The Remedial Efficacy of Gissel Bargaining Orders

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INTRODUCTION

While most employers today respect the rights of unions to organize and bargain collectively, a minority use illegal means to resist organization. All too often an employer confronted with an authorization card majority will refuse recognition in order to dissipate the union's support through unfair labor practices before an election can be held. In such cases, the National Labor Relations Board ("NLRB" or "Board"") may grant relief by issuing a "Gissel bargaining order."† Though Gissel orders are relatively rare,² they merit scrutiny. They are the NLRB's strongest remedy for the serious—and sometimes outrageous—unfair labor practices through which employers can frustrate employee free choice. The effectiveness of Gissel orders is a significant gauge of the Board's ability to protect and promote collective bargaining.

This Article begins with a synopsis of the legal background of special bargaining orders. The efficacy of the Gissel orders are then evalu-
ated by determining the likelihood that a union will subsequently achieve a contract through collective bargaining. The authors chose this approach rather than simply examining whether negotiations occurred following a bargaining order, because the latter standard is a poor gauge of the remedy's success. The employer's illegal conduct may have so undermined the union as to preclude it from negotiating a contract. Furthermore, the contract itself is the real test of remedial success as the statute contemplates the execution of labor-management agreements. Finally, analyzing the remedial efficacy of the bargaining order on the basis of bargaining outcomes is possible because data exists for an objective comparison of the ability of unions to obtain contracts with and without bargaining orders.\(^3\)

The authors' research indicates that in a substantial number of cases unions do not obtain contracts subsequent to *Gissel* orders. The authors examine the factors that contribute to this result and recommend the development of new remedies as well as more vigorous application of existing remedies to better realize the purposes of the Labor Management Relations Act ("LMRA"). The authors' recommendations include creation of a new reinstatement remedy, more vigorous use of the Board's section 10(j) injunctive authority, and the application of make-whole relief measures to unions damaged by illegal employer conduct in the *Gissel* mode.

I

THE APPLICABLE LAW

The LMRA requires that an employer recognize and bargain with a labor organization only if the labor organization represents a majority of

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3. In 1975 the Industrial Union Department of the AFL-CIO surveyed unions associated with 2,656 election victories in 1970. Of those unions responding 78% were able to negotiate first agreements. See Prosten, *The Longest Season: Union Organizing in the Last Decade, a/k/a How Come One Team Has to Play with Its Shoelaces Tied Together*, 31 PROC. ANN. MEETING INDUS. REL. RES. ASS'N 240-49 (1979).

The Department of Organization and Field Services of the AFL-CIO conducted surveys in 1981 and 1982. Charles McDonald reports that of 271 elections won in units of 100 or more employees between April 1979 and March 1981, only 172, or 63%, resulted in first contracts. We cannot infer worsening circumstances for unions between the period of the Prosten study and that of the McDonald study, however, since the former covered all units and the latter only units of 100 employees or more. McDonald, A Memorandum to the National Organizing Committee of the AFL-CIO 1-3 (Feb. 18, 1983). Additionally, merely observing whether or not contract negotiations occurred after the issuance of a bargaining order would not indicate accurately the effectiveness of the Board's remedial process, since an employer may emasculate a union's bargaining power by destroying its majority, and thereby prevent the union from obtaining a contract. A bargaining order in such a case clearly fails to restore the union's position or to enable the union to bargain effectively for its members. Furthermore, while the execution of a contract is not required by law, "the Act contemplates the making of contracts with labor organizations. This is the manifest objective in providing for collective bargaining." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938).
the employees in an appropriate unit. Recognition is normally secured in one of several ways. It may be granted voluntarily by the employer after union demand. In these cases, the union organizer, having obtained authorization cards from a majority of unit employees, meets with the employer and requests recognition. At times the organizer will offer a neutral third party or, more rarely, the employer, the opportunity to examine and check the cards against the company's payroll records. If the employer accepts the union's demonstration of its majority, the full bargaining obligation is created and negotiations can begin.

Recognition may also be secured based on a National Labor Relations Board election. Normally, upon petition of either the employer or the union, the NLRB holds a representation election to determine majority status. A representation election won by the union and certified by the Board imposes a bargaining obligation upon the employer.

This Article is concerned with a third means for securing recognition—that is, through an unfair labor practice charge leading to Gissel bargaining order. A Gissel order might be appropriate in the following hypothetical situation. After an organizational campaign, the union succeeds in obtaining authorization cards from a majority of the employees in the unit. Although the union is now in a position to request recognition from the employer as the employees' bargaining agent, the union organizer withholds his request until the union has signed up as many employees as possible. In the meantime, the employer becomes aware of the union drive and operates swiftly and illegally. Individual employees are called into the main office and interrogated as to the identity of the leaders and supporters of the union campaign. The employer then assembles the employees and lectures them on the possible consequences of unionization: shutdown, elimination of benefits, and stricter work rules. The employer also notes the advantages that might result from the em-

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4. Labor Management Relations (Taft-Hartley) Act §§ 9(a), 8(a)(5), 29 U.S.C. §§ 159(a), 158(a)(5) (1982) [hereinafter LMRA]. Section 9(a) provides that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

5. LMRA § 9(c)(1), 29 U.S.C. § 159(c)(1) (1982); NLRB Rules and Regulations, 29 C.F.R. § 101 (1987). Here, authorization cards also play a part. Before the union can obtain such an election, it must demonstrate that "a substantial number of employees . . . wish to be represented." LMRA § 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A) (1982). The Board has interpreted this provision as requiring a union to show that at least 30% of the unit supports the union before the Board will hold an election. NLRB, Rules and Regulations and Statements of Procedures § 101.18(a). Traditionally, unions meet this requirement by obtaining authorization cards from at least 30% of the employees, and often from over 50%, and presenting them to the Board when petitioning for an election. However, the 30% requirement should not be confused with the majority showing that will support a bargaining order.
ployees' rejection of the union: higher wages, continued job security, and other benefits. The employer culminates its anti-union campaign by discharging suspected union leaders; alternatively, or even simultaneously, it may establish a company union. When the union finally requests recognition as the employees' collective bargaining representative, the employer questions the union's majority position and demands an election.

