October 1972

Gissel Packing Company - The NLRB Applies the Standards

Lawrence F. Doppelt

Jeffrey Ladd

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol49/iss2/3

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
AN EMPLOYER, CONFRONTED by a union demand for recognition as representative of the employer's employees, may ordinarily insist on a secret ballot election conducted by the National Labor Relations Board to determine whether or not the employees desire union representation. Even if the union has secured union authorization cards signed by a majority of the employer's employees, the employer generally need not recognize the union on the basis of the cards alone. NLRB secret ballot elections are the preferred method for ascertaining a union's majority status, being more reliable than cards for purposes of determining employee wishes.

In Gissel Packing Company, however, the Supreme Court severely limited the employer's right to insist on such a secret ballot election in all situations. It held the NLRB may order an employer to recognize and bargain with a union having authorization cards from a majority of the employer's employees if, after the union secures majority status,

* The authors express their appreciation to Jane Lizars, a student at the IIT-Chicago Kent Law School, for permitting them to utilize certain results of a research paper which she prepared on the subject topic.

** Associate Professor of Law, IIT-Chicago-Kent College of Law. B.A., 1956, Northwestern University; J.D., 1959, Yale Law School. Field attorney and acting supervisor with the NLRB, 1959-62. Thereafter engaged in the private practice of law, specializing in labor-management relations.

*** Student at IIT-Chicago-Kent College of Law.

1. Herein called the NLRB.
3. Throughout this article, it is assumed the union is claiming representation for employees in an appropriate bargaining unit for purposes of collective bargaining, and that such authorization cards as it secures are from the employees in such unit.
5. Aaron Brothers, 158 NLRB 1077 (1966).
7. Id. Authorization cards used to sustain a Gissel bargaining order generally must unambiguously authorize the union to represent the employee in matters pertaining to collective bargaining, and be secured without fraud, coercion, or serious misrepresentation. See Cumberland Shoe Corp., 144 NLRB 1268 (1963), aff'd, 351 F.2d 917 (6th Cir. 1965).
the employer engages in unfair labor practices\(^8\) having "the tendency to undermine majority status and impede the election process."\(^9\) Such an order may lie even if, at the time the bargaining order issues, the union represents only a minority of the employees involved, having lost its majority status in the interim period. The policy reasons for the decision are obvious: an employer should not, by its own unfair labor practices, be permitted to render a fair election impossible and then demand that the question of union representation be decided by an election.

The actual result of the *Gissel* decision is not substantially different from what the NLRB and courts have been doing for years. As long ago as 1943 the Supreme Court found that an employer, having committed serious unfair labor practices, could be required to bargain with a then minority union which had previously secured authorization cards from a majority of the employees.\(^10\) Further, since 1949 the NLRB has held, in a long line of cases, that a bargaining order may issue against an employer who in "bad faith" refused to recognize a union having cards signed by a majority of its employees. "Bad faith" was typically established by showing the employer committed serious unfair labor practices after it was aware of the union's recognitional demands.\(^11\) Such an order could be required subsequent to the unfair labor practices even if the union no longer represented a majority of the employees.\(^12\)

However, while the *Gissel* result is basically in accord with prior NLRB holdings, there is a distinct difference in determining whether a bargaining order is appropriate under *Gissel* standards, as opposed to those previously utilized by the NLRB. Before *Gissel* the NLRB looked to the employer's motive in determining the propriety of a bargaining order. If the employer's refusal to recognize a union having cards signed by a majority of its employees was in "bad faith", a bargaining order issued; if the refusal was in "good faith", no such

---

8. The unfair labor practices referred to herein would all be committed under Section 8 of the National Labor Relations Act, hereinafter called the Act.
9. NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 614 (1969). Such an order will issue as a remedy for the employer violating Section 8(a)(5) of the Act, which makes it an unfair labor practice for an employer to "refuse to bargain" with a union selected by a majority of its employees, subject to the provisions of Section 9(a) of the Act. Section 8(d) of the Act defines the duty to bargain.
remedy was imposed. Certainly, the employer's unfair labor practices, or absence thereof, were indicia of the employer's intent, with only serious unfair labor practices generally being sufficient to establish the requisite wrongful motive to warrant a bargaining order. Nevertheless, it was the employer's intent which was the controlling factor in determining whether a bargaining order was appropriate.

