1984

Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision

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Printed in U.S.A.
Vol. 79, No. 1

AUTHORIZATION CARDS AND UNION REPRESENTATION ELECTION OUTCOME: AN EMPIRICAL ASSESSMENT OF THE ASSUMPTION UNDERLYING THE SUPREME COURT'S *GISSEL* DECISION

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The National Labor Relations Act created the National Labor Relations Board (NLRB) and vested the Board with two principal responsibilities. First, the NLRB is responsible for conducting secret ballot elections among employees to ascertain whether they desire a collective bargaining representative.[1] Second, the NLRB is responsible for remedying unfair labor practices.[2] These dual responsibilities, protection of employee free choice and remediation of unfair labor practices, may conflict when the Board is asked to provide a remedy for unfair labor practices that occur during the course of a union representation election campaign. The Board has been concerned that where an employer engages in serious and pervasive unfair labor practices during an election campaign, the employees may become so intimidated that a secret ballot election could not determine accurately the employees' sentiments regarding union representation. The Board has claimed the authority to require an employer to recognize and bargain with a union as the representative of its employees where the union, at some time in the past, has demonstrated support by a majority of employees, in the form of signed union authorization cards, and where the employer has committed serious unfair labor practices that would make holding a fair

* Professor of Law, University of Minnesota Law School. Data collection and analysis for this article were funded by a grant from the Walter G. Meyer Research Program of the American Bar Foundation. Law student research assistants Margaret Rossing and Linda Taylor contributed to the collection of data. Professor Sanford Weisberg, Department of Applied Statistics, University of Minnesota served as statistical consultant. The author gratefully acknowledges the assistance of the staff of Region 18 of the National Labor Relations Board and particularly the cooperation of former Regional Director Robert Wilson and Regional Attorney Herbert Dawidoff. Professor Barry Feld of the University of Minnesota and Professor Julius Getman of Yale University provided invaluable encouragement and advice from the inception of the project.

[1] National Labor Relations Act [hereinafter cited as NLRA], § 9(c)(1), 29 U.S.C. § 159(c)(1) (1982).

[2] NLRA, § 10(c), 29 U.S.C. § 160(c) (1982).

election impossible. In *NLRB v. Gissel Packing Company*,[3] the Supreme Court found the Board's issuance of such bargaining orders to be within the NLRB's statutory authority.

The assumption that underlies the Board's bargaining remedy, affirmed in *Gissel*, is that signed union authorization cards can provide a reasonably accurate demonstration of the extent of success that a union would have had in an election conducted by the NLRB in the absence of unfair labor practices. The central purpose of this Article is to assess empirically the validity of that assumption. This Article briefly outlines the Board's procedures for the conduct of elections and the remediation of unfair labor practices, reviews the legal background and subsequent history of the Supreme Court's *Gissel* decision, and describes prior empirical studies of election behavior. Next, the Article outlines the methodology used here to study empirically the factual assumption behind *Gissel* bargaining orders, reports the results of that study, and discusses possible changes in NLRB policy responsive to those results. In the process of collecting and analyzing data in order to evaluate the *Gissel* assumption, additional information was collected about factors other than authorization cards that might affect the outcome of union representation elections. Therefore the Article also discusses the impact upon elections of a variety of other factors including procedural delays and the day of the week on which the election is held.

I. NLRB PROCEDURES

A. *Election Procedures*

A union representation campaign typically begins when a union organizer or an employee of a company solicits employee signatures on authorization cards. In signing an authorization card, an employee indicates a desire to have the designated union as a representative in collective bargaining with the employer.[4] Except in rare circumstances, a petition from a union or employees requesting the NLRB to conduct a secret ballot election must be accompanied by authorization cards from at least thirty percent of the employees.[5] Following receipt of the petition at a regional Board office, an agent of the NLRB investigates the petition to ascertain whether the case comes within the Board's jurisdiction, whether the proposed bargaining unit is appropriate, and whether the union has submitted a sufficient number of authorization

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[3] 395 U.S. 575 (1969).

[4] 29 C.F.R. § 101.17 (1983).

[5] *Id.* § 101.18(a). The NLRA also permits an employer to file an election petition if a labor organization has requested recognition as a collective bargaining representative. NLRA, § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B) (1982). Employer petitions do not require a showing of employee support. 29 C.F.R. § 101.18(a) (1983).

cards.[6] If it is appropriate to proceed, the Board agent seeks to obtain an agreement between the employer and the union on the details of the election, including a description of the bargaining unit and the date of the election.[7] In more than eighty percent of the cases in which an election is conducted, the terms of the election are resolved by agreement of the parties.[8] Where an agreement is not reached, a formal hearing is held, which is conducted by a Board agent in a nonadversarial manner.[9] The regional director of the Board decides various preelection issues on the basis of the record of the hearing and, where appropriate, orders that the election be held on a specific date and within a specified bargaining unit.[10] An election generally is conducted within thirty days of the order.[11] Campaigning, usually commenced before a petition is filed, is continued during this period and may take the form of speeches, individual solicitation, or the distribution of written material.[12] At the date and time determined by the election agreement or Board order, an election is held under the direction of a Board agent.[13] Elections are almost invariably conducted at the workplace during working hours.[14] Ballots are marked in the secrecy of a voting

6 29 C.F.R. § 101.18(a) (1983). Congress authorized the five-member National Labor Relations Board [NLRB] in Washington to delegate its election responsibilities to regional directors. NLRA, § 3(b), 29 U.S.C. § 153(b) (1982). That delegation was accomplished in 1961 by the promulgation of what is now 29 C.F.R. § 101.21(a) (1983).

7 29 C.F.R. § 101.19 (1983).

8 *See* 45 NLRB ANN. REP. 15 (1980).

9 29 C.F.R. § 101.20(c) (1983).

10 *Id.* § 101.21(a). There is a limited right to review the order of a regional director by the NLRB's five-member Board in Washington, D.C. 29 C.F.R. § 101.21(b) (1983). In fiscal year 1980, when more than thirteen thousand petitions for election related matters were filed nationwide, the five-member Board issued election orders in only 38 cases. *See* 45 NLRB ANN. RÉP. 15 (1980).

11 A. COX, D. BOK & R. GORMAN, LABOR LAW—CASES AND MATERIALS 309 (9th ed. 1981).

12 Employees are permitted to discuss organization at the workplace during nonworking time and to distribute literature in nonworking areas at their place of employment. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). Nonemployee organizers usually may be denied access to the workplace. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). Employers are required to furnish the union with a list of the names and addresses of employees within seven days of the direction of an election. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239-40 (1966). An employer generally is free to make noncoercive speeches during working hours without affording the union any comparable opportunity. NLRB v. United Steelworkers, 357 U.S. 357 (1958). One empirical study of union elections found that 92% of employees received written material from their employer and 85% received such material from the union. J. GETMAN, S. GOLDBERG, & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 90 (1976) [hereinafter cited as J. GETMAN STUDY]. In campaigns in which meetings were held, 83% of employees attended a company meeting, while only 36% attended a union meeting. *Id.* at 92. Only 24% of voters were contacted personally by a union representative and only 14% were contacted by a company representative. *Id.* at 93-94.

13 29 C.F.R. § 101.19(a)(2) (1983).

14 Elections are held on the employer's premises "in the absence of good cause to the contrary." OFFICE OF THE GENERAL COUNSEL, NLRB, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 276 (1974). Mail balloting is used only in unusual circumstances in

booth.[15] Customarily, the Board agent tallies the ballots and reports the results immediately upon the conclusion of the balloting.[16]

Parties to the election may file objections to the election, which may concern unlawful campaigning or irregularities in balloting, and may challenge the eligibility of individual voters.[17] Challenges or objections to the election are resolved by the regional office through investigation and, in some instances, by hearing.[18] Unless waived by a pre-election agreement, the parties also have the right to limited review of the regional director's post-election decisions by the NLRB in Washington.[19] The regional director has the authority, in response to objections, to set aside the results of the election and order a new election if the election campaign and balloting failed to satisfy the Board's desire to provide "conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."[20] While conduct that does not rise to the level of an unfair labor practice may be the basis for setting aside an election, an employer unfair labor practice during the campaign will cause the Board to set the election aside unless it is virtually impossible to conclude that the violation affected the results of the election.[21] In the absence of post-election objections, or following their resolution, the regional director issues a certification of the results of the election, and, where a majority of the employees have voted for the union, the regional director certifies the labor organization as the exclusive collective bargaining representative of the employees.[22] These orders of the regional director are also subject to limited review by the five-member Board. Decisions of the Board on election matters are not

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which long distances are involved or in which eligible voters are scattered because of their duties. *Id.* at 277.

15 29 C.F.R. § 101.19(a)(2) (1983).

16 *Id.* § 101.19(a)(3).

17 *Id.* § 101.19(a)(4).

18 29 C.F.R. § 101.21(c) (1983).

19 *Id.* § 101.21(d).

20 General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). Except in extraordinary circumstances, only events following the filing of an election petition are considered by the Board in deciding whether to set aside the results of an election. Goodyear Tire & Rubber Co., 138 N.L.R.B. 453 (1962); Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275 (1961).

21 In Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786 (1962), the Board held that conduct that violates the Act "is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election." The Board subsequently noted one recognized exception to this policy; where "it is virtually impossible to conclude that . . . [the violations] could have affected the results of the election." Super Thrift Markets, Inc., 233 N.L.R.B. 409, 409 (1977). This exception was applied in a case in which a single employee had been threatened with discharge, but there was no evidence that this information was disseminated to any of the other 850 employees in the unit, working at five different locations. Caron Int'l., Inc., 246 N.L.R.B. 1120 (1979). In the latter case, two members of the Board dissented on the ground that the Board should not presume lack of dissemination and that the majority's application of the *Super Thrift* rule in such cases would result in "the exception swallowing the rule." *Id.* at 1122.

22 29 C.F.R. § 101.19(a)(6) (1983).

directly subject to judicial review, but may be considered by the federal courts of appeals in conjunction with judicial review of an unfair labor practice proceeding, most commonly an employer's refusal to bargain with the union in order to test the validity of the election proceedings.[23]

B. *Unfair Labor Practice Procedures*

The National Labor Relations Act defines the types of conduct that will be considered unfair labor practices[24] and empowers the NLRB to prevent persons from engaging in such practices.[25] The Act also permits the Board to define other unfair labor practices through interpretation of the broadly phrased statutory language that makes it an unfair labor practice to interfere with the rights of employees.[26] The sorts of conduct during the course of a union representation election campaign that would be considered unfair labor practices include discharges of, or other discrimination against, employees because of their union activities,[27] coercive interrogation of employees regarding union sentiments,[28] promises of or grants of benefits to employees for the purpose of persuading them to vote against the union,[29] threats of retaliation for union support, such as a threat to close a plant if a union should win the election,[30] and interference with employees' abilities to engage in reasonable campaign activities.[31] Once a union has been selected as the employees' collective bargaining representative, it is an unfair labor practice for the employer to refuse to bargain with the union or to fail to bargain in good faith.[32]

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23 AFL v. NLRB, 308 U.S. 401 (1940); NLRA, § 9(d), 29 U.S.C. § 159(d) (1982); NLRA, § 10(f), 29 U.S.C. § 160(f) (1982).

24 NLRA, § 8, 29 U.S.C. § 158 (1982). Section 8(a) of the Act outlines conduct that would constitute an unfair labor practice if committed by an employer; section 8(b) defines unfair union labor practices. The scope of this Article makes it appropriate to limit discussion to charges against employers.

25 NLRA, § 10(a), 29 U.S.C. § 160(a) (1982).

26 Section 8(a)(1) of the Act 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. 29 U.S.C. § 158(a)(1) (1982). Section 7 provides:

> 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 . . . .

29 U.S.C. § 157 (1982).

27 NLRA, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982). Section 8(a)(3) makes it a violation "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

28 Polling that fails to meet certain conditions, including secrecy, has been found to be a violation of § 8(a)(1) of the Act. *See supra* note 26. Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967).

29 NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

30 NLRB v. Gissel Packing Co., 395 U.S. 575, 617-20 (1969).

31 Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

32 NLRA, § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982); NLRA, § 8(d), 29 U.S.C. § 158(d) (1982).

The NLRB takes no role in the initiation of unfair labor practices charges. Charges against employers are filed in NLRB regional offices by unions or by individuals. NLRB agents then investigate the charge to determine whether there is reasonable cause to believe the Act has been violated.[33] If the regional director finds the charge to be without merit, it is dismissed if not withdrawn by the charging party.[34] In cases found to have merit, efforts are made toward settlement, both before and after a complaint is issued.[35] If settlement efforts are unsuccessful, a formal hearing is held before an Administrative Law Judge.[36] If the unfair labor practice complaint is based on conduct that also forms the basis of objections to an election, the regional director orders the objections and complaint to be consolidated for hearing before an Administrative Law Judge.[37] If a party is dissatisfied with the decision of the Administrative Law Judge, review is available from the five-member Board.[38] Decisions of the Board are not self-executing but rather are effectuated through enforcement by the federal courts of appeals. The Board may seek enforcement of its orders by petitioning the court of appeals.[39] In addition, any party aggrieved by a final order of the Board may seek judicial review.[40] The Act also authorizes the Board to request injunctive relief in a federal district court at any time following the issuance of a complaint,[41] but such requests are rarely made.[42]

The Act defines the remedial authority of the Board, and, where the Board finds that an unfair labor practice has been committed, directs it to order the 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 . . . [the] Act."[43] Under this authority, the Board is able to provide remedies tailored to the particular unfair labor practice committed, and most commonly orders the employer to cease the specific practice upon

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33 45 NLRB ANN. REP. 9 (1980).

34 *Id.*

35 29 C.F.R. §§ 101.7, 101.9 (1983). Through the processes of dismissal, withdrawal, and settlement, more than 90% of the unfair labor practice cases filed with the Board's field offices are resolved without any formal hearing in a median of 40 days. 45 NLRB ANN. REP. 9 (1980). In fiscal 1980, the regional directors considered 39% of the charges against employers as meritorious. *Id.* at 10.

36 45 NLRB Ann. Rep. 9 (1980).

37 NATIONAL LABOR RELATIONS BOARD, CASE HANDLING MANUAL (PART TWO), REPRESENTATION PROCEEDINGS, ¶¶ 11420.1-.2 (1978); 29 C.F.R. § 102.33 (1983).

38 29 C.F.R. § 102.33 (1983).

39 NLRA, § 10(e), 29 U.S.C. § 160(e) (1982).

40 *Id.* § 10(f), 29 U.S.C. § 160(f).

41 *Id.* § 10(j), 29 U.S.C. § 160(j).

42 In fiscal 1980, regional offices found more than 12,000 charges nationwide against employers to be meritorious. The Board, however, sought injunctions against employers in only 45 cases. *See* 45 NLRB ANN. REP. 9, 10, 205 (1980).

43 NLRA, § 10(c), 29 U.S.C. § 160(c) (1982).

which the complaint was based. Where serious unfair labor practices have been committed in the context of a union representation election campaign, however, it has been the Board's position that its authority to order an employer, for example, to cease threatening employees, or to cease discharging additional employees for anti-union motivations, cannot always restore the atmosphere of free choice that it believes is vital to the conduct of a union representation election. It is this belief that motivated the Board to introduce the additional remedy of ordering an employer whose unfair labor practices had precluded holding a fair election to recognize and bargain with a union although that union had never demonstrated in an election that it actually had the support of a majority of the employees. The next section will address the genesis and application of these *Gissel* bargaining orders.

