OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 99-8 November 10, 1999

TO: All Regional Directors, Officers-in-Charge And Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Guideline Memorandum Concerning *Gissel*

I. Introduction

In *NLRB v. Gissel Packing Co.*,[1] the Supreme Court upheld the Board's authority to issue a remedial bargaining order based on union authorization cards from a majority of employees rather than an election. Such relief is appropriate when the employer commits unfair labor practices so serious that it is all but impossible to hold a fair election even with traditional Board remedies. Over the years, some of the circuit courts of appeal considering whether to enforce Board *Gissel* orders have differed with the Board's approach. In several recent decisions, the Board has explicated its views regarding the factors, including those factors emphasized by the circuit courts, relevant to determining whether a *Gissel* bargaining order is warranted. In Part II below, we identify and discuss these factors, which the Regions should rely on in determining whether to issue *Gissel* complaints. In Part III, we discuss recent problems with enforcement of Section 8(a)(1) *Gissel* cases. In order to develop a response on these issues, Regions are directed to submit to Advice all cases in which they wish to issue complaint seeking a *Gissel* order based solely on 8(a)(1) violations.

The courts have generally also accepted the propriety of interim *Gissel* bargaining orders under Section 10(j) of the Act. Where an employer's violations have precluded employees' choice regarding representation through the election process, use of Section 10(j) is particularly appropriate to preserve the effectiveness of the Board's final remedy. Accordingly, I have determined that Regions should consider 10(j) relief in all *Gissel* complaint cases and should submit each case to the Injunction Litigation Branch with a recommendation as to whether interim relief should be sought. In Part IV below, we discuss issues, particular to certain circuit courts, which the Regions should take into account in investigating and evaluating the propriety of interim *Gissel* relief.

II. The Factors Relevant to *Gissel*

A. The *Gissel* decision

In *Gissel*, the Supreme Court considered whether the Board had the authority to order an employer to bargain with a non-incumbent union on the basis of a union card majority. The Court recognized that, in some cases, "an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside."[2] Declaring that "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct,"[3] the Court rejected employer arguments that such a bargaining order would prejudice employees' Section 7 rights. The Court reasoned that "[a]ny effect will be minimal . . . for there 'is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed.'"[4]

The Court identified two situations (now known as category I and category II *Gissel* cases[5]) in which employer misconduct may warrant the imposition of a card-based bargaining order remedy. Category I cases are those "exceptional" cases involving "outrageous and pervasive unfair labor practices" where the unfair labor practices are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."[6] Category II cases are "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes."[7] In the latter cases, the Court held, the Board

> can properly take into consideration the extensiveness of an employer's unfair [labor] practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board 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, then such an order should issue. . ."[8]

B. The Board's Application of *Gissel*

1. Category I Cases

The category I *Gissel* case is rare. As stated above, it is confined to cases where an employer's unfair labor practices are "outrageous" and "pervasive" and have made the holding of a fair election impossible even with traditional Board remedies. The Board has found Category I misconduct where an employer, in response to a union request for recognition, discharged all, or a substantial portion, of the entire bargaining unit and made it clear to employees that the reason for the discharges was the employees' support for the union;[9] or where the employer shut down the unit and discharged the employees in retaliation for their union activities.[10]

Although the practical impact of a designation as Category I or II may seem minimal,[11] there may be some benefit to litigating a *Gissel* case as a category I case when the level of employer misconduct appears to be extraordinarily egregious. In this regard, the D.C. Circuit has held that the Board's decision to issue a *Gissel* bargaining order in Category I cases is entitled to greater deference.[12]

2. Category II cases

In Category II cases, which comprise the vast majority of *Gissel* cases, the Board determines that the employer misconduct, though not as extraordinary or pervasive as in a Category I case, is sufficiently serious that it will have a tendency to undermine the union's majority strength and make a fair election unlikely. As the Supreme Court instructed, the Board may "take into consideration the extensiveness of an employer's unfair [labor] practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future."[13] A review of recent Board *Gissel* cases demonstrates that the Board examines a number of criteria relevant to these issues in determining whether to impose a *Gissel* bargaining order remedy:

- the presence of "hallmark" violations
- the number of employees affected by the violation -- either directly or by dissemination of knowledge of their occurrence among the workforce
- the size of the bargaining unit
- the identity of the perpetrator of the unfair labor practice
- the timing of the unfair labor practices
- direct evidence of impact of the violations on the union's majority
- the likelihood the violations will recur
- the change in circumstances after the violations

