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REVIEW

NLRB ELECTION LAW

Cornelius J. Peck*

UNION REPRESENTATION ELECTIONS: LAW AND REALITY. By Julius G. Getman, Stephen B. Goldberg, and Jeanne B. Herman. New York: Russell Sage Foundation, 1976. Pp. xvii, 218. \$7.00.

Much of what follows might have been written as a comment on *Shopping Kart Food Market, Inc.*,¹ a recent decision of the National Labor Relations Board, which in turn has many qualities of a review of *Union Representation Elections: Law and Reality*. In *Shopping Kart*, a divided Board overruled a well-established principle of NLRB election law on the basis of empirical evidence published in the book, a type of evidence for which the Board had previously demonstrated little concern. Thus, the significance of the book and the success of the authors' empirical study has been promptly established.

The rules of NLRB election law were developed by the Board in cases in which it concluded that conduct of the parties or others so interfered with the freedom of choice of employees that the election results were not an acceptable indication of the employees' desire concerning union representation. Proceeding case by case, the Board relied upon hunches of various Board members as to the effect of various types of conduct upon employee freedom of choice.² Instead of

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1. 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705 (Apr. 8, 1977). In its opinion in *Shopping Kart*, the majority relied upon a law review article which summarized data later published in the book reviewed here. Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976). The dissenting opinion of Member Jenkins cites the book, making it apparent that the book and its more comprehensive report of the study had been called to the attention of the Board. 228 N.L.R.B. No. 190, at 24 n.37, 94 L.R.R.M. at 1712 n.37.

2. *Getman v. NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971). See also R. WILLIAMS, P. JANUS, & K. HUHN, NLRB REGULATION OF ELECTION CONDUCT (Labor Relations and Public Policy Series, Report No. 8, The Wharton School, University of Pennsylvania 1974) [hereinafter cited as REGULATION OF ELECTION CONDUCT].

attempting to determine the actual effect of the challenged conduct upon employees, the Board has been concerned only with whether it was reasonable to conclude that the conduct tended to prevent free formation and expression of the employees' choice.³ Indeed, the Board denied the authors' request for lists of addresses of employees who would be eligible to vote in scheduled elections upon the ground, among others, that the proposed study would be likely to upset the "laboratory conditions" deemed necessary for elections and would otherwise result in delays inconsistent with the policy of the National Labor Relations Act.⁴ These lists were obtained by the authors only after suit under the Freedom of Information Act.⁵

Commentators had earlier noted the lack of empirical data to support the hypotheses underlying the Board's election rules and suggested that some of the hypotheses were both wrong and contrary to the effects actually produced by the conduct in question.⁶ Their queries, however, failed to produce a change in the Board's way of making policy decisions. Related to the Board's lack of interest in empirical data is its fixation upon adjudication as the process for development of policy, despite criticism by courts and neutral observers that it has failed to make use of its rulemaking powers.⁷ Adjudication focuses attention upon the evidence establishing the facts in a particular controversy and consigns to the area of irrelevancy evidence from which principles of general applicability could be formulated. Judicial decisions relying on rules are usually written without record evidence to support the hypotheses upon which the rules are based—*e.g.*, that

3. 33 NLRB ANN. REP. 60 (1968). See *Shovel Supply Co.*, 118 N.L.R.B. 315, 316 (1957).

4. *Getman v. NLRB*, 450 F.2d 670, 672 (D.C. Cir. 1971).

5. *Id.*

6. REGULATION OF ELECTION CONDUCT, *supra* note 2, at 37, 57, 59, 166, 193, 242, 255, 440; Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 36, 46-53, 88-92, 112-16 (1964); Murphy, *The National Labor Relations Board—An Appraisal*, 52 MINN. L. REV. 819, 843 (1968); Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 106-08 (1954).

