Nonmajority Bargaining Orders: The Only Effective Remedy for Pervasive Employer Unfair Labor Practices During Union Organizing Campaigns

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Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol20/iss2/8
An employer learns that a union organizing campaign is underway at his plant. He responds by discharging union activists, imposing stricter working conditions and higher production quotas, threatening plant closure, falsifying payroll records to prevent some employees from voting for the union, and engaging in numerous other unfair labor practices. Prior to the employer's unfair labor practices, the union has obtained authorization cards from over forty percent of the employees, but the employer's coercive actions have irreparably damaged the union's organizing campaign. The union files unfair labor practice charges against the employer with the National Labor Relations Board (the Board). The Board admits that the possibility of erasing the coercive effects of the employer's unfair labor practices and ensuring a fair election by the use of traditional remedies is slight. Nevertheless, although conceding their probable ineffectiveness, the Board orders only traditional remedies, such as a cease and desist order, reinstatement with back pay of

2. The five categories of employer unfair labor practices are delineated in § 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a) (1982).
3. A union circulates and collects authorization cards from employees during the course of a union organizing campaign. By signing one of these cards an employee authorizes the union to be his or her bargaining representative. See 1 SECTION OF LABOR & EMPLOYMENT LAW, AM. BAR ASS'N, THE DEVELOPING LABOR LAW 503-05 (2d ed. 1983). The National Labor Relations Board generally requires that at least 30% of the employees sign authorization cards before it will hold a union certification election. See 29 C.F.R. § 101.18(a) (1986).
4. The National Labor Relations Board was established by the National Labor Relations Act § 3, 29 U.S.C. § 153 (1982). The Board's principal functions under the Act are (1) to conduct secret ballot elections among employees to determine whether or not they desire to be represented by a union and (2) to prevent and remedy unfair labor practices committed by either an employer or a union. 29 U.S.C. §§ 159, 160 (1982 & Supp. III 1985).
wrongfully discharged employees, a return to the older, more lenient working conditions, and the posting of a notice assuring the employees that the employer will commit no further unfair labor practices.

Current Board policy forbids issuing a bargaining order in this situation, where there is no objective evidence of majority support for a union, even though the bargaining order may be the only effective remedy for extreme employer unfair labor practices. The Board's refusal to issue nonmajority bargaining orders (NMBOs), grounded in its fear of imposing a union on unwilling employees, has left it impotent to remedy the most severe employer unfair labor practices. This Note examines arguments for and against the Board's use of NMBOs and concludes that NMBOs are within the scope of the Board's remedial powers and should be issued in appropriate cases. Part I examines the language and legislative history of the National Labor Relations Act (the Act) and contends that Congress did not expressly preclude the Board from issuing NMBOs; they are, in fact, consistent with Congress' underlying legislative intent. Part II analyzes the Supreme Court's decision in NLRB v. Gissel Packing Co. and argues that the Court there sanctioned the Board's use of NMBOs. Part III discusses relevant policy considerations and concludes that NMBOs are consistent with the Act's policies of effectuating employee free choice and of deterring the commission of unfair labor practices by employers.

5. The Board, pursuant to its broad § 10(c) power to "take such affirmative action... as will effectuate the policies of this [Act]," has devised the bargaining order remedy. 29 U.S.C. § 160(c) (1982); see also 1 SECTION OF LABOR & EMPLOYMENT LAW, AM. BAR ASS'N, THE DEVELOPING LABOR LAW 517-22 (2d ed. 1983). As its name implies, a "bargaining order" requires an employer to engage in collective bargaining negotiations with a union.

6. A nonmajority bargaining order is a bargaining order that is issued by the Board even though there is no objective evidence that the union ever had the support of a majority of the employees (i.e., even though the union has not obtained authorization cards from a majority of the employees and has not won a certification election). An NMBO is appropriate in cases of outrageous and pervasive employer unfair labor practices, the coercive effects of which cannot be eliminated by the application of traditional remedies and have made the holding of a fair and reliable election impossible. See NLRB v. Gissel Packing Co., 395 U.S. 575, 613-14 (1969). For possible additional restrictions on the use of NMBOs, see infra text accompanying notes 85-86.


I. Statutory Authority

A crucial consideration in the debate over the propriety of NMBOs is whether the Board has the statutory authority to issue them—a question dividing both the Board and the courts in recent years. A tension exists within the Act between its fundamental principle of majority rule and its grant of broad remedial authority to the Board to ensure the exercise of employee free choice. Interpretations of the Act in other contexts and an examination of congressional intent, however, indicate that the majority rule principle is more flexible and may be subordinated to the Board's remedial authority to ensure employee free choice. Therefore, NMBOs seem to be within the scope of the Board's statutory authority.

A. Division in Both the Board and the Courts

Whether or not the Board has the authority to issue NMBOs has divided both the Board and the courts in recent years. In *United Dairy Farmers Cooperative Association,* the Board refused to issue an NMBO even though the employer had committed numerous flagrant unfair labor practices, including discriminatory discharges, threats to close the plant, coercive interrogations of employees, and unprecedented cash bonuses to deter support for the union. The Board split, with only one member denying the Board's authority to issue NMBOs under any circumstances. On appeal, the Third Circuit held that the Board has remedial authority to issue an NMBO in cases where the employer has committed such outrageous and pervasive unfair labor practices that there is no reasonable possibility

10. *Id.* at 1031.
11. Two members of the Board stated that the Board *may* have the authority to issue NMBOs, but not in the circumstances of this case. *Id.* at 1027-28. One member of the Board felt that the Board could not issue an NMBO under any circumstances unless and until Congress expressly authorized such a remedy. *Id.* at 1042 (Member Penello, concurring in part and dissenting in part). The other two members of the Board believed that an NMBO should be issued in this case and in *any* case where the employer's misconduct rendered an accurate determination of majority support impossible. *Id.* at 1035 (Chairman Fanning and Member Jenkins, concurring in part and dissenting in part).
that a free and uncoerced election can be held. On remand, the Board, for the first time, issued an NMBO.

