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NLRB PERMITS FALSE CAMPAIGN STATEMENTS IN UNION REPRESENTATION ELECTIONS—SHOPPING KART FOOD MARKET, INC.

The First Amendment to the Constitution guarantees to all employers and union representatives the right to communicate freely to employees.¹ However, in labor relations, as in all other areas, the right of free speech is not absolute.² It may be exercised only in a manner which does not infringe upon the employees' "section 7 rights," under the National Labor Relations Act.³ Any interference with these statutory rights may constitute an unfair labor practice,⁴ and may be sufficient grounds for setting aside a representation election and ordering a new one.⁵

1. The forms of general communication may include direct speech, speech through a third party, usually an agent, and literature, either displayed or distributed to their workers. See Fanning, *Union Solicitation and Distribution of Literature on the Job—Balancing the Rights of Employers and Employees*, 9 GA. L. REV. 367 (1975).

2. *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Cox v. Louisiana*, 379 U.S. 536 (1965); *NLRB v. Federbush Co., Inc.*, 121 F.2d 954 (2d Cir. 1941).

3. The NLRA, 29 U.S.C. §§ 141-187 (1970) [hereinafter referred to as the Act] is composed of four major acts: National Labor Relations Act (Wagner Act) 49 Stat. 449 (1935); Labor Management Relations Act (Taft-Hartley Act), Pub. L. No. 101, 61 Stat. 186 (1947); Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), Pub. L. No. 257, 73 Stat. 541 (1959); and Public Law No. 93-360 (Health Care Amendments), 88 Stat. 395 (1974). Section 7 of the Act provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

NLRA 29 U.S.C. § 157 (1970).

4. An unfair labor practice is a violation of Section 8 of the Act. Very briefly, under Section 8(a), an employer may not: (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7, *see* note 3 *supra*; (2) dominate or interfere with the formation or administration of any labor organization, including financial or other support; (3) discriminate with regard to hire, tenure, term or condition of employment to encourage or discourage membership in any labor organization; (4) discriminate against an employee because he has filed charges or given testimony under the Act; and (5) refuse to bargain collectively with his employees' representatives. Under Section 8(b), a labor organization or its agents may not: (1) restrain or coerce employees in the exercise of their Section 7 rights or an employer in his selection of his collective bargaining representatives; (2) cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3); (3) refuse to bargain collectively with an employer; (4) engage in or induce a secondary boycott; (5) require an excessive or discriminatory initial fee of employees; (6) extract from an employer money or thing of value for services not to be performed; or (7) engage in illegal organizational picketing. NLRA 29 U.S.C. § 158 (1970).

5. Section 9 provides for the designation or selection of representatives for the purposes of collective bargaining by the majority of employees in an appropriate unit. *Id.* § 159. A petition for a representation election may be filed by a union, by employees, or by an employer, with the Regional Office. If the Board finds upon investigation that a question of

The problem of balancing an employer's or union representative's right of free speech with the employees' section 7 rights arises consistently throughout labor law. Since each party, union and employer, is strongly desirous of soliciting votes, communication is especially important in the area of union representation elections.⁶ This desire to communicate convincingly⁷ causes the balancing of constitutional and statutory rights to be precarious. To maintain the necessary balance of rights, the National Labor Relations Board⁸ has adopted various standards for employer and union campaign speech.⁹ In *Hollywood Ceramics Co.*,¹⁰ the Board established a standard of setting

representation exists, an election by secret ballot is ordered and the name of the selected representative, or the lack thereof is certified. Objections to the election may be filed and conduct which creates an atmosphere rendering a free choice by employees impossible will invalidate the election. Objection may be filed within five days after the parties are furnished with the tally of ballots. 41 N.L.R.B. Ann. Rep. 46, 66 (1976).

6. A union may become the representative of the employees for the purposes of collective bargaining by being selected by a majority of the employees in an appropriate bargaining unit. The NLRA does not require the parties to use the formal processes of the NLRB but does offer them. An alternative method of receiving a bargaining order is an authorization by card-check, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), if warranted by the commission of serious unfair labor practices. See Note, *Union Authorization Cards: Linden's Peacemaking Potential*, 83 YALE L.J. 1689-1707 (1974).

7. On a theoretical level, the purpose of the campaign preceding such elections is to disseminate as much information as possible to the employees so that they may make a well-informed and well-reasoned choice of whether a specific union should represent them. On a practical level, the purpose of the campaign is for either the employer or the union to convince the employees that its side is "more right" than the other—i.e., to win. In their desire to disseminate information in a light most favorable to their position, the parties may communicate misleading or inaccurate representations.

8. Hereinafter referred to as the Board.

9. The major safeguards include: a requirement for preservation of laboratory conditions, *General Shoe Corp.*, discussed at notes 25-27 and accompanying text, *infra*; a list of employees' names and addresses being made available by the employer to the union prior to the election, *Excelsior Underwear, Inc.*, discussed at notes 101-103 and accompanying text *infra*, a prohibition of captive audience speeches twenty-four hours prior to the election, *Peerless Plywood Co.*, discussed at notes 104-106 and accompanying text, *infra*; a prohibition of electioneering at the polls, *Milchem Inc.*, 170 N.L.R.B. 362 (1968); and a standard that if one of the dominant appeals of a campaign is to racial prejudice and bigotry, grounds for objections occur, *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962). See also Pollet, *The National Labor Relations Board and Race Hate Propaganda in Union Organization Drives*, 17 STAN. L. REV. 373 (1965). For other election safeguards, see Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 HARV. L. REV. 38, 66-123 (1964).

10. 140 N.L.R.B. 221 (1962). The *Hollywood Ceramics Co.* rule essentially states that where a substantial material misrepresentation of a vital fact is made which affects the outcome of an election, the election will be set aside, and a rerun election will be ordered. The basic policy underlying this rule was first established in *Gummed Prod. Co.*, 112 N.L.R.B. 1092 (1955), which stated that:

the ultimate consideration is whether [because of the challenged propaganda] . . .

the uninhibited desires of the employees cannot be determined in an election.

Id. at 1094.

aside elections on the grounds of material misrepresentations to employees concerning a fact vital to election.¹¹ Recently, in *Shopping Kart Food Market, Inc.*,¹² however, the Board expressly overturned the twenty-two years of precedent generated by this standard and its underlying policy. In that decision, the Board held that it no longer would probe into the truth or falsity of the parties' campaign statements.¹³

FACTS OF *Shopping Kart*

During a meeting on the evening of June 19, 1974, the petitioning union's¹⁴ vice president and business representative told the assembled employees that their employer had profits of \$500,000 during the past year. At the time, the union official made no attempt to explain how he had arrived at this figure. The election was conducted the next day and the union was selected as the employees' representative. Later developments revealed that profits were not \$500,000 but were instead approximately \$50,000.¹⁵

The employer objected to conduct affecting the results of the election and filed a complaint with the Board. The Regional Director concluded that there had been a misrepresentation, but that it was not material,¹⁶ and proceeded to certify the union as the representative of the appropriate bargaining unit. On appeal, the unanimous Board¹⁷ affirmed the Regional Director's decision to certify the union. The Board differed vehemently, however, concerning the majority's decision to overrule *Hollywood Ceramics*.¹⁸

11. Material misrepresentations appear in the labor law context as grounds for an objection to conduct affecting the election, and not as grounds for an unfair labor practice. *Hollywood Ceramics*, *supra* note 10.

12. 228 N.L.R.B. slip op. No. 190 at 1, 94 L.R.R.M. 1975 (1977).

13. *Id.* at 3, 94 L.R.R.M. at 1705.

14. The Retail Clerks Union Local 99, Retail Clerks International Association, AFL-CIO (hereinafter the Union) is the party who petitioned for the election.

15. The facts of the case are found at 228 N.L.R.B. at 2, 94 L.R.R.M. at 1705.

16. The Regional Director based his decision on the lack of evidence that the union representative "either had or could reasonably be perceived to have had knowledge concerning the employer's profits." *Id.*

17. The panel for this case was composed of all five members of the Board, thereby acknowledging the importance of the issue. The Board is authorized to, and usually does, delegate to a panel of three of its members any or all of its powers, including the hearing of appeals from a Regional Director's decision. 29 U.S.C. § 153(b) (1970).

