and an effective collective bargaining agreement, closed its plant in New York and resumed substantially the same operations in Florida.[69] The Board, relying on precedent in "partial closing" cases,[70] issued a bargaining order

65. *Id.* at 1580. The Board, citing Entwistle Mfg Co., 120 F.2d 432 (4th Cir. 1941), emphasized that the discharge of an employee because of union activity is a serious unfair labor practice which "goes to the very heart of the Act." The effect of such discharges is the unmistakable message to the remaining employees that union support equals loss of livelihood. The Board found equally serious the employer's attempt to convert its employees to independent contractors, which would place them outside the scope of the Act. *See* National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1976); H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292 (1948).

66. United Dairy Farmers Coop. Ass'n, 107 L.R.R.M. (BNA) 1577, 1580 (1981).

67. *Id.* A Board-issued bargaining order is effective as of either the date the union is found to have first attained majority support, or the date the employer first begins its unfair labor practices, whichever is later. Smithtown Nursing Home, 228 N.L.R.B. 23 (1977). The effect is that any unilateral changes made by the employer subsequent to that date are in violation of § 8(a)(5): changes made in the face of, and independent of, a collective bargaining agreement. *See also* Lyon's Restaurant, 234 N.L.R.B. 178 (1978).

68. 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967) [hereinafter referred to as Garwin].

69. A practice such as this is known as a "runaway shop." *See, e.g.*, NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962).

70. Partial closing of a business to thwart unionization has been held to be an unfair labor practice under § 8(a)(3). In Textile Workers Union v. Darlington Mfg Co., 380 U.S. 263 (1965), the Supreme Court held "that a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer

to the employer at his Florida location. The order was reversed on appeal because it denied the Florida employees their right to choose their own bargaining representative. The Board argued that the employer could not be allowed to take advantage of a loophole, but the court rejected this argument, viewing the order as punitive rather than remedial.[71]

While the Board has rather broad discretion in adapting remedies to fit the effect of unfair labor practices,[72] its power to order affirmative action under section 10(c) of the Act is remedial rather than punitive.[73] A bargaining order in nonmajority cases, while seeking to remedy employer behavior, may be punitive as to the majority of employees who have not chosen the union, and may in effect violate their section 7 rights.[74]

It is questionable, furthermore, whether *United Dairy* will act as effective precedent, because the Board so limited its holding to the particular facts of the case.[75] Finally, the *United Dairy* bargaining order falls short of being a true *Gissel* category I order, such orders being authorized "*without need of inquiry* into majority status."[76] In contrast, the Board in *United Dairy* sought to justify its order by stressing the minimal mar-

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and if the employer may reasonably have forseen that such closing would likely have that effect." *Id.* at 274.

71. *Compare* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (closing which deters the remaining employees *is* a violation of §§ 8(a)(1) and 8(a)(3)) *with* Garwin, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967). *Garwin* is difficult to reconcile, as the court made no inquiry into a possible deterring effect on the Florida employees.

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

73. Consolidated Edison v. NLRB, 305 U.S. 197, 236 (1938).

74. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).

29 U.S.C. § 157 (1976).

75. The Board repeatedly stressed the 12-14 margin by which the union lost the election and avoided the *Garwin* "risk of imposing a minority union" argument with these election results. United Dairy Farmers Coop. Ass'n, 107 L.R.R.M. (BNA) 1577, 1580 (1981). The Board further limited its holding by stating:

> [W]hat sets this particular case apart from "less extraordinary cases," in which we may issue bargaining orders only if a union has obtained a majority showing, is the gravity, extent, timing, and constant repetition of the violations, which occurred against a background of prior misconduct. . . . *[I]t is rare indeed to encounter misconduct more grave than that which has occurred here.*

Id. (emphasis added).