The Board again issued an NMBO in Conair Corp., as a remedy for an employer's extreme and pervasive unfair labor practices. The employer had made numerous threats of plant closure and loss of benefits, engaged in coercive interrogations of employees, and had unlawfully discharged striking employees. A majority of the Board, reiterating the standard endorsed by the Third Circuit in United Dairy Farmers, held that an NMBO should issue wherever an employer's unfair labor practices completely foreclosed the possibility of a fair election. Two members of the Board dissented on this issue because they felt that the Board did not have the authority to issue NMBOs under any circumstances. On appeal, however, the D.C. Circuit reversed, holding that the Board did not have the authority, under any circumstances, to issue NMBOs. The dissent would permit NMBOs, at least in cases such as this one, where it was reasonably likely that the union would have gained majority support in a coercion-free atmosphere.

Finally, in Gourmet Foods, Inc., the Board overruled its Conair decision and held that it would not, under any circumstances, issue an NMBO. One member of the Board dissented and, consistent with the Board's Conair decision, would have held the Board to have statutory authority to issue an NMBO in exceptional unfair labor practice cases.

Both the Board and the courts have had difficulty deciding whether or not NMBOs are a proper remedy under the Act. The Board currently follows the D.C. Circuit's position that NMBOs are not within its remedial power, even though the Third Cir-

13. Id. at 1069.
14. United Dairy Farmers Coop. Ass'n, 257 N.L.R.B. 772 (1981). The case was heard only by Chairman Fanning and Members Jenkins and Zimmerman.
16. Id. at 1189-90.
17. Id. at 1194.
18. Id. at 1195 (Chairman Van de Water, concurring in part and dissenting in part); id. at 1198-99 (Member Hunter, concurring in part and dissenting in part).
20. The majority would not, "[w]ithout a clear direction from Congress, ... remedy one possible injustice by taking the substantial chance of imposing another." Id. at 1383.
21. Id. at 1399 (Wald, J., dissenting).
23. Id. at 583. In a concurring opinion, Member Dennis stated that she would not issue an NMBO without clear direction from Congress. Id. at 588.
24. Id. at 588-89 (Member Zimmerman, dissenting).
circuit's decision to the contrary in *United Dairy Farmers* still stands. An independent in-depth examination of the relevant portions of the Act is thus warranted.

**B. Tension in the Act**

NMBOs require an employer to bargain with a union in cases where the Board determines that the employer's "outrageous" and "pervasive" unfair labor practices have made the holding of a fair election impossible and that the union would have won the election "but for" the employer's unfair labor practices. Section 10(c) of the Act empowers the Board, upon a finding that an employer has engaged in unfair labor practices, to "take such affirmative action . . . as will effectuate the policies of [the Act]." The Supreme Court has stated that "[t]he Board's [section 10(c) remedial] power is a broad discretionary one, subject to limited judicial review." A Board order will therefore be left undisturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." The policies of the

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25. Section 10(f) of the Act provides for appellate court review of Board decisions. Any person aggrieved by a final order of the Board may obtain judicial review of the order (1) in the Court of Appeals for the District of Columbia or (2) in the Circuit where the unfair labor practice alleged took place, where the person resides, or where the person transacts business. The appellate court has the power to enforce, modify, or set aside, in whole or in part, the order of the Board. 29 U.S.C. § 160(f) (1982).


27. Section 10(c) of the Act reads in relevant part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.


29. *Id.* (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1942)).
Act, set forth in section 1, include the encouragement of collective bargaining and the protection of employees' rights to organize and select representatives of their own choosing.\(^{30}\) NMBOs therefore seem to fall within the Board's broad discretionary power under section 10(c) because, so long as applied in accordance with the "but for" standard, they further the Act's policy of protecting employees' rights to select freely their collective bargaining representatives.

One could argue, however, that NMBOs do not further, and indeed violate, a fundamental policy of the Act.\(^{31}\) Section 9(a) of the Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives of all the employees."\(^{32}\) Imposition of an NMBO seems to violate this principle of majority rule because, by definition, an NMBO is issued only in the absence of objective evidence of majority support for the union. The union in this situation has therefore not been "designated or selected" by a majority of the employees. The Supreme Court has limited the Board's section 10(c) remedial powers when their exercise would "violate [a] fundamental premise on which the Act is based."\(^{33}\) Legislators have stressed the importance of majority rule to the concept of collective bargaining during the legislative debates surrounding the passage of

\(^{30}\) Section 1 of the Act reads in relevant part:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.


\(^{32}\) Emphasis added. Section 9(a) of the Act reads in relevant part:

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 . . . .


the Act. Thus, one could conclude that NMBOs violate the Act’s fundamental premise of majority rule and therefore fall outside the scope of the Board’s remedial powers. A more searching examination of the Act’s majority rule principle, however, reveals that this view is erroneous.

C. Interpretations of the Act in Other Contexts

Although the principle of majority rule is an important policy of the Act, it is not inviolable and may be balanced against the Act’s other policies. In a number of circumstances, neither the Board nor the courts require evidence of actual majority support for a union at all times. For example, the Board conclusively presumes that a union has majority support during its certification year and after voluntary recognition. The rationale for this presumption is that once a collective bargaining relationship

34. Senator Wagner, the sponsor of the Act, stated that “democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers’ rights, just as it is the surest guaranty of political liberty that mankind has yet discovered.” 79 Cong. Rec. 7571 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2337 (1949).

