

# Should Representation Elections Be Governed By Principles Or Expediency?

Mary Ellen Krug\* and Michele A. Gammer\*\*

## I. INTRODUCTION

Should the National Labor Relations Board<sup>1</sup> set aside representation elections because one or more parties has tried to influence the voting with misrepresentation of facts or law? Although the Board is responsible for ensuring fair elections, in *Midland National Life Insurance Co.* it embraced a rule inconsistent with this statutory responsibility,<sup>2</sup> rejecting the *Hollywood Ceramics Co.*<sup>3</sup> rule and narrowly limiting Board review of campaign misrepresentations.<sup>4</sup>

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\* B.A. 1939, University of Washington; L.L.B. 1943, University of Washington. The author passed away while the article was in its final stage of preparation. At the time of her death, Miss Krug was a senior partner at Schweppe, Krug & Tausend, Seattle, Washington. She had practiced almost exclusively in the field of labor and employment law since joining the Schweppe firm in 1943. From 1985 until her death she was chairman of the A.B.A. Section on Labor and Employment Law and was a member and past chairman of the Washington State Public Employees Relations Commission.

\*\* B.A. 1977, Oberlin College; J.D. 1981, Georgetown University Law Center. Law Clerk to the Honorable Richard C. Freeman, United States District Judge, N.D. Ga., 1981-83. Associate, Schweppe, Krug & Tausend, Seattle, Washington, 1983—present.

1. The National Labor Relations Board [hereinafter cited as Board] administers the Labor Management Relations Act [hereinafter cited as Act], 29 U.S.C. §§ 151-69 (1982). It determines all unfair labor practice cases brought before it and has complete authority over representation matters. It possesses a "wide degree of discretion" in performing its function of establishing policies and procedures to safeguard the conduct of representation elections. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946).

2. 263 N.L.R.B. 127 (1982).

3. 140 N.L.R.B. 221 (1962). The *Hollywood Ceramics* rule eliminated "intent to mislead" as an element of campaign misrepresentation and declared that that Board should set aside an election when there has been (1) a misrepresentation or other similar campaign trickery; (2) which involves a substantial departure from the truth; (3) at a time which prevents the other party or parties from making an effective reply; (4) so that the misrepresentation whether deliberate or not, may reasonably be expected to have a significant impact on the election. *Id.* at 224.

4. *Midland*, 263 N.L.R.B. at 129. The Board's frequent changes in election misrepresentation standards have been the focus of considerable comment. See, e.g., Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Gardner, *NLRB Campaign Propaganda: A Call for Congressional Reform*, 11 PEPPERDINE L. REV. 85 (1983); Truesdale, *From Gen-*

This Article examines the *Midland* standard in light of the Board's statutory duty to protect the right of employees to a free and fair choice of collective bargaining representatives. The Article reviews the historical development of the Board's approach to the regulation of election campaign misrepresentations, criticizes the Board's abnegation of its duty to ensure an employee's free choice by its adoption of the *Midland* rule, and suggests a more flexible standard to be used in the review of campaign misrepresentations that would protect the rights of employees without involving the Board in the minutiae of representative election campaigning.

## II. EVOLUTION OF THE LAW ON PRE-ELECTION MISREPRESENTATION

### A. Representation Elections Generally

Employees, labor organizations, and employers may file representation petitions to determine whether a labor organization is entitled to recognition for purposes of collective bargaining.<sup>5</sup> The Board has charged its regional directors with processing and investigating these petitions.<sup>6</sup> The regional director determines in the first instance whether the Board has jurisdiction over the representation matter,<sup>7</sup> whether the petitioner's showing of

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eral Shoe to General Knit: *A Return to Hollywood Ceramics*, 30 LAB. L.J. 67 (1979); Note, *Shopping Kart: The Need For a Broader Approach to the Problems of Campaign Regulation*, 56 N.C.L. Rev. 389 (1978); Note, *Misrepresentation in Union Organizational Elections: The Death of Hollywood Ceramics*, 9 U. Tol. L. Rev. 399 (1978); Comment, *A Look at the Revolving NLRB Policies Governing Union Representation Election Campaigns*, 19 WAKE FOREST L. Rev. 417 (1980); Note, *The Hollywood Ceramics-Shopping Kart Merry-Go-Round: Where Will it Stop?*, 20 SANTA CLARA L. Rev. 157 (1980).

5. 29 U.S.C. § 159(c)(1) (1982). An election is not necessary to create an employer's duty to recognize a union or to bargain with it as the employees' representative. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 583 (1969). A representative may be recognized legally on the basis of a check of signed authorization cards. See *DeQueen Gen. Hosp.*, 264 N.L.R.B. 480, 495 (1982); *Gissel Packing*, 395 U.S. at 583. An employer may legally recognize a union on other evidence of majority representation. *NLRB v. Cofer*, 637 F.2d 1309, 1313 (9th Cir. 1981), *enforcing* 233 N.L.R.B. 527 (1977); *accord Lesnick, Establishment of Bargaining Rights without an NLRB Election*, 65 MICH. L. Rev. 851 (1967). There are also instances when an employer will be required to bargain with a union without an election. *Gissel Packing*, 395 U.S. at 583.

6. 29 U.S.C. § 159(c) (1982).

