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THE GISSEL DOCTRINE: WHEN A BARGAINING ORDER WILL ISSUE

DANIEL M. CARSON*

On June 16, 1969, the Supreme Court handed down its decision in NLRB v. Gissel Packing Co.,¹ a landmark case which was the last major labor decision of the Warren Court. In Gissel, the Court rejected the National Labor Relations Board’s then existing standard for the issuance of bargaining orders, and prescribed an entirely new standard. The purpose of this article is to analyze Gissel and the Gissel family of cases in an attempt to delineate the circumstances in which a bargaining order will issue.

I. THE GISSEL DECISION

NLRB v. Gissel Packing Co. was a consolidation of three cases which were appealed from the Fourth Circuit² and one case on appeal from the First Circuit.³ The Supreme Court granted certiorari in order to resolve, inter alia, the differences among the circuits on various issues relating to union authorization cards. The four cases, each of which has a similar factual background, presented the following questions for determination by the Court:⁴

1. Can the duty to bargain arise without a Board election?
2. Are unambiguous authorization cards, obtained without misrepresentation or coercion, reliable enough to provide a valid route to majority status?
3. Is a collective bargaining order an appropriate remedy when the employer rejects a card majority, undermines a union majority by unfair labor practices, and makes a fair election an unlikely possibility?

A. Factual Background

The uncomplicated factual situations which gave rise to the four cases can be briefly described as follows:⁵ The union waged an organizational

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2. General Steel Prods., Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968); NLRB v. Heck’s, Inc., 398 F.2d 337 (4th Cir. 1968); NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968).
4. 395 U.S. at 579. See notes 22-51 infra and accompanying text. A fourth issue decided, but unrelated to this inquiry, was whether certain specific statements by the employer were protected by the first amendment. 395 U.S. at 616-20.
5. See 395 U.S. at 580-90.
campaign and obtained authorization cards from a majority of employees in the appropriate unit. In each case, the authorization card was an unambiguous request for representation status. Each union demanded recognition by the employer as the sole bargaining agent for the various units. The respective employers refused, claiming that authorization cards are inherently unreliable. Vigorous antiunion campaigns followed, giving rise to numerous unfair labor practice charges. In two of the cases, elections were held, and in each case the employer was the victor. In another case, the union-petitioned election was never held due to unfair labor practice charges subsequently brought against the employer. In the remaining case, the union, without seeking an election, brought unfair labor practice charges against the employer.

The Board found that in each case the employees had signed cards which unambiguously authorized the union to represent the employees as their exclusive bargaining agent. In no case did the authorization card make any reference to an election.

The Board also found in each case that the employer's refusal to bargain was not based upon a "good faith doubt," but on a desire to gain sufficient time to dissipate the union's majority status. This finding was based on evidence of unfair labor practices committed by the employer in each case in his attempt to defeat union recognition. Consequently, the Board set aside the two elections that had been held, and ordered all four of the employers to bargain with the respective unions.

On appeal of the three cases arising in the Fourth Circuit, the court of appeals sustained the Board's findings of §§ 8(a)(1) and (3) violations, but reversed the § 8(a)(5) refusal to bargain determination and refused

9. "Typical of the cards was the one used in the Charleston campaign in Heck's, and it stated in relevant part: 'Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours, or any other conditions of employment.'" 395 U.S. at 583 n.4.
10. The Board found the employers to be in violation of §§ 8(a)(1), (3) & (5) of the National Labor Relations Act. 395 U.S. at 583. Section 8 of the NLRA provides in pertinent part: "(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of [their] rights . . . ; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ; (5) to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158 (1970).
to enforce the Board's bargaining order. The court based the § 8(a)(5) decisions upon the premise that the cards were inherently unreliable and, consequently, insufficient basis upon which an employer may be ordered to bargain.

On appeal of the case arising in the First Circuit, the court of appeals took a different approach to the reliability of authorization cards, found the necessary violations, and enforced the Board's collective bargaining order.

B. The Unfair Labor Practices

Before discussing the decision of the Supreme Court in Gissel, it is essential to take note of the unfair labor practice charges sustained in the various cases. Ultimately, it is the enormity of these violations which will determine the propriety of a bargaining order in a given situation.

In Gissel, at the outset of the union's organizational campaign, the employer threatened two employees with discharge if they engaged in union activity. These employees were subsequently discharged. The union obtained authorization cards from thirty-one of the forty-seven employees in the appropriate unit and demanded recognition. Rejecting the union's demand, the employer began interrogating employees, spying on union meetings to determine the identity of union supporters, and making promises of greater benefits than the union was able to offer. A vice-president of the employer warned the employees that "'[i]f the Union got in, he'd just take his money and let the Union run the place.'" In Heck's, the employer interrogated employees, discharged the leading union advocate and threatened reprisals (reduced hours, fewer raises, and withdrawal of bonuses) if the union was victorious. Further, the employer offered two known union supporters better jobs if they would attempt to "break up the union." These unfair labor practices were in response to the union's demand for recognition at various company warehouses. The initial demand was based upon thirteen authorization cards from a unit of twenty-six employees. The union subsequently obtained the additional card necessary to establish a majority. The employer engaged in essentially the same practices a year later when the union de-

12. 395 U.S. at 585-86.
16. Id. at 676.
manded recognition at another location based upon authorization cards from twenty-one of the thirty-eight employees in the unit.17

In General Steel, the employer interrogated employees as to their union involvement, threatened to discharge them, and warned them of economic reprisals.18 The union demand was based upon possession of one hundred twenty-two cards from the two hundred seven employees in the unit.19

In Sinclair, the employer told the employees that if the union were elected, a strike would probably follow and that "a strike 'could lead to the closing of the plant.'"20 Letters to the same effect were sent to the employees' homes. Just prior to the election, the employer sent out pamphlets impugning the teamsters and again indicating that the election of the union would lead to the closing of the plant.21

It is important to note that in each of these cases the unfair labor practices charged were of a serious nature including threats of economic reprisal and discharge. In all but Sinclair, these were compounded by employee interrogation and promises of benefits.

C. The Supreme Court Decision

1. Authorization Cards and the Duty to Bargain

The National Labor Relations Act (NLRA) makes it an unfair labor practice for an employer to refuse to bargain with the representative of his employees.22 While the Act further provides that the representative designated or selected by the employees as bargaining agent shall act as their exclusive bargaining agent,23 it does not specify any particular method of designation. The Act, however, does permit an employer to petition the Board for an election when one or more labor organizations have demanded recognition.24

One issue facing the Gissel Court concerned the interpretation and interrelationship of these sections of the NLRA. Specifically, the Court had to decide "whether a union can establish a bargaining obligation by means other than a Board election . . . ."25 The Court pointed out that although an election is the "preferred" method of obtaining union recogni-

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17. See 166 N.L.R.B. 674.
19. Id. at 648.
21. Id. at 264.
23. Id. § 159(a).
24. Id. § 159(c) (1)(B).
25. 395 U.S. at 595.
tion, it is well recognized that an election is not the sole means available for obtaining recognition.26

In fact, from the union’s standpoint, the election is, at best, a second resort in the organization of a particular unit. The union will generally direct its campaign toward obtaining authorization cards from a majority of employees in the unit for presentation to the employer along with a formal demand for recognition.

A substantial problem which has plagued both the Board and the courts has been a determination of the circumstances under which the employer may refuse to recognize the union’s card majority and either petition for an election, demand that the union petition for an election, or do nothing at all.

