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THE FAILURE OF *GISSEL* BARGAINING ORDERS

*Terry A. Bethel**
*Catherine Melfi***

I. INTRODUCTION

The principal responsibility of the National Labor Relations Board[1] ("NLRB" or "Board") is to safeguard the right of private sector employees to choose whether they will be represented by labor unions. Much of the Board's activity centers around the conduct of so-called representation elections,[2] in which employees cast ballots for or against union representation.[3] In the typical case, the election follows several weeks or even months of campaigning, both by the employer and by the union that seeks representative status.[4]

The campaigns are often quite spirited, with both the employer and union appealing to employee sentiment through the use of written propaganda, impassioned speeches, movies and various other tactics. Indeed, the representation of employer interests in such

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1. The NLRB was created for the express purpose of implementing the government's labor policies embodied in the National Labor Relations Act. *See* 29 U.S.C. § 153(a) (1994).

2. *See* JULIUS G. GETMAN & BERTRAND B. POGREBIN, LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE 16-17 (1988); *see also* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 40-41 (1976).

3. A review of the Board's procedures and its regulation of representation campaign tactics is beyond the scope of this article. For a thorough discussion see GETMAN & POGREBIN, *supra* note 2, at 16-95 and GORMAN, *supra* note 2, at 40-92.

4. For a general discussion on campaign processes see GETMAN & POGREBIN, *supra* note 2, at 16-79.

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campaigns has become a lucrative business, spawning the growth of both law firms and management consulting businesses.[5]

The campaigns do not always merely appeal to the reason of the electorate. Skittish employers sometimes, often with the assistance of attorneys or consultants, use threats, promises of benefits or even more drastic tactics as a way of influencing employee attitudes. It is the Board's responsibility to regulate such conduct, which it does principally through its unfair labor practice authority.[6]

The National Labor Relations Act[7] ("NLRA") outlaws employer conduct that coerces, threatens or otherwise interferes with the employees' right to choose union representation.[8] In addition, it forbids discrimination against employees on account of their union sympathies.[9] It is these two unfair labor practices, sections 8(a)(1)[10] and 8(a)(3),[11] that carry most of the load for employer misconduct in union representational campaigns.

The extent to which employer speech can constitute an unfair labor practice has been a matter of much controversy within the NLRB and between it and the federal courts.[12] Even though the line may be hard to draw, there is a general agreement that at *some* point, employer speech can become sufficiently threatening to

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5. For a review of some of the problems associated with such enterprises and the Board's mixed success in regulating them, see Terry A. Bethel, *Profiting from Unfair Labor Practices: A Proposal to Regulate Management Representatives*, 79 NW. U. L. REV. 506, 509 (1984).

6. *See* 29 U.S.C. §§ 158, 160 (1994). In addition to its unfair labor practice authority, the Board can sanction some election misconduct merely by setting the election aside and ordering a new one. *See* Gorman, *supra* note 2, at 46-49.

7. 29 U.S.C. §§ 151-168 (1994).

8. *See* 29 U.S.C. § 158(a)(1).

9. *See id.* § 158(a)(3).

10. Section 8(a)(1) states:

> It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain or coerce employees in the exercise of rights guaranteed in section 157 of this title.

Id. § 158(a)(1).

11. Section 8(a)(3) states:

> It shall be an unfair labor practice for an employer —
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Id. § 158(a)(3).

12. *See* GORMAN, *supra* note 2, at 148-51.

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interfere with free choice.[13] In addition, the Board has held that employer conduct (as opposed to speech) can sometimes threaten employees in the exercise of their rights.[14] Finally, the NLRA protects employees who are discharged or otherwise discriminated against in retaliation for their union proclivities.[15]

Discovering such unlawful acts is only part of the Board's authority. Additionally, it has both the power and the responsibility to remedy the resulting harm.[16] The Board has no power to punish employers who engage in unlawful conduct, even if they do so deliberately.[17] Rather, its remedial power is restorative, not punitive.[18]

The typical remedy for speech or conduct that threatens employees is to post a cease and desist order promulgated by the Board.[19] Other remedies include reimbursement for lost wages or benefits and assurances that the employer will not repeat its unlawful conduct.[20] The Board also has the power to reinstate employees who are discharged for their union activity, a remedy of dubious utility[21]

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13. *See id.* at 148-51; *see also* NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 616-20 (1969).

14. *See* GORMAN, *supra* note 2, at 137-42.

15. *See id.* at 137-42.

16. *See* GETMAN & POGREBIN, *supra* note 2, at 72-73.

17. *See id.* at 73.

18. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). *See generally* GETMAN & POGREBIN, *supra* note 2, at 72-79. The Board's remedy power is spelled out in 29 U.S.C. § 160(c), which says that, upon a finding of unfair labor practice, the Board shall have the power to:

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

29 U.S.C. § 160(c).

19. *See* GETMAN & POGREBIN, *supra* note 2, at 73.

20. *See* 29 U.S.C. § 160(c).

21. Two separate studies found that most employees who were ordered to be reinstated never actually returned and, of those who did, over three quarters leave within a relatively short time. The first study was conducted in the early 1960's by former congressman, then graduate student, Les Aspin. It is summarized in *Hearings on H.R. 11725 Before the Special Subcomm. on Labor of the Comm. on Education and Labor*, 90th Cong., 1st Sess. 3-12 (1967). The results of the second study are reported in Elvis C. Stephens & Warren Cheany, *A Study of the Reinstatement Remedy Under the National Labor Relations Act*, 25 LAB. L.J. 31 (1974). For a discussion of these studies and the NLRB's general remedial effectiveness see Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

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Often, the representation election is delayed pending resolution of charges that the employer has committed an unfair labor practice.[22] If the Board discovers unlawful conduct only after the election, it has the authority to set the election aside and order a new one.[23] In either case, the Board's response is of questionable value. Most observers believe that the delay which attends investigation and prosecution of pre-election misconduct works to the advantage of employers.[24] In addition, while employers win more elections than unions, the employer success rate is even greater in rerun elections.[25]

In particularly egregious cases, the Board has what it considers to be its most significant and most potent remedy: the *Gissel* bargaining order.[26] This remedy acknowledges that other remedial measures are not always effective in restoring the status quo. Sometimes, the Board speculates that the employer's conduct will have been so outrageous that mere cease and desist orders and reinstatement orders will not dissipate the harm. In those cases, it is not possible to hold a free election, since the "laboratory conditions"[27] that surround the process have been destroyed.[28]

The Supreme Court's opinion in *Gissel* approved the NLRB's practice of ordering employers to bargain as a remedy for their serious unfair labor practices when two conditions are met.[29] First, the Board must determine that the employer's conduct has destroyed any prospect of a free election.[30] Most labor law scholarship discussing *Gissel* bargaining orders have dealt with the Board's difficulty in defining when this criterion is satisfied.[31] If the Board clears that hurdle, it can order the employer to bargain as a remedy for its

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22. *See* GETMAN & POGREBIN, *supra* note 2, at 27-28.

23. *See* GORMAN, *supra* note 2, at 47.

24. *See Gissel*, 395 U.S. at 611 n.30.

25. *See* Daniel H. Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C. L. REV. 208 (1963).

26. Although bargaining orders existed prior to the Supreme Court's opinion in *Gissel Packing*, they were expressly approved by the Court in that case. *See Gissel*, 395 U.S. at 616.

27. In *General Shoe Corp.*, 77 N.L.R.B. 124 (1948), the Board spoke of its election procedure as a "laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *Id.* at 127.

28. *See generally Gissel*, 395 U.S. 575 (1969).

29. *See id.* at 579.

30. *See id.* at 613-15.

31. *See, e.g.*, Jacqui C. Hood, *Bargaining Orders: The Effect of* Gissel Packing Co., 32 LAB. L.J. 203, 210 (1981); Lawrence F. Dopplet & Jeffrey Ladd, Gissel Packing Co.—*The NLRB Applies the Standards*, 49 CHI.-KENT L. REV. 161, 164 (1972).

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unlawful conduct if it finds that, as some point, the union enjoyed majority status.[32] The Board usually makes this determination by asking whether a majority of employees in the unit signed union authorization cards, typically used by the union as a way of obtaining an NLRB election.[33]

The Board assumes that the *Gissel* bargaining order will restore the status quo by establishment of the collective bargaining relationship that the employer's unlawful conduct destroyed.[34] Some of the Board's assumptions about the creation of such relationships have been examined by Professor Laura Cooper.[35] Little has been done, however, to examine the validity of the Board's assumptions about whether the relationship will endure and how employees, employers and unions will react.[36]

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32. *See Gissel*, 395 U.S. at 610.

33. Unions obtain such signatures during the early stages of the organizational drive. The NLRB requires that the union make a substantial showing of interest in order to petition for an election, which usually equates to signed cards from 30% of the employees in the proposed bargaining unit. The cards employees sign are ordinarily regular union membership applications and are not limited in scope to the election process. Indeed, if more than half of the employees sign, the employer can recognize the union based solely on the cards. *See Gissel*, 395 U.S. at 595-610 (discussing generally the use of these cards).

34. *See id.*

35. *See generally* Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's* Gissel *Decision*, 79 NW. U.L. REV. 87 (1984). Professor Cooper tested the Board's assumption in *Gissel* that a union that obtains a majority of union authorization cards would have won the election, absent the employer's unfair labor practice. *See id.* at 114-41. She found that a union with a bare majority of union authorization cards was actually more likely to lose an election than to win it. *See id.* at 137. In fact, unions did not have an even chance of winning an election until it had cards from almost 63% of the employees. *See id.* at 119. Moreover, once a union has cards from 70% of the employees, the union's chance of winning does not improve significantly with an increase in the number of cards signed. *See id.* at 119. Even unions that had cards from over 90% of the employees won only 65.7% of the time. *See id.*

36. There are three other studies that address similar problems. *See* Benjamin Wolkinson, *The Remedial Efficacy of NLRB Remedies in* Joy Silk *Cases*, 55 CORNELL L. REV. 1 (1969); Rosemary O'Shea, *Gissel* Bargain Orders (1982) (unpublished LL.M. thesis, Harvard University) (on file with author); Benjamin Wolkinson et al., *The Remedial Efficacy of* Gissel *Bargaining Orders*, 10 INDUS. REL. L.J. 509 (1989).

