The Myth of Labor Board Expertise*

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I. THE MYTH OF BOARD EXPERTISE

One of the central assumptions underlying the administration of the National Labor Relations Act is that the National Labor Relations Board has special expertise to determine the impact of employer conduct on the exercise of employee rights guaranteed by the Act. The Board is presumed able to determine, for example, whether discriminatory employer conduct is "inherently destructive" of the right to strike or has only a "comparatively slight" effect on that right.¹ Similarly, the Supreme Court has assumed that the Board can take into account "imponderable subtleties" in weighing the effect of employer speech on employee exercise of the right of self-organization² and that the Board knows whether an employer ban on union solicitation on company premises will prevent effective organization.³ Most recently,

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¹ *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). See also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

² See *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 479 (1949).

³ See *NLRB v. United Steelworkers*, 357 U.S. 357, 362-64 (1958); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

The Board has not disclaimed these judicial assertions of its ability to determine the impact of employer conduct on employee self-organization. For example, when the Board

in *NLRB v. Gissel Packing Co.*,⁴ the Court affirmed the Board's ability, on the basis of its "expert estimate as to the effects on the election process of unfair labor practices of varying intensity,"⁵ to order an employer to bargain with a union that has not been chosen by a majority of his employees.

The assumption that the Board has the ability to assess the actual impact of employer—or union—conduct is a fiction. Although it has been administering the National Labor Relations Act for over thirty-five years, the Board has never engaged in an effort to determine empirically whether a particular type of conduct has a coercive impact.⁶ The Board has not required, or even permitted, the introduction of evidence as to whether particular conduct had a harmful impact on employees. As the Board has stated: "In evaluating the interference resulting from specific conduct, the Board does not attempt to assess its actual effect on employees, but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent the free formation and expression of the employees' choice."⁷ Thus, the elaborate structure of Board rules concerning the circumstances under which it will find a tendency to coerce employee choice is not grounded in any respect on factual data. It rests, rather, on guesses or assumptions.

first required employers to furnish an employee name and address list to the union once an election is directed, *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 61 L.R.R.M. 1217 (1966), it declined to require them to grant union requests for an opportunity to respond, on company time and premises, to antiunion speeches; it preferred to wait "until after the effects of *Excelsior* became known." *General Elec. Co.*, 156 N.L.R.B. 1247, 1251, 61 L.R.R.M. 1222, 1223 (1966). And in *General Stencils, Inc.*, 195 N.L.R.B. No. 173, at 10, 79 L.R.R.M. 1608, 1610 (Mar. 30, 1972), the Board set out "to draw upon [its] knowledge and expertise in evaluating the effects of any misconduct."

⁴ 395 U.S. 575 (1969).

⁵ *Id.* at 612 n.32.

⁶ One of the first statements indicating judicial awareness of this fact was made in *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), which arose out of the authors' efforts to obtain the names and addresses of employees eligible to vote in Board elections for the study described in the text and notes at notes 49-55 *infra*. Speaking for the court, Judge Wright described the Board as "an institution which in over thirty years has itself never engaged in the kind of much needed systematic empirical effort to determine the dynamics of an election campaign or the type of conduct which actually has a coercive impact." 450 F.2d at 675. The Board's lack of expertise respecting voter behavior has been recognized by scholars for some time. See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 46-53, 88-90 (1964); Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228, 253 (1968); Note, *Behavioral and Non-Behavioral Approaches to NLRB Representation Cases*, 45 IND. L.J. 276 (1970). See also Lewis, *Gissel Packing: Was the Supreme Court Right?* 56 A.B.A.J. 877 (1970).

⁷ 33 NLRB ANN. REP. 60 (1969). See also *Murry Envelope Corp.*, 130 N.L.R.B. 1574, 1576, 47 L.R.R.M. 1562, 1564 (1961); *Lane Drug Store, Inc.*, 88 N.L.R.B. 584, 25 L.R.R.M. 1360 (1950).

There is, moreover, nothing in the collective activities or experience of the Board that insures the accuracy of the assumptions upon which these rules are based. As pointed out in a recent article:

The Board's staff consists mostly of lawyers and a few researchers who are primarily concerned with the statistics of the Board's own operations and with legal case analysis. . . .

. . . .
What the Board lacks notably is (1) specific information about labor-management practices and employee attitudes and reactions that may be pertinent to its work, and (2) any systematic means of monitoring the impact of Board and Court NLRB doctrine upon industrial practice Thus, the Board's decision-making fails to provide a bridge between Board members, and the real world of labor relations.⁸

One wonders why the courts have accepted the myth that the Board possesses expertise to determine the impact of employer or union conduct on employee free choice. Court opinions, which abound with references to the Board's expertise, rarely discuss the question of how the Board acquired its special competence. In part, the courts appear simply to have assumed that because the Board constantly rationalizes its rules in terms of the policies, language, and legislative history of the NLRA, it has thereby acquired an understanding of the practical implications of its decisions. But the process of elaborating and harmonizing rules of decision cannot lead to the development of expertise as long as the assumptions upon which the rules rest remain untested.

The courts' uncritical acceptance of the myth of the Board's expertise may also be due in part to its usefulness in allocating institutional responsibility. The myth helps to justify a fairly limited scope of review. Since the courts possess no greater knowledge of the impact of employer and union conduct on employees than does the Board, it is sensible of the courts to permit the Board to make and apply the basic rules with little interference. The Board is in a better position to establish a coherent pattern of regulation, serving the significant interest of treating like cases alike. From this point of view, the Board's practice of finding unfair labor practices on the basis of specific rules deduced from assumptions about impact on employees has much to commend it. It has helped to direct the attention of the Board and the reviewing courts to the question whether the decision in a particular case is consistent with the general holding of similar cases—and away from

⁸ Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 577-78 (1970).

the question whether employee free choice was interfered with, a question that neither the Board nor the courts are capable of answering.