II. *GISSEL* BARGAINING ORDERS

A. *Origins of the Doctrine*

The NLRB's policy of issuing bargaining orders as a remedy for outrageous unfair labor practices committed in the course of an election campaign, which emerged during the Supreme Court's consideration of the *Gissel*[44] case, was only a slight variation from the policy that the agency had always had toward achievement of representative status through the use of authorization cards. Almost as soon as the National Labor Relations Act was enacted in 1935, the Board permitted a union to gain status as the exclusive collective bargaining representative by means other than winning a representation election conducted by the NLRB.[45] A traditional means for a union to gain representative status had been to obtain cards signed by a majority of the employees, authorizing the union to represent them for collective bargaining purposes.[46] A union with cards from a majority of employees could gain representative status in one of two ways. First, the employer might recognize the union voluntarily and bargain with it in the absence of an election.[47] Second, under the Board's *Joy Silk*[48] doctrine, if an employer in bad faith declined to recognize a union that presented to it evidence of a card majority, the employer could be found to have committed the unfair labor practice of failing to recognize the union, and, as a remedy, be ordered to bargain. One of the means by which the Board had traditionally demonstrated an employer's lack of a good faith doubt of the union's majority status was by proving that the em-

44 NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

45 *Id.* at 596-97.

46 *Id.* at 597.

47 R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 40 (1976).

48 Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950). *See also* NLRB v. Gissel Packing Co., 395 U.S. at 592-93.

ployer had committed unfair labor practices in an effort to undermine the union.[49]

In the NLRB's briefs to the Supreme Court for the four cases that were consolidated in *NLRB v. Gissel Packing Co.*, the agency sought to demonstrate how, in each case, the employer's unfair labor practices evidenced its lack of good faith so as to warrant a bargaining order under the *Joy Silk* doctrine.[50] At the oral argument in *Gissel*, however, the Board appeared to abandon the good faith doubt test of *Joy Silk* and adopt a policy of issuing a bargaining order only upon "the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election."[51] The employer's subjective motivation in declining to recognize the union would no longer be at issue.[52] Although the Board's bargaining orders in the four consolidated cases had been based on the "good faith" test, the agency had relied in each instance on findings that the employer's bad faith had been evidenced by unfair labor practices that made holding a fair election impossible.[53] The Supreme Court affirmed the Board's findings that in each of the cases there were unfair labor prac-

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[49] Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264 (1949). Under *Joy Silk*, an employer could also be found to lack good faith if it gave no reasons for having rejected the bargaining demand. NLRB v. Gissel Packing Co., 395 U.S. 575, 593 (1969). In Aaron Brothers Co., 158 N.L.R.B. 1077 (1966), the Board changed its position and relieved the employer of any burden to come forward with reasons for rejecting the bargaining demand. NLRB v. Gissel Packing Co., 395 U.S. at 593. Under *Aaron Brothers*, bad faith could also be proved by an employer's "course of conduct," even if it did not constitute an unfair labor practice. Aaron Bros. Co., 158 N.L.R.B. at 1079.

[50] In *Gissel*, employees were interrogated about union activities, promised better benefits, threatened with reprisals, subjected to surveillance at union meetings, and, in two cases, were subjected to reduced working hours and, later, discharged for union activities. Brief for the National Labor Relations Board at 44-45, NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). The Board concluded:

> Unfair labor practices of the kind engaged in by the Company would tend to undermine the clear majority which the union had originally attained, and warranted the inference that the Company's refusal to bargain was improperly motivated. In these circumstances, a Board election would not reflect a true picture of employee sentiment.

Id. at 47. Unfair labor practices were also used as evidence of bad faith in *Heck's*, *Id.* at 48-49, 50; in *General Steel*, *id.* at 52-53; and in *Sinclair*, Brief for the National Labor Relations Board at 13, Sinclair Company v. NLRB, *decided sub nom.* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

[51] NLRB v. Gissel Packing Co., 395 U.S. at 594. The Supreme Court opinion states that "the Board announced at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether." *Id.* In fact, counsel for the Board, in answer to a question from the bench, responded that the rule he was articulating at oral argument was not a change in policy, but was rather a restatement of the Board's policy articulated in the *Aaron Brothers* case. Transcript of Oral Argument at 21-22, NLRB v. Gissel Packing Co., 395 U.S. at 575. The holding of *Aaron Brothers* is summarized *supra* note 49. In response to repeated additional questions from the bench posing hypothetical situations, however, counsel for the Board concurred in the Justices' restatements of the Board's position that eliminated the "good faith doubt" nomenclature. *Id.* at 22-23, NLRB v. Gissel Packing Co., 395 U.S. at 575.

[52] NLRB v. Gissel Packing Co., 395 U.S. at 594.

[53] *See supra* note 50.

tices that would tend to preclude the holding of a fair election.[54]

The Supreme Court's unanimous opinion also considered whether the National Labor Relations Act permits unions to use mechanisms other than elections to gain representative status, whether authorization cards are intrinsically unreliable, and whether the statute permits issuing a bargaining order as a remedy for the commission of unfair labor practices. The Court reviewed the Act's language and legislative history and concluded that neither the original Act nor its 1947 amendments limit an employer's duty to recognize and bargain with a union to those unions whose representative status had been certified through a Board-conducted election.[55]

In considering whether authorization cards are sufficiently reliable to serve as one of these alternative means for achieving representative status, the Court perceived two objections to card reliability. First, the argument was made that cards could not accurately reflect employees' desires, either because the cards were signed without the benefit of full information before an employer had had an opportunity to present its views or because the card signing was the result of group pressures and would not reflect the sort of individual decision made in the privacy of a voting booth.[56] Second, it was asserted that cards were frequently obtained through misrepresentation and coercion.[57]

The Court did not entirely discredit these objections to authorization cards. It acknowledged, as did the Board, that elections are a preferred and superior method for ascertaining whether a union possesses majority support.[58] What concerned the Court was that, if cards were considered totally invalid, there appeared to be no means to protect employee choice in a situation in which an employer had engaged in conduct that had disrupted the election process. The Court expressed its fear that in the absence of the availability of a bargaining order remedy, "an employer could put off his bargaining obligation indefinitely through continuing interference with elections."[59] The Court concluded that authorization cards could "adequately reflect employee sentiment" when the election process had been impeded.[60] It responded to the argument that the employees lacked exposure to employer opinion by asserting that unions would usually inform employers of the campaign early in the organizational drive.[61] The

54 NLRB v. Gissel Packing Co., 395 U.S. at 595.

55 *Id.* at 595-600.

56 *Id.* at 602.

57 *Id.*

58 *Id.*

59 *Id.* at 603.

60 *Id.*

61 *Id.* The Court assumed that unions would want to make sure that employers knew of the existence of the card signing campaign so that, if employees involved in the union drive were thereafter disciplined, there would be no difficulty in proving employer knowledge of union activ-

Court noted that in three of the cases before it the employer had been informed at the outset of the organizational campaign and that in the fourth case the employer had had a chance to deliver a speech before the union obtained cards from a majority of the employees.[62] Minimizing the impact of group pressures as a reason to consider the cards less reliable than election results, the Court suggested that group pressures would be equally present in elections, which are usually held in small units, in which the sentiment of voters can be individually canvassed.[63] In response to the argument that cards might be signed in an atmosphere of misrepresentation and coercion, the Court stated that the Board had adequate means available to police irregularities in those instances in which they actually occurred.[64]

After dismissing these objections to the reliability of authorization cards for demonstrating majority support, the Court turned to the final question of whether a bargaining order is an appropriate remedy where an employer has committed unfair labor practices that would make a fair election unlikely or that caused an election to be set aside. The Court again noted the danger that limiting the Board to rerun elections would reward employers for unlawful conduct by permitting them to avoid any bargaining obligation indefinitely.[65] The Court also suggested that employees' "true, undistorted desires" could not adequately be reflected in a rerun election tainted by an employer's prior unlawful conduct.[66] The bargaining order remedy was therefore justified as a way to deter employer misconduct as well as to effectuate "ascertainable employee free choice," which had been manifested by an authorization card majority.[67] Chief Justice Warren, writing for the unanimous Court, concluded:

If the Board finds that the possibility of erasing the effects of past prac-

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ity as an element in proving that the discipline was illegally motivated. A text for union organizers does advise them to notify the employer for this reason. S. SCHLOSSBERG & J. SCOTT, ORGANIZING AND THE LAW 66 (3d. ed. 1983). In one empirical study covering 18 elections, however, researchers found only four in which nearly all cards were signed after employer knowledge of the campaign. J. GETMAN STUDY, *supra* note 12, at 135.

62 NLRB v. Gissel Packing Co., 395 U.S. at 603.

63 *Id.* at 604.

64 *Id.* at 602-03. The Court in *Gissel* rejected as "endless and unreliable" any test of the validity of cards that would entail a probe of the employees' subjective motivations. *Id.* at 608. Rather, the Court expressed approval of the Board's *Cumberland Shoe* doctrine, under which cards are considered the unacceptable product of misrepresentation if they were solicited by an assertion that they would be used *only* to get an election. *Id.* at 608-09; Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963).

65 NLRB v. Gissel Packing Co., 395 U.S. at 610-11.

66 *Id.* at 611. The Court cited an empirical study of 267 rerun elections that found that more than 30% of them were won by the party that caused the election to be set aside. Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C.L. REV. 209, 212 (1963), *cited in* NLRB v. Gissel Packing Co., 395 U.S. at 611 n.31.

67 NLRB v. Gissel Packing Co., 395 U.S. at 614.

> tices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such a bargaining order should issue.[68]

The tone of the Supreme Court's opinion in *Gissel* suggests that the Court viewed the bargaining order remedy, not as exceptional or extraordinary, but rather as merely another remedy available to the Board when it appeared preferable to other remedies for unfair labor practices. The Court noted that the bargaining remedy should be used even where other remedies might work, so long as the bargaining order would "on balance" provide better protection for employees.[69] The Court also minimized the significance of bargaining orders by noting that there was "nothing permanent" in such an order because the employees could, after the effects of an employer's unfair labor practices had dissipated, disavow the union.[70] Further, it declined to accept the characterization of the Fourth Circuit and the employers, that, in the great majority of cases in which unfair labor practices had been committed, a cease and desist order and posted notices would make a bargaining order remedy unnecessary.[71] Rather, the Court emphasized that bargaining orders fall within the Act's delegation of broad, discretionary remedial authority to the Board and that in view of the Board's "fund of knowledge and expertise . . . its choice of remedy must . . . be given special respect by reviewing courts."[72]

The Court's treatment of the Board's orders in the four cases con-

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[68] *Id.* at 614-15.

[69] *Id.* The full quotation is set out *supra* text accompanying note 68. Two members of the Supreme Court recently stated their view that *Gissel* bargaining orders should not be sanctioned without a finding of special circumstances that would preclude the use of traditional remedies. John Cuneo, Inc. v. NLRB, 459 U.S. 1178, 1179-80 (1983) (dissent to denial of certiorari) (Rehnquist, J., joined by Powell, J.).

[70] NLRB v. Gissel Packing Co., 395 U.S. at 613. The NLRA authorizes the NLRB, upon receipt of a petition, to conduct a decertification election in which employees are permitted to vote on whether they desire continued representation by their present collective bargaining agent. NLRA, § 9(c)(1)(A)(ii), 29 U.S.C. § 159(c) (1)(A)(ii) (1982).

[71] NLRB v. Gissel Packing Co., 395 U.S. at 612 n.32. The employers' argument was based on the Fourth Circuit Court of Appeals decision in NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 570 (4th Cir. 1967).

[72] NLRB v. Gissel Packing Co., 395 U.S. at 612 n.32. The Court continued: " '[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency.' Consolo v. FMC, 383 U.S. 607, 621 (1966)". The Supreme Court recently repeated the language from *Gissel* quoted above in holding that the remedial discretion afforded the Board by statute permitted it to decline to award an independent contractor reimbursement of dues and other payments unlawfully obtained by a union. Shepard v. NLRB, 459 U.S. 344 (1983). The petitioner had argued that the Board failed to explain satisfactorily why a refund had not been awarded. The Court quoted from Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 197 (1941), saying, " 'All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it.' " Shepard v. NLRB, 459 U.S. at 350. The Court characterized the Board's language describing its remedy in *Shepard* as "something less than a model of precise expository prose," *id.*, yet the Court upheld the Board's remedial order.

solidated in *Gissel* further confirmed the limited role that the Court thought appropriate for judicial review of Board bargaining orders. In three of the cases, the Board had applied its pre-existing doctrine and held that the employers lacked a good faith doubt of majority status. In these cases, therefore, the Board had not evaluated the facts in light of the new standard for bargaining orders that emerged from the *Gissel* proceedings in the Supreme Court. The employers urged the Court to hold that, on the records before it, any conclusion that the card count would be a more reliable indication of employees' desires would be unwarranted.[73] The Court rejected this request, stating that the requisite findings to support the bargaining orders under the new doctrine might have been implicit in the Board's decisions, and that it would be "clearly inappropriate for the court below to make any contrary finding on its own."[74] The Court therefore ordered that the three cases be remanded to the Board for proper findings.[75] In the fourth case, the Board had adopted the finding of the Trial Examiner that, even if the employer had a bona fide doubt of the union's majority status, a bargaining order was necessary because the employer's unfair labor practices had caused the union to lose support.[76] Even though there was not in this fourth case any explicit finding that a fair election would be impossible despite the use of traditional remedies, and certainly no precise explanation from the Board as to why the particular employer actions would preclude a fair election, the Supreme Court affirmed rather than remanded the Board's bargaining order here.[77] The Court's disposition of these four consolidated cases demonstrates its view that it was the Board's prerogative to assess when bargaining orders were appropriate, that the Board was not required to detail its full reasoning process in each case, and that the Board's conclusion, once made, was entitled to substantial deference from the reviewing court.

In light of the Court's characterization of the bargaining order remedy as typical and temporary, and its directive to lower courts to defer to the Board's remedial expertise, one might have expected that

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73 NLRB v. Gissel Packing Co., 395 U.S. at 616. The text of the official reporter, in an apparent typographical error, attributes this argument to the "employees" rather than the employers. There were no employee parties in the case.

74 *Id.*

75 *Id.*

76 Sinclair Co., 164 N.L.R.B. 261, 269 (1967). The Trial Examiner's analysis was, in total, as follows:

> [T]he Union represented a clear majority of the journeymen wire weavers when Respondent began its unlawful campaign directed at destroying that majority. To the extent that the election revealed a loss of union support thereafter, such loss must be found attributable to the Respondent's unfair labor practices. Therefore, effectuation of the policies of the Act would still require such a bargaining order in order properly to remedy Respondent's other unfair labor practices herein found.

Id. (footnote omitted).

77 NLRB v. Gissel Packing Co., 395 U.S. at 620.

Board bargaining orders following *Gissel* would have received ready affirmation in the courts of appeals. In fact, however, such orders have provoked widespread hostility and denials of enforcement in the circuit courts.

B. *Enforcement of* Gissel *Bargaining Orders in the Courts of Appeals*

Few of the appellate court decisions subsequent to *Gissel* adopted the Supreme Court's view of bargaining orders as commonplace or granted the Board the remedial deference that the Supreme Court directed.[78] For reasons that are not fully articulated in their opinions, most of the circuit courts have made it exceedingly difficult for the Board to obtain judicial enforcement of its *Gissel* bargaining orders.

The reasons that these courts have given for their denials of enforcement all seem directly contrary to the Supreme Court's explicit directives in *Gissel*. Some circuit decisions demand from the Board a high,[79] and sometimes unachievable,[80] level of detail in its articulation of why specific unfair labor practices could not be remedied by traditional means. Some decisions have attempted to define for the Board in general rules what kinds of unfair labor practices justify bargaining orders.[81] Other decisions merely dispute specific Board findings about

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[78] Certainly some courts have attempted to observe the Supreme Court's directive to give deference to the Board's remedial bargaining orders. *See, e.g.*, NLRB v. Digital Paging System, Inc., 659 F.2d 725, 726 (6th Cir. 1981); NLRB v. Hitchiner Mfg. Co., 634 F.2d 1110, 1114 (8th Cir. 1980); Bandag, Inc. v. NLRB, 583 F.2d 765, 771 (5th Cir. 1978).