The first Wolkinson study examines the effectiveness of bargaining orders issued under a *Gissel* forerunner, *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950). *See* Benjamin Wolkinson, *The Remedial Efficacy of NLRB Remedies in* Joy Silk *Cases*, 55 CORNELL L. REV. 1 (1969). The *Joy Silk* decision reiterates established precedent. *See id.* at 5. Under *Joy Silk*, the Board issued a bargaining order whenever an employer rejected a union claim to majority status without a good faith doubt that the union enjoyed majority status. *See id.* at 3. Thus, in order to obtain a *Joy Silk* Order, the Board did not have to find the employer guilty of unfair labor practices that were calculated to destroy the union's majority status. *See id.* at

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5-6. In fact, the Board did not have to find that the union's majority had been destroyed, which is a key tenet of the *Gissel* case. *See id.* at 6. Wolkinson's study, then, included cases in which the union retained its majority. *See id.* By contrast, our work focuses on unions that, the Board has found, no longer have a majority at the time the bargaining order issues. Interestingly, the Board abandoned the good faith doubt standard of *Joy Silk* in the *Gissel* case. *See* O'Shea, *supra*, at 7. Its position was later supported by the Supreme Court in *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

The unpublished Harvard LL.M. thesis written by Rosemary O'Shea also addresses similar issues. *See* O'Shea *supra*. It was this work that Paul Weiler relied on to suggest that *Gissel* orders are not effective remedies. *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1795 (1983). Like us, O'Shea sought to determine whether *Gissel* Order unions retain their representative status to bargain a contract. *See* O'Shea, *supra*. Although her study is interesting, it was quite limited in scope and was not conceived and executed in accordance with the tenets of the scientific method. *See id.* at 54. O'Shea located the names of 90 attorneys from NLRB case records between 1976 and 1980, and wrote to all of them. *See id.* She received 38 responses. *See id.*

Finally, a more recent study by Wolkinson examines many of the issues that we address, including a short overlap in study periods. *See* Benjamin Wolkinson et al., *The Remedial Efficacy of* Gissel *Bargaining Orders*, 10 INDUS. REL. L.J. 509 (1989) [hereinafter Wolkinson et al.]. Wolkinson et al. studied a sample drawn from the three and one-half year period between January 1981 and July 1984. *See id.* at 514. Our study group includes 1981 and (because we chose to study NLRB fiscal years) the first nine months of 1982.

Although it is not entirely clear how Wolkinson et al. chose their study group, their process for identifying cases seems seriously flawed. Unlike our study, which identified all of the *Gissel* orders issued over a four year period, Wolkinson et al. selected a sample of 47 cases, apparently drawing all of them from cases that had been reviewed by courts of appeals. *See id.* at 514. The authors assert that this represents all *Gissel* appellate decisions during that period and further claim that they could not identify more cases because the Shepards citation system does not list open cases. *See id.* at 514 n.17. It is not clear what the authors mean by that assertion. It is true that Shepards would not list the results of an appellate decision until after the court ruled. But the NLRB Shepards would list the Board's decision and then simply note that it had been appealed. We located many of our cases in this manner.

One must question whether the authors' methodology identified all of the cases issued from 1981 to mid-1984 and whether the cases they did find are a representative sample. Our research disclosed many more cases, 110 of which were reviewed by the courts. In fact, our research uncovered 49 appellate opinions, 36 of which enforced *Gissel* orders, from January 1981 through September 1982, a period equal to only half of the Wolkinson et al. study period. Since the Wolkinson study period would include those cases, it seems unlikely that there were only 47 such cases in the three and one-half years they studied. The emphasis on appellate cases might also skew the results, a possibility Wolkinson et al. acknowledge in their article. *See id.* More than a third of *Gissel* orders are not appealed, and it may be that the employers most likely to resist collective bargaining at all costs are the ones most likely to appeal. *See id.* at 514. If nothing else, it further delays the obligation to bargain.

One must also question the Wolkinson et al. assertion that the authors could not study many unappealed NLRB decisions because the cases were not "closed." *See id.* The authors do not reveal what they mean by "closed." Of course, if the employer had appealed to the courts, the case would remain open and, during the appeal, there would be no bargaining. Such cases should be excluded. It may be, however, that the authors excluded cases merely because the NLRB had not closed its case file. This would be a peculiar reason to exclude a case from the study. After some period of time, the Board has a compliance officer investigate whether the employer has complied with the Board's order. It is not realistic,

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This paper examines the durability of collective bargaining relationships established by *Gissel* Bargaining orders. By studying the results obtained in most relationships established by the Board over a four year period, we are able to offer answers to questions which the Board has only speculated. In short, we are able to present evidence, contrary to NLRB assumptions, that the *Gissel* bargaining order does not lead to productive collective bargaining relationships that protect the rights of employees who were subject to serious unfair labor practices.

II. Data Collection

We chose to study the population of *Gissel* bargaining orders the NLRB issued during its fiscal years of 1979, 1980, 1981 and 1982.

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however, to assume that nothing has happened just because the Board has not closed its file. Our research indicated that some cases remained open because the employer had refused to comply (though in no case did the Board seek contempt sanctions). Surely such cases should be included in an examination of bargaining order effectiveness. In addition, we were not able to identify any common standard for when regional offices would close case files. It seems likely, then, that Wolkinson et al., who studied only five unappealed orders, grossly understated the number of bargaining orders in their study period.

Wolkinson et al. collected data about the cases in their study group solely by contacting union representatives. *See id.* By contrast, we contacted union representatives, employer representatives and, in some cases, attorneys for both sides. This broader group of contacts not only allowed us to obtain information about more cases, but also allowed us to check the validity of information received from one side or another.

Finally, Wolkinson et al. include in their study group eight cases in which they assert that *Gissel* orders "resulted from informal NLRB settlements." *Id.* at 514. We made no attempt to identify cases in which employers agreed to bargain as a result of voluntary settlement of unfair labor practice charges because we believed that such data have no place in a study of the effectiveness of *Gissel* bargaining orders. Our interest was in assessing the effectiveness of bargaining orders mandated by administrative or judicial orders. Cases in which employers agree to bargain voluntarily as part of a settlement contribute little. When the settlement is reached before hearing, it is not clear that the employer's alleged unfair labor practices, if proven, would even have justified an order. Moreover, since the election may have been delayed pending resolution of the unfair labor practice charges, it is not even clear that the union would have lost the election, had one been held. In short, there has been no determination by the Board that the employer has committed unfair labor practices or that the unfair labor practices would have been sufficient to undermine the union's majority status. Many representation cases include unfair labor practice charges and in most of those cases the General Counsel negotiates with the respondent-employer about the action it is willing to take to remedy an alleged violation. If the General Counsel has strong evidence of majority status, it is hardly surprising that some employers agree to bargain and forsake the administrative hearing process. But one must question whether the typical *Gissel* order employer would so readily concede.

Other comparisons between our study and the Wolkinson et al. study appear at the appropriate places in this article.

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We selected these four years principally for two reasons. First, we knew that enforcement of NLRB unfair labor practice orders can be time consuming, especially when one party seeks judicial review of the Board's order.[37] By selecting cases that were several years old, we believed that all enforcement activity would be completed and that the parties would have had sufficient time to bargain, if bargaining was to occur. This assumption proved to be valid for all but a few cases, in which judicial and administrative proceedings dragged on for unusually long periods of time.

The second reason we chose the years in our study is because they represent a time of transition for the NLRB.[38] The criteria that warrant issuance of a *Gissel* order have been the subject of much debate among scholars and, to some extent, between the NLRB and the courts.[39] It is inaccurate, however, to think of the NLRB as a stable body that applies neutral principles to particular fact situations. The members of the Board are appointed by the president to staggered five year terms[40] and, not surprisingly, the policies implemented by a particular panel tend to reflect the social and economic philosophy of the incumbent administration.[41]

Historically, panels appointed by Republican administrations have been perceived as more partial to management, while those appointed by Democrats have tended to favor unions. One might surmise, then, that such predilections would affect the way in which the panels apply *Gissel* bargaining order criteria. The study period reflects a shift from so called liberal Board members (not all of whom were appointed by Democratic presidents) to a conservative panel dominated by Reagan appointees. We do not suggest that the decisions rendered in the study period represent a perfect balance between conservative and liberal majorities. They do, however, demonstrate a period in which the political philosophy of the Board members changed markedly. From 1979 into 1981 the Board was

37. *See, e.g.*, Benjamin W. Wolkinson et al., *The Remedial Efficacy of* Gissel *Bargaining Orders*, 10 INDUS. REL. L. J. 509, 517 (1988).

38. *See* Terry A. Bethel, *Recent Decisions of the NLRB—The Reagan Influence*, 60 IND. L.J. 248, 248-54 (1985).

39. *See id.*

40. *See* 29 U.S.C. § 153 (1994).

41. The staggered terms, however, often overlap into a change in administration, meaning that appointees from two or more presidents might be on the Board at the same time. Thus, the Board has seldom acted with unanimity in the development of controversial policies.

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controlled by members who were perceived as favorable to labor's interests. By the end of 1981, President Reagan had made appointments, which started to shift the balance of power. Reagan appointees controlled the Board by the end of 1982, a change that prompted many reversals of Board policies and provoked an outcry from organized labor.[42]

Our initial intent had been to select a representative sample of *Gissel* orders issued during each of the four years of the study period. Based largely on information included in NLRB Annual Reports, we believed the Board issued more than 100 *Gissel* orders each year. The 1979 report, for example, asserted that during the fiscal year the Board initiated bargaining by remedial order in 138 cases.[43] That number, however, included bargaining orders that were unrelated to *Gissel* criteria.[44] The number of *Gissel* orders proved to be much smaller.

We began with the Classified Index of National Labor Relations Board Decisions which lists *Gissel* order cases under the heading of orders issued "To Remedy ULPs Which Preclude A Fair Election."[45] In order to cross check for accuracy, we ran a Lexis[46] search using a variety of word combinations, which produced a number of decisions that had not been listed in the Classified Index. Ultimately, we determined that the Board had issued 176 *Gissel* bargaining orders during the study period.

We read each case and collected information which included the unit description, the number of employees in the bargaining unit, the nature of the business and its location, the strength of the union's support as reflected by the number of authorization cards signed by employees in the unit, the results of the election (if any) and the kinds of unfair labor practices the employer committed. We

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42. *See* Bethel, *supra* note 38, at 227 (giving a more thorough review of some of the Reagan Board's more controversial decisions).

43. *See* NATIONAL LABOR RELATIONS BOARD, FORTY-FOURTH ANN. REP. 274 tbl. 4 (1979).

44. *See, e.g., id.* (discussing the 138 instances in which the board initiated bargaining by remedial orders, including cases in which the union had won the election but the employer refused to bargain).

45. NLRB, CLASSIFIED INDEX OF NATIONAL LABOR RELATIONS BOARD DECISIONS AND RELATED COURT DECISIONS, 1977-1979, §§ 625-6612 (1979); NLRB, CLASSIFIED INDEX OF NATIONAL LABOR RELATIONS BOARD DECISIONS AND RELATED COURT DECISIONS, 1980-1982, §§ 625-6612 (1982).

