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Representative Bargaining Orders: A Time for Change

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NOTES

REPRESENTATIVE BARGAINING ORDERS: A TIME FOR CHANGE

The establishment of a collective bargaining relationship between an employer and its employees' representative is an important step in fulfilling the labor policy of the United States.[1] One means of creating a bargaining relationship is a "representative bargaining order."[2] The National Labor Relations Board ("NLRB" or the "Board") issues representative bargaining orders as a remedy for employer unfair labor practices.[3] The order both designates a labor organization as the collective

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1 The aim of United States labor law is to foster peaceful and voluntary collective bargaining. This labor relations policy is rooted in four major statutes: the Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-115 (1976); the Wagner Act of 1935; the Taft-Hartley Act of 1947; and the Landrum-Griffin Act of 1959. The Taft-Hartley, Wagner, and Landrum-Griffin Acts are codified at 29 U.S.C. §§ 151-169 (1976). These three statutes comprise the National Labor Relations Act. Seetion 1 of the NLRA states in relevant part:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstruetions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1976).

2 A bargaining order's effect differs, depending upon the prior position of the parties. When a labor organization is certified pursuant to a secret ballot election, or is voluntarily recognized by an employer as its employees' bargaining representative, the employer is obligated to bargain with the labor organization. An employer's unexcused failure to bargain is an unfair labor practice. In this situation, a bargaining order merely reaffirms the employer's obligation arising from the prior certification or voluntary recognition. *See* 29 U.S.C. § 158(a)(5) (1976) (unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) . . ."); *id.* § 159(a) ("representative" defined as that union "designated or selected for the purposes of collective bargaining by the majority of the employees . . .").

When the bargaining order issues as a remedy for employer unfair labor practices committed prior to any established relationship between the parties, however, the effect is much different. In this context, the NLRB effectively *creates* an obligatory bargaining relationship where one had not previously existed. This remedy is labeled the "representative bargaining order."

To prevent an employer from making unilateral changes in mandatory subjects of bargaining prior to the issuance of a bargaining order, the NLRB imposes a retroactive duty to bargain dating back to the first date of the employer's unfair labor practices. *See* Trading Post, Inc., 219 N.L.R.B. 298 (1975). The Board views the presenee of a union organizing campaign, coupled with serious and pervasive unfair labor practices, as crcating a bargaining obligation on the wrongdoing employer. *Id.* at 200-01. The Supreme Court upheld the imposition of a retroactive duty to bargain in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

3 National labor policy reflects a preference that parties adjust their relations and griev-

bargaining representative for a group of employees, and compels the employer to bargain with that labor organization over the terms and conditions of employment.[4]

In examining representative bargaining orders, this Note first discusses some of the practical problems and policy concerns inherent in these orders. In particular, this discussion highlights the NLRB's failure to support adequately with detailed factual analysis its issuance of representative bargaining orders and the resulting judicial confusion in the circuit courts of appeals. This Note also examines the propriety of such orders in the absence of a prior showing of majority support for the union. Finally, in an attempt to balance policy concerns and reduce inconsistencies in the issuance and enforcement of bargaining orders, the Note proposes an analytical framework for imposing representative bargaining orders.

I
ISSUANCE PROBLEMS AND POLICY CONCERNS

A. *The Designation or Selection of a Representative*

Although designation of representatives through the election process of the National Labor Relations Act ("NLRA" or the "Act") is the preferred method of selection,[5] the Board and the courts recognize that

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ances voluntarily, with minimal interference from the Board. For example, the NLRB may not force parties to agree to collective bargaining contracts or terms. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) (NLRB lacks statutory authority to remedy employer's repeated refusals to bargain in good faith over a dues check-off clause by requiring employer to agree to such a clause). Nonetheless, Congress established the concepts of "employee rights" and "unfair labor practice" to regulate misconduct in labor-management relationships. *See* R. GORMAN, BASIC TEXT ON LABOR LAW: ORGANIZATION AND COLLECTIVE BARGAINING 1-6 (1976). Thus, § 8 of the Wagner Act of 1935 prohibited certain employer acts, such as restraint, interference, and coercion of employees in the exercise of their § 7 rights, *see infra* note 16; domination of unions; discrimination in terms of employment so as to discourage union membership; and refusal to bargain in good faith with the majority representative of the employees. 29 U.S.C. § 158(a) (1976). The Taft-Hartley Act of 1947 proscribed similar conduct by unions. *Id.* § 158(b).

As a result of congressional authorization, *see id.* § 160, the NLRB has the power to implement a wide range of remedies for statutorily-proscribed unfair labor practices. Extraordinary remedies for "aggravated and pervasive" violations of §§ 8(a)1 and 8(a)3 of the NLRA include: personally-sigued notices by the company president acknowledging violations to all employees; a reading by a high management official of a notice before a meeting of employees; union access to nonwork areas in employer's plant during nonwork time; or an order to the employer to furnish names and addresses of all current employees to the union. *See* Hood, *Bargaining Orders: The Effect of* Gissel Packing Company, 32 LABOR L.J. 203 (1981).

4 29 U.S.C. § 158(d) defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."

5 "The most commonly traveled route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board's election and certification procedures under § 9(c) of the Act . . . [I]t is also, from the Board's

"designation or selection" of a representative can occur in three ways.[6] First, an employer can voluntarily recognize an organization purporting to represent a majority of employees in a designated bargaining unit.[7] Second, when the employer does not voluntarily recognize a majority union, NLRB election procedures allow employees to select, by majority vote on a secret ballot, a labor organization as their collective bargaining representative.[8] Finally, in those situations in which an employer's threatening and coercive conduct renders a free election improbable,[9] an NLRB-imposed bargaining order designates the representative.[10]

The Board issues two types of representative bargaining orders. A non-majority bargaining order is issued when no prior showing of majority support for the labor organization has been made. In contrast, the NLRB issues a card-majority bargaining order after proof of one-time or continued card-majority[11] support.[12] The difference between the two

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point of view, the preferred route." NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969) (footnotes omitted).

6 *See* R. GORMAN, *supra* note 3, at 93.

7 *See* NLRB v. A. Lasaponara & Sons, Inc., 541 F.2d 992, 993-95 (2d Cir. 1976), *cert. denied,* 430 U.S. 914 (1977).

8 29 U.S.C. § 159 (1976).

9 Threatening and coercive techniques include: dismissal of union supporters; interrogation of employees; threats of plant closure; grants or denials of benefits; coercive speeches during scheduled work time; and promulgation of overly-broad no-solicitation rules. *See* NLRB v. Arrow Molded Plastics, 653 F.2d 280, 283-84 (6th Cir. 1981) (granting and withholding benefits and issuing overly-broad no-solicitation rule); United Dairy Farmers Coop., 242 N.L.R.B. 1026, 1028-29 (1979) (dismissals, interrogations, granting of bonuses, and threats of plant closure).

10 Once a representative bargaining order issues, a question remains as to how long that order precludes a challenge to the union's bargaining status. Following typical NLRB certification, no one may challenge the union's majority status, absent unusual circumstances or a collective bargaining agreement, *see infra* note 28, for one year. Brooks v. NLRB, 348 U.S. 96 (1954). In one recent case, the General Counsel suggested that the Board give representative bargaining orders the same effect. Irving, *Remedies Under the NLRA: An Update,* 32 N.Y.U. CONF. ON LAB. 73, 81 (1981). Although the parties settled the case before a Board decision was issued, the Board's approval of the settlement containing the General Counsel's recommendation may indicate Board agreement with the one-year limitation. *See id.*

11 Unions use authorization cards for two purposes: first, to make a showing of interest to the NLRB in support of a petition for a representation election (the NLRB requires a 30% showing of majority support, normally through authorization cards, before commencing the election process, 29 C.F.R. § 101.18(a) (1981)); second, to induce the employer to bargain by convincing him that the union enjoys majority support.

The Supreme Court, in NLRB v. Gissel Packing Co., 395 U.S. 575, 604-07 (1969), stated that unless the union solicited the cards for the sole purpose of precipitating an election, authorization cards signed by a majority of employees could establish the requisite majority support for a representative bargaining order. This Note is limited to cases in which the union solicited authorization cards either for the two purposes discussed above, or for the sole purpose of establishing majority support for the union. In addition, the Court acknowledged in *Gissel* that "convincing support" shown "by a union-called strike or strike vote" may also establish majority support. *Id.* at 597. Because no practical difference exists between this type of "convincing support" and card-majority support, for simplicity this Note will refer only to card-majority support.

12 A hypothetical situation illustrates how each of these remedies operates. A labor or-

types of bargaining orders—the prior showing of majority support—reflects important tensions among the principles of majority rule, employee free choice, and NLRB remedial authority.[13] The NLRB, for example, routinely issues, with little or no factual analysis, card-majority bargaining orders as remedies for employer unfair labor practices.[14] On the other hand, the NLRB, after years of rejecting their use, just recently issued its first non-majority bargaining order.[15]

B. *Employee Free Choice*

The principle of employee free choice is found in section 7 of the National Labor Relations Act, and envisions a noncoercive atmosphere in which an employee may fully exercise his statutory rights of self-organization, collective bargaining through chosen representatives, and participation in concerted activities designed to fulfill labor law goals.[16] Section 7 also protects the right of employees to refrain from, as well as

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ganization begins organizing employees of a manufacturing concern. In case A, the union succeeds in persuading over 50% of the employees to sign authorization cards, indicating that these employees support the union. In case B, the union secures cards from only 30% of the employees, the minimum amount required to set the NLRB's election process in motion. 29 C.F.R. § 101.18(a) (1981). Immediately upon hearing of union organizing, the employer begins a harassment campaign designed to coerce the employees to vote against the union. *See supra* note 9. As a result, in both cases the union loses the election. If the NLRB finds both that the employer's unfair labor practices coerced the employees in selecting a representative, and that a re-run election would be no less tainted because of the inadequacy of the NLRB's traditional remedies to cleanse the coercive atmosphere, the Board may then order the employer in cases A and B to bargain with the labor organization. In case A, because the union previously established a majority showing of support through authorization cards, the bargaining order is a card-majority bargaining order. In case B, because there is no previous showing of majority support through authorization cards or otherwise, a nonmajority bargaining order exists.

In both cases, the employer has three choices at this point: he can bargain with the labor representative; he can refuse to bargain and await service of process when the NLRB petitions a circuit court of appeals for enforcement under 29 U.S.C. § 160(e) (1976); or he can directly challenge the NLRB's findings and order in a federal court of appeals where the unfair labor practice allegedly took place, or in the District of Columbia Court of Appeals. 29 U.S.C. § 160(f) (1976). This hypothetical presumes an election and a union defeat. In many cases, however, an election is never held. Prior to an election, a union may file a charge of unfair labor practices and "block" the representation questions (i.e., the election) until after resolution of the charge. 29 C.F.R. § 102.71(b) (1981). If a bargaining order issues to remedy the unfair labor practices, an election is no longer necessary. *See* NLRB v. Amber Delivery Serv., Inc., 651 F.2d 57, 59, 69-70 (1st Cir. 1981); NLRB v. Suburban Ford, Inc., 646 F.2d 1244, 1247 (7th Cir. 1981).

13 For a discussion of these principles, see *infra* notes 16-30 and accompanying text.

14 *See infra* notes 40-64 and accompanying text.

15 United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. 772 (1981). For a discussion of this landmark decision, see *infra* notes 71-83 and accompanying text.