7. The Board's jurisdiction extends to "labor" disputes "affecting commerce." *NLRB v. Longshoreman*, 332 F.2d 992 (4th Cir. 1964). Constitutional conflicts operate to limit the reach of the Board's commerce clause jurisdiction, see *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (in the absence of a clear expression by

interest is sufficient, and whether the bargaining unit is appropriate.<sup>8</sup> When these determinations so indicate, the regional director directs that an election be conducted by secret ballot.<sup>9</sup>

Within five days after the election, a party may file post-election objections with the regional director.<sup>10</sup> When such objections are filed, the regional director investigates the circumstances of the election, usually without a hearing,<sup>11</sup> and issues a report and recommendation to the Board, which makes the final determination.<sup>12</sup> If the Board sustains an objection to an election, a new election is ordered. If the objections are overruled, the Board certifies the results of the election.<sup>13</sup>

Representation proceedings are not directly reviewable by the courts.<sup>14</sup> An employer may challenge the fairness of an election only by refusing to bargain with a victorious union and then contesting the election's validity in unfair labor practice proceedings.<sup>15</sup> The union also may challenge the validity of an elec-

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Congress, the Court declines to construe the Act in a manner that would call upon the Court to resolve "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clause."). In addition, the Act itself contains specific limitations on the Board's jurisdiction in its definition of the terms employer, employee, and labor organization. 29 U.S.C. § 152 (1982).

8. 29 U.S.C. § 159(b) (1982).

9. NLRB Rules and Regulations, 29 C.F.R. § 102.69(a) (1985).

10. The Act itself makes no provision for objections. Objections are filed only pursuant to NLRB Rules and Regulations. 29 C.F.R. § 102.69(a) (1985). An employer or union who challenges a representation election irregularity must present its objections in the representation proceeding and in any subsequent unfair labor practice proceeding to preserve the issue for appellate judicial review. *See, e.g.*, NLRB v. Best Products Co. Inc., 765 F.2d 903, 909 (9th Cir. 1985); NLRB v. Belcor, Inc., 652 F.2d 856, 858 n.2 (9th Cir. 1981) (citing NLRB v. Children's Baptist Home, 576 F.2d 256, 261-62 (9th Cir. 1978)).

11. The Board procedures authorize the regional director to hold a hearing when, in his discretion, he determines that the issues may be resolved more appropriately after a hearing. NLRB Rules and Regulations, 29 C.F.R. §§ 102.69(c), (d) (1985). Several courts, however, have held that a party challenging a representation election is entitled to an evidentiary hearing when the election campaign raises substantial and material factual issues and proffers evidence that establishes a prima facie case for setting aside the election. *See, e.g.*, NLRB v. Bata Shoe Co., 377 F.2d 821, 826 (4th Cir.), *cert. denied*, 389 U.S. 917 (1967); NLRB v. Michigan Rubber Prod. Inc., 738 F.2d 111, 117 (6th Cir. 1984); NLRB v. Chicago Marine Containers, Inc., 745 F.2d 493, 496 (7th Cir. 1984) (a party challenging a representation election is entitled to an evidentiary hearing only when it raises substantial and material factual issues and proffers evidence that establishes a prima facie case for setting aside the election).

12. NLRB Rules and Regulations, 29 C.F.R. § 102.71(c) (1985).

13. *Id.* at 102.69.

14. AFL v. NLRB, 308 U.S. 401, 409 (1940) (Act on its face indicates a purpose to limit appellate review of Board's orders prohibiting unfair labor practices).

15. An employer can refuse to bargain with the certified union and then defend a charge under Section 8(a)(5) of the Act for refusal to bargain. 29 U.S.C. § 158 (a)(1)

tion in unfair labor practice proceedings.<sup>16</sup>

### B. *The Board's Early Approach to Campaign Misrepresentations*

After the passage of the National Labor Relations Act (NLRA),<sup>17</sup> the Board undertook a case-by-case adjudication of the effects of campaign misrepresentations on election results.<sup>18</sup> The Board generally left evaluation of propaganda to the good sense of employees; "[e]xaggerations, inaccuracies, partial truths, name-calling, and falsehoods, while not condoned, [were] excused as legitimate propaganda, provided they [were] not 'so misleading' as to prevent the exercise of a free choice by employees in selecting their bargaining representative."<sup>19</sup> When the challenged misrepresentations lowered campaign standards to such a degree that the uninhibited desires of the employees could not be determined in the election, the Board exercised its corrective authority and set aside the election.<sup>20</sup>

### C. *The Hollywood Ceramics Rule*

In *Hollywood Ceramics Co.*,<sup>21</sup> on the afternoon before the

(1982).

16. Conduct inhibiting the free choice of a bargaining representative may also have the effect of interfering with, restraining, or coercing employees in the exercise of their section 7 rights to collective bargaining, see 29 U.S.C. § 157. Thus, certain conduct which is the basis for overturning an election also may constitute a violation of Section 8(a)(1) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 158(a)(1) (1982); see *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 28 (5th Cir. 1969) (employer who refuses to bargain with a certified union violated the LMRA).

17. 29 U.S.C. § 151-169 (1935). See generally Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199 (1960).

18. *Corn Products Refining Co.*, 58 N.L.R.B. 1441 (1944).

19. *United Aircraft Corp.*, 103 N.L.R.B. 102, 104 (1953); see *Kearney & Trecker Corp.*, 96 N.L.R.B. 1214, 1215 (1951) (conduct found not to go beyond the bounds of permissible union campaigning); cf. *Timken-Detroit Axle Co.*, 98 N.L.R.B. 790, 792 (1952).

20. See *Kawneer Co.*, 119 N.L.R.B. 1460, 1461 (1958) (handbill passed out two days before election contained misstatements and gave the employer insufficient time to correct the misstatements); *Gummed Products Co.*, 112 N.L.R.B. 1092, 1093 (1955) (handbill passed out on eve of election was so misleading as to influence unduly or prevent employees from freely exercising their right to select bargaining representative); *United Aircraft Corp.*, 103 N.L.R.B. 102, 104 (1953) (use of fraudulent documents in election prevented employees from exercising free choice in the selection of bargaining representatives).