46. Lexis is a data base which includes all NLRB decisions issued since 1972.

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also collected the date of the union's demand for recognition, the date the election petition was filed (if any) and the date of the decision. We also Shepardized[47] each case to determine whether it had been reviewed by the court of appeals.

Appellate review of NLRB decisions is not unusual. Board decisions are not self executing.[48] If there are doubts about employer compliance, the General Counsel's only recourse is to seek enforcement in the federal courts of appeals.[49] Moreover, any party adversely affected by a final order of the Board in an unfair labor practice case may request review by the courts,[50] an option that employers sometimes elect, especially in fiercely contested cases like those which lead to *Gissel* orders. Of the 176 cases in the study period, the courts of appeals reviewed the Board's order in 108 or about 61%. This would appear to be significantly higher than the incidence of review for all unfair labor practice cases.[51]

We collected the appellate decisions affecting cases in the study group and read each of them.[52] When the courts ordered further NLRB proceedings, we found those opinions and read them, as well as any additional appellate opinions. In all, the courts refused enforcement of the bargaining order in 32 cases, leaving a total of

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47. Shepards Citations is a publication by Shepard's/McGraw-Hill, Inc. that identifies, among other things, whether a case has been appealed and, if so, whether it was affirmed, reversed or otherwise modified.

48. *See* Benjamin Wolkinson, *The Remedial Efficacy of NLRB Remedies in* Joy Silk *Cases*, 55 CORNELL L. REV. 26 (1969).

49. *See* 29 U.S.C. § 160(e) (1994).

50. *See id.* § 160(f).

51. It is difficult to speculate about the percentage of unfair practice orders that are actually reviewed by the courts of appeals. The NLRB annual reports track the number of cases decided each year, but they do not reveal how many of those cases are reviewed. The annual reports do report the number of cases decided by the courts in a fiscal year, but the delay inherent in judicial review means that most of those cases were handled by the Board in previous fiscal years. About the most one can do is observe the number of cases decided by the Board and the number of judicial decisions over a period of time. For example, in the four year period of this study, the Board decided 4502 unfair labor practice cases. In that same time period, the courts reviewed 1713 cases. If all of these numbers involved the same cases, that would be a review rate of only 38%. But, as already noted, no such figures are available. Nonetheless, these numbers indicate that the overall review rate is probably in the 40% range, meaning that *Gissel* order cases are more likely to be reviewed than most other unfair labor practice cases.

52. Most of the opinions were available in the Federal Reporter, an official case reporting service published by West Publishing Company. Some of the opinions were not reported officially, but were available in the Labor Relations Reference Manual, a case reporting service published by the Bureau of National Affairs. In a few cases, we obtained the appellate opinion through a Freedom of Information Act Request to the NLRB.

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146 cases in which the Board's order should have resulted in collective bargaining. However, we elected to exclude two of those cases.

Chief Justice Warren's opinion in *Gissel* raised the possibility of issuing *Gissel* orders in two different situations. Almost all of the cases have involved the so called *Gissel* category two ("*Gissel* II") orders. These are the cases in which the union must demonstrate that it once had majority status before the Board will order the employer to bargain as a remedy for unfair labor practices.[53] In *Gissel*, however, Chief Justice Warren seemed to say there could be cases in which an employer's actions were so outrageous and pervasive that a bargaining order would be warranted, even if the union never had majority support.[54]

Scholars have debated whether Warren's opinion should be read to authorize *Gissel* category one ("*Gissel* I") orders.[55] The Board, however, steadfastly refused to issue a bargaining order in the absence of a union majority until 1981, when it did so in response to a directive from the Third Circuit.[56] Subsequently, the Board embraced *Gissel* I orders of its own volition and issued such an order in its decision in *Conair Corp.*[57] In 1984, however, the Board abandoned that position in *Gourmet Foods, Inc.*,[58] disclaiming either the power or the inclination to issue such orders.[59]

The only two *Gissel* I orders in the Board's history were issued during the study period. *Conair* would have been excluded from the

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53. *See* NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 614 (1969).

54. The Court's discussion centered around a Fourth Circuit case in which the court speculated that a bargaining order would be issued without a showing of majority status. Chief Justice Warren said "[t]he actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter." *Id.* at 613. The Court then said that the Board had used a "similar policy" of issuing bargaining orders (a dubious pronouncement) and concluded "[t]he only effect of our holding is to approve the Board's use of the bargaining order in less extraordinary cases" in which a showing of majority status is required. *Id.* at 614.

55. *See, e.g.*, Daniel M. Carson, *The Gissel Doctrine: When a Bargaining Order Will Issue*, 41 FORDHAM L. REV. 85 (1972); Andrew A. Peterson, *Of New Employees and Old Violations: The Controversy over Changed Circumstances and Bargaining Orders*, 8 EMPL. REL. L.J. 52 (1982); David Stolow, Note, *NLRB Bargaining Orders in the Absence of a Union Majority*, 26 N.Y.U. L. REV. 291 (1981); Stephen R. Wall, Note, *Representative Bargaining Orders: A Time for Change*, 67 CORNELL L. REV. 950 (1982); Note, NLRB v. Gissel Packing Co.: *Bargaining Orders and Employee Free Choice*, 45 N.Y.U. L. REV. 318 (1970).

56. *See* United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. 772 (1981). The Third Circuit's opinion is reported at 633 F.2d. 1054 (3d Cir. 1980).

57. 261 N.L.R.B. 1189 (1982), *enforcement denied*, 721 F.2d 1355 (D.C. Cir. 1983).

58. 270 N.L.R.B. 578 (1984).

59. *See id.*

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study in any event, since the D.C. Circuit refused to enforce the bargaining order, meaning that there was no mandated collective bargaining relationship.[60] We also elected to exclude *United Dairy Farmers*[61] from consideration because the Board no longer issues such orders and our assumption is that inclusion of a non-majority case might skew the results obtained by majority unions. Although it would have been interesting to compare the experiences of *Gissel* I and *Gissel* II unions, the dearth of *Gissel* I cases made such a comparison impossible.[62]

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60. *Conair*, 721 F.2d at 1355.

61. 257 N.L.R.B. 772.

62. We also made a few decisions about the cases to be included in our original pool of 176. For example, there were a few cases in which the union won the election but, because of serious employer unfair labor practices, the Board also issued a bargaining order. These were typically cases in which the election had already been held but the votes had not been counted. The Board's order provided for certification in the event of a union victory and assumed that a loss was attributable to the employer's unlawful conduct. Thus, the union gained representative status either way.

We chose to exclude cases in which the union won the election, even if the employer's conduct was otherwise serious enough to warrant a *Gissel* order. One of the principal assumptions of a *Gissel* order is that the employer's unfair labor practices have undermined the union's majority or otherwise made a fair election impossible. A primary focus of our study is whether unions that lack a majority can muster sufficient employee support to bargain successfully. Unions that have won an election face no such hurdle.

The *Gissel* order alternative does indicate that the employer has committed serious unfair labor practices. These cases, however, are not necessarily distinguishable from other union election victories following unlawful employer campaigns in which the union elected not to file unfair labor practice charges. In short, our focus is on cases in which the *Gissel* order, complete with its underlying assumptions about the erosion of majority status, is the only method of securing bargaining rights.

We did, however, make one exception to this principle. There are some *Gissel* order cases in which the employer also independently verified the union's majority status. *See, e.g.*, Mazda of Anchorage, 253 N.L.R.B. 803 (1980); English Bros. Pattern & Foundry, 253 N.L.R.B. 530 (1980). Some cases have held that an employer which verifies a union's claim of majority has no right to insist on an NLRB conducted election. *See, e.g.*, Sullivan Elec. Co. v. NLRB, 479 F.2d 1270 (6th Cir. 1973). Rather, the Board can issue a bargaining order based on the employer's independent knowledge of majority status. *See id.* at 1272. Even though we chose to exclude cases in which the union won an election but also received a bargaining order, we decided to include cases where the bargaining order was based, alternatively, on *Gissel* or on independent verification.

Under the NLRA, the election is an event of particular significance. A union that wins an NLRB conducted election is certified as the exclusive representative and its majority status is virtually unchallengeable for one year. *See* ARCHIBALD COX ET AL., BASIC TEXT ON LABOR LAW 274 (11th ed. 1991). Our interest is in studying the success of unions that have not been able to win an election, but have nonetheless secured bargaining rights. As applied in all but two cases in the Board's history, a *Gissel* order requires that the union achieve majority status at some point in its campaign, but assumes that the majority has been lost because of the employer's unlawful conduct. In our view, it makes no difference if an employer verified

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Once we had established the pool of 144 cases in which bargaining was possible, we filed a Freedom of Information Act[63] request with the NLRB seeking the names and addresses of the parties for each of the cases and their counsel or other representatives. The Board cooperated fully by furnishing this and all other public information about the cases in the study group. We then developed a questionnaire which requested information about the effect of the *Gissel* order, including whether the parties had ever bargained; if so, over what period of time; whether they had reached an agreement and if so, would they furnish a copy; and whether the union still had representative status. If the union no longer represented the employees, we asked when and how it had lost that status, whether through decertification, abandonment, selection of a different representative or some other occurrence. Copies of the questionnaires are included as Appendix. We sent the questionnaire to both union and employer representatives supplementing the original requests by additional mailings and by telephone calls.

The purpose of our inquiry is to determine whether bargaining order unions can successfully protect employee rights, as assumed by the Supreme Court in *Gissel*. An initial problem is how to define success. Some might argue that the imposition of the order itself is a measure of success. By ordering the employer to bargain with the union, the government has created a legal relationship that will be regulated by statute. No matter how objectionable this might be to the employer, it cannot merely walk away from the union.

There may be some significance to the remedial order, standing alone. The purpose of the *Gissel* remedy, however, is not merely to sanction the employer or to demonstrate the power of the government. Rather, the Board's remedies are intended to undo the harm caused by the employer's unlawful conduct. At least part of the remedy's purpose then, is to secure lost opportunities for employees. A bargaining order which merely creates a formal relationship between an employer and a union may be of some significance, but such formalities are not the end envisioned by the Act.[64] Rather,

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the union's majority before it began its campaign to dissipate it. This situation differs markedly from the election cases in which the union was able to maintain its majority in spite of the employer's unfair labor practices.

63. 5 U.S.C. § 552 (1994).

64. *See generally* Note, NLRB v. Gissel Packing Co.: *Bargaining Orders and Employee Free Choice*, 45 N.Y.U. L. REV. 318 (1970).

