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Gissel Bargaining Orders: Circuit Courts 'Struggle To Limit Nlrb Abuse

GISSEL BARGAINING ORDERS: CIRCUIT COURTS STRUGGLE TO LIMIT NLRB ABUSE

The National Labor Relations Act (the Act)[1] grants private sector employees[2] the right to organize and bargain collectively with their employer.[3] The National Labor Relations Board (the Board)[4] implements the Act's policies protecting the right of employees to determine freely

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[1] *See* 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981). Congress enacted the National Labor Relations (Wagner) Act (the Act) in 1935. *See* National Labor Relations Act, Pub. L. No. 198, Ch. 372, 49 Stat. 449 (1935). Congress intended the Act to minimize industrial strife by eliminating the inequality of bargaining power between employers and their employees. *See* 29 U.S.C. § 151 (1976 & Supp. V 1981) (congressional declaration of policy); *see also* NLRB v. Fainblatt, 306 U.S. 601, 614 (1939) (Act manifests congressional intent to regulate commerce by protecting employees' right to collective bargaining). By granting workers the right to organize, Congress provided employees with bargaining power in the form of numerical strength so that employees and employers could negotiate and settle labor disputes without the need for judicial intervention. *See* 29 U.S.C. § 151 (1976 & Supp. V 1981) (congressional declaration of policy); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 481 (1960) (labor policy as contemplated by federal legislation is matter for Congress and not for courts). *See generally* Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951) (Act guarantees employees' right to participate in collective bargaining). In 1947, Congress amended the Act by adding provisions collectively known as the Labor Management Relations (Taft-Hartley) Act because Congress believed the Act was too favorable to unions. *See* Pub. L. No. 30-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 151-87 (1976 & Supp. V 1981). Title I of the Taft Hartley Act, §§ 101-04, amended the Act to protect nonunion employees from union coercion. *See* 29 U.S.C. §§ 157, 158(b) (1976 & Supp. V 1981). Title I of the Taft-Hartley Act includes 29 U.S.C. §§ 151-69 (1976 & Supp. V 1981) and is known as the National Labor Relations Act. *See* 29 U.S.C. § 167 (1976).

[2] *See* 29 U.S.C. § 152(2) & (3) (1976) (definition of employee and employer in Act). The Act excludes from coverage employees of either federal, state, or local governments. *See id.* Many jurisdictions provide public employees the right to organize and bargain collectively through statutory enactment or judicial action. *See* 9 KHEEL, LABOR LAW §§ 43.01 & 43.02 (1982); *see also* McLaughlin v. Tilendis, 398 F.2d 287, 288-89 (7th Cir. 1968) (public employees have constitutional rights to join, form, and assist unions). The Act also excludes from the term "employee" any individual having the status of independent contractor, agricultural laborer, domestic servant, supervisor, anyone employed by his parent or spouse, an employer subject to the Railway Labor Act, 45 U.S.C. § 151 (1976), or anyone employed by an individual or entity not an employer under the Act. 29 U.S.C. § 153(e) (1976).

[3] *See* 29 U.S.C. § 157 (1976) (employee rights under Act). Section 7 of the Act details the organization and bargaining protections afforded to employees. *See id.* These protections include the right to join a labor organization, to bargain collectively, to engage in other concerted activities, or to refrain from any of these activities. *See id.* Section 8(a)(1) of the Act provides that an employer commits an unfair labor practice by interfering with the employee rights guaranteed in § 7. *See* 29 U.S.C. § 158 (a) (1) (1976). Section 10(c) of the Act provides authority for administrative formulation of remedies to correct employer unfair labor practices. *See* 29 U.S.C. § 160(c) (1976). Note 12 *infra* (discussion of § 10(c)).

[4] *See* 29 U.S.C. § 153(a) (1976). The Board has exclusive jurisdiction over the resolution of all unfair labor practice cases, pre-empting any state or federal court determination of the dispute except in matters involving collective bargaining agreements. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (state court jurisdiction must yield

whether to engage in collective bargaining[5] by allowing a union to gain bargaining status by majority support.[6] Although elections are the preferred method for determining majority sentiment,[7] a union also may qualify as exclusive bargaining agent by an employer voluntarily recognizing the union[8] or by the Board issuing an order to bargain.[9]

The Board issues a bargaining order to secure bargaining rights for employees when the employer engages in a campaign of coercive mis-

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to Board's exclusive jurisdiction over unfair labor practices); Bova v. Pipefitters & Plumbers Local 60, 554 F.2d 226, 228 (5th Cir. 1977) (Board's exclusive jurisdiction over unfair labor practices pre-empts federal court's jurisdiction); NLRB v. George E. Light Boat Storage, Inc., 373 F.2d 762, 767 (5th Cir. 1967) (federal courts have concurrent jurisdiction with the Board over contract disputes involving unfair labor practices).

[5] *See* 29 U.S.C. § 159(a) (1976)(Act reflects congressional preference for expression of employee sentiment through representation elections). Section 9 of the Act provides that representatives selected for collective bargaining by the majority of a unit's employees shall be exclusive representatives for all the employees in the unit. *Id.* at § 159(c) (1) (A).

[6] *See* 29 U.S.C. § 159 (1976) (outlining employee representation election procedure). The NLRB will hold a secret ballot election if 30% or more of the employees in a relevant work unit sign authorization cards. *See id.* § 159(3) (1); *see also* R. GORMAN, LABOR LAW—BASIC TEXT 105-106 (1976) (discussion of authorization cards).

The Board certifies election results in accordance with § 9(c) of the Act. *See* 29 U.S.C. § 159(c) (1976) (rules and regulations governing election process). A certified union has certain advantages over an uncertified union. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 599 n.14 (1969). For example, the Board protects a certified union for 12 months against the filing of a new election petition by a rival union, against a disruption of the bargaining relationship because of claims that the union no longer represents a majority, and against recognitional practices by rival unions. *See id.*; Brooks v. NLRB, 348 U.S. 96, 99 (1954) (certified union's majority status presumed for one year absent unusual circumstances).

[7] *See* Fraser & Johnson Co. v. NLRB, 469 F.2d 1259, 1265 (9th Cir. 1972) (election is favored method to determine majority will); NLRB v. Drives, Inc., 440 F.2d 354, 366 (7th Cir.) (primary goal of Act is employees' free choice), *cert. denied*, 404 U.S. 912 (1971); NLRB v. American Cable Sys. 427 F.2d 446, 449 (5th Cir.) (industrial democracy is best method to measure employee sentiment), *cert. denied*, 400 U.S. 957 (1970); NLRB v. Foster Co., 418 F.2d 1, 5 (9th Cir. 1969) (election preferred method to measure employee preference for collective bargaining in absence of employer misconduct), *cert. denied*, 397 U.S. 990 (1970).

[8] *See* NLRB v. A. Lasaponara & Sons, Inc., 541 F.2d 992, 995 (2d Cir. 1976) (employer's voluntary recognition of union is binding), *cert. denied*, 430 U.S. 914 (1977); NLRB v. Broad St. Hosp. and Medical Center, 452 F.2d 302, 306 (3d Cir. 1971) (voluntary recognition of union by employer requires establishment of bargaining relationship with union); NLRB v. San Clemente Publishing Corp., 408 F.2d 367, 368 (9th Cir. 1969) (employer's voluntary recognition of union binding on employer regardless of whether Board holds election).

[9] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 612 (1969) (bargaining order designed to remedy past election damage); Drug Package, Inc. v. NLRB, 570 F.2d 1340, 1346 (8th Cir. 1978) (bargaining order is proper where employer misconduct seriously impedes election); NLRB v. Boyer Bros., Inc., 448 F.2d 555, 561 (3d Cir. 1971) (Board may enter bargaining order on basis of authorization cards), *cert. denied*, 409 U.S. 878 (1972); *see also infra* note 6 (discussion of authorization cards).

A bargaining order issued by the Board provides that the employer, upon request, engage in collective bargaining with a particular union as the representative of a designated employee work unit with respect to wages, hours, and other terms and conditions of employment. *See* Linden Lumber Div., Summer & Co., 190 N.L.R.B. 718, 733 (1971) (Board orders employer to bargain).

conduct.[10] The bargaining order remedy reflects the Board's presumption that extensive employer unfair labor practices may preclude the possibility of a fair and reliable representation election.[11] The Board reasons that the use of ordinary remedies, such as the cease and desist order, is inadequate to reestablish the conditions exisiting prior to the employer's unlawful conduct.[12] The Board therefore requires the employer to recognize and bargain with the union to prevent the employer from profiting by violating the Act.[13]

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[10] *See* Grandee Beer Distrib., Inc., 247 N.L.R.B. 1280, 1281 (1980) (bargaining order appropriate where employer committed series of unfair labor practices impeding union support).

[11] *See* Great Atlantic & Pacific Tea Co., Inc., 230 N.L.R.B. 766, 768 (1977) (fair election precluded where lingering effects of employer's misconduct are not erased easily from minds of employees). One of the basic premises underlying administration of the Act is the Board's special expertise to determine the effect of employer's unfair labor practices. *See* NLRB v. Leatherwood Drilling Co., 513 F.2d 270, 273 (5th Cir. 1975).

[12] *See* Dadco Fashions, Inc., 243 N.L.R.B. 1193, 1194 (1979) (number and severity of employer's unfair labor practices negatively impacted on employees' exercise of free choice). The Board issues a bargaining order as a remedial device to redress unfair labor practices committed by an employer to undermine a union's status. *See id.* Section 10(c) of the Act grants the Board broad authority to formulate remedies to correct employer misconduct. *See* 29 U.S.C. § 160(c) (1976). Traditionally, the penalties imposed by the Board include orders to cease and desist unlawful activity, the posting in the workplace of notices announcing that the employer will cease violating the Act and refrain from such conduct in the future, and the re-instatement of discharged employees with backpay. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 181 (1941). Despite the broad discretion that the Act grants to the Board, the Supreme Court has held that the penalty imposed by the Board must be remedial rather than punitive. *See* Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940). The Court has limited further the Board's remedial measures by denying enforcement of remedies not tending to further the policies of the Act. *See* Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943).