21. *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962). The case was decided by the full Board, the majority consisting of Chairman McCulloch and Members Fanning and Brown. Members Rodgers and Leedom concurred in the result.

election at issue, the union had distributed handbills printed in both English and Spanish. Approximately one-third of the employees could understand only Spanish. The handbills contained a table that purported to compare the employer's wage rates with wage rates at unionized plants. In its comparison, the union had failed to include the employer's incentive plan, while the hourly rates listed at union plants included at least a thirty percent incentive payment.<sup>22</sup> The only mention of incentive payments was a single sentence in English, at the end of the wage table, that read: "These rates are on Incentive System with an average employee making 20 percent or more wages."<sup>23</sup> The union won the election and the employer filed objections, arguing that the publication of the handbill containing false wage data immediately prior to the election warranted setting the election aside.<sup>24</sup> The regional director recommended that the objections be overruled.<sup>25</sup>

In reviewing the employer's objections, the Board weighed "the right of the employees to an untrammelled choice" against "the right of the parties to wage a free and vigorous campaign with all the normal, legitimate tools of electioneering."<sup>26</sup> The Board held that an election should be set aside when the misrepresentation:

1. is a substantial departure from the truth;
2. is made at a time which prevents the other party from making an effective reply;
3. whether deliberate or not, may reasonably be expected to have a significant impact on the election; and
4. has been made by a party who has intimate knowledge of the subject matter, so that the employees the party sought to persuade may be expected to attach added significance to its assertion.<sup>27</sup>

The mere fact that a statement has been inartistically or vaguely worded and subject to different interpretations would not suffice to establish misrepresentation.<sup>28</sup>

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22. *Id.* at 222.

23. *Id.* at 222-23.

24. *Id.* at 223.

25. *Id.* at 222.

26. *Id.* at 224.

27. *Id.*

28. *Id.* at 224 n.10. In examining cases alleging election misrepresentations, the courts of appeals also look to the closeness of the vote as an indication of the probable

Applying this test to the facts before it, the Board concluded that the union handbill conveyed a substantially erroneous picture of the comparative wage situation, pertained to a matter of utmost concern to employees, and was timed so as to prevent any reply.<sup>29</sup> Consequently, the election had to be set aside.<sup>30</sup>

The *Hollywood Ceramics* rule recognizes that elections must allow the parties the opportunity to campaign vigorously.<sup>31</sup> In adopting the rule, the Board enunciated a realistic standard. It did not insist on absolute purity of word and deed; the rule's purpose was to maintain an atmosphere conducive to the exercise of employee free choice.<sup>32</sup>

Although the *Hollywood Ceramics* rule has been applied to a myriad of fact patterns, it has yielded consistent results with respect to campaign misrepresentations of wages and benefits. For example, in *Thiem Industries, Inc. v. NLRB*,<sup>33</sup> the Ninth Circuit employed the *Hollywood Ceramics* rule and set aside an election where at the last moment prior to the election, the union had distributed a bulletin containing false information about wage rates.<sup>34</sup> The bulletin represented the percentage of wage increases secured by the union through settlement in six other industries. It unequivocally asserted that the cited increases went to union members and that the union was responsible for achieving the increases.<sup>35</sup> As a matter of fact, the union's claim was false in five out of the six cited industry settlements.<sup>36</sup> Emphasizing that wage rate issues are of particular importance to employees and that the union reasonably is expected to have special knowledge about union benefits, the court found the misrepresentation to be substantial and to have been made at a time when no effective reply was possible.<sup>37</sup>

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effect of the alleged misrepresentation. See, e.g., *Henderson-Trumbull Supply Corp. v. NLRB*, 501 F.2d 1224, 1225 (2d Cir. 1974) (7 votes for the union and 6 against); *Graphic Arts Finishing Co. v. NLRB*, 380 F.2d 893, 894 (4th Cir. 1967) (91 votes for the union and 83 against and 5 challenged); *NLRB v. Snokist Growers, Inc.*, 532 F.2d 1239, 1240 (9th Cir. 1976) (314 votes for the union and 310 against).

29. *Hollywood Ceramics*, 140 N.L.R.B. at 225.

30. *Id.* at 225-26.

31. *Id.* at 224.

32. *Id.* at 223.

33. 489 F.2d 788 (9th Cir. 1973).

34. *Id.* at 789-90.

35. *Id.* at 790.

36. *Id.* at 791.

37. *Id.* at 792.

Similarly, in *Graphic Arts Finishing Co. v. NLRB*,<sup>38</sup> the Fourth Circuit set aside a close election<sup>39</sup> when the union grossly misrepresented the wages paid in unionized companies and the strike benefits paid to union members of another company.<sup>40</sup> Twenty-four hours prior to the election, the union issued two circulars that pointed out the many benefits that would attend unionization. One circular listed wage rates for various classifications but did not identify the companies paying such rates. The evidence later established that none of the unionized companies in the employer's locale paid these rates and benefits.<sup>41</sup> The second circular stated that \$100,000 had been paid to union members who went on strike at another company and that "[n]ot one person lost a thing."<sup>42</sup> In fact, that company's employees had lost \$600,000 in wages as a result of that strike.<sup>43</sup> Applying *Hollywood Ceramics*, the court held that both circulars constituted substantial misrepresentations about matters of paramount importance to employees, noting that the party making the statements was in the best position to know the truth.<sup>44</sup>

In *NLRB v. Snokist Growers, Inc.*,<sup>45</sup> the Ninth Circuit set aside a Board certification where the vote was 314 to 310 in favor of the union.<sup>46</sup> A substantial proportion of the employees in *Snokist* were seasonal workers. The most controversial issue in the election was the amount of past service due that seasonal workers could expect under the union's pension plan.<sup>47</sup> The union misrepresented the amount of past service credit to which seasonal employees would be entitled, and the employer was unable to reply both because of the shortness of time between the misrepresentation and the election and the lack of information with which to rebut the assertion.<sup>48</sup> In fact, the union represented the past service credit previously available to seasonal employees as available at the time of the election although it

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38. 380 F.2d 893 (4th Cir. 1967).

39. There were 91 votes cast for the union and 83 against, with 5 challenged votes. *Id.* at 894.

40. *Id.* at 894-95.

41. *Id.* at 894.

42. *Id.*

43. *Id.* at 895.

44. *Id.* at 896.