Until recently, the Board had followed the Joy Silk doctrine,27 its traditional approach to this problem. Under this doctrine, "an employer could lawfully refuse to bargain with a union claiming representative status through possession of authorization cards if he had a 'good faith doubt' as to the union’s majority status."28 In such a case, the employer could insist that the union petition for an election.29

A finding of bad faith by the Board was a sufficient basis for the issuance of a bargaining order under the Joy Silk doctrine. Such a finding could be premised upon either an employer’s failure to come forth with any reason to doubt the union’s representational status, or a finding of unfair labor practices on the part of the employer. In the latter case, the unfair labor practices served as an indication that the employer’s refusal to recognize the union was based solely upon a desire to gain sufficient time to dissipate the union’s majority status.30

The Joy Silk doctrine was modified by the Board’s holding in Aaron Brothers Co.,31 which shifted the burden of proving the employer’s bad faith to the Board. This limitation was significant because it meant that not every unfair labor practice would result in a finding of bad faith, and it relieved the employer of the burden of having to establish a basis for his “good faith doubt.”32

Because the Joy Silk doctrine, even as modified by Aaron Brothers, retained the “good faith doubt” test, it required an investigation into the

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29. 395 U.S. at 592; 85 N.L.R.B. at 1264.
30. 395 U.S. at 592-93.
32. 395 U.S. at 593-94.
employer's subjective intention in his refusal to recognize the union. According to the Gissel Court, this limitation prompted the Board to abandon the doctrine, and to adopt a new practice which it put into effect just prior to the argument of Gissel before the Supreme Court.33 In Gissel, the Supreme Court gave judicial sanction to the abandonment of the Joy Silk doctrine and adopted the Board's new practice as the correct rule to be applied in authorization card cases.34

Briefly, the Board policy as adopted by the Court may be stated as follows:

When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, unless he has knowledge independently of the cards that the union has a majority, decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under § 9(c)(1)(B). If, however, the employer commits independent and substantial unfair labor practices disruptive of election conditions, the Board may withhold the election or set it aside, and issue instead a bargaining order as a remedy for the various violations. A bargaining order will not issue, of course, if the union obtained the cards through misrepresentation or coercion or if the employer's unfair labor practices are unrelated generally to the representation campaign.35

In adopting this rule, however, the Court expressly limited itself to a situation in which an employer has committed unfair labor practices: "In short, a union's right to rely on cards as a freely interchangeable substitute for elections where there has been no election interference is not put in issue here; we need only decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside."36

In this respect, however, it is interesting to note that the Court also stated that "an employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status."37 Thus, it would seem that the Court excluded from

33. See id. at 594. Since this appears to have been the first announcement of its new rule, most of the Board's bargaining orders before the courts at the time Gissel was decided were phrased in terms of "good faith doubt." But see Lewis, Gissel Packing: Was the Supreme Court Right?, 56 A.B.A.J. 877 (1970), where the author concludes that "[i]t was the Court, not the board, which 'abandoned' Joy Silk." Id. at 878.
34. 395 U.S. at 600.
35. Id. at 591-92 (emphasis added).
36. Id. at 601 n.18.
37. Id. at 609.
its decision only the very limited situation in which an employer, faced with a representation demand based upon authorization cards, neither demands an election nor commits any unfair labor practices. The duty of that employer was left for future court determination.

2. Inherent Reliability of Authorization Cards

With respect to this inquiry, it is again important to note that the Gissel Court expressly limited its discussion to unambiguous authorization cards and did not consider the effect of “dual-purpose cards.”

The employers argued that authorization cards are inherently unreliable and should not be the basis for an order to bargain. In support of their contention, they argued that cards are signed before the employer has had an opportunity to present his argument and, more importantly, that they are tainted by misrepresentation and coercion.

The Court was unpersuaded by these arguments and found that the Board's Cumberland Shoedoctrine adequately insured the employees' free choice. That doctrine, as explained to the Court by the Board, is as follows:

Thus the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides in our view insufficient basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation. A different situation is presented, of course, where union organizers solicit cards on the explicit or indirectly expressed representation that they will use such cards only for an election and subsequently seek to use them for a different purpose....

The foregoing does not of course imply that a finding of misrepresentation is confined to situations where employees are expressly told in haec verbae that the “sole” or “only” purpose of the cards is to obtain an election. The Board has never suggested such a mechanistic application of the foregoing principles, as some have contended. The Board looks to substance rather than to form. It is not the use or nonuse of certain key or “magic” words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election.

38. Id. at 606. A dual-purpose card is a card which on its face states that it may be used either to get an election or to obtain representation status.


40. 395 U.S. at 608-09.

41. Id. at 608 n.27, quoting Levi Strauss & Co., 172 N.L.R.B. No. 57 (June 28, 1968), 1968-2 CCH NLRB Dec. ¶ 20,043, at 25,123 & n.7. However, the Court cautioned the Board against applying too rigid an interpretation of this rule and stated that the trial examiner's findings in General Steel, 157 N.L.R.B. 636 (1966), represent the limits of the Cumberland Rules application. 395 U.S. at 608-09. The examiner in General Steel rejected the employer's
3. The Bargaining Order as an Appropriate Remedy

It has long been the rule that upon a finding of unfair labor practices which have undermined a union's majority status or made the holding of a fair election unlikely, the Board is not limited to a cease-and-desist order, but has the authority to issue a bargaining order. The purpose of the bargaining order is "as much to remedy past election damage as it is to deter future misconduct." The Gissel Court, in establishing guidelines to determine the propriety of a bargaining order in a given situation, set up three categories in which the need for a bargaining order might arise. The first category concerns "exceptional" cases, where the presence of "outrageous" and "pervasive" unfair labor practices justify imposing a bargaining order. Such an order is appropriate even "without need of inquiry into majority status on the basis of cards or otherwise." In the second situation described by the Court, a bargaining order is justified upon a finding that the unfair labor practices, though less pervasive than in the prior situation, "have the tendency to undermine majority strength and impede the election processes." In this situation, the Court adopted the following test:

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.

Finally, the Court noted that there exists the possibility of "a third 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." It is important to emphasize at this point that neither the Court nor the trial examiner concluded "that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face." Id. at 585 n.5.

42. 395 U.S. at 610.
43. Id. at 612 (footnote omitted).
44. Id. at 613.
45. Id. at 614.
46. Id. at 614-15.
47. Id. at 615.
48. See id. at 608.
the Board have adopted a per se rule with respect to bargaining orders. In other words, the totality of each situation must be examined in light of the above rule to determine the propriety of a bargaining order. The presence of any particular unfair labor practice will not, of itself, require a bargaining order. Such an order will be appropriate only when "the possibility ... of ensuring a fair election (or a fair rerun) ... is slight ...." Thus, *Gissel* establishes a fair, reasonable test by which the propriety of a bargaining order may, in each particular case, be measured. The difficulty in applying the *Gissel* test, however, is in determining the fine line between the "less extraordinary cases" in the Court's second category and the "minor or less extensive unfair labor practices" of the third category. 

With respect to this distinction between the second and third categories, it is important to note that the Court, in dictum, stated that a limited interrogation of employees, even if violative of the Act, "might not be serious enough to call for a bargaining order." 

50. 395 U.S. at 614.  
51. Id. at 609, citing Aaron Brothers Co., 158 N.L.R.B. 1077 (1966) and Hammond & Irving, Inc., 154 N.L.R.B. 1071 (1965). NLRB v. Marsellus Vault & Sales, Inc., 431 F.2d 933 (2d Cir. 1970), Mel Croan Motors, Inc. v. NLRB, 395 F.2d 154 (5th Cir. 1968) and NLRB v. O.A. Fuller Super Mkts., Inc., 374 F.2d 197 (5th Cir. 1967), are cases which involved interrogations. In each of these cases, the interrogation was held not to have violated § 8(a) (1) of the Act. 