7. *NLRB v. Wyman Gordon Co.*, 394 U.S. 759 (1969); *NLRB v. Lorben Corp.*, 345 F.2d 346, 350 (2d Cir. 1965) (Friendly, J., dissenting); Bernstein, *The NLRB's Adjudication-Rule Making Dilemma under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254 (1968); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Shapiro, *Choice of Rule-Making or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Summers, *supra* note 6, at 107-08.

suits by children against parents will or will not disrupt domestic tranquility. Adherence to that model suggests that empirical studies are unnecessary. On behalf of the NLRB it should be noted that in its early years it had a Division of Economic Research which conducted investigations extending beyond the scope of particular cases,⁸ but that division was abolished in 1940 pursuant to the provisions of a rider attached to a supplemental appropriation bill.⁹ That prohibition was made permanent in 1947 by a provision of the Taft-Hartley Act,¹⁰ apparently because of a belief that subversive persons advising the Board could influence the course of investigation.¹¹

Based upon their review of NLRB decisions, the authors identified and formulated six major assumptions upon which the Board's rules of election law are based. Obviously, others might have stated these assumptions in somewhat different terms and with greater or lesser breadth for the individual propositions. Nevertheless, the authors' statements of the Board's assumptions appear to be correct summarizations and they are supported by NLRB case law.¹² They are as follows:¹³

- (1) employees are attentive to the campaign;
- (2) employees will interpret ambiguous statements by the employer as threats or promises;
- (3) employees are unsophisticated about labor relations;
- (4) free choice is fragile, but unless reminded of the employer's economic power, employees will not fully appreciate the possibility of its use to oppose unionization. Once reminded of that power by

8. 4 NLRB ANN. REP. 155-57 (1939); 3 NLRB ANN. REP. 250-51 (1938).

9. Act of Oct. 9, 1940, Pub. L. No. 76-812, ch. 780, 54 Stat. 1030, 1037 (1940); see 5 NLRB ANN. REP. 9 (1940).

10. Labor Management Relations Act, 1947, Pub. L. No. 80-101, ch. 120 § 101, 61 Stat. 140 (codified at 29 U.S.C. § 154(a) (1970)).

11. Murphy, *supra* note 6, at 843.

12. The recent and comprehensive study conducted by Williams, Janus, and Huhn, REGULATION OF ELECTION CONDUCT, *supra* note 2, does not use the same formulations of these assumed premises, but nothing in that report suggests that the authors erred in their formulations. The Williams group criticizes the Board with some frequency for proceeding upon premises which favor unions and limit employer freedom of speech, which they believe Congress intended to protect, e.g., *id.* at 55-56, 92, 101, 135, 240-42, whereas the authors' objective inquiry does not involve them in such an evaluation of the political purposes which might be served by the rules. This difference does not, however, constitute a conflict between the studies with respect to the assumptions upon which the Board's rules are based.

13. J. GETMAN, S. GOLDBERG, & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 7-21 (1976) [hereinafter cited without further cross-reference as GETMAN STUDY].

threats, promises, or their effectuation, employees will vote against the union;

- (5) except in unusual circumstances, a union is not at an impermissible disadvantage in presenting its views to employees through solicitation during non-working hours and traditional off-premises channels of communication;
- (6) (a) an employee who signs a union authorization card does so because he wishes union representation, unless the solicitor represents expressly or impliedly that the sole purpose of the card is to obtain an election; (b) the decision to sign an authorization card does not involve the same careful informed consideration as the voting decisions; (c) an employee who does not sign an authorization card does not wish union representation.

To test these assumptions, the authors studied thirty-one elections held by the NLRB during 1972 and 1973.¹⁴ The unions won eight and lost twenty-three of the elections. Working with a staff of forty-three interviewers, the authors contacted and completed interviews with more than 1,200 employees, using a random sample of one-third of the employees in bargaining units larger than twenty-five.¹⁵ Care was exercised to avoid distortion arising from the types of elections studied.¹⁶ The first wave of interviews (Wave I) took place as soon as possible after the direction that an election be held and at least ten days before the election.¹⁷ The second wave of interviews (Wave II) took place immediately after the election.¹⁸ The primary purpose of the Wave I interviews was to determine the pre-campaign sentiments of employees concerning union representation. The Wave II interviews were an attempt to ascertain what the employees remembered of the

14. *Id.* at 33.