*Gissel*, on the other hand, plows a different path, rendering the employer's intent irrelevant in deciding whether a bargaining order should issue. The effect of the employer's action is now the determinative factor. If the employer's unfair labor practices are such that they tend to undermine the union's majority status or disrupt the election process, a bargaining order should issue. If the employer's actions do not have such an effect, no such order is appropriate, even if the employer acted in "bad faith". A *Gissel* remedy will or will not issue depending on the effect of the employer's actions, regardless of intent.

In so setting new standards, *Gissel* established two categories of unfair labor practices to gauge the effect of employer actions and to guide the NLRB in deciding whether a bargaining order should issue thereunder. One category consists of wrongful employer acts which, as noted, "have a tendency to undermine the union's majority strength and impede the election process", in which case a bargaining order is proper. Unfair labor practices fall within this classification if, after taking into account their extensiveness and likely recurrence, "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . ." The second category of unfair labor practices encompasses those "minor or less extensive unfair labor practices" which will not invoke a *Gissel* remedy. To fall within this classification employer wrongful acts must have a "minimal impact" on the election process. Ordinarily, a bargaining order should not, in any event, issue un-

13. See cases cited note 11 supra.
17. *Id.* at 614, 615.
18. *Id.*
19. *Id.*
less the union, at some point, secured cards signed by a majority of the employees.\textsuperscript{20}

Predictably, the vague standards set by \textit{Gissel} have presented the NLRB with a challenge it is finding exceedingly difficult to meet. "No recent decisional task has more perplexed (the NLRB) or confounded the courts which review (NLRB) decisions, than that committed to (the NLRB) in \textit{Gissel} . . . to determine whether an order to bargain is an appropriate remedy for employer interference. . . ."\textsuperscript{21} The NLRB has clearly floundered over application of \textit{Gissel} standards in determining which types of employer actions will or will not warrant a bargaining remedy. With this confusion has come a great degree of uncertainty. Practitioners and persons in the field are hard-put to foresee, with any accuracy, whether employer unfair labor practices have the requisite effect warranting a bargaining order.

In order to establish some predictability in this area it has been suggested that the NLRB establish specific guidelines setting forth which practices will or will not call for a bargaining order.\textsuperscript{22} However, this is manifestly impractical. There are so many variations on individual types of unfair labor practices, and so many combinations thereof, that it would be virtually impossible to foresee and set guidelines for all, or substantially all, types of employer conduct. As soon as any such guidelines were established, new or different combinations of unfair labor practices not covered thereby would surely be committed. Labor relations, like life, "has relations not always capable of division into inflexible compartments. The molds expand and shrink".\textsuperscript{23}

However, a substantial amount of time having passed since \textit{Gissel} and numerous decisions having been issued thereon by the NLRB, an attempt may now be made to determine how the NLRB has categorized various employer unfair labor practices. An examination of NLRB decisions will reveal that agency’s thinking, to date at least, as to which types of employer actions have the requisite effect under \textit{Gissel} standards so as to warrant a bargaining order. In this way a degree of predictability may be brought to this troubled field.

Several caveats should be noted before examining the following post-\textit{Gissel} cases. First, emphasis throughout has been placed on what

\textsuperscript{20} \textit{Gissel} establishes still a third category of unfair labor practices which are rare and not herein discussed. This includes those wrongful actions which are so outrageous and pervasive that a bargaining order will issue even though the union never enjoyed majority status.

\textsuperscript{21} General Stencils, Inc., 195 NLRB No. 173 (1972), dissenting opinion.

\textsuperscript{22} \textit{Id}.