[79] *E.g.*, NLRB v. American Spring Bed Mfg. Co., 670 F.2d 1236, 1247 (lst Cir. 1982); NLRB v. Armcor Industries, Inc., 535 F.2d 239, 245 (3d Cir. 1976); Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1118 & n.16 (7th Cir. 1973). In language typical of other courts using the same approach, the Seventh Circuit in *Peerless* stated that the Board was required to make a detailed analysis "assessing the possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of ordinary remedies." *Id.* at 1118. The requirement of making findings with a high degree of specific detail appears contrary to the Supreme Court's understanding of the Board's task. *See supra* text accompanying notes 73-75. While the Supreme Court acknowledged that the Board might want to take into account the likely recurrence of employer misconduct, NLRB v. Gissel Packing Co., 395 U.S. at 614, the Court made clear that likely recurrence was not a requirement for a bargaining order since in many cases "[t]he damage will have been done." *Id.* at 612. The requirement of *Peerless* that the Board detail why ordinary remedies would be ineffective also appears contrary to the Supreme Court's approach. The Court's own catalogue of the Board's alternative remedies, *id.* at 611-12, indicated that it was well aware of the Board's alternatives, but that it thought them generally inadequate to remedy election damage. *Id.* at 612.

[80] *E.g.*, NLRB v. Apple Tree Chevrolet, Inc., 671 F.2d 838, 840-41 (4th Cir. 1982); NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 216 (2d Cir. 1980); Hedstrom Co. v. NLRB, 558 F.2d 1137, 1150-52 (3d Cir. 1977). In *Apple Tree* and *Jamaica Towing*, the courts had earlier remanded the cases to the Board to make specific findings. The Board in each case made additional findings, but upon a second review the courts refused to enforce the Board's orders on the ground that the findings were insufficiently specific. In *Hedstrom*, the Board had made findings, but the court thought that they were too conclusory.

[81] In the widely cited case of NLRB v. Jamaica Towing, Inc., 632 F.2d at 208, for example, the court, at considerable length, listed unfair labor practices that could be considered "hallmark"

the seriousness of particular unfair labor practices or the extent to which they are likely to have a long-term, coercive effect that would undermine a subsequent election.[82] Still others chastise the Board for failing to take account of changes in circumstances since the initial Board hearing that might permit holding a fair election at a later date.[83] In one recent opinion, subsequently withdrawn, a court sought to create a new requirement that in order for any authorization card to be counted there must be evidence on the record that the employee who signed the card read it before signing,[84] despite the Supreme Court's conclusion in *Gissel* that employees "should be bound by the clear language of what they sign"[85] and the high Court's explicit rejection of any requirement that the Board engage in any administratively burdensome inquiry into the subjective motivations of individual employees.[86]

The inconsistency between the Supreme Court's directives in *Gissel* and the reasons that the circuit courts have given for nonenforcement of Board bargaining orders suggests that judges denying enforcement are not stating their actual reasons for nonenforcement. One judge has described fellow judges who have advanced this type of rationale for nonenforcement as being engaged in "guerrilla warfare" against the Supreme Court's *Gissel* decision.[87] Another judge has boldly suggested that the procedural requirements that have resulted in nonenforcement have been imposed to permit judicial manipulation to achieve judges' subjective ends.[88] While Judge Aldisert directed the following comments to his own Third Circuit, his message applies as

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violations, such as a threat to close a plant, that were so likely to have a lasting inhibitive effect that no extensive explanation would be required of the Board and listed less serious violations that must be either numerous or coupled with some other factor intensifying their effect before they would support a bargaining order. *Id.* at 212-15.

82 *E.g.*, NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 284 (6th Cir. 1981); NLRB v. K & K Gourmet Meats, Inc., 640 F.2d 460, 470 (3d Cir. 1981); NLRB v. Chatfield-Anderson Co., 606 F.2d 266, 269 (9th Cir. 1979).

83 *E.g.*, NLRB v. Frederick's Foodland, Inc., 655 F.2d 88, 90 (6th Cir. 1981); NLRB v. Jamaica Towing, Inc., 632 F.2d at 216; Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503, 510 (7th Cir. 1980). *See also* Note, *"After All, Tomorrow is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?*, 31 STAN. L. REV. 505 (1979).

84 NLRB v. Keystone Pretzel Bakery, Inc., 674 F.2d 197 (3d Cir.), *withdrawn*, 696 F.2d 257 (3d Cir. 1982) (en banc). Upon consideration by the court en banc, three dissenting judges would have required evidence that employees had actually read the cards. NLRB v. Keystone Pretzel Bakery, Inc., 696 F.2d at 268.

85 NLRB v. Gissel Packing Co., 395 U.S. at 606. The Court's only exception to this direction to bind employees to what they sign is to be applied where the language of the card "is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature." *Id.*

86 *Id.* at 608.

87 NLRB v. Keystone Pretzel Bakery, Inc., 674 F.2d 197, 203 (3d Cir.) (Gibbons, J., dissenting), *withdrawn*, 696 F.2d 257 (3d Cir. 1982) (en banc).

88 NLRB v. Permanent Label Corp., 657 F.2d 512, 522, 526 (3d Cir. 1981) (Aldisert, J., concurring).

well to the other courts that have exhibited a similar hostility to the Board's *Gissel* orders. Judge Aldisert wrote:

> The dispute here is not over application of a rule, but over the existence of an entirely different precept: whether the NLRB has the power to order an employer to bargain with a union that has not obtained representation status by an election because of an employer's pervasive unfair labor practices. Although recognizing that *Gissel* is binding precedent, panels of this court have nonetheless tried to subvert it indirectly, focusing their denial of enforcement on the Board's procedural failures.[89]

It appears that many circuit judges simply do not accept the factual premise underlying the Supreme Court's decision in *Gissel* that where a bare majority of employees sign authorization cards there is sufficient evidence that the employees would likely have voted for the union had a fair election been possible. An examination of the enforcement record of the courts in relationship to the percentage of authorization cards obtained by the union provides further, if only impressionistic, support for this conclusion.[90] This author made an informal survey of recent circuit court decisions in which the percentage of authorization cards that the union obtained could be ascertained from the opinion. The survey included 29 elections. In the 18 elections in which unions had collected cards from more than 60% of the employees, the courts enforced the Board's bargaining order in 83% of the cases. In the 11 elections in which the union had cards from a majority but less than 60% of the employees, the court enforced the bargaining order in only 36% of the cases. While the court opinions make no reference to the percentage of authorization cards as an appropriate factor in the enforcement of bargaining orders, it appears that courts may be imposing their own rule of thumb that a union could not have been expected actually to win the election unless it had obtained authorization cards from *more than* a bare majority of employees.[91] The pattern of judicial nonenforcement of *Gissel* bargaining orders underscores the importance of investigating the empirical validity of the Supreme Court's assumption in *Gissel* that unions that obtain cards from a majority of employees are likely to achieve an election victory in the absence of employer unfair labor practices.

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[89] *Id.*, at 526 (Aldisert, J., concurring).

[90] Any effort systematically to assess the enforcement history of *Gissel* bargaining orders in the courts of appeals would be extremely difficult because the NLRB keeps no issue-specific record of its enforcement success and many court of appeals decisions are unreported. Letter from Standau E. Weinbrecht, Freedom of Information Officer, National Labor Relations Board, to the author, (September 20, 1982).

[91] One recent decision not included in the survey explicitly makes reference to the number of authorization cards collected as a reason for declining to enforce a *Gissel* bargaining order. Judge Posner, writing for the court, made reference to the limited empirical research about the predictive value of authorization cards and concluded that a union with cards from 28 of 47 employees (59.6%) would have lost the election, even in the absence of unfair labor practices. NLRB v. Village IX, Inc., 723 F.2d 1360 (7th Cir. 1983).

III. Prior Empirical Studies of Election Behavior

Although courts,[92] labor law scholars,[93] and the National Labor Relations Board itself[94] have called for empirical research about employee behavior in representation election campaigns, only limited research actually has been conducted.[95] The question of the relationship between union authorization card signing and election outcome has been addressed to some extent in four studies.

The most extensive study of union representation election campaigns, conducted by Professors Getman, Goldberg, and Herman, considered a wide variety of behavioral assumptions underlying the Board's regulation of campaign conduct.[96] One of the issues addressed in that study was whether authorization card signing is a reasonably accurate predictor of votes in representation elections. The Getman study considered 31 election campaigns, of which only 29 campaigns included card signing.[97] The study did not have access to NLRB records of authorization cards submitted; but rather relied upon questioning of individual employees.[98] The study concluded that card signing was a reasonably accurate predictor of vote;[99] finding that 72% of the card signers voted for union representation and that 79% of the non-signers voted against such representation.[100] The study also found that the average loss in union support from card signing to voting was 4%.[101] The Getman study, however, did not address directly the assumption behind the *Gissel* bargaining order, that authorization cards

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92 Hedstrom Co. v. NLRB, 629 F.2d 305, 323-24 (3d Cir. 1980) (Rosenn, J., dissenting); Getman v. NLRB, 450 F.2d 670, 675 (D.C. Cir. 1971).

93 *See, e.g.*, Bok, *Foreward* to J. Getman Study, *supra* note 12, at xi-xiii; Grunewald, *Empiricism in NLRB Election Regulation:* Shopping Kart *and* General Knit *in Retrospect*, 4 Indus. Rel. L.J. 161, 197-203 (1981); Henry, *Introduction: A Journey Into the Future—The Role of Empirical Evidence in Developing Labor Law*, 1981 U. Ill. L. Rev. 1; Roomkin & Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 Harv. L. Rev. 1441 (1977).

94 In the context of Board regulation of campaign misrepresentations, the Board has said that it "welcome[s] research from the behavioral sciences," General Knit, 239 N.L.R.B. 619, 622 (1978), and it has, on one occasion, based a policy change on an empirical study, Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311, 1313 (1977). The Board's most recent decision on campaign misrepresentation makes no reference to empirical studies. Midland National Life Ins. Co., 263 N.L.R.B. 127 (1982).

95 *See, e.g.*, Heneman & Sandver, *Predicting the Outcome of Union Certification Elections: A Review of the Literature*, 36 Indus. & Lab. Rel. Rev. 537 (1983). *See also* authorities cited in J. Getman Study, *supra* note 12, at 5 n.24.

96 J. Getman Study, *supra* note 12, at 1-32.

97 *Id.* at 132 n.4.

98 *Id.* at 40-42. In order to assess the accuracy of employee reports regarding card signing, the researchers asked the union to indicate whether employees who had been interviewed had signed an authorization card. The comparison between employee and union reports of card signing suggested that nearly all employees answered the question about card signing honestly. *Id.* at 41-42.

99 *Id.* at 133.

100 *Id.*

101 *Id.* at 100.

signed accurately predict the number of employees who would vote for the union in elections conducted in an atmosphere free of employer unfair labor practices. The elections investigated in that study were not a representative cross-section of elections; nor were they selected to illustrate behavior in the absence of unfair labor practices. To the contrary, the small number of election campaigns studied were selected for inclusion expressly because they were expected to produce vigorous, possibly unlawful campaigning.[102] The authors did find unlawful campaigning in 22 of the 31 elections studied.[103] Although the Getman study suggested that even where unlawful campaigning does occur, it does not affect the election outcome,[104] the small size of the sample and the selection criterion preclude it from answering the question of the predictive value of authorization cards in elections in which unlawful campaigning does not occur.

This failure to segregate clean elections from those in which unfair labor practices have occurred is also present in the other three empirical studies of the relationship between card signing and election outcome. Professor Philip Ross conducted a study for the National Labor Relations Board, examining all 214 elections conducted by the Atlanta regional office of the NLRB in 1960. The results of the study are reported, only briefly, in a speech by Frank McCulloch, then- chairman of the NLRB.[105] The Ross study found that unions that had presented authorization cards from 50-70% of the employees won only 52% of the elections.[106] The Ross study made no attempt to report results separately from elections in which there were no unfair labor practices committed. Further, since the data for elections with 50-70% card signing are grouped together, it is impossible to ascertain election outcomes where unions had only a bare majority of employees signing cards—

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102 *Id* at 34.

103 *Id.* at 35. The study assessed illegality by examining Board findings if unfair labor practice charges had been filed, and by an informal review of arguably illegal conduct by an administrative law judge in cases in which no charges were filed. *Id.* at 111. *See also id.* at 44-45 & nn. 19-21.

104 *Id.* at 121-24. Two other scholars who have reinterpreted data from the J. GETMAN STUDY, *supra* note 12, reached the contrary conclusion. They concluded that although the Getman data showed what its authors considered a statistically insignificant effect of illegal employer conduct, the small effect noted nevertheless could produce substantial impacts upon election outcomes. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1782-86 (1983); Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983).

105 McCulloch, *A Tale of Two Cities: Or Law in Action*, in AMERICAN BAR ASSOCIATION PROCEEDINGS: SECTION OF LABOR RELATIONS LAW 14 (1962).

106 *Id.* at 17. While the speech stated that unions with cards from 50-70% of the employees won 52% of the time, the speech says that they won 42 of 87 elections, which would be 48%. Either the percentage or the numbers of elections or victories must be in error. When unions had cards from 30-50% of the employees they won 19% of the elections. Those unions which had cards from over 70% of the employees won 74% of the elections. *Id.*

cases in which *Gissel* would permit a bargaining order. The study also failed to address other factors that might affect the predictive value of card signing, such as the size of the bargaining unit.

A larger study of the relationship between authorization cards and election outcomes is reported by Professor John Drotning.[107] Drotning obtained data on 1,268 elections between 1956 and 1961 from the Atlanta regional office of the NLRB that had been pre-grouped by the NLRB into seven categories of percentages of authorization cards submitted, three categories of unit size, and two categories of election outcome.[108] Drotning found that in units of fewer than 31 employees, unions won about 57% of the time regardless of the showing of interest as demonstrated by signed authorization cards, but that in larger units outcome was more closely associated with the showing of interest.[109] In units of 31-80 employees, union victories ranged from 41% (with 30-39% authorization cards) to 52% (with 60-69% authorization cards).[110] In units of 81 employees or more, union victories ranged from 31% (with 30-39% authorization cards) to 50% (with 60-69% authorization cards).[111] Drotning concluded that the showing of interest is positively related to the percentage of elections won by unions, but found that especially high showings of interest did not commensurately increase the union's likelihood of success.[112] While the Drotning data permitted consideration of the possible effect of unit size on election outcome, it failed to differentiate elections in which unfair labor practices were committed from other elections, and to consider other factors that might have an impact on election outcome.

A more recent study by Professor Marcus Sandver contains these same limitations, although his data were somewhat broader in scope

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[107] Drotning, *NLRB Remedies for Election Misconduct: An Analysis of Election Outcomes and Their Determinants*, 40 J. BUS. 137 (1967).

[108] *Id.* at 143.

[109] *Id.* at 144.

[110] *Id.* at 144, Table 4.