Under normal circumstances, section 10(c) requires the Board to use the election process to determine employee preferences. However, when an employer commits unfair labor practices, the Board may conclude that the election is no longer an accurate reflection of employee choice and may accept other evidence of majority representation. In Joy Silk Mills v. NLRB, the District of Columbia Court of Appeals upheld a Board order requiring the employer to bargain despite the union's loss of its majority status due to the employer's unfair labor practices. The court agreed that such practices are sufficient evidence of the employer's bad faith in refusing to recognize the majority it is attempting to weaken. The court held that a bargaining order based on authorization cards is appropriate in such cases.6

This approach was subsequently upheld by the Supreme Court in Gissel Packing Corp.7 While affirming an employer's right to insist upon an election as long as the employer's other actions were legal, the Supreme Court held that if an employer's unfair labor practices taint the election outcome or jeopardize the union's chances of a fair election, the Board could issue a bargaining order on the basis of authorization cards previously obtained from a majority of the employees in the unit. Such an order requires a finding of unfair labor practices of sufficient seriousness to undermine union support.8 The Court agreed that such conduct occurred in Gissel.9 The record showed and the Court found several unfair labor practices including coercive interrogations of employees about their union activities, threats of discharge, promises of benefits, as well as discriminatory discharges of employees.10

In examining the validity of authorization cards as a barometer of employee support, the Supreme Court further held that, "The acknowledged superiority of the election process . . . does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—

8. Id. at 610-11.
9. Gissel was a consolidation on appeal of several cases. In Heck the election sought by the union was never held because of the unfair labor charges filed by the union. In General Steel the election was won by the employer and set aside by the Board because of the employer's election violations. See id. at 578.
10. Id. at 615-16.
perhaps the only way—of assuring employee choice.”

While the Court in *Gissel* was prepared to rely on authorization cards to establish the union’s majority, it did not address the question of whether such reliance extended to a situation where no unfair labor practices were committed. In 1974, the Court finally answered this question in *Linden Lumber Division, Summer & Co. v. NLRB.* The Court held that an employer’s refusal to grant recognition based on proffered cards and the employer’s insistence that the union petition for an election, unaccompanied by unfair labor practices aimed at the union majority, was not a violation of the Act, even if the employer asserted no basis for a good faith doubt of the union’s majority claim.

*Gissel* also left unanswered the question of whether a bargaining order was appropriate even if no majority had ever been secured. In dictum, the *Gissel* Court noted that the Fourth Circuit had left open the possibility that the union’s majority status need not be inquired into where the employer had engaged in “outrageous” or “pervasive” unfair labor practices. Despite this signal the Board did not issue a bargaining order in such circumstances until 1982, and then only through a three-member majority. In 1984 the Board placed a significant limitation on this approach and on its own powers in *Gourmet Foods, Inc.* Asserting the primacy of majority designation even in the face of the most egregious unfair labor practices, the Board announced that it would never be justified in issuing a bargaining order if the union had not enjoyed majority status at some point prior to the employer’s illegal actions. Thus, an employer who learns of an organizing effort early enough and who succeeds by unfair means in bringing the organizing to a halt before a majority have signed cards, will not be subject to a *Gissel*-type remedy.

In sum, the order to bargain is the Board’s major remedial weapon for countering an employer’s illegal attempts to destroy the union’s majority position. *Gissel* affirmed the prospective and retrospective validity of the bargaining order where an employer’s illegal conduct compromises the fairness of an election. However, the Court has limited application of this remedy to situations where the union has demonstrated majority status, the employer uses unfair labor practices to destroy the majority, and the majority is indeed lost.

11. Id. at 602.
16. Id. at 115.
II
Bargaining Outcomes and Factors Influencing a Union's Ability to Obtain a Contract

The authors' study is based on an analysis of the outcomes in forty-nine cases where bargaining orders were issued. The appellate courts issued orders in thirty-six cases, the NLRB in five, and eight resulted from informal NLRB settlements. The bargaining orders were issued between January 1981 and July 1984. Following the issuance of these bargaining orders, the authors conducted telephone interviews with union organizers to determine union success or failure in executing collective bargaining agreements.17

Of the forty-nine Gissel incidents, the unions succeeded in obtaining contracts following the issuance of a bargaining order in nineteen—approximately thirty-nine percent of all cases. On one hand, this result is encouraging as the bargaining order is normally sought only after the union's majority support in the bargaining unit has been undermined. That unions succeeded nevertheless in negotiating agreements in thirty-nine percent of the cases suggests that the bargaining order can sometimes help the union establish the bargaining relationship it would have enjoyed absent the employer's violation. On the other hand, a contract execution rate of only thirty-nine percent compares poorly with the ability of unions to achieve contracts in approximately seventy-eight percent of first bargaining situations following NLRB certifications where majority status was maintained through the election.18 By examining the factors contributing to union success or failure in executing contracts, we can more readily identify the measures the NLRB can take to improve

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17. Drawing a sample was made extremely difficult because the NLRB and Regional Offices ceased maintaining separate tabulations of Gissel cases in 1980. As a result, only a few settled cases could be identified. Resort to Shepard's Index was used to identify Gissel orders issued by the Board and the courts. The sample, however, contains relatively few NLRB cases because most NLRB cases identified in Shepard's Index for the period 1981-1984 had not been closed out by the various Regional Offices, and as active cases could not be examined. Through Shepard's Index and analysis of internal NLRB records, the authors determined that between January 1981 and July 1984 there were 47 appellate court decisions that had been closed out. These 47 cases arose in 23 of the NLRB's Regional Offices. The authors succeeded in contacting the union organizers to determine bargaining outcomes in 36 of these cases which were drawn from 21 different Regional Offices. These 36 cases were supplemented by eight closed settled cases and five closed NLRB decisions.

The sample contains several limitations. Because of the relatively few settled and NLRB cases analyzed, caution must be exercised in drawing conclusions from the data. The small sample size precluded meaningful analysis of Gissel order outcomes by types of industry or unions. At the same time, despite the small sample sizes, the data allowed for the testing of statistical significance and provided insights into the practical results of Gissel bargaining orders. Additionally, the greater scrutiny afforded the appellate court cases provides a basis for determining the efficacy of NLRB remedies where the employers are most resistant to collective bargaining. That these cases were drawn from over 21 different Regional Offices also provides a basis for analyzing the efficacy of the Board's remedial processes on a national rather than regional level.

18. See Prosten, supra note 3, at 240-49.
the remedial efficacy of bargaining orders. This Article will examine the effects of different kinds of unfair labor practices, the stage of the case, the location of the firm, and the size of the bargaining unit.