\textsuperscript{23} Mr. Justice Cardoza in \textit{Glanzer v. Shepard}, 233 N.Y. 236, 241 (1922).
the NLRB has done, not on what it has said, although some attention has necessarily been paid to the latter. NLRB utterances and dicta in this area can be misleading, and any degree of certainty can only be attained by searching actual results. Second, the basic inquiry is to how the NLRB has acted, not to how it should have acted. Although some suggestions are advanced, particularly where there are few cases on point, investigation is directed towards how the NLRB has applied the Gissel standards, not to whether it has acted properly. Finally, it is a truism that the NLRB is a political body. Decisions will vary based on the individual predilections of the persons making up the NLRB as a whole, or the particular panel hearing a case. Accordingly, conclusions herein set forth as to what the NLRB has done are by no means conclusive as to what it will do. A more "liberal" or "conservative" NLRB future makeup definitely will affect the results of any particular case. However, it is assumed that the NLRB is sufficiently judicious to recognize that persons in the field do rely on NLRB past decisions for guidance. Disregard thereof, without good reason, adversely affects both labor and management and undermines confidence in the very processes of the NLRB.

Following, then, are cases showing how the NLRB has applied the Gissel standards. They are broken down into individual types of unfair labor practices and combinations thereof, establishing which employer activities may, or may not, have the requisite Gissel effect so that a bargaining order may be warranted.

1. Threats of Reprisals Affecting Job Security—Standing Alone

"A direct threat of loss of employment, whether through plant closure, discharge, or layoff, is one of the most flagrant means by which an employer can persuade employees from selecting a bargaining representative." Accordingly, such or similar threats have been construed to warrant a bargaining order, even if made to relatively few employees, on the basis they are of "such gravity as to render a reliable election unlikely. . .".

25. Only NLRB decisions are analyzed herein, court decisions applying Gissel standards not being included. Further, in all cases cited the union, at some point, enjoyed majority status based on union authorization cards.
27. General Stencils, Inc., 195 NLRB No. 173 (1972). See also footnote 31 of the Gissel decision, noting that threats to close or transfer operations are among the most effective to destroy election conditions. Indeed, Gissel specifically held such a general threat sufficient to invoke a bargaining remedy.
However, there may be instances where a threat, standing alone, is so isolated it will not have the requisite effect. If the employer can prove such a threat was not taken seriously by the employees, or occurred many months before an NLRB election could be held so that its effects could be dissipated, a Gissel remedy may not be imposed. Further, isolated threats by a first line supervisor, without authority to carry them out, may not have the requisite effect when uttered as a personal opinion in give and take sessions with employees. The burden of proving that a serious threat affecting job security does not have the effect of rendering a fair election unlikely rests heavily upon the employer.

2. Actual Reprisals Affecting Job Security—Standing Alone

A discriminatory discharge or layoff of even one employee because of his union activities is generally sufficiently serious to warrant a bargaining order, going, as it does, "to the very heart of the Act". When more than one employee in the unit involved is so discriminatorily discharged, the effect clearly calls for a Gissel remedy. Similar reprisals, such as discriminatorily transferring employees out of the unit to different jobs also warrants a bargaining order. And while there are no cases on point, actual discriminatory plant closures, transfers, subcontracts resulting in layoffs and the like, would certainly call for a Gissel remedy under the rationale of the above cases.

In a dissenting opinion, Chairman Miller of the NLRB indicated that the discriminatory discharge of one employee may not have the requisite unlawful effect under Gissel if other employees did not suspect

28. Claremont Polychemical Corp., 196 NLRB No. 75 (1972). There was also an isolated promise of promotion in this case, and the threat occurred five months before the election.
29. New Alaska Development, 194 NLRB No. 137 (1972), aff'd 441 F.2d 491 (7th Cir. 1971).
32. Such an action violates Section 8(a)(1) and (3) of the Act.
the actual circumstances of the discharge. However, realities of industrial relations render such a situation unlikely, as Chairman Miller acknowledged, and there are no cases so holding. In any event, the burden of proving that a discriminatory discharge does not warrant a bargaining order should lie firmly with the employer.