16 29 U.S.C. § 157 (1976) states in 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, and shall also have the right to refrain from any or all of such activities . . . .

to participate in, any of the above activities.[17]

Many NLRB procedures and rules, especially those concerning selection of collective bargaining representatives,[18] reflect a broad concern for employee free choice.[19] Employee free choice necessitates that an employee have access to all relevant information, that he be able to use this information to determine the consequences of selecting or rejecting union representation, and that he be able to appraise these consequences in light of his own values.[20] Consequently, employees must be guaranteed freedom from any obstructions in the flow of relevant information and from influences that distort assessment of the consequences of unionization.[21]

The NLRB issues a representative bargaining order when an employer engages in unfair labor practices that interrupt the flow of information, distort employee perceptions, and thereby foreclose the preferred method of secret ballot election. The inherent danger in any

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17 *Id.* The Taft-Hartley Act of 1947 added the right to refrain from union activity. The Act demonstrated a shift in national labor policy, with the government becoming an "umpire" rather than a "paternal protector." W. OBERER, K. HANSLOWE & J. ANDERSON, CASES AND MATERIALS ON LABOR LAW 151 (1979).

18 NLRA §§ 8(a)(1) and 8(b)(1)(A), for example, prohibit any employer or union unfair labor practices that effectively infringe on the exercise of § 7 employee rights during an election campaign. 29 U.S.C. §§ 158(a)(1), 158(b)(1)(A) (1976). The preference for secret-ballot elections specifically illustrates the concern for employee free choice. *See supra* notes 5, 8 and accompanying text.

19 The NLRB, under its authority as the overseer of union representation elections, may promulgate election rules: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act] such rules and regulations as may be necessary to carry out the provisions of [the Act]." 29 U.S.C. § 156 (1976). The NLRB, however, promulgates the majority of its rules concerning elections and collective bargaining through individual panel decisions in selected cases. *See* Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board,* 70 YALE L.J. 729 (1961). The Supreme Court questioned the Board's practice in two cases, but nonetheless recognized that establishing rules through individual adjudication has the same effect as promulgating the rules under the Administrative Procedure Act's rule-making provisions. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 762-66 (1969).

Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966) provides an example of Board rule-promulgation through adjudication. The *Excelsior* rule obligates employers, upon demand from unions, to furnish a list of the names and addresses of all employees eligible to vote in representation elections. *Id.* One purpose of the rule is to ensure that each employee has access to all information relevant to the question of union representation. *See Wyman-Gordon Co.,* 394 U.S. at 767. The Board first announced the *Excelsior* rule, however, in an unfair labor practice adjudication. Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).

Although violation of election rules does not necessarily constitute an unfair labor practice, disobedience is sufficient to set aside an election. R. GORMAN, *supra* note 3, at 45. The major purpose of all Board election rules is to ensure "laboratory conditions" preceding representation elections that will best effectuate employee free choice in an uncoerced atmosphere. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948), *enforced,* 192 F.2d 504 (6th Cir. 1951).

20 *See* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 HARV. L. REV. 38, 46 (1964); *supra* note 19.

21 Bok, *supra* note 20, at 47.

representative bargaining order remedy, however, is that the collective bargaining relationship resulting from the order will not accurately reflect the employees' free choice. Although employer unfair labor practices may prevent uncoerced exercise of employee choice, the issuance of a bargaining order similarly represses an employee's individual appraisal of the consequences of unionization. Unless the NLRB can show that but for the unfair labor practices the employees would have voted for unionization, a bargaining order risks strapping employees with unwanted union representation.[22] The NLRB thus must make the troublesome and difficult determination of whether a bargaining order will effectuate the result that would occur if employee free choice existed, or whether the order to protect freedom of choice will impose union representation when a fair and free election might lead to an opposite result.[23]

C. *Majority Rule*

Although employee free choice influences the method of representative selection, majority rule determines whether the labor organization will represent all or none of the employees. This principle reflects the democratic basis of labor relations in the United States and is found in several parts of the NLRA, including section 8 (unfair labor practices)[24] and section 9 (designation and selection of representatives).[25] Simply stated, the rule is: when a majority of employees desire union representation, the labor organization selected becomes the exclusive representative of all the employees;[26] when the majority of employees rejects

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22 Absolute causation, of course, is impossible to prove. *See* W. PROSSER, HANDBOOK OF LAW OF TORTS 242 (1971).

23 As the Supreme Court stated in NLRB v. Gissel Packing Co., 395 U.S. 575, 614-15 (1969):

> If 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 employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . . .

24 Under §§ 8(a)(1) and 8(a)(2), for example, it is an unfair labor practice for an employer to recognize or bargain with a union representing only a minority of employees. *See* ILGWU v. NLRB, 366 U.S. 731 (1961) (employer may not enter into "memorandum of agreement" with union representing only a minority of employees). In exchange for the right of exclusive representation, however, a majority union has a duty to fairly represent the minority group of employees. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

25 *See infra* note 26. The NLRB, for example, employs decertification procedures whereby employees may petition for an election to decertify the labor organization as the majority representative. *See* 29 C.F.R. § 101.17-101.21 (1981).

26 "[R]epresentatives 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 . . . ." 29 U.S.C. § 159(a) (1976); *see* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) (contracts with individual employees may not infringe upon collective bargaining agreement with union).

unionization, the labor organization does not represent any of the employees.[27]

Although the principle of majority rule is sometimes compromised to fulfill other policies of the Act,[28] the general rule remains. Accordingly, in the area of bargaining orders the question is to what extent such orders may infringe on majority rule. Issuing a bargaining order without clear evidence of majority support undermines the principle of majority rule. On the other hand, a finding by the Board that, but for the unfair labor practices, the union would have had majority support, militates in favor of issuing a bargaining order. Therefore, in considering whether to issue a representative bargaining order, the NLRB should be convinced that the employer's unfair labor practices had a causal effect on the union's loss of or failure to gain majority support.[29]

D. *Employer Deterrence*

Although the need for employer deterrence underlies any NLRB remedy, a remedy must only deter future employer misconduct, and should not penalize employer behavior because of previous acts.[30] When bargaining orders issue, the question is the degree to which the principle of employer deterrence may compromise employee free choice

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27 *See* R. GORMAN, *supra* note 3, at 375.

28 In order to instill stability into bargaining relationships and impress upon employees the seriousness of the representation question, the NLRB has created two limits on challenges to a union's majority status: the certification bar and the contract bar. The certification bar creates an irrebuttable presumption of continued majority status for a union during its first year of certification. Brooks v. NLRB, 348 U.S. 96 (1954). After the first year, however, rival unions or individual employees may challenge a certified union's status through the decertification procedures. *Id.* at 103.

Under the contract bar, a valid, written collective bargaining agreement of definite duration prevents an outside union from seeking an election for the length of the contract (up to a maximum of three years). General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962). Congress has created an additional limitation on elections: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159(c)(3) (1976).

29 The Supreme Court recognized the causation issue in NLRB v. Gissel Packing Co., 395 U.S. 575, 619 (1969) (emphasis added).

> Remaining before us is the propriety of a bargaining order as a remedy for a § 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely *or which have in fact undermined a union's majority* and caused an election to be set aside.

30 Section 10(c) authorizes the Board to devise "an order requiring [the wrongdoer] to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c) (1976). The NLRB, however, recognizes three general limitations on its power under section 10(c): a remedy cannot be so broad as to punish a particular respondent or class of respondents; a remedy cannot defeat other purposes of the Act by causing irreparable harm or hampering meaningful collective bargaining; and a Board order cannot compel either party to agree to mandatory subjects of bargaining. *See* Ex-Cell-O Corp., 185 N.L.R.B. 107, 108 (1970), *enforced,* 449 F.2d 1058 (D.C. Cir. 1971).

and majority rule. If deterring employer conduct was the sole concern, a bargaining order would issue in every case; bargaining orders impose representation without a secret ballot election and thereby negate the employer's motive for misconduct. Deterrence is not the sole concern, however, and the NLRB instead must balance the effectiveness of bargaining orders in deterring employer conduct against the infringement on employee free choice and majority rule. With these principles in mind, it is appropriate to examine the history, use, and problems of representative bargaining orders.

II
REPRESENTATIVE BARGAINING ORDERS AND JUDICIAL CONFUSION

A. NLRB v. Gissel Packing Co.[31]

Gissel is the landmark case on the propriety of representative bargaining orders. On consolidated review of four cases, the Supreme Court held that the NLRB may properly issue a bargaining order when an employer has committed unfair labor practices that make a fair election unlikely, and the union has shown prior majority support through authorization cards.[32] The Court found that a bargaining order's purpose is two-fold: "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct."[33]

The Court in *Gissel* suggested a new tripartite classification system for determining the propriety of a bargaining order.[34] First, "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices may warrant a bargaining order even if the union cannot

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31 395 U.S. 575 (1969).

32 *Id.* at 610-16.

33 *Id.* at 612 (footnote omitted).

34 *Id.* at 613-15. The NLRB's traditional approach was the *Joy Silk* doctrine. *See* Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), *enforced,* 185 F.2d 732 (D.C. Cir. 1950), *cert. denied,* 341 U.S. 914 (1951). Under that rule, even though a union claimed representative status through possession of authorization cards, an employer lawfully could refuse to bargain if it had a "good faith doubt" as to the union's majority status. The Board could enter a bargaining order only if it found the absence of a good faith doubt; the employer's independent unfair labor practices or the employer's failure to justify its doubt supported such a finding. *Gissel,* 395 U.S. at 592-93.

The Board modified the *Joy Silk* doctrine in Aaron Bros., 158 N.L.R.B. 1077 (1966), when it shifted the burden to the General Counsel to show bad faith, and indicated that not every unfair labor practice would automatically result in a finding of bad faith. The Board added that the employer need no longer come forward with a justification for his good faith doubt. 158 N.L.R.B. at 1078-79. The Board abandoned the *Joy Silk-Aaron Bros.* doctrine in the oral argument for *Gissel,* and instead argued that an employer's good faith doubt was irrelevant. 395 U.S. at 594. After *Gissel,* therefore, the focus in the issuance of a bargaining order is on the commission of serious unfair labor practices that tend to preclude fair elections, rather than on the employer's good faith. *Id.*

demonstrate that a majority of the unit's employees once supported it.[35] Second, a bargaining order is appropriate in "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process," but only if the union once had majority support.[36] Finally, a bargaining order is never appropriate in cases marked by "minor or less extensive unfair labor practices" that have a "minimal impact on the election machinery."[37]

Gissel dealt exclusively with the second category of card-majority bargaining orders.[38] The Court failed to articulate specific standards for their issuance, but did mention four factors that the NLRB should consider in fashioning a bargaining-order remedy: the extensiveness of an employer's unfair labor practices; the likelihood of their recurrence; the effectiveness of traditional remedies in erasing the effects of past practices and ensuring a fair election; and the possibility that a bargaining order would better protect employee sentiment.[39]

B. *Post*-Gissel *Problems*

Gissel provided the NLRB with broad discretion to develop bargaining-order remedies.[40] Nevertheless, the Board has failed in its use of both card-majority and nonmajority bargaining orders to create an effective and consistent remedy for the commission of serious unfair labor practices. The central flaw is the NLRB's consistent refusal to support issuance of card-majority bargaining orders with a detailed application of facts to standards and its tendency to pay only lip service to the fac-

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35 395 U.S. at 613-14. This category is hereinafter referred to as the "nonmajority bargaining order."

36 *Id.* at 614. This category is hereinafter called the "card-majority bargaining order."

37 *Id.* at 615. Although category three is outside the discussion of this Note, two examples within this category help explain the variability in seriousness of unfair labor practices. In NLRB v. Gruber's Super Market, Inc., 501 F.2d 697 (7th Cir. 1974), the court refused to enforce a bargaining order when the evidence showed only a single unfair labor practice—a unilateral wage increase—and no evidence of anti-union animus. In Poughkeepsie Newspapers, Inc., 177 N.L.R.B. 972 (1969), the Board refused to issue a bargaining order when promises and threats were directed at a few employees: "[T]hese few violations, occurring in a unit of 52 employees, in our opinion, are not of sufficient gravity to support an 8(a)(5) finding or bargaining order." *Id.* at 973 (footnote omitted).