These factors are discussed in more detail below. When investigating a charge containing a potential *Gissel* allegation, the Regions should adduce evidence concerning, and evaluate the warrant for *Gissel* in light of, these factors.[14] Likewise in any litigation of a *Gissel* case, the record should include evidence and argument demonstrating that a *Gissel* remedy is appropriate

under these factors.[15]

a. Presence of "hallmark" violations

Certain employer violations are consistently regarded by the Board and the courts as highly coercive of employee Section 7 rights. These violations, sometimes referred to as "hallmark" violations, will support the issuance of a *Gissel* bargaining order unless some significant mitigating circumstance exists.[16] Hallmark violations include plant closure[17] and threats thereof,[18] unlawful discharge of union adherents,[19] threats of job loss[20] or the granting of significant benefits to employees.[21] The gravity of these types of violations makes them likely to have "a lasting inhibitive effect on a substantial percentage of the work force,"[22] thus precluding a fair election even with traditional Board remedies. However, as further discussed in Part III, below, at least two circuit courts have questioned the issuance of *Gissel* bargaining orders based solely on the granting of benefits.

As detailed below, however, even when "hallmark" violations occur, other factors, such as the proportion of the unit directly affected or informed about the violation, or the size of the unit must also be considered. Moreover, steps that ameliorate the impact of the violations may diminish the need for *Gissel* relief.[23]

b. The number of employees affected by the violations -- either directly or by dissemination of knowledge of their occurrence among the workforce

Central to determining whether violations warrant *Gissel* relief are the number of employees directly affected by the violations. . . .[and] the extent of dissemination among employees."[24] Where a substantial percentage of employees in the bargaining unit is directly affected by an employer's serious unfair labor practices, the possibility of holding a fair election decreases.[25] Thus, discriminatory mass layoffs or discharges of most, if not all, employees in a unit are inherently pervasive.[26] So too are unlawful across-the-board wage increases or other grants of benefits and unlawful threats or promises of benefits made at captive audience meetings.[27] Where only a small portion of a unit is affected, however, even hallmark discharges may be insufficient to warrant *Gissel* relief.[28]

Another way of examining pervasiveness is to consider how widely disseminated is knowledge of the violations among the work force.[29] Even discrimination directed toward one employee, if widely disseminated, may support the need for a *Gissel* bargaining order.[30] The manner of carrying out unlawful discrimination may also indicate a greater likelihood that the violation will have an inhibitory effect on other unit employees. Thus, where an employer overtly demonstrates its retaliatory motive for unlawful discrimination, the Board can conclude that the inhibitory impact of such violations is accentuated.[31] Similarly, where an employer carries out discrimination in a public manner, i.e., where it clearly appears that the discrimination is intended to "send a message" to other employees, the Board may conclude that the violation was widely disseminated to other employees.[32]

In contrast, the Board will not issue a *Gissel* bargaining order if the evidence shows that a substantial portion of the bargaining unit was unaware of the employer's unfair labor practices. This situation may arise in the case of threats of discharge or plant closure directed to just a small number of employees,[33] or where the employees were not aware that the discriminatee was a leading union activist.[34]

c. Size of the bargaining unit

The Board will also consider the size of the unit to determine whether an employer's serious misconduct had a pervasive effect on the workforce which precludes the effective use of traditional remedies. The Board assumes that employer unfair labor practices will have a more coercive effect on a smaller unit of employees: widespread knowledge of the violation is more likely and only a few employees can make the difference between a union's majority and minority support.[35] In contrast, the Board may deny a *Gissel* in a large unit, even in the face of "hallmark" unfair labor practices.[36]

d. Identity of the perpetrator of the unfair labor practice

The Board will also consider the management level of the perpetrators of the unfair labor practices in evaluating the need for a *Gissel* bargaining order. The Board has stated that "[t]he severity of the misconduct is compounded by the involvement of high-ranking officials."[37] The Board has observed that "[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."[38]

This is not to say that the Board will deny a *Gissel* bargaining order when the unfair labor practices are committed only by first-line supervisors. In this regard, the Board has noted that "the words and actions of immediate supervisors may in some circumstances leave the strongest impression."[39]

e. The timing of the unfair labor practices

The Board often highlights the timing of the unfair labor practices to justify the imposition of a *Gissel* bargaining order. An employer's swift reaction to union activity is an indication of the coercive effect of unlawful conduct and the effect of unfair labor practices is increased when the unlawful conduct begins "on the Employer's acquiring knowledge of the advent of the Union. . . ."[40] Similarly, an employer's continued misconduct after the holding of a representation election will further diminish the effectiveness of traditional remedies.[41]

f. Direct evidence of impact of the violations on the union's majority

A *Gissel* remedy may also be supported if the record reveals actual damage to the union's card majority such as a discrepancy between the number of card signers and the number of votes cast for the union in an election.[42] Other evidence of actual loss includes employee revocation of union cards or a marked fall-off of employee participation in union activities such as attendance at union meetings, distribution of literature, wearing union paraphernalia.