3. Threats of Reprisals Affecting Working Conditions—Standing Alone

Threats of reprisals affecting working conditions, as opposed to job security, will generally not give rise to a bargaining order. This not only includes relatively minor threats, such as changing working hours to interfere with outside part time employment, but also more substantial actions, such as threatening to withdraw or renegotiate existing or proposed benefits with a union, or to bargain from scratch. In any event, vague threats of reprisals or futility of bargaining which do not affect job security will not ordinarily warrant a bargaining order by themselves—the NLRB believing that employees “express little concern over the possible loss of certain minor benefits. . .”

4. Actual Reprisals Affecting Working Conditions—Standing Alone

Rather surprisingly, there seem to be no cases involving actual reprisals affecting working conditions standing alone, as opposed to job security. As noted, infra, reprisals affecting working conditions are usually combined with other wrongful activities.

36. General Stencils, Inc., 195 NLRB No. 173 (1972). Chairman Miller also there stated that repeated discriminatory discharges would give rise to a bargaining order.
37. One case where a discriminatory layoff of employees did not have the requisite Gissel effect occurred where: the employees were suspended for 4 hours; the rule under which the employees were suspended was later revoked; and the employees were paid back all monies lost. Central Soya of Canton, 180 NLRB 546 (1970).
38. Such threats are in violation of Section 8(a)(1) of the Act.
39. Poughkeepsie Newspapers, Inc., 177 NLRB 972 (1969). In this case there was also an isolated minor promise of benefits, and still a bargaining order did not issue.
40. Monroe, 190 NLRB No. 100 (1971), rev’d, 460 F.2d 121 (4th Cir. 1972); Olin Conductors, 185 NLRB No. 56 (1970), where other unfair labor practices were also involved and still a bargaining order did not issue; cf. General Stencils, Inc., 195 NLRB No. 173 (1972).
42. General Stencils, 195 NLRB No. 173 (1972).
43. Such activities violate Section 8(a)(1) and, frequently, Section 8(a)(3) of the Act.
However, there is obviously a distinct difference between a threat, to adversely affect an employee's working conditions, and actually doing so. The former involves words which may or may not be taken seriously. Indeed, such words almost fall into the class of "puffing"; the sales pitch employers frequently give employees as to why they should not join unions, and may be so interpreted by employees. Actual reprisals, on the other hand, are a different story. An employee cannot help but take these seriously, his working conditions having actually been adversely affected. The employer has shown, in no uncertain terms, who is "boss", and has exercised his economic power in the most blatant manner. His fist is no longer in a "velvet glove".44

If there is an actual reprisal affecting working conditions which go to the heart of the employer-employee relation, such as wage decreases, demotions, changes in significant working conditions, lessening of earnings opportunities, or the like, a guess may be hazarded that a bargaining order should issue. On the other hand, less important reprisals, such as changes in smoking regulations, eating privileges, or work schedules may not, in themselves, be sufficient for a Gissel remedy.45 Such lesser actions should not affect an employee to the extent that his loyalties to the union or his ability to render a rational election choice are irrevocably destroyed.

5. Promises of Benefits—Standing Alone

Whether promises of benefits made to deter union organizational efforts46 will by themselves warrant a bargaining order has not been specifically decided. It appears that such will be determined by the extent and nature of the promises. A promise affecting relatively few employees, or of a minor or vague nature, will not invoke such a remedy.47 If, on the other hand, the employer solicits employee requests for what it will take to abandon the union, and then promises substantial benefits pursuant thereto, a recognitional order may be appropriate.48

46. Such actions are violative of Section 8(a)(1) of the Act.
While the area of promises of benefits, standing alone, is basically undecided, it is suggested that promises of substantial benefits, especially those affecting earnings opportunities and a substantial number of employees, should call for a *Gissel* remedy. These are a clear abuse of employer economic advantage, preventing employees from exercising a free vote in an election. If the employee votes against the employer he almost certainly loses promised benefits and charts an uncertain course for his economic future. A vote for the employer, contrariwise, assures him of almost certain increased economic opportunities. It would take a strong employee to make an untrammelled choice under such circumstances, the employer having used his economic leverage to prevent a truly reasoned selection.