38 "The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." 395 U.S. at 614.

39 *Id.* at 614-15.

40 It is for the Board and not the courts, however, to make that determination [whether to issue a bargaining order], based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act, . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

Id. at 612 n.32 (citation omitted).

tors that the *Gissel* Court outlined.[41] Instead, the Board has chosen to render presumptuous findings.[42] Furthermore, although the propriety of card-majority bargaining orders is clear after *Gissel,* the status of nonmajority bargaining orders remains uncertain.[43]

1. *Card-Majority Bargaining Orders*

By regulation, an NLRB decision must contain "detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised. . . ."[44] In addition, two principles require that the NLRB provide a reasoned analysis that sets forth those factors justifying issuance of a bargaining order. First, bargaining orders subordinate the right of employees to choose freely their representative to the purpose of remedying employer's unfair labor practices.[45] To ensure the preferred

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41 *See* R. GORMAN, *supra* note 3, at 98:

> In most of the cases decided by the Board prior to *Gissel* and subsequently remanded, as well as cases decided after *Gissel,* the Board has contented itself with a recounting of the employer violations and a rather sketchy or conclusory finding on the question whether they were severe enough so as likely to preclude a fair election.

See also Hood, *supra* note 3, at 210 ("By failing to articulate the factors which justify the issuance of a bargaining order in a substantial number of cases, the Board has created uncertainty about its judgment in *Gissel*-type cases."). Other commentators criticize the NLRB for failing to analyze adequately the necessity for card-majority bargaining orders in individual cases. *See* Sharpe, *A Reappraisal of the Bargaining Order: Toward a Consistent Application of* NLRB v. Gissel Packing Co., 69 NW. U.L. REV. 556 (1974); Walther & Douglas, *NLRB Bargaining Orders: A Problem-Solving or Ivory Tower Approach to Labor Law,* 17 WASHBURN L.J. 1 (1977) (Mr. Walther was a member of the NLRB from Nov. 1975 to Aug. 1977); Wortman & Jones, *Remedial Actions of the NLRB in Representation Cases: An Analysis of the* Gissel *Bargaining Order,* 30 LAB. L.J. 281 (1970); Note, *The* Gissel *Bargaining Order, the NLRB and the Courts of Appeals: Should the Supreme Court Take a Second Look?,* 32 S.C.L. REV. 399 (1980).

Recent Board decisions provide a continued basis for this criticism. *See e.g.*, Roth's IGA Foodliner, 259 N.L.R.B. 132 (1981) (one-paragraph summary supporting bargaining order); Warehouse Groceries Management, Inc., 254 N.L.R.B. 252 (1981) (recital of unfair labor practices and conclusion that bargaining order appropriate). Other recent decisions, however, may show an increased awareness of the necessity of factual analysis. *See e.g.*, Viracon, Inc., 256 N.L.R.B. No. 17 (1981) (application of four *Gissel* factors to employer's unfair labor practices); C.E. Wilkinson & Sons, Inc., 255 N.L.R.B. 1367 (1981) (same).

42 For a typieal example, see Dadco Fashions, Inc., 243 N.L.R.B. 1193 (1979), *enforced,* 632 F.2d 493 (5th Cir. 1980). The Board stated:

> As the Supreme Court made clear in NLRB v. Gissel Packing Co., Inc., . . . , unfair labor practices of the number and severity of those herein have a negative impact on the free choice of employees. We therefore conclude, in agreement with the Administrative Law Judge, that a bargaining order is appropriate under the circumstances in the instant proceeding.

243 N.L.R.B. at 1194; *see also* Ely's Foods Inc., 249 N.L.R.B. 909 (1980), *enforced,* 656 F.2d 290 (8th Cir. 1981); Appletree Chevrolet, Inc., 237 N.L.R.B. 867 (1978), *enforced in part,* 608 F.2d 988 (4th Cir. 1979); Essex Wire Corp., 188 N.L.R.B. 397 (1971), *remanded mem.,* 496 F.2d 862 (6th Cir. 1972); West Side Plymouth, Inc., 180 N.L.R.B. 437 (1969).

43 *See infra* notes 70-92 and accompanying text.

44 29 C.F.R. § 101.12 (1981).

45 *See* Electrical Prods. Div. of Midland-Ross Corp. v. NLRB, 617 F.2d 977, 991 (3d Cir.) (Weis, J., dissenting), *cert. denied,* 449 U.S. 871 (1980).

status of the secret ballot election,[46] a bargaining order should not issue as the norm, but only when it is a necessary exception.

Second, section 10(e) of the National Labor Relations Act empowers the federal courts of appeals to enforce those NLRB orders that are supported by "substantial evidence on the record considered as a whole."[47] The Supreme Court defines the NLRB "as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."[48] On review of a Board order, an appellate court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."[49] Nevertheless, when faced with a petition for enforcement of a bargaining order unsupported by detailed factual analysis, courts choose one of three options.

Some courts of appeals, unwilling to play a strong supervisory role in the labor relations area, enforce card-majority orders with little apparent concern for the lack of factual analysis.[50] Other courts, unwilling

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> In imposing bargaining orders, the Board is subordinating the employee's right to express his choice to its forecast as to who would have won the election if the employer had maintained laboratory conditions. When that prediction is little more than a guess, however, the Board's paternalism does not justify depriving the employees of their vote.

46 *See supra* notes 6, 9 and accompanying text.

47 29 U.S.C. § 160(e) (1976); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (discussion of the scope of review contemplated under § 10(e)).

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

49 *Id.*

50 *See e.g.*, NLRB v. Ely's Foods, Inc., 656 F.2d 290, 293 (8th Cir. 1981):

> While we agree that the specific factual findings of the Board and the ALJ with regard to the necessity of a bargaining order were perhaps less than desirable for appellate review and present only a marginal case for bypassing the preferred election procedure, we find that the complete findings of the Board . . . and the record as a whole support issuance of a bargaining order in this case.

In Tipton Elec. Co. v. NLRB, 621 F.2d 890 (8th Cir. 1980), the majority stated: "[I]t is for the Board and not the courts to make a determination based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." 621 F.2d at 898; *accord* Drug Package, Inc. v. NLRB, 570 F.2d 1340, 1344 (8th Cir. 1978); Amalgamated Clothing Workers v. NLRB, 527 F.2d 803, 807 (D.C. Cir. 1975); Arbie Mineral Feed Co. v. NLRB, 438 F.2d 940, 945 (8th Cir. 1971). *Contra* Tipton Elec. Co. v. NLRB, 621 F.2d 890, 899 (8th Cir. 1980) (Gibson, J., dissenting) (Board's determination should not be supported because "Board has fallen into the trap of using an easy, mechanical application of general rules in a manner that impairs the free choice of the employees."); NLRB v. Arrow Molded Plastics, 653 F.2d 280, 284 (6th Cir. 1981) ("It is equally inappropriate to enforce bargaining orders where the Board's rationale for the order was conclusory."); NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 215-16 (2d Cir. 1980) (bargaining order unenforceable when Board failed to consider employee turnover as a factor and to explain its standards in calling for the order); Rapid Mfg. Co. v. NLRB, 612 F.2d 144, 151-52 (3d Cir. 1979) (order unenforceable when record lacked substantial evidence that unfair labor practices were serious enough to tend to undermine majority strength and impede the election process).

to enforce an unsupported order, but acknowledging that denial of the order would only reward the employer's misconduct, simply remand to the NLRB for further factual analysis.[51] Still other courts are aware that the inherent delay of a remand weakens the remedial and deterrent effect of a bargaining order.[52] These courts choose to supply their own factual analysis in determining the propriety of enforcing a bargaining order.[53] Such analysis goes beyond review for "substantial evidence of the record considered as a whole,"[54] and considers the nature of the unfair labor practices, the surrounding circumstances, and the possibility of holding a fair election.[55] The result is *de novo* review and a transfer of the factfinder's role from the NLRB to the courts—a situation not con-

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51 *See e.g.*, NLRB v. Permanent Label Corp., 106 L.R.R.M. (BNA) 2211, 2217 (3d Cir. 1981) ("We do not rule out the possibility that a collective bargaining order could be appropriate in this case. We ask only for the specific findings upon which to conduct our review."); Hedstrom Co. v. NLRB, 558 F.2d 1137 (3d Cir. 1977).

52 *See e.g.*, Red Oaks Nursing Home v. NLRB, 633 F.2d 503, 509 (7th Cir. 1980) ("It is unfortunate that this fundamental question of employee representation rights should receive so little attention from the Board and should be the subject of the long delays of remand necessitated by the Board's failure to act in the first instance."); Peerless of Am., Inc. v. NLRB, 484 F.2d 1108, 1120 (7th Cir. 1973) ("Consequently, in our desire to avoid needless and futile delay, we shall make the essential analysis and deny enforcement.).

The *Hedstrom* cases graphically illustrate the problem of delay. *See* Hedstrom Co. v. NLRB, 629 F.2d 305 (3d Cir. 1980) (en banc), *cert. denied,* 450 U.S. 96 (1981) (*Hedstrom II*); Hedstrom Co. v. NLRB, 558 F.2d 1137 (3d Cir. 1977) (*Hedstrom I*). The representation election was held in March 1974. In July 1977, the Third Circuit remanded the Board's initial imposition of a bargaining order because of a lack of factual analysis. The Board subsequently engaged in a factual analysis, but it was not until August 1980, six years after the election, that the Third Circuit enforced the bargaining order.

53 *See* NLRB v. Dadco Fashions, Inc., 632 F.2d 493, 498 (5th Cir. 1980) (court considers nature of the unfair labor practices, their severity, and size and population of town in which factory was located); Peerless of Am., Inc. v. NLRB, 484 F.2d 1108, 1120 (7th Cir. 1973) ("We conclude on analysis of the simple facts involved that we would be abdicating our judicial function and shirking our responsibilities if we ever enforced a bargaining order in this case."); *see also* Chromalloy Am. Corp. v. NLRB, 620 F.2d 1120, 1129-30 (5th Cir. 1980); Walgreen Co. v. NLRB, 509 F.2d 1014, 1018-19 (7th Cir. 1975). One court went a step further and created a presumption against the propriety of a bargaining order when the NLRB inadequately justifies the order's necessity:

> Because the Board acknowledges the importance of [section 7] rights, however, we decline to view the Board's inaction as the result of a flagrant disregard for their duties under the law. Rather, except in extreme cases where the reasons for the Board's decision, although not expressly stated, are obvious . . . , we think it appropriate to presume from the legal prineiple that elections are the preferred mcans for determining representative status and from the absence of express articulated consideration, that the necessary requirements for a bargaining order prescribed in *Gissel* are not present.

Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503, 509 (7th Cir. 1980).

54 *See* 29 U.S.C. 160(e) (1976); *supra* note 47 and accompanying text.

55 *See, e.g.,* Peerless of Am., Inc. v. NLRB, 484 F.2d 1108, 1120-22 (7th Cir. 1973) (court considers degree of fear generated by the unfair labor practices, continued strength of the union campaign, apologetic statements of management to the employees, likelihood of future misconduct, and substantial reduction in the workforce).

templated in Congress's labor relations scheme.[56]

The Board's failure to engage in factual analysis of the propriety of issuing card-majority bargaining orders creates other problems as well. The lack of detailed factual analysis results in inconsistencies in the Board's decision whether or not to issue card-majority bargaining orders. In *NLRB v. General Stencils, Inc.*,[57] *(General Stencils I)* the Second Circuit faulted the NLRB for failing to support its issuance of a bargaining order with specific factual findings.[58] To support its criticism, the court highlighted three earlier cases in which the NLRB had declined to issue bargaining orders.[59] The court found the severity of unfair labor practices in those cases indistinguishable from those of the employer in *General Stencils I*.[60] Concluding that "[b]argaining orders are not im-

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56 A remand for a statement of the Board's reasons has in the past proved futile . . . , and, typically, this court has reached the merits of the propriety of the order, in part to avoid further compromise of employee rights inherent in the delay of remand . . . . Thus, the effect of the Board's continuing neglect to fashion standards for the exercise of its discretion is to place exclusive reliance on judicially-prescribed standards for determining the need for bargaining orders, a practice not contemplated by section 10(c) of the Act.

Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503, 509 (7th Cir. 1980).

57 438 F.2d 894 (2d Cir. 1971).

58 *Id.* at 901-02. The *General Stencils* cases serve as good examples of the Board's persistent unwillingness to supply factual analysis to justify bargaining orders. In 1967, the union filed unfair labor practices against the employer. In 1969, the NLRB issued a bargaining order. In 1971, the Second Circuit remanded the bargaining-order issue to the Board for further analysis, even suggesting possible frameworks under which the Board could act. *Id.* at 901-05. In 1972, the NLRB, with one member in dissent, adhered to its original opinion. The Second Circuit again refused to enforce the order, criticizing the Board for its continued inadequate analysis and for "blowing up bits and pieces to arrive at a conclusion not justified by a fair reading of the record as a whole." NLRB v. General Stencils, Inc., 472 F.2d 170, 175 (2d Cir. 1972).

59 438 F.2d at 903-04. The three cases were Blade-Tribune Publishing Co., 180 N.L.R.B. 432 (1969) (interrogation of 13 out of 23 employees; imposition of harsher working conditions on union activist); Stoutco, Inc., 180 N.L.R.B. 78 (1969) (employer threats of plant closure, loss of benefits, or harder working conditions; "suggestion" that a union activist should quit; prediction that the union activist would be terminated after the election); Sehrementi Bros., Inc., 179 N.L.R.B. 853 (1969) (threats to and physical assaults of nonemployee union organizers; surveillance of employees).

60 438 F.2d at 903-04. The *General Stencils* cases involved interrogation of three employees and threats of plant closure and loss of benefits. On remand, the NLRB attempted to explain the apparent inconsistencies in its holdings but, as the Second Circuit stated, "[t]he [Board] majority appeared to think it sufficient to say that the cases were different, as all cases are, whereas the real question is whether they were significantly different, and, if so, how." 472 F.2d at 174.

The Seventh Circuit has similarly criticized the NLRB for failing to clearly indicate why it issued bargaining orders in some cases but not in others. In Peerless of Am., Inc. v. NLRB, 484 F.2d 1108, 1119 n.18 (7th Cir. 1973), the court stated:

> In a footnote in its decision the Board did attempt to distinguish this case from one other case, Motown Record Corp., 197 NLRB No. 176, wherein no bargaining order was issued. But simply dramatically characterizing (or mischaracterizing) the misconduct here as "flagrant, extensive, and far-reaching; [having] covered a much longer period of time; and [having] included direct threats of discharge and plant closing, as well as promises of benefits" and

mune from the great principle that like cases must receive like treatment,"[61] the court remanded the bargaining order issue to the Board for further proceedings.[62]

Others claim that the Board's inconsistent handling of card-majority bargaining orders results in increased unfair labor practices.[63] The NLRB's failure to articulate clearly its standards has left employers with little guidance and less incentive to act in a lawful manner during union election campaigns.[64]

2. *Non-Majority Bargaining Orders*[65]

Problems also pervade the area of nonmajority bargaining orders. Conflicts among majority rule, employee free choice, and NLRB remedial policy sharpen where the Board creates a bargaining relationship with no prior showing of majority employee support by the union. The Supreme Court in *NLRB v. Gissel Packing Co.*[66] spoke of the possible use of nonmajority bargaining orders only when "outrageous and pervasive" unfair labor practices existed.[67] If the NLRB's failure to analyze factual underpinnings of card-majority bargaining orders carries over into nonmajority bargaining order cases, problems will arise in limiting nonmajority bargaining orders to the use envisioned in *Gissel.*[68]

Prior to 1981, the problem of applying the *Gissel* standard to

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appraising the misconduct in the other case as "neither extensive nor of such a nature as to have a lingering effect that could not be erased by the Board's traditional remedies" is hardly a very persuasive differentiation.

See also NLRB v. Scoler's Inc., 466 F.2d 1289, 1294-95 (2d Cir. 1972) (Moore, C.J., concurring) (finding the misconduct in three cases in which the Board did not issue a bargaining order indistinguishable from the misconduct in the case before the court).

61 438 F.2d at 904-05.

62 *Id.* at 905. For subsequcnt history of the case, see *supra* note 58.

63 Hood, *supra* note 3, at 204 ("Since 1969, the number of unfair labor practice cases filed with the National Labor Relations Board has incrcased annually. The ineffectiveness of remedies available to the Board to deal with unfair labor practices may have encouraged campaigu misconduct."). Although the specific effect of inadequately analyzed bargaining orders on this increase is unknown, a more consistent approach in the issuance and enforcement of bargaining orders would minimize any such effect. Awareness that certain misconduct automatically triggers a bargaining order would deter employers from committing such conduct.

64 One commentator suggests that the lack of factual analysis in the area of bargaining orders has led to a decrcase in the severity of unfair labor practices necessary to trigger the issuance of a bargaining order. *Id.* at 207 ("Although identieal factual circumstances are not presented in any particular ease, similar employer conduct which would not, in the Board's opinions, have warranted a bargaining order in the early 1970s now may merit such an order."). Such a change, however, may have resultcd from the NLRB's recognition that traditional remcdies fail to deter employer conduct, thus leaving the bargaining order as the only practicable alternative.

65 *See supra* note 35 and accompanying text.

66 395 U.S. 575 (1969).

67 *Id.* at 613-14.

68 *See* Note, *NLRB Bargaining Orders in the Absence of a Union Majority: Time to Enforce* Gissel, 26 N.Y.L. SCH. L. REV. 291, 317-22 (1981) (discussion of NLRB's inconsistent delinea-

nonmajority bargaining orders never arose because the NLRB consistently refused to issue bargaining orders without a prior showing of majority support.[69] Indeed, before 1980 no court had held that the NLRB had authority to issue nonmajority bargaining orders.[70] The three decisions involving *United Dairy Farmers Cooperative Association,* however, led to a drastic change in NLRB remedial policy and in court perception of NLRB remedial authority.[71] The question remains, however, whether these changes are justified.

The first *United Dairy Farmers Cooperative Association*[72] decision (*United Dairy I*) contains the most detailed statement of the NLRB's previous position on nonmajority bargaining orders. The NLRB General Counsel charged United Dairy Farmers Cooperative with a series of serious unfair labor practices, including threats of plant closure, discriminatory

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tion between *Gissel* category one and category two unfair labor practices); *supra* note 36 and accompanying text.

69 *See* F.W.I.L. Lundy Bros. Restaurants, Inc., 248 N.L.R.B. 415, 415-16, 435-36 (1980); Triana Indus., 245 N.L.R.B. 1258, 1259, 1266 (1979); Wonsocket Health Center, 245 N.L.R.B. 668, 670 (1979); Miami Springs Properties, Inc., 245 N.L.R.B. 668, 670 (1979); United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1026-27 (1979); Haddon House Food Prods., 242 N.L.R.B. 1057, 1058 (1979); Capital Foods, Inc., 241 N.L.R.B. 855, 856 n.5 (1979); Seligman & Assoc., Inc., 240 N.L.R.B. 110, 123-24 (1979); Herbert Halperin Distrib. Corp., 228 N.L.R.B. 239, 246 (1977); South Station Liquor Store, Inc., 223 N.L.R.B. 1115, 1123-24 (1976); Grismac Corp., 205 N.L.R.B. 1108, 1108 (1973); Fugua Homes Mo., Inc., 201 N.L.R.B. 130, 130-31 (1973); GTE Automatic Elec., Inc., 196 N.L.R.B. 902, 903 (1972); Loray Corp., 184 N.L.R.B. 557, 557-58 (1970); Scott's, Inc., 159 N.L.R.B. 1795, 1806-07 (1966); J.P. Stevens & Co., 157 N.L.R.B. 869, 877 (1966); H.W. Elson Bottling Co., 155 N.L.R.B. 714, 716 (1965).

70 A few courts had supported in dicta the concept of nonmajority bargaining orders. *See* NLRB v. Montgomery Ward & Co., 554 F.2d 996, 1002 (10th Cir. 1977); NLRB v. Armcor Indus., 535 F.2d 239, 244 (3d Cir. 1976); J.P. Stevens & Co., Gulistan Div. v. NLRB, 441 F.2d 514, 519 (5th Cir.), *cert. denied,* 404 U.S. 830 (1971); NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 570-71 (4th Cir. 1967). *But see* NLRB v. Roney Plaza Apartments, 597 F.2d 1046, 1051 n.8 (5th Cir. 1979) (refusing to consider propriety of bargaining order because union lacked card majority).

71 In 1979, the NLRB issued the first remedial order in the *United Dairy Farmers Coop.* trilogy. United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026 (1979). Although not a representative bargaining order, the Board's action required the employer to: mail a Board notice to employees and include it in company publications; publish the notice in newspapers; have its president sign all notices and read them to employees assembled for that purpose; grant the union reasonable access to bulletin boards when notices were customarily posted; grant the union access to employer facilities in nonwork areas during nonwork time; and grant the union the right to deliver a 30-minute pre-election speech during worktime, as well as notice of, and equal time and facilities to respond to, any address by the employer to its employees concerning union representation.

In the next year, the Court of Appeals for the Third Circuit enforced the Board's order, but remanded for consideration of the propricty of issuing a nonmajority bargaining order on the facts of the case. United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980). The court rejected the argument that the Board had no authority to issue nonmajority bargaining orders. 633 F.2d at 1066. On remand, a three-member panel of the Board issued a nonmajority bargaining order. United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. 772 (1981).

72 242 N.L.R.B. 1026 (1979).

firing of union adherents, loss of benefits, and interrogation of employees.[73] After upholding the Administrative Law Judge's unfair labor practice findings, the NLRB considered the propriety of issuing a nonmajority bargaining order.[74] All five NLRB members heard the case and wrote three opinions, each of which took a different view of the NLRB's authority to issue nonmajority bargaining orders.[75] Because three members voted against issuance of a bargaining order, the General Counsel appealed to the Third Circuit (*United Dairy II*).[76] Holding that the NLRB did have the authority to issue nonmajority bargaining orders, the court remanded.[77] On remand in *United Dairy III*,[78] a three-member panel of the Board, composed of the two dissenting members in *United Dairy I* and a newly-appointed member,[79] found a nonmajority bargaining order appropriate in light of the "outrageous and pervasive" unfair labor practices.[80]

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73 *Id.* at 1046-55.

74 *Id.* at 1026.

75 Members Murphy and Truesdale wrote the Board's opinion, and stated that although the Board may have the authority to issue nonmajority bargaining orders,

> on the facts in this case we are persuaded that, in the absence of a prior showing by the Union of majority support at some point in the proceeding, it is less destructive of the Act's purposes to provide a secret-ballot election whereby the employees are enabled to exercise their choice for or against union representation than it is to risk negating that choice altogether by imposing a bargaining representative upon employees without some history of majority support for the Union.

Id. at 1028. Chairman Fanning and Member Jenkins concurred in the finding of unfair labor practices, but disagreed with the refusal to issue a nonmajority bargaining order. They believed that a bargaining order was "the only adequate remedy for this [employer's] flagrant and pervasive violations of the Act." *Id.* at 1031.