Senator Wagner also commented that “collective bargaining can be really effective only when workers are sufficiently solidified in their interests to make one agreement covering all. This is possible only by means of majority rule.” Hearings on S. 1958 Before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 43 (1935), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1419 (1949).


35. See supra note 31 and accompanying text.


37. In order to give collective bargaining a chance to function and to stabilize industrial relations, the Board, with Supreme Court approval, requires that a certified union’s majority status be honored for at least one year. Absent unusual circumstances, an employer must recognize a union for the entire certification year even if it has evidence that the union has lost its majority status. See Brooks v. NLRB, 348 U.S. 96 (1954); 1 SECTION OF LABOR & EMPLOYMENT LAW, AM. BAR ASS’N, THE DEVELOPING LABOR LAW 354-55 (2d ed. 1983).

38. An employer may voluntarily agree to recognize a union as its employees’ exclusive bargaining representative if the union has majority status at the time. Such voluntary recognition will bar a decertification election for a reasonable time, even if the union subsequently loses the support of a majority of the employees. See Keller Plastics E., Inc., 157 N.L.R.B. 583 (1966); 1 SECTION OF LABOR & EMPLOYMENT LAW, AM. BAR ASS’N, THE DEVELOPING LABOR LAW 355-57 (2d ed. 1983).
is established, by whatever method, it should receive a fair chance to function. 39 This compromise of the majority rule principle is justified and outweighed by the fact that this presumption furthers the Act’s fundamental policy of encouraging collective bargaining. Similarly, although NMBOs technically may compromise the majority rule principle, they are justified because they further the Act’s fundamental policy of protecting employees’ rights to select freely their collective bargaining representatives. Section 1 of the Act mentions both of these policies, but not the majority rule principle. 40 Thus, NMBOs, like the certification year and voluntary recognition rules, should not be prohibited merely because they may technically compromise the majority rule principle.

Other policies of the Act also outweigh the majority rule principle. For example, the Board may order an employer to bargain after a union’s loss of majority status if the employer has committed extensive unfair labor practices. 41 Furthermore, the Board, without inquiry into majority status, may revoke the certification of a union as a remedy for the union’s unfair labor practices. 42 These cases demonstrate the Board’s power to devise remedies to combat either employer or union unfair labor practices that contradict objective evidence of the apparent wishes of the majority of the employees. The Board’s authority to remedy unfair labor practices appears to trump the majority rule principle. The majority rule principle should therefore not bar the use of NMBOs by the Board, particularly because NMBOs, by definition, are issued in cases where they are the only effective remedy. 43

D. Congressional Intent

An examination of congressional intent confirms that the majority rule principle does not prohibit the use of NMBOs by the Board.

40. See supra note 30 and accompanying text.
41. See infra notes 61-63 and accompanying text; see also Franks Bros. v. NLRB, 321 U.S. 702 (1944) (first Supreme Court case holding a bargaining order justified when an employer’s unfair labor practices caused the loss of a union’s cardholder majority status).
42. See Independent Metal Workers Union, Local No. 1 (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964) (rescinding a union’s otherwise valid certification because the union executed racially discriminatory contracts and administered them in a manner which tended to perpetuate racial discrimination in employment, an unfair labor practice under § 8(b)(2) of the Act).
43. See supra note 6.
Board. Statements in the legislative debates surrounding the passage of the Act, which stressed the importance of the principle of majority rule, do not indicate that Congress intended to withhold the power to issue NMBOs from the Board. These statements show only that Congress felt that majority rule should be the usual mechanism by which employees choose or reject their union.44 Congress adopted this principle to prevent employers from weakening or avoiding collective bargaining altogether by bargaining with individuals, with company-dominated unions, or with unions only on the basis of proportional representation.45 No evidence suggests that the majority rule principle was intended to be superior to other policies embodied in the Act or to limit in any way the Board’s section 10(c) remedial powers.46

Although one could argue that section 7 of the Act prohibits the Board from issuing NMBOs,47 an examination of the legislative history of that section contradicts such a conclusion. Section 7, as amended by the Taft-Hartley Act,48 explicitly states that employees “shall also have the right to refrain from any or all of

44. Conair Corp. v. NLRB, 721 F.2d 1355, 1395 (D.C. Cir. 1983) (Wald, J., dissenting).
46. 29 U.S.C. § 160(c) (1982); see Recent Case, supra note 45, at 827. The situation here is easily distinguished from the one in H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), where the Supreme Court stated that the Board’s § 10(c) powers could not be exercised in such a way as to violate a fundamental premise of the Act. The fundamental premise being violated in H.K. Porter was freedom of contract. H.K. Porter, 397 U.S. at 108. Section 8(d) of the Act states that the obligation to engage in collective bargaining “does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. § 158(d) (1982). The Act, therefore, expressly prohibits interference with the parties’ freedom of contract. In addition, overwhelming evidence in the legislative history demonstrates that Congress intended to preclude the Board from intruding into the substantive terms of collective bargaining agreements. H.K. Porter, 397 U.S. at 104-06. Thus, unlike the case with the majority rule principle, both the clear language of the Act and the legislative history prohibit compromising the principle of freedom of contract.
such [concerted] activities." A House Report seems to indicate that legislators sought to preclude the Board from imposing its choice on the employees: the Board was to respect and enforce the choice actually made by the employees, whether for or against a union. The legislative history of this amendment to section 7, however, reveals that it was added to prevent the Board from condoning various forms of union coercion of employees to join concerted activities, and not to limit the Board's section 10(c) remedial powers.