18. The majority opinion was written by members Penello and Walther, with then-Chairperson Murphy concurring. They held that the *Hollywood Ceramics* rule should be overturned. Therefore, there were no grounds for setting aside this election. 228 N.L.R.B. at 3, 94 L.R.R.M. at 1705. The minority's partial dissent was written by members Jenkins and Fanning, with Jenkins dissenting further. They believed that under the *Hollywood Ceramics* standards,

This Note will trace the development of Board law in the area of misrepresentation to determine what themes the Board has emphasized. It will analyze the Board's decision in *Shopping Kart* and the study of elections on which the Board strongly relied. In addition, the Note will challenge the validity of this study and will criticize the substantial shift in the Board's thinking. Finally, it will discuss the potential impact of the *Shopping Kart* decision upon representation elections and labor law in general.

HISTORICAL DEVELOPMENT OF MISREPRESENTATION LAW

In the early years of the Act, misrepresentations were not perceived to be a problem because the Board required that employers¹⁹ maintain a position of total neutrality regarding the question of unionization.²⁰ In 1941, the Supreme Court in *N.L.R.B. v. Virginia Power and Electric Co.*²¹ eliminated this requirement; however, the Court did recognize that the slight pressures exerted verbally by an

the employees did not consider the Union Representative to be a credible source for such information. The employees also were capable of evaluating his remarks, given the small size of the store and the known small profit margin of the industry. *Id.* at 14, 94 L.R.R.M. at 1709.

19. There were no comparable restrictions placed on union speech because one of the principle functions of the Board under the Wagner Act was the encouragement and promotion of union organization. See Madden, *Origin and Early Years of the National Labor Relations Act*, 18 HASTINGS L.J. 571 (1967); Comment, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243 (1963). See also Maywood Hosiery Mills, Inc., 64 N.L.R.B. 146 (1945), in which the Board stated:

Absent violence, we have never undertaken to police union organization or union campaigns, to weight the truth or falsehood of official union utterances, or to curb the enthusiastic efforts of employee adherents to the union cause in winning others to their convictions.

Id. at 150.

20. See, e.g., *Schult Trailers, Inc.*, 28 N.L.R.B. 975 (1941); *Ford Motor Company*, 23 N.L.R.B. 342 (1940); *Rockford Mitten and Hosiery Co.*, 16 N.L.R.B. 501 (1939); *Southern Colorado Power Co.*, 13 N.L.R.B. 699 (1939); *The Triplett Elec. Instrument Co.*, 5 N.L.R.B. 835 (1938), for early examples of the Board's demand that employers remain totally neutral. See also 3 N.L.R.B. Ann. Rep. 59-62 (1938). In their annual report, the Board noted that:

[i]n considering the effect of the employer's conduct . . . there must be borne in mind the control wielded by employer over his employees—a control which results from the employees' complete dependence upon their jobs, generally their only means of livelihood and economic existence. As the natural result of the employer's economic power, employees are alertly responsive to the slightest suggestion of the employer.

Id. at 125.

21. 314 U.S. 469 (1941). In *Virginia Electric*, an employer was accused of appealing to the employees to bargain with the company directly and to form an inside bargaining committee. The Board held such activities to be unfair labor practices. Although the Court remanded the case, it indicated that neither the Act nor the Board's orders enjoined the employer from expressing his views on labor policies or problems.

employer "may have a telling effect among men who know the consequences of incurring that employer's strong displeasure."²² Due to the obligation to protect employees from the exercise of the employer's superior economic power, the Court stated a policy of balancing the freedom of the employer to speak against the right of the employees to exercise free choice. Because the Board was slow in its recognition of the new balancing standard,²³ Congress enacted as part of the Taft-Hartley Amendments of 1947, section 8(c), also known as the "Free Speech Proviso."²⁴ This placed a statutory duty upon the Board to permit greater freedom of speech when determining whether violations of the Act have occurred. Soon after, the Board adopted the *General Shoe* doctrine²⁵ which required the maintenance of "laboratory conditions"²⁶ in all representation elections so that the "uninhibited desires of the employees"²⁷ could be expressed. The adoption by the Board of this more restrictive standard for speech and conduct in representation elections has meant

22. *Id.* at 477.

23. See, e.g., *Clark Bros. Co., Inc.*, 70 N.L.R.B. 802 (1946); *Monumental Life Ins. Co.*, 69 N.L.R.B. 247 (1946). See also S. Rep. No. 105, 80th Cong., 1st Sess. 166 (1947); *NLRB v. Golub Corp.*, 388 F.2d 921, 66 L.R.R.M. 2769 (2d Cir. 1967). However, in marked contrast to the board's position, the Court expanded the concept of free speech after *Virginia Electric*. See, e.g., *Thomas v. Collins*, 323 U.S. 516 (1945) (holding a cluster of preferred freedoms was involved in employer speech but especially the dissemination of ideas); *Hague v. C.I.O.*, 307 U.S. 496 (1939) (holding that employer's right to discuss and inform people concerning unions is protected by not only free speech but also by free assembly, while the employees' rights included whether or not to listen). See generally speech by Board Chairperson Paul Herzog, to the Annual Convention of the Industrial Relations Section of the Printing Industry of America, in Atlantic City, N.J., 1946, reprinted in 18 L.R.R.M. 147 (1946).

24. Section 8(c) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an *unfair labor practice* under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c) (1970) (emphasis added). One apparent intent of Congress was to allow the employer to make an anti-union but noncoercive speech or leaflet distribution which could not then be treated as evidence of an unfair labor practice (hereinafter "ULP"), *supra* note 4. Previously, inferences from such speech had been made as to a motive for other employer conduct, (for example, discharge) which would then arguably be a "ULP." Conversely, a prohibited motive may render speech that is non-violative on its face a ULP. R. GORMAN, *BASIC LABOR LAW TEXT* 149-150 (1976).

25. *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

26. *Id.* at 127. Regarding "laboratory conditions," the Board stated that:

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 the employees. It is also our duty to determine whether they have been fulfilled.

Id. See also *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962).

27. 77 N.L.R.B. at 127.

that objections to conduct affecting an election could be filed on a much broader ground than available when filing an unfair labor practice.²⁸

In 1962, the Board firmly established its standard for setting aside an election due to misrepresentations made by employers or union representatives in the campaign. In *Hollywood Ceramics*,²⁹ it said that an election would be set aside

only where there has been misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.³⁰

The Board clearly stated that its basic policy underlying all rules in this election field was to insure the employees full and complete freedom of choice in selecting a bargaining representative. To achieve this goal, the Board chose to maintain "laboratory conditions." In deciding objections to elections based upon misrepresentations, the Board again stated that it must balance the right of employees' free choice against the right of the parties to wage a free and vigorous campaign, as viewed within the totality of circumstances.³¹

Until *Shopping Kart*, the courts and Board consistently have applied the *Hollywood Ceramics* standard.³² In addition, two of its

28. In order to maintain laboratory conditions, the Board also established that Section 8(c) is to be limited to adversary proceedings of "ULPs," and not extended to representation election cases. This resulted in a definite split of treatment by the Board. R. GORMAN, *BASIC TEXT ON LABOR LAW*, 150-51 (1976). The motive behind "ULPs," whether involving 8(c) Free Speech or not, is to control behavior; the remedy for violations is the traditional ULP remedies as appropriate, including posting of notices, reinstatement, back pay. The motive behind valid objections to elections is the maintenance of the purity of the Board's own election processes; the remedy for such conduct is only the ordering of a rerun election. Because of the broader standard for setting aside an election, employer and union exercise of their right to free speech in campaigns was not unrestricted, simply because it did not threaten or promise a benefit.

It is also worth noting that a decision of the Board sustaining objections, setting aside the election, and ordering a new vote is not directly reviewable in the courts. *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 n.1 (2d Cir. 1952).

29. 140 N.L.R.B. 221 (1962). See note 10, *supra*.

30. *Id.* at 224. The Board expanded this in footnote 10 to include as one factor: whether the party making the statement possesses intimate knowledge of the subject matter so that the employees sought to be persuaded may be expected to attach added significance to its assertion.

Id. at 224 n. 10.

31. *Id.* at 223-24.