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the question is whether the union has been able to bargain effectively on behalf of the employees.

The most obvious and least controversial measure of success is whether the union was able to negotiate a collective bargaining agreement. The purpose of the Act is to allow employees to choose collective bargaining representatives to act on their behalf.[65] Typically, unions provide such representation by negotiating contracts that protect wages and other benefits and provide employment security. We recognize that bargaining order unions may have less leverage than majority unions and that the agreements they negotiate might be inferior to those of majority unions. Nevertheless, execution of the agreement insures that the union will probably maintain its majority status for the duration of the contract, thus increasing the likelihood that the union's representative status will endure.

Another measure of success could be whether there was ever any bargaining between the employer and the union. Despite the Board's order to bargain, some bargaining order unions never do, apparently discouraged by the employer's tactics and the erosion of employee support. In other cases, the union abandons the relationship after only one or two meetings, during which, presumably, the employer maintained its opposition to any meaningful negotiations. There are cases, however, in which the parties bargain for several months or longer, even though they never reach agreement on a contract. One might argue that it is worth something for a union to force a recalcitrant (and law-breaking) employer to the bargaining table for an extended period, even if the negotiations are unsuccessful. At least the employees would see that the law provided some measure of protection to their effort to organize and bargain collectively.

We are dubious that such a symbolic measure has much worth. Despite the additional cost and time expenditure, the employer ends up with a non-union workforce, the goal it hoped to achieve through an unlawful campaign. Moreover, one might question whether the employees could ever be persuaded to support another organizational effort. Nevertheless, we acknowledge that a period of extended bargaining could have some positive effects. In such cases, the union has not simply walked away from the relationship.

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65. *See id.*

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Prolonged exposure at the bargaining table has some economic cost to the employer and, while the employees do not benefit tangibly from this expenditure, they witness their employer having to meet with the union as a result of both union and government efforts. Also, it is not necessarily the case that failure to reach agreement in such circumstances is the result of employer intransigence or union weakness. A significant percentage of elected unions also fail to produce a collective bargaining agreement. Thus, to account for the possibility that extended bargaining could be of some value, we considered a secondary measure of success for those unions that managed to force negotiations for a period of at least six months, even though the negotiations did not produce an agreement.

III. RESULTS

One of the most interesting findings from this study has already been discussed. Despite the attention given to *Gissel* bargaining orders, and the body of scholarship produced on the subject, they are relatively rare occurrences. In our four year study period, the Board imposed a *Gissel* order in only 176 cases, or an average of 44 times a year. This is a minute number when one considers that, during the same period, the Board decided 4502 unfair labor practice cases.[66] The number is even smaller when it is reduced by the orders not enforced in the Court of Appeals. When those 32 cases are subtracted, only 146 remain. Furthermore, as explained above, we reduced the number to 144 by excluding the *Gissel* I orders.

Of those 144, we were able to obtain information about 137 cases, which represents a 95% response rate.[67] Table 1 reports our findings concerning the success of bargaining order unions in negotiating contracts. Discounting the three severance-only contracts,[68]

66. The Board decided 1108 cases in fiscal 1982, 1028 in fiscal 1981, 1181 in fiscal 1980, and 1185 in fiscal 1979. These numbers include a small number of back pay determinations, jurisdictional disputes and supplemental proceedings. *See* NLRB, FORTY-FOURTH ANN. REP. (1979); NLRB, FORTY-FIFTH ANN. REP. (1980); NLRB, FORTY-SIXTH ANN. REP. (1981); NLRB, FORTY-SEVENTH ANN. REP. (1982).

67. We were not able to obtain complete data in each case. Thus, in some of the results, the number of cases will vary.

68. The severance-only contract means that the employer and union negotiated an agreement concerning the effect on employees of the employer's decision to close. *See, e.g.*, JULIUS G. GETMAN & BERTRAND B. POGREBIN, LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE 117-19 (1988). Obviously, these are not traditional contract negotiations since they will not establish terms and conditions of employment. Even heavily supported elected unions often have diminished leverage in such negotiations since a strike threat has

TABLE 1
CONTRACT VS. NO CONTRACT

Did not reach agreement on contract	105
Negotiated at least 1 contract	29
Negotiated severance-only contract	3
Contract status unknown	7
TOTAL	144

only 29 unions were able to negotiate collective bargaining agreements. This represents 21.2% of the number for which we have information (137) and 20.1% of the total (144). This is to be compared to Professor Cooke's study of the success rate of elected unions, which covered some of the same time period. In contrast to bargaining order unions, unions that were able to win an NLRB conducted election bargained a first contract about 77% of the time.[69]

Discouraging as these numbers are, it would still be a mistake to claim that bargaining order unions achieved a lasting collective bargaining relationship in one-fifth of all cases. Table 2 represents that status of the study group as of early 1990, when data collection ceased. Only 13 of the unions—or less than 10%—had retained their representative status. In nearly one half the cases—45.8%—the union abandoned the relationship, often with no or only minimal negotiations. Although no single cause could be determined, many union representatives complained that the delay, the employer's conduct or some combination of the two, had eroded the union's support so much that effective representation was no longer possible.

An additional thirteen unions were decertified by the employees, a number that might have increased had some unions not abandoned first. In addition, two bargaining order unions abandoned the relationship after they had negotiated a first contract with the

little effect against an employer that plans to terminate operations anyway. Because of this difference and because severance agreements often contain little consequence for employees, the three severance-only agreements in the study cannot be equated with those cases in which unions and employer bargained a collective bargaining agreement.

69. *See* WILLIAM N. COOKE, UNION ORGANIZING AND PUBLIC POLICY: FAILURE TO SECURE FIRST CONTRACTS 84 (1985).

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TABLE 2
STATUS OF BARGAINING ORDER UNIONS

Union still represents	13	9.0%
Union was decertified	11	7.6%
Union abandoned (no contract)	66	45.8%
Union abandoned after contract	2	1.4%
Employer withdrew recognition	1	0.7%
Employer closed	36	25.0%
Other	3	2.1%
Unknown	12	8.3%
TOTALS	144	100.0%

employer. The other cases are largely accounted for by employer closures, which occurred in one quarter of all cases studied.

The results for our alternate measure of success—bargaining for at least six months—appear somewhat brighter, at least at first glance. Of the 113 cases for which we could secure data on this issue, 38 or 33.6% said that bargaining lasted at least six months. Obviously, this number overlaps significantly with cases in which

TABLE 3
SIX MONTHS OR MORE OF BARGAINING

No	75	66.4%
Yes	38	33.6%

the parties actually reached a contract. Thus, if one combines both measures of success, only 35.4% of the respondents report that they either secured a contract or bargained for at least six months.

TABLE 4
SIX MONTHS OF BARGAINING OR CONTRACT

No	73	50.7%
Yes	51	35.4%

It would be a mistake, however, to claim "success" in 35% of *Gissel* bargaining relationships. In the first place, as already sug-

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gested, one might question whether unproductive bargaining is really a success, no matter how long the union lingers. Equally important, the six month measure is itself uncertain as it only surveys elapsed time and not the quality of bargaining or even the number of meetings, data that we could not obtain on a widespread basis. There are, however, cases in which the union persisted for six months or more even though it rarely met with the employer.

Although some unions did manage to bargain for a period of time, many more never bargained at all. In over 40% of the of the cases for which we have data, the union never sat down at the bargaining table.

TABLE 5

No bargaining	56	41.2%
Some bargaining (Includes cases resulting in contracts)	80	58.8%

In addition, other unions managed to bargain for less than a month, sometimes encompassing only one or two sessions.

TABLE 6
NUMBER OF UNIONS THAT BARGAINED FOR MORE THAN ONE MONTH

One month or less	63	55.8%
More than one month (Includes bargaining that resulted in contract)	50	44.2%

It is not enough to report raw numbers of success; dismal as the numbers are, we wanted to identify circumstances in which unions had succeeded, focusing principally on those relationships that had produced a contract. Although the small number of contracts achieved makes it difficult to generalize, we studied several variables to try and determine what factors, if any, contributed to the likelihood of success. We also made certain assumptions about which factors might lead to success, some of which were borrowed from the conventional wisdom of labor lawyers and the NLRB. The base assumption was that unions that enjoy the most support would be most likely to negotiate a contract. As already noted, under the principle of exclusive representation, a certified or recognized

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union bargains for all of the employees in the bargaining unit, whether they support the union or not. Although sometimes not articulated, a principal feature of the strength of a union's employee support is the union's ability to mount a plausible strike threat. A union that wins an election with a strong majority, for example, can credibly claim in negotiations that it will recommend a strike should the parties not reach an agreement. Even if the union makes no express threat, it is reasonable to assume that employers will view the size of the union's election majority as a factor in predicting the possibility of a successful strike.

Bargaining order unions do not have a comparable claim to majority status. They have either lost an election or have been unwilling to brave one. Even so, they have some claim to employee support, since the NLRB will not issue a bargaining order without determining that the union once had a majority. Even if that majority has been undermined by employer coercion, one might expect that the employees' one-time support for the union could be a factor in its ability to negotiate a contract. The intervention of the NLRB has, in theory, ameliorated some of the effects of the employer's unlawful campaign. Consequently, maybe the suppressed union support would resurface. If these assumptions are valid, then the strength of the union's employee support should influence the likelihood of success in bargaining a contract.

We recognize that employee support, standing alone, may not be a valid predictor. Thus, we also studied other factors that could affect both the support for the union and the effect of the employer's conduct. One might assume, for example, that union sympathists in large units might feel less visible to the employer and, therefore, be less susceptible to employer pressure than employees in small units. If this assumption is valid, then larger units should enjoy more success than smaller ones.

Unit size and union strength are not the only variables that could affect a union's chance of success. Other scholars have suggested that employers benefit from the delay that sometimes attends NLRB and related proceedings.[70] The ordinary assumption is that

70. Professor Cooper's data indicated that the length of the delay between card signing and election decreased the union's chance of success. *See* Laura Cooper, *Authorization Cards and Union Representation Selection Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's* Gissel *Decision*, 79 Nw. U. L. REV. 87, 120 (1984). In addition, Professor Weiler argues that "delay is fatal to the viability of a union organizing

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employee support for the union will erode over time, at least if the union has not been able to act on the employees' behalf. This is thought to be especially true when employee turnover is high. All of the cases in the study spanned substantial time periods, with the actual delay dependant on a variety of factors, including the length of the administrative procedure, the existence of judicial proceedings and, in some cases, a remand to the NLRB. Obviously, none of the unions had representative status during the period of delay, except for those cases in which the employers delayed bargaining even after all legal avenues were exhausted. Given the possibility of employee turnover, one might expect, then, that the longer the delay between the demand for recognition (which is when most unions had a card-based majority) and the enforcement of the order, the less the likelihood of success.

