



ST. MARY'S
UNIVERSITY

Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

2003

Dueling Democracies: Protecting Labor Representation Elections from Governmental Interference

John W. Teeter Jr

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Law Commons](#)

Recommended Citation

John W. Teeter, Jr., *Dueling Democracies: Protecting Labor Representation Elections from Governmental Interference*, 106 W. Va. L. Rev. 121 (2003).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact jllloyd@stmarytx.edu.

DUELING DEMOCRACIES: PROTECTING LABOR REPRESENTATION ELECTIONS FROM GOVERNMENTAL INTERFERENCE

*John W. Teeter, Jr.**

I.	INTRODUCTION	121
II.	GUARDING THE GUARDIANS: PROTECTING LABORATORY CONDITIONS FROM BOARD AGENT INTERFERENCE.....	125
III.	BEYOND <i>ATHBRO</i> : PROTECTING LABORATORY CONDITIONS FROM OTHER FORMS OF GOVERNMENTAL INTERFERENCE	126
	A. <i>Bad Beginnings: Origins of the Board’s Insensitivity to Governmental Interference</i>	127
	B. <i>Ambiguities and Equivocation: Lees and its Progeny</i>	128
	C. <i>The Costs of Equivocation: The Board’s Failure to Redress Governmental Interference</i>	137
IV.	A PROPOSAL TO SAFEGUARD LABORATORY CONDITIONS.....	145
V.	CONCLUSION.....	148

I. INTRODUCTION

We live in a democratic society.¹ We enjoy the right to choose our political leaders in secret ballot elections after having had the opportunity to pon-

* Professor, St. Mary’s University School of Law. A.B. 1982, University of Illinois at Chicago Circle; J.D. 1985, Harvard Law School. For Derek Teeter. I would like to express my gratitude to Juliana Fong, William B. Koffel, Deborah Letz, Paul V. Lyons, Aurelia Vincent, Jin Xu, and my students. Any errors are mine, but I’m willing to share.

¹ Providing a definitive interpretation of “democracy” would be far beyond my abilities. As Professor Dahl has explained, the concept now “is not so much a term of restricted and specific meaning as a vague endorsement of a popular view.” ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 2 (1989). At a minimum, however, it would embrace “the vision of people governing themselves as political equals, and possessing all the resources and institutions necessary to do so” *Id.* at 341. In a similar vein, Professor Unger reasons that “[t]he defining elements of democratic practice are the organized competition for the control of governmental power, the appeal to a mass electorate as the final arbiter of this contest, and the sanctity of guarantees that allow the opponents of the people in office to associate and to propagandize.” ROBERTO MANGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* 56 (1987); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 122 (1980) (“Discussions of the meaning of ‘democracy,’ no matter

der the competing candidates' promises, analyze the media's evaluations of the issues, and participate in the debate through our exercise of free speech. We cherish this means of self-governance, and we have engaged in probing critiques of perceived flaws in our electoral process and the need to protect it from the specters of corruption, apathy, and undue influence.²

In the private sphere, American workers also participate in a democracy, an industrial democracy where they decide whether they wish to be represented by a union for purposes of collective bargaining. Pursuant to the National Labor Relations Act (the "Act"),³ employers and unions wage robust campaigns to win the workers' allegiance, workers debate unionization among themselves, and the process commonly culminates in secret ballot elections supervised by the National Labor Relations Board (the "Board").⁴ These labor representation elections are designed to be freely held, majority rule contests analogous to campaigns for public office.⁵

This fundamental choice of whether to unionize is for the workers themselves to decide without any governmental favoritism or coercion. As the late Justice Douglas declared,

how scrupulous they are about noting the existence of some variations in understanding, seem invariably to include political equality, or the principle that everyone's vote is to count for the same, in their core definition.").

² For provocative examples of such critiques, see ISAAC D. BALBUS, *MARXISM AND DOMINATION: A NEO-HEGELIAN, FEMINIST, PSYCHOANALYTIC THEORY OF SEXUAL, POLITICAL, AND TECHNOLOGICAL LIBERATION* 359 (1982), asserting that "representative democracy both implies and reproduces a division between the active few and the passive many in which the latter become dependent on the former"; ROBERT A. DAHL, *ON DEMOCRACY* 188 (1998), concluding that democracies have demonstrated "an unexpected capacity for coping with the problems they confronted — inelegantly and imperfectly, true, but satisfactorily"; E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* 10 (1991), arguing that Americans "do little to promote the virtues that self-government requires or encourage citizens to believe that public engagement is worth the time"; WILLIAM F. STONE, *THE PSYCHOLOGY OF POLITICS* 264 (1974), acknowledging that "broad political participation may be impossible," but intimating that "the search for a truly participatory form of democratic society will continue"; UNGER, *supra* note 1, at 56, maintaining that "democracy as an ideal has only a precarious hold on reality"; Richard Davies Parker, *The Past of Constitutional Theory — and its Future*, 42 OHIO ST. L.J. 224, 249 (1981), exploring "the routine political ineffectiveness and quiescence — rooted in social and economic inequality — of masses of ordinary citizens."

³ 29 U.S.C. §§ 151-169 (2000).

⁴ *Id.* § 159(c)(1)(B) ("If the Board finds . . . a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.").

⁵ For excellent discussions of labor representation elections, see generally JULIUS G. GETMAN ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976); ROBERT E. WILLIAMS, *NLRB REGULATION OF ELECTION CONDUCT* (Labor Relations & Pub. Policy Series No. 8 rev. ed. 1985); Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

Any procedure requiring a "fair" election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By § 7 of the Act, employees have the right not only to "form, join, or assist" unions but also the right "to refrain from any or all of such activities."⁶

Justice Douglas therefore concluded that "[t]he Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a nonunion shop or for a nonunion shop and against a union."⁷ The Board, in other words, must not attempt to influence the workers' freedom of choice regarding unionization.

Democracy is seldom free from conflict, however, and labor representation elections are often marked by tension, controversy, and even blatant hostility between the opposing sides.⁸ As Professor Cox observes, "[t]he struggle for recognition is the bitterest phase of industrial relations."⁹ Such antagonism can result in a myriad of abuses, including a union's resort to voter intimidation¹⁰ or

⁶ NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973) (quoting 29 U.S.C. § 157); see also Bok, *supra* note 5, at 47 (reasoning that "any attempt on the Government's part to determine the grounds on which a union should be selected or rejected would seem inconsistent with a statutory scheme that appears to rely entirely upon the employees to decide this question.").

⁷ *Savair Mfg. Co.*, 414 U.S. at 280.

⁸ This turbulence has deep historical origins. As Cochran and Miller relate, nineteenth-century American employers "all shared an almost psychopathic fear of having to meet the representatives of labor on a footing of equal authority." THOMAS C. COCHRAN & WILLIAM MILLER, *THE AGE OF ENTERPRISE* 238 (rev. ed. 1961). These animosities continue to the present day. See, e.g., CHARLES B. CRAVER, *CAN UNIONS SURVIVE?* 5 (1993) (detailing "the great antipathy United States employers have exhibited toward the organizational rights of their employees."); Derek C. Bok, *Reflections on the Distinctive Character of American Labor Law*, 84 HARV. L. REV. 1394, 1409-10 (1971) ("Throughout the course of labor relations in America, large numbers of employers have made strong and persistent efforts to avoid union organization and collective bargaining."); Timothy A. Canova, *Monologue or Dialogue in Management Decisions: A Comparison of Mandatory Bargaining Duties in the United States and Sweden*, 12 COMP. LAB. L.J. 257, 259 (1991) ("In the United States, . . . the mere legitimacy of union representation is systematically undermined by virulent employer opposition."); Paul C. Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. ON LEGIS. 1, 9, 11 (1986) (discussing a "remarkable rise in illegal employer resistance to collective bargaining" and asserting that "the vast majority of employers do strongly oppose unionization in the campaign, and a substantial minority resort to dirty tactics to try to win the battle.").

⁹ Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 48 (1947).

¹⁰ See, e.g., Knapp-Sherrill Co., 171 N.L.R.B. 1547, 1548 (1968) (finding that workers had been threatened with possible job loss or other employment difficulties if they did not support the union); G.H. Hess, Inc., 82 N.L.R.B. 463, 465 (1949) (concluding that a union had threatened an antiunion worker with "economic reprisal" and possible bodily harm if she voted in the election).

an employer's reliance on bribes,¹¹ violence,¹² and unlawful termination of union supporters.¹³ The Board has long recognized its responsibility for preventing such tactics and assuring the basic fairness of labor representation elections.¹⁴ In its landmark *General Shoe Corp.*¹⁵ decision, the Board proclaimed:

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.¹⁶

Such laboratory conditions can be contaminated by public officials as well as by employers and unions. In fact, as I will demonstrate, government officials have repeatedly jeopardized laboratory conditions by campaigning in labor representation elections. Dueling democracies have been inadvertently created, where the labor-related electioneering of our democratically selected officials threatens to undermine the industrial democracy of the workplace.