32. See, e.g., *Bausch and Lomb, Inc. v. NLRB*, 451 F.2d 873 (2d Cir. 1971) (holding that a statement by an employer that a local of the same union and employer, but in a different city, gave up the employees' Christmas bonus without also indicating that they received something in

major requirements, that of balancing the constitutional rights of employer or union against the statutory rights of the employees, and that of assessing any employer expression within the special context of the labor relations setting, have been continuously reinforced.³³ As recently as 1973, while meeting the periodic challenge to the *Hollywood Ceramics* standard, the Board in *Modine Manufacturing Co.*³⁴ declined to abandon the standard. Despite its acknowledgment of the improved education of the voters, the wide familiarity of Board-conducted elections, and the resulting increased sophistication of employees, the Board stated:

[W]e are not yet ready to say that we will leave all our voters in all of our elections and in all circumstances to sort out, with no protection from us, from among a barrage of flagrant deceptive misrepresentations.³⁵

However, within the next few years, two significant events occurred. First, the composition of the Board changed. Member Penello, who had clearly indicated his dissent to the *Hollywood*

return, was a material misrepresentation); *NLRB v. Trancoa Chem. Corp.*, 303 F.2d 456 (1st Cir. 1962) (holding that material misrepresentation existed where the union indicated wages and benefits negotiated with a similar employer without indicating such would be effective only if employer continued in special government work); *Modine Mfg. Co.*, 203 N.L.R.B. 527 (1973) (upholding a Regional Director's decision that statements by the petitioner-union were not material misrepresentations so that no new election was warranted); *Grede Foundries, Inc.*, 153 N.L.R.B. 984 (1965) (holding that a union handbill distributed the day before the election indicating an average take-home pay at a different employer where in fact only two of 350 employees received the average was a material misrepresentation).

33. See generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel*, the Court stated that:

any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

Id. at 647. See also *NLRB v. Federbush Co. Inc.*, 121 F.2d 954 (2d Cir. 1941), in which Judge Learned Hand stated:

Words are not pebbles in alien juxtaposition. . . . What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.

Id. at 957. This showing of sensitivity may be characterized as realistic or as paternalistic. Either way, the Court has instructed the Board to focus not only on what the speaker intended, but also on what the listener understood.

34. 203 N.L.R.B. 527 (1973). The Board denied that the union is statutorily entitled to a hearing on the issue of alleged misrepresentations since the existence of a tendency to materially mislead is a matter calling for the exercise of the Board's own administrative expertise and common sense, rather than something which is susceptible to development through an evidentiary hearing.

35. *Id.* at 530.

Ceramics rule in *Modine Manufacturing Co.*,³⁶ was joined by two new members who agreed with him on this issue.³⁷ Second, an empirical study of union representation elections was published by Professors Getman, Goldberg and Herman.³⁸ Shortly thereafter, the *Hollywood Ceramics* rule was discarded.

ANALYSIS

Board's Reasoning in Shopping Kart

The *Shopping Kart* majority stated that over twenty years of experience had shown that the *Hollywood Ceramics* rule had impeded free choice.³⁹ The Board further stated that administration of the rule had led to: (1) extensive analysis of campaign propaganda;⁴⁰ (2) restriction of free speech;⁴¹ (3) variance in application between the

36. *Id.* at 530 n.6.

37. The two new members on the Board were Betty Murphy, who became chairperson, and Peter Walther. For the new members' views, see *Big D. Mining*, 222 N.L.R.B. 522 (1976); *The Contract Knitter, Inc.* 220 N.L.R.B. 579 (1975); Address before the Annual Midwest Labor Law Conference, Reference Manual For Continuing Legal Education Program, Midwest Labor Law Conference 1.01 (1976) (for Chairperson Murphy's views). See *Masoneilan Int'l, Inc.*, 223 N.L.R.B. 965 (1976) (for member Walther's views). See Erno Lewis, 217 N.L.R.B. 239 (1975); *Medical Ancillary Servs.*, 212 N.L.R.B. 582 (1974) (for member Penello's early views on the subject).

38. Getman & Goldberg, *The Behavioral Assumptions Underlying N.L.R.B. Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976). Preceding this was its companion article: Getman, Goldberg & Herman, *N.L.R.B. Regulation of Campaign Tactics: The Behavioral Assumptions On Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975) [hereinafter cited as Getman/Goldberg studies]. These articles were later expanded into a book, J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY*, (Russell Sage Foundation, New York, 1976) [hereinafter cited as Getman/Goldberg Study].

39. The Board believed that it was first necessary to establish that the Board was clearly authorized to make this change in Board policy. It specifically relied upon the language in the recent Supreme Court decision in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975) for the authority. In *Weingarten*, the Court noted that the exercise of the Board's administrative discretion in the decisionmaking process necessarily included the authority to revise or to modify principles previously adopted.

40. 228 N.L.R.B. at 4, 94 L.R.R.M. at 1706. Possibly one real reason for this decision is the Board's discomfort with the necessity of "brinkmanship" in analyzing campaign speech.

41. *Id.* Members Fanning and Jenkins in their partial dissent seem to imply that the free speech concerns of the majority may be serving as an excuse rather than as a reason for the new decision. *Id.* at 22, 94 L.R.R.M. at 1711-12.

The argument that free speech is to be afforded the same degree of protection in the labor law area as it is afforded in other areas is without support. It is especially important that the NLRB's application of law within the First Amendment area is in accord with *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Hudgens*, the Supreme Court deferred to the Board's interpretation of labor law regarding shopping center picketing, rather than relying upon traditional First Amendment grounds. Thus, in effect, the Court was telling the Board to use its own

Board and the courts;⁴² (4) increased litigation;⁴³ and (5) a resulting decrease in the finality of election results.⁴⁴ Relying upon two studies on the effects of the *Hollywood Ceramics* rule,⁴⁵ the Board majority concluded that these difficulties and the necessary subjectivity of the rule resulted in a norm that was difficult to administer. Yet the Board stated that these were not the important reasons for their decision to overrule *Hollywood Ceramics*.

The Board indicated that it would be willing to overlook these problems if it felt that there was still a need to protect workers from

expertise in the labor arena when dealing with the area of free speech, instead of the relatively unfamiliar constitutional law.

The recent case, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which expanded free speech into the commercial speech area, does not alter this conclusion. Although *Virginia State Bd. of Pharmacy* may be interpreted as an indication of the Supreme Court's interest in expanding free speech into all business and economic areas, there is a fundamental difference between its application to prescription drug prices and representation campaign speech. By permitting more free speech in advertising drug prices, the consumer receives more truthful information on which to base his decision to buy. In contrast, permitting more free speech in representation campaigns—to the extent of material misrepresentations—may well result in the employee's hearing less truthful information.

42. *Id.* at 4, 94 L.R.R.M. at 1706. Members Fanning and Jenkins disagree with the majority's concern with this variance since: (1) they read these decisions to reflect disagreement with how strictly the *Hollywood Ceramics* rule should be applied, and not with the rule itself; and (2) some variance between the Board and the courts is inevitable since their members are human beings who will sometimes disagree with each other. *Id.* at 18 and 19, n.35, 94 L.R.R.M. at 1710. The relative inexperience in the labor law field among judges and their consequential discomfort in deciding cases in this area of the law may be an additional cause of variance.

43. *Id.* at 4, 94 L.R.R.M. at 1706. Members Fanning and Jenkins believe that "losing parties" do not object routinely to their opponent's campaign statements and that the few cases considered on the misrepresentation issue are an "excellent investment in maintaining our election standards." *Id.* at 17-18, 94 L.R.R.M. at 1710. This belief is supported by figures obtained from the Annual Statistics on the Conduct of Elections—Fiscal Year 1976. These figures indicate that in the last six years the Board has considered some 250-450 misrepresentation cases per year, out of over 10,000 elections conducted per year. Furthermore, rerun elections are directed in only 25-27 elections per year because of objections sustained on this issue. De Sio, Annual Statistics on the Conduct of Elections—Fiscal Year 1976, Office of the General Counsel, Division of Operations Management, Memorandum 77-14, Feb. 11, 1977.

44. 228 N.L.R.B. at 4, 94 L.R.R.M. at 1706. Members Fanning and Jenkins do agree with the majority that delay, particularly of election results, is a serious problem. However, it may be "an unavoidable characteristic" of maintaining the necessary campaign standards. *Id.* at 18-20, 94 L.R.R.M. at 1710-11. In *Shopping Kart* itself, the election was conducted June 20, 1974, and the decision had been before the Board since June 4, 1975. This especially long delay before the Board may have been due to the fact that it was used as a vehicle for a reevaluation of a major rule. *Id.* at 19, 94 L.R.R.M. at 1710.

45. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 85 (1964). Bok expressed the opinion that no standard of truth and accuracy could provide an administrable norm, and to insist on such gives rise to "vague and inconsistent rulings which baffle the parties and provoke litigation." R. WILLIAMS, P. JANUS & K. HUHNS, NLRB REGULATIONS OF ELECTION CONDUCT 57 (1974). The authors claimed that determinations regarding the substantiality and materiality of particular misrepresentations are necessarily highly subjective.

campaign misrepresentations to insure their freedom of choice. However, the majority no longer perceived such a need. The Board rejected the perception of employees as naive, unworldly, and easily swayed, considering the improved educational system and the frequency of Board elections in the industrial world.⁴⁶ Relying almost exclusively upon the recent empirical study by Professors Getman and Goldberg,⁴⁷ the Board concluded that employees are now sufficiently mature to recognize and discount campaign propaganda for what it is.⁴⁸ Consequently, the Board no longer perceived a need for the *Hollywood Ceramics* rule, and held that it would "no longer probe into the truth or falsity of the parties' campaign statements."⁴⁹

The Getman/Goldberg Study

One of the major criticisms that Getman and Goldberg levelled at Board policy-making is that policies are based upon statistically unverified behavioral assumptions.⁵⁰ This charge may be true,⁵¹ and it is healthy to reexamine periodically such premises as to current validity. However, the appropriate response was not to decide that this

46. In fiscal year 1976, the Board conducted 8,027 collective bargaining elections, only slightly more than the past few years, of which the unions won fifty percent. An additional 872 representation elections included inconclusive elections, decertification, union-shop deauthorization and elections. 41 N.L.R.B. Ann. Rep. 16-17 (1976).

47. Getman & Goldberg, *supra* note 38.

48. 228 N.L.R.B. at 8, 94 L.R.R.M. at 1707.

49. *Id.* at 3, 94 L.R.R.M. at 1705.

The majority did state that the Board would continue to set elections aside where a party has engaged in deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is. Furthermore, this decision was limited to areas of misrepresentation, and allegedly was not meant to affect Board intervention in other campaign conduct which interferes with employee free choice (the traditional areas of threats, promises of benefits, surveillance, interrogation, and other unfair labor practices). *Id.* at 9-10, 94 L.R.R.M. at 1708. Murphy, then Chairperson, stated in a concurring opinion, that her sole departure from the majority position was that she additionally would set aside an election "where a party makes an egregious mistake of fact . . . in the most extreme situation." *Id.* at 11-12, 94 L.R.R.M. at 1708. What constitutes an extreme situation has yet to be determined.

50. See generally Raskin, *Deregulation of Union Campaigns: Restoring the First Amendment Balance*, 28 STAN. L. REV. 1175 (1976).

51. The Board has assumed, for example, that an employee's vote will be influenced by: (1) threats of reprisal, *see, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 618-19 (1969); (2) promises of benefit, *see, e.g.*, NLRB v. Exchange Parts Co. 375 U.S. 405, 409 (1964); (3) threat of use of physical force or violence, *see, e.g.*, Al Long, Inc. 173 N.L.R.B. 477 (1968); (4) polling of employees by the employer, *see, e.g.*, Struksnes Const. Co., 165 N.L.R.B. 1062 (1967); (5) surveillance of employees by the employer which implies possible future retaliation, *see, e.g.*, Hendrix Mfg. Co. v. NLRB, 321 F.2d 100 (5th Cir., 1963); and (6) distribution of an official ballot in such a way that suggests either directly or indirectly to the voters a preference of the Board, *see, e.g.*, Allied Elec. Prods., Inc., 109 N.L.R.B. 1270 (1954).

one study had sufficient credibility on its face to overrule policy choices based on many years of experience. In *Shopping Kart*, the Board simply adopted, without critical evaluation, the Getman/Goldberg study's conclusion that the voting habits of employees are largely unaffected by election campaigns, as providing a "more accurate model of employee behavior."⁵³ The lack of critical analysis⁵⁴ of the study is especially significant since there are many criticisms of the study which undermine the validity of its conclusions.⁵⁵

The Getman/Goldberg study consisted of data compiled from interviews with one thousand employees in thirty-one "hotly contested" labor elections⁵⁶ in the Midwest. This data indicated that in eighty-one percent of the cases, an employee's actual vote could be correctly predicted from his intent three weeks prior to the election. Of the nineteen percent whose vote could not be predicted, only five percent of the nineteen percent arguably could have been affected by any speech or action occurring during the campaign.⁵⁷ Professors Getman and Goldberg concluded that the election campaign did not have a significant impact on a voter's choice in the elections.⁵⁸ Accordingly, they proposed that discharges, other reprisals, grants of

52. See Roomkin & Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1441 (1977). In this article, the authors propose the establishment in the NLRB of a research unit capable of evaluating and generating behavioral evidence relevant to the fashioning of labor standards, including the testing of validity of behavioral assumptions.

53. 228 N.L.R.B. at 8, 94 L.R.R.M. at 1707.

54. Two commentators recently noted the importance of critical evaluation of behavioral studies. They stated:

Indeed, it might be desirable to treat behavioral evidence with more suspicion than other evidence. Since science progresses through the accumulation of data and findings and the replication of results, there remains in any scientific venture a significant risk that results will not withstand the discovery of a new investigative technique or hold up under subsequent replications.

Roomkin & Abrams, *supra* note 52, at 1452.

55. The Getman/Goldberg study has been the subject of a recent symposium in 28 STAN. L. REV. 1161 (1976). Commentators reviewed the study from the perspectives of the Board, management, labor, social science (methodology), and industrial relations. See also Goetz & Wike, Book Review, 25 KAN. L. REV. 375 (1977); Kochan, Book Review, *Legal Nonsense, Empirical Examination and Policy Evaluation*, 29 STAN. L. REV. 1115 (1977).

56. A "hotly-contested election" is, by the authors' standards, one with high potential for illegal behavior. Getman/Goldberg study, *supra* note 38, at 34. In these elections, two interviews were conducted with each employee. The first interviews took place within a three week period prior to the election, and consisted of questions concerning the particular employee's attitude towards unions and general working conditions and his voting intent. In the second interview, which occurred after the election, employees were asked how they voted and why. For a fuller discussion of the methodology, see Getman/Goldberg study at 33-51.

57. See notes 67-69 and accompanying text *infra*.

58. Getman/Goldberg study, *supra* note 38, at 120-21.

benefits, threats, promises, interrogations, and misrepresentations should be eliminated as grounds for setting aside elections.⁵⁹

*Criticism of the Internal Validity
of the Getman/Goldberg Study*

The first obvious criticism of the study is that the reliability of the conclusions must be discounted by the fact that the study itself was limited to campaigns conducted in accordance with the *Hollywood Ceramics* standard.⁶⁰ Although the authors attempted to avoid this problem by only studying "hotly contested" elections, their conclusion remains suspect because it is impossible to predict how many more misrepresentations or other election violations would have occurred if the *Hollywood Ceramics* rule had not been in effect.⁶¹ The study's failure to account for the adherence to the legal limits by most of the parties creates three distinct problems. An inherent bias to the study arises which is impossible to remove. The resultant findings inadequately gauge the deterrent effect which the *Hollywood Ceramics* standard has on those parties who do not treat Board law with contempt. This failure also creates a situation in which it is difficult to determine if the meritorious aspects of the rule will be discarded with the obsolete.

The study also has been criticized for using skewed data.⁶² Perhaps the sample of the representation elections used was not sufficiently representative to support the conclusions.⁶³ The elections

59. *Id.* at 147-52.

60. 228 N.L.R.B. at 18, 94 L.R.R.M. at 1710 (Fanning, J. and Jenkins, H., partially dissenting). These elections were also conducted in accordance with other election safeguards. See note 9 *supra*.

61. *But see* Flanagan, *The Behavioral Foundations of Union Election Regulation*, 28 STAN. L. REV. 1195, 1204-05 (1976). The author disagrees with the assumption that more misrepresentations would have occurred without the *Hollywood Ceramics* rule. He feels that the current NLRB and court remedy for such violations (setting aside the election and ordering a rerun of the elections) is not a sufficient inducement for the regulation of misrepresentations. Employers may consider it to be cheaper to bear the remedial costs than to follow the rule. This is particularly true in the case of a rerun of the election since unions tend to lose a high percentage of the reruns. 41 N.L.R.B. Ann. Rep. 234 (1976). Even though this perception may be true with regards to the employer who is openly contemptuous of the law, it may not be true with regards to the employer who is obedient to existing law. Flanagan fails to realize that the main value of the *Hollywood Ceramics* rule may well lie in its ability to deter essentially law-abiding employers from indulging in material misrepresentations.

62. Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181, 1182-85 (1976) [hereinafter cited as Eames].

63. A representative sampling plan insures that the odds are great enough that the selected sample is, for the purposes at hand, sufficiently representative of the population to justify running the risk of taking it as representative. Probability sampling, rather than accidental or quota

studied were limited to a geographical area in Illinois, Indiana, Kentucky, Missouri and Iowa. This fact suggests that the conclusions may not be applicable to other regions, especially the South, where union representation is the smallest of any other region. Additionally, 45% of the N.L.R.B. elections studied were conducted in units of more than one hundred employees, even though only 13% of all N.L.R.B. elections were in units of this size.⁶⁴ Although this may have had administrative benefits for the study, it is not unreasonable to question whether employees in large units are inevitably more familiar with representation elections, thus creating an additional subtle bias in the study. In addition, of the 31 elections studied, the union won eight, or 26%, in contrast to the national average of 50% won by unions in the past several years.

The study also has been attacked for its failure to use a control group.⁶⁵ As noted, the study included interviews of employees who were in the midst of "hotly contested" elections, often including elections in which the employer had exhibited a coercive pattern prior to the campaign. No attempt was made to study any control group of employees who were not subjected to coercion and unfair labor practices. As a result, the study did not indicate what the norm was for employee response and thus could not show how its findings differed from that norm.

Finally, the data in the study was collected in the very limited time frame⁶⁶ of three weeks before the election and for a short period

sampling, is the only approach which makes this possible and involves insurance against misleading results. A. SELLTIZ, R. JAHODA, C. DEUTSCH, & J. COOK, *RESEARCH METHODS IN SOCIAL RELATIONS* 509-21 (1959). That the elections studied were limited to a geographical area and consisted of especially large units raises the question of whether this is a sufficiently pure probability sampling. Fanning and Jenkins in their partial dissent also doubt that the thirty-one elections constitute a statistically significant sample. 228 N.L.R.B. at 18, 94 N.L.R.B. at 1710.

64. This sample was selected in order to get a statistically stable estimate of campaign impact. Getman/Goldberg study, *supra* note 38 at 35.

65. Eames, *supra* note 62, at 1182-85. A control group is one which is not exposed to the assumed causal (or independent) variable. The use of a control group enables the tester to (1) rule out other factors as possible determining conditions; (2) determine that the assumed effect did not occur before the assumed cause; and (3) establish the existence of a concomitant or associated variation between the causal and the dependent variable. While a "before-after" design (as used in the Getman/Goldberg study) may act as its own control group, it may also hamper a determination of the interaction of prior or external events on the dependent variable, thus clouding the study. A. SELLTIZ, R. JAHODA, C. DEUTSCH & J. COOK, *RESEARCH METHODS IN SOCIAL RELATIONS* 94-95, 114-18 (1959).

66. Eames, *supra* note 62, at 1182-85. The purpose of studying the antecedent variable (coercion and propaganda prior to the first interview) is to trace out a causal sequence and thereby to clarify the influences on the relationship between the independent variable (as measured in the first interview) and the dependent variable (the vote as measured in the second interview). See J. ROSENBERG, *THE LOGIC OF SURVEY ANALYSIS* 66-68 (1968).

after the election. No attempt was made to conduct interviews earlier in the campaign when coercion and propaganda easily might have occurred resulting in a polarization of pro- or anti-union sentiment. When Getman and Goldberg began their study three weeks prior to the election, campaigns already may have hardened employee's views.

Another criticism of the Getman/Goldberg study is its failure to analyze and explain one of its key findings, that five percent of the voters did change their minds due to the campaign.⁶⁷ This five percent could have been subjected to exceptionally well-run campaigns⁶⁸ or could have participated in elections in which fewer election safeguards were violated. The important deductions from this statistic are that something caused the voters to change their minds and that some elections are more successful than others in causing such a change.⁶⁹ The study fails to determine what variables are responsible.

A final ground for criticism involves the adequacy of support for some of the study's other conclusions. For example, Board member Jenkins expressed doubt over the support for the conclusions that employees were unaffected by employer's unlawful campaigning, discriminatory discharges, and interrogations⁷⁰ in view of the fact that the employees were never asked whether these factors affected their votes. Instead, the first two of these conclusions were based on data which indicated that initial union supporters did not report a higher percentage of unlawful employee campaigning or employee discharges.⁷¹ The conclusion that employees were unaffected by interrogation was based on findings that it "was rarely reported by

67. 228 N.L.R.B. at 16, 94 L.R.R.M. at 1710. Fanning and Jenkins in their partial dissent express their view that this five percent is not insignificant.

68. Former Board Chairperson Miller finds that many nuances escaped the attention of the authors which do not escape any skilled industrial campaigner, and faults the authors for not looking further to determine the characteristics which distinguish a successful employer or union campaign. Miller concludes that the study supports his experiential belief that campaigns can be highly successful, although few are. But the authors ignored the good possibility that they may have unconsciously chosen poorly run campaigns, which thereby would bias their responses and their conclusions. Miller, *The Getman, Goldberg and Herman Questions*, 28 STAN L. REV. 1163, 1166 (1966).

69. In the campaigns which the authors characterize as "most successful company campaigns," the union lost thirty-five percent of its card signers by the time of voting as compared to an average of four percent in typical campaigns. In "successful union campaigns," it gained ten percent between signing and voting as compared to the same average of four percent. These variances alone must indicate that campaign techniques, whether legal or illegal, do make a difference. Eames, *supra* note 62, at 1186.

70. 228 N.L.R.B. at 24-26, 94 L.R.R.M. at 1712 (Jenkins, H., further dissent).

71. The Getman/Goldberg Study, *supra* note 38, at 121, 126.

employers as a campaign tactic.”⁷² The failure to report these activities does not support the conclusion that these tactics do not influence the employee’s vote.

These criticisms suggest certain internal problems with the study and its conclusions which should have required a more thorough evaluation of this study prior to its unquestioned adoption by the Board. Instead, the Board appears to have incorporated without correction not only these internal deficiencies, but also certain external deficiencies not even fathomed by the study. By its decision the Board manifested a change in attitude towards employees while failing to consider the realities of the labor relations setting and the many purposes served by the *Hollywood Ceramics* rule.

*Criticisms of the External Deficiencies of the
Board’s Decision and the Getman/Goldberg Conclusions*

As a result of the findings and conclusions made by the Getman/Goldberg study, the *Shopping Kart* Board did more than simply state that it will no longer probe into the truth or falsity of parties’ campaign statements; it totally changed its attitude toward employees.⁷³ Prior to *Shopping Kart*, the Board was almost paternalistic in its attitude toward employees in the election campaign setting.⁷⁴ Employees were considered to be inherently in need of protection against a superior opponent to insure freedom of choice, and so were provided with various election safeguards.⁷⁵ With *Shopping Kart*, the Board’s attitude has shifted to one of parental pride that employees are so sophisticated that they can see through almost any misrepresentation made during a campaign.⁷⁶ Thus, because of this new attitude, not only has one of the traditional election safeguards been removed, but it is unpredictable how many more will be discarded for the same reason.⁷⁷

72. *Id.* at 149.

73. 228 N.L.R.B. at 7-8, 11, 94 L.R.R.M. at 1707, 1708.

74. The court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), that two premises have been central to the Board’s paternalism toward employees’ rights. First, the employee-employer relationship inherently retards the free exercise of employee rights. Employment security, being foremost in the minds of the employees, has priority over any desire to support unions. Second, employees do not interpret management statements objectively, but infer the meaning having the greatest impact on their employment security, thus foreclosing the effectiveness of union rebuttal. See also Swift, *NLRB Overkill: Predictions of Plant Relocation and Closure and Employer Free Speech*, 8 GA. L. REV. 77, 91-96 (1973).

75. See note 9 *supra*.

76. See note 49 *supra*.

77. See notes 100-106 and accompanying text *infra*.

This change in attitude, however, is inappropriate because it ignores certain realities of the present national labor relations setting. First, the decision ignores the heterogeneous nature of the workers being organized. A significant number of employees being organized speak little or no English. Many workers are minors in the sixteen to twenty-one age bracket with very limited exposure to the industrial world.⁷⁸ Perhaps most significantly, for the first time in recent history the average new union member's level of educational attainment is below that of the average American.⁷⁹ To assume that the improved educational processes and increased familiarity of industrial elections⁸⁰ justifies the removal of the *Hollywood Ceramics* rule is to deny the presence of these characteristics of the labor force.