6. **Granting of Benefits—Standing Alone**

As opposed to a promise of benefits, the actual granting of substantial benefits to more than an insignificant number of employees in order to deter union organizational efforts will almost certainly invoke a bargaining order. Although there is some contrary authority, it has been noted that such a grant of significant benefits may, *per se*, be sufficient to justify imposition of a *Gissel* remedy. "The employer who identifies the sources of employee discontent, and remedies them, ... demonstrates by his action that he will oppose the union by unlawful means and that employees who support it do so at their grave peril."  

7. **Dominating or Assisting a Rival Union—Standing Alone**

An employer's establishment of a company-dominated union or recognition of a minority union, in the face of organizational efforts by a union having cards signed by a majority of employees should, in itself,
warrant a bargaining order. The establishment or recognition of such a “sweetheart” union would render a fair election or continuing loyalties to the majority union virtually impossible. Once the minority union were recognized, employee reliance would be indefinitely transferred thereto. Employees would necessarily look to the assisted or dominated organization for economic betterment, making it exceedingly unlikely that the majority union could regain or retain their allegiance. A fair election could scarcely be contemplated under such circumstances.

The above analysis should not necessarily apply to minor violations of Section 8(a)(2) of the Act. Permitting a favored rival union to address or solicit employees while denying such rights to a majority union, for example, should not result in a bargaining order, particularly if other avenues of access are available for employee solicitation. Clearly, such violations could be remedied by more traditional routes, and employee loyalties would not be irrevocably affected.

8. OTHER UNFAIR LABOR PRACTICES—STANDING ALONE

Except as otherwise noted above, other individual types of unfair labor practices standing alone will generally not be sufficient to impose a bargaining order on an employer. Most significantly, this includes coercive interrogation, either isolated or systematic. It also applies to physically or verbally abusing an outside union organizer in the presence of employees, unlawfully prohibiting the wearing of union buttons, wrongfully utilizing an employee to convey the em-

54. Cf. Leslie Metal Arts Co., 194 NLRB No. 20 (1971), where the employer established a dominated employee committee, and also threatened unfavorable working conditions to defeat a union; also Overland Distributing Centers, Inc., 194 NLRB No. 113 (1971), where the employer also interrogated one employee, an obviously minor unfair labor practice. Sturgeon Electric, 181 NLRB 157 (1970), where the employer, confronted by one union’s demand, gave support to another union. Such employer action assisting, dominating or forming a labor organization violates Section 8(a)(1) and (2) of the Act.


56. Such interrogation violates Section 8(a)(1) of the Act.

57. Action Advertising Co., 195 NLRB No. 122 (1972); Kohl Motors, Inc., 185 NLRB No. 69 (1970); Arcoa Corp., 180 NLRB 1 (1970), where other unfair labor practices were also involved; Bill Pierre Ford, Inc., 181 NLRB 929 (1970); Blade Tribune Publishing, 180 NLRB 432 (1969), also involving other types of unfair labor practices.

58. The following unfair labor practices involve Section 8(a)(1) of the Act. In all cases cited, there were also other unfair labor practices in addition to those indicated. Since no bargaining order issued when the noted practices were accompanied by other wrongful acts, clearly none would issue for such improper activities standing alone.


ployer's displeasure with the union, and soliciting an employee to feel out fellow employees as to their union activities. While there are no cases, unlawful surveillance or nonsolicitation rules, standing alone, would appear to be in the same class as the foregoing violations, and would not warrant a Gissel remedy. Manifestly, they would not affect a majority status already achieved, or render a fair election unlikely.

9. Threats of Reprisals Affecting Working Conditions Together with Promises of Benefits

As noted, neither threats of reprisals affecting working conditions, as opposed to job security, nor isolated promises of benefits, standing alone, will call for a bargaining order. And, although there are too few cases to form a firm prediction, it appears the combination of such conduct will not necessarily warrant a Gissel remedy.