[13] *See* Peaker Run Coal Co., 228 N.L.R.B. 93, 94 (1975) (bargaining order necessary to prevent employer from avoiding union through campaign of coercion), *cert denied*, 423 U.S. 1016 (1977). The Supreme Court has stated that the Board may weigh "imponderable subtleties" in determining the effect of employer speech on employee organizational activities. *See* NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 479 (1941) (Board correctly decided evidence of employer's coercion). Similarly, the Court has assumed the Board's expertise to measure whether an employer ban on union solicitation on company premises will prevent effective organization. *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (determination of effect of employer's conduct rests with Board).

An empirical study, released in 1976 questions the Board's ability to accurately assess the impact of either employer or union conduct. *See* J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976). The study directly contradicts many of the basic assumptions concerning the analysis under which the Board issues bargaining orders. *Id.* at 101. For example, despite the Board's determination that an organizational campaign affects an election's outcome, the study determined that most workers have firm opinions about whether they want a union, even before the campaign begins. *Id.* at 81-85. Most employees base their opinions on general attitudes about working conditions and unions. *Id.* at 84. The study found that the votes of 81% of the employees votes were predictable from pre-election attitudes and intent. *Id. See generally* J. Getman & S. Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681 (1972) (assumption that Board has ability to assess impact of illegal conduct is fiction).

Federal circuit courts normally grant the Board broad discretion to choose remedies to correct employer unfair labor practices.[14] The standard of review applied by the courts recognizes the Board's special industrial expertise and the courts usually accept Board findings that are reasonable.[15] In reviewing bargaining order cases, however, the circuit courts have indicated concern over the Board's failure to justify decisions ordering an employer to bargain with a union rather than hold a representation election.[16] The conflict between the Board and the courts has caused substantial disagreement among the circuit courts over the correct application of an appropriate standard of review of Board determinations in bargaining order decisions.[17]

In *NLRB v. Gissel Packing Company*,[18] the Supreme Court examined the standards governing the Board's use of the bargaining order remedy.[19]

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[14] *See* NLRB v. Tri-State Transp. Corp., 649 F.2d 993, 994 (4th Cir. 1981) (Act grants Board broad discretion in labor matters).

[15] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951) (circuit court should give special deference to Board's findings). The *Universal Camera* Court held that if the evidence in the record as a whole, including evidence detracting from the Board's conclusions, substantiates the Board's decision, an appellate court may not overrule that decision. *Id.* at 497. The *Universal Camera* Court stated that a court should uphold the Board's findings where the evidence indicates the Board decided between two fairly conflicting views. *Id.* at 483. The Court reasoned that § 10(e) of the Act requires that circuit courts apply the substantial evidence test to decisions by the Board. *Id.* at 477. The Board's findings of fact are conclusive only if substantial evidence in the record considered as a whole supports the Board's conclusions. *Id.* at 487. The *Universal Camera* Court explained that the standard of review that Congress intended appellate courts to apply to Board decisions prevents courts from judging the sufficiency of supporting evidence without also considering the contradictory, or potentially contradictory, evidence available to the reviewing courts. *Id.* at 487-88. Courts must consider all probative evidence that appears credible, even if the Board discounted some or all of the evidence. *Id.* at 495-97.

[16] *See* NLRB v. Pilgrim Foods, Inc., 591 F.2d 110 (1978) (Board often issues bargaining orders without adequate analysis).

[17] *See infra* notes and accompanying text 62 - 129 (discussion of circuit courts' disagreement over Board's issuance of bargaining orders).

[18] 395 U.S. 575 (1969).

[19] *Id.* at 613-15. *NLRB v. Gissel Packing Co.* was a consolidation of three cases from the Fourth Circuit and one case from the First Circuit. *See* Gen. Steel Prods., Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968); NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968); NLRB v. Gissel Packing Co. 398 F.2d 336 (4th Cir. 1968); NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968). In each of the cases considered in *Gissel*, the employer refused to recognize unions demanding recognition on the basis of a majority of authorization cards. 395 U.S. at 579-80. In each case, the employer engaged in vigorous anti-union campaigns characterized by numerous unfair labor practices. *Id.* at 580. The Fourth Circuit upheld the Board's unfair labor practice determinations but denied enforcement of the Board's orders to bargain. *Id.* at 585. The First Circuit enforced the Board's decision to issue a bargaining order. *Id.*

Prior to the Supreme Court's decision in *Gissel*, the Board imposed orders to bargain where an employer's refusal to bargain was not justified by a good-faith doubt as to the union's majority status. *See* Joy Silk Mills, Inc. v. NLRB, 85 N.L.R.B. 1263 (1949), *enf'd*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). In *Joy Silk*, the Board held that an employer could reject a union's demand for recognition based on authorization cards if the employer did so in good faith. 85 N.L.R.B. at 1263. The *Joy Silk* test was modified

The *Gissel* Court outlined the circumstances in which the Board may order an employer to bargain with a union instead of conducting an election to ascertain the employees' desire to participate in collective bargaining.[20] The Court discussed three categories of unfair labor practices in which the Board may remedy employer misconduct through the use of remedial measures.[21] The first category encompasses exceptional cases in which an employer's outrageous and pervasive unfair labor practices prevent the possibility of the Board conducting a reliable election.[22] Under category one, the *Gissel* Court implied in dictum that the Board may issue a bargaining order without a determination of whether the union has attained majority status.[23] The Court defined category two as cases in which the Board determines that traditional remedies will not erase the effect of the employer's past unfair labor practices.[24] The Court stated that category two includes less extraordinary cases in which the employer's misconduct

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by the Board in Joseph P. Serpia, Inc., 155 N.L.R.B. 99 (1965), *rev'd sub nom.*, Retail Clerks Local 1179 v. NLRB, 376 F.2d 186 (9th Cir. 1967); *accord*, Aaron Bros. Co., 158 N.L.R.B. 1007 (1966). In *Joseph P. Serpia*, the Board discarded the position that the employer must carry the burden of proof in demonstrating the good-faith doubt. 155 N.L.R.B. at 100. In oral argument before the *Gissel* Court, the Board abandoned the *Joy Silk* analysis, emphasizing instead that the key to the issuance of a bargaining order is whether the unfair labor practices preclude the determination of employee preference through an election. 395 U.S. at 594. The *Gissel* Court reserved the question of whether a bargaining order may issue where an employer refuses recognition of a union with majority card support and does not petition the Board for an election. *Id.* at 595. The Court later determined that a card majority alone does not require the employer to recognize the union for collective bargaining purposes. *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 310 (1974) (employer not required to recognize union solely on basis of authorization cards). If an employer refuses to recognize the union's majority status, the Board must conduct an election. *Id.* at 311. *See generally* Christensen & Christensen, Gissel Packing *and "Good Faith Doubt:" The Gestalt of Required Recognition of Unions Under the NLRA*, 37 U. CHI. L. REV. 411 (1979) (employer's good faith doubt justifies refusal to recognize union's majority claim based on authorization cards).

[20] *Id.* at 613.

[21] *Id.*

[22] *Id.*

[23] *Id.*; *see* United Dairy Farmers Coop. Ass'n. v. N.L.R.B., 633 F.2d 1054 (3d Cir. 1980). In *United Dairy*, the Third Circuit found that the *Gissel* decision allowed the Board to order an employer committing egregious unfair labor practices to bargain with a labor organization despite the union's failure to achieve a card majority or election victory. *Id.* at 1057. In *Gissel*, the Supreme Court's opinion primarily addressed category two cases and only briefly mentioned the guidelines governing a category one case. 395 U.S. at 615. Prior to the *United Dairy* decision, the Board consistently refused to issue bargaining orders unless the union at one time demonstrated majority support. *See* Fuqua Homes Missouri, Inc., 201 N.L.R.B. 130, 131 (1973) (rejecting issuance of bargaining order absent showing of majority support); J.P. Stevens & Co., 157 N.L.R.B. 869, 870 (1966) (refusing to issue bargaining order without union obtaining support from majority of employees), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967). *See generally* Ostan, *Bargaining Orders*: Gissel *and* United Dairy Farmers *Revisted*, 8 EMP. REL. L.J. 198 (1982).

[24] 395 U.S. at 614; *see supra* note 12 (§ 10(c) of Act gives Board broad discretion to develop remedies to redress employer's unfair labor practices).

tends to undermine the union's majority strength, and impede the election process.[25] The *Gissel* Court found that in category two cases the Board may protect employees' free choice by entering a bargaining order on the basis of the initial card majority favoring union representation.[26] Finally, the *Gissel* Court described a third category in which the employer commits only minor offenses.[27] The Court held that in category three cases the Board should not issue a bargaining order if the employer's misconduct only minimally impacts on the election process.[28]

The circuit courts have disagreed for two reasons with the Board's use of the bargaining order remedy since *Gissel*.[29] First, the circuit courts consistently have criticized the Board's failure to develop clear guidelines to regulate use of the bargaining order remedy.[30] Second, a number of

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[25] *Id.*

[26] *Id.* The Board issues bargaining orders in category two cases where the possibility of eradicating the coercive effects of the employer's past misconduct is slight, and employee sentiment is expressed best through the initial authorization card majority. *See, e.g.*, Ludwig Fish & Produce, Inc., 220 N.L.R.B. 1086, 1088 (1975) (illegal employer discharge of 40% of bargaining unit justifies order to bargain); Montgomery Ward & Co., 220 N.L.R.B. 373, 374 (1975) (large wage increases prior to election prevent fair election); Dallas Ceramic Co., 219 N.L.R.B. 582, 586-87 (1975) (promises by employer to correct grievances if employees reject union renders election unreliable); Two Wheel Corp., 218 N.L.R.B. 486, 487-88 (1975) (unlawful firings of union leaders necessitate bargaining order); Zim Textile Corp., 218 N.L.R.B. 269, 270 (1975) (bargaining order proper where employer offered benefits to employees withdrawing support from union); Teledyne Dental Prods. Corp., 210 N.L.R.B. 435, 436 (1975) (bargaining order is correct remedy when employer suggests to employees that direct dealing with employer to solve employee problems is more advantageous than union representation).