In Marsellus Vault, a supervisor asked one employee, "'How come you went for outside help?'", and another, "'... if you had any problems, why didn't you come to me with them?'" 431 F.2d at 936. The court took note of the fact that the questions were asked at the employee's work stations and not in the employer's office. The court found that the remarks themselves did not constitute unfair labor practices, but added that they "do add significance to the later unfair labor practices." Id. at 937. 

In Mel Croan, a supervisor informed of the union activity asked two employees "'who started it and how it got started.'" 395 F.2d at 155. The court found these questions to have been "an instinctive reaction to a surprise confrontation" and not a coercive interrogation in violation of the Act. In so finding, the court relied upon the following facts: There was no background of employer hostility to union activity; the interrogation did not take place in an atmosphere of unnatural formality; and the supervisor was not seeking information upon which to base reprisals. Id. at 156. 

In Fuller Super Markets, on the day after the store manager learned that various employees had signed authorization cards, the following conversation took place between the manager and one of the employees: 

Manager: "I see you signed the card, the Union card.  
Employee: "Yes sir."  
Manager: "I wonder who started it?"" 374 F.2d at 203.

The court found no background of employer discrimination, that the circumstances were not such as would reasonably induce a fear of reprisal, and that there was no established pattern of employee interrogation. Consequently, the court found that the interrogation did not constitute an unfair labor practice.
4. Application of the Court's Decision to the Cases Pending Before It

In affirming the circuit court's enforcement of the Board order in *Sinclair*, the *Gissel* Court found the case to be within the first category of "exceptional" or "outrageous" cases. This holding was based upon the Board's finding that "the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats."2

In the three cases appealed from the Fourth Circuit, the Court indicated that it was probably implicit in the Board orders that the possibility of a fair election or rerun was slight. Nevertheless, since the Board couched its findings in terms of a "good faith doubt," the Court remanded the case to the Board for proper findings.53

On remand,54 the Board found the unfair labor practices in each of these cases to be sufficient to warrant a bargaining order. In *Gissel* and *Heck's*, the interference was found to be so flagrant and coercive in nature as to warrant the imposition of a bargaining order "even in the absence of a Section 8(a)(5) violation."55 In *General Steel*, on the other hand, the Board merely found it unlikely that the lingering effects of the unlawful conduct would be neutralized by conventional remedies.56

D. Administration of the Gissel Rules

The *Gissel* Court not only established definite guidelines for determining the appropriateness of a bargaining order in each case, but also firmly established the importance and significance of the Board's initial determination of the appropriate remedy. The Court noted that:

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.57

In light of this admonition, absent a showing of clear abuse of discretion, the courts of appeal will not set aside a bargaining order. Consequently, an extensive review of not only the circuit court cases interpreting

52. 395 U.S. at 615 (footnote omitted). In this respect, it is important to note that under the Bernel Foam Doctrine [Bernel Foam Prods. Co., 146 N.L.R.B. 1277 (1964)], "there is nothing inconsistent in the Union's filing an election petition and thereby agreeing that a question of representation exists, and then filing a refusal-to-bargain charge after the election is lost because of the employer's unfair labor practices." 395 U.S. at 615 n.34.
53. 395 U.S. at 616.
57. 395 U.S. at 612 n.32.
Gissel but also the Board determinations following Gissel is essential in order to determine the circumstances under which an employer will be ordered to bargain with the union.

II. CASES AND BOARD DECISIONS FOLLOWING Gissel

In order to determine the parameters of the Gissel doctrine and to fully understand its application, it will be necessary to review the various cases and Board decisions following Gissel. In particular, a careful examination of the unfair labor practice charges sustained in those cases is essential.

At the outset, it is important to keep in mind the various sections of the NLRA with which the courts and the Board are dealing. Before a bargaining order may be issued, a violation of § 8(a)(5) (refusal to bargain) must be found. Following Gissel, this violation may be found to spring from a violation of either § 8(a)(1) (interference with § 7 rights) or § 8(a)(3) (discriminatory discharge) or both. Occasionally, there will be found a violation of § 8(a)(2) (domination), but this will always be compounded by at least a § 8(a)(1) violation.

The background of each of the post-Gissel cases generally falls within a simple pattern. The union seeks representational status through the solicitation of authorization cards. When cards have been signed by a majority of employees within the unit, the union demands recognition. Upon learning of the union activity, the employer generally engages in a vigorous anti-union campaign and commits various unfair labor practices as a result. There may or may not be an election. The union files charges, the NLRB General Counsel issues a complaint, and a trial examiner takes evidence from both sides. The trial examiner, in his report to the Board, makes findings of fact and law and recommends disposition of the proceeding in the manner he deems appropriate. The Board is, of course, free to accept or reject the trial examiner's findings and recommendations in its decision.

A close examination of the post-Gissel cases and Board decisions should

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58. Some disagreement has arisen as to the theory upon which a bargaining order is issued. Members Fanning and Brown indicate that they consider the § 8(a)(5) violation to be inherent in the § 8(a)(1) violation, without even the necessity of having to find a refusal to bargain. United Packing Co., 187 N.L.R.B. No. 132 (Jan. 15, 1971), 1971 CCH NLRB Dec. ¶ 22,654. Chairman Miller, on the other hand, feels that the Board should differentiate between bargaining orders based on § 8(a)(1) violations and those based on § 8(a)(5) violations. United Packing Co., 1971 CCH NLRB Dec. ¶ 22,654, at 29,296-97 (concurring opinion). The rationale behind Miller's argument is that a finding of a § 8(a)(5) violation arising out of a § 8(a)(1) violation merely serves to confuse. Further, he considers a § 8(a)(1) violation, standing alone, to be sufficient basis for issuing a bargaining order. This disagreement need not detain us here as it is more a problem of semantics than anything else. This is particularly so since the result under either theory is the same, a bargaining order. See also F.W. Woolworth Co., 188 N.L.R.B. No. 119 (Mar. 11, 1971), 1971 CCH NLRB Dec. ¶ 22,816.
reveal the answers to at least two important questions: First, has the pre-Gissel standard actually been abandoned and the Gissel doctrine put into effect? Second, what factors are considered to be controlling in the determination of whether or not a bargaining order should issue?

A. Decisions Pending Before the Courts at the Time Gissel Was Decided

As previously noted, Gissel changed the inquiry for determining whether or not a bargaining order should issue. At the time Gissel was decided, many Board decisions were pending before the courts on actions for enforcement of bargaining orders. These decisions were, of course, all decided under the Joy Silk doctrine. Consequently, with the exception of but a few, these cases were remanded to the Board for further findings in light of Gissel.

1. The Exceptions

Several courts relied upon the Supreme Court’s disposition of Sinclair, (one of the Gissel cases) as authority for the enforcement of the pre-Gissel bargaining orders in these cases. Consequently, it may be inferred that the respective courts deemed these cases to fall within the first Gissel category of “outrageous” and “pervasive” unfair labor practices justifying a bargaining order even without an unlawful refusal to bargain. However, it must be noted that there was a showing of majority status in these cases.

Typical of these cases is NLRB v. Wylie Manufacturing Co. The union in Wylie demanded recognition based upon thirty authorization cards from a unit of thirty-six employees. The employer refused to recognize the union and won the ensuing election by a single vote, 18-17. Following a pre-Gissel hearing, the Board found that a plant manager and a foreman had systematically interrogated six employees, threatened economic reprisals in the event of a union victory, and promised benefits if the union were defeated. The court held that, in light of these findings, the Board did not abuse its discretion in granting a bargaining order, and, citing Sinclair, enforced the Board’s decision.