Second, the decision ignores the basic fact that today's employees, when organizing, rarely if ever stand on an equal footing with their employer.⁸¹ Today's high unemployment rate and job uncertainty only exacerbates this problem. The well publicized scarcity of jobs is inevitably on the minds of the employees when they listen to employer speeches. Yet the Board now assumes that the employee is sufficiently "sophisticated" to invariably listen to campaigns with the objective ear of an impartial and knowledgeable third party. This theory breaks with Board precedent that the listener/employee uses a highly subjective "well-tuned ear" to listen to whatever is said by either party who does affect or may affect his livelihood⁸² and cer-

78. As of September, 1977, there were 14,452,300 people aged sixteen to twenty-one years in the civilian labor force. U.S. Dept. of Labor, Bureau of Labor Statistics Volume 24, No. 10, pgs. 21-22 (October 1977). The impact which people in this age bracket might have on union elections is manifested by the results of the election in *Shopping Kart*. Petitioner union won the election by a 14-8 vote. 228 N.L.R.B. at 1 n.2, 94 L.R.R.M. at 1975. The attorney for the employer stated in his Motion for Reconsideration that at least four of the six high school student employees voted for the union. He argued that "no study, doctor, expert or law review article will ever be found to uphold the premise that high school students . . . from an economically depressed area" are mature, experienced adults. Motion for Reconsideration of *Shopping Kart Mkt., Inc.*, 228 N.L.R.B. slip op. No. 190, 94 L.R.R.M. 1975, at 2 (1977).

79. Although the educational attainment level of the average worker in the labor force continues to rise, MONTHLY LABOR REVIEW, March, 1977, 62-65, it is significant to note that one recent study indicates that the educational attainment level of union members is on the decline. Wall Street Journal, Oct. 5, 1977 at 22. In that study, Professor Drucker attributes this decline to the fact that the more educated members of society are entering non-unionized "white collar" professions, thus leaving only a pool of less educated workers for the traditionally unionized occupations. This specifically contradicts one of the majority's premises. 228 N.L.R.B. at 7, 94 L.R.R.M. at 1707.

80. See note 46 and accompanying text *supra*.

81. See notes 22 & 74 and accompanying text *supra*. See generally T. EMERSON, THE SYSTEM OF FREE EXPRESSION, 9-10, 676 (1970).

82. See *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

tainly represents an unsophisticated analysis of the labor relations setting.

Third, and particularly relevant to the election campaign context, the decision ignores the increased sophistication of the various electioneering techniques used.⁸³ As in political election campaigns, the potential voter is subjected to an enormous variety of ever-improving methods of communication designed to capture his vote. In the political election context, recent legislation regulating campaigns⁸⁴ provides more opportunities for opposing parties to clear up any misrepresentations which might occur. In contrast, the Board's overruling of *Hollywood Ceramics* reduces regulation of labor election campaigns and eliminates a procedure for rectifying misrepresentations.⁸⁵ Thus, the employee who may be less educated, younger, and speak English less fluently than the average American, who is on an unequal footing with his opponent, and who is being subjected to just as sophisticated electioneering, may be afforded less protection than his counterpart voter in the political election setting.⁸⁶

In changing its attitude toward employees, the Board did more than slight these realities of the national labor relations setting. The *Shopping Kart* Board appears to have adopted the reasoning that if one purpose of a rule is in serious question, the rule must be dis-

83. See Miller, *supra* note 68, at 1164.

84. See, e.g., Freedman & Edelstein, *Political Campaigning and the Airways*, 1 PEPPERDINE L. REV. 178 (1974); Hollihan, *The Federal Election Campaign Act Amendments of 1974: The Constitutionality of Limiting Political Advertising By the Non-Candidate*, 3 FLA. ST. U. L. REV. 226 (1975); Seeger, *Free Speech and Political Contributions*, 50 CONN. B.J. 33 (1976); Simmons, *The F.C.C.'s Personal Attack and Political Editorial Rules Reconsidered*, 125 U. PA. L. REV. 990 (1977); Wick, *The Federal Election Campaign Act of 1971 and Political Broadcast Reform*, 22 DEPAUL L. REV. 582 (1973).

85. In a speech delivered to the Labor Relations Law Section of the A.B.A., Professor Goldberg, one of the authors of the Getman/Goldberg study, stated that the government's role in union representation elections should be limited to merely conducting the election and counting the ballots. Speech by Stephen Goldberg before the Labor Relations Law Section of the American Bar Association in Chicago, Illinois, 1977, reprinted in 95 L.R.R.M. 390 (1977).

However, former Board Chairperson Edward Miller disagrees with this view. He feels that reduction of the Board's standards to those used in political elections is neither warranted nor desirable. Miller, *supra* note 68.

86. It is worth noting that the Board's attitude of voter sophistication, resulting in less protection, is directly contrary to recent legal trends in other segments of society. The new political candidate disclosure laws (Federal Election Campaign Act, Amendments of 1976, 90 Stat. 1225) commercial speech (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *see* note 41, *supra*; attorney advertisements, (*Bates v. State Bar of Arizona*, 97 S.Ct. 2691 (1977)); and the Freedom of Information Act (5 U.S.C. § 552 (1970)) are examples of consumer laws which have all acknowledged the increasing need and demands of most consumer/citizens for truthful information and protection, without regard to the cost, or administrative inconvenience.

carded, thereby eliminating all other purposes served by the rule.⁸⁷ The Getman/Goldberg study concluded that campaign misrepresentations do not affect the free choice of the employees, for generally the employee decision is made prior to the campaign. Yet, neither the study nor the Board considered that the *Hollywood Ceramics* rule also served as a deterrent and as a necessary part of several of the Board's statutorily delegated duties.

The results of the study do not and cannot calculate the obvious deterrent effect that the *Hollywood Ceramics* rule had on campaign misrepresentations.⁸⁸ Labor relations is an intensely practical field, with both employer and union desirous of winning an election,⁸⁹ and with people's livelihoods resting on the results of elections and consequential collective bargaining agreements. It is likely that the implementation of the Getman/Goldberg conclusions could result in an increase in severe misrepresentations.⁹⁰

A second purpose ignored by the study, and hence by the Board, is that the *Hollywood Ceramics* rule served as an implementation of several of the Board's statutorily delegated duties. A primary task of the Board is conducting elections and maintaining the integrity of election processes in such a manner that they achieve and maintain acceptability in the industrial relations community.⁹¹ This is necessary for the preservation of industrial peace and for the acceptance of a chosen bargaining representative at the negotiation table. By refusing to probe the truth or falsity of essentially all campaign statements by any party, the Board is encouraging an almost "anything goes" atmosphere in which irresponsible statements, or worse, will tend to become commonplace.⁹² Without reasonable limitations or a sincere

87. One purpose not well-served by the old rule was administrative efficiency. Indeed, the Board's real reason for this decision may have been its deep-felt desire to eliminate the time and effort necessitated by investigations and hearings on the issue of material misrepresentations. Unpublished statistics compiled by the Board in 1974 and 1976.

88. See Miller, *supra* note 68, at 1170-71. Miller states that people, including himself, who are directly involved in counseling people who are facing campaigns, know of the deterrent effect because their clients seek and follow their advice as to what may or may not be done, despite the time, effort and money involved. *Id.* at 1170.

89. Technically, a union either wins or loses an election to represent the employees, but an employer merely waits to bargain collectively with the winning union or other bargaining representative, should there be one. See Section 1 of NLRA, 29 U.S.C. § 151 (1970).

90. 228 N.L.R.B. at 18, 94 L.R.R.M. at 1710 (Fanning, J. and Jenkins, H. partially dissenting). There does exist one deterrent factor to a potential increase in misrepresentations: the obvious lie will not be believed and may easily rebound against the speaker.

91. 29 U.S.C. §§ 151, § 159 (1970). See *Modine Mfg. Co.*, 203 N.L.R.B. 527, 529 (1973).

92. 228 N.L.R.B. at 18, 94 L.R.R.M. at 1710 (Fanning, J. and Jenkins, H. partially dissenting). See also *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966). Justice Clark, in *Linn*, recognized that representation campaigns are heated affairs "characterized by

show of concern by the Board, a general insolence towards the election processes likely may develop among all parties. This is clearly contrary to the Board's statutory duty and will defeat the necessary integrity of the election processes.