76. NLRB v. Gissel Packing Co., 395 U.S. 575, 613 (1969) (emphasis added).

gin by which the union ultimately lost the election.[77] Future cases relying on *United Dairy* will most surely litigate the issue of majority representation.[78] This does not seem entirely unreasonable because to take the *Gissel* Court's statement "without need of inquiry into majority status" too literally would run the risk of denigrating the majoritarian principle embodied in section 9 of the Act.[79]

THE MAJORITY PRINCIPLE UNDER THE NATIONAL LABOR RELATIONS ACT

Section 9(a) of the Act mandates that the exclusive representative of a work unit shall be the representative selected by a majority of the employees in the unit.[80] This majoritarian principle was also embodied in the Wagner Act, and virtually adopted in whole by the 1947 Act as amended.[81]

The Act, as well as the history of organized labor, attached great significance to the choice of the majority of the employees. The union elected by a majority acts as the "exclusive representative"[82] of *all* employees[83] and the employer must bargain with that union regarding all terms and conditions of employment.[84]

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77. *See supra* note 58.

78. Ira Golub has suggested that a more convincing test in category I bargaining orders is the "but for" test: the union can be said to have attained majority status "but for" the employer's unfair labor practices. Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union Has Never Attained a Majority*, 29 LAB. L.J. 631, 639 (1978).

79. *Id.* at 637. *See also* The Loray Corp., 184 N.L.R.B. 557 (1970) (Board refused to issue a bargaining order as the record did not contain statistics as to how many employees had actually supported the union). *But see* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the NLRA*, 78 HARV. L. REV. 38, 133 (1964).

80. 29 U.S.C. § 159(a) (1976).

81. *See* H.R. REP. NO. 510, 80th Cong., 1st Sess., *reprinted in* [1947] U.S. CODE CONG. SERV. 1135. While the Board will certify a union which receives a majority of the votes cast, *see* Virginian Ry. v. System Fed'n, 300 U.S. 515 (1937); NLRB v. Deutsch Co., 265 F.2d 473 (9th Cir. 1959), *cert. denied*, 361 U.S. 963; RCA Mfg. Co., Inc., 2 N.L.R.B. 168, 171 (1936), the National Mediation Board (administrative body of the National Railway Laborers Act) will not certify a union unless a majority of the employees in the work unit participate in the election. Pan Amer. Airways, Inc., NMB No. R-1818 (1947).

82. 29 U.S.C. § 159(a) (1976).

83. *See* Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 396 (1950). Huade Engineering Co., 1 N.L.R.B. 87 (1934), established the exclusive representative concept, embodied in § 9(a) of the Wagner Act, 49 Stat. 453 (1935), and adopted by the present Act, 29 U.S.C. §§ 151-169 (1976).

84. 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 representative of all of the employees in such unit for the purposes of collective bargaining in respect

Furthermore, under the *Celanese* doctrine,[85] a union certified by the Board enjoys an irrebuttable presumption of majority status for one year after certification. Following the certification year, the presumption becomes rebuttable. In a refusal-to-bargain case,[86] the burden of rebutting the presumption rests on the party claiming a lack of majority.[87] The employer must establish either that at the time of refusal the union no longer enjoyed majority status or that his refusal was based on a good faith doubt of the union's continued majority status.[88] While the Board has consistently adhered to this formula for rebutting the presumption,[89] some circuits have been reluctant to agree, holding that an employer violates section 8(a)(5) of the Act, despite a good faith doubt, if the General Counsel establishes that the union, in fact, enjoyed majority status at the time of refusal to bargain.[90]

Additionally, the Board has held that lack of union membership or lack of participation in union activities does not, by itself, indicate lack of union support, inasmuch as the union represents nonmembers as well as members.[91] The Board has simi-

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to rates of pay, wages, hours of employment, or other conditions of employment.

29 U.S.C. § 159(a) (1976).

85. Celanese Corp. of Amer., 95 N.L.R.B. 664 (1951), *recognized in* Brooks v. NLRB, 348 U.S. 96, 101 n.9 (1954). *See also* Automated Business Sys., 205 N.L.R.B. 532 (1973).

86. Under § 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5) (1976).

87. IAM Lodges 1746 & 743 v. NLRB, 416 F.2d 809 (D.C. Cir. 1969) (absent special circumstances, irrebuttable presumption continues for one year after certification and thereafter presumption continues until showing of sufficient evidence to cast serious doubt on union's majority status; burden is then on General Counsel to prove that union in fact represents a majority); Strange and Lindsay Beverages, Inc., 219 N.L.R.B. 1200 (1974) (employer must show by objective facts that it had reasonable doubt as to union's majority status on date employer withdrew recognition).