Contrary to the above conclusion, however, are the realities of employer-employee relations. Standing together, threats of reprisals and promises of benefits paint a picture to employees of an employer determined to destroy a union's majority status, and willing to use seriously improper means to do so. Thus, in concert, they may well have a cumulative effect of destroying a union's majority status or rendering a fair election unlikely. In any event, it seems clear it would not take too much more, together with such combination, to call for a bargaining order.

10. Threats of Reprisals Affecting Working Conditions Together with Other Unfair Labor Practices not Themselves Warranting a Bargaining Order

Threats of reprisals affecting working conditions, as opposed to job security, do not ordinarily result in a Gissel remedy. This contin-
ues to be the case even where they are accompanied by other unfair labor practices which do not themselves warrant a bargaining order;\textsuperscript{68} such as interrogation.\textsuperscript{69}

It should be questioned whether this should be the result where there are various other unfair labor practices accompanying threats of reprisals. The cumulative effect of such concerted practices may well have the same coercive effect as a more serious unfair labor practice standing alone. The impact of an employer embarking on a series of unlawful activities, however minor each may be individually, will certainly have an effect well beyond what each alone might cause.\textsuperscript{70} The employees will get the employer's message loud and clear: adherence to the union may invoke the employer's wrath.

11. **Promises of Benefits Together with Other Minor Unfair Labor Practices**

Promises of benefits which, standing alone, will not invoke a bargaining order, will not necessarily do so when combined with other minor unfair labor practices, such as interrogation or solicitation of an employee to query his fellow employees as to their union affiliation.\textsuperscript{71} Where, however, there are a number of minor unfair labor practices, combined with a promise of benefits, the cumulative effect may be such as to warrant a bargaining order.\textsuperscript{72}

12. **Threats of Reprisals Affecting Job Security Combined with Minor Unfair Labor Practices**

A threat of reprisal affecting job security will ordinarily call for a \textit{Gissel} remedy.\textsuperscript{73} Combined with other unfair labor practices, even the most minor, there is little doubt such a remedy is warranted.\textsuperscript{74}

When the additional unfair labor practices are something more than

\textsuperscript{68} Hereinafter, unfair labor practices not themselves warranting a bargaining order may be referred to as "minor" unfair labor practices.
\textsuperscript{69} New Alaska Development Corp., 194 NLRB No. 137 (1972).
\textsuperscript{70} Cf. Kaiser Agricultural Chemicals, 189 NLRB No. 95 (1971).
\textsuperscript{72} Cf. Ingress Plastene, Inc., 177 NLRB 481 (1969).
\textsuperscript{73} 395 U.S. 575 (1969).
\textsuperscript{74} Irv's Market, 179 NLRB 832 (1969), \textit{aff'd}, 434 F.2d 1051 (5th Cir. 1970), threats of store closure combined with interrogation; General Steel Products, 180 NLRB 56 (1969), threats of discharge and other dire events combined with interrogation; Dayton Town & Country, 179 NLRB 847 (1969), \textit{aff'd}, 445 F.2d 901 (9th Cir. 1971), threat of discharge plus interrogation; Lil General Stores, 188 NLRB No. 117 (1971), threats of discharge, interrogation and impression of surveillance; General Stencils, 195 NLRB No. 173 (1972), threats of layoffs, interrogation and surveillance.
minor, but perhaps less than those requiring a bargaining order on their own, a bargaining remedy will, of course, issue.\textsuperscript{75}

13. \textbf{Actual Reprisals Affecting Job Security Together with Minor Unfair Labor Practices}

An actual reprimand against employees for engaging in union activities being a practice which will invoke a bargaining order,\textsuperscript{76} it follows that such action, together with either minor\textsuperscript{77} or more extensive unfair labor practices which do not themselves warrant a bargaining order,\textsuperscript{78} will result in a \textit{Gissel} remedy.