In *Gissel Packing Co.*,⁹ however, Board and Court attention was re-directed to the question of when employer conduct interferes with employee freedom of choice. The case involved the power of the Board to order an employer to bargain with a union not chosen by a majority of his employees in a representation election. The Court upheld the Board's power to issue such orders where the Board found that the employer had engaged in (1) "outrageous" and "pervasive" unfair labor practices that could not be remedied,¹⁰ or (2) "less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes."¹¹ In the latter situation the Board can issue a bargaining order only when it finds that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order."¹² The Court's language suggests that the Board is required to decide not only whether the employer conduct in question had a coercive effect on the election campaign just completed, but also the likelihood of its continued impact or recurrence in a subsequent rerun election.

In the cases immediately following *Gissel*, the Board did not address itself seriously to the questions posed by *Gissel*. It simply announced its conclusions, using the language of the Supreme Court as a formula to be invoked when the Board chose to issue a bargaining order.¹³ This approach to the mandate of *Gissel* has, however, proven unacceptable to the courts of appeals. In several cases they have denied enforcement of bargaining orders or remanded to the Board for further findings of fact,¹⁴ and in some cases the courts, expressing displeasure with the

⁹ 395 U.S. 575 (1969).

¹⁰ *Id.* at 613.

¹¹ *Id.* at 614.

¹² *Id.* at 614-15.

¹³ See, e.g., *West Side Plymouth, Inc.*, 180 N.L.R.B. 437, 73 L.R.R.M. 1014 (1969); *Steele Apparel Co.*, 179 N.L.R.B. 218, 72 L.R.R.M. 1305 (1969), *enforcement denied on other grounds*, 437 F.2d 933 (8th Cir. 1971); *Hancock Fabric Outlet, Inc.*, 179 N.L.R.B. 639, 72 L.R.R.M. 1432 (1969). This continues to be the practice in most cases. See, e.g., *NLRB v. World Carpets, Inc.*, 463 F.2d 57 (2d Cir. 1972); *Tri-County Tube, Inc.*, 194 N.L.R.B. No. 5, 78 L.R.R.M. 1530 (Nov. 10, 1971); *Almaden Volkswagen*, 193 N.L.R.B. No. 110, 78 L.R.R.M. 1371 (Oct. 13, 1971).

¹⁴ See, e.g., *NLRB v. Miller Trucking Serv., Inc.*, 445 F.2d 927, 931-32 (10th Cir. 1971); *New Alas. Dev. Corp. v. NLRB*, 441 F.2d 491, 494-95 (7th Cir. 1971); *NLRB v. General Stencils, Inc.*, 438 F.2d 894, 901-02, 905 (2d Cir. 1971).

Board's performance, have made their own determinations of the impact of employer unfair labor practices and their likely effect on the outcome of a subsequent election.¹⁵ The courts of appeals have not questioned the ability of the Board to make the findings called for by the Supreme Court. To the contrary, the theme running through the opinions is the failure of the Board to make such findings with the degree of care that *Gissel* seemingly commanded. The accusation that the Board, when asked to make specific findings, has responded instead with "a litany, reciting conclusions by rote without factual explication," has been quoted repeatedly by the courts of appeals.¹⁶

It is not surprising that when the Board orders an employer to bargain with a union not elected by his employees, the courts have been reluctant to grant enforcement merely on the basis of the Board's assumed expertise. Such cases involve different and more significant interests than does the enforcement of an order directing an employer merely to cease and desist from interfering with his employees' rights or even to bargain with a union chosen by the employees. In neither of the latter situations does the Board's order appear to run counter to the exercise of employee free choice. In the *Gissel* situation, however, it does.¹⁷ Since the Board's powers are supposed to be remedial rather than punitive, the sacrifice of employee free choice arguably inherent in a bargaining order could not be justified solely to punish the employer for engaging in improper conduct.¹⁸ The use of a bargaining order in a *Gissel* situation can be justified only if there is good reason to be-

¹⁵ See, e.g., *NLRB v. Copps Corp.*, 458 F.2d 1227, (7th Cir. 1972); *NLRB v. Henry Colder Co.*, 447 F.2d 629 (7th Cir. 1971); *NLRB v. Kostel Corp.*, 440 F.2d 347, 351-53 (7th Cir. 1971); cf. *Tyler Pipe Indus., Inc. v. NLRB*, 447 F.2d 629 (7th Cir. 1971).

¹⁶ See, e.g., *NLRB v. General Stencils, Inc.*, 438 F.2d 894, 901 (2d Cir. 1971), and *NLRB v. Kostel Corp.*, 440 F.2d 347, 352 (7th Cir. 1971), citing *NLRB v. American Cable Sys., Inc.*, 427 F.2d 446, 449 (5th Cir. 1970), where the statement originated. In *NLRB v. World Carpets of New York, Inc.*, 463 F.2d 57, 62 n.6 (2d Cir. 1972), Judge Friendly noted that "[a]lthough *Gissel* clearly mandates a reasoned analysis by the Board as to how the employer's misconduct has jeopardized the chances for a fair election in each particular case, concern has been voiced . . . that the Board's bargaining orders since *Gissel* have been deficient in this respect." See also Progrebin, *NLRB Bargaining Orders Since Gissel: Wandering From a Landmark*, 46 ST. JOHN'S L. REV. 193, 201-07 (1971).