On the other hand, the Board has also held that traditional remedies may be insufficient to correct an employer's violations even where a union subsequently obtains a card majority[43] or even where the union might ultimately be certified in an unresolved Board election.[44] Regions should be aware, however, that this view is not universally accepted by the courts of appeals (see discussion at IV.B.3 below).

g. The likelihood the violations will recur

The *Gissel* determination turns not only on the extensiveness of the past violations but also the likelihood of their recurrence in the future.[45] The Board has held that post-election violations evidence a strong likelihood that unlawful conduct will recur in the event another organizing effort occurs in connection with a Board-ordered re-run election.[46] Moreover, the violations may themselves demonstrate the tenacity of an employer's commitment to thwart the union and permit the inference that violations are likely to recur.[47]

h. Change in circumstances after the violations

Gissel respondents typically move the Board to consider evidence of a change in circumstances since the administrative hearing which, they argue, would support the denial of a bargaining order. The change in circumstances which they believe should obviate the need for a *Gissel* bargaining order includes the passage of time since the violations occurred and the turnover of employees or management.[48] The Board generally denies respondents' motions to reopen the record to consider such evidence.[49] However, while denying the motion, the Board generally discusses the evidence as proffered and provides a full discussion as to whether such changes would mitigate the need for a *Gissel* bargaining order.[50]

Resort to 10(j) proceedings in *Gissel* cases, as discussed in Part IV.A below, may minimize the delay that permits changed circumstances to become an issue in *Gissel* cases. However, in those cases where the issue is raised, the Regions must be

prepared to argue, in rejecting a respondent's offer of proof, why the evidence offered would not mitigate the need for a *Gissel* bargaining order.

III. *Gissel* and Section 8(a)(1) violations

Gissel cases that involve only allegations of Section 8(a)(1) present a unique problem and should, henceforth, be submitted to Advice on whether to issue a *Gissel* complaint. These cases generally involve either threats of plant closure, or promises or grants of benefits, or a combination of both. Historically, the Board, with court approval, has considered these violations of the "hallmark" variety which, even in the absence of Section 8(a)(3) misconduct, may be sufficient to warrant the need for a *Gissel* bargaining order.[51] However, the viability of these 8(a)(1) *Gissel*s has become less certain in recent years, as several of the courts of appeals have not accepted the Board's view of these violations as "hallmark" and declined to enforce the Board's decisions.

For instance, the Sixth and D.C. Circuits have questioned the notion that an unlawful grant of benefits is a "hallmark" violation which may justify the imposition of a *Gissel* bargaining order. In *DTR Industries, Inc.*,[52] the Sixth Circuit indicated that it does not consider an unlawful wage increase to be a hallmark violation. And, in *Skyline Distributors*, the D.C. Circuit stated that there was "almost no judicial authority supporting a *Gissel* bargaining order based solely on the grant of economic benefits."[53]

In addition, in several cases in which the Board relied on unlawful threats of plant closure to support a *Gissel* order, the Board failed to obtain enforcement of the *Gissel* order because the courts disagreed that the employers' statements were unlawful threats, finding them instead to be protected speech under Section 8(c) of the Act.[54]

In at least one recent case, the Board issued a *Gissel* bargaining order based only on Section 8(a)(1) threats of plant closure and unlawful grants of benefits.[55] The Board has yet to fully address the implications of these decisions, however. In order to develop a coordinated response to the positions taken by the courts, these cases should be submitted for advice on the merits of whether to issue a *Gissel* complaint.

IV. Interim *Gissel* Orders under Section 10(j)

A. The Effectiveness of *Gissel* 10(j)s

From FY 1990 through FY 1998, the Board issued decisions in 119 ULP cases involving a request for a *Gissel* bargaining order. In a comparable nine year period, however, the Board sought a Section 10(j) interim *Gissel* bargaining order in only 68 cases. Thus, Regions have issued and litigated dozens of *Gissel* unfair labor practice complaints without the benefit of parallel 10(j) proceedings.

Those benefits can be substantial. In 69% of the 68 10(j) cases (47 out of 68 cases), the injunction case was resolved favorably, either through settlement (28 cases) or a favorable decision by a district court (19 cases).[56] Further, in only two of the favorably resolved 10(j) cases did the underlying ULP case go before a circuit court for Section 10(e)-10(f) enforcement of the Board's order.[57] Thus, in many cases, with 10(j) relief, the entire underlying labor dispute can be resolved short of the full litigation through circuit court enforcement of a final Board order.