Member Penello concurred in both the denial of the bargaining order and the finding of unfair labor practices, but dissented as to the plurality's discussion of the Board's possible authority to issue nonmajority bargaining orders:

> Holdings of the Supreme Court, the plain words of the statute, and its legislative history confirm the correctness of the Board's prior practice [of not issuing nonmajority bargaining orders] and establish that the Board's remedial authority is limited by the majority rule doctrine. I must therefore dissent from my colleagues' determination that in future cases bargaining orders shall issue in derogation of the majority rule precept.

Id. at 1038. Thus, a majority of the Board, Members Murphy, Truesdale, and Penello voted against issuance of a bargaining order.

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

77 Thus, we hold that the Board has the remedial authority to issue a bargaining order in the absence of a card majority and election victory if the employer has committed such "outrageous" and "pervasive" unfair labor practices that there is no reasonable possibility that a free and uncoerced election could be held. . . . [W]e must remand for the Board to consider in the first instance whether the facts in this case rise to the "outrageous" and "pervasive" conduct which sanctions the issuance of such bargaining orders.

Id. at 1069.

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

79 Member Zimmerman commenced his term on the Board on December 16, 1980.

80 United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. 772, 774 (1981). The Board's analysis was an improvement in its attention to factual findings, discussing in detail why the case

The decision in *United Dairy III* does not settle the issue of nonmajority bargaining orders. Although the Third Circuit upheld the propriety of such orders,[81] the District of Columbia Circuit recently expressed doubts as to their validity.[82] In addition, two new members of the NLRB, including the present chairman, recently voiced their objections to the use of nonmajority bargaining orders.[83] An analysis of the

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involved "outrageous and pervasive" unfair labor practices in contrast to "less extraordinary" cases in which prior majority support would be necessary. The Board's analysis of ensuring a fair election through traditional remedies, however, is sketchy. Although the Board's decision in *United Dairy* is an improvement in factual analysis, one wonders if the Board would have engaged in such an examination if the case had not been the first decision in which it issued a nonmajority bargaining order.

81 United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1069 (3d Cir. 1980).

82 Local 115, International Brotherhood of Teamsters v. NLRB, 640 F.2d 392 (D.C. Cir. 1981), *enforcing as modified sub nom.* Haddon House Food Prods., 242 N.L.R.B. 1057 (1979), *cert. denied,* 454 U.S. 837 (1981). *Haddon House* was decided the same day as *United Dairy I.* All five Board members heard the case and again issued three opinions on the propriety of nonmajority bargaining orders. 242 N.L.R.B. 1057, 1060, 1063 (1979).

The D.C. Circuit, in reviewing *Haddon House,* found it unnecessary to consider the propriety of nonmajority bargaining orders in light of the procedural posture of the case. The court did, however, criticize the Third Circuit's findings in *United Dairy II*, stating: "We do not share [the Third Circuit's] confidence that the Board's authority is so broad . . . ." 640 F.2d at 397 n.7.

The Fifth Circuit also apparently rejects the propriety of nonmajority bargaining orders. In NLRB v. Roney Plaza Apartments, 597 F.2d 1046 (5th Cir. 1979), the union had solicited authorization cards by telling each employee that all other employees had already signed cards. The court found that this misrepresentation invalidated the card's use as a reliable indicator of majority support. 597 F.2d at 1051. The Board, however, relying on the card majority, had already issued a card-majority bargaining order to remedy the employer's unfair labor practices, which included coercive interrogations, restrictions on solicitations, and discharge of a leading union adherent. Reserving the issue of the seriousness of the employer's unfair labor practices, the court held that the bargaining order was inappropriate because the union misrepresentation meant that "the union [lacked] the valid card majority necessary for a *Gissel* order." 597 F.2d at 1051 & n.8. Thus, the court read *Gissel* as requiring a valid card majority before a bargaining order could issue, implicitly rejecting the propriety of nonmajority bargaining orders.

83 Member Jenkins and Member Fanning (ex-Chairman) are still on the Board. The new members are Chairman Van de Water and Member Hunter. In a recent case with facts similar to *United Dairy,* Members Jenkins, Fanning, and Zimmerman comprised a majority and, following *United Dairy III,* imposed a nonmajority bargaining order. *See* Conair Corp., 261 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1173 (1982). Chairman Van de Water and Member Hunter, however, vigorously dissented, citing their disagreement with the Third Circuit's opinion in *United Dairy II,* and reiterating ex-Member Pennelo's arguments in dissent in *United Dairy I.* The key vote in this battle is Member Zimmerman who, in *United Dairy III,* refused to discuss his views on Board authority to issue nonmajority bargaining orders, and instead "respectfully recognize[d] the Third Circuit's decision as binding on the Board for the purpose of deciding [United Dairy III]." 257 N.L.R.B. 772 n.8 (1981).

Because the unfair labor practices supporting the bargaining order occurred in New Jersey, the *Conair* case, if appealed by the employer, could very likely end up in the Third Circuit Court of Appeals. *See* 29 U.S.C. § 160(f) (1976). Member Zimmerman's vote, with Members Fanning and Jenkins in *Conair,* therefore, may simply represent his continued deference to the Third Circuit's opinion in *United Dairy III.* On the other hand, Conair Corp. may also appeal to the District of Columbia Court of Appeals, *see* 29 U.S.C. § 160(f) (1976). In that case Conair would enjoy a greater prospect of success, given that court's hesitancy to

arguments, both in favor of nonmajority bargaining orders and against them, clarifies the nature of this dispute.

a. *Arguments for Nonmajority Bargaining Orders.* Three major considerations support issuance of nonmajority bargaining orders. First, the Supreme Court in *Gissel* arguably recognized the propriety of nonmajority bargaining orders in exceptional circumstances.[84]

Proponents believe that the Court's discussion of such orders was more than "an intellectual excursion"; rather it was "a sign post giving directions which lower courts should follow in the future."[85] These proponents contend that the Supreme Court in *Gissel* recognized that cases involving " 'outrageous and pervasive' unfair labor practices"[86] necessitate nonmajority bargaining orders to effectuate the purposes of the National Labor Relations Act.

Second, courts have recognized that the NLRB may balance the principles of majority rule and employee free choice against its own remedial policies.[87] For example, in other areas of labor law, the Board has subordinated majority rule and free choice if protection of other labor policies necessitate a different result;[88] consequently, proponents argue, nonmajority bargaining orders are not invalid because they compromise other policies.[89] Moreover, the NLRB can minimize an order's

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support the concept of a nonmajority bargaining order. *See* Local 115, International Brotherhood of Teamsters v. NLRB, 640 F.2d 392 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 837 (1981).

84 *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 613-14 (1969); United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1065-66 (3d Cir. 1980) (*United Dairy II*); Comment, *United Dairy Farmers Coop.: NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-Union Majority,* 80 COLUM. L. REV. 840, 842 (1980); Note, *NLRB Bargaining Orders in the Absence of a Union Majority: Time to Enforce* Gissel, 26 N.Y.L. SCH. L. REV. 291, 306-07 (1981); 47 TENN. L. REV. 418, 423 (1980).

85 *United Dairy II,* 633 F.2d 1054, 1065-66 (3d Cir. 1980).

86 NLRB v. Gissel Packing Co., 395 U.S. 575, 613 (1969). *But see supra* note 58.

87 *See* United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1035 nn.42-43 (1979) (Fanning & Jenkins, dissenting), for cases in which the Supreme Court has supported Board balance of remedial policies and majority rule.

88 *See, e.g.,* NLRB v. Falk Corp., 308 U.S. 453 (1940) (approving order disestablishing employer-dominated union and forbidding it from appearing on ballot in later representation election); NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938) (approving order requiring employer to cease recognizing union that the employer unlawfully dominated and assisted even though no evidence existed that the union did not enjoy majority support.).

89 Furthermore, proponents contend that although nonmajority bargaining orders can create new relationships when none previously existed, Board remedies ean do more than merely maintain the status quo. *See, e.g.,* International Union of Elec., Radio & Mach. Workers v. NLRB, 426 F.2d 1243 (D.C. Cir.), *cert. denied,* 400 U.S. 959 (1970) (D.C. Circuit accepts concept of "made-whole relief," when employer flagrantly refuses to bargain in good faith, this remedy envisions a determination of what the parties would have agreed to if bargaining took place, and implemcntation of those predicted wages and benefits); *see also* R. GORMAN, *supra* note 3, at 536-39. *But see* Local 57, International Ladies' Garment Workers v. NLRB, 374 F.2d 295 (D.C. Cir.), *cert. denied,* 384 U.S. 942 (1967). In *Local 57,* the D.C. Circuit refused to sustain an NLRB order that would have forced an employer, who had committed unfair labor practices by transferring operations from New York to Florida, to bargain collec-

adverse effect on majority rule and employee free choice. Nonmajority bargaining orders need not be permanent.[90] Indeed, the NLRB traditionally issues card-majority bargaining orders for only one year or a "reasonable period."[91] Other safeguards are also available to balance effectively majority rule, employee free choice, and employer deterrence.[92]

Finally, the exclusion of nonmajority bargaining orders from the NLRB's remedial scheme would arguably encourage employers to act swiftly in squashing any initial indications of union support.[93] Deterrence of employers is the most persuasive argument for nonmajority bargaining orders. Frequently, no other alternative is available for use against recidivist employers with long histories of violating traditional and extraordinary Board remedies.[94] Additionally, if employer unfair labor practices make a free election improbable, proponents argue that the NLRB should resolve doubts of the employees' real choice against the employer and thereby prevent "him from capitalizing on the uncertainty created by his own unlawful acts."[95] Therefore, regardless of whether *Gissel* supports the issuance of nonmajority bargaining orders, practical considerations mandate that a more effective remedy, such as the nonmajority bargaining order, be available when all other traditional and extraordinary remedies have failed.

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tively with employees at the Florida facility. The court remanded to the Board on the ground that the Board had not determined the Florida employees' desire for union representation. In effect, the court held that the Board's desire to remedy the New York unfair labor practices could not infringe on the Florida employees' freedom of choice.

90 "There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition." NLRB v. Gissel Packing Co., 395 U.S. 575, 613 (1969).

91 *See* Irving, *Remedies Under the NLRA: An Update*, 32 N.Y.U. CONF. LAB. 73, 81 (1979).

92 *See infra* notes 104-08 and accompanying text.

93 For example, a well-informed employer, determined to avoid union representation, will realize that preventing union support from developing into majority support will preclude the NLRB's use of a card-majority bargaining order. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 612 (1969) ("If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done . . . .").

94 *See* Thompson & Pollitt, *Oversight Hearings of the NLBR: A Preliminary Report*, 27 LAB. L.J. 539, 540-42 (1976) (identifying the "rogue employers"). The authors identify J.P. Stevens Co., Florida Steel Corp., Monroe Auto Equipment Co., Dow Chemical Co., and Litton Industries as the "rogue employers" of the NLRB. *Id.* at 540-41. These employers have committed numerous unfair labor practices, and have come before the NLRB many times. For example, as of 1976, J.P. Stevens Co. had been before the NLRB 15 separate times; each time the Board concluded that the company had violated the Act. *Id.* at 540. In addition, as of 1976, the circuit courts of appeals had sustained the NLRB on eight different occasions, and heard contempt citations against J.P. Stevens Co. on five occasions. *Id.* at 540-41.