Likewise, in Local 880, Retail Store Employees v. NLRB, the court

59. § 10(e) of the NLRA empowers the Board to petition the court of appeals for enforcement of its orders. 29 U.S.C. § 160(e) (1970). § 10(f) of the Act permits an aggrieved party to seek review of a final order of the Board in the court of appeals. Id. § 160(f).
62. The reprisals included fewer hours of work, discharge, loss of overtime, no raises, and plant relocation.
63. 417 F.2d at 196.
64. 419 F.2d 329 (D.C. Cir. 1969). See also NLRB v. L.B. Foster Co., 418 F.2d 1 (9th
cited Sinclair in enforcing the Board's bargaining order. The § 8(a)(1) and § 8(a)(3) violations involved in this case included unlawful interrogations, discriminatory reprisals, a bonus, reduction of one employee's hours and discharge of another employee.

In each of these cases which the court presumably found to involve "extreme" unfair labor practices, the employer's anti-union campaign was both extreme and compounded by multiple instances of unfair labor practices. This is especially clear in Retail Store Employees, where the employer violated both § 8(a)(1) and § 8(a)(3) of the Act.

2. Remanded Cases

A reading of the cases remanded to the Board to be reconsidered in light of Gissel reveals two significant facts:

a) in not one of these cases did the Board determine that a bargaining order issued under the Joy Silk doctrine was inappropriate under the Gissel doctrine;

b) in every case, the Board appears to have merely rephrased its opinion, replacing the Joy Silk language with Gissel language.

In reaffirming the initial bargaining order, the Board would reiterate its former unfair labor practice findings and couch its decision in one or more of the following Gissel phrases: Traditional remedies could not ensure a fair rerun; unfair labor practices establish the likelihood of their recurrence; a fair election rerun is unlikely; or the unfair labor practices were so coercive and pervasive as to destroy utterly the conditions necessary for a free election.

A majority of these cases, however, involved extensive unfair labor practices, generally involving violations of both § 8(a)(1) and § 8(a)(3). In some cases, there were, in addition, violations of § 8(a)(2).

Typically, these cases involved surveillance of employees, threats of
discharge, discharges or layoffs and promises of benefit should the union lose.

In Local 347, Food Store Employees v. NLRB, the employer had engaged in coercive interrogation of the employees, created an impression of surveillance, adopted an unlawful no-solicitation rule, transferred one employee and discharged three others. Following a demand for recognition based upon cards from twenty-three of forty-one employees and the employer's refusal, the Board found violations of §§ 8(a)(1), (3) and (5) and ordered the employer to bargain with the union upon request.

The Board, however, does not limit its bargaining orders to situations involving violations of multiple sections of the Act. In Krystyniak v. NLRB, the employer violated only § 8(a)(1). The Board, nevertheless, found the employer's conduct to be so egregious that it held a bargaining order would be appropriate even absent a refusal to bargain.

A number of cases remanded to the Board were subsequently enforced when they later appeared before the court. One such case, NLRB v. American Art Industries, Inc., involved violations of §§ 8(a)(1), (3) and (4) of the Act. The §§ 8(a)(1) and (3) violations involved the usual interrogation, threats, promises and discharges. The § 8(a)(4) violation involved the discharge of four employees who had testified at an NLRB hearing. The Board, considering the case on remand, found that the coercive effects of the unfair labor practices could not be eliminated by traditional remedies and held that:

The [employer's] extensive violations of Section 8(a)(3) and (1) contemporaneously with its refusal to bargain, and in conjunction with its subsequent 8(a)(4) violations, demonstrate the likelihood of the recurrence of unfair labor practices in the future, and render any traditional remedy inadequate assurance of a fair election. Therefore, we find that the bargaining order previously issued to remedy the [em-
ployer's] unfair labor practices is appropriate to remedy its violations of Section 8(a)(5) as well as Section 8(a)(1), (3), and (4) of the Act.\textsuperscript{77}

It is obvious from these cases that \textit{Gissel} had no immediate effect upon the issuance of bargaining orders. The Board's reconsideration of the cases in light of \textit{Gissel} consisted merely in rephrasing the decisions using \textit{Gissel} language. For the most part, the courts, recognizing the Board's expertise in fashioning remedies, merely accepted the rephrased remand decisions and enforced the bargaining orders.

\textbf{B. Post-\textit{Gissel} Board Proceedings in Which a Bargaining Order Was Not Issued}

The number of cases in which the Board has determined unfair labor practices to be of the minor or less extensive type is miniscule in comparison with the number of cases in which the Board has issued bargaining orders. This, in itself, indicates that the Board either does not consider a bargaining order to be a drastic remedy or it places a very restrictive interpretation upon the category of less extensive unfair labor practices not requiring a bargaining order, or both. An examination of these cases will be helpful, therefore, in determining what the Board considers to be the spectrum in which the \textit{Gissel} doctrine is to be applied.

In a recent case before the Board, \textit{Clover Industries Division of GTI Corp.},\textsuperscript{78} the union lost an election by a vote of thirty-eight to thirty after demanding recognition based on some fifty cards. During the organization period, a foreman approached an employee, a good friend, and jokingly said that the company had authorization cards and that some of the employees were going to ask for them back. On another occasion, a foreman told two employees not to wear union buttons as they might interfere with the operation of their presses and prove to be hazardous. In addition to these conversations, the work of four part-time employees was reduced. The trial examiner found that the conversations were not coercive in effect and that the reduction of work, despite the fact that business picked up shortly thereafter, was not prompted by the employees' union sentiment. Consequently, the trial examiner concluded that "there were no extensive practices justifying a bargaining order. Since there were no Section 8(a)(1) and (3) violations . . . there was no unlawful refusal to bargain."\textsuperscript{79} The Board adopted the trial examiner's findings and recommendations holding that "there was no conduct on which a bargaining order could have been predicated."\textsuperscript{80}

\textsuperscript{77} 179 N.L.R.B. at 907-08.
\textsuperscript{78} 188 N.L.R.B. No. 36 (Jan. 29, 1971), 1971 CCH NLRB Dec. \$ 22,709.
\textsuperscript{79} 1971 CCH NLRB Dec. \$ 22,709, at 29,378.
\textsuperscript{80} Id. In C.E. Glass, Div. of Combustion Eng'r, Inc., 189 N.L.R.B. No. 74 (Mar. 31,
In a similar case, *Oxford Pickles, Division of John E. Cain Co.*, a divided Board found an employer's letters to his employees to be non-coercive and refused to issue a bargaining order. Included in those letters were such statements as:

Question: If the Union is voted in, isn't the Company forced by law to keep its plant in South Deerfield?

Answer: Absolutely not. If a Union in this plant put us in a position of not being able to compete in the sale of pickles, we have every legal right to move where costs would permit us to compete with other plants. The Company is free to hire permanent replacements for the strikers so that it can continue to operate. This means that after the strike is over, you may no longer have a job.82

The employer noted in the letter that it was prohibited from making pre-election promises to its employees, and added that the underlying reason for this was the Board's recognition that the employer "'does have the power to make good its promises and the Union does not.'"83

*Olin Conductors, Olin Mathieson Chemical Corp.*, presents an interesting situation in which the trial examiner recommended a bargaining order, but the Board found one to be unnecessary. In this case, the union obtained cards from sixty-nine of the eighty-three employees in the unit. The employer refused to recognize the union and defeated the union by an eighty-one to thirty-four vote in the election.

During the organizational campaign, the employer called a series of meetings to discuss the employees' complaints. These complaints, all minor in nature (such as a request for a water cooler), were subsequently rectified. The employer also stressed the fact that all benefits presently enjoyed by the employees would be subject to negotiation should the union be elected. On several occasions, the employer questioned the employees as to their support for the union.