My analysis of this dilemma contains both descriptive and prescriptive components. On the descriptive level, I will delineate the Board's consistent failure to articulate doctrines and remedies that would protect workers from possible confusion and coercion and preserve the integrity of these elections. Even in the isolated instances where the Board has sought to redress such prob-

¹¹ See, e.g., *Del Rey Tortilleria, Inc.*, 272 N.L.R.B. 1106, 1110 (1984) (promising wage increases if employees rejected union), *enforced*, 787 F.2d 1118 (7th Cir. 1986); *Borden Mfg. Co.*, 193 N.L.R.B. 1028, 1031 (1971) (vowing to be more generous in granting benefits to employees if the union lost the election); *Paterson Fire Brick Co.*, 93 N.L.R.B. 1118, 1119 (1951) (offering to rehire a laid-off employee if the union lost the election).

¹² See, e.g., *Garvey Marine, Inc.*, 328 N.L.R.B. 991, 994-95 (1999) (involving a supervising pilot threatening to attack prounion deck hands), *enforced*, 245 F.3d 819 (D.C. Cir. 2001).

¹³ See, e.g., *Schaeff Inc. v. NLRB*, 113 F.3d 264, 268 (D.C. Cir. 1997) (firing workers in response to organizational activity); *Morehead City Garment Co.*, 94 N.L.R.B. 245, 248 (discharging employees to discourage unionization), *enforced as modified per curiam*, 191 F.2d 1021 (4th Cir. 1951).

¹⁴ As Professor Pollitt has explained, "A bribed or coerced vote does not represent the free and informed choice by the voter, and when bribery or duress is shown to have occurred, the NLRB will set aside the results of an election and direct a new one." Daniel H. Pollitt, *The National Labor Relations Board and Race Hate Propaganda in Union Organization Drives*, 17 STAN. L. REV. 373, 393 (1965).

¹⁵ 77 N.L.R.B. 124 (1948).

¹⁶ *Id.* at 127.

lems, its reasoning has been too ambiguous and shortsighted to provide a lasting solution. Indeed, the Board's most recent opinions reveal its fundamental failure to eradicate the consequences of such governmental interference.

On the prescriptive level, I suggest a proposal that would recognize the right of public officials to speak out during labor campaigns while simultaneously shielding workers from both intended and unintended political pressure. My proposal entails three interrelated steps. First, the Board must assure workers of their right to vote in an autonomous and uncoerced manner. Second, the Board must clarify that public officials engaged in campaigning are simply stating their personal preferences rather than enunciating government policy. Third, the Board must reiterate its own institutional impartiality in the election and its dedication to vindicating the workers' freedom of choice.

II. GUARDING THE GUARDIANS: PROTECTING LABORATORY CONDITIONS FROM BOARD AGENT INTERFERENCE

In *General Shoe*, the Board frankly acknowledged that laboratory conditions could be spoiled "because of our fault" as well as the transgressions of employers, unions, and others.¹⁷ Indeed, in numerous cases the Board has confronted situations where its own agents have jeopardized an election's legitimacy. The leading opinion in this area is *Athbro Precision Engineering Corp.*,¹⁸ where a Board agent supervising the balloting was observed drinking beer with a union representative during a break in the voting.¹⁹ Based on this fraternization, the employer argued that the union's victory should be vacated because "the behavior of the Board agent gave an appearance of irregularity to the conduct of the election, thus departing from the standards of integrity which the Board seeks to maintain."²⁰

In a unanimous opinion, the Board ruled in the employer's favor even though there was no evidence that the Board agent's conduct had influenced the election's outcome. As the Board reasoned, it was necessary to invalidate the union's triumph and hold a new election because

[t]he Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning

¹⁷ *Id.*

¹⁸ 166 N.L.R.B. 966 (1967), *vacated sub nom. Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 67 L.R.R.M. (BNA) 2361 (D.D.C.), *acq. in result* 171 N.L.R.B. 21 (1968), *enforced*, 423 F.2d 573 (1st Cir. 1970).

¹⁹ *Id.* at 966.

²⁰ *Id.*

the election standards we seek to maintain, is a sufficient basis for setting aside that election.²¹

Through the implementation of this standard, the Board has sought to prevent the appearance of favoritism.²² Rooted in the need to preserve laboratory conditions, the Board strives to assure that even inadvertent misconduct by its agents does not cast a cloud of suspicion over the balloting. Although the Board has not been perfectly consistent in its application of *Athbro*,²³ it has invoked the basic holding to vacate numerous elections that raised the specter of Board agent partiality.²⁴ The *Athbro* doctrine is thus an important fixture in the Board's electoral jurisprudence,²⁵ but its reasoning should not be limited to cases of Board agent interference. As explained below, there are equally important instances of electoral interference by other types of government officials that must also be addressed.

III. BEYOND *ATHBRO*: PROTECTING LABORATORY CONDITIONS FROM OTHER FORMS OF GOVERNMENTAL INTERFERENCE

The Board, of course, is not the only governmental entity that could spoil laboratory conditions through the appearance of favoritism. In truth, numerous non-Board government officials have interjected their arguments in labor representation elections in ways that could engender confusion and coercion on the part of the voters. In contrast to *Athbro*, however, the Board's approach

²¹ *Id.*

²² See, e.g., 1 THE DEVELOPING LABOR LAW 469 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001) (explaining that "[t]he Board holds its agents to high standards of accuracy and neutrality in the conduct of elections and sets aside elections in which its agents do not meet those high standards.").

²³ For a critique of such vacillation, see John W. Teeter, Jr., *Keeping the Faith: The Problem of Apparent Bias in Labor Representation Elections*, 58 U. CIN. L. REV. 909, 911 (1990) (asserting the need for strict prophylactic adherence to the *Athbro* standard).

²⁴ See, e.g., *Jakel, Inc.*, 293 N.L.R.B. 615, 616 (1989) (setting aside election based on agent's improper removal of a ballot from the ballot bag); *Hudson Aviation Servs.*, 288 N.L.R.B. 870, 870 (1988) (vacating election based on agent's heated dispute with employer's assistant manager); *Laszo & Paulette Fono*, 273 N.L.R.B. 1326, 1328 (1984) (invalidation due to agent's failure to comply with the Board's Casehandling Manual); *Alco Iron & Metal Co.*, 269 N.L.R.B. 590, 591 (1984) (setting aside election where agent had union observer translate voting instructions for workers); *Glacier Packing Co.*, 210 N.L.R.B. 571, 572-73 (1974) (setting aside election for agent's emotional confrontation with employer's staff); *Kerona Plastics Extrusion Co.*, 196 N.L.R.B. 1120, 1120 (1972) (nullifying election results due to agent's premature closure of a voting session).

²⁵ As Judge Harry T. Edwards has summarized, "The Board attempts, as near as possible, to hold elections in a laboratory condition. This requires the Board and its agents to maintain an appearance of neutrality in conducting fair and impartial elections." *North of Mkt. Senior Servs., Inc. v. NLRB*, 204 F.3d 1163, 1167-68 (D.C. Cir. 2000) (internal citations omitted).

to these forms of official intrusion has been decidedly anemic. As a result, the right of workers to a free and untrammelled choice has been repeatedly undermined.

A. *Bad Beginnings: Origins of the Board's Insensitivity to Governmental Interference*

*Ormet Corp.*²⁶ is an early example of the Board's insensitivity toward possible governmental interference. In *Ormet*, the United Steelworkers of America challenged an election it lost to a rival union, the Baton Rouge Metal Trades Council.²⁷ The Board dismissed this challenge, however, and specifically rejected both of the Steelworkers' claims that public officials had undermined the voters' freedom of choice.²⁸ According to the Steelworkers, the local sheriff harassed its representatives, told citizens that they could obtain employment only on the sheriff's terms, and created a "reign of terror" by threatening black employees that they had better refrain from supporting the Steelworkers.²⁹ In a terse dismissal of this allegation, the Board simply concluded that "the Regional Director reported that no evidence . . . had been offered by the Steelworkers, and none was obtained by him in the course of his investigation."³⁰

The Steelworkers also alleged that the parish police jury had campaigned actively against them and instigated a negative "whispering campaign."³¹ This charge was also rebuffed, as the Board contended that only one employee had stated that a member of the police jury had contacted him and that he had simply been urged to support another union (the Aluminum Workers).³²

The *Ormet* Board's failure to support its opinion with detailed reasoning is troublesome. Given the Steelworkers' allegations that the sheriff had terrorized local black employees, the Board needed to undertake a more critical scrutiny of the regional director's claim that there was no substantiating evidence. This is particularly true in light of the election's context—the deep southern hamlet of Burnside, Louisiana in the 1950s.³³

²⁶ 122 N.L.R.B. 159 (1958).

²⁷ *Id.* at 160.

²⁸ *Id.* at 162.

²⁹ *Id.* at 160.

³⁰ *Id.* at 161.

³¹ *Id.* at 160.

³² *Id.* at 161.