¹⁷ In cases in which a bargaining order is sought, the union has either lost an election, or become convinced that it would lose and withdrawn the petition. Thus, current employee sentiment would appear to be counter to unionization.

¹⁸ Dean Bok argued that many times unfair labor practices are found and elections set aside not because the conduct in question was likely to have a coercive impact upon employees, but because it was likely to give one side or another an unfair advantage in the election. See Bok, *supra* note 6, at 53-56. Since no election follows a bargaining order, however, justification of a bargaining order by this rationale would be inconsistent with *Gissel's* concentration on the particular case.

lieve that the employees' failure to choose union representation in an NLRB election was the result of employer coercion and did not, in fact, represent the true desires of the employees.

Another factor which helps to explain the close scrutiny given the Board's post-*Gissel* decisions is the requirement that the Board's order be responsive to the facts of the particular case. As noted above, the criterion in most unfair labor practice proceedings is whether the conduct in question has a general tendency to interfere with employees' exercise of their statutory rights. The impact in the particular case is not critical. So long as the issue is cast in general terms, for a court to disagree with the Board would require it to challenge the basic assumption of Board expertise in judging impact. When, however, the issue is cast in narrower terms—that is, whether this employer's conduct has tended to prevent these employees from expressing their choice on the question of unionization—the courts can disagree with the Board's conclusions, or require greater substantiation than the Board has brought before them, without challenging the basic assumption of Board expertise.

While the courts have often referred to the requirement that the Board make specific findings as to both the immediate and continuing impact of the employer's conduct and the likelihood of its recurrence, they have not specified how the Board is to make these difficult determinations. Thus, the basic problem confronting the Board is that of devising acceptable rules about the impact and probability of recurrence of unfair labor practices.¹⁹ The task is a formidable one. As Chairman Miller has stated, "No recent decisional task has more perplexed the Board, or confounded the courts which review [its] decisions"²⁰

Even if the Board were capable of making a realistic assessment of the extent to which unfair labor practices affected votes in the original election, how could it determine whether the impact would continue? To make this determination it would be necessary for the Board to consider factors such as the effect of the passage of time both in dissipating the coercive impact upon the affected employees and in changing the composition of the work force between the two elections. Yet the Board has been reluctant to consider these factors, arguing that to

¹⁹ In *NLRB v. General Stencils, Inc.*, 438 F.2d 884, 901 (2d Cir. 1971), Judge Friendly, citing K.C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 59-60 (1969), suggested the possibility of hypothetical rule making. In view of the emphasis to be placed upon specific findings in each bargaining order case, however, it is difficult to understand how that practice might be useful in this context.

²⁰ *General Stencils, Inc.*, 195 N.L.R.B. No. 173, at 12, 79 L.R.R.M. 1608, 1611 (Mar. 30, 1972) (dissenting opinion), *supplementing* 178 N.L.R.B. 108, 71 L.R.R.M. 1652 (1969).

do so would be to permit the employer to profit by the delays inherent in the procedure for remedying unfair labor practices. Some courts have accepted this argument;²¹ others have not.²² But in no case have the courts really required an elaborate inquiry into the question of potential changes. They have enforced bargaining orders without such inquiry, and when the courts have themselves made impact determinations they have largely ignored this factor, focusing instead on the nature of the unfair labor practice and the conditions that existed at the time.²³

Even subtler questions arise if the Board is to judge adequately the likelihood that the unfair labor practices will recur. The Board would be forced to consider not only the propensity of the employer to commit further acts of the type found unlawful, but also the potential deterrent effect of possible alternative remedies. There is, however, no body of knowledge currently available that would permit decisions of the latter sort to be made on any basis other than conjecture or surmise.

The lack of information is highlighted by the courts' demand for greater specificity. In one case, for example, the Board was directed to consider whether specific employees were likely to have been coerced by a threat of retaliation.²⁴ How is the Board to determine this? Something might be learned if Board agents were to question threatened employees as to how they voted and why, but such questioning by government agents obviously undercuts the statutory requirements of a secret ballot in Board elections. Moreover, it is not easy to attribute shifts in voting intention to a specific cause. Voters may shift despite or without regard to the questionable conduct of their employer. Assuming that an employee is capable of sorting out his own motives, his self-respect may dispose him against attributing his vote against the union to the fact that he was frightened by the employer's statements. Indeed, it is perhaps more likely that an employee who has voted in favor of the union would be willing to testify that the threats had a coercive effect on him. But such testimony would be difficult to credit, both because the employee might think it of benefit to the union and because it would be inconsistent with the employee's behavior. Thus, investigation of the actual impact of unfair labor practices on a case-by-case basis is likely to be unproductive at best, and has the drawbacks of under-

²¹ See, e.g., *NLRB v. Copps Corp.*, 458 F.2d 1227 (7th Cir. 1972); *NLRB v. L.B. Foster Co.*, 418 F.2d 1, 4-5 (9th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

²² See, e.g., *NLRB v. General Stencils, Inc.*, 438 F.2d 894, 905 (2d Cir. 1971); *NLRB v. American Cable Sys., Inc.*, 427 F.2d 446, 449 (5th Cir. 1970), *cert. denied*, 400 U.S. 957 (1970).

²³ See cases cited note 15 *supra*.