88. Terrel Mach. Co., 173 N.L.R.B. 1480 (1969) (doubt must be based on objective considerations and must not have been advanced for the purpose of gaining time in which to undermine union).

89. Orion Corp., 210 N.L.R.B. 633, *enforced*, 515 F.2d 81 (7th Cir. 1975) (basis upon which employer formed his doubt was subjective, rather than objective and employer found in violation of § 8(a)(5)); Automated Business Sys., 205 N.L.R.B. 532 (1973) (bargaining order issued when employer committed unfair labor practices after withholding recognition based on less than objective doubt); Ingress Plastene, Inc., 177 N.L.R.B. 481 (1969), *enforced in part, remanded in part*, 430 F.2d 542 (3d Cir. 1970) (unlawful withholding of recognition coupled with unfair labor practices prompted issuance of cease and desist order). *See also* Bally Case & Cooler, Inc., 172 N.L.R.B. 1127 (1968); Lloyd McKee Motors, 170 N.L.R.B. 1278 (1968).

90. IAM Lodges, 1746 & 743 v. NLRB, 416 F.2d 809 (D.C. Cir. 1969). The General Counsel is the prosecuting body of the NLRA.

91. NLRB v. Washington Manor, Inc., 519 F.2d 750, 753 (6th Cir. 1975) ("high turnover of employees unaccompanied by objective evidence that new employees do not support the union is no evidence of loss of majority

larly held that nonmembership in the union or poor attendance at meetings is not inconsistent with continued support for the union, because individuals may subscribe to an organization's purpose, or may wish to be represented by it, without being activists, paying dues, or joining.[92]

It is also well established that unless the majority of its employees desires union representation, the employer may not lawfully impose such representation on them.[93] Thus, the Board has consistently presumed that a voluntarily-recognized union represents the majority of the unit employees.[94] Except in cases where rival unions are actively engaged in organizing the unit employees, the duty to recognize and bargain continues for a reasonable time once the union has been recognized voluntarily.[95] This duty remains in the absence of a collective bargaining agreement, even in cases where the employer subsequently develops a good faith doubt of union majority.[96]

Consistent with its advocacy of employee free choice and representation by majority support, the Board has established a pattern of dissolving "company unions", or unions confined to the employees of a single employer and unaffiliated with any other union. Such unions were frequently established by employers in order to maintain control and to convert collective bargaining into a "colloquy between one side of [the employer's] mouth and the other."[97] To dispose of the large volume of resultant litigation, the Board established two propositions: unaffiliated unions were to be legal if freely chosen by the employees without employer domination,[98] and the question of domination or improper interference was to be "one of fact in each case."[99] The prohibition against employer domi-

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status"); Carton Bros., 203 N.L.R.B. 774 (1973) (filing of a decertification petition by employees not evidence that union had lost majority status).

92. Washington Manor, Inc., 519 F.2d 750, 753 (6th Cir. 1975); Orion Corp., 210 N.L.R.B. 633, *enforced*, 515 F.2d 81 (7th Cir. 1975); Star Mfg. Co., 220 N.L.R.B. 582 (1975), *enforced in part*, 536 F.2d 1192 (7th Cir. 1976).

93. Dancker and Seilew, Inc., 140 N.L.R.B. 824 (1963), *enforced*, 330 F.2d 46 (2d Cir. 1964); Mohawk Business Mach. Corp., 116 N.L.R.B. 248 (1956).

94. A union that has been voluntarily recognized may, however, seek an election in order to obtain the benefits of certification. General Box Co. v. NLRB, 82 N.L.R.B. 678 (1949).

95. Josephine Furniture Co., Inc., 172 N.L.R.B. 404 (1968).

96. Cayuga Crushed Stone, Inc., 195 N.L.R.B. 543 (1972), *enforced*, 474 F.2d 1380 (2d Cir. 1973); Tweel Importing Co., 219 N.L.R.B. 666 (1975).

97. R. BROOKS, UNIONS OF THEIR OWN CHOOSING 68-69 (1939). *See also* Crager, *Company Unions under the NLRA*, 40 MICH. L. REV. 831-33 (1942).

98. *See* S. REP. NO. 573, 74th Cong., 1st Sess. 10 (1935).