45. 532 F.2d 1239 (9th Cir. 1976).

46. *Id.* at 1240.

47. *Id.*

48. *Id.*

had been discontinued two months before. The court observed: "The election was much too close to reinforce any confidence in the assertion that incorrect information could not have affected the outcome. The employer was not the cause of the difficulty; delay in the union's own publication system was the cause."<sup>49</sup> Other circuits similarly have found the *Hollywood Ceramics* rule to be a workable and reasonable standard and of particular importance when one party has made a significant misrepresentation just before the election and the other side has not had the opportunity to rebut.<sup>50</sup>

#### D. *The Demise of Hollywood Ceramics: Shopping Kart*

For fifteen years, from 1962 until 1977, the Board applied the *Hollywood Ceramics* standard to determine whether pre-election misrepresentations required the setting aside of an election. In *Shopping Kart Food Market, Inc.*,<sup>51</sup> the Board abandoned this standard and overruled *Hollywood Ceramics*. The new majority announced that it would no longer probe into the truth or falsity of the substance of campaign statements,<sup>52</sup> finding that regulation of campaign propaganda frustrated, rather than furthered, employees' free choice.<sup>53</sup>

In *Shopping Kart*, on the day before the election, the union vice-president portrayed the employer's past yearly profits as \$500,000. The uncontroverted evidence established that the employer's profits were one-tenth of this amount.<sup>54</sup> A closely split Board<sup>55</sup> overruled the employer's objection to the election,

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49. *Id.* See Getman & Goldberg, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on which the Board Regulates*, 27 STAN. L. REV. 1465 (1975) [hereinafter cited as *Regulation of Campaign Tactics*], and Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976) [hereinafter cited as *Empirical Evaluation*] for a discussion of the process by which the Board identifies and regulates campaign misrepresentations.

50. See *J.I. Case Co. v. NLRB*, 555 F.2d 202, 204-05 (8th Cir. 1977) (union substantially misrepresented the wages and benefits at other unionized companies, warranting setting election aside); see also *NLRB v. Millard Metal Serv. Center, Inc.*, 472 F.2d 647, 650-51 (1st Cir. 1973); *Cross Baking Co. v. NLRB*, 453 F.2d 1346, 1351 (1st Cir. 1971); *NLRB v. Winchell Processing Corp.*, 451 F.2d 306, 310 (9th Cir. 1971).

51. 228 N.L.R.B. 1311 (1977).

52. *Id.* at 1313.

53. *Id.* at 1311.

54. *Id.*

55. Board Members Penello and Walther were joined by newly appointed Chairman Murphy, who wrote a separate concurring opinion. Members Fanning and Jenkins dissented. *Id.* at 1313-14 n.24.



announcing that the Board would no longer probe into the truth or falsity of campaign statements,<sup>56</sup> but rather would intervene solely in cases when a party has engaged in "such deceptive practices as improperly involving the Board and its processes," or when forged documents prevented voters from recognizing propaganda.<sup>57</sup> Newly-appointed Chairman Murphy reluctantly concurred in the decision to overrule *Hollywood Ceramics*, noting that she agreed with the principles of that case and that an election should be set aside when a party makes "an egregious mistake of fact."<sup>58</sup>

The *Shopping Kart* "majority" supported its ruling with several assertions. First, it emphasized that the *Hollywood Ceramics* rule had been inconsistently interpreted by the Board and courts and thus encouraged parties routinely to object to their opponents' campaign statements.<sup>59</sup> Second, the majority disagreed with the underlying assumption of *Hollywood Ceramics*—the need to protect employees from campaign misrepresentation. Rejecting "the completely universified assumption" that campaign misrepresentations impeded employee choice, the majority stated that "the Board rules in this area must be based on a view of the employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."<sup>60</sup>

To support its conclusion that employees do not need protection from misleading statements, the *Shopping Kart* majority relied on an "empirical study" of Board elections conducted by Professors Getman, Goldberg, and Herman.<sup>61</sup> In this study,

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56. *Id.* at 1311.

57. *Id.* at 1313.

58. *Id.* at 1313 n.24.

59. *Id.* at 1313. In his dissent, Member Fanning noted that the statistics for the years 1971-76 showed that only three to four and one-half percent of the election objections filed were based on misrepresentations. *Id.* at 1316.

60. *Id.* at 1313 n.21.

61. *Empirical Evaluation*, *supra* note 49. This article and an earlier article, *Regulation of Campaign Tactics*, *supra* note 49, were incorporated into a book. See J. GETMAN, B. GOLDBERG, & B. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) [hereinafter cited as *LAW AND REALITY*]. Compare Peck, *NLRB Election Law*, 53 WASH. L. REV. 197 (1977) (defending the study), with Miller, *The Getman, Goldberg and Herman Questions*, 28 STAN. L. REV. 1163, 1170 (1976), and Weiler, *Promises to Keep: Securing Workers' Rights to Self Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781-86 (1983) (criticizing the study). See also Goldberg, Getman & Brett, *Union Representation Elections: Law and Reality: The Authors Respond to the Critics*, 79 MICH. L. REV. 564 (1981) (defending the analysis in *LAW AND REALITY*) [hereinafter cited as *The Authors Respond to the Critics*].

1,000 employees in thirty-one elections held in five states were interviewed soon after the direction of the election but before it was held and then again after the election. The authors found that the parties' electioneering had not affected the decision of eighty-one percent of the voters.<sup>62</sup> Thus, eighty-one percent voted in accordance with the intent they expressed to interviewers between the direction of the election and the election. From this finding, the authors concluded that the voters' decisions seemed to be determined by their attitudes toward unions and toward their jobs, both of which had been established prior to the campaign.<sup>63</sup>

In their dissent, Members Fanning and Jenkins sharply criticized the majority's reliance on the empirical study.<sup>64</sup> They observed that the number of elections studied did not constitute a statistically significant sample and, more importantly, that all of the campaigns studied were conducted in accordance with the *Hollywood Ceramics* standard.<sup>65</sup> Accordingly, voters in those elections were not subjected to the materially false misrepresentations that might have occurred if a more relaxed standard, or no standard at all, had governed.<sup>66</sup>

Addressing the remaining concerns raised by the *Shopping Kart* majority, the dissent observed that the variations in the application of the *Hollywood Ceramics* rule between the Board and courts signalled disagreement about the stringency of the rule's application only, and not its underlying principles.<sup>67</sup> When

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62. *Shopping Kart*, 228 N.L.R.B. at 1313.