In contrast, absent 10(j) relief, enforcement of a *Gissel* bargaining obligation is often delayed for several years as the case is litigated before the Board and circuit courts. During that time, "the union's position in the plant may have already deteriorated to such a degree that effective representation is no longer possible."[58] Legal commentators have noted that an ultimate *Gissel* bargaining order issued by the Board often does not produce a viable and enduring bargaining relationship.[59] Lengthy enforcement litigation also leaves the Board's *Gissel* order vulnerable to an employer's passage of time and changed circumstances defenses.[60] Thus, it appears that the most effective and successful vehicle for gaining *Gissel* relief includes petitioning a district court for an interim bargaining order under Section 10(j) soon after an administrative complaint issues.[61]

Accordingly, whenever a Region is investigating the propriety of issuing a *Gissel* complaint, it should also investigate and

consider the propriety of seeking a 10(j) *Gissel* order. Any case in which a Region issues a *Gissel* complaint should be submitted to the Injunction Litigation Branch, Division of Advice, with a recommendation regarding Section 10(j) *Gissel* relief.[62]

In evaluating the propriety of 10(j) *Gissel* relief, the Regions should consider not only the criteria discussed above relevant to the issuance of a *Gissel* complaint but should also be mindful of the treatment accorded *Gissel* bargaining order remedies by the circuit court in which the 10(j) case would be litigated. Issues specific to the circuit courts are discussed below.

B. Circuit Court Considerations

1. Criticism of the Board's failure to articulate the need for a *Gissel* bargaining order

The Second, Fourth, Sixth and D.C. Circuits have expressed dissatisfaction with the level of the Board's discussion and analysis of the need for a *Gissel* order in lieu of traditional non-bargaining order remedies.[63] Thus, in evaluating and litigating a *Gissel* 10(j) case, the Regions should consider the evidence relevant to the *Gissel* factors discussed in Part II, above, and explain how the evidence supports the need for a *Gissel* bargaining order.

In particular, these courts criticize the Board for failing to consider or explicate why traditional remedies would not suffice to ensure a fair election.[64] The Regions should therefore specifically explain why traditional Board remedies will not suffice to remedy an employer's serious and pervasive unfair labor practices. In this regard, the Regions may focus on the particular nature of the violations, or the circumstances in which they were committed, to demonstrate why traditional remedies will not suffice to allow the Board to conduct a free and fair election untainted by the effects of the employer's unfair labor practices.

2. Requiring proof of a "causal connection"

The Sixth and Fourth Circuits have suggested the necessity in *Gissel* cases for proof of a "causal connection" between the unfair labor practices and the inability to hold a fair election.[65] Thus, in *M.P.C. Plating, Inc. v. NLRB*, the Sixth Circuit held that, to justify a *Gissel* bargaining order, the Board "must make factual findings and must support its conclusion that there is a causal connection between the unfair labor practices and the probability that no fair election could be held."[66]

Although this requirement is arguably inconsistent with the test as enunciated in *Gissel*, which spoke of violations that "have the *tendency* to undermine majority strength and impede the election processes,"[67] it is nevertheless binding on district courts which sit in these circuits. In our view, the type of evidence required to meet this standard is akin to "impact" evidence adduced in typical 10(j) proceedings. Thus, in order to demonstrate that an interim *Gissel* bargaining order under Section 10(j) is "just and proper" and necessary to prevent "irreparable harm," Regions can adduce evidence to prove the adverse effects of the unfair labor practices on employee support for the union, including, where available, the actual loss of majority support.[68] Therefore, where such evidence is available, the Regions should continue to demonstrate the actual adverse impact of the violations upon the union's majority support in both the ULP proceeding and the 10(j) litigation.

3. Whether a union's success in obtaining or holding employee support after an employer's unfair labor practices negates the need for a *Gissel* bargaining order

Some courts have upheld the Board's view that traditional remedies may be insufficient to correct an employer's violations even where a union subsequently obtains a card majority[69] or even wins a representation election.[70] These courts have relied upon the egregiousness of the unfair labor practices, the employer's continued misconduct, the effect of cumulative misconduct and the avoidance of further delay from ordering a rerun election instead of an immediate bargaining order.[71] In contrast, the Fourth, Sixth and Eighth circuits have held that a union's continued success was proof that a fair election could be held.[72] The Regions should continue to adhere to the Board's view when issuing *Gissel* complaints which may ultimately be litigated in these courts.[73] However, when evaluating their *Gissel* cases for the propriety of seeking 10(j) relief in any district court which sits in the Fourth, Sixth or Eighth circuit, the Regions should consider this issue and address it in their 10(j) memorandum.