The union complained of various unfair labor practices and raised objections to the election. The trial examiner found that the employer had violated §§ 8(a)(1) and (5) of the Act and that, under the standards set forth in *Gissel*, a bargaining order was appropriate.

The Board adopted the trial examiner's findings with the exception of the § 8(a)(5) violation and held that "[t]he 8(a)(1) violations are

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81. 190 N.L.R.B. No. 24 (April 26, 1971), 1971 CCH NLRB Dec. ¶ 22,889, the Board, Member Brown dissenting, found an employer's "speech" distributed to the employees along with their paychecks to be non-coercive.


83. Id. at A-8.

neither so extensive in nature nor so pervasive in character as to preclude the holding of a fair rerun election."

Sinclair & Rush, Inc., involved unfair labor practice charges which were somewhat more grievous than those in the prior cases. The union demanded recognition based upon cards from twenty-four of the forty employees in the unit. The employer refused, suggesting that an election would be appropriate. During the organizational campaign, the employer engaged in day-to-day conversations with the employees, questioned them about their union sympathies and promised them benefits if the union were rejected. In addition, after the election, the employer posted a notice stating that as a matter of law he was "prevented from improving the wages, benefits or other terms and conditions of employment until such time as" the objections filed by the union were resolved. This was determined by the Board to be a misrepresentation of the applicable law.

The Board found that the above practices violated § 8(a)(1) but nevertheless adopted the trial examiner's finding that "[t]he holding of a fair election was not necessarily rendered impossible." It should be noted here that the Board determined that a fair election was possible despite the presence of compound § 8(a)(1) violations (interrogations, promises of benefits and misrepresentation of the applicable law).

In Carpenter Lithographing & Printing Co., the Board found that a fair election could be held despite the fact that an employee had been laid off for suspected union activity. This § 8(a)(1) and (3) violation was, however, tempered by the fact that the employee was not active in the employer's plant and was on sick leave at the time of the layoff. Nevertheless, it indicates that the Board will, in appropriate circumstances, withhold a bargaining order despite a § 8(a)(3) violation.

In Central Soya of Canton, Inc., the Board, in an in-depth opinion, set forth certain factors which it said it would consider in mitigation of various unfair labor practices. The Board found that the following conduct violated §§ 8(a)(1) and (3): A supervisor told the employees to remove union buttons and those refusing were told to leave the production line; the employer adopted a no-solicitation rule which the Board found to be overly broad; nine employees were suspended or laid off for wearing union badges. The Board took into consideration, however, the fact that in each of these instances the employer took immediate steps to

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88. Id. at 28,641.
89. 1970 CCH NLRB Dec. ¶ 21,911.
90. 180 N.L.R.B. 546, enforced, 433 F.2d 347 (5th Cir. 1970).
rectify his unlawful activity. The badge prohibition and no-solicitation rule were rescinded the next day and the suspended employees were reinstated and paid for the time missed.

The Board, in deciding that a fair election rerun could be held, found the following factors to be controlling:

a) The relatively minor nature and limited extent of the unfair labor practices;

b) The erasure of the coercive effects therefrom and the unlikelihood of recurrence; and

c) The fact that there was no independent indication that a coercion-free rerun could not be held.91

In Blade-Tribune Publishing Co.,92 the employer suggested to three of the twenty-four employees in the unit that a rejection of the union would be to their benefit. He also made a change in the work schedule of one union supporter. The Board found that this conduct constituted the minor, less extensive type of unfair labor practice that did not justify a bargaining order.

Stoutco, Inc.,93 involved a slightly different situation than the usual pattern. In this case, the union did not represent a majority of the employees at the time it petitioned for an election.94 Throughout the organizational campaign, the employer threatened to withdraw existing benefits if the union were elected, interrogated employees with regard to their union activities, threatened to discharge employees and close the plant, and, finally, threatened to impose more work on the employees. The Board ordered a new election, holding: “[W]e do not believe that, in all the circumstances of this case, the unfair labor practices were of such a nature as to warrant imposition of a bargaining order.”95

Reviewing these cases as a whole, the Board appears to be stating that it will not issue a bargaining order when: a) the unfair labor practices are of an extremely minor or non-coercive nature; b) there are substantial mitigating factors which indicate that a fair election or rerun may be possible; or c) where the union never had a majority and the unfair labor practices were not “extreme” and “pervasive.”

C. Post-Gissel Bargaining Orders

The vast majority of proceedings in which the Board finds the employer to have engaged in unfair labor practices do result in the issuance of a

91. 180 N.L.R.B. at 547.
94. Consequently, in order to issue a bargaining order under Gissel, the Board would have to find the case to be within the first category of unfair labor practices, i.e., involving “outrageous” conduct. See text accompanying note 44 supra.
95. 180 N.L.R.B. at 179.
bargaining order. Likewise, the overwhelming majority of Board-issued bargaining orders which are brought before the courts for enforcement are upheld, often without opinion.
From the examination of the cases up to this point, it has become clear that employers generally follow the same patterns in committing unfair labor practices. Because the cases are so similar, an attempt to develop the facts of each case would be unnecessarily repetitious. Nearly every case involves similar findings of coercive interrogation, promises of benefit, discharges, threats of reprisals, threats of plant relocation, and so forth. The differences are generally in the degree of the offense.

In addition to cases involving usual unfair labor practice charges, bargaining orders have been issued in cases involving: post-election unfair labor practices which compounded the unlawful pre-election activity,\(^9\)

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\(^9\) NLRB v. Clay City Beverages, Inc., 434 F.2d 1315 (6th Cir. 1971) (per curiam); Texaco, Inc. v. NLRB, 436 F.2d 520 (7th Cir. 1971); NLRB v. Jerome T. Kane, 435 F.2d 1203 (4th Cir. 1970); Amalgamated Clothing Workers v. NLRB, 432 F.2d 1341 (D.C. 1970); NLRB v. Kingwood Mining Co., 435 F.2d 158 (4th Cir. 1970); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (9th Cir. 1970); United Steelworkers v. NLRB, 441 F.2d 1005 (D.C. Cir. 1970); Local 153, ILGWU v. NLRB, 64 L.C. 11,261 (D.C. Cir. 1970); NLRB v. Int'l Metal Specialties, Inc., 433 F.2d 870 (2d Cir. 1970), cert. denied, 402 U.S. 907 (1971); NLRB v. V & H Indus., Inc., 433 F.2d 9 (2d Cir. 1970) (per curiam); NLRB v. Stanley Air Tools, 432 F.2d 358 (6th Cir. 1970) (per curiam), cert. denied, 402 U.S. 908 (1971); NLRB v. Li'l General Stores, Inc., 170 N.L.R.B. No. 94 (Mar. 28, 1968), enforced, 422 F.2d 571 (5th Cir. 1970), on remand, 188 N.L.R.B. No. 117 (Mar. 5, 1971), 1971 CCH NLRB Dec. ¶ 22,802. The union solicited nineteen cards from the twenty-three-man unit. Without making a prior demand for recognition, the union petitioned for an election which it subsequently lost by a vote of 16-8. The Board found the usual § 8(a)(1) and (3) violations and issued a bargaining order. The court remanded the case to the Board for a determination of whether or not the employer had knowledge of the union majority. Without this knowledge, apparently, the union would not be entitled to the bargaining order despite the unfair labor practices. On remand, however, the Board found that the employer had the requisite knowledge and ordered him to bargain with the union upon request.

the discharge of employees because of their union sympathies, a poll of the employee's views on unionization taken without a secret ballot or assurances against reprisals, the circulation of a petition among the employees by the employer to authorize the withdrawal of union applications, supporting a rival union, and the discharge of employees engaged in an unfair labor practice strike.