²⁴ *New Alas. Dev. Corp. v. NLRB*, 441 F.2d 491, 494 (7th Cir. 1971).

cutting the guarantee of a secret ballot and inviting the manipulation of evidence.²⁵

Since specific inquiry about impact is not feasible, the Board will, of necessity, respond to the demand for greater specificity by articulating general criteria for measuring the impact of unfair labor practices in a variety of circumstances. Three different factors are potentially relevant to impact determination: the nature of the unfair labor practices, the circumstances under which they were committed, and the demographic characteristics of the employees.

Board opinions make clear that the nature of the unfair labor practices involved is significant in impact determinations. The Board has rarely elaborated, however, on the weight assigned to this factor or on the basis upon which various types of illegal behavior are differentiated. Instead, it frequently employs epithets such as "flagrant" or "egregious" in place of explanation.²⁶ Some principles can, however, be deduced from the Board's opinions. First, an unfair labor practice that is viewed as "deliberate" or "calculated" is more likely to lead to a bargaining order than one that is not.²⁷ Second, much turns on the significance of the interest being endangered. If the employer's statements or acts can be characterized as threatening either a significant economic interest, such as retention of jobs, or a fundamental legal right, it is more likely to lead to a bargaining order.²⁸ Third, acts of reprisal, particularly discharges, are considered to be extremely effective in swaying votes and very difficult to remedy.²⁹ Not only is there a great deal of language to

²⁵ Similar reasoning led the Court in *Gissel* to treat employee testimony as unreliable. After the employer had threatened to take reprisals for union activity, an employee had testified that he had signed an authorization card solely to secure an election and not to designate the union as his bargaining representative. 395 U.S. at 608.

²⁶ See, e.g., *W.T. Grant Co.*, 195 N.L.R.B., No. 183, 79 L.R.R.M. 1670 (Mar. 22, 1972); *Short Stop, Inc.*, 193 N.L.R.B. No. 107, 79 L.R.R.M. 1571 (Oct. 14, 1971).

²⁷ See, e.g., *GTE Automatic Elec., Inc.*, 196 N.L.R.B. No. 134, at 32, in which the Board stressed that the employer was "not one who violated the law without knowledge of its sanctions. . . . [I]ts supervisors' misconduct was not accidental but intentional." *Accord*, *International Harvester Co.*, 179 N.L.R.B. 753, 72 L.R.R.M. 1467 (1969) (employer activities found deliberately and calculatedly designed); *J.P. Stevens & Co.*, 179 N.L.R.B. 254 n.3, 75 L.R.R.M. 1375, 1378 (1969), *enforced*, 441 F.2d 514 (5th Cir. 1971). Compare *Thomas Mkts.*, 191 N.L.R.B. No. 75, at 3, 77 L.R.R.M. 1451, 1453 (June 21, 1971), in which the Board refused to issue a bargaining order in part because the unfair labor practices were the result of an "honest, though misguided, effort to comply with [an earlier unfair labor practice] settlement agreement."

²⁸ See, e.g., *General Stencils, Inc.*, 195 N.L.R.B. No. 173, at 4-8, 79 L.R.R.M. 1608, 1609 (Mar. 30, 1972): "A direct threat of loss of employment . . . is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative."

²⁹ "The Board has long recognized that a discriminatory discharge even of a single employee discourages support for the Union on the part of the remaining employees." Cor-

this effect in Board opinions, but the coincidence of 8(a)(3) violations and bargaining orders is notable.³⁰ Fourth, promises to correct the grievance which led to union organization are also considered particularly effective.³¹

These "rules" directed to the nature of the unfair labor practice involved are unsatisfactory. They often confuse moral outrage with impact determination. It is, for example, difficult to understand the stress placed on the employer's state of mind. One would think that the employees' perception of the employer's conduct would be more significant than the employer's motive.³² Similarly, the nature of the legal interest being threatened is relevant only if one assumes that employee reactions fall into patterns consistent with the analytical structure of the NLRA. Moreover, rules of decision based on such nebulous factors as the nature of the legal interest being threatened or the deliberateness of the employer's actions are very difficult to apply in a consistent fashion. In a sense, all unfair labor practices are deliberate, and any threatened action can be characterized as inconsistent with fundamental statutory rights.³³ Thus, the bargaining order decision is announced but not explained by the Board's characterization of the unfair labor practice as deliberate or as threatening a basic right.

While the other decisional principles referred to above do address themselves to impact, their validity is questionable. What is threatened

nelius Am. Inc., 194 N.L.R.B. No. 154, 79 L.R.R.M. 1206 (Jan. 11, 1972). It demonstrates that an employer has "completely rejected the collective-bargaining principle and its violations could only have had the effect of destroying conditions needed for a fair election." *International Van Lines*, 177 N.L.R.B. 353, 355, 71 L.R.R.M. 1387, 1390 (1969), *modified*, 448 F.2d 905 (9th Cir. 1971).

³⁰ See, e.g., *E.L. Jones Dodge Inc.*, 190 N.L.R.B. No. 136, 77 L.R.R.M. 1297 (June 4, 1971); *George J. Roberts & Sons, Inc.*, 188 N.L.R.B. No. 51, 76 L.R.R.M. 1337 (Feb. 9, 1971), *enforced in part*, 451 F.2d 941 (2d Cir. 1971).

³¹ See, e.g., *International Harvester Co.*, 179 N.L.R.B. 753, 754, 72 L.R.R.M. 1467 (1969): "There are few unfair labor practices so effective in cooling employees' enthusiasm for a union than the prompt remedy of the grievances which prompted the employees' union interest in the first place." See also *Texaco Inc.*, 178 N.L.R.B. 434, 72 L.R.R.M. 1146 (1969), *enforced*, 436 F.2d 520 (7th Cir. 1971).