A. Bargaining Success by Type of Employer Unfair Labor Practice

The type of employer unfair labor practice significantly affects a union’s ability to obtain a contract.19 For example, the union executed contracts in four out of five cases (80%) where employer violations did not go beyond threats (section 8(a)(1) infractions).20 In stark contrast, the union succeeded in only fifteen of the forty-two cases (35%) where the employer fired union sympathizers (a violation of section 8(a)(3)).21

The reasons a union faces greater difficulty in obtaining contracts when an employer discharges union adherents are not difficult to perceive. Where the employer’s violations consist merely of threats and intimidations, the union can better combat the violations and regain the employees’ allegiance. For example, the skillful union organizer can negate the effect of a unilateral wage increase by convincing employees that the union was responsible for the wage gain. Similarly, the organizer can point out to employees that the employer’s threats to close the plant or decrease production if they select the union as their bargaining agent are only bluffs (a particularly persuasive argument in a profitable factory). Campaign literature may also assuage employee concerns by identifying other, similar facilities that continued to operate following a successful organizing effort.

However, both workers individually and the union institutionally are often defenseless in the face of actual employee dismissals. The illegal discharge of union supporters forcefully communicates to all workers the risk involved in supporting the union. Confronted with the reality that identification with the union might be at the expense of their jobs, employees avoid union contact. Moreover, where the dismissed employees have also been active union organizers, the union is deprived of the

<table>
<thead>
<tr>
<th>Type of ULP</th>
<th>No. of Bargaining Orders</th>
<th>No. of Contracts Obtained</th>
<th>% of Contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>8(a)(5)</td>
<td>1</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>8(a)(1)</td>
<td>5</td>
<td>4</td>
<td>80%</td>
</tr>
<tr>
<td>8(a)(2)</td>
<td>1</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>8(a)(3)</td>
<td>42</td>
<td>15</td>
<td>35%</td>
</tr>
</tbody>
</table>

20. Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” The § 8(a)(1) infractions involved in these cases were threats, interrogations, and promises or extension of benefits.

21. This difference in bargaining outcomes influenced by type of unfair labor practice is statistically significant at the .10 level.
“inside” leaders on whom it depends to mobilize employee support. Their elimination leaves the workers bereft of leadership at a time when the employer is attempting to disrupt the union’s organizational drive. With the loss of these men and women, the paid union organizer alone must attempt to maintain the employees’ morale and support for the union in the face of the company’s attacks.

The coercive effect of the discharge is intensified by the difficulty of remedying the violation and restoring the status quo. Studies by Aspin and by Stephens and Chaney show that most employees who have been discriminatorily discharged will either waive or reject an offer of reinstatement during NLRB case processing. Some will find employment elsewhere, while others without work will decline reinstatement rather than work in a hostile climate. Many of those who do return remain for only a few months.

The discriminatee’s failure to return also impairs the union’s chances of executing contracts. Of the forty-two cases in this study in which dismissal occurred, information was obtained in thirty-two on the return of the discriminatees to their original jobs. Unions obtained contracts in seven of sixteen cases (44%) where all or some of the discriminatees returned to work, but in only four of sixteen cases (25%) where all illegally discharged employees rejected employer reinstatement offers. The failure of discharged employees to return to their jobs cannot help but impress upon the remaining employees the peril involved in supporting the union; as Aspin notes, “it is a dramatic refutation of the union’s claims that it can protect the employees.” Thus, despite the Board’s bargaining order or settlement agreement, the union organizer faces great difficulty mobilizing employees’ support behind the union’s effort to obtain a contract when confronted with wrongful discharges.

B. The Stage of Case Disposition

An employer charged with an unfair labor practice has several alternative courses of action. The employer may settle the case prior to a

22. “Articulate and respected leaders inside the plant are vital to any campaign. . . . If no potential leaders can be found, the representative had better acknowledge the probability that he will not be able to wage a successful campaign.” AFL-CIO, GUIDEBOOK FOR UNION ORGANIZERS 5, 6 (1961); see also Smisek, New Remedies for Discriminatory Discharge of Union Adherents During Organizing Campaigns, 5 INDUS. REL. L.J. 564-601 (1983).


formal hearing by an administrative law judge, or the employer may decide to challenge the regional director's determination that the employer has acted unlawfully and litigate the case. Litigation itself has a number of steps: a case may be closed after an administrative law judge's hearing and decision, a Board decision and order, or a court decision and order.

It appears that a union's chances of executing a contract in a Gissel case are significantly diminished by an employer's commitment to litigate the unfair labor practice charges filed against it. Unions achieved contracts in fifty percent of the cases where a bargaining order was issued following a settlement agreement and in only thirty-three percent of the cases litigated through to the court of appeal.

Time is the major factor precluding the execution of contracts in litigated cases. An informal settlement usually requires several months for completion. A Board decision requires an average of 484 days, and an appellate court opinion, 969 days. As a case is being litigated, the union loses support from those who are dissatisfied with the union's ability to achieve its promises. Union organizers are well aware that a newly organized employee is easily disappointed and that failure to win quick benefits often results in the union "folding like a tent." In addition, the employer's unfair labor practices remain unremedied until a case is finally decided. Employee support for the union, if not already eliminated, is imperiled by the delay; the greater the delay, the greater the turnover. Those who support the union may quit while new employees can hardly be expected to join the union in the face of unremedied violations.

<table>
<thead>
<tr>
<th>Stage of Case Disposition and Bargaining Success</th>
<th>Total Cases</th>
<th>No. of Contracts Obtained</th>
<th>% of Contracts Obtained</th>
</tr>
</thead>
<tbody>
<tr>
<td>After:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Settlement</td>
<td>8</td>
<td>4</td>
<td>50%</td>
</tr>
<tr>
<td>Board Order</td>
<td>5</td>
<td>3</td>
<td>60%</td>
</tr>
<tr>
<td>Court of Appeals Decree</td>
<td>36</td>
<td>12</td>
<td>33%</td>
</tr>
<tr>
<td></td>
<td>49</td>
<td>19</td>
<td>39%</td>
</tr>
</tbody>
</table>

26. This difference was not statistically significant. However, this certainly does not rule out the possibility of adverse effect of delays caused by litigation. This effect is reflected in observations which are reinforced by empirical conclusions of other researchers that delays also operate to lower the likelihood of union election victories. See Prosten, supra note 3, at 240-43; Roomkin & Juris, Unions in the Traditional Sectors: The Midlife Passage of the Labor Movement, 31 PROC. ANN. MEETING INDUS. REL. RES. ASS'n 212, 217-18 (1978). In general when dealing with small samples such as considered here, not achieving a statistically significant result may be attributed to high sampling error rather than any absence of an effect.