³³ In other cases the Board has been more attentive to the racial dynamics of a contested election. See, e.g., *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 72 (1962) (vacating election in small Georgia town where employer distributed inflammatory racial propaganda). Much has been written on how the Board should react when ethnic hate speech is used as a form of campaign propaganda. See generally Nicholas A. Beadles & Christopher M. Lowery, *Union Elections Involving Racial Propaganda: The Sewell and Bancroft Standards*, 42 LAB. L.J. 418 (1991) (analyzing Board

The Board's cursory rejection of the Steelworkers' second allegation is equally suspect. The Board acknowledged that one employee had received a message from the police jury that he should vote for the Aluminum Workers, but the Board failed to explore the context of that communication. Being cornered by a law enforcement representative to vote a particular way in a hotly contested election with racial overtones raises obvious possibilities of coercion and would be sure to fuel speculation regarding the government's stake in the campaign. At a bare minimum, the Board should have investigated the nature of the communication and its possible inconsistency with the duty to assure a free and untrammled choice on the part of the workers.

B. Ambiguities and Equivocation: Lees and its Progeny

Following *Ormet*, the Board decided a series of cases purporting to protect workers from various forms of official interference. These decisions, however, have been marred by vagueness and a myopic inability to perceive the inherently problematic nature of political intrusions into representation elections. The Board has thus overturned elections in a few particularly egregious cases but has failed to adopt strong prophylactic measures to palliate the corrosive impact of steadily recurring governmental interference.

*James Lees & Sons Co.*³⁴ is the progenitor of this doctrinal equivocation. In *Lees*, there was a massive effort by local newspapers, townspeople, and public officials (including a mayor, a county attorney, and a city councilman) to oppose a union's organization drive at a Virginia textile mill.³⁵ This antiunion campaign included editorials, leaflets, letters, advertisements, and personal visits warning that the union's election could cause the mill to close.³⁶ Based on such sustained, multifaceted pressure, the Board ruled,

[W]e agree with the Regional Director that the numerous statements and conduct by various responsible groups and individuals in the community . . . reasonably conveyed the view to the employees that in the event of unionization the Employer would shut down its plant and other employers would not locate in the

policy and court decisions regarding racially based campaigning); Pollitt, *supra* note 14 (advocating dialogue as the best response to racial hate speech); Rudolf Sachs, *The Racial Issue as an Antiunion Tool and the National Labor Relations Board*, 14 LAB. L.J. 849 (1963) (calling for stricter Board regulation of racial speech); John W. Teeter, Jr. & Christopher Burnett, *Representation Elections, Anti-Semitism and the National Labor Relations Board*, 5 VA. J. SOC. POL'Y & L. 341 (1998) (examining the Board's failure to deter Judeopathic electioneering); Note, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243 (1963) (questioning the practicality of the *Sewell* standard).

³⁴ 130 N.L.R.B. 290 (1961).

³⁵ See *id.* at 290-91.

³⁶ *Id.* at 292-98.

community. Accordingly, we find that such conduct created a general atmosphere of fear and confusion which precluded the holding of a free election. We shall, therefore, set the election aside and order a new election.³⁷

Lees was correctly decided, for the Board recognized that no electoral experiment could be legitimately conducted amidst "fear and confusion." Given the harsh warnings of plant closure from public officials, prominent businessmen, neighbors, and journalists, there was abundant evidence that the workers' ability to make a free choice had been imperiled. Furthermore, the Board correctly calibrated the standard for determining whether an election should be vacated, explaining that "it reasonably appears that the freedom of choice of the employees *could* have been interfered with."³⁸ To insist upon any higher standard of proof would make it inordinately difficult to demonstrate a breach of the requisite laboratory conditions.

Lees's precedential power was undermined, however, by the protean nature of the pressure in that case. The Board did not accentuate the public officials' participation in the antiunion campaign, and there is no indication how the Board would have ruled if the mayor, county attorney, and city councilman had acted alone. For that reason, *Lees* has not stood as a bulwark against possible governmental intimidation in labor elections.

Three years later, the Board echoed *Lees*'s ambiguities in *Utica-Herbrand Tool Division of Kelsey-Hayes Co.*³⁹ Here again public officials (including the mayor, local police officers, and members of the state legislature) joined forces with local media and influential citizens to blanket a small southern town with its antiunion warnings.⁴⁰ In conjunction with the employer, these community officials and civic leaders reiterated in "letters, home visits, leaflet distribution, radio newscasts and spot announcements, and newspaper editorials and advertisements" that a union victory would force the employer to relocate and result in local economic distress.⁴¹ The Board therefore concluded that such propaganda "created an atmosphere of fear of reprisal and loss of job opportunity" which "prevented the exercise of free choice in the election."⁴²

As in *Lees*, the political pressure did not take place in isolation but was supplemented by the lobbying of civic leaders and the media. The Board did,

³⁷ *Id.* at 291.

³⁸ *Id.* at 291 n.1 (emphasis added). As Bok explains, "judges and administrators have agreed that actual interference with an election need not be shown to establish a violation of the law; it is enough that the conduct in question *tends* to have these effects." Bok, *supra* note 5, at 42 (emphasis added).

³⁹ 145 N.L.R.B. 1717 (1964).

⁴⁰ *Id.* at 1717-20.

⁴¹ *Id.* at 1719-20, 1723-26.

⁴² *Id.* at 1719.

however, single out certain conduct by officials for specific disapproval. The Board remarked,

We note further the coercive elements present in the home visits of local police officers and the mayor of the city, and in the distribution of antiunion propaganda at all banks in the community. Such pressures, although not emanating from the Employer, exerted a coercive effect upon the employees' free choice and, in conjunction with [the other antiunion campaign tactics], form a basis for setting aside the election.⁴³

Yet, even here, there was significant ambiguity, for the Board neglected to specify whether it was the identity of the campaigners or the location of the electioneering that rendered the home visits coercive. It is commonly understood that management representatives cannot make campaign stops at an employee's domicile. As the Board stated in *Peoria Plastic Co.*,⁴⁴ "calling upon [workers] at their homes to urge them to reject a union" constitutes "conduct calculated to interfere with the free choice of a bargaining representative regardless of whether or not the employer's actual remarks were coercive in character."⁴⁵ *Utica-Herbrand* therefore failed to clarify the significance, if any, of the home visitors' status as public officials.

In *Ely & Walker*,⁴⁶ the Board continued this pattern of reaching a sensible result but through insufficient analysis. Here, the mayor of still another sleepy southern town and a member of the chamber of commerce were held to have coercively campaigned by telling workers they "would not have a union because the Respondent [employer] was opposed to it, that the Respondent would pay a lawyer \$1,000 a day to keep the Union out, and that it would do the employees no good to get a contract because the Respondent would merely 'sweat it out.'"⁴⁷ The trial examiner reasoned that these remarks violated the employees' rights because they "implied that the Respondent would not recognize and bargain with the Union in good faith and were calculated to instill in the minds of employees the futility of selecting the Union as their collective-bargaining representative."⁴⁸

The trial examiner's conclusion was sound, but he did not delineate the scope of his reasoning. It violates section 8(a)(1) of the Act for *any* representa-

⁴³ *Id.* at 1719-20.

⁴⁴ 117 N.L.R.B. 545 (1957).

⁴⁵ *Id.* at 547-48. For a concise discussion of this issue, see WILLIAMS, *supra* note 5, at 303-07.

⁴⁶ 151 N.L.R.B. 636 (1965).

⁴⁷ *Id.* at 650.

⁴⁸ *Id.* The Board affirmed the trial examiner's rulings with no elaboration on this aspect of the case. *See id.* at 637.

tive of the employer to imply that unionizing would be futile,⁴⁹ and no emphasis was placed on the mayor's position as a public official.⁵⁰ As in *Lees and Utica-Herbrand*, there was no concrete effort to analyze the potential perils posed by a government official's involvement in a labor representation campaign.⁵¹

In contrast, in *Richlands Textile, Inc.*,⁵² the administrative law judge ("ALJ") specifically emphasized the public position of an antiunion campaigner. In this case, Mohn, a member of the North Carolina House of Representatives, mailed the employer's work force a letter warning that a union victory would cause the plant's closure and that "hundreds of people . . . would lose their jobs."⁵³ After relating that Mohn was "a long-established businessman," a "prominent citizen," and a "member of the local establishment," the ALJ stressed the critical factor:

*But more importantly, Mohn was the elected state representative of the district and had held this position for 8 years. As such, it is apparent that a majority of those in the district regard Mohn as knowledgeable regarding matters that affect his constituents, and, as their representative, they believe that he is reasonably alert to protect their interests.*⁵⁴

The ALJ then held that the employer violated section 8(a)(1) of the Act by failing to repudiate Mohn's letter.⁵⁵ As he explained, "the Company in effect

⁴⁹ As 29 U.S.C. § 158(a)(1) (2000) provides, it is "an unfair labor practice" for management "to interfere with, restrain, or coerce employees in the exercise of the rights" to support or oppose unionization. Suggesting that it would be fruitless for workers to organize is commonly found violative of this provision. See, e.g., *Taylor Chair Co.*, 292 N.L.R.B. 658, 662 (1989) (employer stating he would not sign a contract with the union), *aff'd*, 899 F.2d 12 (5th Cir. 1990) (unpublished table opinion); *Trane Co.*, 137 N.L.R.B. 1506, 1510 (1962) (employer claiming he would unilaterally set wages regardless of the union's presence).