The intensity of the employer's unlawful campaign might also influence the union's success. This assumption is consistent with the basic theory of *Gissel*, which is that unlawful employer tactics will undermine employee support for the union. It is difficult to assess the severity of an employer's campaign. Moreover, our review of the study group makes it impossible for us to generalize about when the Board will find that its *Gissel* criteria have been satisfied. Merely counting the number of unfair labor practices in a case is not particularly revealing. Some offenses are trivial, isolated, and affect relatively few employees. One measure, however, is to count the number of serious unfair labor practices occurring in the campaign. We did this by tallying the number of "hallmark" violations in each case.[71] We also paid special attention to certain serious violations which the Board assumes are particularly egregious, like discriminatory discharge and threat of plant closure.

None of these factors stand in isolation. Obviously, factors such as delay and union strength are related. Units with high levels of employee support may be less affected by employer intransigence. Similarly, if one assumes that small units are more vulnerable to employer threats, it seems equally reasonable to believe that the intensity of the employer's campaign will compound the effect. Our

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drive." Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1793 (1983).

71. The hallmark unfair labor practices are discriminatory discharge, threat of discharge, promise of benefit, grant of benefit and threat of closure or closure. *See* NLRB v. Jamaica Towing, 632 F.2d 208, 212-13 (2d Cir. 1980).

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examination, then, focuses not merely on individual factors but also on interactions among potential influences.

In order to make our findings understandable to the widest possible audience, we will summarize them without reference to the scientific method, using tables where appropriate. It is important to note that we use multi-variable methods so that the influence of factors can be considered without any confounding from other factors.

A. Size of the Unit

There were few large units in the study group. Because the average NLRB bargaining unit tends to be small,[72] we considered all units in excess of 100 employees as large. Using that definition, the results are consistent with our assumption. That is, holding other factors constant, larger bargaining units are more successful than smaller units, a conclusion that holds true using either definition of success.

TABLE 7
AVERAGE SIZE

Average size of unit with contract	115.5
Average size of unit without contract	40.3
Average size over 6 mos. bargaining	87.9
Average size less 6 mos. bargaining	37.4

Thus, a union was more likely to bargain a contract in units of more than 100 employees than in smaller units. This may suggest that employees in larger units feel less vulnerable to employer retaliation or are more secure about maintaining their anonymity, thus

72. In fiscal 1981, for example, one of the years in the study group, the Board conducted representation elections (not counting decertification elections) in 6656 bargaining units among a total employee population of 403,837 employees, which is an average of just over 60 employees per unit. *See* NLRB, FORTY-SIXTH ANN. REP., tbl. 13 (1981). Table 17 of the same report indicates that all elections were conducted in units of fewer than 59 employees. *See id.* Similar figures exist for the other years in the study group. Thus, in fiscal 1979, 73.7% of the elections were conducted in units of 59 or fewer employees; in fiscal 1980 the number was 75.4%; and in fiscal 1982 the number was 75.8%. *See* NLRB, FORTY-FOURTH ANN. REP., tbl. 17 (1979); NLRB, FORTY-FIFTH ANN. REP., tbl. 17 (1980); NLRB, FORTY-SEVENTH ANN. REP., tbl. 17 (1982).

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reducing the likelihood that the employer will retaliate against them personally. But it might also suggest that employees in large units are less sensitive to their employer's desires or concerns about unionization, whether expressed lawfully or not. Larger work places, for example, might simply be more impersonal, making it less likely that employees would heed employer calls to stay non-union.

One problem with attributing *Gissel* union success to employer size is that size appears to have little effect in smaller units. If unions succeed in large units because employees feel less threatened, then one might assume that size would have exactly the opposite effect in very small units. Units with fewer than 100 employees were less successful, but once membership dipped below 100, size had no impact. That is, the union's probability of success did not diminish in proportion to size. Once units reached 25 employees or smaller, size alone had no impact at all.

Size does seem to matter, however, when other factors are added, at least in smaller units. The probability of success does not change in units over 100 no matter what other variables are added. In smaller units, however, the union's probability of success increased if the employer had threatened employees with retaliatory discharge. This seems counter-intuitive. The NLRB regards the threat of discharge as an egregious violation and has often commented that employees are particularly sensitive to threats of job loss.[73] This effect would seem to be exacerbated in small units, where employees are less assured that their union sympathies can remain secret. If employer coercion actually affects employees, one might assume that a threat of discharge in a small unit would decrease the union's chance of success. The employees would be frightened away from the union and unwilling to lend it their support.

The contrary result might be explained in a variety of ways. It may be, as Getman, Goldberg and Herman ("Getman et al.") suggested, that some unlawful campaign practices actually have little impact on employees.[74] Of course, the contrary might also be true. That is, the employees might have taken the threat of discharge seriously and turned to the union for protection. That hypothesis

73. *See* JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 14 (1976).

74. *See id.* at 113-6.

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seems supported by the fact that the threat of discharge affected union success only in small units. Faced with a hostile employer, employees in small units, who cannot hope for anonymity or group strength, turn to the union as their only source of protection.

The effect of threat of discharge, however, seems undermined by the fact that a threat of plant closure had no impact, regardless of the size of the bargaining unit. Like threat of discharge, the NLRB assumes that employees are particularly sensitive to employer threats to close the business and thereby terminate employment.[75] The presence of such threats, then, would seem to undermine employee support for the union and diminish its chance of negotiating an agreement. These contrary results are consistent with Getman et al. conclusion that employees are not affected by such threats.[76] However, it may be that employees are affected by threats, but that they simply discount employer threats to close their business. A business closure, after all, affects the employer's livelihood, as well as that of the employees. It seems reasonable, then, to interpret the data as suggesting that employees take seriously a threat of individual discharge but will discount a threat to close the plant and fire everyone.[77]

B. Delay

Despite the conventional wisdom of lawyers and the NLRB, and in spite of data suggesting that delay works to an employer's advantage in election cases, it seems to have no effect on the likelihood

75. *See id.* at 14.

76. *See id.*

77. Our data suggest that employees might well be skeptical of threats to close. Although the employer ceased operations in a full 25% of the cases studied, the employer's threat to do so is not an accurate predictor of that action. The employer threatened to close in just over 58% of the cases, as demonstrated in the following table:

TABLE 8
THREAT OF CLOSURE

Threat	Frequency	Percent
No	60	41.7
Yes	84	58.3

We were unable to determine what happened in twelve of the cases. Using the 132 cases for which we have information, 77 threatened to close and 55 did not. Of those who made the threat 24 or about 31% closed; of those who did not make the threat 12 or about 22% closed. Although the percentage is higher for those who made the threat, the differences in percentages are not statistically significant. The data do not indicate that the closure was motivated by the organizational effort.

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that a bargaining order union will negotiate a contract. That is, when the delay is measured from the time of demand for recognition to the time when all administrative and judicial delays are exhausted, the length of the interval seems not to affect a union's chance for success. A union experiencing a long delay before bargaining begins is no less likely to succeed than a union that begins bargaining shortly after the bargaining order.

TABLE 9
DELAY

	No Contract (incl. sev. only) (n=107)	Contract (n=29)
Average Delay	968.1 days (from 290-2019 days)	1096.8 days (from 364-2580 days)

It is no easy matter to explain why delay is not a factor in the union's success, especially since it does seem to matter when the union seeks certification through an election. It may be that the strength of bargaining order unions remains constant, regardless of the delay. That is, there may be some hard core supporters who are not threatened by employer coercion and whose enthusiasm for the union does not dim over time. This would mean that a union's ability to gain enough support to negotiate successfully is not dependent on whether the employer can delay the onset of bargaining. This hypothesis, however, is inconsistent with one of the most commonly assumed consequences of delay, which is turnover in the bargaining unit.

We were not able to obtain employee turnover data from the employers. All we have is anecdotal evidence, which consists of several comments by union organizers who attributed their failure to bargain a contract to the disappearance of their supporters through turnover. We recognize that employee turnover may have just been proffered as an excuse and that other factors might also have contributed to the union's failure. Nevertheless, many of the cases dragged on for years, with the average delay from demand to an effective bargaining order of almost three years. Moreover, many of the bargaining units did not employ craftsmen or skilled laborers. It seems reasonable to assume, then, that the delay contributed to the appearance of new faces in the bargaining unit, none of which had

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been part of the union's original majority. Moreover, while the employers could not lawfully ask about union sympathies when they hired the new workers, it seems safe to assume that they would avoid hiring new employees who had previous experience with unions.

It may be that the data mean just what they show, which is that delay does not matter. To the extent that some bargaining order unions are able to bargain contracts and build lasting relationships, their success does not depend on the length of time an employer is able to delay the onset of bargaining. It may also be, however, that delay is not relative. That is, as compared to election cases, there was a substantial delay in all of the cases in the study group. The least amount of time that expired between the demand and the point where bargaining was required was 290 days and the average was almost three years. By contrast, in the typical election case, there is only a few months between the union's demand and its certification. It may be, then, that whatever damage is done by delay has already occurred by the time a *Gissel* bargaining obligation arises and that further delay does not increase the effect.

C. Support for the Union

The typical assumption in collective bargaining is that unions that enjoy high levels of support can make the most credible strike threat and, accordingly, will have more clout at the bargaining table. *Gissel* order unions should have no such advantage. Some of them have already lost an election and, the Board assumes, the employer's unlawful conduct has frightened most employees away from the union. In theory, however, the *Gissel* order should restore employee confidence in the union. Thus, one might assume that the level of employee support prior to the employer's unlawful campaign would offer some prediction of the union's success in negotiation after issuance of the order. That is, if employee support was undermined by the employer's unfair labor practices (and not by genuine disaffection with the union) that support should resurface when the government acts to protect employees through the issuance of the bargaining order. One might expect, then, that those unions that bargained a contract would be those that enjoyed the most support prior to the unlawful campaign.

It is not easy to determine precise levels of employee support. As noted earlier, the Board determines support for the union by count-

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ing the number of signed authorization cards, a measure approved by the Supreme Court in *Gissel*,[78] despite claims about problems with cards. We recognize that some employees might sign authorization cards out of fear or in order to buy peace; but it may also be that some union supporters refrain from signing out of fear of employer retaliation. Despite the fact that the use of cards is imperfect, we think it is justifiable to measure employee support with the same yardstick used by the Board not only in *Gissel* but also in voluntary recognition cases.