Finally, although one might contend that Congress would have explicitly provided for exceptions to the principle of majority rule if any were intended, an examination of the legislative history of the Act again contradicts such a conclusion. Congress made one explicit exception to the majority rule principle: section 8(f). It provides that a construction industry employer does not commit an unfair labor practice by signing a collective bargaining agreement with a union before the union has established majority employee support. Because Congress did not explic-

49. Section 7 of the Act reads:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.


50. This report stated that the Taft-Hartley amendment:

assures that when the law states that employees are to have the rights guaranteed in section 7, the Board will be prevented from compelling employees to exercise such rights against their will . . . . In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so.


51. A House Report stated that the amendment:

provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so. Taken in conjunction with the provisions of section 8(b)(1) . . . . , wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties [sic] of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act.

H.R. Rep. No. 510, 80th Cong., 1st Sess. 39-40 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 543-44 (emphasis added). Therefore, this amendment to § 7 apparently was intended primarily to protect employees from union coercion, and not from remedies devised by the Board.

52. See Conair Corp. v. NLRB, 721 F.2d 1355, 1382 (D.C. Cir. 1983).

53. Section 8(f) reads in relevant part:
ity authorize an exception to the principle of majority rule as a remedy for gross unfair labor practices, opponents of NMBOs argue that they are impermissible. 54

Examination of the legislative history, however, diminishes the value of section 8(f) as evidence of congressional intent to legislate only explicit exceptions to the principle of majority rule. 56 The congressional reports reveal that Congress considered section 8(f) consistent with, and not an exception to, the majority rule principle. 56 Thus, because Congress did not expressly enact any substantive exceptions to the majority rule principle, section 8(f) provides no real evidence of an intention to bar any implicit exceptions to the rule.

On the contrary, one can argue that when Congress wanted to limit the Board’s authority it did so explicitly. 57 For example, section 9(b) expressly limits the Board’s authority to designate bargaining units when certain types of employees are involved. 58 Because Congress did not expressly limit the Board’s broad and discretionary section 10(c) remedial powers, no congressional intent to prohibit the Board from issuing NMBOs appears to exist.

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization of which building and construction employees are members [because] the majority status of such labor organization has not been established under the provisions of [§ 9 of this Act] prior to the making of such agreement . . . .


54. See supra note 52 and accompanying text.

55. See Conair Corp., 721 F.2d at 1396 (Wald, J., dissenting); Recent Case, supra note 45, at 828-29.

56. See S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959). Employment relationships in the construction industry are generally too brief to allow a representation election to be held. Construction industry employers, however, typically hire from union halls where a majority are union members. Therefore, a majority of the workers will have already expressed their support for the union, making the § 8(f) "exception" to the principle of majority rule consistent with it.


58. 29 U.S.C. § 159(b) (1982). This section prevents the Board from designating as a bargaining unit a group of both professional and nonprofessional employees, unless a majority of the professional employees votes to be included in the unit. It also prevents the Board from designating a bargaining unit to include, together with other employees, guards hired to protect the employer’s interests. See also H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970), discussed supra note 46 (holding that the Board had no authority to compel agreement on substantive terms of a contract because § 8(d) of the Act expressly prohibits this practice).
II. SUPREME COURT APPROVAL

The United States Supreme Court has never explicitly decided whether or not NMBOs are within the Board's remedial powers. In *NLRB v. Gissel Packing Co.*, however, the Court, in dicta, referred to the Board's possible use of NMBOs. The favorable manner in which they were discussed indicates at least implicit Court approval of NMBOs.

In *Gissel*, the issue before the Court was whether or not a bargaining order was an appropriate remedy in cases where objective evidence of a union's majority status once existed but subsequently had been dissipated by extensive employer unfair labor practices. The Court held that this type of bargaining order, now known as a "Gissel bargaining order," is an appropriate remedy when the employer's unfair labor practices have made a fair election unlikely. The Court reversed the Fourth Circuit, which had held that authorization cards were unreliable indicators of employee sentiment and that, in effect, the Board could issue a bargaining order only after the union had won a certification election. The Court, however, noted that the area of disa-


60. 395 U.S. 575 (1969). *Gissel* was a consolidation of four cases. Three of these cases were appealed from the Fourth Circuit: NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968); NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968); and General Steel Prods. v. NLRB, 398 F.2d 339 (4th Cir. 1968). In these cases, the Fourth Circuit refused to enforce bargaining orders issued by the Board. The employers had committed unfair labor practices and had refused to bargain with the union when presented with union authorization cards signed by a majority of the employees. Nevertheless, the Fourth Circuit held that the employers had not violated § 8(a)(5) of the Act by refusing to bargain with the union, on the ground that authorization cards were such unreliable indicators of the desires of the employees that an employer was justified in withholding recognition pending the result of a certification election. The fourth case was appealed from the First Circuit: NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968). In this case, the First Circuit upheld a bargaining order issued by the Board under circumstances very similar to the Fourth Circuit cases.

61. A union has objective evidence of majority status when it collects signed union authorization cards from a majority of the employees. See supra note 3.

62. The Court held that because authorization cards can be reliable evidence that the union once had majority status, a bargaining order, by restoring the status quo, is a permissible remedy for employer unfair labor practices likely to have dissipated this majority and impeded the election process. *Gissel*, 395 U.S. at 606-07, 614.