⁵⁰ Instead, the trial examiner noted the mayor's non-governmental importance, observing that he was an officer of the town's only bank and that the bank held mortgages on some of the workers' homes. *Ely & Walker*, 151 N.L.R.B. at 643.

⁵¹ This ambiguity is underscored by the Board's opinion in *Proctor-Silex Corp.*, 159 N.L.R.B. 598, 610-11 (1966), where the Board affirmed the trial examiner's ruling that a community business committee's coercive antiunion electioneering interfered with the workers' right to a fair election. *Id.* at 611. *Proctor-Silex* makes no mention of governmental officials serving on the committee, and so it is uncertain if the Board in *Lees and Utica-Herbrand* attached any importance to the political status of the management-side advocates in those cases.

⁵² 220 N.L.R.B. 615 (1975).

⁵³ *Id.* at 616-17. The ALJ stressed that Mohn "wrote in the full panoply of his office as state representative," using "the official governmental stationery and letterhead of the North Carolina Assembly." *Id.* at 618.

⁵⁴ *Id.* at 618 (emphasis added).

⁵⁵ *Id.* at 619.

acquiesced in and ratified by its silence and inaction the unqualified and unequivocal statement in Mohn's letter that he had been informed that the Company would begin closing the plant if the employees voted for the Union."⁵⁶ Again, Mohn's official status was key to the analysis:

Upon slight reflection, it would occur to a reader of the letter that a person of Mohn's responsibility in the community, and who was speaking to them as their elected state representative, would not state categorically that the Company would close the plant if the employees voted for the Union, unless he knew that this was the fact and the facts came from "the horse's mouth," so to speak [An] employee-reader of Mohn's letter may have concluded that not only did Mohn's information come from the Company but that the latter had suggested to Mohn that he inform his constituents of such fact.⁵⁷

Such logic is commendable, for it recognizes that a state official is not just "some Joe Doakes who had made a statement at the local coffee shop or in a grocery store."⁵⁸ To the contrary, a government representative's statements can be particularly problematic. Many workers will assume that the official has special access to information regarding the probable consequences of unionization. Furthermore, such workers may believe that the official is legitimately trying to protect their welfare and uphold the economic stability of the community. *Richlands Textile* is thus an encouraging case where the Board, for the first time, explicitly recognized the particularly coercive potential of governmental campaigning in representation elections.

The opinion, however, was not an unmitigated blessing. Although the Board fully adopted this aspect of the ALJ's recommended order, it did so without explicitly addressing his focus on Mohn's involvement. Furthermore, even the ALJ overlooked a fundamental reason why a public official's participation in labor representation campaigns can unduly interfere with the workers' freedom of choice. This, in essence, is the fear of governmental retaliation. Workers may understandably be loath to defy the stated preferences of a powerful politico in the midst of a heated struggle between management and labor. Indeed, such workers may suspect that a vote adverse to the official's interests could leave them with a vindictive foe in the halls of government.

Such distrust of government is a deeply ingrained component of our culture.⁵⁹ This trepidation transcends all demographic boundaries⁶⁰ and has grown

⁵⁶ *Id.*

⁵⁷ *Id.* at 618-19.

⁵⁸ *Id.* at 618.

⁵⁹ According to Professor Orren,

appreciably worse in recent decades.⁶¹ As Professor Orren concludes, “The public has not only lost faith in the ability of government to solve problems, but it has actually come to believe that government involvement will just make matters worse.”⁶²

It is therefore understandable that many workers could feel apprehensive when a government figure ventures into the labor campaign process. Given their lack of confidence in the fundamental integrity of such officials, employees might reasonably question whether disregarding a government representative’s electoral preferences could entail negative consequences.⁶³

The American republic was born in a climate of suspicion that persists to this day. “Distrust of government,” writes Samuel Huntington, “is as American as apple pie. It has historically been a central, continuing, and distinctive element of the American political tradition and the idea that people *should* trust their government is a radical departure from that tradition.”

Garry Orren, *Fall from Grace: The Public’s Loss of Faith in Government*, in *WHY PEOPLE DON’T TRUST GOVERNMENT* 77, 88-89 (Joseph S. Nye, Jr., et al. eds., 1997). On a related theme, social scientists have emphasized the critical role human psychology plays in political perceptions and participation. See generally CAROL BARNER-BARRY & ROBERT ROSENWEIN, *PSYCHOLOGICAL PERSPECTIVES ON POLITICS* (1985); *EXPLORATIONS IN POLITICAL PSYCHOLOGY* (Shanto Iyengar & William J. McGuire eds., 1993); HANS J. EYSENCK, *THE PSYCHOLOGY OF POLITICS* (1999); FRED I. GREENSTEIN, *PERSONALITY AND POLITICS: PROBLEMS OF EVIDENCE, INFERENCE, AND CONCEPTUALIZATION* (1969).

⁶⁰ Orren, *supra* note 59, at 84. As Orren explains, “Today’s public cynicism cuts across all categories—black and white, male and female, rich and poor Loss of faith in government has attached itself to every population group.” *Id.* It is noteworthy that among blue-collar workers, the average score on “Trust in Government” declined from 52 in 1964 to 25 in 1994 (on a scale of from 0 to 100). *Id.* at 86-87 tbl. 3-1.

⁶¹ Orren states:

Since 1964, for example, the number of Americans who feel that the government is run by a few big interests looking out only for themselves has more than doubled (to 76 percent), and the number who believe that public officials don’t care about what people think has grown from 36 percent to 66 percent. The number saying that quite a few people running the government are crooked increased from 29 percent to 51 percent.

Id. at 81.

⁶² *Id.*

⁶³ Whether an individual worker feels coerced by such political pressure will, of course, depend on the precise facts and personalities involved in a given case. As the late Professor Hayek understood, “[w]hether or not attempts to coerce a particular person will be successful depends in a large measure on that person’s inner strength” FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 138 (1960). As Cox attests, “[w]ords which may only antagonize a hard-bitten truck driver in Detroit may seriously intimidate a rural textile hand in a company village where the mill owners dominate every aspect of life.” ARCHIBALD COX, *LAW AND THE NATIONAL LABOR POLICY* 44 (Inst. of Indus. Relations, Monograph Series No. 5, 1960). Similarly, different employees will vary in their predispositions to submit to government authority. See, e.g., ERICH FROMM, *ESCAPE FROM FREEDOM* 21 (1941) (inquiring “how can we account for the attraction which submission to a leader has for so many today?”). Again, however, the key to remember is that the issue is whether

The Board, however, has not contemplated how the public's distrust of government, coupled with the intrusion of politicians in representation elections, could erode laboratory conditions. Instead of reflecting an emerging sensitivity to the perils of official coercion (real or perceived), the Board's opinions remain clouded with equivocation. *Columbia Tanning Corp.*⁶⁴ exemplifies this persistent institutional ambivalence.

In contrast to earlier cases, in *Columbia Tanning* the public official was campaigning on behalf of a union instead of management and the setting was northern rather than southern.⁶⁵ Here, the Massachusetts Commissioner of Labor sent immigrant factory workers from Greece a letter in their native tongue lauding the International Ladies' Garment Workers' Union as "a powerful and honest Syndicate" and a leader in defending employees' rights.⁶⁶ After the union was elected, the employer challenged the result on the grounds that workers could have confused the Commissioner of Labor's office with the Board and thereby failed to appreciate the Board's impartiality.⁶⁷ The Board's regional director rejected this objection, arguing that the letter was "merely an endorsement . . . by an official of the Commonwealth of Massachusetts" and that "it would be unreasonable to conclude" that it gave workers "the impression that the United States Government or the Board itself" supported the union.⁶⁸

The Board, however, overruled the regional director and invalidated the election. In language spawning conflicting interpretations, the Board decided that "the letter solicited and distributed by the [union] improperly suggests governmental approval" of its campaign.⁶⁹ This was clearly improper, for "no participant in a Board election should be permitted to suggest either directly or indirectly to the voters that this government agency endorses a particular choice."⁷⁰ The Board then explained how the commissioner's letter easily could have confused the workers regarding the Board's electoral neutrality. These employees (most of whom had recently arrived in America and about half of whom did not understand English) "in all likelihood were not familiar with the

such conduct *tends* to coerce workers, not whether a particular employee felt subjectively intimidated. See *supra* note 38 and accompanying text.

⁶⁴ 238 N.L.R.B. 899 (1978).

⁶⁵ See *id.* at 899.

⁶⁶ *Id.* at 899 & n.1.