63. *Id.* at 1313. Of the remaining 19%, 6% were undecided at the first interview, while 13% voted contrary to the intent they had expressed to interviewers immediately after the filing of a petition for the election. But significantly, the authors found that the votes of the undecided 6% correlated with their "familiarity" with the union's campaigns. Thus, those employees who voted for a union recalled significantly more issues raised by the union than did those who voted against the union. A similar pattern existed for the 13% who switched their votes. Finally, the authors found that the votes of the undecided and switchers were determinative in 9 of the 31 elections—that is, in 29% of the elections studied. *Empirical Evaluation*, *supra* note 49, at 279-82. The *Shopping Kart* majority construed this data to "cast doubt on the assumption that employees are unsophisticated about labor relations and are therefore easily swayed by campaign assertions." *Shopping Kart*, 228 N.L.R.B. at 1313.

64. *Shopping Kart*, 228 N.L.R.B. at 1315-18. The empirical study was directed primarily at intimidation, threats, and promises rather than misrepresentations. Yet the Board has continued to review elections carefully for intimidation, threats, and promises, applying the conclusions of the study only to misrepresentations.

65. *Id.* at 1316.

66. *Id.*

67. *Id.* at 1316-17.

different tribunals exercise some discretion and analyze differing fact situations, differing judgments are rendered.<sup>68</sup> And as to the delay caused by litigation, the dissent viewed the delay as an unavoidable incident of ensuring an employee's free choice.<sup>69</sup>

The *Shopping Kart* decision, appearing as it did on April 8, 1977, achieved one of the objectives of the doomed Labor Reform Act.<sup>70</sup> The Act, ardently championed by the AFL-CIO and the Carter administration, was filibustered to death by the Senate in June, 1978.<sup>71</sup> Both the House and Senate versions of the bill would have curtailed sharply the grounds on which elections could be set aside and would have legislated the *Hollywood Ceramics* rule out of existence. Indeed, Professors Getman, Goldberg, and Brett have noted with satisfaction endorsement of their views in this proposed legislation.<sup>72</sup>

#### E. *Hollywood Ceramics Revisited: General Knit*

The approach taken in *Shopping Kart* to campaign misrepresentation was short-lived. In *General Knit of California, Inc.*<sup>73</sup> after a change in membership,<sup>74</sup> the Board once again adopted the *Hollywood Ceramics* standard.<sup>75</sup> After midnight on the day of the election and again at 7:15 a.m. at the time the polls opened, the union in *General Knit* distributed leaflets indicating that the employer had enjoyed an annual profit of \$19.3 million when, in fact, the employer had sustained a loss in excess of \$5 million.<sup>76</sup> The employer filed objections. Applying *Shopping Kart*, the regional director overruled the objections, finding the misrepresentation did not constitute an egregious mistake of fact, a forgery, or a misrepresentation of Board processes.<sup>77</sup>

The Board remanded the case to the regional director for further investigation or a hearing under the *Hollywood Ceramics* standard.<sup>78</sup> The new majority had concluded that the rule

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68. *Id.* at 1317.

69. *Id.*

70. S. 2467, 95th Cong., 2d Sess. (1978); H.R. 8410, 95th Cong., 1st Sess. (1977).

71. 34 CONG. Q. ALMANAC 286 (1978).

72. *The Authors Respond to the Critics*, *supra* note 61, at 566.

73. 239 N.L.R.B. 619 (1979).

74. Member Truesdale replaced Member Walther, who was part of the majority in *Shopping Kart*.

75. *General Knit*, 239 N.L.R.B. at 620.

76. *Id.* at 619.

77. *Id.* at 619-20.

78. *Id.* at 623.

announced in *Shopping Kart* was inconsistent with the Board's responsibility to ensure fair elections.<sup>79</sup> While recognizing employees' ability to assess campaign propaganda, the new majority expressed the conviction that "no matter what the ultimate sophistication of a particular electorate, there are certain circumstances where a particular misrepresentation . . . may materially affect an election."<sup>80</sup> These circumstances occur where campaign issues are distorted by "substantial misstatements of relevant and material facts within the special knowledge of the campaigner, so shortly before the election that there is no effective time for reply."<sup>81</sup> Under these circumstances, the majority concluded, the election should be set aside in order to maintain the integrity of elections and ensure employee free choice.<sup>82</sup> Board members Penello and Murphy separately dissented, reiterating the concerns that had led them to adopt the *Shopping Kart* rule.<sup>83</sup>

#### F. A Return to Shopping Kart: Midland

Four years after *General Knit*, a new majority of the Board again abandoned the *Hollywood Ceramics* standard<sup>84</sup> and reinstated the *Shopping Kart* rule, in *Midland National Life Insurance Co.*<sup>85</sup>

In *Midland*, the employer had distributed campaign literature to its employees on the afternoon before the election. One of the handbills included photographs and a description of three local employers' involvement with the union. The handbill text misrepresented both the events that ensued after the union's campaigns and the identity of the organizing union. A second handbill contained a reproduction of a portion of the union's 1979 financial report filed with the Department of Labor, with an accompanying text that conveyed a false impression as to how the union spent its money.<sup>86</sup> The union learned of the distribution three and one-half hours before the polls opened. The

79. *Id.* at 620.

80. *Id.*

81. *Id.* (citing *Shopping Kart*, 228 N.L.R.B. at 1315 (emphasis in original)).