63. Id. at 585-86. The Fourth Circuit also indicated that a bargaining order might be appropriate in cases where the union's majority status was otherwise undisputed. Furthermore, NMBOs may be issued. See infra note 65 and accompanying text.
agreement between its position and that of the Fourth Circuit was not large as a practical matter.64

The Fourth Circuit had left open the possibility of imposing an NMBO in exceptional cases. These extreme cases would be marked by outrageous and pervasive employer unfair labor practices, the effects of which could not be eliminated by the application of traditional remedies, thus making a fair and reliable election unlikely.65 The area of disagreement between the Supreme Court and the Fourth Circuit—whether authorization cards constituted sufficient evidence of a pro-union majority to support a bargaining order—was not large as a practical matter because the Fourth Circuit had left open the possibility of imposing an NMBO. An NMBO, like a Gissel bargaining order, would be issued even though the union had never won a certification election. Therefore, the Supreme Court, by citing the Fourth Circuit's tentative approval of NMBOs to demonstrate that their views really were not that far apart, appeared to sanction the Board's use of NMBOs.67

Further support for this argument may be found in two other passages in Gissel. First, the Court noted that the employer's unfair labor practices in the Sinclair case, one of the four cases consolidated in Gissel, were so coercive that a bargaining order would have been necessary to repair their unlawful effects even in the absence of a section 8(a)(5) violation.68 At the time of the

64. The Court stated that "[d]espite our reversal of the Fourth Circuit below . . . on all major issues, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter." Gissel, 395 U.S. at 613.

65. The Court explained:

While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices . . . if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."

Id. at 613-14 (1969) (emphasis added) (quoting NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967)).

66. See supra notes 62-63 and accompanying text.

67. See, e.g., Comment, supra note 31, at 889; Comment, supra note 26, at 844-45; Note, supra note 31, at 967. But see, e.g., Golub, supra note 26, at 636-37; Hunter, supra note 31, at 576-77.

68. NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir. 1968).

Gissel decision, a union established a section 8(a)(5) violation, in this context, by showing that it had achieved majority status and that the employer had rejected its bargaining request in bad faith.70 A showing that the employer had committed serious unfair labor practices which tended to interfere with the election process,71 an element clearly present in the Sinclair case, satisfied the bad faith requirement. In fact, precisely because this element was so strong, the Court believed that no section 8(a)(5) violation was necessary to justify a bargaining order.72 The Court thus suggested that the other element, achieving majority status, was not required and, therefore, that an NMBO would have been proper in the Sinclair case.73

Second, the Gissel Court indicated the seriousness of its endorsement of NMBOs immediately following its approval of the Fourth Circuit’s statements leaving open the possibility of issuing NMBOs.74 The Court added that, “[t]he Board itself . . . has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices.”75 The Court referred to the policy of issuing a bargaining order when an employer’s unfair labor practices had undermined a union’s cardholder majority, even though the employer had not violated the duty to bargain with the union.76 In other words, the Board had placed great weight on the remedial policies of the Act and had regularly issued bargaining orders in cases of severe employer unfair labor practices, even when the union had never won a certification election. The same emphasis on the remedial policies of the Act underlies NMBOs, and the Court, by analogizing to this accepted Board

70. See Gissel, 395 U.S. at 582-83.
71. See id. at 594; 1 Section of Labor & Employment Law, Am. Bar Ass'n, The Developing Labor Law 497-98 (2d ed. 1983).
72. The Court noted that, in Sinclair, the employer’s threats of reprisal were so coercive that the Board “did not have to make the determination called for in [cases involving less severe unfair labor practices] that the risks that a fair rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards.” Gissel, 395 U.S. at 615.
73. See Conair Corp. v. NLRB, 721 F.2d 1355, 1392 (D.C. Cir. 1983) (Wald, J., dissenting); Gourmet Foods, Inc., 270 N.L.R.B. 578, 590 (1984) (Member Zimmerman, dissenting); Comment, supra note 31, at 890. But see Gourmet Foods, Inc., 270 N.L.R.B. 578, 585 n.43 (1984); Comment, supra note 31, at 891 (arguing that the Court was dispensing with the bad faith requirement, not the cardholder majority requirement).
74. See supra note 65 and accompanying text.
76. The Gissel Court expressly cited J.C. Penney Co. v. NLRB, 384 F.2d 479 (10th Cir. 1967) and United Steelworkers v. NLRB, 376 F.2d 770 (D.C. Cir. 1967) as examples of this Board policy. Gissel, 395 U.S. at 614.
practice, appeared also in this way to sanction the Board's use of NMBOs.\textsuperscript{77}

Disagreement persists, however, as to the extent to which the Court endorsed NMBOs in \textit{Gissel}. Some have argued that the Court's statements in \textit{Gissel} regarding NMBOs are mere dicta\textsuperscript{78} and therefore should not be given much weight.\textsuperscript{79} Furthermore, the Court expressly limited its holding to bargaining orders where, as in the case before it, the employer's unfair labor practices were less severe, and a cardholder majority at one time had been shown.\textsuperscript{80} This argument fails to recognize, however, that Supreme Court dicta play an important role in shaping public policy. The Board and the lower courts often look to the Court's dicta for guidance.\textsuperscript{81} In fact, the Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have all interpreted \textit{Gissel} as implicitly endorsing NMBOs.\textsuperscript{82} It is therefore likely that the Court carefully considered its statements regarding NMBOs and the probable impact they would have in guiding future Board policy.

\textsuperscript{77} See \textit{Gourmet Foods}, 270 N.L.R.B. at 590 (Member Zimmerman, dissenting); Comment, \textit{supra} note 26, at 845. \textit{But see Conair Corp.,} 721 F.2d at 1380 n.83 (arguing that this statement shows the Court's reference to NMBOs to be only casual).