[27] 395 U.S. at 615.

[28] *Id.*; *see* Rensselaer Polytechnic Inst., 219 N.L.R.B. 712, 713 (1975) (new company policy promising employees access to top company officers not sufficiently egregious to impose bargaining order); Sands Indus., Inc., 218 N.L.R.B. 461, 470 (1975) (illegal discharge of two employees does not warrant order to bargain); Lasco Indus., Inc., 217 N.L.R.B. 527, 528 (1975) (illegal merit increases insufficient to support issuance of bargaining order); Colony Knitwear, 217 N.L.R.B. 51, 52 (1975) (implied threats by employer do not require order to bargain).

[29] *See generally* Note, *Bargaining Orders Since* Gissel Packing: *Time to Blow the Whistle on* Gissel?, 1972 WISC. L. REV. 1170 (1972). (Board's bargaining order decisions criticized by circuit courts).

[30] *See* Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503, 508 (7th Cir. 1980) (examination of Board decisions applying *Gissel* reveals no consistent criteria for issuing bargaining orders). Criticism of the Board for failing to articulate uniform standards controlling issuance of bargaining orders virtually is unanimous by both courts and commentators. *See* NLRB v. K&K Gourmet Meats, Inc., 640 F.2d 460, 469 (3d Cir. 1981) (Board engages in speculation to find that bargaining order is appropriate); NLRB v. Matouk Indus., Inc., 582 F.2d 125, 130 (1978) (Board has not articulated consistent standards governing issuance of bargaining orders); *see also* Comment *A Reappraisal of the Bargaining Order: Toward A Consistent Application of* NLRB v. Gissel Packing Co., 69 N.W.U. L. REV. 556, 557 (1974) (Board's post-*Gissel* decisions indicate absence of coherent standards governing use of bargaining orders); Note, *The* Gissel *Bargaining Order, The NLRB, and the Court of Appeals: Should the Supreme Court Take a Second Look?*, 32 S.C. L. REV. 399, 425 (1980) (Board needs standards to apply uniformly bargaining orders).

circuits also have criticized the Board's increasing tendency to impose bargaining orders in category two cases when the employer's misconduct is not so egregious as to prevent a fair election.[31]

In *NLRB v. General Stencils, Inc.*,[32] decided shortly after *Gissel*, the Second Circuit encouraged the Board to adopt specific criteria indicating the circumstances in which employer unfair labor practices justify a bargaining order.[33] The *General Stencils* court proposed that the Board use its rulemaking powers to formulate guidelines for issuing bargaining orders.[34] Alternatively, the Second Circuit stated that the entire Board could join in a detailed opinion articulating the general principles controlling issuance of bargaining orders.[35] The *General Stencils* court also stated that the Board could explain in each case the factors precluding a free election.[36] When the Second Circuit remanded *General Stencils*, however, the Board declined to set forth any specific factors justifying application of the bargaining order remedy.[37]

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[31] NLRB v. Keystone Pretzel Bakery, Inc., 109 L.R.R.M. 3277, 3280 (3d Cir. 1982) (Board often issues bargaining orders routinely); Grandee Beer Distrib., Inc. v. NLRB, 630 F.2d 928, 934 (2d Cir. 1980) (court will not enforce bargaining orders where valid election is still possible).

[32] 438 F.2d 894 (2d Cir. 1971) (remanding 178 N.L.R.B. 108 (1969)). In *NLRB v. General Stencils*, the Board supported the bargaining order by finding that the employer engaged in a number of § 8(a) (1) violations such as interrogating employees, showing an intention to revoke many privileges and to impose new restrictions on employees, and threatening to close the plant in event of a union victory. 438 F.2d at 899. The Second Circuit denied enforcement of the order to bargain because the court could not determine which of the three *Gissel* categories the Board relied upon in deciding to issue a bargaining order. *Id.* at 894. The court remanded the case to the Board for a determination of whether the circumstances warranted a bargaining order. *Id.*

[33] *Id.* at 903.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *See* General Stencils, Inc., 195 N.L.R.B. 1109, 1110 (1972) (bargaining order proper where employer unfair labor practices would prevent fair election). Chairman Miller dissented in General Stencils and outlined several factors the Board should consider in issuing a bargaining order. *Id.* at 1112-14 (Miller, Ch., dissenting). Miller argued that an employer grant of significant benefits, such as wage increases to employees, and repeated employer violations of § 8(a) (3), including reassignment, demotion or discharge of union adherents, constitutes sufficiently egregious conduct to allow the Board to order per se an employer to bargain. *Id.* at 1112. Miller also argued that the Board should adopt specific tests for deciding whether an employer's wrongful threats actually affected the possibility of holding an uncoerced election. *Id.* at 1113. First, Miller stated that the Board should consider what actions the employer threatened to take. *Id.* Miller argued that the employer's threat of a plant closure was a threat of the gravest consequence, more so than a threatened strict adherence to work rules. *Id.* Second, Miller urged the Board to determine if the effect of an employer's threat on employees was affected by the source, deliberateness, and specificity of the threat. *Id.* at 1113-14. Finally, Miller argued that the Board should consider whether the employer threats were disseminated widely. *Id.* at 1114. Miller reasoned that the employer threats in *General Stencils* were not disseminated widely and dissented from the majority decision to issue a bargaining order. *Id.*

The Second Circuit again reversed the Board's decision in *General Stencils* and held

In addition to disagreeing with the Board's refusal to develop clear bargaining order guidelines, the circuit courts have disagreed with the Board's liberalized use of bargaining orders.[38] The courts' conflict with the Board results from the frequency with which the Board issues bargaining orders.[39] The courts warn that in many cases the Board merely recites the employer's unfair labor practices and then states in general terms that a coercion-free election is not possible.[40] In response to the courts' perception that the Board abuses the bargaining order remedy, a majority of the circuit courts temper the traditional deference accorded to the Board's judgment[41] and require the Board to conduct a specified analysis

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that the issuance of a bargaining order was incorrect. *See* NLRB v. General Stencils, Inc., 472 F.2d 170, 175 (2d Cir. 1972) (Board arrives at conclusion not justified by fair reading of record as whole). The Second Circuit denied enforcement, and praised Miller's attempt to formulate workable guidelines. *Id.* at 171. The court stated that Miller's proposals were superior to a case by case explication of factors precluding a fair election. *Id.* at 172.

[38] *See* NLRB v. Chester Valley, Inc., 652 F.2d 263, 272 n.5 (2d Cir. 1981) (Board increasingly issues bargaining orders rather than hold elections). In *Chester Valley*, the Second Circuit requested the Board to document the number of cases in which the Board granted bargaining orders rather than direct new elections. *Id.* The Board responded that over the past three years, in the overwhelming majority of cases, the Board granted the General Counsel's request for a bargaining order. *Id.* The court reiterated the judicial concern that where the employer's unfair labor practices are not clearly pervasive, the Board too often exercises its discretion in favor of a bargaining order. *Id., see also* Hedstrom Co. v. NLRB, 629 F.2d 305, 309 (3d Cir. 1980) (en banc) (Board must explain with specificity coercive impact of unfair labor practices and why fair election is not possible), *cert. denied*, 450 U.S. 996 (1981).

[39] *See* Hood, *Bargaining Orders: The Effect of* Gissel Packing Company, 32 LAB. L.J. 203, 207 (1980) (Board decisions indicate clear reduction in degree of misconduct necessary to issue bargaining order). For example, Hood states that in the 1971 case Owens IGA Foodliner, 188 N.L.R.B. 277 (1971), the Board adopted the trial examiner's finding that the employer violated § 8(a) (1) by continued offers of wage increases and shorter hours after notification that the employees signed union authorization cards. *Hood, supra* at 207. In refusing to issue a bargaining order, the trial examiner found that the employer's single violation did not constitute a refusal to bargain or a coercive threat. 188 N.L.R.B. at 288. In the factually-similar 1979 decision of *Pedro's Restaurant*, the Board reversed itself, finding that the promise of benefits to induce employees to reject union support warrants issuance of a bargaining order. *See* 246 N.L.R.B. 567, 568 (1979) *enf'd as modified*, 652 F.2d 1005 (D.C. Cir. 1981). Hood catalogues specific employer conduct that the Board once rejected as insufficient to support a bargaining order, but now finds is severe enough to warrant an order to bargain. *Hood, supra* at 204-05; *see, e.g.*, Montgomery Ward & Co., Inc., 187 N.L.R.B. 956, 967 (1971) (promise of benefit); J.A. Conley Co., 181 N.L.R.B. 123, 133 (1970) (encouraging employees to vote against union); Blade Tribune Publishing Co., 180 N.L.R.B. 432, 432 (1969) (changing employees' work schedules); Arcoa Corp., 180 N.L.R.B. 1, 6 (1969) (polling employees regarding union preference); A&P Iron Works, Inc., 179 N.L.R.B. 291, 298 (1969) (recognition of rival union); Seymore Transfer, Inc., 179 N.L.R.B. 26, 34 (1969) (unlawful interrogation of employees).

[40] *See* Donn Prods. Inc. v. NLRB, 613 F.2d 162, 165 (6th Cir.) (court is not required to enforce bargaining order based on conclusory statements unsupported by facts), *cert. denied*, 447 U.S. 906 (1980); New Alaska Dev. Corp. v. NLRB, 441 F.2d 491, 494 (7th Cir. 1971) (enforcement denied absent precise analysis by Board that traditional remedies will not suffice).

[41] *See* NLRB v. Rexair, Inc., 646 F.2d 249, 250 (6th Cir. 1981) (court exercises less

justifying the choice of a bargaining order.[42] The circuit courts' specificity requirement prevents the Board's rationale in bargaining order cases from consisting of only a litany of employer offenses[43] because the Board must avoid use of conclusory language in assessing the impact of the employer's misconduct.[44] Although the exact language of the specificity requirement varies among the circuits, the Board essentially must conduct a three-part analysis in order to obtain enforcement of a bargaining order.[45]

The first component of the specificity requirement compels the Board to make specific findings measuring the immediate and residual impact

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deference to Board in bargaining order decisions); NLRB v. Armcor Indus., Inc., 535 F.2d 239, 242 (3d Cir. 1976) (court will scrutinize closely Board decision to issue bargaining orders); *supra* notes 14-18 and accompanying text (court traditionally defers to Board's expertise in labor decisions).