27. Weiler, Promises to Keep: Securing Worker Rights to Self Organization Union the NLRA, 96 HARV. L. REV. 1769, 1796 (1983) (Table III). The estimates are based on 1980 figures that Weiler obtained from the NLRB's Office of the Executive Secretary. The several month figure for settlement cases is a rough approximation based on the observation that in 1980 an average of 46 days elapsed between the filing of a charge and the issuance of a complaint. Since complaints are issued only after settlement efforts prove fruitless, it is reasonable to conclude that settlements are executed before complaints are issued.

studies have corroborated the finding that the longer the delay in processing an NLRB election, the less likely the workers were to vote for the union.  

Delays also frustrate reinstatement; the evidence suggests that an employer who delays a reinstatement offer until efforts at litigation are exhausted will generally succeed in discouraging discharged employees from returning. The evidence shows that forty-one of sixty-nine discriminatees (59%) accepted reinstatement when the offer was made prior to any litigation, while only thirty-four of 104 discriminatees (33%) accepted reinstatement when it was first offered following the issuance of a Board order or court decree.

Several factors account for this outcome. The first is that well over a year may pass before a Board or court decision is handed down. The longer a person is jobless, the greater the economic pressure compelling the discriminatee to find other employment. Furthermore, the discriminatee must be able to show that he has actively sought other employment to be entitled to back pay. Having obtained an equivalent or superior position, perhaps in another location, the discriminatee may refuse reinstatement. The second factor is fear of company retaliation. By withholding an offer of reinstatement until after the Board or court decision, the employer makes it patently clear to the discriminatee that it is vigorously opposed to the discriminatee's return. Few discriminatees are so bold as to return in the face of continued employer hostility and the risk of further injury.

Thus, whether an employer settles or litigates may often be the decisive factor in a union's ability to obtain a contract. The passage of time associated with the limitation of a Gissel case operates to destroy union majorities and demoralize union adherents. Consequently, the support that a union can gather following a bargaining order in a litigated case is often marginal; in approximately sixty-three percent of the litigated cases studied here, the union either failed to request bargaining or gave up after futile attempts to gain a contract.

C. Geographic Location of the Firm

It might be expected that the employer behavior exhibited in Gissel cases would be more typical of rural communities than of larger cities or metropolitan areas. Rural areas are less unionized than urban areas in part because of vigorous community opposition to unions; many employ-

31. See Aspin, supra note 23; Stephens & Chaney, supra note 24.
32. See supra note 26, where data indicates that unions obtained contracts in only 15 of 41 cases (37%) which were litigated.
ers relocate in rural communities in order to escape unionization. Furthermore, rural employers are in a better position than their urban counterparts to campaign against unions by exploiting and integrating economic, political, and community pressures.\textsuperscript{33}

The data, however, indicate that the \textit{Gissel} case is not a small-town phenomenon: indeed, fifty-five percent of the forty-nine cases in this study occurred in urban areas.\textsuperscript{34} The urban complexion of these \textit{Gissel} cases is probably a result of the greater concentration of union efforts in the industrialized metropolitan areas. Union organizing drives are usually responses to employee requests,\textsuperscript{35} and the rural inhabitant is generally more conservative and less inclined to support a union than a city dweller.\textsuperscript{36} The greater inclination of urban employees to unionize, coupled with the greater number of potential union members in metropolitan areas, often dictates the location of the union’s organizing efforts. Since a \textit{Gissel} case arises only out of an organizing campaign, concentration of union efforts in urban areas produces a greater absolute number of urban \textit{Gissel} cases. At the same time, however, it is possible that the percentage of rural campaigns resulting in \textit{Gissel} cases is higher than the same percentage of urban campaigns.

Unions experienced greater difficulties executing contracts in small towns than in urban communities.\textsuperscript{37} This difference is not surprising, as it might be expected that the small-town \textit{Gissel} employer would have a better chance of destroying union support than would an urban employer. As noted earlier, the rural employer can generally mobilize far more extensive social, economic, and political pressures than the urban employer to frustrate the union’s campaign. This condition occurs in its most extreme form in those local communities whose economies are dominated by a single or a few large firms.\textsuperscript{38} In such a community, workers will be more seriously concerned over the consequences of losing

\begin{center}
\begin{tabular}{|l|c|c|c|}
\hline
 & No. of Cases & No. of Contracts & \% Contracts Obtained \\
\hline
Urban Community & 28 & 14 & 50\% \\
Small Town & 21 & 5 & 24\% \\
\hline
49 & 19 & 39\% \\
\hline
\end{tabular}
\end{center}

\textsuperscript{34} In this study a “small town” was defined as a city with a population of 50,000 or less which was not within a 25-mile radius of any city having a population over 50,000. Most of the cases occurring in small towns, however, involved communities having populations of fewer than 25,000 persons.
\textsuperscript{36} \textit{Am. Ass'n of Indus. Management, Guidelines to Victory} 23 (1966).
\textsuperscript{37} Bargaining Success and Geographic Location of Firm

\textsuperscript{38} Foulkes cites a secretary-treasurer of a major union indicating that “political elections and union elections are not equivalent. The employer holds economic power over the life and death of the workers. In small towns in agricultural areas there frequently is no other available employment.” F. Foulkes, \textit{Personnel Policies in Large Non-Union Companies} 23 (1980).
their jobs and hence more susceptible to employer coercion designed to destroy the union’s support.

D. Bargaining Unit Size and Scope of the Union’s Original Majority

There appears to be little or no correlation between bargaining unit size and the union’s success in executing an agreement. Unions were about as successful in negotiating agreements in firms with one to fifty employees (34%) as they were in facilities with over 100 workers (45%).