\textsuperscript{78} The union had been able to show that it had obtained a cardholder majority at one time in all four of the cases consolidated in \textit{Gissel}. \textit{Gissel}, 395 U.S. at 580, 587. The Court's statements concerning NMBOs may therefore be regarded as dicta.

\textsuperscript{79} \textit{See}, e.g., \textit{Conair Corp. v. NLRB}, 721 F.2d 1355, 1380 (D.C. Cir. 1983); \textit{Gourmet Foods, Inc.}, 270 N.L.R.B. 578, 585 (1984); \textit{United Dairy Farmers Coop. Ass'n}, 242 N.L.R.B. 1026, 1039 (1979) (Member Penello, concurring in part and dissenting in part); \textit{Hunter, supra} note 31, at 577; Comment, \textit{supra} note 31, at 889-90, 894; Note, \textit{supra} note 31, at 969 n.98.

\textsuperscript{80} The Court stated, "The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." \textit{NLRB v. Gissel Packing Co.}, 395 U.S. 575, 614 (1969).

\textsuperscript{81} \textit{Gourmet Foods}, 270 N.L.R.B. at 589 (Member Zimmerman, dissenting).

\textsuperscript{82} \textit{See}, e.g., \textit{NLRB v. Windsor Indus.}, 730 F.2d 860, 864 (2d Cir. 1984); \textit{Ona Corp. v. NLRB}, 729 F.2d 713, 720 (11th Cir. 1984); \textit{NLRB v. Maidsville Coal Co.}, 693 F.2d 1119, 1121-22 (4th Cir. 1982); \textit{NLRB v. Berger Transfer & Storage Co.}, 678 F.2d 679, 693 (7th Cir. 1982); \textit{United Dairy Farmers Coop. Ass'n v. NLRB}, 633 F.2d 1054, 1066 (3d Cir. 1980); \textit{Chromalloy Mining & Minerals Corp. v. NLRB}, 820 F.2d 1120, 1129 (5th Cir. 1980); \textit{NLRB v. Montgomery Ward & Co.}, 554 F.2d 996, 1002 (10th Cir. 1977); \textit{NLRB v. Lou De Young's Mkt. Basket, Inc.}, 430 F.2d 912, 914 (6th Cir. 1970). \textit{But see Conair Corp.,} 721 F.2d at 1381 (concluding that the most that can be said is that the \textit{Gissel} Court left open the NMBO issue). \textit{United Dairy Farmers} and \textit{Conair Corp.} are the only cases that discuss in depth the reasoning behind their interpretations of the \textit{Gissel} dictum. The arguments advanced in these cases have been discussed throughout Part II of this Note. For a discussion of the relationship between the Board and the federal courts, see \textit{supra} note 25.
III. POLICY CONSIDERATIONS

NMBOs, in addition to being consistent with the language, legislative history, and Supreme Court interpretations of the Act, further the Act's underlying policy goals. NMBOs help both to ensure employee freedom of choice and to deter employer unfair labor practices.

A. Employee Freedom of Choice

When an employer's outrageous and pervasive unfair labor practices are so coercive as to make a fair and reliable election impossible, the true wishes of the majority of the employees remain indeterminate. Through the careful application of the NMBO remedy, however, the Board should be able to predict with reasonable accuracy and effectuate what the true uncoerced wishes of the majority of the employees would have been "but for" the employer's unfair labor practices. The Board could develop guidelines in two areas to ensure that it applies the NMBO remedy in a manner most consistent with the Act's policy of effectuating employee free choice. First, the Board should issue NMBOs only in cases involving certain types of highly coercive employer unfair labor practices, such as discriminatory discharges or clear threats of retaliation. By restricting the use of NMBOs to remedy only those employer unfair labor practices likely to have led to a significant loss of support for the union, the Board would ensure that the remedy addresses an actual loss of employee support for the union caused by the employer's unfair labor practices. Second, NMBOs should be issued only in cases where the union can show that a substantial proportion, perhaps thirty percent, of the employees had signed authorization cards prior to the employer's unfair labor practices. By

83. These policy goals are set forth in § 1 of the Act. 29 U.S.C. § 151 (1982); see supra note 30.
84. Because the employer's unfair labor practices have interfered with the free expression of the employees' views, no objective evidence exists of what the employees' true wishes regarding union representation would have been "but for" the employer's coercive actions. See Conair Corp. v. NLRB, 721 F.2d 1355, 1399-1400 (D.C. Cir. 1983) (Wald, J., dissenting); Conair Corp., 261 N.L.R.B. 1189, 1193 (1982); United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1034 (1979) (Chairman Fanning and Member Jenkins, concurring in part and dissenting in part); Bok, supra note 26, at 138.
85. See Bok, supra note 26, at 138.
86. Id.
restricting the use of NMBOs to cases where the union at one time had achieved significant employee support, the Board would help ensure that a majority of the employees would have supported the union "but for" the employer's unfair labor practices and, therefore, that the NMBO is consistent with the Act's policy of effectuating employee free choice.