[42] *See, e.g.*, NLRB v. Hasbro Indus., Inc., 672 F.2d 978, 990 (1st Cir. 1982) (Board must measure lingering coercive effects of company's actions); NLRB v. Apple Tree Chevrolet, Inc., 671 F.2d 838, 840 (4th Cir. 1982) (Board's finding under *Gissel* must be specific and detailed); NLRB v. Rexair, Inc., 646 F.2d 249, 251 (6th Cir. 1981) (Board should examine residual impact of employer's misconduct); Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503, 509-10 (7th Cir. 1980) (Board should determine effect of unfair labor practices through detailed analysis); Bandag, Inc. v. NLRB, 583 F.2d 765, 767 (5th Cir. 1978) (Board should examine carefully impact of employer's unlawful actions); NLRB v. Pacific S.W. Airlines, 550 F.2d 1148, 1152 (9th Cir. 1977) (Board should measure immediate and residual impact of unfair labor practices).

[43] *See* United Serv. for Handicapped v. NLRB, 678 F.2d 661, 664 (6th Cir. 1982) (bargaining order not enforced where Board's reasoning consists of a litany and recites conclusions by rote without factual explanation); Walgreen Co. v. NLRB, 509 F.2d 1014, 1016 (7th Cir. 1975) (court will not enforce Board bargaining order decisions based on conclusory statements unsupported by sufficient facts).

[44] *See* Justak Bros. and Co. v. NLRB, 664 F.2d 1074, 1081 (7th Cir. 1981) (Board must give sufficient reasoning to justify bargaining order and permit court to perform adequate judicial review). In *Justak*, the Seventh Circuit stated that the specificity requirement was not meant to burden the Board nor curtail the issuance of bargaining order. *Id.* The court reasoned that elaborate explanations by the Board are not essential. *Id.* The court acknowledged that scientific accuracy in estimating the impact of unfair labor practices is impossible. *Id.* The Seventh Circuit held that the Board only must delineate the factors considered and describe how the Board weighed these factors in deciding to issue a bargaining order. *Id.*; *see* NLRB v. Matouk Indus., Inc., 582 F.2d 125, 130 (1st Cir. 1978) (court will remand bargaining order decisions where Board fails to support conclusions with sufficient reasoning); NLRB v. Armcor Indus., Inc., 535 F.2d 239, 244 (3d Cir. 1976) (Board must specify reasons leading to use of bargaining order remedy).

[45] *See* NLRB v. American Cable Sys., Inc., 414 F.2d 661, 668 (5th Cir. 1969) (Board must justify issuance of bargaining order), *cert. denied*, 300 U.S. 957 (1970). In *American Cable*, the Fifth Circuit announced a detailed standard of review for bargaining orders that has provided a model for other circuit courts. 414 F.2d at 668. The Fifth Circuit held that the Board must find that the union had obtained valid authorization cards from a majority of the employees in an appropriate bargaining unit. *Id.* The court also required the Board to find that the employer's unfair labor practices, although not outrageous and pervasive enough to justify a bargaining order in the absence of a card majority, were still serious and extensive. *Id.* at 668-69. Furthermore, the *American Cable* court stated that the Board must conclude that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies, though present, is slight and employee sentiment can best be protected in the particular case by a bargaining order. *Id.* at 669.

of employer actions affecting the election process.[46] This requirement reflects the reviewing court's concern that the administrative record must contain sufficient evidence to support the Board's finding that a bargaining order is appropriate.[47] The circuit courts have found the Board's failure to determine the likelihood that the employer's unfair labor practices will recur is fatal to a decision imposing a bargaining order.[48]

The second component of the specificity requirement directs the Board to engage in a detailed analysis assessing why the employer's misconduct precludes a reliable election and necessitates issuance of a bargaining order.[49] The courts reason that requiring the Board to explain and defend the use of the bargaining order remedy protects the integrity of the administrative process by facilitating meaningful judicial review.[50] Requiring the Board to provide analysis and findings concerning the propriety

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[46] *See* NLRB v. K&K Gourmet Meats, 640 F.2d 460, 467-70 (3d Cir. 1981) (Board must support bargaining order with sufficient basis in fact); Rapid Mfg. Co. v. NLRB, 612 F.2d 144, 150 (3d Cir. 1979) (Board must isolate evidence sufficiently substantial to demonstrate that fair election is impossible).

[47] *See* NLRB v. Gilbralter Indus., Inc., 653 F.2d 1091, 1099 (6th Cir. 1981) (Board must state sufficient basis in fact to issue bargaining order). In *Gilbralter Industries*, the court restated the Sixth Circuit's position that the entry of a bargaining order is inappropriate where the Board does not measure the residual impact, continuing effect, or likelihood of recurrence of the employer's unfair labor practices. *Id.*; *see* NLRB v. East Side Shopper, Inc., 498 F.2d 1334, 1336 (6th Cir. 1974) (enforcement denied where Board's support of bargaining order was litany of conclusions without factual explication).

[48] *See* Donn Prods., Inc. v. NLRB, 613 F.2d 162, 166 (6th Cir. 1980) (Board must consider probability that employer's unfair labor practices will recur); NLRB v. Four Winds Indus., 530 F.2d 75, 81 (9th Cir. 1976) (Board should consider likelihood of recurrence of employer's misconduct).

[49] *See* NLRB v. Century Moving & Storage, Inc., 683 F.2d 1087, 1093 (7th Cir. 1982) (application of specified analysis standard insures that Board considers whether employer's misconduct precludes election). In *Century Moving*, the Seventh Circuit required the Board to conduct "specific findings" as to the immediate and residual impact of the unfair labor practices on the election process. *Id.* The court also required the Board to make a detailed analysis assessing the possibility of holding a fair election in terms of any continuing effect of employer misconduct, the likelihood of recurring employer misconduct, and the potential effectiveness of ordinary remedies. *Id.*; *see* NLRB v. Jamaica Towing, Inc., 602 F.2d 1100, 1103-04 (2d Cir. 1979) (bargaining order not enforced in absence of express consideration by Board of factors precluding preferred election remedy); NLRB v. Gibson Prods. Co., 494 F.2d 762, 767 (5th Cir. 1974) (Board must make proper findings to support decision that only bargaining order will remedy unfair labor practices).

[50] *See* NLRB v. Armcor Indus., 535 F.2d 234, 245 (3d Cir. 1974) (specificity requirement prevents abuse of administrative process). In *Armcor Industries*, the Third Circuit stated that the fundamental reason supporting the specificity requirement is that the Board must make sufficient findings to permit the court to perform informed judicial review of the Board's bargaining orders. *Id.* Other courts repeatedly have sounded a similar theme in requiring the Board to comply with the specificity standard. *See* Grandee Beer Dist., Inc. v. NLRB, 630 F.2d 928, 930 (2d Cir. 1980) (Board's inadequate analysis prevents court of appeals from performing its statutory review obligations); First Lakewood Assoc. v. NLRB, 582 F.2d 416, 423 (7th Cir. 1978) (specific findings by Board facilitates meaningful judicial review).

of a bargaining order also protects against the arbitrary exercise of the Board's power.[51]

The specificity requirement's third component insures that the Board must consider similar bargaining order cases in which the Board decided not to order the employer to bargain.[52] The courts find that requiring the Board to distinguish factually similar cases contributes to the growth and predictability of the Board's use of the bargaining order remedy.[53] The courts reason that the Board's broad discretion to remedy employer misconduct does not allow the Board to issue bargaining orders in a random or inconsistent manner.[54]

The circuit courts' adoption of the specificity requirement, however, has not resulted in a consistent review of bargaining order decisions.[55] Circuit courts continue to disagree over whether the Board's analysis is sufficient to meet the standard mandated by the specificity requirement.[56] Disagreement among the circuit courts results from the apparent contradiction between the bargaining order's twin goals of preventing employer misconduct and effectuating employee free choice.[57] Although an order to bargain may deter an employer from violating the Act, issuance of a bargaining order in the absence of an election also may impinge on

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[51] *See* NLRB v. Eagle Material Handling Co., 558 F.2d 160, 167 (3d Cir. 1977) (specificity standard provides protection against arbitrary exercise of Board's power).

[52] *See* Peerless of America v. NLRB, 484 F.2d 1108, 1119 (5th Cir. 1973) (Board failed to distinguish similar cases where bargaining orders were not issued). In *Peerless*, the Fifth Circuit admonished the Board for not distinguishing prior decisions where employer threats were equally serious if not far more serious to the election process. *Id.* The court held that absent any self-evident basis for differentiation, the reviewing court cannot responsibly guard against administrative excess unless the Board explains in what respects one case differs from another. *Id.*

[53] *See* Chromalloy Mining and Minerals v. NLRB, 620 F.2d 1120, 1129 (5th Cir. 1980) (Board's reconciliation of contrary results in bargaining order cases contributes to stability of labor law).

[54] *See* NLRB v. Jamaica Towing, Inc., 602 F.2d 1100, 1105 (2d Cir. 1979) (Board's broad discretion does not allow inconsistent rulings). In *Jamaica Towing*, the Board reversed the Administrative Law Judge's (ALJ) decision not to issue a bargaining order. *Id.* at 1104. The Second Circuit reasoned that requiring the Board to reconcile other inconsistent decisions is paramount in cases where the Board overturns the ALJ's finding. *Id.* The court stated that inconsistencies in bargaining order case law give the impression that the Board is making ad hoc decisions. *Id.* at 1105. The court held that the Board's wide discretion in choosing remedies does not override the correlative duty to explain the use of the bargaining order in one case, and the failure to do so in a factually similar case. *Id.*

[55] *See infra* notes 63-98 and accompanying text (discussion of Third and Fourth Circuits' inconsistent application of specificity requirement).