³² Compare *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951) with *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). State of mind may, admittedly, in certain circumstances, be relevant to the likelihood of unfair labor practices recurring. "Deliberateness," however, is too ambiguous a concept on which to rely in issuing bargaining orders. See note 33 *infra*.

³³ The term deliberate is ambiguous. It can mean that the act itself was intended; that the result was intended; or that the illegality of the act was known. In addition, a consequence of the act may be treated as having been intended if it was foreseeable. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963). Because of this ambiguity, the effort to make application of section 8(a)(3) of the NLRA turn on employer motivation proved unworkable and had to be abandoned. See Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 743-50 (1965).

may be less significant than whether it is likely to be carried out. More serious threats may be perceived as less likely to be implemented and may also carry a greater likelihood of backfiring. Acts of reprisal may not be effective because they are not perceived as such by the employees. When recognized, they may have the effect of solidifying union support by showing the need for a union to protect employee interests, or simply by making the employees angry with the employer. Whatever coercive effect reprisals have may be dissipated when the acts are remedied, as when employees discharged in retaliation are subsequently reinstated. Responding to employee grievances once a union organizational campaign has begun may serve to demonstrate the effectiveness of the union.

The Board's rules concerning the circumstances under which unfair labor practices are likely to be effective are also based on certain assumptions. It is assumed, for example, that the effectiveness of threats varies directly with the status in the company hierarchy of the persons communicating them.³⁴ Certain types of threats, such as a threat to clamp down on discretionary grants of leave, may, however, be more credible when made by low-level supervisors, who make the actual decisions. The assumption that serious threats, such as plant closings, will inevitably be communicated in small plants³⁵ is also questionable. The extent and nature of communication about the campaign have never been systematically studied, and it may be that employees do not discuss the employer's campaign to any significant extent. Finally, each of these assumptions about the differential impact of unfair labor practices, depending upon their nature and circumstances, presupposes that there is a basic identifiable unit of coercive impact. Yet both the existence and amount of any coercive impact of unfair labor practices on individual employees are highly questionable.

It is tempting to assume, as at least one court has, that it is possible to predict the effect of employer conduct on demographically defined subgroups of employees. The Seventh Circuit has announced several times that young, old, unskilled, or part-time employees are more susceptible to coercion by employer unfair labor practices than are other employees.³⁶ The court has also assumed that the impact of an unfair labor practice can be determined in part by the size of the city in which

³⁴ See, e.g., *NLRB v. Kostel Corp.*, 440 F.2d 347, 352 (7th Cir. 1971). See also *NLRB v. Copps Corp.*, 458 F.2d 1227 (7th Cir. 1972).

³⁵ See Blackman, *Relative Severity of Employer Unfair Labor Practices*, 22 LAB. L.J. 67, 70 (1971), and cases cited therein.

³⁶ See, e.g., *General Stencils, Inc.*, 195 N.L.R.B. No. 173, at 5, 79 L.R.R.M. 1608, 1609 (Mar. 30, 1972); *Scolers, Inc.*, 192 N.L.R.B. No. 49, 78 L.R.R.M. 1858 (July 27, 1971).

the company is located.³⁷ None of these assumptions is necessarily valid. Youthful, unskilled, and part-time workers may be relatively unsusceptible to threats of reprisal since they may have the least commitment to the particular job involved. Older employees with long service may also be unimpressed with threats of job loss if, in a plant with no seniority system, they have seen other senior employees laid off before younger employees with less service. They, or some of them, may fear less the risk of job loss if the union prevails than the actuality of job loss without a union. There is nothing to suggest that the impact of unfair labor practices varies from one locale to another. Indeed, there is simply no basis for assuming that the possession of any particular demographic characteristic would render an employee more or less susceptible to a grant or promise of benefits.

As this discussion should make clear, there is a great need for information about the actual impact of unfair labor practices. We are aware of two efforts to provide the Board with such information. One, a study by Professor John Blackman,³⁸ is of little value for this purpose since it employs prior Board decisions as its primary sources of information as to impact. Thus, the author simply asserts that company statements will have a greater impact in smaller units, and that statements by higher officials will have a greater effect on employees than threats by lower-level supervisors.³⁹ Indeed, the author compounds the weakness of the Board's approach by adding to it his own "intuitive evaluations," as when he states, without any empirical basis, that interference with public distribution of literature, unfair use of company time and facilities, and the offer or grant of benefits to individuals "are relatively minor in their impact on the unit."⁴⁰ The "study" in question is thus little more than an effort to give the appearance of precision to what is in fact sheer guesswork.

A more influential and ambitious study was undertaken by Professor Daniel Pollitt.⁴¹ He sought to measure the impact of unfair labor prac-

³⁷ *NLRB v. Kostel Corp.*, 440 F.2d 347, 352 (7th Cir. 1971).

³⁸ Blackman, *supra* note 35. The study, although unofficial, was "sponsored by the NLRB as a form of operations analysis." *Id.*

³⁹ *Id.* at 70.

⁴⁰ *Id.* The author also takes the position that under certain circumstances negotiating an agreement with one of two unions competing to represent a unit is a serious rejection of the whole system of lawful procedures and "forecloses all opportunities for the employees to exercise freedom of choice." *Id.* at 71. For a contrary view, see Getman, *The Midwest Piping Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. CHI. L. REV. 292 (1964).