95 Bok, *supra* note 20, at 138 n.274. Professor Bok also stated: "[T]hose who would resist this remedy in the name of the employees must answer for the employees whose free choice is currently impaired by the lack of adequate remedies." *Id.* at 135.

b. *Arguments Against Nonmajority Bargaining Orders.* Opponents of nonmajority bargaining orders argue that the NLRB lacks the authority to issue such orders. First, they contend that NLRB remedial actions under section 10(c) cannot compromise the principle of majority rule.[96] Second, these opponents claim that the NLRB must respect employee free choice at all times; nonmajority bargaining orders eliminate that choice, and replace it with an administrative determination of what is best for the employees.[97] Indeed, through a nonmajority bargaining order, the NLRB may designate a union as the exclusive representative of employees who may not desire *any* union representation.[98]

As discussed above, proponents of such orders attempt to reconcile employee free choice and majority rule with nonmajority bargaining orders by arguing that serious employer unfair labor practices prevent majority support from ever developing in the first place.[99] Accordingly, a bargaining order merely places the parties in the position that they would have been in but for the unfair labor practices.[100] This argument

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96 *See* United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1042 (1979) (Penello, dissenting); Platt, *The Supreme Court Looks At Bargaining Orders Based on Authorization Cards,* 4 GA. L. REV. 779, 796 (1970).

97 *See* United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1043 (1979) (Penello, dissenting).

98 Employee free choiee and majority rule are fundamental principles of the National Labor Relations Act. *See supra* notes 16-30 and accompanying text. The NLRB should not compromise majority rule or employee free choice without legislative or judicial support. Opponents of nonmajority bargaining orders argue that nothing in the legislative history of the National Labor Relations Act supports the argument that the NLRB can balance employee free choice and majority rule against the Board's § 10(c) remedial powers. *See* United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1040 (1979) (Penello, dissenting). *See generally* Weyand, *Majority Rule in Collective Bargaining,* 45 COLUM. L. REV. 556 (1945).

Further, although proponents rely on Supreme Court dictum in *Gissel* to support the propriety of nonmajority bargaining orders, such reliance is weak. The Supreme Court never expressly said that nonmajority bargaining orders could issue when "outrageous" and "pervasive" unfair labor practices existed. Rather, before discussing the card-majority bargaining orders involved in *Gissel,* the Court mentioned that the Fourth Circuit had "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." NLRB v. Gissel Packing Co., 395 U.S. at 613. The Supreme Court, however, did not adopt the Fourth Circuit's statement; it said only that "the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter." *Id.* at 613. Moreover, the Fourth Circuit's position emerged from dictum in an earlier case. NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 570-71 (4th Cir. 1967); *see* Platt, *supra* note 96, at 796-97. Finally, the dictum in *S.S. Logan Packing Co.* relied on a scholarly hypothetical posed by Professor Bok. *S.S. Logan Packing Co.,* 386 F.2d at 570 n.35; *see* Bok, *supra* note 20, at 132-39. Dictum built upon dictum, which in turn was built upon a scholarly hypothetical, hardly supports Board authority to issue nonmajority bargaining orders. *See* Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union Has Never Attained a Majority,* 29 LAB. L.J. 631, 636 (1978).

99 *See supra* notes 93-95 and accompanying text.

100 *See* United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1038 (1979) (Fanning & Jenkins, dissenting) ("Where the union has, despite the employer's egregious misconduct, nonetheless achieved substantial support [albeit not majority support], the issuance of a bar-

fails to recognize, however, that unions lose over fifty percent of all elections untainted by employer unfair labor practices.[101] Thus the underlying presumption of the proponents' argument—that unfair labor practices cause the apparent lack of employee support—is statistically invalid. In many cases, nonmajority bargaining orders will actually undermine employee free choice and majority rule.[102] In contrast, refusal to issue bargaining orders when there is no prior evidence of majority support undermines no principles. A refusal is not the equivalent of a finding that a majority of employees did not and do not support the union.[103] Instead, failure to grant a nonmajority bargaining order only indicates that, based on the factual record, the NLRB cannot ascertain what employees would have chosen but for the unfair labor practices.

Finally, extraordinary remedies other than nonmajority bargaining orders are available to effectively curb employer unfair labor practices that restrict employee free choice.[104] Examples of alternative remedies are union access to employer facilities,[105] Board-ordered speeches by high-ranking company management,[106] and resort to district court injunctive relief.[107] These remedies do not create a forced collective bar-

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gaining order is appropriate since there is a very good probability that had employee choice been allowed to emerge it would have favored the union.").

101 In the fiscal year ending Sept. 30, 1979, for example, unions won 3,623 out of 8,043 elections, or 45% of those conducted by the NLRB. 44 NLRB ANN. REP. 16 (1979) *reprinted in* LABOR RELATIONS YEARBOOK 278 (BNA 1980).

102 Indeed, as Member Penello stated in dissent in *United Dairy I*: "Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered." 242 N.L.R.B. 1026, 1043 (1979) (quoting statement of Sen. Wagner, 79 CONG. REC. 7571 (1935)).

103 As the plurality opinion in *United Dairy I* stated:

> [The dissenters] state that our view is equivalent to a determination that here a majority of the employees oppose the Union. That is simply not the case. There is no way of knowing how a majority of the employees feel about the Union. The most that can be said is that at no time has a majority of the employees indicated that they supported the Union.

242 N.L.R.B. 1026, 1028 n.10 (1979).

104 In *United Dairy I,* for example, the plurality opinion developed several extraordinary remedies, stating: "Respondent's unfair labor practices are, in the circumstances of this case, so 'outrageous' and 'pervasive' that these conventional remedies will not suffice to dissipate them and are inadequate to give Respondent's employees sufficiently explicit reassurances and understanding of their rights under the Act." 242 N.L.R.B. 1026, 1029 (1979); *see supra* note 71 for a listing of the extraordinary remedies in *United Dairy.*

105 *See* Haddon House Food Prods., 242 N.L.R.B. 1057 (1979), *enforced as modified sub nom.* Local 115, International Bhd. of Teamsters v. NLRB, 640 F.2d 392, 401-04 (D.C. Cir.), *cert. denied,* 102 S. Ct. 141 (1981).

106 *See* United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1031 (1979), *enforced and remanded,* 633 F.2d 1054 (3d Cir. 1980).

107 Section 10(j) of the National Labor Relations Act empowers the NLRB General Counsel to petition a district court for temporary injunctive relief in the case of an unfair labor practice charge. 29 U.S.C. § 160(j) (1976). Although the Board rarely uses this alternative form of remedy, injunctive relief could be an effective deterrent against employer misconduct during the six-month period necessary to conclude an unfair labor practice charge. *See* Pettibone, *The Sec. 10(j) Bargaining Order in* Gissel-*Type Cases,* 27 LAB. L.J. 648 (1976); Note,

gaining relationship, yet they operate to raise the prestige of the union, to help foster an uncoercive atmosphere, and to deter employers from committing unfair labor practices.[108]

III

A Proposed Model for the Issuance of Representative Bargaining Orders

An analytical model for the issuance of both nonmajority and card-majority bargaining orders is necessary to provide guidelines and alleviate problems in this area. For example, requiring the NLRB to make a detailed factual analysis would reduce inconsistencies in both the implementation and the enforcement of bargaining-order remedies.[109] Fur-

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Compelling Collective Bargaining Under § 10(j) of the National Labor Relations Act, 36 WASH. & LEE L. REV. 187 (1979).

108 In Haddon Food House Prods., 242 N.L.R.B. 1057 (1979), *enforced as modified sub nom.* Local 115, International Bhd. of Teamsters v. NLRB, 640 F.2d 392 (D.C. Cir.), *cert. denied,* 102 S. Ct. 141 (1981), the Board, although not issuing a nonmajority bargaining order, ordered the employer to: grant the union access to company bulletin boards and other posting places for a two-year period; make available to the union a list of the names and addresses of its current employees; give union spokesmen reasonable access to nonwork areas during nonwork periods; grant the union equal time if the employer convened its employees for a "captive audience" speech; allow the union to make one 30-minute preelection speech before any Board-scheduled election; post copies of the Board's notice at the employer's premises; mail copies of the notice to employees and former employees at their homes; reprint the notice in appropriate company publications; reprint the notice in newspapers of general circulation in the vicinity; and order the company president personally to read a copy of the notice to an assembly of employees. 640 F.2d at 400-01. Recognizing the strength of these remedies, the court stated:

> The access remedies are designed to assist the Union in communicating with the employees, and to assist the employees in hearing the Union's side of the story without fear of retaliation. The notice remedies are intended to inform the employees of their statutory rights and the legal limits on the Employer's conduct, and to reassure them that further violations will not occur.

Id. at 399-400.

Many of these remedies have come under severe criticism and suffer from problems similar to those that afflict representative bargaining orders. *See, e.g.,* Local 115, International Bhd. of Teamsters v. NLRB, 640 F.2d 392, 403 (D.C. Cir.) (denying enforcement of Board order requiring company president to read notice to employees: "Such specificity is uniquely oppressive on the individual singled out, and the lack of particularized need may create the misimpression that the Board is seeking to punish an uncooperative respondent."), *cert. denied,* 102 S. Ct. 141 (1981); Textile Workers, AFL-CIO v. NLRB, 388 F.2d 896, 903-04 (2d Cir. 1967) (finding requirement that company officials read Board notice of unfair labor practices to their employees to be humiliating), *cert. denied,* 393 U.S. 836 (1968). Most extraordinary remedies have come out of the litigation involving J.P. Stevens, Inc., referred to by the Second Circuit as " 'the most notorious recidivist' in the field of labor law." NLRB v. J.P. Stevens & Co., 563 F.2d 8, 13 (2d Cir. 1977) (quoting Bartosic & Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors,* 39 U. CHI. L. REV. 225, 256 n.4 (1972)), *cert. denied,* 434 U.S. 1064 (1978). Application of these remedies to other employers, therefore, has sparked controversy, for not many other employers have as poor a record for anti-union misconduct as J.P. Stevens. *See* United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1038 n.54 (1979) (Penello, dissenting); Bartosic & Lanoff, *supra,* at 256 n.4; Thompson & Pollitt, *supra* note 94.

109 *See supra* notes 44-64 and accompanying text.

thermore, NLRB use of an analytical model would restore the Board's factfinding function and, concomitantly, relieve the courts of appeals from having to make findings of fact.[110]

One basic model for both nonmajority and card-majority bargaining orders, as opposed to separate models for each, highlights the proper role of each order in the Board's remedial scheme.[111] To reflect the fundamental differences between the two orders, the proposed model contains variations for nonmajority bargaining orders. The logical starting point for developing the analytical model is *NLRB v. Gissel Packing Co;*[112] thus, the Supreme Court's four factors form the outline for the proposed model.[113]

A. *Extensiveness of Employer's Unfair Labor Practices*

In determining the propriety of a bargaining order in a particular case, the NLRB should consider the "quality, severity, reach, repetition, and variety of the unfair labor practices."[114] Not every unfair labor practice should support a bargaining order. Indeed, the Court in *Gissel* recognized a category of "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order."[115] A proper balance between majority rule, employee free choice, and remedial policy would preclude isolated and ineffectual unfair labor practices from supporting bargaining orders.[116]

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110 *See supra* notes 44-56 and accompanying text.

111 The fundamental difference between the two bargaining orders lies in their factual context. In nonmajority bargaining order cases, the union has failed to achieve majority support. *See supra* note 12 and accompanying text. In card-majority bargaining order cases, the union at one time allegedly enjoyed majority support, but nonetheless either lost the secret ballot election, or lost its card majority. *See supra* notes 11-12 and accompanying text.

Prior to an election, the union may file unfair labor practice charges and "block" the election. 29 C.F.R. § 102.71(b) (1981). If the Board finds that the misconduct precludes holding a free election, a bargaining order may issue. *See* Coating Prods. v. NLRB, 648 F.2d 108 (2d Cir. 1981) (NLRB's issuance of bargaining order on basis of union authorization cards signed by majority of employees not abuse of discretion); NLRB v. Suburban Ford, Inc., 646 F.2d 1244 (8th Cir. 1981) (six out of nine employees signed cards). When the union at one time enjoyed majority support but no election occurs, therefore, the union alleges that the employer unfair labor practices precluded the possibility of holding a free and uncoerced election. *See id.* at 1245-46 ("The NLRB found . . . the Company engaged in unfair labor practices that would tend to undermine the Unions' majority strength and impede the election processes."). In nonmajority bargaining order cases, therefore, the union alleges that the employer's unfair labor practices prevented the development of majority support.