\textsuperscript{76} \textit{Supra}, section 4 of the text.


\textsuperscript{78} Zermuhlen & Associates, 189 NLRB No. 63 (1971), discharge, threats of reprisals affecting working conditions, interrogation; Atlas Engine Works, Inc., 181 NLRB 52 (1970), \textit{aff'd}, 435 F.2d 558 (6th Cir. 1970), discriminatory refusal to rehire, threat of benefit loss, impression of surveillance, interrogation, unlawful no-solicitation rule; Amsterdam Wrecking, 195 NLRB No. 18 (1972), discharge of union adherents, threat to withhold benefits, interrogation; Acker Industries, 184 NLRB No. 51 (1970), \textit{rev'd}, — F.2d —, 68 LC Par. 12688, 80 LRRM 2364 (10th Cir. 1972), discharge plus promise of benefits; General Plastics, 188 NLRB No. 111 (1971), \textit{aff'd},
14. GRANTING OF BENEFITS TOGETHER WITH MINOR UNFAIR LABOR PRACTICES

Since the granting of substantial benefits to deter employees from engaging in the union activities is enough to warrant a bargaining order,\textsuperscript{79} such action combined with other unfair labor practices considered minor will generally result in a \textit{Gissel} remedy.\textsuperscript{80} The one contrary case is difficult to reconcile with the above conclusion.\textsuperscript{81}

15. HODGEPODGE

While an attempt has been made herein to categorize and pigeonhole types of unfair labor practices to ascertain whether they meet \textit{Gissel} standards, it should be recognized that, with certain exceptions, there are few black and white areas. In most cases, more than one type of unfair labor practice has been committed, and the combinations of wrongful acts is almost infinite. However, from what has already been noted, and to further guide practitioners and parties in this area, bargaining orders will properly issue in the following melange of situations:\textsuperscript{82}

a. Threats of plant closures or job loss to even a few employees and discriminatory reprisals affecting job security, combined with various minor unfair labor practices, such as interrogation, threats of

\textsuperscript{79} Supra, section 6 of the text.

\textsuperscript{80} Escondido Ready Mix, 189 NLRB No. 69 (1971), granting of benefits combined with offer to deal directly with employees; WKRG-TV, 190 NLRB No. 34 (1971), granting of benefits, with interrogation, nonsolicitation rule; Texaco, Inc., 178 NLRB 434 (1969), granting of benefits, interrogation; C&G Electric, 180 NLRB No. 52 (1969), granting of benefits, plus interrogation; Hy-Vee Food Stores, 178 NLRB 609 (1969), \textit{affd}, 426 F.2d 763 (8th Cir. 1970), granting of benefits, combined with threats to adversely affect promotional opportunities and interrogation. Levi Strauss, 180 NLRB No. 43 (1969), \textit{affd}, 441 F.2d 1027 (D.C. Cir. 1970), granting of benefits combined with threat of loss of benefits, interrogation, and nonsolicitation rule.

\textsuperscript{81} Olin Conductors, 185 NLRB No. 56 (1970), where soliciting and rectifying grievances was combined with threats that each benefit would have to be renegotiated anew with the union.

\textsuperscript{82} Cases where bargaining orders will not issue have been discussed, \textit{supra} note 78.
NLRB APPLIES THE STANDARDS

reprisals or reprisals affecting working conditions, promises of benefits, and/or surveillance; 88

b. Illegally assisting a rival union in recognizing it, rather than the majority union, and discriminatory discharges; 84

c. Granting of benefits, threats of reprisals affecting job security, and actual reprisals affecting job security, together with minor unfair labor practices such as interrogation, threats of reprisals affecting working conditions, promises of benefits, surveillance, and/or no solicitation rules; 86

d. Granting of benefits and actual reprisals affecting job security, together with other minor unfair labor practices such as interrogation, promise of benefits, and/or surveillance; 86