Important to this discussion are the factors which will not preclude the issuance of a bargaining order. The size of the appropriate unit, for example, will not be considered by the Board. Bargaining orders have been issued for units comprised of as few as two employees and as many as five hundred. Likewise, so long as the union has cards from a majority of employees in the unit, the size of that majority will not affect the outcome. Nor will the size of the employer's election victory be given any weight by the Board.

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105. One factor which has caused considerable disagreement is the weight which should be given to the passage of time and employee turnover. The court remanded NLRB v. American Cable Systems, Inc., 427 F.2d 446 (5th Cir.), cert. denied, 409 U.S. 957 (1970), to the Board on this very point. Likewise, the court in NLRB v. General Stencils, Inc., 438 F.2d 894 (2d Cir. 1971) "suggested" that the Board consider evidence on this point in its reconsideration of the propriety of a bargaining order. On the other hand, in a recent case, New Alaska Dev. Corp. v. NLRB, 441 F.2d 491 (7th Cir. 1971), the Seventh Circuit affirmed the Board's refusal to reopen the record to consider these factors. The court, in Alaska Development, specifically refused to follow American Cable and held that "a bargaining order may be enforced 'in spite of substantial changes in the situation occurring after the election.'" Id. at 493 (citation omitted). The position taken by the Board on this issue is quite clear—an employer should not be permitted to profit from his wrongdoing. Thus, the Board will issue a bargaining order regardless of the changed circumstances and, depending upon the circuit in which the case arises, the court may or may not remand on this issue.
108. Essex Wire Corp., 188 N.L.R.B. No. 59 (Feb. 5, 1971), 1971 CCH NLRB Dec. ¶ 22,738 (cards from 189 out of 345 employees). But see Chairman Miller's dissenting opinion in which he argues that the slender majority coupled with the fact that a few cards were disallowed due to misrepresentations is sufficient basis to deny the bargaining order. 1971 CCH NLRB Dec. ¶ 22,738, at 29,415.
D. Post-Gissel Court Decisions Which Have Not Enforced Bargaining Orders

The vast majority of circuit court decisions following the appeal of Board-issued bargaining orders merely affirm the Board's findings and, often without opinion, enforce the order. In all but a limited number of cases, the courts have merely given lip service to the appropriate language from *Gissel*. Nevertheless, in a few cases, courts have refused to enforce the Board's bargaining order, and have instead engaged in a searching, critical analysis of the Board's application of the *Gissel* doctrine. For the most part, these courts have found fault with that application. These decisions are the subject of this subsection.

An analysis of the Board's post-*Gissel* policy was made in the Second Circuit by Chief Judge Friendly in *NLRB v. General Stencils, Inc.*. In 1961 and again in 1966, attempts to unionize General Stencils had failed as the union, in each instance, lost a Board-conducted election. A third attempt, beginning in 1967, led to the instant proceeding. The union, having solicited authorization cards from twenty-four employees in a union of thirty-two, demanded recognition. The employer refused, demanding another election. The union representative, conceding that the union could not win an election, declared that there would be no election since the union was filing unfair labor practices charges, including a refusal to bargain charge, against the employer.

The trial examiner, acting under pre-*Gissel* standards, found the employer's refusal to recognize the union to have been made in "good faith." Consequently, he found that, despite the § 8(a)(1) violations, there had been no violation of § 8(a)(5). The Board withheld its decision until after the Supreme Court handed down its decision in *Gissel*. Based upon the new rules prescribed by the Supreme Court, the Board found the trial examiner's § 8(a)(5) determination to be incorrect and ordered the employer to bargain with the union upon request. The Board found that the employer had engaged in pervasive unfair labor practices both before and after the union's demand for recognition, and held that:

"These unfair labor practices . . . tended to destroy the employees' free choice by frightening them into withdrawing their allegiance from the Union and were of such a nature as to have a lingering effect and make a fair or coercion-free election quite dubious, if not impossible."

The unfair labor practices upon which the Board based its decision included the interrogation of employees as to union activity, threats to

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110. 438 F.2d 894 (2d Cir. 1971).
112. 178 N.L.R.B. at 109.
enforce a no-smoking rule, to discharge employees for tardiness, to discontinue a loan policy, to discontinue free coffee breaks, to lay off employees and to close the plant.

The court of appeals found a sufficient basis for the Board's determination that the various threats made by the employer constituted a violation of § 8(a)(1). In particular, the court noted that the threat to close the plant constituted a clear violation of § 8(a)(1) under the Gissel test. With respect to these findings, the court enforced the Board's cease-and-desist order.

With respect to Board findings of unlawful interrogation, on the other hand, the court refused to enforce the Board's cease-and-desist order. The various interrogations upon which the Board based its decision included asking an employee if she were " 'with the Union or with him' " (adding that it was up to her whether or not she joined); asking another employee whether he had signed a card and who had attended a particular union meeting; and finally, asking a third employee if he had signed a card, to which he falsely replied in the negative. In the first two instances, the court found that there was no attempt to subject the employees to coercion or to intimidate them with inherent threats of reprisal. In the third case, the court found the interrogation to be an insufficient basis upon which to base a § 8(a)(1) violation.

Thus, the court was faced with determining the appropriateness of a bargaining order based only on the employer's various threats of reprisal. Although mindful of the Board's expertise in fashioning remedies, the court found that the Board merely discharged its obligation by " 'reciting conclusions by rote without factual explication.' " This finding, coupled with a discussion of seemingly contradictory Board decisions, led the court to remand for further consideration that portion of the Board order which dealt with the § 8(a)(5) violation.

113. The court noted, however, that it "entertain[ed] some doubt whether the Gissel test applies in all its severity to the discussion of such subjects." 438 F.2d at 900.
114. Id. at 898.
115. Id. at 901.
116. The court further indicated that the threats involved in this case would not be a sufficient basis upon which to issue a bargaining order: "It deserves emphasis that the Court noted in Gissel . . . that threats to eliminate benefits had been shown to have very much less effect on rerun elections—and thus presumably on elections—that threats of plant closings, and cited statistics impressively confirming this. Evidently the American working man who wants a union has enough sturdiness and sufficient confidence in the union's ability to protect him that he is not cowed by employer threats to cease the distribution of free doughnuts or to enforce no-smoking rules if the union comes in. We thus have considerable doubt whether the Court contemplated that bargaining orders would be entered on the basis of such threats alone, and indeed whether the Board would have done so here in the
In addition, the court offered several constructive suggestions by which the Board might resolve what had become an unnecessarily complex situation. The court suggested that the Board avail itself of its rule-making powers to "reveal at least some of the Board's thought processes to unions, employers, and reviewing courts, and [to] bring about a degree of certainty and uniformity that . . . does not seem to have been attained." Alternatively, the court suggested that the full Board issue an opinion "illuminating how it meant to apply its Gissel-given authority." Failing that, said the court, the Board should set forth in detail the factors in each case which seem to preclude a fair election and in doing so, distinguish them from other cases in which the opposite conclusion has been reached.