[111] *Id.*

[112] Drotning's results for units of all sizes for showings of interest over 50% are as follows:

Percentage of Cards	Percentage Union Wins
50-59%	49%
60-69%	55%
70-79%	55%
80-89%	67%
90-99%	75%

Id. Drotning also separately reported results from 120 elections from the Buffalo regional office for fiscal years 1962-1964. The Buffalo data were reported individually for each election and included the actual vote. Drotning concluded that the relationship between authorization cards and union vote is not very strong. *Id.* at 143-45. He found that consideration of the showing of interest and bargaining unit size would explain only 21% of the variation in voting results. *Id.* at 145, Table 5. A condensed version of the study's results are published in Drotning, *The NLRB's New Rule on Union Organizing: A Note*, 18 LAB. L.J. 283 (1967).

than those available to Drotning.[113] Sandver obtained access to information about the 100 most recent single union elections in early 1977 in 12 NLRB regional offices.[114] The study covered 1,174 elections about which Sandver obtained the number of authorization cards, number of eligible voters and number of votes obtained by the union. While Sandver was able to report information about the actual number of votes obtained, this was reported in only four categories. Sandver found that unions that collected cards from 50% or more of the electorate succeeded in 58.7% of the elections.[115] Sandver's study also considered, to a limited extent, the impact of unit size on the predictive value of authorization cards. The only results that he reports that make any reference to bargaining unit size reflect election outcome in 160 units with more than 100 workers. Among these large elections, of the 48 cases in which a union had authorization cards from more than 50% of the employees, the union won only 43.7% of the elections.[116]

These four studies recognize the importance of empirically testing the factual assumptions that form the basis of national labor policy concerning authorization cards and union representation elections. While these studies have indicated, in general, that authorization card percentages have some value in predicting subsequent votes in favor of the union, none of these studies evaluated data that would permit assessment of the basic assumption in *Gissel* that authorization cards are a reasonably accurate indication of outcome in elections conducted in an atmosphere free of unfair labor practices. Further, while two of these studies include a limited examination of the possible impact of bargaining unit size on the predictive value of authorization cards, no study has so far considered other factors that might affect the cards' predictive utility. The research that has been accomplished suggests the need to study further the relationship between authorization cards and election outcomes within a research design that permits consideration of unfair labor practices and the variety of other factors that might influence election outcome.

IV. METHODOLOGY

The objective of the study conducted here was to obtain and analyze comprehensive information regarding a large number of union elections. Such information is available only in the files of the National Labor Relations Board regional offices. Region Eighteen of the NLRB, located in Minneapolis, was selected for study solely for convenience. The territory of Region Eighteen encompasses all of Minne-

113 Sandver, *The Validity of Union Authorization Cards as a Predictor of Success in NLRB Certification Elections*, 28 LAB. L.J. 696 (1977).

114 *Id.* at 698.

115 *Id.* at 700.

116 *Id.* at 701.

sota, North Dakota, and South Dakota, as well as parts of Iowa and Wisconsin. An agreement was negotiated with Region Eighteen to permit access to representation and unfair labor practices case files of the NLRB, which permitted the author to code any information contained in the files except the identity of the parties.[117]

All information was collected directly from the official files. At the time the study was undertaken, Region Eighteen had available at its office files for the calendar years 1978, 1979, and 1980. Following pretesting and amendment of coding instruments, a single research assistant read and coded files for all of the elections conducted during these years in response to a union petition.[118] A limited number of files was separately coded by the author to test the accuracy of the work of the research assistant. During coding, all of the documents in the file were read to obtain information. These included documents that would ordinarily be available to the public, such as election petitions and reports of election results, as well as confidential information reported by board agents, such as the number of authorization cards collected. Where there were several possible documents in the file that might report the same information, such as number of employees in the bargaining unit, the information was coded from each document. Only information from the most reliable document available was used in the data analysis. For example, the size of the bargaining unit becomes more clearly defined as the pre-election procedures progress and therefore the latest assessment of size was considered the most reliable.

While the central purpose of the study was to explore the relationship between authorization cards and election outcomes in cases in which no unfair labor practices occurred, it was appropriate, once access to the NLRB files had been granted, to gather information of any kind available that might explain the results of union representation elections. Information gathered from the files included the size of the bargaining unit, the votes in the election, the election outcome, objections to the election, if any, and whether the objections were based on campaign conduct, the date and day of the week of the election, the nature of the employer's business, the type of bargaining unit, the date of the election petition, the nature of the union's and employer's representation in the election proceedings, and the numbers and age of authorization cards submitted by the union. Information about unfair

[117] This study therefore is unable to report any information regarding election behavior of any particular unions. It was also a condition of the agreement that the Regional Director would be permitted to review the manuscript reporting the results of the study prior to its publication solely to insure that no information would be published that would permit ascertainment of the identity of any person, party, case, or proceeding.

[118] The NLRB also conducts elections upon the request of an employer, to decertify existing union representatives, and to deauthorize a union from entering into a union shop agreement. NLRA, §§ 9(c)(1)(B), 9(c)(1)(A)(ii), 9(e); 29 U.S.C. §§ 159(c)(1)(B), 159 (c)(1)(A)(ii), 159(e) (1982). No information on these other kinds of Board elections was collected for this study.

labor practices obtained included whether charges were filed, the nature of any charges filed, and their resolution. The only items gathered that involved any subjectivity in coding whatsoever were the nature of the employer's business and the nature of the parties' representatives. The categories used for these items are explained in the Results Section. The data were converted to a machine-readable format and assembled by computer. The statistical consultant analyzed the computer data at the direction of the author.

Fortunately, this study commenced collection of information regarding authorization cards at a time when such information was still available from the NLRB. Beginning at the end of 1980, the Regional Office began to phase in use of a new NLRB form which no longer called for board agents to record the actual number and age of authorization cards.[119] The new form does not require agents to note the extent to which the cards submitted by the union exceed the thirty percent minimum for conducting an election.[120] Thus, it would be impossible now to replicate this study using NLRB records for election proceedings begun after 1980.

This study's sole reliance on information contained in NLRB files suggests a possible weakness in its design. A central focus is on the number of signed authorization cards obtained by a union. If a union fails to turn in to the Board all of the cards it obtains, the Board's records will be an inaccurate source of information about the number of cards actually signed. In order to assess the significance of this possible problem in research design, a survey of union organizers was undertaken to determine whether they are likely to supply the NLRB with all of the cards they obtain in an election campaign.

Since it would be extremely difficult to obtain a statistically accurate assessment of organizers' conduct, a limited anecdotal survey was used. Organizers actively engaged in filing election petitions were identified from recent petitions filed in the Region. An effort was made to contact organizers from a variety of unions who participated in elections with a variety of types of employers and sizes of bargaining units. No attempt was made to make the survey include a representative sample of organizers. Thirty organizers were contacted by telephone during the fall of 1981 and the spring of 1982. Of the 30 organizers, 19 said that they always turn in to the Board all of their authorization cards. Two organizers reported that they never turn in all of the cards. Nine organizers reported that they usually turn in all of the cards ob-

119 By NLRB Memorandum 80-57, dated November 4, 1980, regional offices were directed to use a revised form NLRB-4069 which required board agents to check whether the authorization cards submitted represented less than 10% of the unit, 10-30% of the unit, or more than 30%. Where the prior form had required agents to record the dates on which cards had been signed, the new form only asked the agent to check a box indicating that the designations were current.

120 *See supra* note 5 and accompanying text.

tained, but that they withhold cards under special circumstances. The two organizers who reported that they never turn in all the cards said that they did so because they distrusted the ability of NLRB personnel to maintain the confidentiality of the information and feared employer reprisals. The nine organizers who reported that they declined to submit all cards under special circumstances mentioned a few situations that they thought might warrant card withholding. A situation mentioned by more than half of these organizers was one in which they feared an unusually vicious employer campaign and hoped that by withholding cards they could mislead the employer about the strength of union support. Another circumstance mentioned was where the union had a special need to expedite the election process. Where expedition was desired, these organizers might obtain a significant number of cards over thirty percent, turn them in to get the Board processes underway, and then continue to collect additional cards that would not be submitted to the Board. This limited survey suggests that the NLRB files probably provide substantially accurate records of the numbers of authorization cards obtained by unions. The statistics that follow, however, should be read with the recognition that at least some figures probably underestimate the number of signed cards the union obtained

Another limitation of the research design should be recognized: since all data considered were obtained from the election and unfair labor practice files of the NLRB, there was no opportunity to evaluate any of the possible factors that influence election results of which no record is made in official files. For example, the files do not include any information about the extent or nature of campaigning by either unions or employers. Conduct that would have been considered an unfair labor practice but that was never reported to the NLRB is not included in this study. The research design also precluded evaluating changes in employees' sentiments toward unionization in workplaces in which no election ever resulted.

V. Results

There were 791 elections conducted upon the filing of a union petition in NLRB Region Eighteen during 1978, 1979, and 1980. In 31 of these elections, more than one union sought representative status. Analysis was limited to the 760 elections in which only one union participated because the small number of multi-union elections did not warrant the additional complexity that their analyses would require. All of the information that follows, therefore, is limited to the 760 single-union elections.

Table 1 indicates the variation in the number of elections and the success of unions during the three years studied, and shows that the overall success rate of unions during the period of the study was 48.2%.

TABLE 1
ELECTIONS AND ELECTION OUTCOME BY YEARS

Year	N Elections	% Elections	N Union Won	% Union Won
1978	287	37.8%	134	46.7%
1979	222	29.2%	113	51.0%
1980	251	33.0%	119	47.4%
All Elections	760	100.0%	366	48.2%

Significance = .61

Differences in success rates between years were not significant.[121] The success rate of unions in Region Eighteen during the three-year period appears to be slightly higher than the success rate of unions nationally.[122]

Table 2 shows the proportion of bargaining units in various size categories and the rate of union success in each category. The number of employees in bargaining units in which elections were conducted ranged from 2 to 1,049. The mean unit size was 40.8 employees, smaller than the national average.[123] Table 2 indicates that the

[121] In this and the following tables, the "significance" is the chance of observing differences at least as large as those actually found in the data computed under the null hypothesis that no real differences exist. Thus, small significance values increase the likelihood that observed differences are real and not due to chance. Conventionally, values less than .05 are taken to be significant—and thus real—differences, although this or any other cut-off value is arbitrary. In all the tables, significance values are computed for two-tailed tests. For tables of counts, chi-squared tests for significance were used. For tables of averages, t-tests or F-tests were used, as appropriate.

[122] In the fiscal year that ended September 30, 1980, the NLRB nationally conducted 6,610 single-union elections initiated by union petition of which unions won 47.4%. 45 NLRB ANN. REP. 270, Table 13 (1980). In the 1979 fiscal year, the NLRB conducted 6,672 such elections of which unions won 46.3%. 44 NLRB ANN. REP. 297, Table 13 (1979). For a possible explanation of this difference in outcome see *infra* note 124 and accompanying text.

This footnote and *infra* notes 123-25 compare Region Eighteen to the rest of the country in regard to union election success rates, size of bargaining units, and the nature of industries in which elections are conducted. Additional information about the representativeness of Region Eighteen can be obtained by comparing the extent of union membership in the region to membership nationally. In 1980, 25.2% of the national workforce were union members. In the two states in the region in which there were no right-to-work laws, union membership was slightly above the national average, with Wisconsin at 28.6% and Minnesota at 26.2%. Union membership was below the national average in the three remaining states that do have right-to-work laws, Iowa (22.0%), North Dakota (17.1%), and South Dakota (14.7%). U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83, at 409, Table 682 (103d ed. 1982).

[123] Precisely comparable information is not available from the NLRB Annual Report, but the information suggests that units in Region Eighteen were, on the average, somewhat smaller than units nationally. The NLRB reports that in fiscal 1980 in all types of elections (as opposed to just

TABLE 2
ELECTIONS AND ELECTION OUTCOME BY SIZE OF UNIT

Size*	N Elections	% Elections	N Union Won	% Union Won
2-9	242	31.9 %	132	54.5%
10-20	180	23.7 %	92	51.1%
21-99	272	35.9 %	126	46.3%
100+	64	8.4 %	15	23.4%
All Elections	758	99.9 %**	365	48.2%

Significance = .0001

* Size is expressed in numbers of eligible voters.

** Totals in this and subsequent tables may be more or less than 100% due to rounding.

size of the bargaining unit was closely related to the union's success rate. In the study, unions won 54.5% of the elections in units with under 10 employees, but only 23.4% of the elections with 100 or more employees.[124] These statistics suggest that size influences outcome. The lower average size of bargaining units in Region Eighteen therefore may explain in part the greater success of unions in that Region

elections conducted upon the petition of a single union) the average number of employees voting per establishment was 56, compared with 63 in 1979. 45 NLRB ANN. REP. 18 (1980).

124 While precisely comparable information on unit size is not available from the NLRB Annual Report, a rough comparison can be made between the information from Region Eighteen and the national statistics. The data reported in Table 2 are for elections in calendar years 1978-1980. The data in Table A below are for fiscal year 1980. The Region Eighteen data include only single union elections, petitioned for by a union. The national data below report single and multi-union elections petitioned for by either a union or an employer. The inclusion of multi-union elections would raise the level of union success while the employer petitions would lower union success rates. Note also that national data are reported in slightly different size categories. With these caveats, Table A represents elections and election outcome by size on a national basis for fiscal year 1980 derived from 45 NLRB ANN. REP. 286, Table 17 (1980).

TABLE A
ELECTIONS AND ELECTION OUTCOME BY SIZE OF UNIT
NLRB NATIONAL DATA FOR FISCAL YEAR 1980

Size of Unit	N Elections	% Elections	N Union Won	% Union Won
Under 10	1691	23.2 %	953	56.4%
10-19	1593	21.8 %	815	51.2%
20-99	2949	40.4 %	1395	47.3%
100-1999	1056	14.5 %	342	32.4%
1999 +	7	0.0 %	3	42.9%
Totals	7296	99.9 %*	3508	48.1%

* Total does not equal 100% because of rounding.

Although Tables 2 and A show a significantly different distribution of unit size (Table 2 has more small units and fewer large ones), there is no evidence that, adjusting for the size of the unit, the odds of union victory are different in the two tables. This can be evaluated statistically by a

than in the nation as a whole. The significance of unit size in determining outcome probably reflects the relative ease with which union organizers are able to communicate with employees in small workplaces. The legal restrictions that preclude nonemployee organizers from access to the workplace, that do not require employers to provide unions with names and addresses of employees until just before the election and that permit an employer to deny the union an opportunity to address employees at the workplace are likely to be a much greater impediment to organization in a large bargaining unit than in a small one. A large bargaining unit may also be more likely to include employees with diverse working experiences who are not so easily united by the themes of a union campaign.

Table 3 indicates the distribution of elections among various kinds of bargaining units and the relative success of unions in those units. The types of bargaining units are arranged in ascending order of union

TABLE 3
ELECTIONS AND ELECTION OUTCOME BY BARGAINING UNIT

Type of Unit	N Elections	% Elections	N Union Won	% Union Won
Craft	29	3.8%	9	31.0%
Guard	5	.7%	2	40.0%
Industrial	404	53.4%	183	45.3%
Office	66	8.7%	31	47.0%
Combination	12	1.6%	6	50.0%
Truckers	76	10.0%	39	51.3%
Department	114	15.1%	64	56.1%
Professional	51	6.7%	31	60.8%
All Elections	757	100.0%	362	48.1%

Significance = .12

method described in S. FIENBERG, THE ANALYSIS OF CROSS-CLASSIFIED CATEGORICAL DATA (2d ed. 1980). Under this method, the two tables are treated as "layers" of a three dimensional table (with the two categories of elections over 100 voters in Table A pooled together). Assuming that all elections in Table 2 are reported in Table A, the model states that union success rate given size of the unit is the same for the two layers. The results of the test are: $X^2 = 3.02$, d.f. = 4, significance = 0.5. There is thus no evidence that the region studied differs from the nation with respect to union success rate.