⁴¹ Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C.L. REV. 209 (1963). Previous field studies of the impact of the campaign that are not directed specifically to the relative severity of various unfair labor practices are reported in Brotslaw, *Attitude of Retail*

tices and other improper campaign tactics by studying the results of rerun elections. Unfortunately, however, in contrasting the rerun results on the basis of types of "unfair" electioneering practices involved in the first election, Professor Pollitt did not control for other variables, such as unit size, type of union, original margin of victory, or time lag between first and second election, each of which, his study indicates, may be related to the outcome of a rerun election.⁴² Nor was any effort made to control for the type of campaign conducted by the employer in the rerun election or for changes in the work force between the first and second election. As a result, the Pollitt study does not establish or even strongly support the conclusion that it reaches.

For example, among the rerun elections Pollitt studied, unions lost a far greater proportion when the original election was set aside because of threats to close the plant than when it was set aside because of threats to eliminate benefits or to refuse to deal with the union if elected.⁴³ Accordingly, he concludes that plant closing threats have a greater impact than do other types of threats.⁴⁴ A substantial proportion of the cases involving a threat to close the plant may have occurred, however, in large units, where Pollitt suggests a changed result is less likely, while a similar proportion of the cases involving a threat to deprive employees of benefits may have taken place in small units, where Pollitt suggests

Workers Toward Union Organization, 18 LAB. L.J. 149 (1967); see San Fernando Valley State College Political Science Department, *A Survey of Voters in National Labor Relations Board Elections* (unpublished report prepared for the Los Angeles and Orange Counties Organizing Committee, AFL-CIO (1968)); Comment, *An Examination of Two Aspects of the NLRB Representation Election: Employee Attitudes and Board Inferences*, 3 AKRON L. REV. 218 (1970). An unsuccessful field study is discussed in Roy, *The Role of the Researcher in the Study of Social Conflict: A Theory of Protective Distortion of Response*, 24 HUMAN ORGANIZATION 262 (1965). Archival studies include Drotning, *The Union Representation Election: A Study in Persuasion*, 88 MONTHLY LAB. REV. 938 (1965).

⁴² See M. ROSENBERG, *THE LOGIC OF SURVEY ANALYSIS* (1968).

⁴³ Pollitt's sample contained 21 cases in which the first election was set aside because of threats to close the plant if the union won; in only 6 of these cases (29 percent) did the union win the second election. In 12 cases the first election was set aside because of threats to eliminate benefits or to refuse to bargain if the union won; the union won the second election in 9 instances (75 percent). Pollitt, *supra* note 41, at 215.

⁴⁴ Professor Pollitt's conclusion has been accepted by the courts. In *Gissel*, Chief Justice Warren pointed out that "[t]he study shows further that certain unfair labor practices are more effective to destroy election conditions for a longer period of time than others. For instance, in cases involving threats to close or transfer plant operations, the union won the rerun only 29% of the time, while threats to eliminate benefits or refuse to deal with the union if elected seemed less irremediable with the union winning the rerun 75% of the time." 395 U.S. at 611 n.31. In *NLRB v. General Stencils, Inc.*, 438 F.2d 894, 903 (2d Cir. 1971), Judge Friendly said: "It deserves emphasis that the Court noted in *Gissel* . . . that threats to eliminate benefits had been shown to have very much less effect on rerun elections—and thus presumably on elections—than threats of plant closings, and cited statistics impressively confirming this."

a changed result is more likely. In short, the failure to analyze the results of rerun elections preceded by various types of "unfair" practices in terms of other factors that might influence the results of the rerun election makes the Pollitt study an unreliable basis for determining the impact of the practices studied.

Even if Professor Pollitt had used more rigorous analytic methods to insure that statistically significant relations existed between the variables with which he is concerned, his explanations of the causal factors would not necessarily follow. For example, Pollitt's figures show that unions had the worst rerun record when the original election was upset on the basis of employer technical defects such as marked ballots or campaigning too close to the ballot box.⁴⁵ Applying Professor Pollitt's own reasoning, one would be forced to conclude that this conduct had the most powerful "coercive" effect of all. It is doubtful, however, that anyone would so contend. If the figures have any meaning, they probably indicate that the union did poorly in the second election because the nonunion vote in the first election represented the true sentiment of the employees. Indeed, this appears to be the author's explanation.⁴⁶ But how does one know that this phenomenon does not explain the tendency for the unions involved in the study to lose the rerun elections that followed a threat to close the plant? A tendency to similar results in the rerun elections in both situations could indicate either that the unfair practices in the first election had a lasting coercive impact, or that they had no impact at all. Pollitt makes the first assumption as to plant closing threats, the second as to technical defects. Perhaps his different analysis of these two situations is based on the different reactions of the "experienced eye."⁴⁷ But without some further empirical basis for rejecting alternative explanations, these conclusions are unwarranted.

The point is best illustrated by one election reported by Pollitt in which the employer "pulled out all the stops," engaging in five different violations of the Act. The union lost the first election forty-six to thirty-six and the rerun fifty-one to eighteen.⁴⁸ Following the analysis adopted in Pollitt's study, one would conclude that the vote against the union in the rerun was attributable to the lasting coercive effect of the unfair labor practices. That, however, fails to explain the much closer vote in the first election, when the employer's conduct was fresher in the minds

⁴⁵ Of seventeen such cases the union won the rerun in only three. Pollitt, *supra* note 41, at 215.

⁴⁶ *Id.* at 216-17.

⁴⁷ *Id.* at 215.

⁴⁸ *Id.* at 214.

of the employees. Neither Pollitt nor any of the courts deals with the possibility that supposedly coercive conduct may have a negative effect, convincing the employees, particularly those who had previously signed authorization cards, that they need a union for protection. In the election referred to above, it may be that the close vote in the first election, rather than the lopsided vote in the second, was the result of the employer's unfair labor practices. By the time the rerun was held, the employees, being less frightened, might have felt less need for a union. It is very difficult to tell which hypothesis is correct without knowing much more about the second campaign.