The reason may be that smaller or larger units provide offsetting advantages and disadvantages to the union organizer confronted with employer unfair labor practices. Maintaining contact with employees is certainly easier for the union organizer in a small unit than in a unit of more than one hundred employees. Additionally, in larger units the employer may be better able to disrupt a union organizing campaign by discriminating against particular employees and by spreading divisive rumors. At the same time, turnover in a small unit is more likely to erode employee support for the union; the discharge or voluntary quitting of one or two union supporters or the hiring of one or two men unsympathetic to the union can drastically change the union’s position. Furthermore, small employers often have strong personal relationships with their employees and can exert direct pressure on them to repudiate the union.

There also seems to be little correlation between the size of the union’s original majority status and the union’s ability to gain a contract. The evidence indicates that a union’s chances of executing a contract are not any greater where the union had originally signed up as many as

<table>
<thead>
<tr>
<th>Size of Unit</th>
<th>Cases</th>
<th>No. of Contracts Obtained</th>
<th>% of Contracts Obtained</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-9</td>
<td>11</td>
<td>5</td>
<td>45%</td>
</tr>
<tr>
<td>10-19</td>
<td>10</td>
<td>3</td>
<td>30</td>
</tr>
<tr>
<td>20-29</td>
<td>6</td>
<td>3</td>
<td>50</td>
</tr>
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<td>30-39</td>
<td>7</td>
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</tr>
<tr>
<td>40-49</td>
<td>1</td>
<td>1</td>
<td>100</td>
</tr>
<tr>
<td>50-59</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>60-69</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>70-79</td>
<td>1</td>
<td>1</td>
<td>100</td>
</tr>
<tr>
<td>80-89</td>
<td>1</td>
<td>1</td>
<td>100</td>
</tr>
<tr>
<td>90-99</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>100+</td>
<td>11</td>
<td>5</td>
<td>45%</td>
</tr>
</tbody>
</table>

| Total        | 49    | 19                         | 39%                    |
ninety percent of all employees in the appropriate unit. It appears that an employer can use unfair labor practices to evade its bargaining obligation even where previous support of the union was overwhelming. This finding highlights the need for stronger remedial measures in Gissel cases.

III
DEVELOPMENT AND APPLICATION OF REMEDIES

Of the forty-nine Gissel incidents examined for this Article, unions succeeded in obtaining contracts following the issuance of a bargaining order in nineteen—approximately thirty-nine percent.

As indicated earlier, this contract execution rate compares poorly with the ability of unions to achieve contracts in approximately seventy-eight percent of first bargaining situations following NLRB certifications where no serious unfair labor practices have been committed. It is obvious then that a bargaining order must be supplemented with other remedies.

A. Development of a Reinstatement Remedy

The Board’s basic Gissel remedy for egregious employer violations is the bargaining order. However, the bargaining order is inadequate where the employer has discharged union supporters. The data demonstrates that, where illegal dismissals occurred, unions achieved contracts in only fifteen of forty-two cases (35%). In contrast, contracts were executed in four of the five cases where only section 8(a)(1) violations occurred. The major reason for this outcome is that the realities of industrial employment often frustrate the Board’s effort to reinstate discriminatees. It is only normal that a previously discharged discriminatee will be reluctant to return to his or her former position.

In a thorough review of remedies available in discharge cases, one commentator has suggested that the most effective solution would be the temporary suspension of an employer’s right to dismiss during the course of an organizational campaign. Under this approach, the employer

<table>
<thead>
<tr>
<th>% of Employees Who Signed Authorization Cards</th>
<th>Cases</th>
<th>No. of Contracts Obtained</th>
<th>% of Contracts Obtained</th>
</tr>
</thead>
<tbody>
<tr>
<td>50-59</td>
<td>17</td>
<td>8</td>
<td>47%</td>
</tr>
<tr>
<td>60-69</td>
<td>14</td>
<td>5</td>
<td>36%</td>
</tr>
<tr>
<td>70-79 -</td>
<td>8</td>
<td>2</td>
<td>25%</td>
</tr>
<tr>
<td>80-89</td>
<td>3</td>
<td>1</td>
<td>33%</td>
</tr>
<tr>
<td>90-100</td>
<td>49</td>
<td>19</td>
<td>39%</td>
</tr>
</tbody>
</table>

41. Prosten, supra note 3, at 240-49.
42. Supra note 19.
43. Smisek, supra note 22, at 595-600.
would be prohibited from dismissing any individual unless that employer had filed a certificate of theft, violence, or gross misconduct with the regional office of the NLRB prior to that discharge. Any employee discharged pursuant to a certificate could file a charge with the regional office. If, after an expedited investigation, the Board had reasonable cause to believe that no theft, violence, or gross misconduct had been committed by the employee, it could order reinstatement.\footnote{Id.}

Implementation of this remedy could significantly reduce the incentive employers would otherwise have to discharge union adherents. The regional office could seek discharged employees’ immediate reinstatement during the organizing campaign, which would likely constrain the employer and aid the union’s drive. Protected against violations of section 8(a)(3), unions would be better equipped to negotiate contracts following the issuance of a bargaining order.

At the same time, this remedial approach is suspect under current case law. It is well accepted that if an unlawful purpose is not present or cannot be found as a matter of law,\footnote{Cf. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).} “discrimination” does not violate the Act even if the employer’s conduct is deemed unfair or unjustified. The courts have held that an employer can discharge an employee for a good reason, a poor reason, or no reason at all as long as union considerations are not involved.\footnote{See, e.g., Associated Press v. NLRB, 301 U.S. 103 (1937); NLRB v. McGahey, 233 F.2d 406 (5th Cir. 1956); Borin Packing Co., 208 N.L.R.B. 45 (1974). There is an additional difficulty with this proposal if the author contemplates implementing the proposal under current statutory language. Section 10(c) of the Act prohibits reinstatement of any person discharged or suspended for “cause.” A reasonable argument could be made that this applies to temporary or interim remedies as well as final Board orders.} Consequently, by prohibiting employer discharges except when gross misconduct had occurred, the Board would encroach upon the exercise of management authority to a degree never before sanctioned by the courts.

The authors propose a remedial change focusing on the first stage of the reinstatement process. As noted above, the discriminatee’s personal decision not to accept reinstatement may satisfy his or her own needs but adversely affects implementation of the bargaining order. However, the discriminatee’s decision need not leave the section 8(a)(3) remedy impotent. An alternative exists, which, although a major change, is compatible with the Board’s current remedial authority.