IV. Conclusion

Any questions regarding the implementation of this memorandum should be directed to the Division of Advice; questions regarding issuance of a complaint should be addressed to the Regional Advice Branch; questions regarding Section 10(j) *Gissel*s should be addressed to the Injunction Litigation Branch.

/s/
F. F.

cc: NLRBU
Release to the Public

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[1] **395 U.S. 575 (1969).**

[2] **395 U.S. at 610.**

[3] **Id. at 612 (footnote omitted).**

[4] **Id. at 612, n. 33 (citation omitted).**

[5] **See *M.J. Metals Products, Inc.*, 328 NLRB No. 170, slip op. at 1 (August 10, 1999).**

[6] ***Gissel*, 395 U.S. at 613-614.**

[7] **Id. at 614.**

[8] **Id. at 614-615.**

[9] ***Cassis Management Corp.*, 323 NLRB 456, 459 (1997), supplemented by 324 NLRB 324 (1997), enfd. mem. 152 F.3d 917 (2d Cir. 1998), cert. denied 160 LRRM 2192 (1998)(discharge of entire unit); *U.S.A. Polymer Corp.*, 328 NLRB No. 177 (August 24, 1999) numerous independent violations of Section 8(a)(1), unlawful layoff of 45% of the unit employees, including 9 of the 10 members of the employees' organizing committee and retaliatory conduct against employees who testified on behalf of the General Counsel at the unfair labor practice hearing).**

[10] ***Allied General Services*, 329 NLRB No. 58 (September 30, 1999).**

[11] **At one time the Board interpreted the *Gissel* decision as authorizing the Board to issue bargaining orders in response to category I level violations even in the absence of a prior union card majority. See *United Dairy Farmers Cooperative Assn*, 257 NLRB 772 (1981) and *Conair Corp.*, 261 NLRB 1189 (1982). The Board, however, abandoned this approach in *Gourmet Foods*, 270 NLRB 578 (1984).**

[12] **See *Power, Inc. v. NLRB*, 40 F.3d 409, 422 (D.C. Cir. 1994).**

[13] ***Gissel*, 395 U.S. at 614.**

[14] **Of course, the Region must also determine whether the union obtained a valid card majority.**

[15] **Summary judgment motions containing a *Gissel* allegation should conform to the requirements set forth in *Allied General Services*, 329 NLRB No. 58, slip op. at 3 (September 30, 1999).**

[16] **See, e.g., *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-13 (2d Cir. 1980); *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 4 (July 27, 1999).**

[17] ***NLRB v. Jamaica Towing*, 632 F.2d at 212, citing, inter alia, *Frito-Lay, Inc.*, 232 NLRB 753, 755 (1977), enf'd as modified, 585 F.2d 62 (3d Cir. 1978).**

[18] A threat of plant closure "is the one serious threat of economic disadvantage which is wholly beyond the influence of the union or the control of the employees." *NLRB v. Jamaica Towing*, 632 F.2d at 213. Accord: *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301-1302 (6th Cir. 1988) and the cases cited therein. Indeed, in *Gissel*, the Supreme Court noted that threats of plant closure are demonstrably "more effective to destroy election conditions for a longer period of time than others." 395 U.S. at 611, n. 31. Thus, repeated plant closure threats--alone--were held to warrant a remedial bargaining order in one of the cases comprising the *Gissel* decision. See *NLRB v. The Sinclair Glass Co.*, 397 F.2d 157 (1st Cir. 1968), affd. in *Gissel*, 395 U.S. at 615.

[19] The discharge of union activists is conduct which "'goes to the very heart of the Act' and is not likely to be forgotten. . . . Such action can only serve to reinforce employees' fear that they will lose employment if they persist in union activity.'" *M.J. Metal Products, Inc.*, 328 NLRB No. 170, slip op. at 2, citing *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941). See also *NLRB v. Davis*, 642 F.2d 350, 354 (9th Cir. 1981)(employees are unlikely "to miss the point that backpay and offers of reinstatement made some 9 to 11 months after the discharge does not necessarily compensate for the financial hardship and emotional and mental anguish apt to be experienced during an interim period of unemployment.").

[20] *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enf'd mem. 47 F.3d 1161 (3d Cir. 1995).