[56] *Compare* NLRB v. Permanent Label Corp., 657 F.2d 512, 516 (3d Cir. 1981) (en banc) (Board's finding sufficient to meet specificity requirement) *with* Hedstrom Co. v. NLRB, 558 F.2d 1137, 1139 (3d Cir. 1977) (bargaining order not enforced where Board's justification insufficient to comply with specificity requirement).

[57] *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969) (effectuating free choice becomes as important as deterring employer misconduct); *see infra* notes 152-57 and accompanying text (discussion of bargaining orders dual goals).

employees' right to reject collective bargaining.[58] In applying the specificity requirement, courts that emphasize the deterrence of employer misbehavior may attain a result contrary to courts that emphasize whether the Board considered the possibility of holding an election.[59] Courts focusing the analysis on one goal to the exclusion of another frequently reach different conclusions in similar cases.[60] A survey of circuit court decisions indicates that courts' failure to develop and apply a consistent standard of review to determine whether the Board's issuance of a bargaining order conforms to the standards announced in *Gissel*.[61]

The Third Circuit is divided over a court's proper role in reviewing bargaining order decisions.[62] In *NLRB v. K&K Gourmet Meats, Inc.*,[63] the Third Circuit refused to enforce the Board's finding that a bargaining order was necessary to redress the employer's unfair labor practices.[64] The court stated that the bargaining order is an extraordinary remedy operating to disenfranchise workers in the choice of their representative.[65] The *Gourmet Meats* court held that a bargaining order is appropriate only when the positive advancement of the policies underlying federal labor law outweigh the effects of disenfranchisement.[66] The Third Circuit's analysis centered on whether the effect of the employer's illegal conduct necessitated issuance of a bargaining order.[67] The court found that the

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[58] *See* NLRB v. National Car Rentals Sys., Inc., 672 F.2d 1182, 1190 (3d Cir. 1982) (Board's bargaining order may impose a bargaining representative on employees not desiring collective bargaining). In *National Car Rental*, the Third Circuit stated that the Board failed to recognize the injustice in imposing a bargaining order on employees who are perfectly able to decide whether they want representation by a union. *Id.* at 1191. The court held that the injury which might occur to the rights of the employees by imposing on them a union they might not want is much greater than injury occurring by allowing the employer to avoid a unionized work force. *Id.*

[59] *See infra* notes 139-47 and accompanying text (discussion of courts which vary emphasis between deterring employer misconduct and effectuating employee free choice).

[60] *See* Note, *The Gissel Bargaining Order, the NLRB, and the Courts of Appeals: Should the Supreme Court Take a Second Look?*, 32 S.C. L. REV. 399, 402-403 (1980) (emphasizing one goal over another alters analysis required to determine whether bargaining order is appropriate).

[61] *See infra* notes 62-129 and accompanying text (discussion of courts' failure to apply consistent standard of review in bargaining order cases).

[62] *See generally* Comment, *Enforcement of Collective Bargaining Orders in the Third Circuit: The Rise and Fall of the* Armcor *Standards*, 25 VILL. L. REV. 913 (1980) (discussion of Third Circuit bargaining order cases).

[63] 640 F.2d 460 (3d Cir. 1981). In *NLRB v. Gourmet Meats*, the Third Circuit rejected the Board's finding of several § 8(a)(1) violations by the employer, including interrogation of an employee by a supervisor and an implied promise by the company president to consider employee complaints. *Id.* at 465. The court, however, decided that the evidence was sufficient to justify the Board's finding that both a supervisor and the company president committed unfair labor practices by promising employee benefits in exchange for defeat of the union. *Id.* at 466.

[64] *Id.* at 470.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 469-70.

Board's traditional remedies were sufficient to ensure a fair determination of employee sentiment.[68] The *Gourmet Foods* dissent criticized the majority's opinion as indicative of the "guerilla warfare" used by a minority of judges in the Third Circuit against bargaining orders.[69] The dissent explained that in prior Third Circuit decisions, the court often imposed the specificity requirement to deny enforcement of bargaining orders on the grounds that adequate review was not possible.[70] The dissent argued that in *Gourmet Meats*, the majority simply substituted the court's judgment for that of the Board.[71] The dissent contended that, given the majority's holding, court enforcement of bargaining orders was doubtful under any circumstances.[72]

In contrast to the court in *Gourmet Meats*, the Third Circuit in *NLRB v. Permanent Label Corp.*[73] emphasized the deterrence of employer miscon-

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[68] *Id.* In *Gourmet Meats*, the Third Circuit found that the record indicated that the employees were unimpressed with the employer's promise of benefits. *Id.* at 470. The court reasoned that where employees do not believe an employer's unlawful promise, traditional remedies adequately correct the effect of the employer's illegal practice. *Id. But see* United Oil Mfg. Co. v. NLRB, 672 F.2d 1208, 1211 (3d Cir. 1982). In *United Oil*, the Third Circuit agreed with the Board's finding that seven of the 29 employees in the unit were affected directly by the employer's illegal conduct, either as the targets of interrogation, the recipients of promotion and wage increases, or the victims of denied overtime benefits. 672 F.2d at 1212. The court distinguished the *Gourmet Meats* decision, however, stating that in *Gourmet Meats* the ALJ characterized the employer misconduct as "minimal," while the ALJ in *United Oil* termed the employer's unfair labor practices as "serious." *Id.* at 1213. The *United Oil* court agreed with the ALJ's description and enforced the Board's bargaining order. *Id.* at 1214. The *United Oil* dissent asserted that *Gourmet Meats* controlled. *Id.* at 1215 (Van Dusen, J., dissenting). The dissent found that the ALJ's description of the employer's unlawful conduct was not the primary consideration. *Id.* at 1218. The dissent argued that a *Gissel* order is not appropriate given serious unfair labor practices, but rather an order may issue only upon a finding that the possibility of a fair election is slight. *Id.*

[69] 640 F.2d at 471; *see* NLRB v. Keystone Pretzel Bakery, Inc., 109 L.R.R.M. (BNA) 3277, 3282 (3d Cir. 1982) (Gibbons, J., dissenting) (aggressive minority of judicial activists in Third Circuit continues with ingenuity to strike down bargaining orders).

[70] 640 F.2d at 471.

[71] *Id.*

[72] *Id.* at 473.

[73] 657 F.2d 512 (3d Cir. 1981) (en banc). In *NLRB v. Permanent Label, Corp.*, the Third Circuit affirmed the Board's findings of multiple unfair labor practices, including unlawful retaliatory suspensions of employees because of their union support. *Id.* at 517. In enforcing the ALJ's determination that a bargaining order was necessary, the Board did not provide a separate articulation of the reasons for imposing the order. *Id.* at 519. Previously, the Third Circuit had required that the Board, in addition to adopting the ALJ's findings, independently make the necessary findings to support a bargaining order. *See* Hedstrom Co. v. NLRB, 558 F.2d 1137, 1146 (3d Cir. 1977) (Board has not made detailed analysis of lingering effects of employer's unfair labor practices). Following the Supreme Court's admonition in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), that reviewing courts should leave administrative agencies free to establish procedures for deciding matters within their scope of authority, the Third Circuit abandoned its demand for additional Board elaboration concerning the propriety of a bargaining order. *See* Kentworth Trucks, Inc. v. NLRB, 580 F.2d 55, 62 (3d Cir. 1978) (citing Vermont Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. at 525).

duct and enforced the Board's decision to issue a bargaining order.[74] The *Permanent Label* court's analysis focused on the severity of the employer's unfair labor practices, rather than on the reasons why a fair election was impossible.[75] The court found that the Board correctly complied with the specificity requirement by concluding that the employer's violations were widespread and that the employer would violate the Act to resist unionization.[76] The dissent in *Permanent Label* argued that the Board did not satisfy the specificity requirement.[77] The dissent stated that under a category two inquiry, the *Gissel* Court required a determination that the employer's conduct impedes the election process.[78] The dissent also argued that the Board's analysis circumvented the specificity requirement by failing to address whether the employer's unfair labor practices would recur.[79] The dissent contended that the Board did not meet the reviewing standard by stating only the magnitude of the employer's unfair labor practices while not estimating the misconduct's coercive impact on the employees.[80] The dissent further contended that the Board did not appraise adequately the factors preventing a fair election.[81]

The Fourth Circuit has emphasized both the protection of employee free choice and the deterrence of illegal employer actions in applying the specificity requirement to bargaining order decisions.[82] In *NLRB v. Apple Tree Chevrolet, Inc.*,[83] the Fourth Circuit held that to obtain enforcement

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[74] 657 F.2d at 521.

[75] *Id.* at 520-21.

[76] *See Id.* at 520. The *Permanent Label* court enforced the bargaining order and held that the specificity requirement did not require the ALJ to state specifically the inference drawn from each factor cited in support of the bargaining order. *Id.* at 521. The court stated that requiring stated inferences by the Board would elevate form over substance and overstep the appropriate limits of judicial review. *Id.*

Judge Aldisert, in a concurrence, criticized the majority's application of the specificity requirement. *Id.* at 522. Judge Aldisert argued that the specificity requirement allowed appeals courts to impose their own judgments on the Board under the guise of reviewing the Board's basis for imposing an order to bargain. *Id.* at 524-27. Judge Aldisert also argued that the rule reflected a hostility to *Gissel* orders in general and the competence of ALJ's in particular. *Id.* at 526-27. Judge Aldisert contended that the court would continue to divide as long as opinions differed over the application of the rule. *Id.* at 521.

[77] *Id.* at 529. The *Permanent Label* dissent asserted that virtually the entire thrust of the ALJ's discussion focused not on the reasons why a free election was impossible, but instead on the reasons why the employer's misconduct invalidated the prior election. *Id.* at 532.

[78] *Id.* at 534-35.

[79] *Id.* at 533.

[80] *Id.* at 533-34.

[81] *Id.* The *Permanent Label* dissent argued that the Board in reviewing the ALJ's decision should have considered such factors as the closeness of the vote, the change in composition of the workforce, the effect of the passage of time, the probability of repeated employer violations and the effectiveness of traditional remedies. *Id.* at 534.