⁶⁷ *Id.* at 899-900.

⁶⁸ *Id.* at 901.

⁶⁹ *Id.* at 900.

⁷⁰ *Id.* at 899-900.

complexities of state and federal jurisdiction over labor relations."⁷¹ For that reason

[t]hey could not be expected to discern readily the difference between the state "Department of Labor" and the Federal "National Labor Relations Board," particularly in light of the fact that both contain the word "Labor" in their titles. From the perspective of the Greek employees, both agencies could reasonably have been perceived as part of one "government" which was conducting the election. The potential for confusion eliminates the Board's appearance of impartiality and thereby interferes with the exercise of a free choice in the election.⁷²

The Board's reasoning is rather ambiguous. On one level, *Columbia Tanning* suggests a bold, prophylactic protection of workers from *any* governmental interference with their right to a free and untrammelled choice. Such is the import of the conclusion that "the letter . . . improperly suggests governmental approval" of the union.⁷³

When read in context, however, the opinion simply emphasizes that the Board's aura of impartiality must not be tarnished. The Board members' root concern was not necessarily with the impropriety of governmental partiality in the abstract, but only with the appearance of possible Board favoritism. As such, *Columbia Tanning* has done little to protect workers from the potentially coercive pressure of countless officials outside the Board.

This is regrettable, for the Board confronted a case ripe with potential intimidation. Recent immigrants, presumably with little understanding of our political structures and constitutional guarantees, could readily fear disregarding the strongly worded endorsement of the state's Commissioner of Labor, especially when the letter was printed on the Commissioner's governmental letterhead and would therefore seem to be issued in his official capacity. Furthermore, the likelihood of coercion was increased because, as the employer argued, the Commissioner exercised "a significant degree of control over the terms and conditions of employment in . . . Massachusetts, particularly over alien workers."⁷⁴ The Board's apparent focus on its own image of impartiality thus seems unduly parochial; the real grounds for invalidating the election should have been the possibilities of confusion and intimidation inherent in the Commissioner's statement.

⁷¹ *Id.* at 900.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 900 n.4 (alteration in original). In fact, the commissioner had the statutory responsibility "for administering wage and hour laws and health and safety provisions as well as those laws which make it illegal to employ aliens without work permits." *Id.*

The Board's parochialism was replicated by the Ninth Circuit in *Micronesian Telecommunications Corp. v. NLRB*.⁷⁵ In *Micronesian*, the employer appealed the Board's refusal to hold a hearing on its claim that the president of the Northern Marianas Senate and a local mayor fouled laboratory conditions by campaigning for the union.⁷⁶ Based on *Columbia Tanning*, the employer asserted that "employees' exercise of free choice is impaired when one party misleads voters to believe that that party's position has official governmental imprimatur."⁷⁷

The Ninth Circuit disagreed, however, and upheld the Board's order. The court opined:

The *Columbia Tanning* election was not invalidated by the Board merely because a state officer expressed support for the union, but because it could have easily appeared that the Board favored one side or the other. In this election, [the employer] did not claim that it appeared the NLRB favored one side or the other, nor did it otherwise demonstrate that the alleged misconduct interfered with the employees' exercise of free choice.⁷⁸

These arguments are of dubious worth. First, the Ninth Circuit failed to consider the foreseeable perplexity engendered when public officials participate in representation elections. Such campaigning can clearly mislead workers into believing that the Board, as well as the endorsing politico, supports one of the competing parties.⁷⁹ Second, the court concluded that the employer failed to demonstrate an interference with laboratory conditions, yet the Board had refused to hold a hearing where the employer might have established such a breach through testimony, cross-examination, and other supporting evidence.⁸⁰

⁷⁵ 820 F.2d 1097 (9th Cir. 1987), enforcing 279 N.L.R.B. 1114 (1986).

⁷⁶ *Id.* at 1102.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See, for example, *Ursery Cos.*, 311 N.L.R.B. 399, 399-400 (1993) (Oviatt, dissenting), for an elaboration on this theme. The majority and dissenting opinions in *Ursery* are discussed *infra* at notes 82-98 and accompanying text.

⁸⁰ Parties challenging an election are not automatically entitled to a hearing on their objections. As the Board has explained,

Section 102.69 of the Board's Rules and Regulations sets forth election procedures, including the handling of objections. It provides for the holding of a hearing when it appears to the Board that exceptions to the report of a Regional Director on objections raise substantial and material factual issues. In accordance therewith, the Board has held that unless substantial and material issues of fact are raised a request for a hearing will be denied. The Board has rejected the contention that a Respondent is entitled as a matter of right to a hearing on objections to an election. In order to prevent delay in election pro-

Third, it is disheartening that the court replicated the Board's blunder by failing to weigh the intrinsically coercive possibilities when public officials endorse sides in labor campaigns.⁸¹ Such potential intimidation may be particularly problematic in *Micronesian*, where the residents of a tiny, remote island commonwealth were confronted with the political arm-twisting of both a mayor and the president of their senate.

C. *The Costs of Equivocation: The Board's Failure to Redress Governmental Interference*

The timid, ambivalent nature of *Lees* and its progeny is more than just theoretically suspect; it has had adverse practical consequences for the health of industrial democracy. The Board's failure to recognize and address the inherent dangers of governmental interference has led it to uphold election results notwithstanding the clear likelihood of voter confusion or intimidation.

In *Ursery Cos.*,⁸² for example, the Board interpreted *Columbia Tanning's* ambiguities in a way that deprived workers of protection from political pressure. In *Ursery*, a member of the Connecticut House of Representatives wrote a letter endorsing the union, which the union reprinted on its stationery and distributed among the workers.⁸³ In a two-to-one opinion, the Board held

cedure the Board has uniformly refused to direct a hearing on objections unless the party supplies specific evidence of conduct which *prima facie* would warrant setting aside the election.

O.K. Van & Storage, Inc., 127 N.L.R.B. 1537, 1539 (1960), *enforced*, 297 F.2d 74 (5th Cir. 1961).

In analogous situations, this restrictive approach to hearings has been the focus of scholarly critique. See, e.g., WILLIAMS, *supra* note 5, at 427 ("By granting the party which has alleged that the election has been unfairly conducted an opportunity to subpoena witnesses, cross-examine the agent involved, and generally air the facts surrounding the claim of impropriety, the Board would do much to overcome the notion that it actually is partial in election matters.").

⁸¹ Serious institutional concerns are presented when the reviewing courts drift into complacency and fail to scrutinize and correct the errors and omissions of administrative decision makers. As Professor Frug has explained:

The judicial review model [of administrative law] assigns the role of police officer to the courts, and the model's ability to legitimate bureaucracy rests on this judicial role. Bureaucratic legitimacy is derived from the courts' own legitimacy: it is because we can trust the courts that we can trust the bureaucracy.

Geral Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1334 (1984) (both explicating and critiquing the judicial model and other justificatory paradigms of administrative power).

⁸² 311 N.L.R.B. 399 (1993).

⁸³ *Id.* at 399. Among other statements, the representative asserted that "the Union is powerful and wins for its members." *Id.* at 400.

that the letter did not violate laboratory conditions.⁸⁴ The majority first distinguished *Columbia Tanning* on the grounds that, in *Ursery*, the representative's title did not include the word "Labor," and his letter appeared only as a reduced reproduction on the union's letterhead.⁸⁵ The majority then argued that *Columbia Tanning's* main concern had been "whether and to what extent a document imitates a Board publication and under what circumstances it can be said that the Board or the United States favors one party to the election."⁸⁶ Finally, the majority extolled the workers' political sophistication, claiming that they should be able to distinguish between the Board and a state legislator.⁸⁷

As Board Member Oviatt explained in his dissent, such reasoning fails to consider the possible problems created by the representative's letter. Oviatt stressed that the employees understood little or no English and concluded that "the letter impermissibly suggests Government sanction of the union in the election."⁸⁸ Taken literally, Oviatt appeared to assert that an endorsement by *any* public official would taint the election and require vacature of the result. This reading is bolstered by Oviatt's emphasis that "the employees received what appears to be an official letter from a Connecticut representative endorsing the Union"⁸⁹

Unlike the majority, Oviatt recognized the limited understanding many employees have of the intricacies of federal law, state law, and the complex, multi-natured role of administrative agencies.⁹⁰ This, of course, would be of special concern among immigrant workers with a minimal grasp of English. In contrast to the majority's sanguine assurances – unsupported by any evidence – of the workers' understanding of our governmental institutions, Oviatt asserted:

[T]hese employees in all likelihood would not readily discern the distinction between Connecticut State government and the Board as an agency of the Federal Government [T]hese employees' possible unfamiliarity with the structure of Government creates the likelihood that the employees could have

⁸⁴ *Id.*

⁸⁵ *Id.* at 399.

⁸⁶ *Id.*

⁸⁷ *Id.* at 399 n.2.

⁸⁸ *Id.* at 399-400 (Oviatt, dissenting).