A close relationship between small unit size and union success was also observed in a study of a sample including 647 single-union elections nationally for the period March through September 1966, Rose, *What Factors Influence Union Representation Elections?,* MONTHLY LAB. REV. 49 (Oct. 1972), and in a review of NLRB annual reports for the fiscal years 1966-70 reported in Chaison, *Unit Size and Union Success in Representation Elections,* MONTHLY LAB. REV. 51 (Feb. 1973).

success rates. Most elections in the region were conducted in industrial units in which the union success rate was 45.3%, lower than the rate of 48.1% for all elections. The highest success rate was 60.8% in units of professional employees.

Table 4 describes the distribution of elections among industries and the success of unions in the various industries. Industries are arranged in descending order of the industry's proportion of elections. Table 4 shows no significant relationship in the region between the nature of the employing industry and the outcome of the election.[125]

While the data reported thus far for Region Eighteen are similar to publicly reported information available to earlier researchers, many of the results that follow are dependent upon the unusual degree of access the NLRB afforded for this study. The access to raw information in the files of the regional office permitted consideration of data derived from unfair labor practice files related to representation case files as well as

TABLE 4

ELECTIONS AND ELECTION OUTCOME BY EMPLOYING INDUSTRY

Industry*	N Elections	% Elections	N Union Won	% Union Won
Manufacturing	307	40.4%	140	45.6%
Service	165	21.7%	80	48.5%
Wholesale	95	12.5%	42	44.2%
Retail	78	10.3%	40	51.3%
Trans-portation	76	10.0%	48	63.2%
Construction	29	3.8%	10	34.5%
Insurance	7	.9%	5	71.4%
Mining	2	.3%	0	0.0%
All Elections	759	99.9%	365	48.1%

Significance = .06

* Industrial Codes used were the same reported in Table 16, 45 NLRB ANN. REP. 284 (1980). "Insurance" includes finance, insurance and real estate. "Transportation" includes transportation, communication and other utilities.

125 Only a very rough comparison can be made between the regional data reported in Table 4 and the national experience of union elections in various industries, because the NLRB Annual Report only reports industry classifications for elections as a whole, without differentiating single from multiple union elections, and without separating the variety of kinds of elections (union-sought elections, employer-sought elections, and decertification elections). The national data are for fiscal year 1980, while the regional data in Table 4 are for calendar years 1978-80. Table B below is derived from 45 NLRB ANN. REP. 284, Table 16 (1980). For ease of comparison, industries here are reported in the same order as in Table 4.

records of authorization cards submitted to the Board. The access to unfair labor practice and authorization card records permitted a direct test of the assumption that employer unfair labor practices demonstrably weaken employees' support for a union.

In this study an employer unfair labor practice was counted as having occurred if the case was resolved either by settlement or by a final finding by an administrative law judge, the NLRB, or a court that an unfair labor practice had been committed.[126] This method of determining which elections were conducted in the presence of unfair labor practices caused a variety of situations to be counted as clean elections. While most elections placed in the "no unfair labor practices" category are likely to be those in which no illegal conduct occurred, it is possible that in some of the elections included in this category unlawful behavior occurred that was not the subject of any unfair labor practice charges. For example, a union might not file charges if, after winning the election, it feared that filing would interfere with the positive relationship with the employer needed for upcoming collective bargaining negotiations. In addition, a union might be able to settle informally or

TABLE B
ELECTIONS AND ELECTION OUTCOME BY EMPLOYING INDUSTRY
NLRB NATIONAL DATA FOR FISCAL YEAR 1980

Industry	N Elections	% Elections	N Union Won	% Union Won
Manufacturing	3482	42.5%	1473	42.3%
Service	1600	19.5%	836	52.2%
Wholesale	522	6.4%	216	41.4%
Retail	936	11.4%	414	44.2%
Transportation	1135	13.8%	541	47.7%
Construction	265	3.2%	135	50.9%
Insurance	156	1.9%	82	52.6%
Mining	91	1.1%	39	42.9%
Public Admin. & Postal	11	0.1%	8	72.7%
Totals	8198	99.9%	3744	45.7%

Each industry's proportionate share of elections in Tables 4 and B is generally similar, except that there was a substantially larger percentage of elections in the wholesale industry in the region than in the nation as a whole. In both tables, unions had above average success in the service, transportation, and insurance classifications. In the region, unions in the retail industry performed above average while their success nationally was slightly below average. There was a substantial difference in the performance of unions in the construction industry, where nationally they ranked above average but in the region had the second lowest success rate of any industrial category.

126 This definition of an unfair labor practice will result in finding fewer unfair labor practices than did the definition used in the Getman study because that study evaluated employer conduct independently in cases in which no unfair labor practice charges were filed. J. GETMAN STUDY, *supra* note 12, at 111. *See also supra* note 103 and accompanying text.

by a grievance procedure a problem that might otherwise have been the subject of an unfair labor practice charge. It is also possible that a union, having lost an election, will no longer have sufficient interest in the workplace to file an unfair labor practice charge. Therefore, in the report of data that follows, it is possible that a few of the elections included under the label "no unfair labor practices" are ones in which unlawful conduct occurred but a formal charge to the NLRB was never made.

Two possible measures of the impact of employer unfair labor practices upon elections are election outcome and the extent to which a union loses support between the time authorization cards are signed and the election. These two measures are reported in Tables 5 and 6. Table 5 reports the variation in election outcome between clean elections and those in which the employer committed unfair labor practices. Employer unfair labor practices were found in 53 (or 7%) of the elections conducted in 1978-1980 in the region. The employer was found to have violated section 8(a)(3) of the National Labor Relations Act by discriminating against union supporters with regard to terms of employment in 21 cases and in 36 cases independent section 8(a)(1) violations were found concerning interference with employees' rights protected by the Act.[127] Although Table 5 shows that unions won a higher percentage of elections where no unfair labor practices were committed than where there were, the differences in Table 5 were not statistically significant.

TABLE 5
ELECTION OUTCOME AND EMPLOYER UNFAIR LABOR PRACTICES

Unfair Labor Practices	N Elections	% Elections	N Union Won	% Union Won
No	707	93.0%	343	48.5%
Yes	53	7.0%	23	43.4%
All Elections	760	100.0%	366	48.2%

Significance = .47

Since outcome fails to take account of the extent of union support prior to the commission of unfair labor practices, a better measure of whether unfair labor practices influence voting is obtained by examin-

[127] *See supra* notes 26-31 and accompanying text for the statutory language and examples of the sorts of conduct considered to be unfair labor practices under sections 8(a)(1) and 8(a)(3).

TABLE 6
UNION VOTE LOSS AND EMPLOYER UNFAIR LABOR PRACTICES

Unfair Labor Practices	N Elections	Mean Vote Loss	Standard Deviation
No	628	13.4%	27.9%
Yes	44	12.6%	24.2%
All Elections	672*	13.3%	27.7%

Significance = .85

* In 88 cases the file did not contain some datum necessary for this calculation, usually the number of authorization cards submitted.

ing the degree to which union support declines between the signing of authorization cards and the election. This measure is labeled "vote loss" and is defined as the percentage of employees signing authorization cards minus the percentage of employees voting for the union at the election. The relationship between employer unfair labor practices and vote loss is indicated in Table 6, which shows that unions, on the whole, lost 13.3% of their support from the time of card signing to the election.[128] Table 6 indicates that in elections in which employer unfair labor practices occurred, the union lost less support than it did in clean elections, although this difference is not statistically significant. While Table 6 does not indicate that employer unfair labor practices actually improve a union's chance of success, the results provide no support for the NLRB's assumption that employer unfair labor practices substantially decrease union support.

In light of these findings, which indicated no adverse impact of employer unfair labor practices on union support generally, efforts were made to determine whether employer unfair labor practices reduce union voting strength in any types of elections. Comparisons of various bargaining units and industries also revealed no discernable

[128] To the extent that union organizers may withhold authorization cards from the NLRB, as discussed in Section IV *supra*, this figure will understate the actual extent of vote loss. An approximate measure of vote loss that accounts for this possible understatement can be made by measuring vote loss only for those elections in which unions submitted cards from more than 50% of the voters, since card withholding is much less likely to have occurred in such cases. When vote loss was calculated only for those elections in which unions submitted cards from more than 50% of the electorate, the mean vote loss was 15.2%. The difference in vote loss reported here between elections with unfair labor practices and clean elections may be distorted, if as is probably the case, card withholding occurred more often in elections with unfair labor practices than in clean elections.

impact of unfair labor practices on union support. Since the NLRB has suggested that unfair labor practices might have a greater impact on elections in small units,[129] vote loss was also calculated for units of various sizes in both clean elections and elections involving unfair labor practices. These results appear in Table 7.

Table 7 shows that in the smallest units, those with less than ten employees, the mean vote loss was 26.6% in unfair labor practice elections and 20.7% in clean elections. In units with between ten and twenty employees, however, the pattern was reversed, with unions losing 15.7% of their support in clean elections and only 5.7% in elections with unfair labor practices. Table 7 shows no statistically significant evidence that employer unfair labor practices negatively influence

TABLE 7

VOTE LOSS IN RELATIONSHIP TO UNIT SIZE AND EMPLOYER UNFAIR LABOR PRACTICES

Size of Unit	Unfair Labor Practices Committed: Yes N	Yes Mean Vote Loss	No N	No Mean Vote Loss
2-9	11	26.6%	208	20.7%
10-20	13	5.7%	147	15.7%
21-99	17	8.0%	225	6.4%
99+	3	16.6%	48	.7%
All Elections	44	12.6%	628	13.4%

Significance = .47*

* Averaging over all unit sizes.

129 For example, the Board has said that "the [small] size of the work force . . . militates in favor of issuing a bargaining order. The impact of [an employer's] unfair labor practices is heightened considerably and prolonged when they occur in a small bargaining unit of employees . . . ." Martin City Ready Mix, 264 N.L.R.B. No. 66, slip op. at 8-9 (Sept. 30, 1982). In attempting to satisfy the demands of the directive of the court of appeals for specific reasons justifying a bargaining order, the Board in another case stated, "[e]xperience has shown that an employer's unlawful conduct is magnified when directed at a small number of employees." Jamaica Towing, Inc., 247 N.L.R.B. 353, 354 (1980) *enforcement granted in part, denied in part*, NLRB v. Jamaica Towing, Inc., 632 F.2d 208 (2d Cir. 1980). *See supra* notes 80-81 for a further discussion of *Jamaica Towing*. In NLRB v. Maidsville Coal Co., 718 F.2d 658 (4th Cir. 1983) (en banc), *cert. denied*, 52 U.S.L.W. 3651 (U.S. Mar. 5, 1984)(No. 83-1073), the court enforced a bargaining order by accepting the Board's assertion that it was justified because of "the small size of the employee complement in question and the substantial percentage of the workforce subjected to the Employer's unlawful terminations and other unfair labor practices." Maidsville Coal Co., 257 N.L.R.B. 1106, 1106 n.1 (1981). There were nine employees in the bargaining unit in that case.

union support in elections in small units. Vote loss appears substantially the same for each size class regardless of the commission of unfair labor practices.

In further search of support for the NLRB's assumption about the influence of employer unfair labor practices, the impact of unfair labor practices on vote loss in close elections, defined here as elections in which the union received between 45% and 55% of the vote, was examined.

TABLE 8
VOTE LOSS IN RELATIONSHIP TO EMPLOYER UNFAIR LABOR PRACTICES IN CLOSE ELECTIONS*

Unfair Labor Practices	N Elections	Vote Loss	Standard Deviation
No	93	8.1%	21.4%
Yes	10	- 7.9%**	13.5%
All Elections	103	6.5%	21.3%

Significance = .023

* Close elections are those in which the union received between 45% and 55% of the votes.
** A negative vote loss indicates a gain in union support.

Table 8 shows that in close elections there was a significant difference in vote loss related to unfair labor practices. In close elections, where unfair labor practices were committed, unions *gained* an average of 7.9%; yet where no unfair labor practices were committed, unions *lost* an average of 8.1% of their support.[130] Thus, in close elections, where the only statistically significant evidence of an impact of unfair labor practices on union support was found, the evidence is completely contrary to the Board's assumption that employer unfair labor practices cause unions to lose support. Of course, this study provided no means to ascertain why employer unfair labor practices tended to increase support for the union in these elections. Nevertheless, one can speculate that perhaps employees, rather than being intimidated out of voting for the union by the employer's actions, considered such actions further cause for seeking the protection of a union.

Apart from this limited evidence about close elections, this study

[130] It is possible that the vote gain shown in the close elections with unfair labor practices could actually reflect authorization card withholding rather than an actual gain in support. In order to check for this phenomenon, a calculation was made of the percentage of authorization cards submitted for each of the ten close elections in which unfair labor practices occurred. This calculation showed that authorization cards submitted for these ten elections ranged from 37.5% to 66.7% and averaged 48.7%, with a standard deviation of 0.095. This demonstrates that the vote gain shown in Table 8 is an actual gain and not a reflection of card withholding.

reveals no detectable differences in union vote loss related to commission of employer unfair labor practices. The absence of any such difference makes it appropriate to report the remaining data for the study as a whole without segregating elections in which unfair labor practices were committed.[131]

A central inquiry in this study was the extent to which signed authorization cards are an accurate indication of the support that a union could expect on election day. The mean vote loss of 13.3% for all elections, shown in Table 6, is strong evidence that the percentage of authorization cards obtained in general substantially overrepresents the union's voting strength. This finding warrants further inquiry into the question of whether the Board, in *Gissel* cases, is correctly assuming that a union with authorization cards from a majority of employees in a unit is likely to obtain majority support in a subsequent election.

TABLE 9

ELECTION OUTCOME IN RELATION TO PROPORTION OF VOTERS WHO SIGNED CARDS

% Employees Who Signed Cards*	N Elections	% Elections	N Union Won	% Union Won
30%	91	12.0%	41	45.1%
30-40%**	73	9.6%	21	28.8%
40-50%	118	15.5%	32	27.1%
50-60%	115	15.1%	47	40.9%
60-70%	102	13.4%	55	53.9%
70-80%	92	12.1%	60	65.2%
80-90%	61	8.0%	39	63.9%
90-100%	108	14.2%	71	65.7%
All Elections	760	99.9%	366	48.2%

Significance = 0

* "% Employees Who Signed Cards" used throughout this article, includes only those cards that were actually submitted to the Board. See discussion *supra* Section IV.

** In this and subsequent tables in which data appears to be reported in overlapping categories, the data reported within a category includes all numbers greater than the first number and less than or equal to the second number, *e.g.*, the category of 30%-40% includes all elections in which more than 30% and less than or equal to 40% of employees had signed cards.

131 S. FIENBERG, *supra* note 124, at 49. This result—that employer unfair labor practices do not negatively affect union support—improves the utility of prior studies that themselves have failed to distinguish unfair labor practice elections from others. *See supra* text accompanying notes 92-116.

Table 9 demonstrates the relationship between percentage of cards submitted and election outcome. Table 9 shows that unions that submitted authorization cards from 30% of the employees, the smallest proportion of cards that the Board will accept in order to hold an election, won 45.1% of the time, but unions that submitted cards from 30-50% of the employees won less than 30% of the time. This result probably does not reflect a reality that unions with fewer cards do better, but rather that among those unions that submitted cards from precisely 30% of the employees to the NLRB, some were deliberately holding back cards or submitting cards early in an election campaign in an attempt to expedite the election process.[132]

Omitting the abberant category of unions that submitted exactly 30% cards, Table 9 shows a direct relationship between authorization cards submitted and election results: the larger the proportion of cards submitted, the more likely the union is to win the election. Note specifically that in elections in which the union had authorization cards from a bare majority of the electorate—situations in which the Board would find the cards sufficient to permit a bargaining order under *Gissel*—unions won only 40.9% of the time. Only when a union had cards from more than 60% of employees did it achieve at least an even chance of winning the election. Another interesting finding in Table 9 is that an increase in the proportion of authorization cards collected over 70% did not substantially increase the union's chance of success. Unions with authorization cards from 90-100% of the employees still won only 65.7% of the time.