Obviously, each union in the study had majority support at one time, with the level running from 50.8% favoring the union to 100% (in very small units). The average level of support was 67.4% which, interestingly, is close to the level at which Cooper found unions had an even chance of winning an election.[79] Contrary to our assumptions, the data indicate that this level of support is not a reliable predictor of a *Gissel* union's ability to bargain a contract. Indeed, the level of support was slightly higher in unsuccessful units, though the difference is not significant.[80]

TABLE 10

	No Contract	Contract
Average Level of Support	68.3%	65.8%

Perhaps these data are not all that surprising. In the first place, Cooper's figures indicate that, had these cases gone to an election, the union would have lost about half of them, meaning that the authorization card count is not a particularly accurate method of judging the strength of a union's support. If the cards did accurately measure employee support, the *Gissel* order obviously did not sufficiently reassure employees, who remained reluctant to voice support for the union after the employer's unlawful campaign. It could also be that employers in the study, who had displayed a willingness to violate the law to remain non-union, were not intimidated by a

78. *See* NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 601-10 (1969).

79. *See* Cooper, *Authorization Cards and Union Representation Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's* Gissel *Decision*, 79 NW. U. L. REV. 87, 119 (1984).

80. *See id.* at 115-18.

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union's strike threat, no matter what the level of employee support.[81] Such employers may have been more resistant to a contract, even in those units where the union had once enjoyed strong support.

It is probably also true that level of employee support prior to the unlawful campaign does not mean much standing alone. Authorization card counts, after all, reveal the sympathies of individual employees, some of whom disappear as a case lingers in the administrative and judicial process. Thus, we considered whether the variables of delay and employee support taken together revealed an effect on a bargaining order union's probability of success. However, just as neither variable made a difference standing alone, they did not increase a union's chance of success when looked at in combination. A union's level of support was not significant no matter how short or long the delay. It is worth noting, however, that there were no *short* delays in this study. The average lag time between demand and effective order was just under a thousand days and the shortest delay was 290 days or almost 10 months. It may be, then, that whatever impact delay would have on a union's level of support had already occurred.

D. Unfair Labor Practices

We assumed that the union's chance of success would decrease as the severity of the employer's unlawful conduct increased. Interestingly, this proved not to be the case. We acknowledge that there is some difficulty assessing how serious an employer's violations are. We believe, however, that identifying those campaigns which included more than one of the so-called hallmark violations was a justifiable method of identifying particularly flagrant campaigns. Even so, no matter how we counted the unfair labor practice and no matter what groupings of violations we made, there is no evidence that unions were less successful when the campaign was more outrageous.

Nor was the severity of the employer's campaign relevant when we combined it with the size of the bargaining unit. This is true despite our assumption that employer threats might be taken more seriously by employees in small units. Similarly, there was no evi-

81. *See id.* at 117.

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TABLE 11

	No Contract	Contract
% w/ discriminatory discharge	72.9%	65.5%
% w/ threat to close	59.8%	48.3%
% w/ threat of discharge	48.6%	58.6%
% w/ promise of benefit	57.9%	51.7%
% w/ grant of benefit	36.4%	58.6%

dence of effect when we combined the seriousness of the unfair labor practices and the size of the union's majority.

That does not mean, however, that the data show no effect from particular unfair labor practices. In both large and small units, the presence of a promise of benefits made it less likely that the union would succeed. Conversely, the actual grant of benefits made it *more* likely that the union would succeed. This latter phenomenon might be explained by assuming that employees credit the union with the receipt of benefits, and are, therefore, more likely to support its bargaining efforts on their behalf. If the level of employee support following the bargaining order is the determinant for union success, then it is not clear why the promise of benefit hurts the union. It may be that such promises convince employees to forsake the union and rely on the employer's beneficence. If that is true, however, then one has to wonder why they fail to make the same decision when employers actually give them benefits.

As noted above, a threat of discharge seems to have some impact on the union's success when such threats are made in small units. Interestingly, however, the actual presence of a discriminatory discharge during a campaign seems to have no effect at all, regardless of the size of the unit. This result seems counter to the conventional wisdom that discriminatory discharge is the most serious threat to employee concerted action. It may be, however, that the coercive effect of an egregious campaign affects employees, whether or not anyone has been fired.

Nor do these conclusions change when one combines other variables, with one exception already mentioned. As reported above, the union was more likely to bargain a contract in cases where the employer made a threat of discharge in small units. Otherwise, however, the presence of unfair labor practices in combination with

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each other or grouped with other variables made no difference in the probability of success.

We also considered a different measure of severity as another study suggested that unions were more likely to bargain a contract after less serious campaigns. Cases involving discriminatory discharge typically involve section 8(a)(3); however, less serious violations are considered only under section 8(a)(1). Thus, we looked at whether a bargaining order union had a better chance of success if the employer committed only 8(a)(1) violations, a comparison also used by Wolkinson et al. In their study, Wolkinson et al. concluded that unions were successful 80% of the time when the employer committed only 8(a)(1) violations, though their sample size was quite small.[82] They found only five such cases.[83] By comparison, our data include forty cases in which there were only violations of section 8(a)(1). In contrast to Wolkinson et al., our data indicate no significant difference in the success rate of unions where the employer violated only section 8(a)(1). Unions bargained a contract in 25% of those cases which is about the same as the overall success rate.

Our results are not surprising in light of our finding that a discriminatory discharge generally has no effect on a union's success rate. Although section 8(a)(1) does encompass some less serious violations like interrogation or impression of surveillance, it also includes serious acts. For example, the hallmark violations of threat of discharge, promise of benefit, grant of benefit and threat of closure all violate section 8(a)(1). Therefore, merely sorting cases by the type of violation does not help predict success.

IV. Conclusion

The *Gissel* Bargaining order extracts significant costs and provides relatively few rewards. Professor Cooke's study of elected unions in 1979 and 1980 (two of the years included in our study) found that unions that won an election were able to bargain a first contract about 77% of the time.[84] By contrast, the *Gissel* order unions in our study group achieved a contract only 20% of the time

82. *See* Benjamin W. Wolkinson et al., *The Remedial Efficacy of* Gissel *Bargaining Orders*, 10 Indus. Rel. L.J. 509, 515 (1988).

83. *See id.*

84. *See* William N. Cooke, *The Failure to Negotiate First Contracts: Determinants and Policy Implications*, 38 Indus. & Lab. Rel. Rev. 163, 173-74 (1984).

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and, even if one makes the dubious assumption that mandated bargaining reaps some benefits, such unions are able to maintain a bargaining relationship for more than six months in only about 35% of cases. As the Board's most drastic remedial step, then, the *Gissel* order is an abject failure. Employers who are determined to remain non-union have a reasonably good chance of doing so. Although the cost may have some deterrent effect on some employers, that provides little relief for the employees whose employers have used the process to defeat the union. Ironically, then, the most the Board can claim for its most vaunted remedy is the possibility of just the kind of effect it eschews. It provides some punishment, but even that is scant deterrent to employers willing to pay the price.

We were not surprised to learn that *Gissel* bargaining orders are ineffective, a result that was suggested by some earlier work and that, in any event, seems consistent with common sense. If, as is commonly believed, a union's strength influences its ability to mount a credible strike threat and if the strike is the oil that lubricates the machine of collective bargaining, it is hardly surprising that a weak union will negotiate poorly. We had hoped, however, that our data would yield one of two results. We speculated that, though *Gissel* orders seldom worked, they might be most effective in the most egregious cases. If employer speech and conduct really do threaten employees, then we thought that, paradoxically, the worst cases might produce the best chance of success. These cases, after all, would involve employees who did not merely change their minds about the union but, rather, were scared away from it. We speculated that, once the cowed employees saw their lawbreaking employer restrained by powerful government action, perhaps carrying the sanction of a federal appellate court, they would be free once again to support their union. Perhaps it works that way, though our data fail to show any correlation between seriousness of the unfair labor practices and the union's probability of success.

Alternatively, we had hoped that our data would allow us to speculate intelligently about the conditions under which a *Gissel* bargaining order would most likely succeed. Perhaps the most persistent criticism of NLRB *Gissel* policy is the difficulty in determining the criteria that must exist to warrant issuance of an order. Whatever the merits of the Board's refusal to articulate such standards, we had hoped that we could provide some guidance about the circumstances in which success seemed most likely, data that

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might prove useful to the Board in deciding whether to issue an order. We cannot. To the contrary, the prediction of whether certain factors will lead to successful bargaining can be made just as well by flipping a coin.

Although not always acting on the basis of reliable data, other scholars, too, have speculated that *Gissel* orders are ineffective and, in the best tradition of law reviews, have proposed law reform to alleviate the problem. Wolkinson et al. urges that the situation can be remedied if unions are able to choose replacements for employees fired during an organizational campaign.[85] Professor Weiler's proposal also focuses on the harm done during the campaign, but offers a different solution. Because he doubts the Board's ability to undo the effects of the employer's unlawful tactics, he proposes, in effect, that the campaign be eliminated. Or, at least, that the employer's participation be sharply curtailed. He proposes "instant elections" based on the Canadian model, which would cut short the employer's opportunity to respond to a union's card signing campaign.[86]

The Wolkinson proposal to allow unions to hire replacement workers does not warrant serious comment. Fair or not, much of American labor law is premised on the employer's ability to control the work place and even the National Labor Relations Act does not limit an employer's freedom to hire, absent proof of anti-union discrimination. Even then, the Board has never claimed the power to delegate hiring decisions to an outside party. The most it has done is to require the employer to hire or reinstate specific individuals who have been the targets of unlawful discrimination. There is no reason to believe that the Board's remedial power is sufficient to encompass an order allowing the union to make hiring decisions.

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85. *See* Benjamin W. Wolkinson et al., *The Remedial Efficacy of Gissel Bargaining Orders*, 10 INDUS. REL. L.J. 509, 523-27 (1989).

86. *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1805 (1983). This proposal, of course, assumes that the employer has not become aware of the campaign early in the process, since early cognizance would allow the employer to begin its campaign before the union even had a card majority. In *Gissel* itself, Chief Justice Warren observed that employers know about card signing campaigns early because unions "normally" inform employers of them. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 603 (1969). The Chief Justice did not support this assertion with data and, in fact, there is no supporting empirical evidence. In contrast, Getman et al. found that employers typically did not know about the union's efforts until they received a demand for recognition. *See* GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 135 (1976).

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Nor is it realistic to believe that congress would amend the Act to give the Board power to control employer hiring decisions.