A Seventh Circuit case very similar to General Stencils was New Alaska Development Corp. v. NLRB. The court remanded the case to the Board emphasizing the same points made by Chief Judge Friendly in General Stencils:

So far as the record shows, neither the Examiner nor the Board panel took into consideration the "extensiveness" of the Company's election day threats and the impact of this unlawful practice upon the election; whether the practice might recur; whether there is only a slight possibility that the impact could be erased by "traditional remedies" to ensure a fair election rerun; and whether on balance the employee sentiment in the pre-election cards would be better protected by a bargaining order. Consequently, we remand the case for the proper analysis of the causal connection between the unfair labor practices and the conclusion that the election process was undermined. Upon remand, the record alone should be the basis of the Board's "proper findings." The Board may determine, for example, whether Kutas, Barton, and Gibson, the three most active employees in Union drives, were likely to have been influenced by the threats; whether the three had a timely opportunity to spread the harmful influence among other employees; what effect, other than turnover, the time span between the threats and the bargaining order might have upon elimination of the impact; and whether the Company's unlawful conduct might probably recur if an election were held.

absence of its erroneous conclusion with respect to the unlawful interrogation of [two of the employees]." Id. at 903.

Upon reconsideration, the Board reaffirmed its bargaining order. 195 N.L.R.B. No. 173 (March 30, 1972), 1972 CCH NLRB Dec. ¶ 24,024. The Board reasoned that the employer had made not one but a series of threats, including termination of employment, which would have affected every employee in the unit. Applying its knowledge and expertise in evaluating the effects of unfair labor practices, the Board determined the appropriate remedy to be a bargaining order.

117. 438 F.2d at 901-02.
118. Id. at 902.
119. Id.
120. 441 F.2d 491 (7th Cir. 1971).
121. Id. at 494-95 (footnotes omitted).
NLRB v. American Cable Systems, Inc., 122 is another case where a court of appeals took a very critical approach to the Board's issuance of bargaining orders. In American Cable, the Board found violations of §§ 8 (a)(1), (3) and (5), based upon coercive interrogation of five employees, promises of benefits and discharge of two admitted union supporters—all of which followed a demand for recognition based upon cards signed by four employees in a unit of seven. After the first hearing, 123 the court set forth a list of what it considered to be prerequired findings for the issuance of a bargaining order under the Gissel doctrine. The list included: (a) valid cards from a majority in the unit; (b) serious and extensive employer unfair labor practices; (c) only a slight possibility that traditional remedies could insure a fair election or rerun; and (d) the finding that employee sentiment can be best protected by a bargaining order. 124 The court remanded the case to the Board for consideration of these factors.

On remand, the Board again issued a bargaining order, this time parroting the language found in Gissel. When the case again came before the court, the court remanded, criticizing the Board for refusing to take into consideration such factors as lapse of time, complete employee turnover, and departure of the only management official found to have committed the unfair labor practices, in its determination of whether or not a fair election could be held at American Cable. 125 The court in so holding

122. 427 F.2d 446 (5th Cir.), cert. denied, 400 U.S. 957 (1970).
123. 414 F.2d 661 (5th Cir. 1969), cert. denied, 400 U.S. 957 (1970).
124. 414 F.2d at 668-69.
125. 427 F.2d at 448. See also Clark's Gamble Corp. v. NLRB, 422 F.2d 845 (6th Cir.), cert. denied, 400 U.S. 868 (1970) (remanded to determine whether the passage of time made a fair election possible). But see Henry Colder Co., 184 N.L.R.B. No. 13 (June 30, 1970), 1970 CCH NLRB Dec. ¶ 22,115, modified, 447 F.2d 629 (7th Cir. 1971), wherein the employer petitioned the Board to reopen the record to consider employee turnover (all but four employees had left the company). In its second supplemental decision, the Board stated that it "interprets the opinion of the Supreme Court of the United States in NLRB v. Gissel Packing Company . . . as permitting the issuance of a bargaining order where, as here, the standards therein are met, regardless of the passage of time and the union's loss of majority by turnover or otherwise since the commission of the unfair labor practices and the union's demand for recognition." 1970 CCH NLRB Dec. ¶ 22,115, at 28,469. The Board found American Cable to be "procedurally distinguishable." Id. at 28,469 n.3.

In NLRB v. Gibson Prods. Co., 421 F.2d 156 (5th Cir. 1969) (per curiam), the court remanded to the Board for consideration in light of American Cable and the guidelines set out in Gissel. On remand, 185 N.L.R.B. No. 74 (Aug. 27, 1970), 1970 CCH NLRB Dec. ¶ 22,299, the Board respectfully disagreed with the court's American Cable holding that "no bargaining order should issue unless at the time such an order is directed the Board 'finds the electoral atmosphere unlikely to produce a fair election . . . .'" 1970 CCH NLRB Dec. ¶ 22,299, at 28,761. To the contrary, the Board found that such a rule "would render a
attempted to put the remedy of a bargaining order in the proper perspective:

The Court in *Gissel* thus placed bargaining orders based on a card majority in a special category: an extraordinary remedy available to the Board to overcome the polluting effects of the employer's unfair labor practices on the electoral atmosphere. The order is not a traditional punitive remedy, but is a therapeutic one. It is not, therefore, the type of remedy which is automatically entitled to enforcement at any time after the occurrence of the unfair labor practice. . . . On the contrary, the Supreme Court indicated that an open free election rather than a bargaining order is the preferred remedy if such an election is possible.126

*L. C. Cassidy & Son, Inc. v. NLRB*127 is one of the few cases to date in which a court has actually refused on final determination to enforce the Board's bargaining order.128 In *Cassidy*, the union demanded recognition based upon authorization cards from seventeen of thirty-two employees in the unit. The union petitioned for an election, which it subsequently lost eighteen to ten. During the organization period, the employer held bi-monthly meetings with the employees. The trial examiner found that, although these meetings themselves did not violate the Act, and although the employer made no threats of reprisals in the event of a union victory, the employer did make "implied promises of benefits conditioned on renunciation of the Union."129 The trial examiner concluded that this conduct, in violation of § 8(a)(1), caused the dissipation of the union's majority. Consequently, a sufficient basis for a bargaining order was established. The trial examiner dismissed that portion of the complaint alleging a violation of § 8(a)(5).

The court agreed that a bargaining order is an appropriate remedy for § 8(a)(1) violations, but only "where the employer has engaged in flagrant unfair labor practices so outrageous and pervasive and of such nature that the resultant coercive effect cannot be eliminated by traditional remedies."130 Such was not the case here. Unlike the situation in *Gissel*, the employer's refusal to bargain in this case was not compounded by threats of reprisals and wrongful discharges, or other egregious unfair labor practices which would preclude the holding of a fair election.

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126. 427 F.2d at 448.
127. 415 F.2d 1358 (7th Cir. 1969).
128. The court in NLRB v. Steele Apparel Co., 437 F.2d 933 (8th Cir. 1971), also refused on final determination to enforce a bargaining order. The court found in that case, however, that the order was based upon ambiguous authorization cards and also that the employees were told that the cards would be used to get an election. Consequently, its consideration does not properly belong among the Gissel line of cases.
129. 415 F.2d at 1360.
130. Id. at 1365. See text accompanying note 44 supra.
Unlike most cases, involved a large bargaining unit, consisting of some one hundred fifty-five employees. It is of particular importance because it stands for the proposition, inter alia, that in determining the propriety of a bargaining order the Board should not examine isolated unfair labor practices out of context, but should determine their effect on the unit as a whole. Only in this manner can the Board accurately determine whether or not a fair election or rerun can be held.

In Drives, the union obtained cards from eighty-four of the one hundred fifty-five employees in the unit. Following a demand for recognition, but prior to the employer's refusal to recognize, the union petitioned for an election which it subsequently lost, seventy-two to fifty-three. The union filed six unfair labor practice charges after its election loss. Of these, three were withdrawn and two others were disallowed. The trial examiner recommended, and the Board issued, a bargaining order based on violations of §§ 8(a)(1), (2), (3) and (5).