112 395 U.S. 575 (1969).

113 *See supra* text accompanying note 47.

114 United Dairy Farmers Coop. Ass'n (*United Dairy III*), 257 N.L.R.B. 772, 773 (1981).

115 NLRB v. Gissel Packing Co., 395 U.S. at 615; *see supra* text accompanying note 37.

116 Two recent cases in the First Circuit illustrate that court's reluctance to enforce bargaining orders involving less serious unfair labor practices. In NLRB v. Amber Delivery Serv., Inc., 651 F.2d 57 (1st Cir. 1981), the court refused to enforce the Board's bargaining order, stating: "In these circumstances, we think the holding of a fair election—which consti-

To promote consistency in the application of bargaining orders, the NLRB should delineate certain types of unfair labor practices that would create a rebuttable presumption that a bargaining order was proper.[117] By relying on research studies or testimony from experienced parties, the Board should identify those unfair labor practices that clearly affect employee free choice.[118] Unfair labor practices significantly affecting a large percentage of employees, engaged in by high management officials, and constituting complete action, rather than threats, should trigger the rebuttable presumption of a bargaining or-

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tutes the 'preferred' method of determining a bargaining unit's representative . . . remains a viable option." *Id.* at 71 (citation omitted). The court found that the acts of employee interrogation and solicitation, although unfair labor practices, had "minimal impact on the election process." *Id.* at 70. Further, the one-day suspensions of union adherents and the changes in working conditions, although occurring at the height of the union campaign, did not justify the "extreme" remedy of a bargaining order. *Id.* at 70-71.

Earlier, in NLRB v. Pilgrim Foods, Inc., 591 F.2d 110 (1st Cir. 1978), the same court also refused to enforce a bargaining order. The court found that the cancellation of a scheduled wage increase, solicitation of grievances and promising to remedy them, threatened reprisals, and discharge of an employee, although all unfair labor practices, did not render a fair election infeasible. *Id.* at 120. Emphasizing that the management employee who committed the unfair labor practices no longer worked for the company, the court found that the "unfair labor practices [fell] within the third *Gissel* category." *Id.; see also supra* note 37 (further examples of "less serious" unfair labor practice cases).

117 The presumption would operate in the following manner. The Ceneral Counsel would continue to have the burden of establishing the commission of unfair labor practices. If that burden is met, and the unfair labor practices fall within the class of misconduct that triggers the presumption, the General Counsel would not have the burden of proving causation between the misconduct and the loss of majority support. Instead, because of the inherent adverse effect of such practices on employee free choice, the Board may presume causation. The presumption is rebuttable, however, and the employer would have an opportunity to show that an untainted election is possible despite the unfair labor practices. The employer might do this by demonstrating any of the following: an extended passage of time between the unfair labor practices and final adjudication; termination of management employees who committed misconduct; serious *union* misconduct; large employee turnover or reduction in workforce; and affirmative acts of the employer designed to remedy past violations and create a spirit of cooperation. *See, e.g.,* NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 284 (6th Cir. 1981) (four-year passage of time since first election militates in favor of a rerun election and against a bargaining order); NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 120 (1st Cir. 1978) (termination of management employee who committed unfair labor practices reduced likelihood that past practices would affect future employee choice); Peerless of Am., Inc. v. NLRB, 484 F.2d 1108, 1121-22 (7th Cir. 1973) (apology of company president to employees and concluding bargaining order not warranted); Laura Modes Co., 144 N.L.R.B. 1592, 1595-96 (1963) (refusal to issue bargaining order because of union violence).

118 For example, the Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575, 611 n.31 (1969), relied on a study by Professor Pollitt concerning the relative effects of unfair labor practices on rerun elections. *See generally* Pollitt, *NLRB Re-Run Elections: A Study,* 41 N.C.L. REV. 209 (1963). A controversial study by Professors Getman, Goldberg, and Herman in 1976 analyzed the effects of employer misconduct on employee choice in representation questions. *See* J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTION: LAW AND REALITY (1976). For an interesting example of the Board's use of empirical studies in the creation of Board election rules, see General Knit of Cal., Inc., 239 N.L.R.B. 619 (1978).

der.[119] Examples include those practices that directly affect employee job security, such as mass discriminatory firings, plant closings, or subcontracting of work.[120] Nonmajority bargaining orders should only issue in cases marked by these "outrageous and pervasive" unfair labor practices.[121] Although both card-majority and nonmajority bargaining orders affect employee free choice and majority rule, nonmajority bargaining orders have a greater potential adverse effect on the employees' true desires.[122] When only less serious unfair labor practices are present, nonmajority bargaining orders should never issue. Instead, less serious unfair labor practices[123] should not support a bargaining order unless the union shows prior majority support.[124] By restricting the use of nonmajority bargaining orders to a limited and identifiable class of serious unfair labor practices, the Board will avoid expanding such orders beyond those "exceptional" cases targeted by the Supreme Court in *Gissel.*[125]

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119 *See* Salem, *Non-Majority Bargaining Orders: A Prospective View in Light of* United Dairy Farmers, 32 LAB. L.J. 145, 156-57 (1981).

120 Categorizing unfair labor practices is not a new idea. In *Gissel,* for example, the Court mentioned three categories of unfair labor practices: " 'outrageous' and 'pervasive' "; "less pervasive"; and "less extensive." 395 U.S. at 613-15. Similarly, both the Board and the courts have recognized "hallmark" violations of federal labor law. Coating Prod. v. NLRB, 648 F.2d 108, 109 (2d Cir. 1981); NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 212-13 (2d Cir. 1980). These "hallmark" violations include: closing of plants; grants of benefits; reassignment, demotion, or discharge of union adherents; and threats of plant closure or job termination. *Id.* at 212-13. Only misconduct involving complete action should trigger the presumption of a bargaining order. Threats and interrogation of employees do not have as adverse an effect on employee attitudes as does complete action (e.g., termination or plant closure). *See* J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 118, at 149-52. On the other hand, discriminatory discharges are the "ultimate weapon in thwarting the employees' exercise of protected statutory rights," Ludwig Fish & Produce, Inc., 220 N.L.R.B. 1086, 1087 (1975), and plant closure is "the penultimate threat for an employee." Electrical Prods. Div. of Midland-Ross Corp. v. NLRB, 617 F.2d 977, 987 (3d Cir.), *cert. denied,* 449 U.S. 871 (1980).

121 *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 613-15 (1969).

122 *See supra* notes 97-102 and accompanying text.

123 Although they do not rise to complete action threatening job security, these unfair labor practices are still serious. As the NLRB noted in General Stencils, Inc., 195 N.L.R.B. 1109, 1109-10, *enforcement denied,* 472 F.2d 170 (2d Cir. 1972) (footnote omitted):

> A direct threat of loss of employment, whether through plant closure, discharge, or layoff, is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative. Such conduct is especially repugnant to the purposes of the Act because no legitimate justification can exist for threatening to close a plant or to impose more onerous and severe working conditions in the event of a union victory. Such threats can only have one purpose, to deprive employees of their right freely to select or reject a bargaining representative!

124 *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 614-15 (1969); *supra* note 42 and accompanying text.

125 *Id.* at 613. In addition to restricting nonmajority bargaining orders to cases involving serious unfair labor practices, this proposal would simplify the whole area of bargaining orders by delineating the proper use of both nonmajority and card-majority bargaining orders. Professors Getman, Goldberg, and Herman, in their study on union representation elections, concluded that bargaining orders, if retained by the Board, should only issue based upon

Although card-majority bargaining orders may issue in cases involving less serious unfair labor practices, mere recital of the unfair labor practices is insufficient.[126] Instead, the Board should factually analyze how the misconduct precludes a fair election, taking into account the reach, repetition, and variety of the employer misconduct. Other relevant criteria are the size of the employee unit affected, the speed of the employer's unlawful response, the nature of the company's business, the size of the surrounding community, and any affirmative acts by the employer indicating a spirit of cooperation.[127]

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predetermined criteria, not upon case-by-case judgments concerning impact. J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 118, at 155. The authors found that their data indicated that the Board was incapable of making judgments concerning the effect of unfair labor practices on free choice. *Id.* Whether or not all of the authors' recommendations are accepted, their point is well taken. In order to encourage consistency in Board decisions and to stress the bargaining order's real purpose as a remedy for unfair labor practices, and not as a method of representative selection, the Board should predetermine, by categorizing unfair labor practices, the proper use of bargaining orders.

126 *See* NLRB v. Ely's Foods Inc., 656 F.2d 290, 294 (8th Cir. 1981) (McManus, C.J., concurring):

> I am aware of and approve the legal standard of review that requires us to give deference to the Board on these matters. But I suggest that such deference is not warranted where the Board has merely set forth a litany, reciting conclusions by rote without any factual explication.

127 Each of these considerations might affect the impact of the unfair labor practices on the election process. Apologetic remarks by management, for example, may eliminate any lasting effect of the employer's misconduct. *See, e.g.,* Peerless of Am., Inc. v. NLRB, 484 F.2d 1108, 1121 (7th Cir. 1973). Conversely, the smaller the employee unit or town in which the company is located, the more pervasive will be the unfair labor practices' effect. *See, e.g.,* NLRB v. Ely's Foods Inc., 656 F.2d 290, 293 (8th Cir. 1981) ("Of equal importance is the fact that the store in issue here was family-run, located in a small town."); NLRB v. Circo Resorts, Inc., 646 F.2d 403, 406 (9th Cir. 1981) ("In addition, since a small bargaining unit is involved, the need for a bargaining order is greater."); Pay'n Save Corp. v. NLRB, 641 F.2d 697, 703 (9th Cir. 1981) ("The probable impact of unfair labor practices is increased when a small bargaining unit, such as here, is involved and increases the need for a bargaining order.") (quoting NLRB v. Bighorn Beverage, 614 F.2d 1238, 1243 (9th Cir. 1980)).

The NLRB also recognizes that the timing of the unfair labor practices is relevant. United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. 772, 773 n.13 (1981) ("The Board has often found that the speed of an employer's response to union activity is a factor to be weighed in determining the necessity of a bargaining order."). Further, if large employee turnover or workforce reduction occurs, a bargaining order may not be appropriate because a majority of the coerced employees may no longer work for the employer. *See, e.g.,* Peerless of Am., Inc. v. NLRB, 484 F.2d 1108, 1121 (7th Cir. 1973):

> Finally, we take note of the substantial reduction of the plant's work force. While there was no substantial employee turnover, nevertheless a marked decrease in the number of bargaining unit employees deserves some consideration, not only because the division of sentiment among the remaining employees may be different, but also because employees may view the benefits of unionization in a far different light when the economic plight of their employer has substantially diminished their ranks.