One empirical study, the "Getman study," purports to show that employer unfair labor practices have no significant impact on employee votes in union certification elections. If this study's conclusions are true, then a strong argument could be made that NMBOs not only are unnecessary but also would consistently interfere with employee free choice. The Getman study has been severely criticized, however, and its data have even been used to support the opposite conclusion, that employer unfair labor practices significantly reduce the pro-union vote. In addition, another independent study found employer unfair labor practices to have a pronounced negative effect on union organizing and on the ultimate election outcome. Thus, because employer unfair labor practices are likely to have a material impact on employee votes, NMBOs remain a necessary re-


88. This study analyzed 31 union certification elections and concluded that employer unfair labor practices do not persuade employees to vote against union representation. The authors therefore suggest the elimination of the bargaining order as a remedy for unlawful election campaigning by employers. Id. at 154. Cf. Flanagan, NLRA Litigation and Union Representation, 38 STAN. L. REV. 957, 981-88 (1986) (arguing that a decision to unionize is influenced significantly more by general economic conditions than by employer unfair labor practices).

89. A union loses a certification election, according to the Getman study's view, because most of the employees truly do not want to be, and never did want to be, represented by the union. An NMBO therefore would impose a union on the employees against their true wishes. See Recent Decision, 49 GEO. WASH. L. REV. 780, 797 (1981) (discussing United Dairy Farmers Coop. Ass'n v. NLRB).

90. See Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1782-87 (1983) (contending that the Getman study actually showed that employer unfair labor practices reduced the pro-union vote, though the study's authors claimed that these results were statistically insignificant, and further arguing that the study's research methods were flawed).

91. One analyst used this data to estimate that severe employer unfair labor practices reduced the number of pro-union votes by 15 percent. W. Dickens, Union Representation Elections: Campaign and Vote (Oct. 1980) (unpublished Ph.D. dissertation, Department of Economics, Massachusetts Inst. of Technology) (cited in Weiler, supra note 90, at 1784-86 & nn.50-55, 59-60).

92. These researchers found that unlawful employer opposition, as measured by the average number of unfair labor practice charges filed against employers per election, had a significant negative effect on union organizing. D. ELLWOOD & G. FINE, THE IMPACT OF RIGHT-TO-WORK LAWS ON UNION ORGANIZING (National Bureau of Economic Research Working Paper No. 1116, 1983) (cited in Weiler, supra note 90, at 1786 n.61).
medial device and, if carefully applied by the Board, would fur­
ther the Act's policy of ensuring employee freedom of choice.

Even if the Board occasionally errs in its calculations, how­
ever, and orders an employer to bargain with a union that would not have had the support of a majority of the employees, the adverse effects on employee freedom of choice would be mini­
mal. First, it is quite unlikely that an NMBO would have the effect of forcing any employee to join the union against his will. Employees would be compelled to join a union only if a union security clause93 is negotiated. But a union is unlikely to be able to pressure an employer who violates the law to resist unioniza­
tion into making this significant concession.94 Second, NMBOs are only temporary and, after a reasonable period of time has passed, the employees are free to vote out the union.95 Finally, it is quite likely that the union will try to negotiate a contract satisfac­tory to the majority of the employees, because it will have to win their support in order to survive as their exclusive repre­sentative in the long-term.96

Furthermore, NMBOs do not interfere with employee free
choice significantly more than do Gissel bargaining orders, which have the Supreme Court's explicit approval.97 Even where
a cardholder majority at one time has been shown, opinions or the composition of the workforce may have changed since the cards were signed and collected; employees may have signed the cards in a "go along" mood, with the intent later to cast a secret ballot the other way; or some of the employees may have misun­derstood the effect of signing the cards.98 The fact that the
union at one time had a cardholder majority, the only relevant factor distinguishing a Gissel bargaining order from an NMBO,

93. A union security clause requires all employees covered by a collective bargaining agreement, as a condition of employment, to obtain and maintain membership in the union. See 2 SECTION OF LABOR & EMPLOYMENT LAW, AM. BAR Ass'N, THE DEVELOPING LABOR LAW 1365 (2d ed. 1983).

94. Bok, supra note 26, at 135.

95. See NLRB v. Gissel Packing Co., 395 U.S. 575, 613 (1969) ("There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition."); Conair Corp. v. NLRB, 721 F.2d 1355, 1398 (D.C. Cir. 1983) (Wald, J., dissenting); Gourmet Foods, Inc., 270 N.L.R.B. 578, 592 & nn. 27-28 (1984) (Member Zimmerman, dissenting); Golub, supra note 26, at 640; Note, supra note 31, at 968.

96. Bok, supra note 26, at 135; see also Gourmet Foods, 270 N.L.R.B. at 592 (Member Zimmerman, dissenting).

97. See supra notes 62-63 and accompanying text.

98. See United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1034 (1979) (Chairman Fanning and Member Jenkins, concurring in part and dissenting in part).
thus is not necessarily a significant indicator of what the current employee voting preference would have been "but for" the employer's unfair labor practices. Therefore, NMBOs appear to offer no less protection to employee free choice than Gissel bargaining orders, which have attained widespread acceptance.

Finally, whatever minimal harm NMBOs may occasionally work on employee free choice is outweighed by the fact that they are the only effective remedy for severe employer unfair labor practices. By definition, NMBOs are issued only in cases where the "coercive effects [of employer unfair labor practices] cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." Traditional remedies are likely to be ineffective in these more serious cases because "there are many workers whose apprehensions cannot be allayed by notices posted in the plant or by the possibility of reinstatement and backpay at some future date." Some have argued that other extraordinary remedies, particularly the section 10(j) injunction, would be just as effective as NMBOs. The section 10(j) injunction, however, is a doubtful alternative to NMBOs, especially considering the courts' reluctance to grant them and the historical practice of issuing injunctive relief during organizing campaigns only on a

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99. Cf. Cooper, Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision, 79 Nw. U.L. Rev. 87, 137 (1984) (concluding that authorization cards from at least 62.5% of the employees were needed before the union stood a better than even chance of actually winning the representation election).