82. *General Knit*, 239 N.L.R.B. at 623.

83. *Id.* at 624-36.

84. In 1982, the Board consisted of Chairman Van de Water and Members Fanning, Jenkins, Zimmerman, and Hunter.

85. 263 N.L.R.B. 127, 132-33 (1982).

86. *Id.* at 128.

votes in the election tallied at 107 to 107, with 20 challenged ballots. All the challenges were sustained and the union filed objections.<sup>87</sup> Relying on *Hollywood Ceramics* and *General Knit*, the hearing officer sustained the objections and recommended setting aside the election.<sup>88</sup>

A three-member majority of the Board rejected the recommendation, certified the results of the election, and returned to the "sound rule" announced in *Shopping Kart*.<sup>89</sup> In a lengthy opinion, the majority, comprised of Chairman Van de Water and Members Zimmerman and Hunter, traced the history of the Board's treatment of objections based on misrepresentations of fact.<sup>90</sup> The majority again found that the *Hollywood Ceramics* rule was unwieldy and subject to inconsistent application and that the "protectionism" championed by *Hollywood Ceramics* was unwarranted.<sup>91</sup> The opinion drew a sharp dissent from Members Fanning and Jenkins, who criticized the Board's abandonment of employees to the mercies of unscrupulous campaigners.<sup>92</sup>

Thus, under the Board's current standard, an election will be set aside only if a party has used forged documents or altered Board documents during its campaign.<sup>93</sup> The courts have found that the Board was acting within its statutory discretion in the adoption of the *Midland* rule.<sup>94</sup>

### III. DISCUSSION AND ANALYSIS

The Board has always recognized the necessity for allowing

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87. *Id.* at 127.

88. *Id.* at 129.

89. *Id.*

90. *Id.* at 129-30.

91. *Id.* at 132.

92. *Id.* at 133-35.

93. *Shopping Kart* teaches that the Board will intervene when a party has engaged in deceptive campaign practices that improperly involve the Board and its processes. *Shopping Kart*, 228 N.L.R.B. at 1313. However, the Board held that it would no longer treat mischaracterizations of Board actions as objectionable conduct unless they involve altered Board documents. *Affiliated Midwest Hospital, Inc.*, 264 N.L.R.B. 1094, 1095 (1982) (union announced the board had issued complaint against employer when, in fact, no such complaint was issued). Misrepresentations of Board actions are treated like other misrepresentations and will not serve as a basis for upsetting an election. *Id.* at 1094-95.

94. *U.S. Ecology, Inc. v. NLRB*, 772 F.2d 1478, 1481 (9th Cir. 1985); *NLRB v. Best Prod. Co.*, 765 F.2d 903, 912-13 (9th Cir. 1985); *Hickman Harbor Serv. v. NLRB*, 739 F.2d 214, 217-18, (6th Cir. 1984); *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726, 728 (1st Cir. 1983).

the parties wide latitude in campaigning for or against union representation. At the same time, it has recognized the importance of setting some types of standards to protect employees' free choice. These standards are particularly important when the alleged misrepresentation is made without sufficient time for the other side to reply and when the misrepresentation is on a subject about which the party making the statement might be expected to have reliable information. A rule similar to the one announced in *Hollywood Ceramics* is needed for this purpose. The Board should continue to set aside close elections where an egregious campaign misrepresentation has been made.

#### A. *The Principles Dropped for Expediency*

The Board has not disputed the principles of *Hollywood Ceramics*; it has expressed concern over the applicability of the rule and the assumptions underlying the rule. Thus, in *Shopping Kart*, Members Penello and Walther said they would continue to adhere to *Hollywood Ceramics* if they shared the belief that employees needed Board protection from campaign misrepresentation.<sup>95</sup> Chairman Murphy concurred, noting that although she agreed with the basic principles of *Hollywood Ceramics*, she was voting to overrule it because the rule had been misapplied and failed to treat employees as mature adults capable of evaluating campaign rhetoric.<sup>96</sup> She departed from her colleagues, Members Penello and Walther, in stating: "I would also set aside an election where a party makes an egregious mistake of fact . . . I would only find an egregious mistake of fact to constitute interference with an election in the most extreme situations."<sup>97</sup> Members Fanning and Jenkins pointed out in their dissent that they agreed with the majority that the union that won the election should be certified.<sup>98</sup> No member dissented from the result.

*Hollywood Ceramics* was overruled in *Shopping Kart* by a divided Board that was united, however, in its agreement with the principles of *Hollywood Ceramics*. But the result would have been the same if the *Hollywood Ceramics* rule had been applied; overruling it was unnecessary to the decision. And while *Shop-*

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95. *Shopping Kart Food Markets, Inc.*, 228 N.L.R.B. 1311, 1313-14 (1977).

96. *Id.* at 1314.

97. *Id.*

98. *Id.* at 1315.

ping Kart stood for the proposition that elections would not be set aside because of misrepresentations of fact, three members—Chairman Murphy and Members Fanning and Jenkins—agreed that they would continue to set aside elections if the misrepresentations were egregious.

### B. *The Getman, Goldberg, and Herman Study*

*Shopping Kart* was predicated principally on the empirical study, by Professors Getman, Goldberg, and Herman, of the behavior of voters in thirty-one representation elections scattered throughout five midwestern states in different industries.<sup>99</sup> The sample selected for study was not a random sample but elections in which the authors predicted that “unlawful” campaigning might occur. Their predictions were based on five criteria:

- (1) the strength of the employer’s opposition to unionization;
- (2) whether the law firm representing the employer had a reputation for representing employers who campaigned strongly and sometimes unlawfully;
- (3) whether the employer had engaged in unlawful practices in prior elections;
- (4) whether the employer appeared willing to abide by counsel’s advice in conducting the campaign;
- (5) the views of employer and union representatives as to the likely nature of the campaign.<sup>100</sup>

The study has been analyzed, applauded, and criticized in many publications, most notably in the dissenting opinions in *Shopping Kart* and *Midland* and in numerous law review articles.<sup>101</sup> The study found that “unlawful campaigning has no greater effect on employee voting behavior in a union representation election than does lawful campaigning.”<sup>102</sup> The authors explained that the purpose of their study was to determine whether unlawful campaigning has a greater effect on voters than does lawful campaigning. For, if it does not, there is little value in the NLRB’s maintaining a regulatory system designed

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99. *Id.* at 1318 (Jenkins, M. dissenting).