In addition to their other proposals, both Wolkinson et al. and Weiler propose that the Board make expanded use of its power to seek injunctions under section 10(j).[87] We have no quarrel with these proposals. Indeed, such action is particularly desirable in section 8(a)(3) discriminatory discharge cases. No one questions the debilitating impact discharge has on individual employees and there is significant evidence that the Board's ordinary remedies do not provide adequate relief. Moreover, there is at least some evidence, in our study and Wolkinson's, that early reinstatement provides assurances to the remaining employees.[88] Although the Board has traditionally shied away from section 10(j), the current Board Chairman and General Counsel have expressed a willingness to use it.[89]

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87. *See* Wolkinson et al., *supra* note 85, at 527-28; Weiler, *supra* note 86, at 1799-1801.

88. *See* Wolkinson et al., *supra* note 85, at 516 (finding that in bargaining units where all or some of the reinstated employees returned to work, unions succeeded 44% of the time). Our data show a success rate of about 40%, or almost double the overall rate.

89. *See* WILLIAM B. GOULD IV, AGENDA FOR REFORM, 161 (1993). Prior to his appointment as NLRB Chairman, William Gould discussed the use of 10(j), stating that "[i]t warrants attention, perhaps in the form of more rigorous guidelines that exhort the Board to seek injunctive relief." *Id.*

Shortly after his appointment, Gould made the following remarks concerning the increased use of 10(j):

> One other area is of vital importance. Since my first day on the job on March 14, I have signed 24 requests for temporary injunctive relief. If the National Labor Relations Act redeems its statutory promise of freedom of association and the promotion of collective bargaining, prompt relief must be available under appropriate circumstances. The General Counsel, in May, made requests of the Board for authorization to institute discretionary injunctive proceedings under Section 10(j) of the Act in 14 cases—this is the highest number of requests in a single month made by the General Counsel to the Board since 10(j) was enacted in 1947.

Remarks of NLRB Chairman Gould to the Commonwealth Club, San Francisco, Daily Lab. Rep. (BNA) 111 (June 13, 1994).

At a labor law conference in October 1994, NLRB General Counsel Fred Feinstein cited statistics indicating that "[i]n fiscal 1994 there were 82 such [10(j)] cases, an all time record, and 67 of them were in the second half of the year, since he assumed the general counsel position." *NLRB Officials Outline Goals for Speeding up Agency Actions*, Daily Lab. Rep. (BNA) 202 (Oct. 21, 1994). Feinstein also noted that "[w]hile the board is seeking 10(j) injunctions at four to five times the previous rate, its success rate of 80 percent to 90 percent has not changed." *Id.* At this same conference, Board member Margaret A. Browning stated that the Board felt that the use of Section 10(j) was "warranted and appropriate" and that "[e]very request for 10(j). . . has been approved by the Board." *Id.*

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Even with section 10(j) relief, however, the outlook for *Gissel* bargaining orders is hardly auspicious. The orders seldom work the way the Board hopes they will and employees' rights are protected only infrequently and, apparently, randomly. This is not solely the Board's fault. It lacks the power to sanction even blatant law violators and its attempts to use its restorative powers creatively have often been slapped down by courts of appeal.[90] It is fair to observe, however, that the Board has sometimes resisted judicial invitations to expand the scope of its remedial authority.[91]

Although we agree with proposals to strengthen the Board's hand, we also question the utility of such reform scholarship. Law review articles that suggest amendment to the NLRA no doubt serve their purpose of fostering debate among scholars, but they do little to influence the law. Although the original Wagner Act has been amended several times since its inception in 1935, the amendments have curtailed, not strengthened, the power of unions.[92]

Feinstein also stated, in a 1994 fiscal year-end report, that "I have made the increased use of Section 10(j) injunctive proceedings a cornerstone of my administration of the Act." *NLRB Cites Successes*, NAT'L L.J., Dec. 12, 1994, at A16. During Feinstein's first seven months in office,

> the board approved 65 of the 83 Sec. 10(j) injunctions that it authorized for the entire fiscal year. Of the 83 authorized, 62 petitions actually were filed. The agency was successful in 30 of 36 emergency proceedings that were resolved as of Sept. 30 [1994]. The NLRB authorized between 26 and 42 Sec. 10(j) injunctions annually between 1990 and 1993.

Id.

As of June 1995, this increased use of section 10(j) had continued. During 1994-95, the Board "authorized requests for more than federal 125 injunctions, triple the rate of the past decade." Robert L. Rose, *The Enforcers: Federal Labor Board Gets More Aggressive, To Employers Dismay*, WALL ST. J., June 1, at A1.

90. *See, e.g.*, H.K. Porter Co. v. NLRB, 197 U.S. 99 (1970) (reversing the Board's remedy and forcing an employer to agree to a union proposal for a check off clause, though not disagreeing with a Board finding that the employer had refused to concede the clause merely to frustrate a collective bargaining agreement.); Electrical, Radio & Mach. Workers v. NLRB, 502 F.2d 349 (D.C. Cir. 1974) (rebuffing the Board's effort to require an employer to pay the NLRB's litigation costs), *enforcing in part*, 194 N.L.R.B. 1234 (1972).

91. *See, e.g., Electrical, Radio & Mach. Workers*, 502 F.2d 349; Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970), *enforcement denied*, 449 F.2d 1046 (D.C. Cir. 1971). In these cases, the Board resisted the Court of Appeals' declaration that the Board had the power to award make-whole relief in refusal to bargain cases. *See Gourmet Foods*, 270 N.L.R.B. at 213 (1984) (disclaiming the power to issue *Gissel* I bargaining orders, despite an earlier court of appeals opinion to the contrary); United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054 (3d Cir. 1980).

92. The Taft-Hartley amendments of 1947 created the first unfair labor practices against unions including, inter alia, a ban on secondary boycotts, a limitation on recognitional picketing and, significantly, an amendment to section 7 which provided that employees had

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Moreover, while speculation about labor law reform may be useful, it hardly seems practical. The last significant attempt at labor law reform—which would have strengthened both unions and NLRB power—failed in 1978, when democrats controlled both the congress and the White House. There is no prospect for such reform in the current political climate.

Even if there was, one might question whether stronger NLRB remedies would have significant effect. Scholars—and unions—have assumed that much of labor's decline can be attributed to lax enforcement and doctrinal shifts by the NLRB. It seems reasonable to suggest that individual employees would be better served by swift administration of unfair labor practice charges and by aggressive enforcement of NLRB remedies. But there is scant evidence that the Board action can deter or negate contentious employers who are determined to resist unions with unlawful means. During the Reagan administration, much was made of the NLRB's conservative tilt and, not surprisingly, labor blamed some of its problems on those policies. The truth is that labor's slide in the private sector started before Reagan's election and it has not abated during a democratic—and presumably friendlier—administration.[93]

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the right to refrain from union activity. This change has been explained as marking a shift in government attitude from one that encouraged unionization to one of neutrality. *See* Taft-Hartley Act, ch. 120, 61 Stat. 140 (1947) (codified as amended at 29 U.S.C. §§ 151-168 (1994)).

The 1959 amendments closed several "loopholes" in the secondary boycott provisions and significantly curtailed a union's right to picket for recognition. *See* Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 525, 542-45 (codified as amended at 29 U.S.C. §§ 151-68 (1994)).

The last significant amendment, in 1974, removed the exemption for non-profit hospitals. *See* Pub. L. No. 93-360, 88 Stat. 395, 396 (codified as amended at 29 U.S.C. §§ 151-168 (1994)). Although this increased the scope of union activity protected by the NLRA, it was supported by industry groups who sought federal regulation of hospital labor relations.

93. The percentage of the private sector workforce represented by unions has been declining steadily for many years, and has not abated since Reagan and Bush left office. In 1995, union membership stood at 10.4%. *See Union Membership Declines in 1995 to 16.4 Million, A 300,000 Drop*, Daily Lab. Rep. (BNA) No. 28, at d-19 (Feb. 12, 1996). The number was 11.5% in 1992, when President Clinton took office. *See Proportion of Union Members Declines to Low of 15.8%*, Daily Lab. Rep. (BNA) No. 25, at b-3 (Feb. 9, 1993). (Note - the 15.8 percent figure in the title reflects public and private sector). The level was 13% in the private sector in 1988. *See Union Membership Declines to 16.8 Percent of Workers in 1988, BLS Survey Shows*, Daily Lab. Rep. (BNA) No. 18, at b-1 (Jan. 30, 1989). Professor Weiler claims that the level was just over 20% in 1980. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1818 (1983). He also says that the level stood at 24% during the Carter administration in 1978. *See id.*

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Professors Getman et al. suggest that the kinds of activity that lead to *Gissel* orders actually have little effect on employees,[94] a conclusion rejected by both Weiler and Wolkinson. Wolkinson ignores Getman et al. entirely, though Weiler uses their data and a different methodological approach to draw exactly the opposite conclusions.[95] Our data is consistent with both arguments. Thus, if a union's majority was not lost because of the adverse effects of employer unlawful conduct, then NLRB remedies would not restore the majority. Rather, the employees would have abandoned the union for their own reasons and they would not return merely because the Board imposes the union as their bargaining agent. It could also be, of course, that the employer's action did intimidate the employees and that the Board's efforts have not persuaded them that it is safe to return to the fold.

In either case, one must question the continued efficacy of the *Gissel* remedy. Perhaps the Board should continue to issue *Gissel* orders for whatever deterrent value they may hold for employers on the margin. But the NLRB should stop pretending that such orders can create effective collective bargaining relationships and, importantly, unions should not rely on them in their effort to organize hostile employers. This is not, in short, a problem that can be easily solved by the law. In fact, neither of the NLRB's two most important remedies, the *Gissel* bargaining order or reinstatement, actually does much to protect workers.

Rather than look to NLRB intervention, unions must develop their own strategies to counter the effects of egregious employer conduct. The new head of the AFL-CIO promises a renewed emphasis on organizing, one area in which unions have slipped in recent years.[96] Labor leaders have watched their traditional

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94. *See* GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 119-20 (1988).

95. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1786 (1983). "Ironically, then, the raw data that Getman and his coauthors so carefully gathered point to precisely the opposite conclusion from the one they drew. A protracted representation campaign, punctuated by discriminatory discharges and other reprisals against union supporters, can have a pronounced effect on the ultimate election verdict." *Id.*

96. *See, e.g.*, Stuart T. Silverstein, *Sweeney, A 'New Voice,' Elected to Lead AFL-CIO*, L.A. TIMES, Oct. 26, 1995, at A14.