Additionally, the Board has a statutory duty to encourage the maintenance of stable bargaining relationships.⁹³ Collective bargaining has assumed a central role in the labor relations setting.⁹⁴ Because the negotiation process establishes the basic working relationships between employer and employees, it is important that the bargaining relationship be conducted in an atmosphere of trust and good faith.⁹⁵ Such a difficult requirement would be complicated if the parties bargaining originally had met in a campaign accompanied by irresponsible statements. This easily could aggravate the feelings of hesitancy and defensiveness which a party often brings to the bargaining table, and ultimately could lead to increased distrust and suspicion towards one's opponent. Irresponsible statements may be deterred by this consideration alone. However, if they are not, such a state of affairs will not lead to industrial peace, but, instead, could lead to the industrial strife which the Board has tried to prevent ever since the Act was formulated.

Finally, the rule served the Board's purpose of assuring that employees have complete freedom of choice in selecting a bargaining representative. The Board's withdrawal from protecting the employees against misrepresentations will alter the balance between the rights of the employees and the employer's and union's valid rights to free speech,⁹⁶ and will affect the Board and the parties' effort to assure employees their right to freedom of choice. This is clearly contrary to the stated policy of providing both the employees and the public free, fair and informed representation elections.⁹⁷ To permit

bitter and extreme charges, counter-charges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Id.* at 58.

93. See 29 U.S.C. § 151 (1970) (stating that the policy of the United States is to encourage the practice and procedure of collective bargaining).

94. See Brooks, *Stability Versus Employee Free Choice*, 61 CORNELL L.J. 344 (1976); Address by Gerald Brown, Recent Trends in N.L.R.B. Decisions, Feb. 1, 1963, cited in Fuchs, *Pre-Election Campaign Propaganda and Activities Before the National Labor Relations Board*, 4 B.C. IND. AND COMM. L. REV. 485 (1963).

95. 29 U.S.C. § 158(d) (1970) (stating "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith").

96. 228 N.L.R.B. at 22, 94 L.R.R.M. at 1711-12. See note 41 *supra*.

97. See *Bausch and Lomb Inc. v. NLRB*, 451 F.2d 873 (2d. Cir. 1971) (holding that the minimal chilling effect on both the speech of the employer and the union presented by the sanction of setting aside an election because of misrepresentation was justified).

such a change in policy requires more than the support of a single study.⁹⁸

IMPACT OF *Shopping Kart*

The impact of the *Shopping Kart* decision may be more extensive than is readily apparent.⁹⁹ Although the decision is limited specifically to the area of misrepresentations,¹⁰⁰ its rationale conceivably could be extended to other election safeguards. For example, under the *Excelsior* rule,¹⁰¹ an employer is required to file with the Regional Director the names and addresses of all employees eligible to vote within seven days of the direction of election or approval of the election agreement. The lists usually are made available to the petitioning union(s) ten to twenty-three days before the election in order to permit the union to campaign among the employees and to insure a free and reasoned choice. If, as the study suggests, nearly all employees have a firm vote preference at the time of the direction of election¹⁰² or at least three weeks prior to the election, then the need for these lists is somewhat questionable. If the study's conclusion does not call for the elimination of the *Excelsior* rule, it certainly suggests that the proper time to make the lists available is as soon as a valid petition is filed.¹⁰³

98. See note 41 *supra* regarding the effect of *Hudgens*.

99. The potential effect of *Shopping Kart* is especially unclear at this point for two reasons. First, Board member Walther has resigned, and President Carter has nominated John Truesdale, former Executive Secretary of NLRB, as his replacement. Since Walther tended to be a conservative member, and had been actively inviting a case to challenge *Hollywood Ceramics*, the appointment of new member Truesdale may affect the future of the *Shopping Kart* decision. At this point, no indications of member Truesdale's opinion are available. Second, since then Chairperson Murphy's concurring opinion was quite unclear regarding her "egregious mistake of fact" standard, see note 49 *supra*, opportunity for leeway in interpretation of the decision does exist.

100. Compare Penello's and Walther's statement that the Board will continue its policy of overseeing other campaign conduct outside of misrepresentations, 228 N.L.R.B. at 10, 94 L.R.R.M. at 1708, with Jenkin's and Fanning's belief that this may be the first step in dispensing with time-honored election safeguards, *Id.* at 22, 94 L.R.R.M. at 1711.

101. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). The *Excelsior* rule was established by the Board in order to give labor organization an opportunity to explain their point of view to the employees. Under the existing circumstances at the time of the decision, an employer had many more opportunities to address the employees. An employer had both a list of the names and addresses of his employees and a continuing opportunity to address the employees on his work premises. The labor organizations had no such equal opportunities. See generally Fanning, *Union Solicitation and Distribution of Literature on the Job—Balancing the Rights of Employers and Employees*, 9 GA L. REV. 367 (1975).

102. Getman and Goldberg state that of the 94% of the employees having a vote preference for the employer and the 82% for the union at the time of the first interview, 87% of those employees voted as they had intended. *Supra* note 38 at 64.

103. The original rationale for the *Excelsior* rule, see note 101 *supra*, may be removed since the proposed Labor Reform Act of 1977, H.R. 8410, 95th Cong., 1st Sess. § 3(b)(1)(A) (1977),

Another election safeguard which may be affected by the *Shopping Kart* rationale is the *Peerless Plywood* rule¹⁰⁴ that an election may be set aside if either the employer or the union delivers captive audience speeches within twenty-four hours of the election. If campaigning during the last three weeks before an election is virtually worthless,¹⁰⁵ then the *Peerless Plywood* rule also would appear to be worthless.¹⁰⁶

Aside from the procedural aspects of the election, the *Shopping Kart* decision may have a grave impact on voter turnout. At present, voter turnout in labor elections is at an all-time high; it approaches ninety percent, in marked contrast with a much lower figure in political elections.¹⁰⁷ One reasonable assumption is that the lower voter turn-out in political elections is caused by the voter's inability to rely on representations made by candidates where there is no satisfactory system of deterrence.¹⁰⁸ With the Board's refusing to examine for misrepresentations, it is reasonable to foresee that voter skepticism and lower expectations of honesty may carry over from political elections to representation elections.

The *Shopping Kart* decision also may have an effect outside of the election area. For example, the Board could begin applying a stricter standard in determining what factual situations would constitute unfair labor practice violations of section 8(a)(1),¹⁰⁹ which prohibits

requires that if an employer addresses employees on its premises or during working time on representation issues, employees shall be assured an equal opportunity to obtain in an equivalent manner information from the union. (The bill was passed by the House of Representatives on Oct. 6, 1977).

104. *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

105. Getman/Goldberg study *supra* note 38, at 146.

106. This change may be doubtful in view of a post-*Shopping Kart* decision, *Rodac Corp.*, 231 N.L.R.B. No. 29, 95 L.R.R.M. 1608 (Aug. 9, 1977), (holding for strict enforcement of the *Peerless Plywood* rule), but this was a Fanning-Jenkins majority decision, and a full five-person panel has yet to decide the issue.

Another election safeguard which may be affected by the *Shopping Kart* decision is the rule against campaign appeals to racial prejudice and bigotry. *Sewell Mfg. Co.*, *supra* note 9. Because of the Board's change in attitude toward voters, it may now be that employees are sufficiently sophisticated to ignore the emotional and irrational appeal of racial slurs and epithets. However, it does appear that the *Milchem* rule, *supra* note 9, is not in danger of being modified. The *Shopping Kart* Board noted that grounds for objections would be preserved if the Board's election processes are deceptively used. 228 N.L.R.B. at 9. Since electioneering at the polls may be considered to be deceptive use of the Board's election processes, this objection might remain unaffected by the *Shopping Kart* decision.

107. 228 N.L.R.B. at 20, 94 L.R.R.M. at 1711 (Fanning, J. and Jenkins, H., partially dissenting).