Similarly, when Pollitt describes other cases involving threats to close down, he fails to indicate the margin of employer victory in the first election. Perhaps in most cases it was close enough to make the union think it had a chance in the second election, but the employer succeeded in reassuring the employees that they did not need a union to protect them. Then the high percentage of union losses might be explained by the fact that in many cases the union was deprived in the rerun of the benefit of the fear engendered in the first election. We offer this hypothesis not because we consider it more likely than the one suggested by the author, but to demonstrate the peril involved in drawing conclusions about the impact of campaign tactics in one election by studying the results of a second election.

II. THE EFFORT TO LEARN ABOUT VOTER BEHAVIOR THROUGH A PANEL STUDY

A. Research Design

In recent years political scientists have been able to learn a great deal about the effect of political campaigns on voting behavior.⁴⁹ A major methodological breakthrough in the study of voting behavior is the panel or wave study, which involves interviewing a selected sample or "panel" of voters at different points in a campaign. This technique enables the researcher not only to ascertain whether the proportion of voters intending to vote for each party has changed during the course of the campaign, but also to identify those voters who have changed their preference. Further analysis of the characteristics of those who changed and their reasons for doing so is then possible.

The successful use of the panel technique in studying the dynamics

⁴⁹ See, e.g., B. BERELSON, P. LAZARSFELD & W. MCPHEE, *VOTING* (1954); A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *THE AMERICAN VOTER* (1960); P. LAZARSFELD, B. BERELSON & H. GAUDET, *THE PEOPLE'S CHOICE* (3d ed. 1968); Glaser & Kadushin, *Political Behavior in Midterm Elections*, in W. MCPHEE & W. GLASER, *PUBLIC OPINION AND CONGRESSIONAL ELECTIONS* 251 (1962). See also Burdick, *Political Theory and the Voting Studies*, in E. BURDICK & A. BRODBECK, *AMERICAN VOTING BEHAVIOR* (1959).

of political election campaigns suggested to us that it might be used to similar advantage in studying Board elections. We are presently engaged in such a study. In each election studied, we interview a randomly selected sample of employees twice. In the first wave of interviews, which occurs before the campaign has begun in earnest, we obtain attitudinal and demographic data for each employee in addition to his voting preference. The second wave of interviews is conducted immediately after the election. Changes in the respondent's attitudes toward the parties, the way in which he actually voted, and his perception of the issues in the company and union campaigns are all recorded. After the election, we interview company and union officials, obtain copies of all campaign literature and speeches, and identify the major themes and arguments used by each side.⁵⁰

B. Techniques of Analysis

In regulating election campaigns, the Board makes three basic assumptions, upon which all of its more particular assumptions rely.⁵¹ These are: (1) that employees generally are attentive to the campaign; (2) that their voting preferences may change as a result of the campaign; and (3) that the specific effect of unlawful campaign tactics by employers is to intimidate employees into voting against the union.⁵² We seek to test these assumptions in two ways. First, we try to predict how each individual will actually vote from data collected prior to the campaign. If we accurately predict the vote in an election prior to the inception of the campaign, it would suggest that the specific content of the campaign is largely irrelevant in shaping voting behavior. Second, we compare the relative familiarity with the campaign of union voters, company voters, and those whose allegiance changed during the course of the campaign, and investigate correlations between familiarity with individual campaign issues and vote. We single out for particularly close analysis the relationship between perception of unlawful speech or conduct and vote.

We use the following techniques to analyze the impact of statements

⁵⁰ For the research design of this study, see Getman, Goldberg & Herman, *The National Labor Relations Board Voter Study: A Preliminary Report*, 1 J. LEGAL STUDIES 233 (1972). See also Goldberg & Getman, *Voting Behavior in NLRB Elections* in N.Y.U. 23D CONF. ON LAB. 115 (1971).

⁵¹ See generally Bok, *supra* note 6. See also Samoff, *supra* note 6; Note, *supra* note 6.

⁵² In many bargaining order cases the Board has taken the position that after a union has obtained authorization cards from a majority of employees, a "subsequent diminution of support, as revealed by the Union's loss in the election . . . can only be attributed to [the employer's] unlawful conduct." *Overland Distribution Centers, Inc.*, 194 N.L.R.B. No. 113, 79 L.R.R.M. 1188 (Dec. 23, 1971); see *The Great Atl. & Pac. Tea Co.*, 194 N.L.R.B. No. 132, 79 L.R.R.M. 1087 (Dec. 30, 1971) ("extensive unfair labor practices quite obviously achieved their objective . . . for the Union lost the election").

and actions currently considered unlawful. First, we note all employee reports of speech or conduct that would probably constitute an unfair labor practice and attempt to correlate reported perceptions with vote. Then we correlate commission of unlawful action with vote across elections by comparing the amount of vote switching in elections where unfair labor practices occur with the amount in elections free of unfair practices. Finally, we note specifically how the commission of unfair labor practices affects our ability to predict vote. If our precampaign voting predictions are more accurate in legal elections, it would suggest that unfair labor practices have some effect on the result. An error in favor of the union would suggest that the unfair labor practices helped the company; an error in favor of the company would suggest the reverse.