[82] *See supra* text accompanying notes 59-60 (courts which vary emphasis between deterring employer misconduct and effectuating employee free choice may reach contrary results).

[83] 671 F.2d 838 (4th Cir. 1982). In *NLRB v. Apple Tree Chevrolet, Inc.*, the Board peti-

of a bargaining order, the Board must advance specific, detailed reasons why an election will not reflect employee preferences fairly.[84] In refusing enforcement of the bargaining order, the court stated that the Board did not consider whether the employer's conduct would continue in the future or whether traditional remedies would erase the coercion resulting from the employer's prior misconduct.[85]

The Fourth Circuit in *NLRB v. Maidsville Coal Company, Inc.*,[86] criticized the Board for failing to examine the possibility of conducting a fair election.[87] The court stated that under a category two analysis, *Gissel* requires the Board to consider why traditional remedies will not erase the damage occasioned by the employer's unfair labor practices.[88] The *Maidsville Coal* court reasoned that the specificity requirement directs the Board to consider whether the employer misconduct precluded a fair election.[89] The court held that the Board's conclusory language justifying the bargaining order was insufficient to meet the *Apple Tree Chevrolet* standard and denied enforcement of the order.[90]

The Fourth Circuit's decision in *Standard-Coosa-Thatcher Carpet Yarn Division, Inc. v. NLRB*[91] indicates that the court will not require the Board to emphasize consistently the protection of employee free choice.[92] The *Standard-Coosa-Thatcher* court stated that deference to the Board's judgment is appropriate unless the Board's decision rests on insubstantial

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tioned the Fourth Circuit a second time for enforcement of a bargaining order. *Id.* at 839. Previously, the Fourth Circuit denied enforcement, remanding the case to the Board for reconsideration of the bargaining order. *See* NLRB v. Apple Tree Chevrolet, Inc., 608 F.2d 988 (4th Cir. 1979) (Board directed to consider bargaining order's propriety after court upheld employer's discharge of four employees as lawful).

[84] 671 F.2d at 840.

[85] *Id.* at 841. The *Apple Tree Chevrolet* court distinguished the Fourth Circuit's prior decision in *J.P. Stevens & Co., Inc. v. NLRB*, 668 F.2d 767 (4th Cir. 1982); *see* 671 F.2d at 841. The *J.P. Stevens* court found little evidence to indicate that conventional Board remedies effectively would redress the effects of the employer's multiple unfair labor practices. 668 F.2d at 773. Moreover, the *J.P. Stevens* court held that the past history and recent conduct of Stevens suggested that the employer would likely ignore all Board remedies except a bargaining order. *Id.* In contrast, the *Apple Tree Chevrolet* court found no evidence that the Board's ordinary cease and desist order would not suffice to insure an untainted election. 671 F.2d at 841.

[86] 693 F.2d at 1119 (4th Cir. 1982). In *NLRB v. Maidsville Coal, Inc.*, the Board held that the employer committed § 8(a)(1) violations by unlawfully interrogating employees and by threats of employee discharges, as well as § 8(a)(3) violations by illegally discharging employees. *Id.* at 1120.

[87] *Id.* at 1121.

[88] *Id.*

[89] *Id.* at 1122.

[90] *Id.* at 1123.

[91] 691 F.2d 1133 (4th Cir. 1982). In *Standard-Coosa-Thatcher Carpet Yarn Div. Inc. v. NLRB*, the Board found that the employer unlawfully responded to a union campaign with threats of plant closure, threats of retaliation against union activists, and discriminatory discipline aimed at thwarting unionization. *Id.* at 1144.

[92] *Id.*

evidence or erroneous legal standards and constitutes an abuse of discretion.[93] The court reasoned that the ultimate choice of an appropriate remedy remains within the providence of the Board.[94] The court found that the Board's conclusions were reasonable and enforced the Board's decision to issue a bargaining order.[95] The dissent in *Standard-Coosa-Thatcher* criticized the majority's departure from the prior application of the specificity requirement in *Apple Tree Chevrolet* and *Maidsville Coal*.[96] The dissent contended that the majority's emphasis on employer misconduct altered the specificity requirement's essential analysis that requires the Board to demonstrate why traditional remedies are inappropriate.[97] The dissent argued that under a proper application of the specificity requirement, the Board failed to meet the burden of proving that a fair election was not possible.[98]

The Seventh Circuit enforces bargaining orders only when the Board considers the possibility of holding a fair election.[99] The Seventh Circuit holds that in the absence of express consideration by the Board of the propriety of a bargaining order, a court should presume that an election is the preferred means of determining representative status.[100] In *Justak Brothers & Co., Inc. v. NLRB*,[101] the Seventh Circuit enforced the Board's decision to issue a bargaining order, ruling that the Board's findings suf-

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[93] *Id.*

[94] *Id.* The *Standard-Coosa-Thatcher* court found that the employer's conduct tended "to have a lasting inhibitive effect" on employees' formulation and expression of free choice regarding unionization. *Id.* (quoting NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 213 (2d Cir. 1980)). The Fourth Circuit therefore decided that a *Gissel* order was appropriate unless a very strong showing negates the inference of lasting effects. *Id.* at 1144.

[95] *Id.* at 1146.

[96] *Id.* at 1145 (Bryan, J., dissenting). Judge Bryan wrote the dissent in *Maidsville Coal* and authored the majority opinion in *Standard-Coosa-Thatcher*. *See supra* notes 86-90 and accompanying text (discussion of *Maidsville Coal*).

[97] 691 F.2d at 1146.

[98] *Id.*

[99] *See* Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503 (7th Cir. 1980). In *Red Oaks*, the Seventh Circuit reaffirmed the principle that when the Board fails to make detailed findings justifying a bargaining order, the court will favor elections as the preferred means of determining whether the employees desire to enter into collective bargaining. *Id.* at 507-09; *see also* Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1122 (7th Cir. 1973) (Board's findings insufficient to warrant choice of bargaining order over new election). The *Red Oaks* court declined to view the Board's failure to develop workable bargaining order guidelines as the results of a flagrant disregard for their duties under the law. 633 F.2d at 509. Rather, the court stated that the Board should follow the legal principle preferring elections and presume that the necessary requirements for a bargaining order are not present. *Id.*

[100] *See* First Lakewood Assoc. v. NLRB, 582 F.2d 416, 423 (7th Cir. 1978) (Board must appraise factors reasonably bearing on potential curative effect of ordinary remedies).

[101] 664 F.2d 1074 (7th Cir. 1981). In *Justak Brothers & Co. v. NLRB*, the court upheld the Board's findings that an employer engaged in surveillance of union activities, discharged union supporters, threatened layoffs and immigration investigations, and promised employees additional benefits to thwart unionization. *Id.* at 1082.

[102] *Id.* at 1081.

ficiently complied with the specificity requirement.[102] The court reasoned that the Board adequately considered the remedial value of traditional remedies in measuring the impact of the employer's misconduct on the election process.[103] The court affirmed the Board's finding that the employer's systematic campaign of unfair labor practices prevented the possibility of determining employee sentiment through a reliable election.[104]

In *NLRB v. Century Moving & Storage, Inc.*,[105] the Seventh Circuit denied enforcement of a bargaining order where mitigating evidence, such as the absence of any antiunion animus on the part of the employer, reduced the impact of the misconduct.[106] The court stated that the Board's critical inquiry under the specificity requirement is whether a valid election was precluded because of the employer's unlawful actions.[107] The court found that since the employer did not have a history of previous violations, recurrence of the employer misconduct was doubtful and traditional remedies would allow a coercion-free election.[108]

The First Circuit has expressed dissatisfaction with the Board's failure to comply with the specificity requirement by refusing to remand Board decisions that fail to make the necessary analysis.[109] In *NLRB v. American*

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[103] *Id.* at 1088.

[104] *Id.*

[105] 683 F.2d 1087 (7th Cir. 1982). In *NLRB v. Century Moving & Storage, Inc.*, the Board found that the employer's unfair labor practices consisted of coercive employee interrogation, an unlawful promise of wage increases, and layoffs motivated by anti-union considerations. *Id.* at 1088.

[106] *Id.* at 1093-94.

[107] *Id.* at 1093.

[108] *Id.* In *Century Moving*, the court stated that although the employer's misconduct was too severe to fall within the third *Gissel* category, the misconduct was not sufficient to support imposing a category one bargaining order. *Id.* at 1093-94. The court determined that under a category two analysis the bargaining order was inappropriate since the Board's traditional remedies were sufficient to mitigate the employer's unlawful acitvity. *Id.*

The Sixth Circuit generally focuses the specificity analysis in terms of whether a fair election is possible. *See, e.g.*, NLRB v. Frederic's Foodland, Inc., 655 F.2d 88, 90 (6th Cir. 1982) (bargaining order not appropriate where unfair labor practices would not in court's opinion prevent fair election); NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 284 (6th Cir. 1981) (bargaining order not enforced where effect of unfair labor practices quickly dissipated); NLRB v. Gilbraltar Indus., Inc., 653 F.2d 1091, 1099 (6th Cir. 1981) (election remains preferred method of determining employee choice); NLRB v. Rexair, Inc., 646 F.2d 249, 250 (6th Cir. 1981) (court exercises less deference and scrutinizes Board more closely where bargaining order is imposed without holding election). In two recent Sixth Circuit decisions, however, the court approved category two bargaining orders issued by the Board without requiring the Board to comply with the specificity requirement. *See* Stanley M. Feil, Inc. v. NLRB, 674 F.2d 567, 568 (6th Cir. 1982) (Board order to bargain supported by substantial evidence); NLRB v. Industry Prods. Co., 673 F.2d 164, 165 (6th Cir. 1982) (Board did not abuse authority in issuing bargaining order).