100. See *The Authors Respond to the Critics*, *supra* note 61, at 568 n.29.

101. See *supra* note 57.

102. See *The Authors Respond to the Critics*, *supra* note 61, at 564.

to separate lawful from unlawful campaigning.<sup>103</sup> But measuring the effectiveness of election campaigns in terms of lawfulness or unlawfulness is to employ a meaningless yardstick. Some lawful campaigns are effective, while many are not. Some unlawful campaigns are effective, while many are not. And certainly not all campaigns, according to the empirical study itself, are ineffective: a small percentage of employees do change their minds between the filing of the petition and the election. In addition, many elections are close. Thus, it is unclear that misrepresentations do not affect the outcome of a significant number of elections.<sup>104</sup> Moreover, the authors of the empirical study themselves note "some issues [are] particularly salient<sup>105</sup> in certain elections. When an employer or union emphasize[s] a theme that [is] relevant to the specific situation, recognition [is] high."<sup>106</sup>

The authors attribute to the pre-*Shopping Kart* Board two assumptions: (1) employees are unsophisticated about unionization, so their loyalties are tenuous and easily changed by the campaign; and (2) employees are attentive to the campaign and base their decisions on the parties' arguments.<sup>107</sup> The authors conclude that both of these assumptions are unfounded but, as the authors admit, the parties are attentive to representations about salient issues. And no matter how sophisticated employees are, they cannot evaluate a representation on such an issue in the absence of specific information.

In any event, there is an empirical gauge of campaign effectiveness more eloquent than all the answers to carefully worded and supposedly analytical questions: the money both unions and employers pour into campaigns year after year and election after election—in effect, "the underwriters."<sup>108</sup>

103. *Id.* at 567-68.

104. See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

105. "Salient" is defined as "prominent or striking," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2003 (3d ed. 1971) and as "standing out from the rest," IX THE OXFORD ENGLISH DICTIONARY 52 (2d ed. 1970); an apt example of its use is "pick the salient details out of dull verbiage — J.P. Marquand." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2003.

106. LAW AND REALITY, *supra* note 61, at 82.

107. *Id.* at 140-41.

108.

Still, they [owners and captains] made a show of keeping up the brag, until one black day when every captain of the lot was formally ordered to immediately discharge his outsiders and take association pilots in their stead. And who was it that had the dashing presumption to do that? Alas! It came



### C. Other Criticisms of the Hollywood Ceramics Rule

In *Shopping Kart*, the Board expressed concern about the differing interpretations of the *Hollywood Ceramics* rule by the Board and courts and noted that the Board's involvement in reviewing these types of contested elections unduly delayed certification.<sup>109</sup> Because the Board has been vested by Congress with broad discretion, and discretion implies judgment on specific sets of facts rather than routine ministerial fiat, some seeming inconsistencies are to be expected and are not necessarily undesirable. To achieve the statutory objective of fair and free elections, a tribunal must evaluate each case on its own facts, according to known rules. Decisions regarding union elections, like sentencing convicted persons, fixing bail, awarding custody of children, granting or denying injunctions, and approving or disapproving reorganization plans under the Bankruptcy Act, require the exercise of judicial discretion and thus will result in some variation in outcomes among different tribunals.

The *Hollywood Ceramics* rule also has been faulted because it appears to require the Board to evaluate the truth or falsity of campaign propaganda. However, the Board rarely has been asked to determine whether an assertion was true or false. Were truth or falsity at issue, the Board's reluctance to pass on the question might be understandable, but the falsity of a representation is nearly always conceded and the issues presented are those of substantiality, apparent authenticity, opportunity for reply, and apparent impact on the elections.<sup>110</sup>

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from a power behind the throne that was greater than the throne itself. It was the underwriters!

M. TWAIN, *LIFE ON THE MISSISSIPPI* 102 (1944).

109. The courts generally have set aside elections more freely than has the Board. Thus, in *NLRB v. Winchell Processing Corp.*, 451 F.2d 306, 310 (9th Cir. 1971), the Ninth Circuit denied enforcement to a bargaining order based on union misrepresentations of wages and benefits the union had negotiated in other contracts. The court did not cite *Hollywood Ceramics*, but did cite the earlier case of *Stewart-Warner Corp.*, 102 N.L.R.B. 1153, 1158 (1953) (cited in *Winchell*, 451 F.2d at 308).

Citing *Hollywood Ceramics*, the First Circuit declined to enforce a bargaining order, in *Cross Baking Co. v. NLRB*, 453 F.2d 1346, 1349 (court declined enforcement based on fear, coercion, and misrepresentation), and in *NLRB v. Millard Metal Serv. Center, Inc.*, 472 F.2d 647, 650 (1st Cir. 1973) (court declined enforcement based on union's wage distortion). See also *Graphic Arts Finishing Co. v. NLRB*, 380 F.2d 893, 896 (4th Cir. 1967) (circulars misrepresenting lost wages during strike sufficient to set election aside); *Peerless of America v. NLRB*, 576 F.2d 119, 123-24 (7th Cir. 1978) (handbill not sufficiently inflammatory to set election aside); *J.I. Case Co. v. NLRB*, 555 F.2d 202, 206-07 (8th Cir. 1977) (election set aside because of wage and benefit misrepresentation).