⁸⁹ *Id.* at 400 (Oviatt, dissenting).

⁹⁰ For a helpful historical overview of the evolving roles of administrative agencies in our democratic system of self government, see generally RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 24-41 (3d ed. 1999).

been misled as to the impartiality of the “government” in the election.⁹¹

Oviatt’s reasoning was compelling, for many Americans have little knowledge of how government operates and the practical and jurisdictional divisions within it. Even experienced attorneys can be bewildered by the administrative maze, its statutory origins, and its interrelationships with the three main branches of government.⁹² Furthermore, political scientists have identified “disturbing patterns” of misinformation that reveal “the public is ignorant about much of the detail of government and politics”⁹³ As examples, only thirty percent of respondents in a scientific study could identify both of their United States senators, and only twenty-nine percent could name their member in the House of Representatives.⁹⁴ More generally, Carpini and Keeter conclude:

Only 13 percent of the more than 2,000 political questions examined could be answered correctly by 75 percent or more of those asked, and only 41 percent could be answered correctly by more than half the public. Many of the facts known by relatively small percentages of the public seem critical to understanding – let alone effectively acting in – the political world: fundamental rules of the game; classic civil liberties; key concepts of political economy; the names of key political representatives; many important policy positions of presidential candidates or the political parties; basic social indicators and significant public policies. And for at least some measure of political knowledge, Americans appear significantly less informed than citizens of most other comparably developed nations. Hardly the stuff of informed consent, let alone of a working representative democracy.⁹⁵

In the face of such pervasive misunderstandings, the linguistically challenged workers in *Ursery* could easily have thought that the state representative was speaking on behalf of “the government” and that “the government” encom-

⁹¹ *Ursery*, 311 N.L.R.B. at 400 (Oviatt, dissenting).

⁹² Some years ago, a licensed attorney complained bitterly that he could not locate a particular agency regulation in the United States Code Annotated. His eyes shined with a sense of mystical discovery as I revealed the existence of the Code of Federal Regulations.

⁹³ MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 101, 17 (1996).

⁹⁴ *Id.* at 94 tbl. 2.11. Furthermore, “many Americans believe the president has the power to adjourn Congress at his will (35 percent), to suspend the Constitution (49 percent), and to appoint judges to the federal courts without the approval of the Senate (60 percent).” *Id.* at 99.

⁹⁵ *Id.* at 101-02.

passed the Board. As Oviatt appreciated, “[a] suggestion of governmental approval of any party to an election eliminates the Board’s appearance of impartiality and thereby interferes with the exercise of a free choice in the election.”⁹⁶

Oviatt was correct that any governmental endorsement of a party creates a per se peril to the Board’s aura of neutrality, and without this appearance of impartiality, there can be no free and fair election. In addition, the state representative’s testimonial was potentially coercive itself. For the representative to write, “I am sure . . . you will see that the Union is powerful” and that “in unity there is strength” naturally raises questions about the plight of workers who defy that power and support the employer.⁹⁷ Workers may understandably hesitate to rebuff the endorsement of a legislator who could potentially affect their lives in a myriad of benevolent and not-so-benevolent ways.⁹⁸

Two years after *Ursery*, however, the Board reached an even more deeply disturbing decision in *Chipman Union, Inc.*⁹⁹ In *Chipman*, the Board ruled that a letter from Congresswoman Cynthia A. McKinney did not interfere with the election in that case.¹⁰⁰ This letter was written on House of Representatives stationery and sent to more than five hundred workers shortly before the election.¹⁰¹ Among other statements, Representative McKinney stated,

This letter is written in support of your struggle for respect, dignity, and justice as employees with Chipman-Union, Inc. I urge you to continue to fight and strive for fairness in the workplace. It is important to unite, organize and support each other I embrace you, Chipman-Union employees, in your struggle for fairness and justice in the workplace.¹⁰²

The Board held that this rather dramatic call to arms did not transgress laboratory conditions.¹⁰³ The Board first argued that McKinney’s letter “does not even mention [the union], the election, unionization, Congress as a whole, or the National Labor Relations Board”¹⁰⁴ Such reasoning, however, fails to recognize that these appeals to “unite” and “organize,” in the culminating days

⁹⁶ *Ursery*, 311 N.L.R.B. at 400 (Oviatt, dissenting) (citing *Columbia Tanning Corp.*, 238 N.L.R.B. 899 (1978)).

⁹⁷ *Id.*

⁹⁸ As Professor Bell has concluded, “rather than risk challenging any authority – however benign – most people will defer to it.” DERRICK BELL, *CONFRONTING AUTHORITY* 152 (1994).

⁹⁹ 316 N.L.R.B. 107 (1995).

¹⁰⁰ *Id.* at 107.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 108.

¹⁰⁴ *Id.* at 107.

of the election, were obviously engineered to enhance support for the union. Furthermore, Representative McKinney's stationery, message, and signature line all identified her as a member of Congress, so the Board's observation that she did not additionally refer to "Congress as a whole" merits little weight. Finally, that the letter did not overtly name the Board seems insignificant when McKinney was plainly addressing the election to be conducted by that agency.

The Board's next line of arguments is equally questionable. The Board stressed that "the letter does not indicate, and the Employer does not claim, that Congresswoman McKinney had any specific authority over labor matters within Congress."¹⁰⁵ This assertion seems weak, for most workers would be unlikely to know whether Representative McKinney's precise committee assignments pertained to labor-management relations. The Board also erred by adopting the hearing officer's rationalization that McKinney's letter "reads as the personal expression of a political and partisan being speaking for herself."¹⁰⁶ If that were true, why would McKinney have thrice reminded the workers – through her stationery, text, and signature line – of her official position as a United States representative? Such argument, moreover, ignores that a member of Congress, unlike a private citizen, has the power to voice her "personal expression [as] a political and partisan being" by voting on key legislation and taking other actions that could affect the workers' interests in many different ways.¹⁰⁷

The Board then claimed that the employer had failed to demonstrate "that its employees could not discern the difference between statements about labor relations by an individual member of Congress and statements by the Board and its representative."¹⁰⁸ Such reasoning is deceptive, for the employer was never given an adequate occasion to make the showing. As the Board acknowledged, the hearing officer "relied on *procedural grounds*" to overrule the employer's objection and had issued a "*refusal to expand the investigation*" of that objection.¹⁰⁹ As a consequence, the employer never had an adequate opportunity to demonstrate the workers' possible confusion regarding Congress and the Board. Perhaps even more important, the Board offered no justification for its de facto presumption that workers do in fact comprehend such complexities unless the objecting party can prove the contrary.

The *Chipman* Board's final tactic was to distinguish *Richlands Textile, Inc.*¹¹⁰ on the grounds that "it was clear that Representative McKinney was speaking only for herself and that her message contained no threat or coercive

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 107-08.

¹⁰⁹ *Id.* at 107 (emphasis added).

¹¹⁰ 220 N.L.R.B. 615 (1975); see *supra* notes 52-63 and accompanying text.

statement whatsoever.”¹¹¹ Once again, the Board’s rationalizations elide the core concerns. *Chipman* did not entail the direct, palpable coercion of *Richlands Textile*, but intimidation is always a matter of degree.¹¹² Employees in a contentious organizational campaign could predictably fear crossing swords with a Congresswoman who had expressed a deep interest in the election.¹¹³ This is particularly so when, contrary to the Board, it was far from clear whether McKinney “was speaking only for herself.” In addition to having repeatedly highlighted her message with the imprimatur of Congress, McKinney may have been receiving financial or political support from the union. In perhaps the weakest aspect of its opinion, however, the *Chipman* Board ruled:

We . . . find it immaterial whether Congresswoman McKinney sent the letter because the [Union] and its members had provided support to her. What matters here is the content of her letter, not why she wrote it. Consequently, we affirm the hearing officer’s evidentiary rulings excluding evidence of any financial relations between the [Union] and Congresswoman McKinney.¹¹⁴

Reasoning such as this borders upon the specious. Having claimed that McKinney was speaking solely for herself, the Board then precluded any discovery of whether she may have been a paid agent of the union or the beneficiary of its campaign contributions. The actual “content” of the letter – and its likely impact on workers – could not be interpreted in the absence of the surrounding context of her history with the union and any economic and political entanglements. In sum, the *Chipman* Board unjustifiably refused to examine the multiple possible improprieties of McKinney’s intrusion into the representation campaign.

¹¹¹ 316 N.L.R.B. at 108.

¹¹² See HAYEK, *supra* note 63, at 138 (observing that “[t]here are many degrees of coercion”). For an in-depth discussion of competing concepts of coercion, see Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 HASTINGS CONST. L.Q. 439, 473-92 (2002).