15. *Id.* at 33, 37, 47.

16. The number of the voters in the bargaining units studied varied from four to just about four hundred; the employers involved were engaged in a broad range of business activities; and the elections took place in Illinois, Indiana, Iowa, Missouri, and Kentucky in communities ranging in size from a town of 1,255 to cities the size of Chicago and St. Paul. *Id.* at 35-36. In the Wave I interviews, employees were asked the sensitive question whether they had signed a union card. Union records revealed that the question was answered correctly by 85% of those who said they had and by 89% of those who said they had not. *Id.* at 42. Nevertheless, several important questions may be raised whether there was a distortion produced by studying elections at companies whose labor relations policies made it possible to predict that there would be vigorous and possibly unlawful campaigning. See note 76 and accompanying text *infra*.

17. GETMAN STUDY, at 33-34.

18. *Id.* at 33.

content of the campaign, how they voted, and why.¹⁹

The results of the study indicate that the NLRB has been wrong in almost all of its assumptions concerning employee behavior. Employees are not generally attentive to the campaign. The average employee remembered less than ten percent of the company's campaign issues and seven percent of the union's issues. No company issue was remembered by more than forty percent of the employees. A union theme of improved wages was recalled by seventy-one percent of the employees, and a union theme that it would prevent unfairness was recalled by sixty-four percent of the employees. Only twenty-two percent of the employees could recall, within ten percent of the correct figure, the amount of wages a union claimed to have obtained from employers elsewhere. Regardless of the number of issues raised in the campaigns, employees recalled an average of only three company issues and between two and three union issues.²⁰

The authors conclude that the NLRB has been correct in assuming that some employees will interpret ambiguous statements as threats or promises, but has been in error as to the type of employees who will give such interpretations and as to the effect of these statements on employee voting behavior. For instance, fewer company voters than union voters reported that there had been a job-loss theme.²¹ Thirty-four percent of the employees intending to vote for the union reported reprisals by the employer for union activity, whereas only ten percent of those intending to vote for the company reported such conduct; unlawful benefits were reported by thirty-one percent of those intending to vote union, but only nineteen percent of those intending to vote for the company.²² In eight elections, union supporters were discharged during the card-signing campaign, but it was primarily union supporters, not company supporters, who tended to view the discharges as having been motivated by anti-union sentiment.²³ Never-

19. *Id.*

20. *Id.* at 75-83.

21. *Id.* at 87. Only 24% of the company voters reported a job loss theme, whereas 47% of the union voters reported such a theme.

The authors defined job-loss themes as "employer campaign themes raising the possibility that a union victory might result in employees losing their jobs due to plant closing, strikes, discharges, or layoffs." *Id.* Thus, an employer suggestion that unionization would reduce efficiency, raise costs, weaken the company's competitive position, and thereby cause a loss of jobs, would qualify as a job-loss theme.

22. *Id.* at 121-22.

23. *Id.* at 126-27.

theless, no more card-signers switched to vote for the company in these elections than in other elections in which union supporters were not discharged, thus indicating that union supporters were not coerced into changing their votes because of what they viewed as discriminatory conduct.²⁴ Illegal interrogation of employees was, according to the authors, a matter of little concern to union supporters, forty-three percent of whom thought the employer knew their position on unionization.²⁵ The authors suggest that employees susceptible to coercion may have succumbed to that pressure before the pre-election campaign, whereas those employees favorably disposed toward the union are aware of the employer's economic power and view threats or reprisals as confirmation of the need for a union.²⁶

The basic assumption of the NLRB that employees are unsophisticated about unionization and thus are susceptible to influence is not supported by the data concerning employee involvement with unions. Forty-three percent of the employees interviewed had been union members on other jobs; seventy-five percent reported that an immediate member of the family had been a union member; and thirty percent had voted in a previous NLRB election.²⁷ What happens during an election campaign was much less likely to determine an employee's vote than his predisposition toward unions. The votes of eighty-one percent of the employees could be predicted from their pre-campaign attitudes toward unions and their jobs, and from their intent before the campaign to vote for or against the union.²⁸