110. The courts have tended to look at the closeness of the vote in assessing the

It also has been argued that the rule in *Hollywood Ceramics* might be used as a tactic by one of the parties in an attempt to delay certification. If the object of the NLRA is to ensure that elections are the fair and free choice of the employees, then protection of these principles appears more important than speed of certification.

#### D. *The Board's Decision in General Knit and Midland*

Eighteen months after *Shopping Kart*, the replacement of Member Walter with Member Truesdale brought a return to *Hollywood Ceramics* principles. In *General Knit*, the majority merely found that an issue of fact required further investigation at the regional level; the Board did not pass on the question of whether or not the election should be set aside. It sent the case back for investigation, but held that the case would be decided in accordance with *Hollywood Ceramics* principles. Chairman Fanning and Member Jenkins declined to speculate on what the ultimate outcome would be, Member Penello assumed that the employer's objection would be sustained, and Member Murphy thought that under the *Hollywood Ceramics* rule the objection would be overruled.

Then, in a lengthy opinion in *Midland National Life Insurance Co.*, the majority traced the history of the Board's treatment of objections based on misrepresentations of fact and explained why the majority preferred the rule of *Shopping Kart* to that of *Hollywood Ceramics* and *General Knit*. The majority, however, had little to say about the facts of the case.

If we examine the facts in *Midland* in light of the *Hollywood Ceramics* rule, we find the following:

1. A half-truth that, standing alone, could create a false impression as to the union's use of members' funds;
2. At a time that prevented the other party from making an effective reply;
3. By a party who knew the whole truth, but truncated an official document so that the employees it sought to persuade might be expected to attach added significance to the assertion; and
4. A tied vote.

Though the *Midland* majority again overruled *Hollywood*

*Ceramics*, they did not contest the general principles the case propounded. Summarizing their reasons for overruling it, the majority said: "The ill effects of the rule include extensive analysis of campaign propaganda, restriction of free speech, variance in application as between the Board and the courts, increasing litigation, and a resulting decrease in the finality of election results."<sup>111</sup>

But the right of free speech has never been held to include the right to tell lies with impunity and enjoy the fruits of the deception. The *Hollywood Ceramics* rule in no way restricts speech, but merely warns that under some circumstances, misrepresentations of fact or law, whether deliberate or not, may cause an election to be set aside. As to *Hollywood Ceramics* causing variations in application by the Board and the courts, increasing litigation, and decreasing the finality of election results, the *Midland* court itself recognized the broad scope of discretion with which Congress had entrusted the Board to establish the procedures necessary to ensure fair and free choice of bargaining representatives. Again, each case is unique on its facts; different tribunals may be expected to reach different conclusions which will be set aside only for abuses of discretion. The fact that different tribunals may apply the principles not entirely uniformly is hardly grounds for eschewing the principles.

The *Midland* majority had at hand all the evidence necessary for an empirical study of the delay in certification attending an application of *Hollywood Ceramics* principles, but if they made such a study, they did not choose to share the results. Member Truesdale, however, did give us an empirical study for 1976.

For example, in fiscal 1976, (the last full year in which *Hollywood Ceramics* was still the law), the Board conducted 8,899 elections; in 7,982, or nearly 90%, neither side challenged the validity of the results through objections. Of those cases where objections were filed, only 30% involved *Hollywood Ceramics* allegations, and of these only 9 cases went to the courts of appeals. Thus, only 3.4% of the elections were in any way delayed by the *Hollywood Ceramics* doctrine, while a minute .1% of the cases experienced the delay attendant to a court

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111. *Midland*, 263 N.L.R.B. at 131.

appeal or enforcement.<sup>112</sup>

The dissenters in *Midland* pointed out that, according to an internal audit conducted for the General Counsel, the number of elections involving allegations of misleading statements increased from 327 in 1976, the year before *Shopping Kart* was decided, to 357 in 1978, the first full year after *Shopping Kart* was in effect. This increase occurred despite a decrease in the total number of elections conducted in those respective years from 8,899 to 8,464.<sup>113</sup>

The reception of *Midland* in the courts of appeals has been on sufferance—that is, less than enthusiastic. The First Circuit has recognized the breadth of the Board's discretion in election cases but has noted that it does not necessarily endorse the application of *Midland* to fundamental and clear-cut instances of misrepresentation.<sup>114</sup> The Sixth Circuit shares this reluctance. It would set aside an election where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected.<sup>115</sup>

### CONCLUSION

As it stands, the *Midland* rule implies broad license in election campaigning, even to the point that he who lies last lies best. The apparent zeal of the Board to achieve quick certification of election results, even when those results are tainted with last minute false representations, probably exceeds its intention, particularly because the number of certifications delayed on that ground have been miniscule. The variation in the application of a rule like the one in *Hollywood Ceramics* should not argue against the use of such a rule because variation always accompanies the exercise of discretion, and Congress has expressly authorized that discretion. Perhaps, however, after twenty-three years the *Hollywood Ceramics* rule should be restated in light of experience but with its sound principles retained. The rule

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112. J. Truesdale, *From General Shoe to General Knit: A Return to Hollywood Ceramics*, 30 LAB. L.J. 67, 72 (1979).

113. *Midland*, 263 N.L.R.B. at 134.

114. *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726, 729 (1st Cir. 1983). In a concurring opinion, Judge Aldrich stated that *Midland* "seems to be burning down the barn to get rid of the rats . . ." *Id.* at 730.

115. *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343, 348 (6th Cir. 1984).

might be reformulated as follows:

For an election to be set aside because of a misrepresentation, the misrepresentation must:

1. Be an egregious misrepresentation of fact or law with respect to a salient issue;
2. Occur at a time that prevents the other party from making an effective reply;
3. Reasonably be expected to have had a significant impact on the election, whether deliberate or not; and
4. Have been made by a party having intimate knowledge of the subject matter so that the employees may be expected to attach added significance to its assertion.

Such a formulation would require that election campaigning be conducted with a minimum level of truthfulness yet would not threaten unnecessary intrusions by the Board and courts over trivial misrepresentations.