¹¹³ Such anxiety is especially foreseeable given the public’s widespread distrust of both congressmen and union leaders. As studies demonstrate, “fewer than one out of five [Americans] feel that congressional leaders can be believed.” SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND* 15 (rev. ed. 1987) (quoting Daniel Yankelovich, *Emerging Ethical Norms in Public and Private Life* 2-3 (Apr. 20, 1977) (unpublished manuscript)). Similarly, labor leaders “are believed to be exceptionally corrupt and unethical.” *Id.* at 220. In fact, one poll found that 64 percent of the public agreed with the statement that “[m]any union leaders have known ties with racketeers and organized crime.” *Id.* at 219 tbl. 7-4. Representative McKinney’s campaign letter thus created a significant likelihood that workers may have thought twice about ignoring her edict.

¹¹⁴ 316 N.L.R.B. at 107 n.3.

Despite these serious flaws, *Chipman* was invoked by the Board in *Saint-Gobain Abrasives, Inc.*¹¹⁵ In *Saint-Gobain*, the employer challenged a narrow union victory on the grounds that the United States Congressman for the district had campaigned energetically for the union.¹¹⁶ In particular, the Congressman had opined:

The Company has also refused to debate [an] important issue, claiming that federal labor laws do not allow a fair debate because the laws restrict what an employer can say. As a United States Congressman with a strong interest in labor law, I can assure you that the law does indeed allow for a fair debate. If the company chooses not to debate, that is their right, but they should not hide behind misstatements about federal regulations.¹¹⁷

In essence, the Congressman accused the employer of deceiving the workers regarding campaign speech. Such an allegation is highly questionable on the merits¹¹⁸ and potentially inflammatory. The majority simply parroted *Chipman*, however, holding that “the Employer failed to establish that employ-

¹¹⁵ 169 L.R.R.M. (BNA) 1116 (Dec. 20, 2001).

¹¹⁶ The Union won by a tally of 406 to 386 with eighteen challenged ballots. *Id.* at 1117.

¹¹⁷ *Id.* (Hurtgen, dissenting).

¹¹⁸ See *id.* Putting it gingerly, Chairman Hurtgen noted in his dissent that “there is responsible view to the contrary.” *Id.* It is true that under section 8(c), employers have the right to campaign against unions as long as their statements contain “no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c) (2000). Undeniably, however, there are stringent limitations on employer campaign speech. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (restricting an employer’s freedom to make predictions regarding the possible effects of unionization on the company); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964) (prohibiting employers from promising benefits to affect the election’s outcome); *American Warehousing & Distrib. Servs., Inc.*, 311 N.L.R.B. 371 (1993) (barring employers from suggesting that it would be futile to support the union); *Peoria Plastic Co.*, 117 N.L.R.B. 545 (1957) (disallowing employer campaign visits to employees’ homes). Employer campaign speech is regulated more stringently than that of unions because of the economic power employers wield over their workers. As the court explained in *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26 (5th Cir. 1969), “[a]n employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant.” *Id.* at 30. See also ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 146 (13th ed. 2001) (“Any argument which discloses the speaker’s strong wishes is not wholly an appeal to reason if the listener is in the speaker’s power.”); Thomas G.S. Christensen, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U. L. REV. 243, 265 (1963) (stating that “when the boss talks, employees may suspect that the is doing more than talking.”). For detailed discussions of section 8(c)’s scope, see generally Herbert Burstein, *Free Speech for Employers*, 1 LAB. L.J. 425 (1950); Cox, *supra* note 9, at 15-20; Robert F. Koretz, *Employer Interference with Union Organization Versus Employer Free Speech*, 29 GEO. WASH. L. REV. 399 (1960).

ees 'could not discern the difference between statements about labor relations by an individual member of Congress and statements by the Board . . .'"¹¹⁹

Here the majority replicated the *Chipman* Board's failure to appreciate the potential for puzzlement and coercion when a government representative intercedes emotionally into a labor campaign. Furthermore, as Chairman Hurtgen explained in his dissent, it is "far from certain" that workers comprehend the distinctions among the three main branches of government and regulatory agencies.¹²⁰ Finally, the Congressman's loaded analysis of federal regulation of employer campaign speech was especially problematic.¹²¹ As Hurtgen reasoned:

[A] Congressman should . . . stay away from that issue in the context of pro-party comments in an ongoing organizational campaign. The danger is that employees are likely to view that statement as definitive. After all, it comes from a Federal official. Conversely, an employer response would not carry the same weight. As to matters of law, employees are likely to view the response of a Federal official as more reliable than that of a private party to the election.¹²²

Hurtgen was certainly on target in his emphasis that speech by federal officials is not analogous to that of private parties, for the former enjoy an aura of governmental expertise not shared by common members of the public. His dissent, however, was far too narrow. The central problem in *Saint-Gobain* was not merely that the Congressman addressed an esoteric point in labor law but that he threw his political weight behind one of the contending forces in the election. Yet again, even dissenting Board members have failed to consider an everyday laborer's anxiety about transgressing the specific, passionate exhortations of a public official. In an election, the worker is entitled to focus on her professional and psychological best interests. Her choice, after all, may be a crucial turning point in her working life.¹²³ She should be able to make this

¹¹⁹ *Saint-Gobain*, 169 L.R.R.M. (BNA) at 1117 (quoting *Chipman Union, Inc.*, 316 N.L.R.B. 107, 108 (1995)).

¹²⁰ *Id.* at 1118 (Hurtgen, dissenting).

¹²¹ *See id.* at 1117. Hurtgen cautioned that "because of their official position in the U.S. Government, [members of Congress] must be especially careful in opining on controversial issues of Federal law." *Id.*

¹²² *Id.*

¹²³ As I have argued elsewhere:

A worker's decision on whether or not to unionize may be the most critical choice of her professional life. Not only will it affect vital material issues such as her future wages, hours, and other terms and conditions of employment, it is also a primary act of self-expression and collective self-determination.

fundamental decision in a laboratory free from the pressure of any government officials, whether they are Board agents or members of Congress.

IV. A PROPOSAL TO SAFEGUARD LABORATORY CONDITIONS

The Board's responsibility to protect the workers' freedom of choice is beyond question. It is also clear that government officials can perplex and intimidate voters when they interject their beliefs into labor representation campaigns. It therefore behooves the Board to decide upon a sensible solution to this dilemma.

One obvious – and obviously unsatisfactory – response might be to forbid governmental authorities from expressing their viewpoints in labor contests. Such an approach would raise grave constitutional concerns,¹²⁴ and it would be politically perverse to restrain public officials from speaking out on the issues of the day. Rather than engage in a quixotic attempt to silence such officials, the Board should simply move to obviate any resulting confusion or coercion on the part of the workers.

Here the Board could solve, or at least ameliorate, the problem through a deliberate extension of its current practice. The Board routinely informs workers of their right to select or reject union representation and assures them of the Board's neutrality. For example, the Board's "Notice of Election" assures workers of their "right to a free, fair, and honest election" and that "[t]he National Labor Relations Board protects [their] right to a free choice."¹²⁵ The Notice also states, "The National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election."¹²⁶

Such notifications readily could be extended to govern cases where public officials have campaigned for the employer or union. The Board should explicitly reassure the work force that (1) employees have the legal right to vote as their consciences dictate, (2) the official's statements reflect only her personal perspectives rather than authoritative government policy, and (3) the Board is

Teeter, *supra* note 23, at 984.

¹²⁴ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions."); *Wood v. Georgia*, 370 U.S. 375, 395 (1962) ("The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.").

¹²⁵ NAT'L LABOR RELATIONS BD., NOTICE OF ELECTION, FORM NLRB-707 (1991).

¹²⁶ *Id.* Similarly, the Board's publication *Your Government Conducts an Election* provides, "You are entitled by federal law to vote your free choice in a fair, honest, secret-ballot election to determine whether employees want union representation." Nat'l Labor Relations Bd., *Your Government Conducts an Election* 4 (July 2000), at <http://www.nlr.gov/publications/election.pdf> (last visited Aug. 2, 2003). This publication also reiterates, "When an election is held, the Board protects your right to a free choice under the law The National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election." *Id.* at 4-5.

neutral with regard to the election's outcome and will protect the workers' freedom of choice. In this manner, officials would remain free to opine on desirable electoral outcomes, but the risks of confusion and coercion would be minimized.

To enhance the accessibility and credibility of these assurances, Board personnel should verbally explain them to the employees in addition to posting them at the workplace. There are multiple reasons why these guarantees must be given in oral as well as written form. Millions of American workers have extremely limited or even nonexistent reading skills. According to the Business Council for Effective Literacy, approximately seventy-two million adults are either completely or functionally illiterate.¹²⁷ Similarly, the National Assessment of Education Progress has found that thirty-six million adults could not read at the eighth-grade level and that seventy million fell shy of the eleventh-grade level.¹²⁸ Such literacy barriers can be even more daunting in cases such as *Columbia Tanning*¹²⁹ and *Urserly Cos.*,¹³⁰ where many of the employees did not understand English.