[109] *See* NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 120 (1st Cir. 1978) (court may analyze record to determine propriety of bargaining order when Board's findings are inadequate). In *Pilgrim Foods*, the court relied upon the *Gissel* Court's warning that a bargaining order should not issue when the impact of the unfair labor practices is minimal. *Id.* at 120. The First Circuit stated that remand to the Board was improper when the court's review of

Spring Bed Manufacturing Co.,[110] the First Circuit denied enforcement of a bargaining order because the Board's decision did not explain why the employer's illegal conduct would impede a valid election.[111] Rather than remand the case to the Board for clarification, the First Circuit examined the entire record and found that traditional remedies would insure a fair election.[112]

In *NLRB v. Amber Delivery Service, Inc.*,[113] the First Circuit ignored the *Gissel* Court's warning that the Board primarily is responsible for determining whether or not to issue a bargaining order.[114] In *Amber Delivery*, the First Circuit did not challenge the sufficiency of the Board's justification for the bargaining order, but disagreed with the Board's conclusions concerning the impact of the employer's misconduct.[115] The court dismissed the Board's contention that the employer's unlawful statements concerning the union and illegal changes in working conditions justified issuance of a bargaining order.[116] The First Circuit found the employer's

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the record indicated that the employer's unfair labor practices fell within the third *Gissel* category. *Id.*

[110] 670 F.2d 1236 (1st Cir. 1982). In *NLRB v. American Spring Bed Mfg. Co.*, the Board found that the union represented a majority of the employees in the bargaining unit. *Id.* at 1246. Although the company claimed it had a good faith doubt in rejecting a union claim for recognition, the Board rejected the Company's defense. The Board instead found that the company, while refusing to bargain, also engaged in a series of unfair labor practices violative of §§ 8(a) (1) and (3). *Id.* The Board held that the employer's miconduct provided requisite proof of a § 8(a) (5) violation. *Id.* The First Circuit held in *American Spring Bed* that when a union makes a showing of a valid card majority, a determination of whether a § 8(a) (5) violation was committed requires essentially the same analysis as whether a bargaining order should issue. *Id.* at 1247; *see* First Lakewood Assoc. v. NLRB, 582 F.2d 416, 422 (7th Cir. 1978) (analysis of § 8(a) (5) and bargaining order issue is similar).

[111] 670 F.2d at 1248. In *American Spring Bed*, the Board found that the company's unfair labor practices consisted of an illegal wage increase, the termination of two employees for union activities and a threat to an employee based on anti-union animus. *Id.* at 1242-44. The court held that the company's illegal wage increase neither intimidated nor coerced employees in relation to their ability to make a free choice in electing a union representative. *Id.*

[112] *Id.* at 1248. The *American Spring Bed* court stated the judicial concern that remand to the Board results in inefficiency and exacerbates the Board's administrative burden. *Id.* After analyzing the record, the First Circuit vacated the bargaining order, ruling instead that a cease and desist order would sufficiently erase the effects of the employer's misconduct and allow the Board to hold a fair election. *Id.* at 1243-49.

[113] 651 F.2d 57 (1st Cir. 1981). In *NLRB v. Amber Delivery Serv., Inc.*, the Board held that the employer committed unfair labor practices by impermissibly interrogating and soliciting help from employees, by imposing suspensions on employees in retaliation for union activities, and by instituting changes in working conditions in an unlawful attempt to convert employees into independent contractors thereby depriving them of the statutory right to union representation. *Id.* at 58; *see supra* note 3 (Act excludes independent contractors).

[114] 651 F.2d at 70.

[115] *Id.*

[116] *Id.* at 69-70.

election misconduct minimal and the employer's past behavior suggested recurrence of the unlawful activity was unlikely.[117]

Although the majority of circuit courts have adopted the specificity requirement, the District of Columbia Circuit and the Eighth Circuit still defer to the Board's determination of the propriety of a bargaining order.[118] In *John Cuneo, Inc. v. NLRB*,[119] the District of Columbia Circuit held that the court would enforce a decision to issue a bargaining order unless the Board abused its remedial discretion.[120] The court found that the Board's recital of a litany of the employer's unfair labor practices supported issuance of a bargaining order.[121] The court reasoned that the employer's misconduct indicated a pattern of conduct designed to stifle further union activity.[122] The court stated that the *Gissel* Court did not require that the Board find that only a bargaining order would suffice.[123] Instead, the District of Columbia Circuit held that the Board merely must find that a bargaining order better protects employees' expressed union preference.[124]

The Eighth Circuit, which traditionally refused to apply the specificity requirement in reviewing bargaining order decisions,[125] rejected en-

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[117] *Id.* at 70.

[118] *See* Amalgamated Clothing Workers v. NLRB, 527 F.2d 803, 807 (D.C. Cir. 1975) (Board has broad authority to issue bargaining orders), *cert. denied*, 426 U.S. 907 (1976). In *Clothing Workers*, the employer violated the Act by unlawful pre-election conduct including coercive threats, promises of benefits and changes in employment conditions. *Id.* at 807. The District of Columbia Circuit court stated the majority view requiring the Board to support the bargaining order with detailed findings, but then deferred to the Board's expertise in upholding the order to bargain. *Id.* at 808.

[119] 681 F.2d 11 (D.C. Cir. 1982), *cert. denied*, 51 U.S.L.W. 3550 (Jan. 25, 1983). In *John Cuneo, Inc. v. NLRB*, the court affirmed both the Board's unfair labor practice findings and the Board's determination that it was justified in making the bargaining order retroactive to the date on which the company rejected the union's lawful demand for recognition and embarked on the course of unlawful conduct. *Id.* at 12.

[120] *Id.* at 23.

[121] *Id.* at 24. Although the Supreme Court denied certiorari in *John Cuneo*, two justices dissented from the denial. *See* 51 U.S.L.W. 3550 (Jan. 25, 1983). Justice Rehnquist, joined by Justice Powell, took exception to the District of Columbia's approval of the bargaining order in two respects. *Id.* Justice Rehnquist stated that the court in *John Cuneo* focused on the type of practice committed, rather than the extent to which the practices occcurred. *Id.* Justice Rehnquist argued that the District of Columbia Circuit's analysis could find any type of unfair labor practice rising to the level of misconduct contemplated by *Gissel* if committed with sufficient frequency. *Id.* Justice Rehnquist also stated the *Gissel* Court's warning that bargaining orders never were intended to be issued routinely. *Id.* Since the District of Columbia sanctioned the bargaining order without a finding that the special circumstances required by *Gissel* existed, Justice Rehnquist argued that the Supreme Court should review the order. *Id.*

[122] 681 F.2d at 23.

[123] *Id.*

[124] *Id.* at 24.

[125] *See* Abie Mineral Feed Co. v. NLRB, 438 F.2d 940, 945 (8th Cir. 1971) (court should

forcement of a bargaining order in *Patsy Bee, Inc. v. NLRB*[126] because the Board offered only conclusory language stating that the possibility of a fair election was minimal.[127] The court held that in the absence of substantial evidence indicating that the employer's conduct impeded the election process, the Board abused its discretion by issuing a bargaining order.[128] Although the *Patsy Bee* court did not explicitly adopt the specificity requirement, the court employed the same analysis in rejecting the Board's order to bargain.[129] The court found that the employer's unfair labor practices only were isolated incidents that produced little impact on the employee's allegiance to the union.[130]

The disparate results in bargaining order cases reflect the Board's failure to develop controlling bargaining order guidelines[131] and the circuit courts' inability to apply a consistent analysis in reviewing such orders.[132] The Board's basis for issuing bargaining orders rests upon its special expertise in determining the coercive impact of employer misconduct.[133] The Board undermines its expertise regarding employee behavior by failing to articulate the reasons justifying a decision to issue a bargaining order.[134] The circuit courts repeatedly have questioned the Board's credibility by rejecting the Board's conclusions concerning the impact of employer misconduct.[135] The courts' reluctance to enforce bargaining order decisions reflects the courts' implicit recognition that not only has the Board applied the bargaining order in an arbitrary manner,[136] but

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defer to Board's exercise of discretion when record is silent concerning actual impact of employer's unfair labor practices).

[126] 654 F.2d 515 (8th Cir. 1981). In *Patsy Bee, Inc. v. NLRB*, the court rejected the Board's finding that the company president threatened the closing of the plant if the employees voted for the union. *Id.* at 518. The court found that the three remaining unfair labor practices had no significant effect on union strength. *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* In rejecting the Board's issuance of the bargaining order, the *Patsy Bee* court found that the Board offered no support for the order other than a conclusory statement that the odds for a free choice in a rerun election were minimal. *Id.*

[130] *Id.*

[131] *See supra* noted 32 - 37 and accompanying text (discussion of Board's refusal to develop bargaining order guidelines).

[132] *See supra* notes 62 - 129 and accompanying text (discussion of circuit courts' failure to apply a consistent standard of review).

[133] *See* J.P. Stevens & Co., Inc. v. NLRB, 668 F.2d 767, 774 (4th Cir. 1982) (courts recognize Board's expertise in fashioning remedies); *see also supra* notes 14 - 17 and accompanying text (courts defer to Board's expertise in labor matters).

[134] *See* NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 119 (1st Cir. 1978) (First Circuit shares concern of other circuits that Board issues bargaining orders without adequately explaining reasons).

[135] *See* Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1120 (7th Cir. 1973) (current Board assumptions concerning impact of employer misconduct are questionable).