We must begin by reiterating that the Board has broad remedial authority. Section 10(c) of the Act, which provides that the Board “shall issue and cause to be served . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as
will effectuate the policies of this Act,"\textsuperscript{47} gives the Board broad powers to remedy unfair labor practices. The courts have recognized the wide latitude the Board has in remediying violations of the Act. In vesting the Board with power to order affirmative relief, the Supreme Court acknowledges that:

Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.\textsuperscript{48}

Similarly, in \textit{NLRB v. Seven-Up Bottling Co.}, the Supreme Court declared that "in fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience."\textsuperscript{49} The only limitations on the Board's authority are that its orders be remedial and not "punitive," and that they be appropriate to the particular situation before it. By the term "punitive" the courts generally have meant an action that goes beyond an attempt to restore the status quo existing before the unfair labor practice.\textsuperscript{50}

We propose that when a discriminatee in a Gissel case declines reinstatement, the union should have the authority to select the discriminatee's replacement. There are a number of ways to implement this remedy. For example, the union could either refer an individual to the job opening or provide a list from which the employer could hire.\textsuperscript{51} The union would refer on a nondiscriminatory basis, without regard to whether the employee was a union member or supporter. This approach would eliminate concerns that the remedy would run afoul of the ban on the closed shop in which all hires must be union members, or other prohibitions on discriminatory referral.\textsuperscript{52} Curtailing the employers' abil-

\textsuperscript{48} Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).
\textsuperscript{49} 344 U.S. 344, 346 (1953).
\textsuperscript{50} "The Board must establish that the remedy is a reasonable attempt to put aright matters the unfair labor practice set awry." Carpenters Local 60 v. NLRB, 365 U.S. 651, 658 (1961) (concurring opinion).
\textsuperscript{51} Naturally this remedy can be applied only when the union is able to select qualified replacements; the employer would be under no obligation to hire an unqualified worker. Use of a referral list, rather than direct union designation of the replacement, would substantially lessen this problem. The union would refer an individual or a group of workers, perhaps from a roster of unemployed members, and the employer would be required to hire from the list of referrals, or reject on a nondiscriminatory basis until a qualified replacement was identified. Conflicts over qualifications or implementation of the remedy could be resolved through a compliance hearing, similar to any dispute involving the remedy. The employer should also be able to treat the union-selected replacements in the same manner that he would have treated the original discriminatees had they returned.
\textsuperscript{52} Compare Teamster's Local 337 v. NLRB, 365 U.S. 667 (1961), where the Court observed that while it may be assumed that the very existence of a hiring hall encourages union membership, the Act prohibits encouragement only if accomplished by discrimination.
ity to discharge employees as a weapon against the union would help allay employees' fears for their own job security. Thus employees might conclude that an employer confronted with this remedy would no longer be predisposed to engage in further discharges. The remedy also would help maintain union support in the unit, because employees would see the union exercise the power to fill vacancies resulting from discriminatory employer conduct.

This remedy may not necessarily compensate for the loss of active support provided by the discriminatees, where the discriminatee was an active union organizer. To remedy this loss, one may argue that the union should be permitted to designate a replacement or compile a list of proposed replacements from known supporters, or even paid staff members, whose intent would candidly be to fill the discriminatees' empty place both in the job and in union support. This approach is consistent with NLRB decisions holding that an employee has full section 8 protection even if that person is simultaneously on the union payroll for organizing purposes, as long as that employee performs adequately on the job.53

Although this measure resembles a “discriminatory” referral, it is permissible under the broad remedial powers mandated in Seven-Up Bottling.54 Restoration of the status quo requires the revival of union support to its level prior to the discrimination. Indeed, this reinstatement remedy is no more radical than the fundamental Gissel remedy, where despite the statutory objective of majority choice, the Board will impose a Gissel bargaining order without regard to current union support among employees. Like the Gissel order, this reinstatement remedy would enable the union to regain its original level of support and counter the employer's attempt to use illegal means to create an anti-union majority.

It will be argued that this remedy inflicts punitive sanctions upon an employer, since allowing the union to select a discriminatee's replacement violates an employer's traditional prerogative of hiring its own employees. However, the Supreme Court has acknowledged that the language of section 10(c) does not restrict reinstatement to those discriminatorily discharged. In Phelps Dodge Corp. v. NLRB55 the Court declared that the Board's power “to order an opportunity for employment does not derive from the phrase ‘including reinstatement of employees with or without back pay,’ and is not limited by it.”56 Instead, the Board's remedial authority is based on the congressional mandate to take “affirmative action” that “will effectuate the purposes of the Act.”57

54. Supra text accompanying note 49.
55. 313 U.S. 177 (1941).
56. Id. at 191.
57. Id. at 188.
The Supreme Court has also recognized that an employer's right to hire and discharge is not absolute and may be restricted to remedy unfair labor practices. In upholding the constitutionality of the Wagner Act, the Court said that "the Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."\(^\text{58}\) An employer who refuses to recognize a union representing a majority of its employees while discharging union supporters, however, creates an extralegal and abnormal situation. In hiring replacements for the discriminatees refusing reinstatement, an employer is not exercising its normal right to hire but is, in effect, exploiting its violations of the law.

It may be contended that this remedy goes beyond restoring the status quo, since the latter would require reinstatement only of the discriminatee. This misstates the purpose of reinstatement. Reinstatement is not only a remedy for the particular employee discharged but is also an attempt to lessen the effects of the discharge on the remaining employees. To limit reinstatement to the particular employee is, in many cases, to deny a remedy. A discriminatee's concern for his or her economic security will often result in rejection of the reinstatement offer. Furthermore, by replacing the discharged union supporter, the employer dramatically refutes the union and the Board's claim that they can protect employees; it demonstrates to all the continued peril involved in supporting the union. Consequently, restoration of the status quo—reestablishment of the union's majority position and the elimination of the discharge's intimidating effect upon the employees—requires that the Board extend the scope of its reinstatement remedy.