99. 3 NLRB ANN. REP. 28-29, 108, 112-126 (1939). *But see* SELECT SENATE COMM. ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, INTERIM REPORT, REP. NO. 1417, 85th Cong., 2d Sess. 255, 256, 298-299, 300 (1958). For examples of what the Board and the courts have held to be "company

nated unions, most prevalent during the 1930's, has been retained by the Act as amended.

The concepts of employee free choice and union majority status are deeply rooted in labor history. To issue a bargaining order without inquiry into whether the union has ever attained majority status would violate employee rights embodied in the Act, as well as afford the Board the power to exercise punitive authority.

CONCLUSION

The implications of a bargaining order where the union has never attained majority status is recognized by the Board, as evidenced by its reluctance over the past twelve years to exercise the authority granted by *Gissel*.[100] *United Dairy* clearly falls short of being a *Gissel* category I bargaining order. The courts have long recognized the deference to be given to Board expertise[101] in interpreting the Act and the employer conduct. The Board, in exercising this expertise, chose to avoid fitting a fact situation to the Supreme Court's category I imposed authority. The threshold between bargaining orders where majority status had been dissipated, and bargaining orders where a majority has never been attained, has yet to be truly crossed, and, perhaps fortunately, *United Dairy* lacks the flexibility to open the door to what could be punitive remedies unauthorized by statute.[102]

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unions," *see* Thompson Ramo Wooldridge, Inc., 132 N.L.R.B. 993 (1961) *modified on other grounds and enforced*, 305 F.2d 807 (7th Cir. 1962) (employer domination found where employee association was comprised of management personnel); Han-Dee Spring & Mfg. Co., 132 N.L.R.B. 1542 (1961) (employer sought to thwart outside union by forming grievance committee which gave its members increased benefits); Wahlgren Magnetics, 132 N.L.R.B. 1613 (1961) (employer contributed financial support to the company union). *But see* Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967) (evidence did not support NLRB finding that employer illegally dominated union where there was no showing of antiunion bias, employee dissatisfaction, or employer financial contribution).

100. Also to be considered is that the Board's composition had changed. The original majority who, when considering *United Dairy* for the first time in 1979, declined to issue a bargaining order, had left the Board by the time of remand in 1981. *See supra* note 63.

101. Consolidated Papers, Inc. v. NLRB, 670 F.2d 754 (7th Cir. 1982) (findings of the Board will not be set aside unless the reviewing court is convinced that the Board has acted in an arbitrary and capricious manner). *But see* Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972).

102. It should also be noted that the bargaining order in *United Dairy* came almost eight years after the unfair labor practices and unsuccessful union election. The risk of imposing a union upon unconsenting employees is even greater when one considers the high probability of employee turnover.

Furthermore, imposing a union on unconsenting employees is entirely contradictory to one of the most basic principles of American labor history. The majoritarian principle embodied in section 9 of the Act implies that a category I collective bargaining order would be punitive, not only to the employer, but to the employees as well: the very persons for whom statutorily protected representation was established. The Board has repeatedly held that employer-assisted unions will not be tolerated, but is virtually affording itself the right to impose Board-assisted unions upon employees without inquiry into the employees' free choice. The National Labor Relations Board must not forget that while the Act serves to protect employers and labor unions, its most important purpose is to protect the laborer.*

Leslie A. Sammarco

* On May 28, 1982, the National Labor Relations Board for the second time issued a bargaining order without a showing of union majority support in Conair Corporation, 110 L.R.R.M. 1161 (1982). Finding violations of Sections 8(a)(1) and 8(a)(3), the Board, not surprisingly, stressed the employer's outrageous behavior and the narrow margin by which the union lost the representation election. *Id.* at 1167. Furthermore, while the majority opinion expressly rejected the proposition that such an order violated the principle of majority determination, it also emphasized that the risk of contravening the wishes of the majority is lessened by the union's card support from 46 percent of the work unit. Id. at 1166-1167. Such reasoning is predictable after *United Dairy* and most certainly demonstrates the trend of future nonmajority bargaining orders. *See also* United Supremarkets, 110 L.R.R.M. 1173 (1982) (decided the same day as *Conair Corporation*; bargaining order not issued because employer behavior was not of the *Gissel I* type.)