> To enliven organizing throughout the AFL-CIO, [President John] Sweeney has proposed spending $20 million a year on such efforts, roughly 30% of the federation's budget. Among other things, he wants to expand the operations of the

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strongholds disappear or "downsize" and have not responded well with convincing appeals to non-traditional and high tech industries. Merely spending money on advertising and training younger organizers, however, will not be enough to deal with employers who are bent on avoiding unions at all costs. Rather, unions must meet such hostility with aggressive tactics of their own. No one suggests that this will be easy. The right to replace economic strikers[97]—and the increased willingness to use it—limits the extent to which unions can use their most traditional weapon, the strike. And there is no real likelihood that Congress will act to undo the effects of this rule.[98]

It may be, however, that other weapons are under-utilized. A union with a genuine majority, for example, could strike for recognition.[99] Outside the health care industry, unions need give no notice before striking. If, as Getman et al. found, employers are typically unaware of organizational activity,[100] a recognition strike

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AFL-CIO's Organizing Institute, a training school for organizers, and establish an office of strategic planning to coordinate organizing activities among unions.

Id.; *see also* Frank Swoboda, *Labor Wants Political Focus on Wages; AFL-CIO to Mount Campaign to Keep Issue at Center of '96 Elections*, WASH. POST, Dec. 16, 1995, at A20.

Starting in June, the AFL-CIO plans to send 1,000 college students and young workers into the field to help start membership organizing campaigns as part of what the federation has labeled the Union Summer campaign.

Id.

97. The right to permanently replace economic strikers is traced to the Supreme Court's decision in *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Most observers think that management's willingness to use this weapon stems from President Reagan's decision to replace the striking air traffic controllers in 1981. *See Study Reviews Strike Activity and Use of Permanent Replacements over 55 Years*, Daily Lab. Rep. (BNA) No. 92, at d-8 (May 16, 1994).

An analysis of 165 strikes from 1935 through 1990 suggests that strikes after 1981—the year President Reagan fired nearly 12,000 members of the Professional Air Traffic Controllers Organization for participating in an illegal strike—were longer, and involved more strikers and more permanent replacements than strikes in the 1950s, 1960s, and 1970s.

Id.

98. The Workplace Fairness Act died in the Senate in 1994. *See Defeat of Striker Replacement Bill a Victory for Business Coalition*, Daily Lab. Rep. (BNA) No. 133, at d-4 (July 14, 1994).

99. The right to picket for recognition is governed by section 8(b)(7), which allows such activity—accompanied by striking—as long as it does not continue beyond 30 days without the filing of a petition. *See* 29 U.S.C. § 158(b)(7) (1994).

100. *See* JULIUS GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 134-35 (1988).

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could significantly disrupt an employer's business, especially if timed to occur during particularly busy times.[101]

As economic strikers, employees engaged in a recognitional strike could be permanently replaced, a tactic that employers have been more willing to use since President Reagan's replacement of striking air traffic controllers in 1981. However, the NLRA attempts to funnel such disputes into elections rather quickly[102] and a short term strike might demonstrate the union's power at little risk to employees. Moreover, the union has options that do not involve replacement risk. Unions can, of course, picket for recognition and, if they heed the restrictions of the publicity proviso to section 8(b)(7), they can do so indefinitely.[103] Even more important, the Supreme Court's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*[104] legitimized secondary consumer boycotts that the NLRB—and unions—had previously believed unlawful. After *DeBartolo*, unions must no longer demonstrate some significant business relationship between a primary employer and a secondary target, so long as it confines its activity to consumer-directed handbilling.[105]

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101. There is some question about whether a strategically timed strike is protected activity, though the better cases find that it is, at least as long as there is no damage to employer property. *See, e.g.*, ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 312-14 (1976).

102. A complete discussion of limitations included in section 8(b)(7), including the so-called expedited election, is beyond the scope of this article. For a fuller discussion, see *id.* at 220-39.

103. Like its counterpart in section 8(b)(4), discussed *infra*, the publicity proviso to section 8(b)(7) allows a union to publicize its dispute to consumers. Importantly, however, section 8(b)(7) allows unions to accomplish this by picketing, even if they have an organizational objective, so long as their picketing does not have the effect of inducing other employees to refuse to cross the picket line. For a more complete discussion see *id.* at 236-39.

104. 485 U.S. 568 (1988).

105. A complete discussion of the issues raised by *DeBartolo* and the publicity proviso to the NLRA's secondary boycott provisions is beyond the scope of this article. *See* 29 U.S.C. § 158(b)(7)(C) (1994) (making it an unfair labor practice for unions to embroil neutral employers in their disputes with so-called primary employers). In the circumstances discussed in this article, the primary employer would be the employer the union sought to organize. However, the publicity proviso to section 8(b)(4) exempted activity "other than picketing" when the purpose was to advise the public "are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . . ." *Id.* § 158(b)(4). Historically, the NLRB gave a broad interpretation to the producer-distributor relationship required under the publicity proviso. The result was to allow unions to publicize the fact, usually by handbilling, but also by other means of advertising other than picketing, that an employer carried on some sort of business relationship with an employer against whom the union had a primary dispute. The principal subject of the Supreme Court's first

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Under *Debartolo*, then, a union seeking to organize a recalcitrant employer could direct its actions not only to the employer, but to commonly owned enterprises, customers, suppliers, co-tenants and any other entity that might pressure the employer to temper its attacks on the union. The union could undertake such handbilling with simultaneous recognitional picketing of the primary employer (with or without a strike), which could affect the employer's employees, as well as its customers.

In the mid 1980's, when President Reagan's NLRB appointees were changing Board policy at a rapid pace, some union leaders called for a repeal of the NLRA.[106] One might question, however, whether they desired such drastic action. No responsible union official could endorse a repeal of legislation that recognizes the right of employees to join unions and, using their collective strength, press their employees for fair treatment and an equitable distribution of the fruits of their labor. No doubt what union officials really wanted was not the abridgement of section 7 rights but the repeal of the Taft-Hartley amendments of 1947, which established union unfair labor practices and curtailed the weapons labor had used most successfully against employers, like the secondary boycott and recognitional strikes.

But the call for repeal did more than dramatize labor's frustration with the conservative tack steered by the Reagan Board. It recognized that labor could not depend on the administrative processes of government to protect its ability to organize and bargain for employees. There is no reason for labor to abandon this

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DeBartolo decision was how close that relationship had to be for the publicity proviso to apply. *See* Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147, 152, 156 (1983). In the Court's 1988 decision in *DeBartolo II*, however, the Court said that the publicity proviso was merely illustrative and that § 8(b)(4) was not broad enough to encompass any appeals made solely by handbilling. *See DeBartolo*, 485 U.S. at 588 (1988). The result is that unions are free to use secondary pressures, including consumer boycotts, whether or not there is a so-called producer-distributor relationship, so long as its efforts are carried out by handbilling.

106. *See, e.g.*, Richard L. Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 881 (1987) (Richard L. Trumka was president of the United Mine Workers union).

> I say abolish the Act. Abolish the affirmative protections of labor that it promises but does not deliver as well as the secondary boycott provisions that hamstring labor at every turn. Deregulate. Labor lawyers will then go to juries and not to that gulag of section 7 rights—the Reagan NLRB.

Id.; *see also Kirkland Says Many Unions Avoiding NLRB, Calls Board an "Impediment" to Organizing*, Daily Lab. Rep. (BNA) No. 167, at A-11 (Aug. 30, 1989) ("[AFL-CIO President Lane] Kirkland remarked that he would prefer 'no law' to the current labor statutes . . . .").

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recognition, merely because of a change in administration and a somewhat more tolerant NLRB. Liberal or conservative, the remedies imposed by the Board have little effect on obstinate employers who are willing to brave the administrative and judicial processes to remain non-union.

Although the NLRA largely restrains union tactics that have proven effective in the past, *Debartolo* furnishes an opportunity for unions to recapture some of the secondary weapons that have served them well. And the efforts need not end there. Unions that accept the reality that they cannot depend on NLRB remedies to protect them will surely develop workable strategies to protect themselves.

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APPENDIX

UNION QUESTIONNAIRE

In 1981, the NLRB ordered _____ to bargain with the _____. Please answer, to the best of your knowledge, the following questions.

1. Does the above mentioned Union still represent the employees?

yes_____ no_____

IF THE ANSWER TO QUESTION NUMBER ONE IS NO, PLEASE ANSWER QUESTIONS 1a, 1b and 2; (If the answer to question number one is YES, please proceed to question number two.)

1a. When did the Union stop representing the employees?

(Please enter date)_____.

1b. Why did the Union stop representing the employees?

(Please choose one answer)

_____ (i) The Union was decertified by the employees through an NLRB election.

_____ (ii) The Union voluntary abandoned (gave up) representation of the employees.

_____ (iii) Another Union replaced them.

iii.a. Name of the replacing union

_____.

iii.b. Date of replacement_____.

iii.c. Does the replacement union still represent the employees?

yes_____ no_____

don't know_____

_____ (iv) Other. Please explain why the Union stopped representing the employees.

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2. Did the Company and the Union ever engage in collective bargaining?

yes_____ no_____

IF THE ANSWER TO QESTION NUMBER TWO IS YES, PLEASE ANSWER QUESTIONS 2a and 2b; (If the answer to question two is NO, please proceed to question number three.)

2a. Over what period of time did the parties bargain?

From _____ to _____.

2b. Did the Company and the Union ever enter into a collective bargaining agreement (a labor contract) as a result of negotiations?

yes_____ no_____ negotiations in progress _____

IF THE ANSWER TO QUESTION NUMBER 2b IS YES, PLEASE ANSWER THE FOLLOWING QUESTIONS; (If the answer is NO, please proceed to the end of the form.)

(i) What were the beginning and ending dates of the first contract?

Beginning _____, Ending _____.

(ii) Did the first contract include a wage increase?

If yes, approximately how large of a wage increase (stated in percentage terms)?

_____%

(iii) Did the first contract include a wage decrease?

If yes, approximately how large of a wage decrease (stated in percentage terms)?

_____%

(iv) Have there been any more contracts since the first one?

yes_____ no_____

(v) What were the beginning and ending dates of those contracts?

Beginning _____, Ending _____.

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IF THE ANSWER TO QUESTION NUMBER TWO IS NO (i.e., if there was never any bargaining between the Company and the Union) PLEASE ANSWER THE FOLLOWING QUESTION.

3. The Company and the Union never bargained because:

_____3a. The Union never requested bargaining.

_____3b. The employer went out of business.

Date employer closed business _____.

_____3c. Other (please explain why this Union and the Company never bargained).

WILL YOU PLEASE SEND US A COPY OF ALL CONTRACTS NEGOTIATED BETWEEN THE COMPANY AND THE UNION? This information is requested only for statistical purposes. Neither the contract nor identifiable information from the contract will be disclosed publically.

Would you like to receive a copy of the final report?

_____yes _____no

To return, please enclose completed questionnaire and labor contract(s) in the postage prepaid envelope.

THANK YOU FOR YOUR COOPERATION

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