Another measure of the relationship between authorization cards and election outcome is the comparison between the mean number of authorization cards submitted in all elections and the mean number submitted in elections in which the union won. The mean proportion of authorization cards submitted for all elections was 65.7%. In elections in which unions ultimately won, the mean proportion of authorization cards submitted was 71.9%; in elections in which unions lost the mean proportion of cards was 59.9%.[133]

A regression analysis is another way to express the relationship between authorization card collection and union vote. A regression analysis of the elections studied produced the following equation:

$$\text{Union vote} = .21 + 48 \times (\%\ \text{cards})$$

$$(R^2 = .13)$$

Applying this equation, it can be calculated that a union that receives a

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[132] See the discussion at the end of Section IV *supra* exploring the incidence of and possible reasons for organizers withholding authorization cards from the Board.

[133] Significance = 0

TABLE 10
ELECTION OUTCOME IN RELATIONSHIP TO TIME BETWEEN PETITION AND ELECTION

Election Outcome	N Elections	Mean Days	Standard Deviation
Union Won	363	48.44	34.43
Union Lost	392	58.41	68.49
All Elections	755	53.62	55.01

Significance = .012

bare majority of cards (51%) can be expected to receive votes from only 46% of the employees.[134] Or, applying the analysis differently, in order to expect to receive a majority vote (51%), a union would need to receive authorization cards from 62.5% of the employees.[135]

While the focus of the study was upon authorization cards and unfair labor practices, the opportunity to have access to a broad range of information contained in NLRB files permitted consideration of other factors that might affect election results. Among the other factors considered were the delay between card signing and the election, the nature of the parties' representatives in the election proceedings, the election turnout, and the day of the week on which the election was held.

It is commonly believed that the longer the delay between a union's submission of an election petition and the election, the less likely the union will be to win the election.[136] The evidence in this study provides some support for this assumption, although the results are not entirely consistent with the assumption. Table 10 presents the mean period of time, in days, between the election petition and the election, for all elections, and for various election outcomes. Table 10 shows that for all elections in the study, the mean number of days be-

[134] .21 + .48 (.51) = .21 + .25 = .46 = Vote

[135] C = % Cards
.51 = .21 + .48C
.30 = .48C
.625 = C

[136] A guide for union organizers warns them to beware of employer efforts to insist upon full NLRB hearings in a desire to "stall the election until enthusiasm for the union has waned." S. SCHLOSSBERG & J. SCOTT, ORGANIZING AND THE LAW 181 (3d ed. 1983). A guide for employers facing union campaigns advises them that expediting an election "is usually unwise." R. LEWIS & W. KRUPMAN, WINNING NLRB ELECTIONS: MANAGEMENT'S STRATEGY AND PREVENTIVE PROGRAMS 152 (2d ed. 1979). Employers are advised to seek an election date that gives them "as much time as is necessary to furnish employees with sufficient facts to make an informed decision." *Id.* at 153. *See also* Roomkin & Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75, 76-77.

TABLE 11
VOTE LOSS IN RELATIONSHIP TO TIME BETWEEN PETITION AND ELECTION

Days Between Petition and Election	N Elections	Mean Vote Loss	Standard Deviation
15-30	82	15.5%	35.0%
31-45	263	9.5%	24.6%
46-60	214	16.0%	28.3%
61-90	93	17.1%	26.8%
91-773	17	10.1%	23.6%
All Elections	669	13.4%	27.7%

Significance = .05

tween the petition and the election was 53.62. That period of time was shorter, a mean of 48.44 days, when unions won. The time period was longer than average, or a mean of 58.41 days, when unions lost.[137] Table 10 thus provides support for the assumption that delay between the petition and election decreases the union's chance of victory.

There are a variety of reasons that might cause delay to decrease the likelihood of a union victory. The union's campaign commences before the employer's campaign. The longer the period in which the employer has actively campaigned, the more likely it is that employees will be persuaded by the employer's viewpoint. Furthermore, it may be difficult for a union to sustain enthusiasm over a long period. Also, perhaps as time passes employee turnover has an increased impact on election results. Union supporters may be more likely to be dissatisfied with their jobs and therefore more likely to obtain other employment during a delay.

A more precise measure of the impact of delay than election outcome, however, is probably the degree of vote loss—that is, the amount of support the union lost between card signing and the election. Here, the impact of delay is less clear. Table 11 displays the relationship between vote loss and the time between the petition and the election. The table shows that unions retained their support to the greatest extent,

[137] Another study, using data supplied by the NLRB for over 45,000 single union elections between July 1972 and September 1978 also found a difference of about ten days in the period from petition to election between elections in which unions won (1.9 months) and elections in which employers won (2.2 months). Roomkin & Block, *supra* note 136, at 88. Earlier studies concerning the impact of delay are briefly described in the same article. *Id.* at 77.

TABLE 12
VOTE LOSS IN RELATIONSHIP TO AGE OF CARDS AT ELECTION

Age of Cards in Weeks	N Elections	Mean Vote Loss	Standard Deviation
Under 2	12	12.6%	38.0%
2 to 4	27	18.4%	35.5%
4 to 8	54	8.1%	30.7%
8 to 12	43	10.5%	22.0%
12 to 16	42	12.4%	27.7%
16 to 24	92	10.9%	27.3%
24 to 36	104	15.8%	27.7%
36 to 52	53	11.6%	25.8%
Over 52	10	21.4%	21.4%
All Elections	437	12.7%	27.9%

Significance = .70

losing only 9.5% of their support, in elections held between 31 and 45 days after the signing of the petition. In contrast to popular wisdom, the union's support dropped to a substantially greater degree—15.5%—in elections held the shortest period of time after the petition, between 15 and 30 days. Also contrary to expectations, in elections with the greatest delays between petition and election—more than 90 days—unions lost only 10.1% of their support.

Another measure of the impact of time on maintenance of union support reveals a similarly inconclusive pattern. From the files in which it was possible to determine the dates on which the authorization cards were signed, a calculation was made of the average age of authorization cards on the date of the election. Then the mean vote loss for each category of authorization card age was computed. Table 12 reports the relationship between age of authorization cards and vote loss. Note that since there was a substantial number of elections in which information about the age of the cards was incomplete, Table 12 reports data for a smaller number of elections than did the prior tables. The results in Table 12 reveal a pattern similar to that in Table 11, with union support dropping sharply in elections held relatively close to the date of card signing. There is a distinct contrast between elections in which the cards were between two and four weeks old, in which union support dropped by 18.4%, and elections with cards between four and

eight weeks old, in which vote loss was at its lowest level of 8.1%. One can only speculate about why a union would lose substantial support in an election held quickly after card signing or the filing of an election petition. It may be that unions require some minimal period of time in which to respond effectively to employer campaign arguments. It could also be that quick elections are only held in those cases in which an employer, knowing of its strength, is willing to consent to an early election. In Table 12, as in Table 11, there is no showing of a consistent decline in union strength as time passes. To summarize the data on the impact of the passage of time on union support, there is some evidence, in Table 10, examining only the outcome of the elections, that delay lessens the likelihood of a union victory, but examining vote loss, a more precise measure of impact, in Tables 11 and 12, there is no evidence that the passage of time produces a corresponding decrease in union strength.

Another factor examined for its possible effect upon election outcomes was the nature of the representatives that companies and unions selected to represent them in the NLRB proceedings. In recent years concern has been expressed about a widespread increase in the use of labor consultants, those who specialize in advising companies how to remain or become union-free.[138] An effort was made to assess the possible impact of labor consultants on election results. Since the only source of data for the study was NLRB files, the following tables can be expected to provide a somewhat inexact measure of actual representation. It may be, for example, that an employer used a management consulting firm to assist in the union representation election campaign, but the firm never had any contact with the NLRB. In such a case, the file would not correctly reveal the nature of the company's representation. Tables 13 through 18 report election results in relationship to the nature of the parties' representative as reflected in NLRB files.

Table 13 reports the frequencies of each category of company representation and the election results for each category. Table 13 shows that a majority of all employers were represented by attorneys and that employers represented by attorneys were significantly more likely than other employers to defeat the union effort. Less than a quarter of all employers used labor consultants. Employers relying on labor consul-

[138] *See, e.g.*, Lawler, *Labor-Management Consultants in Union Organizing Campaigns: Do They Make a Difference?* 1981 INDUS. REL. RESEARCH A. PROC. THIRTY-FOURTH ANN. MEETING 374, in which the author concluded from a study of NLRB representation and decertification elections in 155 grocery stores that the presence of a consultant on behalf of the employer reduced the likelihood of employees voting in favor of bargaining. *Id.* at 377. The impact of employer consultants was a central focus of extended congressional hearings in 1979. 1, 2 *Pressures in Today's Workplace: Oversight Hearings Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., lst Sess. (1979).

TABLE 13
ELECTION OUTCOME IN RELATIONSHIP TO EMPLOYER REPRESENTATION

Employer Representative	N Elections	% Elections	% Union Won
Officer	139	18.3%	56.8%
Attorney	437	57.7%	43.5%
Consultant	177	23.4%	51.4%
Other	5	0.7%	80.0%
All Elections	758	100.1%	48.1%

Significance = .012

tants were more likely to win elections than were employers who handled the election with their own officials, but less likely to win than employers represented by attorneys.[139]

Table 14 reports information regarding unions' representatives. Table 14 shows that 67.2% of unions use no outside representation in elections and instead have an employee of the union handle the election. Unions were about half as likely as employers to retain an attorney, and rarely used consultants. Comparing election outcomes with the nature of the unions' representatives revealed no statistically significant results.

TABLE 14
ELECTION OUTCOME IN RELATIONSHIP TO UNION REPRESENTATION

Union Representative	N Elections	% Elections	% Union Won
Official	507	67.2%	50.1%
Attorney	239	31.7%	43.1%
Consultant	8	1.1%	75.0%
All Elections	754	100.0%	48.1%

Significance = .06

[139] A recent survey reporting responses from 52 companies involved in NLRB elections also found that employers without outside assistance in an election were more likely to lose. Murrmann & Porter, *Employer Campaign Tactics and NLRB Election Outcomes: Some Preliminary Evidence*, 1982 INDUS. REL. RESEARCH A. PROC. THIRTY-FIFTH ANN. MEETING 67, 69.

Using the measure of vote loss, the drop in union support from the time of card signing to the election, revealed no statistically significant impact of either union or company representatives upon voting behavior. Table 15 indicates mean vote loss for the various categories of company representatives and Table 16 reports vote loss in relationship to the union's representative. While Tables 15 and 16 show that companies and unions that hired labor consultants did better than average in eroding or maintaining union support, respectively, in neither case were the differences so great as to be statistically significant.

TABLE 15
VOTE LOSS IN RELATIONSHIP TO EMPLOYER REPRESENTATION

Employer Representative	N Elections	Mean Vote Loss	Standard Deviation
Officer	124	12.3%	30.4%
Attorney	381	13.1%	25.3%
Consultant	161	14.4%	31.1%
Other	4	19.6%	6.6%
All Elections	670	13.3%	27.7%

Significance = .89

TABLE 16
VOTE LOSS IN RELATIONSHIP TO UNION REPRESENTATION

Union Representative	N Elections	Mean Vote Loss	Standard Deviation
Official	450	13.2%	27.1%
Attorney	208	14.0%	29.3%
Consultant	8	3.9%	17.3%
Unknown	1	6.3%	0.0%
All Elections	667	13.3%	27.7%

Significance = .77

The data were further examined in an attempt to determine whether the presence of labor consultants increased the likelihood of the commission of unfair labor practices. Table 17 displays the rela-

tionship between the nature of the company's representative and the commission of unfair labor practices.

TABLE 17
EMPLOYER UNFAIR LABOR PRACTICES IN RELATIONSHIP TO EMPLOYER REPRESENTATION

Employer Representation	N Elections	% Elections Involving § 8(a)(1) Violations	N Elections Involving § 8(a)(1) Violations	% Elections Involving § 8(a)(3) Violations	N Elections Involving § 8(a)(3) Violations
Officer	139	2.2%	3	2.8%	1
Attorney	437	2.3%	10	4.8%	21
Consultant	177	4.5%	8	7.9%	14
All Elections	753	2.8%	21	4.8%	36

Significance for 8(a)(1) = .28
Significance for 8(a)(3) = .01

There was no evidence of significantly more violations of section 8(a)(1), involving generalized coercion of employees, when any type of company representative was present, but there was evidence that section 8(a)(3) violations, involving discrimination regarding terms of employment—most commonly discharges for union activity—were more likely to occur in elections in which the company was represented by a consultant.

To summarize the information regarding the impact of the use of labor consultants, the study found that employers' use of consultants had no demonstrable impact in improving the employer's likelihood of success in the election or eroding employee support for the union. There was, however, evidence that discriminatory conduct against employees is more likely to occur in elections in which employers are represented by a consultant.

Some recent research has focused upon the impact of the rate of employee participation in NLRB elections.[140] Studies have indicated the high rate of voter turnout in NLRB elections. One survey of elections between July 1972 and September 1978 found that 89.9% of all eligible voters participated in NLRB single union nondecertification

[140] Block & Roomkin, *A Preliminary Analysis of the Participation Rate and the Margin of Victory in NLRB Elections,* 1981 INDUS. REL. RESEARCH A. PROC. THIRTY-FOURTH ANN. MEETING 220. The authors found that participation rates decline as the margin of victory in the election increases and that the decline was greater in elections that the union won. *Id.* at 224.

TABLE 18
ELECTION OUTCOME IN RELATIONSHIP TO MEAN EMPLOYEE TURNOUT

Election Outcome	N Elections	Mean Turnout	Standard Deviation
Union Won	365	86.9%	15.3%
Union Lost	392	89.5%	12.9%
All Elections	757	88.2%	14.1%

Significance = .011

elections.[141] For the fiscal year 1980, the NLRB reported a turnout rate of 87.8%.[142] The participation rate of employees in the elections considered for this study was also very high. The turnout rates for all elections and for elections of varying outcomes are presented in Table 18. The term "turnout" describes the result of dividing the number of actual voters by the number of eligible voters. Since NLRB procedures permit persons to vote who may have not been considered eligible initially, it is possible for the turnout in an election to exceed 100%. Table 18 shows that 88.2% of employees voted in the representation elections

TABLE 19
ELECTION OUTCOME IN RELATIONSHIP TO EMPLOYEE TURNOUT

Turnout	N Elections	% Elections	% Union Won
Under 30%	5	.7%	80.0%
30-40%	3	.4%	100.0%
40-50%	10	1.3%	60.0%
50-60%	19	2.5%	52.6%
60-70%	43	5.7%	58.1%
70-80%	97	12.8%	47.4%
80-90%	174	23.0%	52.9%
90-95%	85	11.2%	38.8%
95%+	321	42.4%	45.5%
All Elections	757	100.0%	48.2%

Significance = .11

141 *Id.* at 222.

142 45 NLRB ANN. REP. 16 (1980). In that year, the Board held 8,198 conclusive representation elections in which a total of 521,602 employees were eligible to vote and in which 458,114 cast ballots. *Id.* at 15-16.

in the region during the three years of the study. There was a significantly higher average turnout in elections that unions lost (89.5%) than in elections that unions won (86.9%).

Table 19 provides another way of looking at the relationship between turnout and election outcome. Table 19 shows that in 42.4% of elections in the region the turnout exceeded 95% and that in more than three-quarters of the elections the turnout surpassed 80%. Although the rate of union success does not decline directly with each increment of employee turnout, the pattern of union success rates in Table 19 reinforces the finding of Table 18 that, in general, the likelihood of union success declines as employee turnout increases.