e. Granting of benefits and threats of reprisals affecting job se-


85. Airline Parking, Inc., 196 NLRB No. 154 (1972); Starward Fabrics, Inc., 190 NLRB No. 97 (1971); All-Tronics, Inc., 179 NLRB 138 (1969); City Welding & Mfg. Co., 191 NLRB No. 30 (1971), aff'd, — F.2d —, 68 LC Par. 12869, 80 LRRM 3057 (3rd Cir. 1972); Mechanical Specialties, 179 NLRB 676 (1969); R. D. Cortina Co., Inc., 179 NLRB 701 (1969), aff'd, — F.2d —, 66 LC Par. 12167, 78 LRRM 2479 (2nd Cir. 1971); J. P. Stevens, 179 NLRB 254 (1969), aff'd, 441 F.2d 514 (5th Cir. 1971); Tri-State Stores, Inc., 185 NLRB No. 117 (1970), where there was also a unilateral reduction in the work week.


curity, either alone or together with other unfair labor practices, such as threats of reprisals affecting working conditions, interrogations, and/or promise of benefits; 88

f. Threats of discharge and physical harm, withdrawing employee washroom privileges, promising benefits, offering individual contracts to employees, and interrogation; 89
g. Illegally assisting and recognizing a dominated labor organization, interrogation, threats of loss of benefits, and contracting with the minority union; 90

h. Illegally forming a company-dominated union, together with granting benefits, interrogation, and threats of reprisals affecting job security; 91

i. Unlawful change of working conditions, threats of discharge, interrogation and promise of benefits; 92

j. Unlawful discharge, dominating and assisting a union, interrogation, promise of benefits. 93

k. Coercively interrogating and polling employees and creating an impression of surveillance against a background of widespread company hostility to unionization and prior flagrant unlawful practices at other company facilities. 94

The above cannot, and is not meant to be exhaustive of Gissel cases. It does, however, categorize the most typical types of cases with which the NLRB has been confronted, and demonstrates how Gissel standards have been applied by that agency in the past. Insofar as precedent may be a guide to the future, it may shed some light for practitioners in the field as to how the NLRB may be expected to proceed.

A final note is in order based on a recent article questioning whether an employer's pre-election campaigning has a real impact on how employees vote in an election. 95 It is the preliminary conclu-

89. Overmeyer Co., 190 NLRB No. 71 (1971).
92. The Dalf Corp., 188 NLRB No. 57 (1971).
sion of the article that the specific content of the campaign is generally irrelevant in shaping voting behavior. The article suggests that the employees consciously, or subconsciously, have determined how they will vote in advance of any campaigning, based on their pre-existing predilections for or against unionization.

While the implications of the above study are admittedly preliminary, it is not believed the results are wholly valid for the following reasons. First, it is not in accordance with the realities of industrial relations. It is not at all uncommon that a large majority of employees sign cards for a union, and then vote against the union after intensive pre-election employer campaigning. While some of the vote switchers may well have signed cards because of social or other pressures, it is unlikely that most did so for that reason. Employer pressures are equal to those generated by the union and these are considered when an employee determines whether or not to sign a card. Were an election to be held immediately after the majority of employees signed cards, but before any employer campaigning, it is likely that the affirmative action of signing a union card would be carried forward into the voting booth. Therefore, the switch in voting can only be explained by the employer's pre-election conduct.

Second, even if, as the above article indicates, as many as 80 per cent of the employees have determined how to vote in advance of pre-election campaigning there would still remain 20 per cent of the voters who are undecided. The vote of this remaining bloc may well determine the outcome of the election. It is to this group of undecided voters that the parties direct their pre-election campaigning. To conclude that this group is unaffected by threats, promises and other coercive activity is hard to believe. After all, when an employee is told his future economic livelihood depends on the outcome of an election, he will not ignore what he is hearing.

Accordingly, and with respect to the aforementioned article, it is believed that the implied conclusions therein, namely, that a Gissel-type remedy is not required when employer pre-election conduct seriously affects the results of an election, is not in accord with the realities of industrial relations. It would appear that Gissel will, and should, remain in effect as a viable method for curing certain types of employer unfair labor practices.