Another possible argument is that the proposed remedy runs afoul of section 8(d) limiting the Board's authority to compel contractual concessions. The Supreme Court specifically addressed that issue in \textit{H.K. Porter v. NLRB},\(^\text{59}\) ruling that the Board lacks the authority to impose contract terms on a party in a remedial contract. Admittedly, \textit{H.K. Porter} speaks to the propriety of imposing a contract provision or, perhaps by extension, a "contract-like" situation on an employer. The remedy at issue in \textit{H.K. Porter} sought to secure for unit employees benefits of collective bargaining unfairly denied them by the employer's refusal to bargain in good faith. The remedy proposed here does nothing of this sort. It does not determine working conditions of unit employees. It does not infringe upon the "freedom of contract" explicitly protected in \textit{H.K. Porter}. Unlike \textit{H.K. Porter}, it does not try to replicate the results of negotiations that never occurred. Its focus is on a remedy for the section 8(a)(3) violation rather than the section 8(a)(5) bargaining remedy. It

\(^{58}\) NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 45 (1937) (emphasis added).

does no more than fill the vacancy created by the discriminatee's reluctance to return to work and it permits full implementation of the section 8(a)(3) and, ultimately, the section 8(a)(5) remedy. Working conditions of the employees and the employer's contract obligations will be determined by subsequent free collective bargaining. Greater equality in the bargaining is sought through implementation of the section 8(a)(3) remedy, but that can hardly be seen as falling within the scope of *H.K. Porter*.

It might also be said that this remedy creates a "mini-hiring hall" and in so doing violates the *H.K. Porter* ban on the imposition of a contract term. A hiring hall is normally a contract creation and by permitting the union to dispatch individuals to a job, our remedy arguably imposes on the employer a hiring hall. But, because no permanent power or right accrues to the union, there is no infringement of the right to contract. Unlike contract terms that endure for the life of the agreement, the union's limited referral authority is to be exercised only once. If the union dispatched replacement leaves for nondiscriminatory reasons, the union would have no further part in filling the vacancy. The union would have no part in filling other vacancies not encompassed in the section 8(a)(3) remedy nor any vacancy if the original discriminatee accepted reinstatement.

Admittedly, this remedy appears to put hiring in the hands of the union to a limited degree. In normal bargaining circumstances, an employer's agreement to a similar condition might be a violation of the section 8(a)(3) prohibition against encouraging union membership. However, such an easy comparison obscures a crucial difference. If the condition were instituted or agreed to by an employer in contract negotiations, the question of intent and a possible section 8(a)(3) violation would arise. If union action forced the condition upon an employer, the union might be in violation of section 8(b)(2). But that is hardly the case when a *Gissel* order has issued. There is neither a volitional act of the employer, nor any action insisted on by the union. The procedure is solely in compliance with a remedial order. It cannot be seriously argued that a Board remedy of an employer violation may not advance or favor union interest. When any violation is remedied, one party's interests will be "advanced" simply to re-create the status quo.

In summary, this remedy does not affect the employer's normal employment policies. Rather, it emphasizes the statutory and public interest element of the reinstatement order. It may be compared to remedial measures the Board takes in other unfair labor practice situations. While the remedy goes beyond making whole the individual discriminatee, there is precedent in other remedies. In section 8(a)(1) violations, for
example, it would clearly be insufficient if only the employee who was interrogated or threatened was made aware of the finding of a violation and the withdrawal of the threat; a notice must be publicly posted because the impact of the violation is imputed to all the employees. But the notice does more. It tells the other employees that the union has succeeded in forcing the employer to withdraw its threat. Similarly, our proposal satisfies the "public" element of the case and the need to reassure other employees of the efficacy of the section 8(a)(3) remedy. It does so by strengthening the section 8(a)(3) remedy and thus protecting the viability of the bargaining order and the collective bargaining process.61

B. Use of the Section 10(j) Injunctions

This study has also indicated that the delay involved in deciding a case seriously damages the union's bargaining position. By the time a bargaining order is issued, the union may no longer have supporters. Under section 10(j) of the Act, however, the Board has discretionary authority to seek interim relief from the federal courts as soon as a violation has occurred. In issuing a section 10(j) injunction in a Gissel case, a court could order the employer to bargain with the union. The section 10(j) procedure would work to preserve the status quo—the union's bargaining position—during the lengthy interval between the issuance of the complaint and the Board or court decision.62

Since the 1970s the NLRB has sought injunctive relief to require initial employer recognition and bargaining pending adjudication of a complaint in a Gissel-like proceeding.63 Significantly, the majority of the appellate courts confronted with the issue of a section 10(j) injunction in these circumstances have upheld interim bargaining orders as appropri-

61. It is not our intent to afford the union an overall replacement right whenever an employee has been discharged for union activity and declines reinstatement. Such a total revision of remedial authority is neither intended nor feasible where a union presence is minimal and no organizational effort has begun or where the union has been recognized. Whether this remedy is applicable in other kinds of non-Gissel cases is beyond the scope of this Article. In the limited circumstances of the Gissel order, we believe the remedy is warranted and feasible.

62. It might be argued that utilizing the § 10(j) injunction might work against the union's bargaining position if the period of bargaining under the injunction were used to reduce the duration of the bargaining duty after issuance of the bargaining order. This should not be a serious concern. Bargaining in a "violation free" atmosphere is the goal of the remedy. With the issuance of the final order and compliance with it, the underlying unfair labor practices giving rise to the Gissel order will be corrected. Then good-faith bargaining can take place. Bargaining pursuant to the injunction will prevent further erosion of the union's position and may lead to a contract but it should not be relied on to fulfill the duty under the final remedial order. Just as an election will not be ordered when pending unfair labor practices have not been remedied, (NLRB Case Handling Manual Pt. 2, Representation Proceedings § 11452), bargaining under the shadow of remedies violations will not fulfill the bargaining duty and will not reduce the duration of bargaining after the final order.

ate relief. In *Seeler v. Trading Port Inc.*, the Court of Appeals for the Second Circuit held that when a regional director of the NLRB makes a showing, based on authorization cards, that a union has had a clear majority at one time and when the unfair labor practices by the employer are so substantial as to undermine majority strength and preclude the possibility of holding a fair election, the district court must issue an interim bargaining order.\(^6\) The court specifically noted that "only if the district courts may issue interim bargaining orders, can the union's viability be maintained to the degree necessary to make final board adjudication in the form of an election or a bargaining order meaningful."\(^6\)

Similar rulings have been issued by other circuit courts.\(^6\) As this study has demonstrated, the erosion of union support that occurs when relief is delayed until enforcement proceedings are completed justifies the issuance of an interim bargaining order as the only practical method of protecting the union's viability and the effectiveness of an eventual Board *Gissel* order.