Table 20 reports further information on turnout, this time related to union vote loss, which is the difference between union support demonstrated by authorization cards signed and the support shown at the election.

Table 20 shows that in the few elections with the lowest voter turnout—under 60%—unions actually gained support during this period. Turnout proportions between 60% and 80% have an irregular impact upon vote loss. The most interesting result reported in Table 20 is that while vote loss remains essentially constant at turnouts between 80% and 95% (a vote loss of between 5.7% and 6.9%), vote loss climbs sharply to a mean of 15.1% when turnout exceeds 95%. Table 20 reports a significant relationship between turnout and vote loss.

TABLE 20
VOTE LOSS IN RELATIONSHIP TO EMPLOYEE TURNOUT

Turnout	N Elections	Mean Vote Loss	Standard Deviation
Under 50%	3	- 5.1 %*	8.9%
50-60%	2	-30.0 %*	42.4%
60-70%	14	12.1 %	32.5%
70-75%	20	26.2 %	41.4%
75-80%	16	13.8 %	17.5%
80-85%	22	5.7 %	29.2%
85-90%	71	5.9 %	29.0%
90-95%	78	6.9 %	22.1%
95%+	418	15.1 %	27.0%
All Elections	644	12.8 %	27.6%

Significance = .003

* A negative vote loss indicates a gain in union support.

To summarize the data on the impact of turnout on pro-union voting, Tables 18 and 20 show that turnout has a statistically significant influence. Table 19, while not statistically significant, displays a pattern that supports that conclusion. The data show that union support and the likelihood of union success in the election decline with increased voter turnout and that unions do worst in elections with extremely high turnouts, which comprise the vast majority of elections. The data collected provide no basis for determining the reason that increased turnout adversely affects union success, but one can speculate that, in general, union advocates are more highly motivated to express their position by voting than are employees who are satisfied with the status quo. Where turnout is large, a larger proportion of the employees who are generally more passive and pro-employer are voting.

A final question addressed in the study was the possible impact of the day of the week of the election on election outcome and level of union support. Such an inquiry was included in the study in response to a published report of a question session at a conference following a speech by former NLRB Chairman John Fanning at which Steelworkers Organizing Director John Oshinski reported that a survey of Steelworkers elections had shown that most elections are scheduled on Thursdays and Fridays when unions have the least chance of success.[143]

Table 21 reports the findings in Region Eighteen on the relationship between the day of the week on which the NLRB election was conducted and the outcome of the election. Table 21 shows that more than a third of all NLRB elections are held on a Friday and more than 60% of elections are held on either a Thursday or a Friday. Putting aside the extremely infrequent Saturday elections, the Board was least likely to hold elections on Mondays, when the unions won 53.7% of the time, and most likely to hold them on Fridays, when unions won only 42.7% of the elections. The reasons for the "Friday factor" are somewhat difficult to ascertain. It may be a reflection of the greater degree of access that employers have to employees; a Friday election comes at the end of a week in which an employer has had an opportunity to speak directly to its employees each day. It could be instead that employees have generally more positive attitudes about their workplace and a tendency to vote against a union when they are looking ahead to weekend leisure time. Fridays may be more likely to be paydays, which might reinforce a positive view of the employer and emphasize to employees their economic dependence upon the employer. The

[143] *Union Organizing Campaigns and Women*, 106 Lab. Rel. Rep. at 114, 116 (1981). Oshinski told Chairman Fanning that the Steelworkers won 80% of elections on Mondays, 70% on Tuesdays, 50% on Wednesdays, 43% on Thursdays, and 45% on Fridays. Chairman Fanning replied that Oshinski's study was "very interesting" and promised to pass the observations along to his colleagues at the NLRB. *Id.*

TABLE 21
ELECTION OUTCOME AND TURNOUT IN RELATIONSHIP TO DAY OF WEEK

Day of Week	N Elections	% Elections	Mean Turnout	% Union Won
Monday	67	8.9%	89.3%	53.7%
Tuesday	100	13.2%	86.6%	53.0%
Wednesday	127	16.8%	89.4%	54.4%
Thursday	187	24.8%	87.6%	49.2%
Friday	267	35.4%	88.6%	42.7%
Saturday	7	.9%	88.2%	28.6%
All Elections	755	100.0%	88.3%	48.5%

Significance (Turnout) = .68
Significance (Outcome) = .14

greater success of employers in Friday elections could simply mean that employers savvy enough to use their influence in a settlement to get elections scheduled for Fridays are also savvy enough to conduct effective election campaigns or to manage employee relations so well that a union is of little appeal.

Table 22 aggregates the data from Table 21 by half-weeks. Table 22 shows that unions are significantly more likely to win an election held early in the week when the NLRB is least likely to schedule the election. Unions won 53.7% of elections conducted Mondays through Wednesdays, but only 45.1% of the elections conducted Thursdays through Saturdays.

TABLE 22
ELECTION OUTCOME IN RELATIONSHIP TO PART OF WEEK

Time of Week, by Part of Week	N Elections	% Elections	% Union Won
Monday-Wednesday	294	38.9%	53.7%
Thursday-Saturday	461	61.1%	45.1%
All Elections	755	100.0%	48.5%

Significance = .02

With such a startling difference in outcome related to weekday it seems appropriate to inquire why the NLRB disproportionately schedules elections toward the end of the week. In more than eighty percent of the cases, the parties determined the date of the election by a consent or stipulation agreement. Such agreements outline not only the election date, but also the bargaining unit and other factors.[144] It has been suggested that unions are unable to influence the scheduling of elections effectively because employers are willing to condition their agreement to a consent election upon setting an election date in the latter part of the week.[145] Unions, seeking to avoid the delays that a formal hearing would cause, feel compelled to accede to the employer's demand for an election late in the week. As to the remaining election dates that are set by the regional directors, one explanation sometimes given for elections held later in the week is that turnout is thought to be greater then and that scheduling elections to maximize turnout is consistent with the role of the NLRB to increase employee free choice in deciding whether to have a collective bargaining representative.[146] Table 21, however, indicates that turnout is not in fact greater in the latter part of the week and that turnout is actually higher on Mondays, when the NLRB rarely holds elections, than on Fridays, when elections are most commonly held.

The impact upon voting behavior of the day of the week on which the election is held can also be measured by examining the extent to which the voting reflects a loss in the support earlier garnered by the union through signatures on authorization cards. Table 23 presents the correlation between weekday and vote loss. Measured by vote loss, probably a better measure of impact upon voters than election outcome, there is no significant difference among weekdays. Looking only at vote loss, there is no pattern, such as that in Tables 21 and 22, suggesting that unions lose support as the week progresses.

The foregoing analysis of the data has considered the relationship between a single response (for example, outcome) and a single predictor (for example, unit size). Regression methods permit studying the effects of several variables simultaneously upon a response. To use these methods properly, only the 567 elections for which all variables are recorded are considered. The following predictor variables were

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144 *See supra* note 8 and accompanying text. A recent survey of employers in 52 elections correlating employer perceptions of their degree of success in influencing election date and unit composition concluded that both types of employer influence are positively correlated with employer success in the election. Murrmann & Porter, *supra* note 139, at 70-71.

145 *Union Organizing Campaigns and Women*, 106 Lab. Rel. Rep. at 114, 116 (1981) (statement of John Oshinski); Letter from John L. Oshinski to Laura Cooper (March 13, 1981).

146 The NLRB advises its staff engaged in determining election dates to take into account the "desirability of facilitating employee participation" and directs that, where there is a choice, dates of likely high absenteeism should be avoided. NATIONAL LABOR RELATIONS BOARD, CASE HANDLING MANUAL (PART TWO), REPRESENTATION PROCEEDINGS ¶ 11302.1 (1975).

TABLE 23
VOTE LOSS IN RELATIONSHIP TO DAY OF WEEK

Day of Week	N Elections	Mean Vote Loss	Standard Deviation
Monday	63	12.6%	31.0%
Tuesday	94	17.1%	29.2%
Wednesday	111	12.5%	28.0%
Thursday	159	11.6%	26.3%
Friday	236	13.9%	26.9%
Saturday	5	4.2%	16.9%
All Elections	668	13.4%	27.6%

Significance = .67

considered: turnout, proportion of authorization cards, presence of an unfair labor practice charge, presence of an unfair labor practice finding, age of authorization cards at the time of the election, size of the bargaining unit, day of the week of the election, type of bargaining unit, and type of industry.[147] The response variables considered were election outcome, percent of vote the union obtained, and vote loss (percent of authorization cards compared with percent of vote for the union).

The response variables of outcome and percent vote were analyzed using the method of linear logistic regression.[148] Usual multiple linear regression was used to study predictors of vote loss.[149] The two techniques are very similar in the way that they model response, but they use quite different methods for obtaining the estimates that appear in the resulting models.[150]

147 The variable of company representation was initially considered in the regression analysis, but was found not to have any effect and so is not included in the results reported here.

148 C. MORRIS & J. ROLPH, INTRODUCTION TO DATA ANALYSIS AND STATISTICAL INFERENCE ch. 8 (1981).

149 S. WEISBERG, APPLIED LINEAR REGRESSION chs. 2, 7, 8 (1980).

150 For linear regression, for example, we might fit a model like:

Vote Loss = $b_0 + b_1$ (proportion cards) + b_2 (turnout) + other terms, where the "other terms" are also additive effects of other variables in the study. The b's are estimated using least squares analysis. Linear logistic regression leads to a similar equation, except that the appropriate response in the case of election outcome is the logarithm of the odds of success versus failure. A typical model might be log (odds of union success) = $c_0 + c_1$ (proportion cards) + c_2 (turnout) + other terms. For logistic regression, the c's are estimated using maximum likelihood methods that take account of the binomial variation in counted data. For either method, large values of the b's and c's (either positive or negative) correspond to useful predictors of the response. For linear regression, familiar t and F tests are available to judge the sizes of the b's either individually or in groups. In logistic regression, with the large sample available in this study, approximate t- tests and likelihood ratio or G^2 tests are avail-

TABLE 24
ODDS OF UNION SUCCESS ON DIFFERENT DAYS OF THE WEEK

Day of Week	Ignoring Other Factors: Estimated Coefficient	Ignoring Other Factors: Odds of Success	Adjusted for Other Factors: Odds of Success
Monday	.41	1.50 to 1	1.51 to 1
Tuesday	.33	1.40 to 1	1.17 to 1
Wednesday	.33	1.40 to 1	1.41 to 1
Thursday	.18	1.20 to 1	1.38 to 1
Friday	-.19	0.82 to 1	1.00 to 1

Test for equality of odds ignoring other factors is $G^2=8.15$, df=4, significance = .086
Test for equality of odds adjusting for other factors is $G^2=3.13$, df=4, significance = .54

Applying logistic regression to the response variable of outcome, beginning with the day of the week as a predictor, produces the results set out in Table 24. This table was generated by fitting the logistic model to explain log (odds of union success) as a linear function of indicator variables for the five weekdays. There is mild evidence that these five differ. The next column converts these estimates to odds. The odds of union success on Mondays are estimated at 1.5 to 1, while the odds on Fridays fall to .82 to 1. If we compare Monday through Thursday against Friday elections, we find the odds of success for the first four days of the week to be 1.31 to 1, while for Friday elections, the union's odds are only .84 to 1. These results show a significant difference between Friday and non-Friday elections. The last column of Table 24 provides the fitted odds for the five weekdays, when the coefficients are estimated from a model that includes several other

able to give the same information. For either, t-statistics roughly greater than 2 in absolute value correspond to a significance level of .05 for that variable.

In linear regression, a coefficient estimate is interpreted as the rate of change in the response when one and only one of the predictors is varied. For example, in a model including unit size, the b estimated corresponding to unit size gives the amount of change in the response for every additional person added to the unit, assuming that all other variables are fixed at their current value. For logistic regression, a somewhat more complicated interpretation for the c's is available because of the logarithm in the equation. For these models, the c's correspond to changes in the log odds of union success; c's bigger than 0 correspond to increasing the odds of success, while c's less than 0 correspond to decreasing the odds of success. Since we have used natural logarithms, if we change a predictor by an amount, say d, and if c is the coefficient estimated for that predictor, we *multiply* the odds of union success by exp(cd).

TABLE 25
FITTED LOGISTIC REGRESSION TO PREDICT OUTCOME

Variable	Estimated Coefficient	Approximate t-statistic
Constant	0.38	0.55
Turnout	-2.29	-3.26
% Employees Who Signed Cards	3.48	6.92
Age of Cards (Days)	-0.0062	-2.38
Unit Size	-0.0021	-1.30
Friday Election	-0.29	-1.51

predictors, notably turnout, percent cards, age of cards, and unit size. Adjusting for these other factors makes the differences between days smaller. In particular, the fitted odds for Friday increase to 1 to 1. The results reported in the last column of Table 24 suggest that if the day of the week has an effect on outcome, it is that Friday elections slightly reduce the union's chances of success as compared with other days and that much of the "Friday factor" can be explained by other variables.

Table 25 provides the result of a fitted logistic regression including those factors that appeared most important in determining outcome: turnout, percent cards, age of cards, size of unit, and whether the election took place on a Friday. The other predictors listed above, including type of bargaining unit, type of industry, and presence of unfair labor practices have essentially no predictive power on outcome. The fitted coefficients and corresponding approximate t statistics are given in the table. The small t statistics for the "Friday factor" and for size of the unit show that their effects were only marginal. The fitted coefficients presented in Table 25 can be explained as follows: If all other factors are held constant, but turnout is increased by 10%, the odds of the union winning the election are multiplied by .80. Thus, increasing turnout hurts the union's chance of success. Similarly, for every 10% increase in cards submitted, the odds of the union winning are multiplied by 1.42, so the greater the union's proportion of cards, the better the union's odds of success. A ten-day increase in the average age of the authorization cards multiplies the odds by .94. Increasing the unit size by ten people multiplies the odds by .98. Holding the election on a Friday rather than another day multiplies the odds of union success by .75.

Not surprisingly, applying a logistic regression analysis to the re-

sponse variable of percentage of vote for the union yields results that are qualitatively the same as the results for the outcome response reported in Table 25. Table 26 summarizes the fitted logistic regression model including the same five predictors used in Table 25 for outcome. Again, the predictors excluded from the table were not important. As with outcome, the most clearly important predictor of vote for the union is the percentage of cards submitted. Unions with higher proportions of cards obtained higher proportions of votes. Turnout has a slight negative effect and the other three predictors that had a marginal effect in predicting outcome are even less useful in predicting the percent of the union vote.

TABLE 26
FITTED LOGISTIC REGRESSION TO PREDICT PERCENTAGE OF UNION VOTE

Variable	Estimated Coefficient	Approximate t-statistic
Constant	-0.19	-0.30
Turnout	-1.23	-1.86
% Employees Who Signed Cards	2.67	5.63
Age of Cards (Days)	-0.0011	-0.76
Unit Size	-0.0010	-0.80
Friday Election	-0.064	-0.35

Finally, applying linear regression analysis to the response variable of vote loss produced results qualitatively similar to those for the overall outcome. As seen in Table 27, the major predictors of vote loss were turnout, percent cards, age of cards and size of the unit. Day of the week had no apparent effect on vote loss. All of the useful predictors had positive coefficients, indicating that as these increase, so does vote loss. It is only to be expected that vote loss would increase with the percentage of authorization cards since vote loss can only be large if the percentage of employees signing cards is also large. The effect of proportion of cards on vote loss noted in Table 27 may be simply a reflection of the chosen measure for change in employee support for the union. The R^2 for Table 27 was only .15, indicating that only a small part of the variation in vote loss is successfully modeled by the predictors. Whatever causes employees who signed cards to vote against the union largely is not modeled by these few variables measuring the characteristics of the election.