See generally Note, *"After All, Tomorrow Is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?,* 31 STAN. L. REV. 505 (1979). Additionally, the Board should consider the nature of the employer's business:

> The nature of the Company's business and its location should also be considered. A self-service shoe store lends itself to the employment of rela-

B. *Likelihood of Recurrence of Unfair Labor Practices*

To ensure that bargaining orders remain "exceptional," the Board should not routinely issue them whenever serious violations occur.[128] Instead, the Board should determine whether a bargaining order, as opposed to traditional remedies, is necessary to prevent *continued* misconduct. The NLRB should base its determination in part on the employer's past history of wrongdoing. Traditional remedies, such as cease and desist orders, do not affect employers with histories of recidivism.[129] For these employers, bargaining orders may be the only effective deterrent.[130]

On the other hand, in cases involving first-time violators, the NLRB cannot accurately predict that traditional remedies alone will fail to deter future misconduct. Therefore, the Board should apply to these employers a strong presumption against the issuance of bargaining orders. Nevertheless, statements of continued union animus, or misconduct subsequent to the unfair labor practices but prior to the Board order, may indicate a probability of future misconduct and thus rebut the presumption.[131] As a general rule, however, bargaining orders

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> tively youthful, unsophisticated or superannuated, unskilled employees—both of whom are more likely to be susceptible to extraneous influence in making their decision about Union activity than more sophisticated and skilled employees.

NLRB v. Kostel Corp., 440 F.2d 347, 352 (7th Cir. 1971).

Finally, employer misconduct occurring subsequent to the alleged unfair labor practices, but prior to the Board's order, is relevant; it demonstrates that the employer is still committed to opposing unionization through unlawful means. *See* Chromalloy Mining & Minerals Alaska Div. Chromally Am. Corp. v. NLRB, 620 F.2d 1120, 1131 n.8 (5th Cir. 1980).

128 *See* NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 120 (1st Cir. 1978) (despite serious unfair labor practices, bargaining order unenforceable, because no evidence indicated that employer would continue unfair labor practices or ignore Board's cease and desist order).

129 Traditional remedies for unfair labor practices include: cease and desist orders; reinstatement of unlawfully discharged employees; make-whole relief to employees for losses occasioned by employer's unlawful conduct; and publication of Board notice announcing findings of unfair labor practices. *See, e.g.,* United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1030-31 (1979). Nonetheless, as the Supreme Court said in NLRB v. Gissel Packing Co., 395 U.S. 575, 612 (1969): "If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity." This is especially true for recidivist violators.

130 *See* United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. 772, 773 (1981) (footnote omitted), in which the Board noted: "Respondent's history of recidivism reveals its continuing antipathy to its employees' statutory rights, and suggests as well the futility of proceeding to a second election, since there is every reason to believe that Respondent would again flout the Act in order to avoid a union victory."

131 *See* Chromalloy Mining & Minerals, Alaska Div. Chromalloy Am. Corp. v. NLRB, 620 F.2d 1120, 1131 n.8 (5th Cir. 1980) (subsequent misconduct demonstrates continued commitment to opposing unionization through unlawful means). On the other hand, different considerations may indicate that the presumption is warranted. *See, e.g.,* NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 120 (1st Cir. 1978) (termination of management employee who committed unfair labor practices reduced likelihood that past misconduct would continue).

should issue only in cases involving recidivist violators of the National Labor Relations Act.[132]

C. *The Possibility of Erasing Effects of Past Practices and Ensuring a Fair Election Through Use of Traditional or Extraordinary Remedies*

Unlike bargaining orders, traditional remedies have little adverse effect on employee free choice and majority rule.[133] The Board, therefore, should inquire first into the effectiveness of traditional remedies before considering the propriety of a bargaining order. If traditional remedies can deter future employer misconduct and foster an atmosphere conducive to free choice, then bargaining orders should not issue.[134] This requirement would not only reinforce the "exceptional" status of the bargaining order, but would also preserve the secret ballot election as the preferred method of representative selection.

Similarly, the Board should consider the effectiveness of other extraordinary remedies as an alternative to the bargaining order.[135] These

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132 The NLRB apparently disagrees with this proposal. The Board, although considering the employer's recidivism in United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. 772, 773 n.11 (1981), stated:

> Although recidivism is an important element to be weighed, we do not consider it to be a prerequisite to the issuance of a bargaining order. Such a requirement would encourage an employer innocent of prior misconduct to launch an unlawful campaign against union activity, since the employer would be aware that a bargaining order was unavailable to remedy its misconduct.

Further, in Conair Corp., 261 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1161, 1165 n.16 (1982), the Board issued a nonmajority bargaining order, even though the Board itself recognized that "[i]n the instant case, there is no evidence that Respondent engaged in unfair labor practices predating those described above."

The Board's view ignores the Supreme Court's statement that "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct." NLRB v. Gissel Packing Co., 395 U.S. 575, 612 (1969) (footnote omitted); *see supra* note 33 and accompanying text. A history of misconduct supports the proposition that future misconduct is probable and that a bargaining order is necessary to deter it. An isolated violation of the Act, however, does not indicate that future misconduct is probable. Indeed, the Board is incapable of knowing if the first-time violator will ignore other traditional or extraordinary remedies. Thus, the Board's statement in *United Dairy III* comes close to an unwarranted assumption that all violators of the National Labor Relations Act will continue to violate the Act with impunity unless bargaining orders issue.

133 Because none of the traditional remedies, *see supra* note 129, create a bargaining relationship, employee rights to choose freely a representative remain protected.

134 An of informal employee poll is one means of determining the potential effectiveness of traditional remedies. Under § 9 of the National Labor Relations Act, the Board could modify the election procedures to provide mechanisms for such polls. Alternatively, the Board could issue traditional remedies for a trial period of six months to one year. After expiration of the time period, an NLRB agent could review the situation to determine the necessity of a bargaining order. If the traditional remedies had failed to eradicate the effects of the past practices, the NLRB then could issue a bargaining order.

135 The NLRB has noted the "unique effectiveness of speeches [by unions] addressed to employees assembled during working hours at the locus of their employment." H.W. Elson Bottling Co., 155 N.L.R.B. 714, 716 n.7 (1965), *enforced as modified,* 379 F.2d 223 (6th Cir.

remedies, although having problems of their own, may better protect employee free choice and majority rule.[136] The Board should analyze both the deterrent and corrective effect of extraordinary remedies in each case as a precondition to consideration of bargaining orders.

D. *Protection of Employee Sentiment*

When creating remedies for unfair labor practices, the Board should always strive to ensure employee free choice. In some bargaining-order cases, the employer's unfair labor practices may have restricted that free choice.[137] In other cases, however, the employees may in fact not favor unionization.[138] This possibility is even greater in nonmajority bargaining order cases, in which the union has made no prior showing of majority support.[139]

The Board, therefore, should determine employee sentiment as accurately as possible. For example, if there were a representation election, the closeness of the vote might indicate that the union would have won but for the unfair labor practices.[140] Similarly, even if more than fifty percent of the employees did not sign authorization cards, the ac-

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1967). Because a union speech clearly has less effect on employee free choice and majority rule than bargaining orders, the Board should consider this type of extraordinary remedy, as well as others, before issuing bargaining orders. *See also* Golub, *supra* note 98, at 641.

136 For a discussion of extraordinary remedies, *see supra* notes 104-08 and accompanying text.

137 *See supra* notes 93-95 and accompanying text.

138 *See supra* note 101 and accompanying text.

139 Professors Getman, Goldberg, and Herman, in their study on union representation elections, stated three relevant findings. First, they found that employees generally have strong predispositions for or against union representation. J. GETMAN, S. GOLDBERG & J. HERMAN, *supra* note 118, at 146. Second, anti-union and pro-union election campaigns do not cause most employees to switch their predispositions. *Id.* Third, the signing of an authorization eard is an accurate indicator of an employee's choice at the time the card is signed. *Id.* at 132. These findings support the thesis that when a union has actively solicited employee signatures, and does not possess a majority of the employees' signatures on authorization cards, a nonmajority bargaining order probably will not effectuate employee free choice. *But see* Golub, *supra* note 98, at 640 ("[T]here is good reason to believe that the net effect [of nonmajority bargaining orders] would be to promotc, rather than to impede, the legitimate interests of the employees as a whole.").

140 *See* NLRB v. Permanent Label Corp., 106 L.R.R.M. (BNA) 2211, 2219 (3d Cir. 1981) (Garth, J., concurring) (When determining propriety of bargaining order, Board should consider "closeness of vote" when union lost election 65-64); United Dairy Farmers Coop. Ass'n (*United Dairy III*), 257 N.L.R.B. 772, 775 (1981). In *United Dairy III,* the Board noted that the union had lost by only two votes, and stated that "the risk of imposing a minority union on the employees is greatly decreased in view of the substantial support cxhibitcd by the Union in the election." *Id.* The Board, however, went on to note that:

> Although we find that the closeness of the election is a factor to be considered in this case, we would not require a close elcction as a condition of a bargaining order. Such a requirement might encourage an employer to escalate its misconduct in order to achieve an overwhelming election victory and avoid a bargaining order, thereby rewarding those who engage in the greatest misconduct.

107 L.R.R.M. at 1580 n.22.

tual percentage of those who did sign may reflect the level of employee support.[141] Such a factual investigation of employee support should reduce the number of cases in which bargaining orders infringe on employee free choice by imposing union representation when the employees desire none.

Other safeguards exist to minimize a bargaining order's potentially adverse impact on employee free choice and majority rule. Restricting a bargaining order to one year permits employees to file a decertification petition at the end of that year if the union does not represent their interests.[142] Similarly, forbidding union security clauses in any contract negotiated by the employer and union during the one-year period insulates employees from being forced to choose between joining the union or losing their jobs.[143] Finally, requiring the union to inform all employees of their right to petition for a decertification election at the end of the one-year period ensures employee awareness of the right to choose freely a representative.[144]

CONCLUSION

The time has come to reexamine the proper role of the bargaining order in the Board's arsenal of remedies. The thirteen years since *Gissel* have revealed strong sentiment both for and against nonmajority bargaining orders, as well as major problems with the application of card-majority bargaining orders. The acceptance or nonacceptance of nonmajority bargaining orders will depend on the balance struck between the remedial policies of section 10(c) and the principles of majority rule and employee free choice. Practical necessity should tip that balance in favor of nonmajority bargaining orders; the NLRB must not

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141 *See, e.g.,* Conair Corp., 261 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1161, 1167 (1982) (46% of employees signed union authorization cards); Haddon House Food Prods., 242 N.L.R.B. 1057, 1064-65 (1979), *enforced as modified,* Local 115, International Brotherhood of Teamsters v. NLRB, 640 F.2d 392 (D.C. Cir.), *cert. denied,* 454 U.S. 837 (1981) (21 of 60 employees signed authorization cards).

142 29 C.F.R. § 101.17 (1981) sets out the procedure for decertification of bargaining representatives. In order to trigger an election, the petition needs signatures from only 30% of the employees in the bargaining unit. 29 C.F.R. § 101.18 (1981).

143 Union security provisions are contractual clauses found in collective bargaining agreements. *See generally* R. GORMAN, *supra* note 3, at 639-76. These are advantageous to unions because they increase the dues-paying membership. *Id.* at 641. A "union shop" agreement is one type of union security arrangement. It requires employees to join the union after a grace period on the job, and to remain members during the term of the collective bargaining agreements. By prohibiting union shop and other union security clauses from collective bargaining agreements negotiated during the bargaining order period, the NLRB can ensure that employees will have an effective choice of whether or not to join the union. *See* Bok, *supra* note 20, at 135.

144 *See* NLRB v. Drives, Inc., 440 F.2d 354, 367 (7th Cir.), *cert. denied,* 404 U.S. 912 (1971) (modifying the Board's order "to include provision for a notice to the employees advising them of their independent right to petition for a new election"); Golub, *supra* note 98, at 641.

be powerless against employers committed to fighting unionization through unlawful means.

If bargaining orders are to be effective, however, clear and consistent standards for their issuance must exist. Moreover, those standards must be based on factual findings. Mere presumptuous standards result in a mechanical application of bargaining orders without the essential inquiry into their necessity in individual cases. The NLRB is a fact-finding body designed in part to remedy individual violations of the National Labor Relations Act. The Board should maintain this function, and condition any remedy not on general presumptions, but on findings of fact.

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