Despite judicial approval of interim bargaining orders, the available data suggests that the NLRB has rarely sought to exploit this remedy. In a nine year period between August 1971 and June 1980 the NLRB filed fifty-four petitions for interim bargaining orders, an average of approximately six per year. This number appears insignificant when juxtaposed against the 719 cases in which the NLRB authorized *Gissel* bargaining orders during this same nine year period.\(^6\) Given the increased predisposition of the appellate courts to honor such section 10(j) requests, the NLRB should move as forcibly as its resources permit to provide this relief as a necessary measure to safeguard employee rights to join unions and bargain collectively.\(^6\)

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64. 517 F.2d 33 (2d Cir. 1975).
65. *Id.* at 38.
66. *See, e.g.*, Kayward v. MMIC, Inc., 116 L.R.R.M. 2465 (2d Cir. 1984); Wilson v. Liberty Homes, 108 LRRM 2699 (7th Cir. 1981); Gottfried v. Mayco Plastics, 103 L.R.R.M. 3104 (6th Cir. 1980); Levine v. C.W. Mining Co. 619 F.2d 432 (6th Cir. 1979). Additionally, in Fuchs v. John Mahoney Construction Corp., No. 81-1674 (1st Cir.), *affg* Civ. No. 80-2703 T (D.C. Mass. 1981), the First Circuit also issued an interim bargaining order on the basis of the employer's commission of unfair labor practices where the union previously obtained authorization cards from a majority of the employees in the unit. Here, however, the issuance of the bargaining order was also influenced by the employer's failure to honor a settlement agreement by which the complaint had been dismissed in return for the employer's agreement to recognize the union and reinstate discharged employees.

In contrast, the Fifth Circuit has held that interim bargaining orders would be inappropriate where the union had never engaged in a bargaining relationship with the employer because it would materially alter rather than maintain or restore the status quo. Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975).


68. Admittedly, there have been various district court opinions rejecting the Board's request for the issuance of temporary bargaining orders in *Gissel* cases. *See, e.g.*, Eisenberg v. S.E. Nichols,
C. Make Whole Remedies

In the late 1960s there was an effort to have the NLRB implement a compensatory remedy in section 8(a)(5) cases involving Gissel circumstances. Under this approach the employer could be required to compensate its employees for wage increases and fringe benefits which arguably they would have obtained through collective bargaining had the employer not refused to bargain. This remedy would have significantly assisted unions in a Gissel case. Unions would have been better able to maintain employee support during the course of litigation by being able to point out to workers that the ultimate issuance of a bargaining order would provide workers with tangible economic gains. Additionally, by eliminating the profit that the Gissel employer accrues from his illegal acts, the compensatory remedy would significantly increase the relative cost of the employer's anti-union campaign. Under such circumstances, many anti-union employers might be deterred from violating their obligation to bargain collectively.

Despite the potential potency of this proposed remedy the Board has refused to apply it. Relying on the Supreme Court’s decision in H.K. Porter, the NLRB in Ex-Cell-O rejected the application of a compensatory remedy in a section 8(a)(5) case on the ground that it conflicts with the nonconcession mandate of section 8(d). As a result, the Board held that it lacked the statutory authority to issue such a remedy. The Board has not modified its position and there is little basis for anticipating a modification.

At the same time, there are other remedies that may be implemented within the Board’s statutory authority. As indicated earlier, an employer who commits serious unfair labor practices and litigates causes the union to engage in an additional organizing campaign in order to mobilize employees in support of the union’s effort to negotiate an agreement following the issuance of a bargaining order. The additional costs of this second campaign are directly attributable to the employer’s violations. Consequently, in all Gissel cases that are occasioned by employer litigation, the NLRB should require the employer to reimburse the union for

Docket 78-2613 (D.C.N.J.); Taylor v. Circo Resorts, 458 F. Supp. 152 (D.C. Nev. 1978) (appeal dismissed as moot upon issuance of Board order (9th Cir.)). However, as more appellate courts uphold NLRB petitions for § 10(j) bargaining orders, district court opposition to this relief should dissipate.

71. Tidee Prods. v. NLRB, 426 F.2d 1943 (D.C. Cir. 1970), cert. denied, 400 U.S. 950 (1970), on remand, 194 N.L.R.B. 1234 (1972). On remand, the NLRB refused to accept the advice of the District of Columbia Court of Appeals that it had authority to issue a make whole order in § 8(a)(5) cases, and declined to issue such a remedy.
all additional organizing costs.\textsuperscript{72} Given the erosion of employee support generated by the employer's unfair labor practices, the Board should afford union organizers access to the employer's premises following an order to communicate with employees in their nonwork areas and on nonwork time. Through such additional opportunities, the union would be more likely to succeed in rebuilding the level of support it once enjoyed and which it must sustain to make any future bargaining meaningful and effective.\textsuperscript{73}

In 1978 Congress considered legislation designed in part to improve the efficacy of NLRB remedies.\textsuperscript{74} Among the new features considered were double back pay for illegally discharged employees, a compensatory remedy in refusal to bargain cases, and debarment of employers who have willfully violated NLRB orders. This legislation was never enacted.\textsuperscript{75} As a result, the NLRB has been left to apply its traditional remedies in unfair labor practice proceedings. To date, the order to bargain is still the principal remedy in \textit{Gissel} cases. Nevertheless, as demonstrated by this study, the order to bargain will often be a futile remedy. At the same time, the Board's hands are not entirely tied. Through expanded use of the section 10(j) injunction procedure, a broadening of the standard reinstatement remedy, and the compensation of unions for their increased organizational costs in \textit{Gissel} cases, the Board can limit the effect of and discourage the incidence of such violations. In so doing, the Board would be meeting its responsibility to protect and promote the collective bargaining process.

\textsuperscript{72} See, e.g., J.P. Stevens & Co., 244 N.L.R.B. 407 (1979), \textit{enf'd and remanded}, 668 F.2d 767 (4th Cir. 1982); Winn Dixie Stores, Inc. v. NLRB, 567 F.2d 1343 (5th Cir. 1978).

\textsuperscript{73} See, e.g., NLRB v. S. & H. Grossinger's, Inc., 372 F.2d 26 (2d Cir. 1967), and NLRB v. W.H. Elson Bottling Co., 379 F.2d 223 (6th Cir. 1967), where the courts have enforced such a remedy.


\textsuperscript{75} For some of the political considerations involved in the demise of the legislation, see D.A. Mills, \textit{Flawed Victory in Labor Law Reform}, Harvard Bus. Rev. (May-June 1979).