TABLE 27
MULTIPLE LINEAR REGRESSION TO PREDICT VOTE LOSS

Variable	Estimated Coefficient	t-statistic
Constant	-0.45	-6.73
Turnout	0.27	3.98
% Employees Who Signed Cards	0.40	8.30
Age of Cards (Days)	0.00027	1.67
Unit Size	0.00024	1.84
Friday Election	0.015	0.74

Residual Mean Square = .050, df = 561, R^2 = .15

In summary, the regression analysis produced results consistent with the correlations presented earlier. Of all the factors considered in the study, authorization cards are the best predictor of election results, but authorization cards alone, or with other factors, only predict a very small part of the variation in election outcome. There is, on the average, a substantial loss in support for unions from the time of card signing to the date of the election. Even a union that collects cards from all or nearly all employees has a significant chance of losing the election. Next to authorization cards, election turnout was the best predictor of outcome, with a union's chance of success dropping as turnout increased. The only additional factors that have a demonstrable, although smaller, impact on election results were bargaining unit size, length of time from card signing to election, and weekday on which the election was held. The larger the bargaining unit, the smaller was the union's chance of success. Delay between card signing and the election also decreased the union's chance of success. Holding elections on a Friday, rather than another day of the week, lessened the likelihood of a union victory. Noticeably absent from this list of factors that influence the outcome of representation elections is the commission of employer unfair labor practices. There is no evidence that employer unfair labor practices adversely affect the union success rate.

VI. CONCLUSIONS

This study was designed to test empirically the validity of the NLRB's assumption underlying its *Gissel* doctrine, that if a union obtains authorization cards from a majority of employees, it is reasonably likely to win a representation election in the absence of employer unfair labor practices. In the process of gathering and analyzing data to

test this assumption, other results were obtained that provide a basis to question other NLRB policies regarding representation elections.

Looking first at the assumption underlying the *Gissel* policy, the data here show that unions with authorization cards from a bare majority of employees are substantially more likely to lose, than to win, an election. Only when a union's authorization card support reaches 62.5% does it have as much as an even chance of winning. These facts seriously undermine the factual assumption underlying *Gissel* and should warrant a reconsideration of that policy. *Gissel*'s bargaining order remedy is designed to effectuate employee free choice, rather than just to deter employer misconduct.[151] Thus, permitting a union with authorization card support from only a bare majority of employees to become the employees' exclusive bargaining representative fails to effectuate the sentiments of those employees about unionization that they probably would express if they were allowed to participate in a secret ballot election. If the Board indeed is interested in issuing bargaining orders in cases in which unions would have won the election, then the Board might require authorization cards from substantially more than a majority of the employees—perhaps the 62.5% figure found here—to better gauge when a union has at least an even chance of winning.[152] In the alternative, the Board could attempt to improve the reliability of authorization cards as a predictor of election outcome by standardizing their content and requiring a simple verbal explanation to be given to employees requested to sign cards.[153] Each of these alternative modifications of the *Gissel* doctrine would make it somewhat more burdensome, as a practical matter, for unions to obtain NLRB elections. In view of the relative unreliability of current organizing methods, however, encouraging unions to establish more solid support among employees before seeking a Board election may have a salutary effect on the success of organizing efforts.

Certainly any reconsideration of the *Gissel* policy must take into account not only the results of this and other empirical studies, but also

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[151] The Supreme Court said in *Gissel* that "[A] bargaining order is designed as much to remedy past election damage as it is to deter future misconduct." NLRB v. Gissel Packing Co., 395 U.S. at 612 (footnote omitted).

[152] Increasing the percentage of cards required for a *Gissel* bargaining order would likely have the practical effect of causing unions to engage in more organizing activities before seeking an election in order to make a bargaining order available should serious unfair labor practices follow.

[153] For example, the NLRB might require that authorization cards state: "I hereby authorize this union to represent me for purposes of collective bargaining with my employer. I understand that this card will probably be presented only to the NLRB in order to get an election. I have been informed, however, that if my employer should commit serious unfair labor practices, the NLRB may use this card, among others, as a basis for ordering my employer to bargain with this union as my exclusive representative for collective bargaining even though no election is ever held or an election is held which the union loses." The Board could also require that employees who are asked to sign cards are given a verbal statement of the same information, much as police officers provide *Miranda* warnings to those they arrest.

other costs and benefits that might result from a change in policy. If, for example, the existing doctrine has an effect of deterring the commission of serious employer unfair labor practices, then an effort would have to be made to provide an alternative, at least equally effective, deterrent.[154] If making it more difficult for unions to secure authorization cards would jeopardize employee free choice or would upset, in favor of management, the balance of power established by current Board policies, then other policy changes should be made to improve exercise of employee rights and unions' chances for election success. One such method would be to enhance unions' ability to communicate with employees in an election campaign.[155] Any cost-benefit analysis of the proposed modifications of the *Gissel* doctrine must also take into account that the objectives of deterrence and effectuation of employee free choice that underlie the current policy both are undermined seriously by employers' knowledge that there is a substantial likelihood that NLRB bargaining orders will be denied enforcement in the courts

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[154] For example, the Board might attempt increased use of its discretionary authority to seek injunctions against unfair labor practices committed during election campaigns. *See supra* notes 41-42 and accompanying text. Or, Congress might amend the statute to mandate such injunctions or provide stiffer penalties for the commission of unfair labor practices during an election campaign. For example, sections 8 and 10 of the Labor Reform Act of 1977, H.R. 8410, 95th Cong., lst Sess. 123 CONG. REC. 273711-14, would have, respectively, provided double back pay for employees discharged unlawfully during an organizing campaign or prior to an initial collective bargaining agreement and required the Board to seek injunctions to remedy unlawful discharges committed during this same period. The Act passed in the House but was never voted on in the Senate. In a more substantial amendment, Congress might eliminate the requirement of section 10(c) of the Act, 29 U.S.C. § 160(c) (1982), that Board remedies be in the nature of "affirmative action" only and permit the Board to adopt overtly punitive monetary penalties against employers that commit serious and pervasive unfair labor practices. In interpreting the existing section 10(c) of the Act, the Supreme Court has said that "the power to command affirmative action is remedial, not punitive." Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940). In permitting the Board to assess monetary penalties, Congress would be acknowledging that employers' primary motivation for unlawful efforts to defeat unionization is economic and therefore economic sanctions might be the most effective deterrent. NLRB awards of punitive damages were advocated in Note, *NLRB Power to Award Damages in Unfair Labor Practice Cases*, 84 HARV. L. REV. 1670, 1679-83 (1971).

[155] *See supra* note 12 describing the present policies regarding union access to employees and the imbalance that they create between employer and union opportunities to communicate with employees. The Board or Congress might permit unions to address employees on company time if employers do so or otherwise increase unions' opportunity for communicating with employees. Section 3 of the unenacted Labor Reform Act of 1977, H.R. 8410, 95th Cong., 1st Sess. 123 CONG. REC. 273711-14, would have required the Board to issue regulations that would have given unions equal opportunity to address employees during working time and would have assured employees "an equal opportunity overall to obtain . . . information from the employer and [the] labor organization." Giving union organizers equal access to employees would also require overruling NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), in which the Supreme Court held that, under most circumstances, the Act does not permit the NLRB to allow nonemployee organizers on company property. Implementing such changes to permit unions equivalent opportunities for communication was a central recommendation of the empirical study of union elections conducted by Getman, Goldberg, and Herman. J. GETMAN STUDY, *supra* note 12, at 156-59.

of appeals.[156] Modifying the *Gissel* doctrine to conform to more accurate factual assumptions of employee card signing and voting behavior should increase judicial enforcement of bargaining orders, and thereby enhance the ability of the doctrine to achieve its objectives.[157]

While the results of this study concerning the reliability of authorization cards provide a substantial reason for reassessing the policy of awarding bargaining rights to unions that possess support from a bare majority of employees, the results concerning the lack of impact of employer unfair labor practices suggest a basic problem in the Board's policy of setting aside all victories won by an employer who has committed an unfair labor practice during the campaign.[158] Underlying the latter policy is the assumption that employer unfair labor practices committed during a campaign decrease employee support for the union. This study found no evidence to support such an assumption. Correlations presented here revealed no significant difference in election outcomes or in union vote loss between clean elections and elections with unfair labor practices. In none of the regression analyses did unfair labor practices appear to have even the slightest influence upon the percentage of union vote, union vote loss, or election outcome. The

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156 *See supra* text accompanying notes 78-91.

157 Any reassessment of *Gissel* should also include an empirical evaluation of the impact of those bargaining orders that are implemented. An employer ordered to bargain under *Gissel* commences bargaining with the knowledge that, in the view of the Board, the union with which it is ordered to bargain does not presently possess the support of the majority of employees. Since the ability of a union to obtain a collective bargaining agreement is, in significant part, dependent on the employer's assessment of the union's level of support among employees, it would be expected that many *Gissel* bargaining orders would not, in fact, result in a collective bargaining agreement. An empirical study of 59 bargaining orders issued in cases involving employer unfair labor practices under the Board's pre-*Gissel Joy Silk* doctrine found that contracts were reached in 49% of the cases. Wolkinson, *The Remedial Efficacy of NLRB Remedies in* Joy Silk *Cases*, 55 CORNELL L. REV. 1, 8 n.23 (1969). Where employers exercised their right to obtain judicial review in the courts of appeals, contracts were reached in less than a third of the cases. *Id.* at 11. Another study of more than 2,600 cases of union bargaining rights obtained through elections determined that initial contracts were obtained with the employer in more than 77% of the cases. Prosten, *The Rise in NLRB Election Delays: Measuring Business' New Resistance*, MONTHLY LAB. REV. 38, 40 (Feb. 1979). More recent information regarding the efficacy of *Gissel* bargaining orders is available. Professor Weiler reports on an unpublished thesis which studied 38 *Gissel* bargaining cases and found that initial contracts were reached in 14 or 37% of the cases. In assessing the limited data regarding the attainment of a subsequent contract, Weiler concluded that "a *Gissel* order has less than a 10% chance of producing a lasting collective bargaining relationship." Weiler, *supra* note 104, at 1795 n.94. Additional data are available in a study reported to the National Organizing Committee of the AFL-CIO. The study reported on a group of 40 cases, 90% of which were *Gissel* bargaining order cases and the remainder of which were cases of bargaining orders resulting from surface bargaining following a successful election. Of the 40 cases, 11 or 28% resulted in a contract. By comparison, the same report included a study of 271 successful elections in units of over 100 employees during 1979-1981. Initial contracts were obtained in 63% of the cases. Following expiration of the first contract, second contracts were secured in 56% of the election cases. Memorandum from Charles McDonald to AFL-CIO National Organizing Committee (Feb. 18, 1983).

158 *See supra* note 21.

only evidence of a statistically significant relationship between the commission of unfair labor practices and voting behavior, reported in Table 8, showed that, in close elections, unions actually gained support when employers engaged in unlawful conduct. The results here substantially replicate the conclusions of the Getman, Goldberg, and Herman study of election behavior, which found that unions "did not lose significantly more support in unlawful elections than in clean elections,"[159] and that employees "who intended to vote union were more likely to report unlawful campaign tactics than employees who intended to vote company."[160] If these studies are correct in finding no evidence that unlawful employer conduct causes unions to lose support, then the Board, while retaining other remedies for specific employer unfair labor practices, need not automatically set aside the results of elections in which such conduct occurs.[161] Again, if abandoning the remedy for employer unfair labor practices of setting elections aside decreases deterrence, the Board should be authorized to seek imposition of harsher penalties, including fines, upon employers.[162]

While this study found no evidence that unfair labor practices decrease union support, it does not go so far as to show that in cases of outrageous and pervasive unfair labor practices, where *Gissel* would permit a bargaining order, unfair labor practices have no impact. In none of the elections considered in this study did the unfair labor practices rise to such a level as to warrant a *Gissel* bargaining order.[163] Since the data for this study were limited to cases in which elections were actually conducted, it was not possible to evaluate the possible impact of unfair labor practices that are so serious or begin so early that an election petition is never filed, or one that is filed is later with-

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159 J. GETMAN STUDY, *supra* note 12, at 128. Note, however, that other scholors have disputed whether the data of the Getman study supports this conclusion. *See supra* note 104. Other researchers have found a correlation between union losses and employer unfair labor practices. *See* Dickens, *supra* note 104, at 560.

160 J. GETMAN STUDY, *supra* note 12, at 129.

161 For example, in an election campaign won by the employer, in which the employer discharged employees for their union activities, the employer's conduct should be found to be an unfair labor practice. The employees subject to the discrimination should be provided back pay and offered reinstatement, preferably through a prompt injunction, but the election need not be set aside.

162 *See supra* note 154. The Getman study recommended remedies including injunctive relief to obtain reinstatement of discharged employees, treble damages for lost earnings and loss of government contracts. J. GETMAN STUDY, *supra* note 12, at 161.

163 Of the thirty-one elections included in the Getman research, in nine cases the administrative law judge who consulted with the researchers concluded that bargaining orders would have been warranted if the union had had a majority of authorization cards and had lost the election. J. GETMAN STUDY, *supra* note 12, at 113. In only two of these nine elections did the union actually have a card majority and then lose the election. *Id.* at 113 n.2. The Getman study found that in no group of potential union voters did a significantly greater proportion vote against union representation in bargaining order elections than in clean elections. *Id.* at 115.

drawn because of the union's devastation through such practices.[164] While the data show no adverse impact of ordinary unfair labor practices upon union support, this study provides no direct evidence on the question of whether *Gissel* bargaining orders are necessary to remedy losses of union support that might be caused by the most serious unfair labor practices.

Two other factors, found by this study to have signifcant impacts upon election results, do have implications for changes in NLRB policies. The finding that procedural delays following the union's election petition have an adverse impact upon union success, a conclusion that other studies have reached as well,[165] suggests that the NLRB and Congress should make further efforts to expedite pre-election proceedings.[166] Finally, the findings that union success is significantly impaired by conducting elections on Fridays[167] and that the Board holds more elections on Fridays than any other day, warrants a change in Board policy concerning the setting of election dates. For the approximately twenty percent of elections in which the election date is determined, after a hearing, by the regional director, the day of the week for the election should be selected randomly. As to those elections in which the parties set the date by agreement, over which employers often have effective control, the Board should consider permitting the parties to agree only upon a week for the election and having the Board set the weekday for the election by a random process.

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164 The J. GETMAN STUDY, *supra* note 12, also had this limitation. It might be very difficult to identify and study workplaces in which election petitions were never filed or later withdrawn because of serious and pervasive unfair labor practices.

165 *See supra* note 137 and Prosten, *supra* note 157, at 38, 39.

166 Expedition might be achieved by increasing the size of the NLRB staff available to handle election investigations. Statutory amendments could also decrease delays. Current law gives employers an absolute right to a hearing prior to scheduling an election, provided that the question of representation would affect commerce, even if no showing has been made that there are any issues to be considered at the hearing. NLRA, § 9(c)(1), 29 U.S.C. § 159(c)(1) (1982). A congressional report noted that the median period between a petition and an election is 45 days, but that when a hearing is requested the median time is 75 days. HOUSE COMM. ON EDUCATION & LABOR, THE LABOR REFORM ACT OF 1977, H.R. REP. No. 95-637, 95th Cong., lst Sess. 5 (1977).

167 The absence of a clear explanation for the impact of the "Friday factor" does not undermine the suggestion that election days be randomized since the recommended change appears to be essentially cost-free and to threaten no other established policies.