[21] The Board has noted that unlawfully granted benefits "are particularly lasting in their effect on employees and difficult to remedy by traditional means . . . not only because of their significance to the employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees." *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir.), cert. denied 515 U.S. 1158 (1995).

[22] *NLRB v. Jamaica Towing, Inc.*, 632 F.2d at 213.

[23] *Masterform Tool Co., Cylinder Components, Inc.*, 327 NLRB No. 185, slip op. at 3 (March 30, 1999)(*Gissel* remedy denied where certain 8(a)(1) violations were dismissed and employer recalled 6 of 7 unlawfully laid off employees after three months).

[24] *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 3.

[25] See, e.g., *M.J. Metal Products, Inc.*, 328 NLRB No. 170, slip op. at 1 (noting that 8(a)(3) discharges constituted more than 25% of the unit); *Bonham Heating & Air Conditioning, Inc.*, 328 NLRB No. 61, slip op. at 2 (May 19, 1999)(noting that 4 of 7 unit employees, or 40%, were unlawfully laid off); *General Fabrications Corp.*, 328 NLRB No. 166, slip op. at 2 (August 11, 1999) (noting that 7 of 31 unit employees suffered unlawful discrimination).

[26] See, e.g., *Allied General Services, Inc.*, 329 NLRB No. 58, slip op. at 3; *U.S.A. Polymer Corp.*, 328 NLRB No. 177, slip op. at 1; *Cassis Management Corp.*, 323 NLRB at 459 (1997).

[27] See, e.g., *Skyline Distributors*, 319 NLRB 270, 278-279 (1995), enf. denied in rel. part 99 F.3d 403, 410-412 (D.C. Cir. 1996) (grant of benefit); *Complete Carrier Services, Inc.*, 325 NLRB No. 96, ALJD slip op. at 3 and 5 (1998)(promise and grant of benefit, threat of plant closure); *Gerig's Dump Trucking, Inc.*, 320 NLRB 1017 (1996), enfd. 137 F.3d 936 (7th Cir. 1998)(grant of benefits). But as to the propriety of relying solely on Section 8(a)(1) violations for *Gissel* relief, see discussion Part III, infra.

[28] *Philips Industries, Inc.*, 295 NLRB 717, 718-719 (1989)(large size of unit diluted impact of unlawful discharges); *Pyramid Management Group, Inc.*, 318 NLRB 607, 609 (1995) (discrimination affected only small portion of unit).

[29] See *Holly Farms Corp.*, 311 NLRB 273, 282 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. on other grounds 517 U.S. 392 (1996).

[30] See, e.g., *Traction Wholesale Center Co.*, 328 NLRB No. 148, slip op. at 21 (July 28, 1999); *Coil-ACC, Inc.*, 262 NLRB 76, 83 (1982), enfd. 712 F.2d 1074 (6th Cir. 1983).

[31] See, e.g., *U.S.A. Polymer Corp.*, 328 NLRB No. 177, slip op. at 2.

[32] See *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 2 and 5 ("public and dramatic discharge" of discriminatee); *J.L.M. Inc. d/b/a Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993), enf. as mod. 31 F.3d 79 (2d Cir. 1994)(employer posts notice at facility that discriminatee would never work for the employer again).

[33] See *Blue Grass Industries*, 287 NLRB 274, 276 (1987) (bargaining order denied where no evidence that threats of plant closure were widely disseminated among employees in the unit).

[34] See *Munro Enterprises, Inc.*, 210 NLRB 403 (1974).

[35] See *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 5 (gravity of impact of violations heightened in relatively small unit of 25 employees); *Traction Wholesale* 328 NLRB No. 148, slip op. at 21 (same, 20 person unit); *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 694 (7th Cir. 1982)(impact of unfair labor practices increased in "small unit" of 42 employees); *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1243 (9th Cir. 1980)("probable impact of unfair labor practices is increased when a small bargaining unit . . is involved and increases the need for a bargaining order").

[36] See *Philips Industries*, 295 NLRB 717, 718-719 (1989) ("the effect of violations is more diluted and more easily dissipated in a larger unit" of 90 employees); *Beverly California Corp.*, 326 NLRB No. 30, slip op. at 4 (1998) (*Gissel* not warranted where unit was "sizeable" (92-103 employees) and violations generally did not affect a significant number of employees).

[37] *M.J. Metal Products, Inc.*, 328 NLRB No. 170, slip op. at 2, citing *Consec Security*, 325 NLRB No. 71, slip op. at 2 (1998). Accord: *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 481 (7th Cir. 1994).