Furthermore, there is no guarantee that even literate employees would happen to see a written notice at the workplace and stop to read it. The simple truth is that not all workers consult company bulletin boards where such notices are commonly placed. As studies have shown, some employees do not frequent those areas of the plant near the bulletin boards or are too preoccupied with work to read their contents.¹³¹

Finally, oral communication to workers is typically far more effective than written notification. For generations it has been known that "[p]sychological tests indicate that leaflets or other printed propaganda devices cannot match the persuasive power of oral presentations."¹³² As many work-

¹²⁷ Joanne Draus Klein, *Waking Up to the American Nightmare: One in Five Workers is Functionally Illiterate, a Chilling Statistic for any Company*, 16 CORP. CLEVELAND 34, 34 (1992).

¹²⁸ Jonathon Kozol, *Illiteracy Statistics: A Numbers Game*, N.Y. TIMES, Oct. 30, 1986, at A31; see also JONATHAN KOZOL, *ILLITERATE AMERICA* 4 (1985) ("Twenty-five million American adults cannot read the poison warnings on a can of pesticide, a letter from their child's teacher, or the front page of a daily paper.").

¹²⁹ 238 N.L.R.B. 899 (1978); see *supra* notes 64-74 and accompanying text.

¹³⁰ 311 N.L.R.B. 399 (1993); see *supra* notes 82-98 and accompanying text.

¹³¹ See, e.g., HELEN BAKER ET AL., *TRANSMITTING INFORMATION THROUGH MANAGEMENT AND UNION CHANNELS* 41-43 (1949). Parallel concerns have been raised in the context of Board-ordered written notices stating that employers have been found guilty of violating the Act and will take specific remedial steps. As one scholar has commented, "[t]here is more than a modicum of doubt as to whether notices are read, understood, or sufficient to allay the apprehensions and misgivings caused by the employer's unfair labor practices." Peter B. Hoffman, *Notice Posting: A Pilot Study*, 18 LAB. L.J. 556, 557 (1967); see also John W. Teeter, Jr., *Fair Notice: Assuring Victims of Unfair Labor Practices That Their Rights Will Be Respected*, 63 UMKC L. REV. 1, 2 (1994) (calling for the oral reading of all notices of employers' unfair labor practices).

¹³² Note, *Union Right of Reply to Employer On-the-Job Speeches: The NLRB Takes a New Approach*, 61 YALE L.J. 1066, 1074 (1952). Leading studies supporting this conclusion include LEONARD W. DOBB, *PUBLIC OPINION AND PROPAGANDA* 529-32 (1948) (describing superiority of

place-related studies have demonstrated, “[f]ace to face communication is most effective” in the organizational setting.¹³³ Combining oral with printed reassurances of the Board’s neutrality and the workers’ freedom of choice would therefore best counteract coercion and perplexity.

Such a step would not be a guaranteed cure-all. Some confusion could persist, and it is foreseeable that certain workers might continue to feel hesitant about spurning a government official’s preferences in the election. The anonymity of the balloting process, however, coupled with methodical, potent assurances of the Board’s neutrality and commitment to protecting the workers’ rights, should go a long way toward reducing any residues of puzzlement or compulsion to an acceptable minimum.¹³⁴

public meetings over radio broadcasts in influencing people); JOSEPH T. KLAPPER, COLUMBIA UNIV., *THE EFFECTS OF MASS MEDIA II-9 TO II-10* (1949) (“The lecturer was found to be the most effective in modifying opinions . . . and the printed material least effective.”); PAUL F. LAZARSFELD ET AL., *THE PEOPLE’S CHOICE: HOW THE VOTER MAKES UP HIS MIND IN A PRESIDENTIAL CAMPAIGN* 128-29 (2d ed. 1948) (discussing radio’s superiority over newspaper in political contests); RAYMOND W. PETERS, *COMMUNICATION WITHIN INDUSTRY: PRINCIPLES AND METHODS OF MANAGEMENT-EMPLOYEE INTERCHANGE* 78 (1950) (analyzing advantages of oral communication); WALTER H. WILKE, *AN EXPERIMENTAL COMPARISON OF THE SPEECH, THE RADIO, AND THE PRINTED PAGE AS PROPAGANDA DEVICES* 27 (1934) (“Several independent indices of the results of the propaganda used showed the speaker technique to have the most striking positive effects . . . and the printed technique to have only a slight effect.”). These sources are also cited in Teeter, *supra* note 131, at 12 n.56.

¹³³ Stuart M. Klein, *Communication Strategies for Successful Organizational Change*, *INDUS. MGMT.*, Jan.-Feb. 1994, at 26, 27; see also Richard L. Daft & Robert H. Lengel, *Organizational Information Requirements, Media Richness and Structural Design*, 32 *MGMT. SCI.* 554, 560 (1986) (“Face-to-face is the richest medium because it provides immediate feedback so that interpretation can be checked.”); Fredric M. Jablin, *Superior-Subordinate Communication: The State of the Art*, 86 *PSYCHOL. BULL.* 1201, 1202 (1979) (observing that “face-to-face discussion is the dominant mode of interaction” in the workplace); Jerry Tarver, *Face-to-Face Communication*, in *INSIDE ORGANIZATIONAL COMMUNICATION* 205, 220 (Carol Reuss & Donn Silvis eds., 1985) (“Face-to-face communication in all its forms continues to be important.”); Cynthia Stohl & W. Charles Redding, *Messages and Message Exchange Processes*, in *HANDBOOK OF ORGANIZATIONAL COMMUNICATION* 451, 487 (Fredric M. Jablin et al. eds., 1987) (explaining that “ambiguous work environments are more effectively clarified (not surprisingly) through face-to-face rather than written communication”). Notwithstanding these conclusions, the need remains for further research. See, e.g., Robert A. Snyder & James H. Morris, *Organizational Communication and Performance*, 69 *J. APPLIED PSYCHOL.* 461, 461 (1984) (noting that “studies of communication in work organizations are grossly underrepresented in the empirical research literature”); Joanne Yates & Wanda J. Orlikowski, *Genres of Organizational Communication: A Structural Approach to Studying Communication and Media*, 17 *ACAD. MGMT. REV.* 299, 320 (1992) (“Empirical research is needed to investigate the various social, economic, and technological factors that occasion the production, reproduction, or modification of different genres in different sociohistorical contexts.”). These sources are also cited in Teeter, *supra* note 133, at 12 n.57.

¹³⁴ Our inability to eliminate all elements of possible intimidation is, of course, no excuse for not taking feasible steps toward reducing such pressures and maximizing the workers’ freedom of choice. As Hayek realized,

We cannot prevent all harm that a person may inflict upon another, or even all the milder forms of coercion to which life in close contact with other men ex-

V. CONCLUSION

More than half a century has passed since the Board announced the laboratory conditions standard of *General Shoe Corp.*,¹³⁵ and more than thirty-five years have elapsed since the Board decided *Athbro Precision Engineering Corp.*¹³⁶ Confusion and coercion remain real threats, however, due to the participation of government officials in labor representation campaigns. We are confronted, in essence, with a problem of dueling democracies: non-Board public officials should be free to support or oppose unionization, but we must prevent their electioneering from undermining the industrial democracy of labor elections.

The Board's responses to this quandary have been equivocal and ineffective. Although *James Lees & Sons Co.*¹³⁷ and its progeny indicate some awareness of the problems posed by governmental interference, they lack both the institutional vision and doctrinal teeth to bring such problems to heel. In fact, *Chipman Union, Inc.*¹³⁸ and *Saint-Gobain Abrasives, Inc.*¹³⁹ demonstrate the Board's failure to grasp the potential puzzlement and pressure imposed upon workers when public officials intervene in representation elections. Such ambiguities and inaction must be replaced with doctrinal clarity and meaningful prophylactic protection.

My proposed solution would be simple, efficacious, and fair. The Board should reassure workers of their right to cast uncoerced ballots, clarify that the political officials are not declaring governmental policy, and emphasize that the Board is both impartial in the election and committed to protecting the workers' freedom of decision. In this manner, *dueling* democracies might evolve into *dynamic* democracies, where workers can critically appraise the opinions of government representatives yet remain confident of their power to vote as they choose.

poses us; but this does not mean that we ought not to try to prevent all the more severe forms of coercion, or that we ought not to define liberty as the absence of such coercion.

HAYEK, *supra* note 63, at 139.

¹³⁵ 77 N.L.R.B. 124 (1948); *see supra* notes 15-16 and accompanying text.

¹³⁶ 166 N.L.R.B. 966 (1967), *vacated sub nom* Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 67 L.R.R.M. (BNA) 2361 (D.D.C.), *acq. in result* 171 N.L.R.B. 21 (1968), *enforced*, 423 F.2d 573 (1st Cir. 1970); *see supra* notes 18-25 and accompanying text.

¹³⁷ 130 N.L.R.B. 290 (1961); *see supra* notes 34-38 and accompanying text.

¹³⁸ 316 N.L.R.B. 107 (1995); *see supra* notes 99-114 and accompanying text.

¹³⁹ 169 L.R.R.M. (BNA) 1116 (Dec. 20, 2001); *see supra* notes 115-23 and accompanying text.