108. *Id.*

109. 29 U.S.C. § 158(a)(1) (1970). An example may be that the granting of bonuses just prior to an election arguably could be "ignored" by a "sophisticated employee". This would be in

employer interference, restraint or coercion of employees in the exercise of their section 7 rights.¹¹⁰ Such a standard would require more flagrant coercion and outright deception before the Board would find that an unfair labor practice had occurred.¹¹¹ If, as alleged by the Board, employees are sufficiently sophisticated to view impartially what is said,¹¹² the Board's test may become the more objective "reasonably prudent person on the street." This would be an unfair substitute for the standard of the reasonable employee with his "ear well-tuned" to coercive innuendoes. Such a view would result in not only fewer findings of objectionable campaign conduct, but also fewer findings of unfair labor practices and fewer bargaining orders. Consequently, tougher campaigns would be waged by all parties.¹¹³

opposition to *N.L.R.B. v. Exchange Parts*, 375 U.S. 405, 409 (1964) (holding that employees are not likely to miss the inference that the source of benefits now being granted may be a "fist inside the velvet glove.") A second example is when the employer conveys a sense of futility of selecting a bargaining representative. Arguably, this could also be "ignored." See, e.g., *The Trane Co.* 137 N.L.R.B. 1506 (1962) (holding a violation occurred when the employer explained that his wage policies would continue to be determined unilaterally "union or no union"); *Metropolitan Life Ins. Co.*, 53 L.R.R.M. 1187 (1963) (holding a violation occurred when the employer stated that he would abide by his present policies "even if Jesus Christ were representing the employees"). A third example is the current safeguards required to be observed by an attorney when interrogating employees as necessary preparation for his defense for a pending trial. These safeguards may be minimized due to the notion that "sophisticated" employee will not feel coerced. *Johnnie's Poultry Co.*, 146 N.L.R.B. 770 (1964).

110. 29 U.S.C. § 158 (a)(1) (1970).

111. *Supra* note 85. Professor Goldberg recommends that election results should stand regardless of whether the employer grants benefits or takes reprisals during the campaign. However, he would preserve the right to file unfair labor practice charges, based on such conduct, under § 8(a)(1) and (3). See generally Swift, *N.L.R.B. Overkill: Predictions of Plant Relocation and Closure and Employer Free Speech*, 8 GA. L. REV. 77-100 (1973), in which the author suggests that the Board and the courts should take a less restrictive view towards 8(a)(1) violations in the representation election context.

112. See notes 46-49 and accompanying text *supra*.

113. Two areas of impact exist outside the Labor Board itself. The first is in the new fields of labor relations in the public sector and in state agricultural labor boards. See California Agricultural Labor Relations Act of 1975, CAL. LABOR CODE § 1140-116 (West Supp. 1976); Ariz. Rev. Stat. §§ 23-1381 to 1395 (1972, Supp. 1975); Idaho Code § 22-1401 to 4113 (1972, Supp. 1975); Kan. Stat. § 44-818 to 830 (1973). The Board's reliance of the Getman/Goldberg study and its questioning of behavioral assumptions may result in the discouragement of what has been thus far the uncritical importation of N.L.R.B. decisions and rule making into their own law. See Flanagan, *The Behavioral Foundations of Union Election Regulation*, 28 STAN. L. REV. 1195 (1976).

The second area of impact is in the area of civil law. Since remedy from the Board for misrepresentations is now denied, civil lawsuits for misrepresentation and detrimental reliance may increase as an alternative. That this is a possibility was acknowledged in *Linn v. Plant Guards, Local 114*, 383 U.S. 53, 65 (1966). However, the Court held that the standards for a defamation suit by either union or employer are to be those enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which require stricter standards to establish a cause of action. The Court stated that the requiring of a higher standard to establish a cause of action was to discourage the use of civil law suits as weapons of economic coercion.

A final area of impact involves the Board's policy making procedures. The *Shopping Kart* Board's decision to rely upon the Getman/Goldberg study raises the question of whether exclusive reliance upon one empirical study is to become acceptable precedent.¹¹⁴ While the increasing influence of behavioral sciences and technology in our legal system¹¹⁵ may be beneficial, slavish adherence to predictions of how people will behave should not completely replace experience and common sense. Although the task of establishing rules would be easier if one could rely on simple formulas or statistical computations, as NLRB member Brown stated just prior to *Hollywood Ceramics*,

[c]onvenient results are not always appropriate ones. Indeed, they rarely are in the field of labor relations because of the different factual circumstances, relationships between parties, variations between industries and plants within industries, and the continually changing economic climate.¹¹⁶

Increased efficiency, lighter case loads, and less conflict with the Courts which may in fact result from the discarding of the *Hollywood Ceramics* rule are clearly desirable. However, the Board must not ignore its primary duty of viably protecting employees' section 7 rights. Complete reliance upon an uncritically evaluated study cannot viably protect these rights.

CONCLUSION

In the interests of protecting the employees' rights, the integrity of the Board's election processes and the stability of the collective bargaining processes, the Board must return to an evaluation of campaign statements made by both the employer and the union. A new standard should be adopted which not only acknowledges but also emphasizes that: (1) the misrepresentation must be quite substantial; and (2) the particular level of sophistication among the employees who are voting must be a factor in determining the substantiality of misrepresentations.¹¹⁷ The many exceptions to the presumed high

114. See Roomkin & Abrams, *supra* note 52.

115. See Dworkin & DeNisi, *Empirical Research on Labor Relations Law: A Review, Some Problems, and Some Directions for Future Research*, 28 LABOR L.J. 563 (1977).

116. Address by N.L.R.B. member Gerald A. Brown before the Labor Law Section of the State Bar of Texas in San Antonio, Texas, on July 5, 1962, reprinted in 50 L.R.R.M. 72 (1962).

117. The level of sophistication was already a part of the *Hollywood Ceramics* rule, but has not been sufficiently emphasized or acknowledged.

[W]e may for example take into account the current degree of sophistication of the voters at a particular time or in a particular area as one of many intangibles going into a determination of whether a rerun or hearing is justified.

Modine Mfg. Co., 203 N.L.R.B. at 531.

level of sophistication of employees requires that if the particular employees realistically need protection in order to make their desires known through the election, such protection must be given by the Board.¹¹⁸

In the alternative, if *Shopping Kart* is allowed to stand, both the effects of the decision and the accuracy of the conclusions of the Getman/Goldberg study should be evaluated to determine whether the desired results are accomplished in the marketplace. Whatever the results of this evaluation, the Board in the future should be reluctant to accept such empirical behavioral studies. Their use should be closely examined in terms of the procedures used, the basis for their conclusions, and the weight to be given them in general, and in the particular situation.

By refusing to probe into the truth or falsity of campaign statements in *Shopping Kart*, the Board has changed the law in the area of misrepresentations during campaign elections.¹¹⁹ Yet, to be practical, the Board's approach must include protection for the employees' exercise of their section 7 rights and for the Board's statutory obligations. As it now stands, the practical approach suggested by *Shopping Kart* fails to sufficiently protect either the employees or the Board's statutory obligations.

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118. An objective standard could be provided to determine a lack of individual employee sophistication. Information for such a determination could be provided by the employer when he supplies the *Excelsior* list. For example, if a certain percentage of employees spoke little or no English, or had minimum job experience and/or level of education, or if the level of unionization in the geographical area was low, the presumptions of sophistication by the Board would be lacking. Such an election then could be categorized as requiring less to constitute a "material misrepresentation."

119. See *Thomas E. Gates and Sons*, 229 N.L.R.B. No. 100, 95 L.R.R.M. 1198 (May 17, 1977), (the Board reaffirmed *Shopping Kart* and declined to order a second election on the basis of a misrepresentation by \$1.90 of the existing wage under union's current contract, made during the campaign by the Employer); *Cormier Hosier Mills*, 230 N.L.R.B. No. 185, 95 L.R.R. 1461 (July 21, 1977) (union misrepresentation that employer had engaged in intercorporate manipulations by a two million dollar loan so as to prevent employees from sharing equitable in the employer's profits, was not grounds for objections to the election since it did not fit within the narrow exceptions to the *Shopping Kart* rule). See also regarding retroactivity of *Shopping Kart*, *Blackman-Uhler Chem. Div. v. NLRB*, 561 F.2d 1118 (4th Cir. 1977), 96 L.R.R. 307 (4th Cir. Sept. 12, 1977), (remanding a case involving campaign misrepresentations of employer's profits by forty-eight percent to the Board for a determination of whether the *Shopping Kart* rule is applicable to other pending decisions). But see *Shalom Nursing Home*, 230 N.L.R.B. No. 145, 95 L.R.R.M. 140 (July 19, 1977) (holding that where *Shopping Kart* decision, issued two days after exceptions to the Hearing Officer's Report on Objections to the Election was due, so that no exceptions to the recommendation that the objections to the misrepresentation be sustained were received, the objection is overruled on the basis of *Shopping Kart*).