[38] ***M.J. Metal Products, Inc.*, 328 NLRB No. 170, slip op. at 2. See also id. at n. 9 and cases cited therein; *Bakers of Paris*, 288 NLRB 991, 992 (1988), enfd. 929 F.2d 1427 (9th Cir. 1991)("The effect of unfair labor practices is increased when the unlawful conduct is committed by top management officials, who are readily perceived as representing company policy and in positions to carry out their threats . . . .").**

[39] ***Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 4. See also *C & T Manufacturing Co.*, 233 NLRB 1430 (1977) ("Threats from a so-called first-line supervisor, accompanied by use of the names of company officials . . . are as coercive upon the employees as if made by the company officials themselves . . . .").**

[40] ***Bakers of Paris*, 288 NLRB at 992. See also *M.J. Metal Products*, 328 NLRB No. 170, slip op. at 2; *State Materials, Inc.*, 328 NLRB No. 184, slip op. at 1 (August 31, 1999)(unfair labor practices began immediately after union organizing campaign commenced); *Joy Recovery Technology Corp.*, 320 NLRB 356, 368 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998)(employer's "prompt" response); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enf'd. 44 F.3d 516 (7th Cir.), cert. denied 515 U.S. 1158 (1995) (impact magnified by the fact that it occurred on the day after the union demanded recognition).**

[41] ***General Fabrications Corp.*, 328 NLRB No. 166, slip op. at 2, citing *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995).**

[42] **See *J.L.M., Inc.*, 312 NLRB 304, 305 (1993), enf. denied on other grounds, 31 F.3d 79 (2d Cir. 1994)("clear dissipation of union support" revealed by the stark drop from card majority of 128 to only 62 votes in election).**

[43] **See discussion and cases cited in *Weldun International*, 321 NLRB 733, 735-736 (1996), enf. denied in rel. part 165 F.3d 28, 1998 WL 681252 (6th Cir. 1998)(unpublished decision).**

[44] **See, *General Fabrications Corp.*, 328 NLRB No. 166, slip op. at 3, n. 17 (and cases cited herein).**

[45] **Id., slip op. at 1.**

[46] **Id., slip op. at 2; *Bonham Heating & Air Conditioning, Inc.*, 328 NLRB No. 61, slip op. at 3.**

[47] ***Bonham Heating & Air Conditioning, Inc.*, id., slip op. at 3 ("the depth of the Respondent's disregard for employee rights is evidenced by the extreme measures it took to defeat the employees' organizational efforts").**

[48] **The courts are almost unanimous in requiring that the Board consider the relevance of changed circumstances. See *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1170-1172 and cases cited at n. 4 (D.C. Cir. 1998). The Ninth Circuit is the only circuit which does not require the Board to consider post-hearing changed circumstances. See *NLRB v. Bakers of Paris*, 929 F.2d 1427, 1448 (9th Cir. 1991).**

[49] **See *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 5 and 7)(employee turnover and passage of time, citing *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990)).**

[50] **See, e.g., *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 5-7 and fn. 14; *State Materials*, 328 NLRB No. 184, slip op. at 1-2.**

[51] **See *NLRB v. So-Lo Foods, Inc.*, 985 F.2d 123, 125-126 (4th Cir. 1992)(*Gissel* bargaining order appropriate where employer accompanied grant of benefits with, inter alia, threats of plant closure); *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292 (6th Cir. 1988)(threats of plant closure with minor 8(a)(1)'s); *NLRB v. Ely's Foods*, 656 F.2d 290 (8th Cir. 1981)(threats of closure and promise of wage increase); and *NLRB v. Dadco Fashions*, 632 F.2d 493 (5th Cir. 1980) (threats of plant closure and other 8(a)(1)'s). See also *Tower Records*, 182 NLRB 382, 387 (1970), enfd. mem. 79 LRRM 2736 (9th Cir. 1972)(*Gissel* order based on wage increase: "It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed.").**

[52] **39 F.3d 106, 115 (6th Cir. 1994).**

[53] ***Skyline Distributors v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996). Apart from the court's refusal to uphold the *Gissel* bargaining order, Judge Edwards, writing for the majority, expressed profound disagreement with the Supreme Court's determination that the grant of a wage increase may constitute an unfair labor practice. See, id. at 408-409, discussing *NLRB v. Exchange Parts, Co.*, 375 U.S. 405 (1964).**

[54] **See *Be-Lo Stores v. NLRB*, 126 F.3d 268, 285-286 (4th Cir. 1997); *Kinney Drugs, Inc.*, 74 F.3d 1419, 1427-1428 and 1429 (2d Cir. 1996); *DTR Industries, Inc. v. NLRB*, 39 F.3d at 114; and *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1133-1136 (D.C. Cir. 1994).**