C. Observations

Results of this preliminary research,⁵³ although still far from conclusive, are inconsistent with all of the Board's basic assumptions. Employees display a fairly low degree of familiarity with the campaigns of the parties. We have been generally successful in predicting voting behavior, including vote switching, on the basis of data collected prior to the election campaign—that is, without regard to the nature of the campaign.⁵⁴ Those employees who intended at first to vote for union representation but ultimately voted against the union (there have been almost no changes in the other direction) have persistently demonstrated the least awareness of the campaigns of both sides, suggesting that what switching does take place is not in response to the campaign.

While we have observed a correlation between vote and employee perception of employer unfair labor practices (regardless of whether such practices have actually occurred), the correlation has been negative: those employees who thought that the employer had engaged in unfair labor practices tended to vote for union representation. In addition, there has been no significant positive correlation between vote and perception of unfair labor practices for any demographic subsamples, such as older, younger, white, black, or male or female employees.⁵⁵

⁵³ For a detailed analysis of the test findings, see Getman, Goldberg & Herman, *supra* note 50.

⁵⁴ Prediction has been made on the basis of a formula developed by regression analysis. The formula takes into account the employee's attitudes toward his job and the union and his precampaign voting intention.

⁵⁵ The data thus far do not support, therefore, the position of those courts that have suggested that the Board tailor its issuance of bargaining orders to the demographic characteristics of the bargaining unit involved. Meaningful findings as to the impact of unfair practices on demographically defined subgroups would require subsamples large

D. Utilization of Voter Studies

By examining the Board's basic assumptions concerning voter behavior, studies such as ours should help the Board to develop an accurate model of employee behavior. This, in turn, should permit the articulation of more accurate guidelines for determining the impact of unfair labor practices. One way in which our study can help is by indicating the normal parameters of vote changing in illegal elections. We have been able thus far to predict the vote of approximately 80 percent of the electorate regardless of the legal or illegal nature of the campaign.⁵⁶ If we can continue to do so in all elections, including those in which substantial unlawful conduct occurs, it would suggest that less than 20 percent of the electorate is susceptible to influence by the content of the campaign. Moreover, the number of people whose vote we are unable to predict will inevitably be greater than the number whose votes are changed by the employer's unfair labor practices. Some of our errors are for employees who we predicted would vote against the union but who vote for it. Of those who do vote against the union, some do so for reasons unrelated to the campaign. Respondents who we predicted would vote for the union but who vote for the company show no greater awareness of the campaign than those whose vote we predicted accurately. They do not have any greater tendency to report unfair labor practices, thus indicating that our inability to predict their vote is not related to their perception of the campaign or to their awareness of unfair labor practices. A Board decision, then, not to issue bargaining orders following elections in which the union's margin of defeat was greater than 20 percent would be quite consistent with our findings and with the policy of *Gissel*.⁵⁷

III. CONCLUSION

The Board is currently in an unenviable position. It has been directed by the courts to be more specific about the impact of employer misconduct before issuing a bargaining order. But the degree of specificity required is unclear and the Board is incapable of making detailed findings about the impact of unfair labor practices. Neither changes in

enough to insure the statistical significance of any differences among them. In view of the small sample of all employees whose votes appear to be affected by unfair labor practices, we do not expect to be able to make meaningful findings for demographic subgroups, although we shall continue to test for them.

⁵⁶ See Getman, Goldberg & Herman, *supra* note 50. As our sample gets larger and the number of prediction errors thereby increases we intend to engage in systematic analysis of deviant cases to determine the sources of error and to correct our mistakes.

⁵⁷ 395 U.S. at 612. Similarly, the Board could decide not to entertain election challenges in such cases.

the Board's investigative techniques nor existing scholarship can provide the Board with this ability. Voting studies such as ours may, when completed, provide some basis for making more informed decisions, but even then many of the questions that the Board is supposed to address may remain unanswered. What is the Board to do now?

One possibility would be to stop issuing bargaining orders altogether on the theory that there exists no empirical basis on which to find in any case that the employer's conduct prevented the expression of majority employee sentiment for union representation. On the other hand, it can fairly be said that there presently exist no empirical data that conclusively disprove the Board's assumptions as to impact, and the Supreme Court plainly contemplated the issuance of bargaining orders when serious or numerous unfair labor practices are committed. It might also be argued that elimination of the possibility of a bargaining order would encourage the commission of unfair labor practices and that, when employees are in fact coerced by employer conduct, there is no other effective remedy.⁵⁸

Perhaps the most prudent course for the Board is to proceed cautiously in the issuance of bargaining orders, especially when the margin of union defeat is substantial. Second, the Board should simplify its guidelines for issuing a bargaining order, declining the judicial invitation to take into account the particular characteristics of the employees and employer so long as there is no statistical evidence that they are relevant. The Board should also use scientific studies of political voting behavior and, as it becomes available, field research in Board elections.⁵⁹ To the extent that the Board feels that political voter studies are inapposite or voting studies such as ours are misleading, it should articulate its reasons for so concluding. The courts in turn should be realistic in reviewing bargaining order decisions. Specific findings as to impact are not possible and should not be required. The most that can be asked for is a reasoned explanation of the Board's conclusions, taking into account what is known about voting behavior.

⁵⁸ Indeed, some observers have questioned the efficacy of the bargaining order when it stands alone, and have urged that it be accompanied by back pay to compensate employees for the benefits lost by the employer's refusal to bargain. *See International Union of Elec. Workers v. NLRB*, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970); *St. Antoine, A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039 (1968).

⁵⁹ Chairman Miller recently made an effort to do this. *Allis-Chalmers Mfg. Co.*, 194 N.L.R.B. No. 150, 79 L.R.R.M. 1148 (Jan. 14, 1972) (concurring).