[136] *See* NLRB v. Keystone Pretzel Bakery, Inc., 109 L.R.R.M. (BNA) 3277, 3280 n.3 (3d Cir. 1982) (limitations and issued bargaining orders in cases when such action clearly was not warranted).

empirical evidence directly contradicts many of the Board's basic assumptions.[137] The courts' criticism of the Board has not abated the controversy which surrounds decisions issuing an order to bargain.[138] The Board continues to issue bargaining orders without clear standards to guide application of the remedy.[139]

The increased use of bargaining orders has heightened the Board's conflict with the circuit courts over the correct interpretation of the Supreme Court's decision in *Gissel*.[140] The Board's policy concerning bargaining orders relies upon the *Gissel* Court's finding that a bargaining order may issue if the remedy better protects employees' expressed union preference.[141] The Board reasons that the *Gissel* Court granted the Board broad discretion to determine whether to use traditional remedies or issue a bargaining order.[142] The circuit courts, however, have exercised less deference to the Board when the Board imposes bargaining orders without determining whether the employer's unfair labor practices precluded a reliable election.[143] The courts' interpretation of *Gissel* rejects the premise that the Board may balance whether traditional remedies or a bargaining order best protect employee choice.[144] Instead, courts applying the spec-

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[137] *See supra* note 12 J. GETMAN, S. GOLDBERG & J. HERMAN (empirical study contradicts many of Board's basic assumptions concerning impact of employer's unfair labor practices). Commentators repeatedly have criticized the Board's lack of expertise respecting voter behavior. *See* Bernstein, *The NLRB's Adjudication-Rule Making Dilemma under the Administrative Act*, 79 YALE L.J. 571, 577-78 (1970) (Board lacks specific information about labor-management practices and employee attitudes and reactions); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 46-53, 88-90 (1968) (one may be justly skeptical of Board's expertise concerning effect of employer conduct); Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV 681, 683 (1972) (Board's experience does not insure accuracy in its assumptions); Samoff, *NLRB Elections, Uncertainty and Certainty*, 117 U. PA. L. REV. 228, 252 (1968) (Board should deliberately refrain from deciding impact of employer campaign tactics); Note, *Behavioral and Non-Behavioral Approaches to NLRB Representation Cases*, 45 IND. L.J. 276, 278 (1970) (Board should articulate evidence supporting behavior conclusions or abandon present approach). *See generally* Lewis, Gissel Packing: *Was the Supreme Court Right?* 56 A.B.A.J. 877 (1970); Pogrebin, *NLRB Bargaining Orders Since* Gissel: *Wandering From a Landmark*, 46 ST. JOHN'S L. REV. 193 (1971).

[138] *See* NLRB v. Gibralter Indus., Inc., 653 F.2d 1091, 1099 (6th Cir. 1981) (Board's order to bargain not in accordance with purposes of Act).

[139] *See* NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 119 (1st Cir. 1972) (Board issues bargaining orders without adequate reasoning); NLRB v. Armcor Indus., Inc., 535 F.2d 239, 244 (3d Cir. 1976) (rule requiring Board to set forth reasoned analysis justifying bargaining order under *Gissel* is salutary).

[140] *See* NLRB v. Chester Valley, Inc., 652 F.2d 263, 272 (2d Cir. 1981) (circuit courts note the increasing number of bargaining orders issued by Board).

[141] 395 U.S. at 614-615.

[142] *See* John Cuneo, Inc. v. NLRB, 681 F.2d 11, 24 (D.C. Cir. 1982) (*Gissel* directs courts to allow Board discretion in deciding if bargaining order better protects employees' union preferences).

[143] *See supra* notes 41-45 and accompanying text (courts deference to board lessened in review of bargaining order decisions).

[144] *See* NLRB v. American Spring Bed Mfg. Co., 670 F.2d 1236, 1248 (1st Cir. 1982) (elec-

ificity requirement hold that *Gissel* requires the Board expressly to consider the impact of the employer's misconduct on the election process.[145] The specificity requirement originated from the courts' concern that the Board often mechanically concluded that a bargaining order was the proper remedy.[146] The specificity requirement attempts to insure that the Board comply with the *Gissel* Court's rationale and not arbitrarily impose bargaining orders.[147] The circuit courts' continued division between emphasizing the need to focus on deterring employer misconduct and emphasizing the need to protect employees' freedom of choice, however, only exacerbates the uncertainty surrounding the proper use of the bargaining order remedy.[148]

The circuit courts' split over the proper application of the specificity requirement has significant practical ramifications for employers. Although the courts normally defer to the Board's judgment, employers appealing orders to bargain may find a reviewing court more receptive to an employer's argument that the Board abused its discretion.[149] The employer's probability of successfully challenging the Board's order will depend on which circuit court reviews the decision.[150] Circuit courts applying the specificity requirement closely scrutinize the Board's rationale supporting a bargaining order, thus allowing the employer greater opportunity to attack the Board's reasoning and conclusions.[151] The employer's likelihood of winning an appeal of a Board decision ultimately may depend on a showing that a fair election to determine the employees' sentiment concerning unionization is still a viable possibility.[152]

The philosopical differences among the circuit courts reflect the inherent difficulty in balancing the courts' limited role in reviewing ad-

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tion is preferred method of determining bargaining unit's representative and bargaining order appropriate only when fair election not possible).

[145] *See* NLRB v. K&K Gourmet Meats, Inc., 640 F.2d 460, 469 (3d Cir. 1981) (bargaining order appropriate where employer's misconduct coerces employees and prevents fair election).

[146] *See* NLRB v. Essex Wire Corp., 496 F.2d 862, 863 (6th Cir. 1972) (Board's reasoning consists only of conclusions without factual explication).

[147] *See supra* notes 49 - 51 and accompanying text (specificity requirement protects against arbitrary application by Board).

[148] *See* NLRB v. Permanent Label Corp., 657 F.2d 512, 522 (3d Cir. 1981) (Aldisert, J., concurring) (specificity requirement has failed to add predictability and stability to bargaining order law); *see also supra* note 76 (discussion of Judge Aldisert's concurrence in *Permanent Label*).

[149] *See* NLRB v. Keystone Pretzel Bakery, Inc., 109 L.R.R.M. (BNA) 3277, 3280 (3d Cir. 1982) (courts should not defer readily to Board's often questionable expertise by not requiring that substantial evidence support agency adjudication).

[150] *See* NLRB v. K&K Gourmet Meats, Inc., 640 F.2d 460, 470 (3d Cir. 1981) (Gibbons, J., dissenting) (Third Circuit decisions indicate that certain judges have signalled Board that bargaining orders are unwelcome in Third Circuit).

[151] *See supra* notes 41-45 and accompanying text (circuit courts exercise less deference to bargaining order decisions).

[152] *See* NLRB v. Apple Tree Chevrolet, Inc., 671 F.2d 838, 841 n.5 (4th Cir. 1982) (court will not enforce bargaining orders where valid election still is possible).

ministrative actions with the judicial responsibility to restrain the Board within the broad policies established by Congress in the Act.[153] A proper application of the specificity requirement recognizes the policy distinctions between the two categories of bargaining order cases discussed by the *Gissel* Court.[154] In category one, the *Gissel* Court implied that egregious employer misconduct may allow the Board to order an employer to bargain with a union without a determination of majority sentiment.[155] The Court's language indicates that deterring employer misconduct is the primary policy behind category one.[156] Category two modifies the attention placed on deterring employer violations by directing the Board to give equal emphasis to effectuating employee free choice.[157]

The *Gissel* Court's admonition that protecting employee free choice is an equal policy consideration is implemented fully only when the Board expressly considers whether traditional remedies will permit an unbiased election.[158] The Third Circuit in *Gourmet Meats* recognized that a proper application of the specificity requirement compels the Board to determine the coercive impact of an employer's misconduct on affected employees.[159] The *Gourmet Meats* court correctly reasoned that requiring the Board to make detailed findings concerning the effectiveness of traditional remedies effectively reinforces the principle that a representation election is preferable to a bargaining order.[160] The Third Circuit's decision in *Permanent Label* illustrates a different application of the specificity requirement which permits the Board to emphasize unduly the severity of the employer's misconduct.[161] In *Permanent Label*, the majority's decision allowed the Board to refrain from specifically measuring the effect of the employer's unfair labor practices.[162] The court enforced the bargaining order decision despite the Board's failure to determine properly whether a fair election still was possible.[163] The *Permanent Label* court's rationale undermines the purpose of the specificity requirement by permitting the

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[153] *See supra* notes 2 - 16 and accompanying text (discussion of general guidelines governing circuit court review of Board decisions).

[154] 395 U.S. at 612-16.

[155] *Id.* at 614.

[156] *Id.*

[157] *Id.*

[158] *See* NLRB v. Apple Tree Chevrolet, Inc., 671 F.2d 838, 841 (4th Cir. 1982) (continuing impact of employer's misconduct is important matter).

[159] 640 F.2d at 466; *see* supra notes 63 - 72 and accompanying text (discussion of *Gourmet Meats*).

[160] 640 F.2d at 465-66; *see* United Serv. for Handicapped v. NLRB, 679 F.2d 661, 664 (6th Cir. 1982) (specificity requirement supports *Gissel*'s Court's finding that elections are preferred).

[161] *See supra* notes 73 - 76 and accompanying text (discussion of majority opinion in *Permanent Label*).

[162] *See* supra notes 77 - 81 and accompanying text (discussion of dissenting opinion in *Permanent Label*).

[163] 657 F.2d at 519.

Board to refuse to conduct the critical analysis concerning whether traditional remedies will permit an unbiased election.[164] In contrast, the *Gourmet Meats* court's application of the specificity requirement supports the *Gissel* Court's rationale by directing the Board to determine whether traditional remedies adequately will correct the damage to the election process.[165] The Third Circuit's approach in *Gourmet Meats* provides effective protection to an aggrieved party through reasonable judicial review of bargaining order decisions.[166]

Despite the divergence of views over the specificity requirement, courts recognize that the Board must apply the bargaining order remedy uniformly to protect the integrity of the democratic procedures embodied in the Act.[167] Courts apply the specificity requirement to limit the Board's inconsistent issuance of bargaining orders and prevent the Board from abusing its remedial discretion.[168] An incorrect application of the specificity requirement, however, permits the Board to give undue weight to the severity of the employer's misconduct and, therefore, alters the essential inquiry required to determine whether a bargaining order is an appropriate remedy.[169] A correct application of the specficity requirement protects employee free choice and insures that the Board will proceed cautiously in issuing bargaining orders and not apply the extraordinary remedy in a routine fashion.[170]

BENTON J. MATHIS, JR.

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[164] *Id.*

[165] 640 F.2d at 466.

[166] *Id.*

[167] *See generally supra* notes 29-37 and accompanying text.

[168] *See generally supra* notes 46-54 and accompanying text.

[169] *See generally supra* notes 55-61 and accompanying text.

[170] *See generally supra* notes 62-129 and accompanying text.