[55] **See *Complete Carrier Services, Inc.*, 325 NLRB No. 96 (1998)(*Gissel* bargaining order based on promise and grant of wage increase and threats of plant closure; no 8(a)(3) discharges or layoffs). See, also *Wallace Int'l*, 328 NLRB No. 3 (April 12, 1999)(threats of plant closure and promises of wage increases are "likely to have a pervasive and lasting deleterious effect on the employees' exercise of their Section 7 rights," and Board would "normally consider issuing a *Gissel* bargaining order in these circumstances," but denies *Gissel* based on "unjustified delay" in deciding the case.**

[56] **The 19 wins were 48% of the *Gissel* 10(j) cases litigated to a court decision in this period.**

[57] **The Board was successful before the courts in both those cases.**

[58] ***Seeler v. Trading Port, Inc.*, 517 F.2d 33, 37-38 (2d Cir. 1975).**

[59] **See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1795 (1993); see also Bethel, *The Failure of Gissel Bargaining Orders*, 14 Hofstra Lab. L.J. 423 (1997).**

[60] **Under the Board's Rules and Regulations, Section 102.94(a), whenever a district court grants an injunction under Section 10(j), the Board obligates itself to expedite the underlying unfair labor practice proceeding. Such expedition may further limit the development of changed circumstances in the administrative case.**

[61] **Such relief preserves the Board's ability to effectively remedy the violations either in the form of a remedial bargaining order or an election. See *Seeler v. Trading Port, Inc.*, 517 F.2d at 38. In one instance involving a decertification petition rather than an initial representation petition, the Board's final order was a re-run election rather than a *Gissel*-type bargaining order where the status quo had previously been restored through the grant of an interim bargaining order under Section 10(j). See *Eby-Brown Co. L.P.*, 328 NLRB No. 75, slip op. at 3-4 (May 26, 1999).**

[62] **The Region's submission may recommend against 10(j) proceedings. Of course, if a case poses a close issue on the merits of the *Gissel* bargaining order remedy, the Region may also submit the case to the Division of Advice on the merit issue.**

[63] **See, e.g., *Harpercollins San Francisco v. NLRB*, 79 F.3d 1324, 1333 (2d Cir. 1996); *Be-Lo Stores v. NLRB*, 126 F.3d 268, 282 (4th Cir. 1997); *NLRB v. Taylor Machine Products, Inc.*, 136 F.3d 507, 520 (6th Cir. 1998); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1173 (D.C. Cir. 1998).**

[64] **See cases cited in preceding footnote.**

[65] **See *M.P.C. Plating, Inc. v. NLRB*, 912 F.2d 883, 888 (6th Cir. 1990); *NLRB v. Taylor Machine Products, Inc.*, 136 F.3d at 519; and *Be-Lo Stores v. NLRB*, 126 F.3d at 282. But, in the Fourth Circuit compare *NLRB v. CWI of Maryland, Inc.*, 127 F.3d 319, 334 (4th Cir. 1997), where the court upheld the bargaining order and made no reference to the requirement of a causal connection.**

[66] **912 F.2d at 888.**

[67] **395 U.S. at 614 (emphasis added).**

[68] **See, e.g., *Seeler v. The Trading Port, Inc.*, 517 F.2d at 37-38. See also Part II.B.2.f, supra.**

[69] **See *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1175 (D.C. Cir. 1993), discussing *United Oil Mfg. Co., Inc. v. NLRB*, 672 F.2d at 1212 and *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 519 (3d Cir. 1981)(en banc), cert. denied 455 U.S. 940 (1982).**

[70] **See *Power, Inc. v. NLRB*, 40 F.3d 409, 423 (D.C. Cir. 1994).**

[71] **See, e.g., *Power, Inc. v. NLRB*, id.**

[72] **See *NLRB v. Weldun Int'l, Inc.*, 165 F.3d 28, 1998 WL 681252 (6th Cir. 1998)(unpublished order)(denying enforcement of *Gissel* bargaining order based, in part, on union's obtaining additional signed authorization cards after an unlawful layoff); *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 1000-1001 (4th Cir. 1979)(where union received "substantial majority" of unchallenged votes cast in election, no reasonable basis for finding that employer's misconduct made a fair election unlikely); and *Arbie Minerals Feed Co. v. NLRB*, 438 F.2d 940, 945 (8th Cir. 1971)(declining to enforce *Gissel* bargaining order where union obtained 11 of its 14 authorization cards after most of the employer's unfair labor practices).**

[73] **See discussion, infra., at Part II.B.2.f.**