100. But see, e.g., Gourmet Foods, Inc., 270 N.L.R.B. 578, 584-85 (1984); Conair Corp., 261 N.L.R.B. 1189, 1196-97 (1982) (Chairman Van de Water, concurring in part and dissenting in part); Hunter, supra note 31, at 577-78; Comment, supra note 31, at 913-14; Recent Decision, supra note 89, at 798. These administrators and authors contend that NMBOs, unlike Gissel bargaining orders, do not restore the status quo. Therefore, strictly speaking, NMBOs are not a remedial measure, but a punitive measure, and arguably are outside the scope of the Board's authority.


102. Bok, supra note 26, at 135-36.

103. Section 10(j) of the Act provides that "[t]he Board shall have power . . . to petition [a] United States district court . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." 29 U.S.C. § 160(j) (1982).

104. See, e.g., Hunter, supra note 31, at 579-80; Note, supra note 31, at 970; Recent Decision, supra note 89, at 799-800; cf. Note, Remedial Gap at the NLRB Following the Demise of the Nonmajority Bargaining Order: Gourmet Foods, Inc. and Warehouse Employees, Local 503, 1985 Wis. L. Rev. 1193, 1208-17 (1985) (suggesting alternative remedial devices to be applied by the Board assuming the NMBO remedy never again will be available).
showing of a card majority. Therefore, NMBOs appear to be the only effective way to remedy severe employer unfair labor practices. On balance, they best ensure employee freedom of choice in these situations.

B. Deterrence of Employer Unfair Labor Practices

A second policy goal that NMBOs further is the deterrence of employer unfair labor practices. The threat of having an NMBO imposed should create a strong incentive for an anti-union employer to keep his opposition to the union within the law. If he does not do so, he may be forced to bargain with the union anyway, even if his unfair labor practices successfully keep the union from winning the election or obtaining a cardholder majority. On the other hand, in the absence of the threat of an NMBO, an anti-union employer may risk committing serious unfair labor practices at the first signs of unionization, so as to prevent the union from acquiring a cardholder majority and thereby ensure that he will never be subject to a bargaining order.

105. See Recent Case, supra note 45, at 832 & n.125.


107. Conair Corp., 721 F.2d at 1400 (Wald, J., dissenting) ("The prospect of a remedial bargaining order should create a strong incentive for the anti-union employer to keep its campaign within legal limits. For even if the company wins the organizational battle, it may lose the collective bargaining war."); see also Gourmet Foods, 270 N.L.R.B. at 593 (Member Zimmerman, dissenting); United Dairy Farmers Coop. Ass'n, 242 N.L.R.B. 1026, 1037-38 (1979) (Chairman Fanning and Member Jenkins, concurring in part and dissenting in part); Bok, supra note 26, at 133.

108. If the Board is not allowed to issue NMBOs:

The anti-union employer can avoid ever dealing with a union by rushing in at the first sign of union sentiment, before employees have begun to experience the collective strength of numbers, with threats of plant closings, mass discharges and close surveillance, thereby creating an atmosphere of coercion that outlasts the tenure of current employees and outdistances the remedial powers of the Board. Conair Corp., 721 F.2d at 1400 (Wald, J., dissenting). In addition:

If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him "to profit from [his] own wrongful refusal to bargain," while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; and any election held under
Although one could argue that NMBOs are an ineffective remedy, and therefore that their deterrent effect would prove to be illusory, the experience with the bargaining order in general offers strong evidence to the contrary. Those who contend that NMBOs are ineffective remedies point out that NMBOs cannot compel a recalcitrant employer to make any concessions or agree to a contract. In addition, the employees probably would be unable to utilize the strike weapon, because employees who are too intimidated to vote for the union in a secret ballot election would be unlikely to vote to go on strike. Therefore, they conclude, because NMBOs are unlikely to produce viable and enduring collective bargaining relationships, employers would have no real incentive to avoid them. Past experience with the bargaining order remedy in general, however, suggests that such an incentive indeed exists. Employers have fought the bargaining order remedy with considerable tenacity, indicating that they consider the possibility of meaningful bargaining to be substantial. Therefore, the threat of an NMBO may effectively deter employer unfair labor practices and possibly even result in long-lasting collective bargaining relationships.

CONCLUSION

Under current Board policy no effective remedy exists for pervasive employer unfair labor practices during a union organizing campaign. Traditional Board remedies often cannot fully eliminate the coercive effects of these extreme unfair labor practices. Particularly when a union has come close to obtaining a card-
holder majority, the employer's unfair labor practices may have been sufficient to deter enough pro-union votes so as to defeat a union that would have won a representation election in a coercion-free environment.

Board acceptance and careful application of the NMBO remedy would largely solve this problem. The bargaining order would, by definition, erase the effects of employer unfair labor practices that have caused a union to lose a certification election. The Act's broad grant of remedial power to the Board, combined with the flexibility of the majority rule principle, is sufficient to support the Board's statutory authority to issue NMBOs. The Supreme Court's implicit approval of NMBOs in Gissel strengthens this view. Furthermore, NMBOs, if carefully applied, would further the Act's policy of effectuating employee free choice and, in addition, be likely to deter employer unfair labor practices in the first place.

The Board, therefore, should reverse its current policy and begin issuing bargaining orders when it determines that a union would have won a certification election "but for" the employer's unfair labor practices. In making this determination, the Board should take into account both the severity of the employer's unfair labor practices and objective evidence of the extent of union support among the employees prior to the employer's unfair labor practices. In addition, the Supreme Court, in order to resolve the current confusion in this area, should explicitly approve the Board's use of NMBOs at the next available opportunity.

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