The Seventh Circuit determined that there were separate incidents involving six individual employees and various incidents involving the entire unit upon which the Board based its decision. One of the six individuals was told that "'anyone caught signing [authorization cards] in the plant or distributing them out would be disposed of.'" Another was told that if he were caught discussing the union he could be fired, to which he replied that he knew his rights. A third employee was given the impression that union activities were under surveillance and was told that if the union were successful, the employees would lose their bonuses, make less money and "'the company would probably close the doors.'" That same employee was denied time off from work to attend a labor representation proceeding and, a week later, was constructively discharged. Another employee was also denied time off to attend the hearing and subsequently resigned. A former employee who was also a union activist was denied reinstatement despite a rapid turnover of employees. The last of the six employees was questioned by a foreman, who was also a good friend of the employee, about his union sentiments, and told that unionization would probably cause the company to lose customers. Other remarks were made to this employee which were interpreted by the trial examiner to be threats. Finally, the trial examiner found that a wage increase which the employee was to have received was withheld pending the outcome of the election.

In addition to these individual incidents, all of which were found to be

132. 440 F.2d at 357.
133. Id.
134. Id.
in violation of § 8(a)(1) and, in the case of the constructive discharge, of § 8(a)(3), the Board found that the employer had violated § 8(a)(2) by illegally assisting a "so-called Advisory Board." Finally, the Board found a violation of § 8(a)(1) in an implied promise of benefits in the form of improved working conditions made shortly before the election. The latter violation consisted of a survey requesting information about the working conditions at Drives and stated that "consistent with our financial ability" improvements would begin as soon as possible. Also, two days before the election, a statement was made to the effect that the company wanted to change conditions that bother the employees.

The court held that the findings that the employer had violated §§ 8(a)(1), (2) and (3) were supported by substantial evidence. In so finding, however, it noted that of the six individuals involved, none were "actually intimidated or even discouraged from continuing to support the union." The court also took note of the fact that statements were "hardly more than expressions of opinion." With respect to the survey and related statements, the court agreed with the Board that these constituted an implied promise of benefit.

Having made the above findings, the court applied them to the question of what caused the union loss, and found that "[t]he Board directed no attention to the possibility that Respondent's employees might well have voted to reject the union even if Respondent had not committed any unfair labor practices." The court found that such might well have been the case. In this respect, the court criticized the Board for, in effect, using the language of Gissel, while applying the pre-Gissel test by automatically finding a § 8(a)(5) violation arising out of the §§ 8(a)(1), (2) and (3) violations.

The court, however, determined on its own that the Board's holding was correct under Gissel standards. It held that the employer's unfair labor practices were serious and, even absent a § 8(a)(5) violation, a bargaining order would be appropriate. Further, the court noted that the employer should not be permitted to profit from his wrongdoing. For these reasons, the court decided to enforce the bargaining order.

135. There was, however, no contention that this violation influenced the outcome of the election. Id. at 359.
136. Id. at 359-60.
137. Id. at 360.
138. Id. at 361.
139. Id. at 362.
140. Id. at 365.
141. Cf. NLRB v. L.B. Foster Co., 418 F.2d 1 (9th Cir. 1969), cert. denied, 397 U.S. 990 (1970), where the court granted enforcement despite a three-year delay. The court held that "to deny enforcement . . . is to put a premium upon continued litigation by the employer." 418 F.2d at 4.
The court did point out, however, that a bargaining order alone would not sufficiently protect the interests of the employees. As noted above, the court indicated that it was not entirely convinced that a majority of the employees would have, under any circumstances, voted for the union. This, coupled with the fact that some four years had elapsed, led the Board to modify the bargaining order by requiring that the employees be notified of their right to reject the union after a reasonable time by petitioning for a secret ballot election.

In *NLRB v. M. H. Brown Co.*, the Second Circuit emphasized the seriousness of a bargaining order by carefully examining the Board's factual determinations. The Board had found violations of § 8(a)(1) and § 8(a)(3) based upon alleged interrogations of employees by the company president, promises and granting of wage increases and fringe benefits, and the layoff of a seven man shift, all after the union's demand for recognition. After reviewing the Board's findings, the court concluded that the record did not indicate that any substantial violations of the Act had occurred.

The court held that the employer's conversations with the employees were protected by the rule set forth in *NLRB v. Dorn's Transportation Co.*, in that they were held purely for general informational purposes, and not for the purpose of obtaining information as to the union sentiment of individual employees. The court also relied on the fact that there was no history of hostility to unionism on the part of the employer. With respect to the alleged illegal increase in benefits and layoffs, the court found that the former was contemplated prior to the advent of union activity and that the latter was caused solely by a decline in business.

The importance of a bargaining order for all concerned—the union, the employer and the employees—cannot be underestimated. As the cases discussed in this section indicate, such an order must be firmly buttressed by both the law and the facts. These court of appeals decisions clearly demonstrate that, in at least some cases, the Board is not discharging its obligations when it issues bargaining orders.

The purpose of *Gissel* was not to have the Board continue to apply the *Joy Silk* doctrine using *Gissel* language. Rather the Supreme Court intended that the Board carefully examine the effect of an unfair labor practice upon the electoral atmosphere. The test, as *Gissel* makes abundantly clear, is whether or not, under the totality of the circumstances, a fair election or rerun could be held. While the Board phrases its deter-

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142. 441 F.2d 839 (2d Cir. 1971).
143. 405 F.2d 706 (2d Cir. 1969).
144. "[W]here the employer asserts a business justification for the layoffs, some basis for concluding that they were motivated at least partially by anti-union considerations must be shown." 441 F.2d at 843.
mination in terms of the possibility of a fair election, it has yet to focus on the issue.

In General Stencils, the court suggested to the Board that it adopt a consistent, clear and explicit approach to this issue. In Alaska Development, the court informed the Board that it was not giving sufficient consideration to the “extensiveness” of the unfair labor practices in determining their effect upon the electoral atmosphere. In American Cable, the court warned the Board that this area of labor law is far too important for “formalistic and perfunctory treatment.” In Cassidy, the court found the Board’s attitude toward bargaining orders to be far too frivolous and indicated that the Board should be less quick to grant them. In Drives, the court made the findings and handed down the type of analysis which the Board should have made in the first place. In M.H. Brown, the court determined that the Board was not giving adequate consideration to all of the facts presented to it. In each case, the court has suggested that the Board is not giving sufficient consideration to the context in which the cases arise and, further, that it is not giving sufficient consideration to mitigating factors. In short, the courts are warning the Board that it has not properly embraced the Gissel doctrine.

III. Conclusion

If during the course of an organization campaign the employer commits compound unfair labor practices (i.e., multiple violations of § 8(a)(1) or a combination of §§ 8(a)(1) and (3) violations), and if there are no substantial mitigating factors, the Board will issue an order requiring the employer to bargain with the union upon request. The conclusion is inescapable that under these circumstances the Board will inevitably find a violation of § 8(a)(5).

In most cases, the courts will defer to the Board’s expertise in fashioning remedies and will enforce the bargaining order. Some of the more recent cases, however, have indicated that the courts are less than satisfied with the Board’s application of the Gissel doctrine. In addition to criticizing the Board’s analysis of the Supreme Court’s order, the courts have indicated that the Board may be applying the Gissel doctrine too inflexibly.

145. See text accompanying notes 117-19 supra.
146. See text accompanying notes 120-21 supra.
147. See text accompanying notes 122-26 supra.
148. 427 F.2d at 449.
149. See text accompanying notes 127-30 supra.
150. See text accompanying notes 131-41 supra.
151. See text accompanying note 142 supra.
152. See part II(D) supra.