Of the nineteen percent who did not vote in accordance with their predisposition, six percent were undecided, leaving thirteen percent in the category of persons who switched their vote from their originally stated intent. The votes of the undecideds and the switchers determined the results of nine of the thirty-one elections.²⁹ The votes of this nineteen percent thus determined almost one third of the elections, making study of the effects of the campaign on this group of particular importance. Persons who were initially undecided and then voted for the union or persons who switched from a company intent to

24. *Id.* at 127.

25. *Id.* at 121-29.

26. *Id.* at 128-29.

27. *Id.* at 66.

28. *Id.* at 60-62.

29. *Id.* at 103.

voting for the union knew more about the union's campaign than those who voted for the company, whereas those who were initially undecided and then voted for the company were no more familiar with its campaign than were the union voters.³⁰ Those who switched from an intention to vote union to voting for the company were likewise no more familiar with the company's campaign than those who voted for the union.³¹ The apparent reason that the undecideds and switchers who voted for the union knew more about the union's campaign was that they had attended union meetings more frequently.³² The absence of greater familiarity with the company's campaign on the part of switchers or undecideds who voted for the company thus suggests that the company's campaign does not play as important a part in determining the election as attendance at union meetings, but the fact that seventy-six percent of the switchers and sixty-eight percent of undecideds voted for the company³³ cautions against discounting the importance of that campaign.³⁴ The authors suggest that the employer's campaign may encourage employees to reconsider their initial decision to support the union or that it may demonstrate to employees that the employer is aware of causes of employee dissatisfaction and should be allowed an opportunity to eliminate them.³⁵ The latter explanation is consistent with an earlier finding concerning the success of a theme that the company was new or management had recently been taken over,³⁶ which suggested it should be given a chance to improve.

The importance of attendance at union meetings in creating familiarity with union issues is supported by the findings that attendance at meetings is more strongly related to familiarity with issues than is receipt of written material.³⁷ Employers were substantially more successful than unions in getting employees to attend meetings, and most of the employees attending union meetings were already union sup-

30. *Id.*

31. *Id.* at 103-04.

32. *Id.* at 104.

33. *Id.* at 107.

34. It has been suggested that employee inertia might explain the high percentage of company votes from switchers and undecideds. See Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181 (1976).

35. GETMAN STUDY, at 108.

36. *Id.* at 76.

37. *Id.* at 91.

porters.³⁸ The chief reasons why employees did not attend union meetings were (1) meetings held at an inconvenient time or place (forty percent), (2) lack of interest in the union (twenty-nine percent), and (3) not knowing about the meeting (nine percent). Personal contact also bore a significant relationship to campaign familiarity.³⁹

These findings led the authors to conclude that the union is at a substantial disadvantage when the employer can hold meetings on company time and the union cannot.⁴⁰ This conclusion is at odds, however, with the answer given by the Board to the Supreme Court's query in *NLRB v. United Steelworkers of America (Nutone, Inc.)*⁴¹ whether such use of company time for campaigning created an imbalance in the opportunities for organizational campaigning. The Board's conclusion has been that such an imbalance is not created unless there are unusual circumstances, as when employees are isolated by working on board a ship,⁴² or when the company has enforced a broad and unlawful no-solicitation rule⁴³ or a broad, but privileged, no-solicitation rule.⁴⁴

The authors found a high correlation existed between campaign themes and the reasons given by employees for their votes.⁴⁵ They attribute this, not to the efficacy of the campaign, but to the general predispositions of the voters and their acceptance of campaign issues consistent with those predispositions.⁴⁶ A separate analysis of the switchers' reasons for changing their positions to determine if campaign issues affected their decisions proved to be fruitless.⁴⁷ The authors conclude that only the few employees who were initially company supporters but switched and voted for the union fit the NLRB's

38. *Id.* at 92. Eighty-three percent of the employees interviewed had attended company meetings; only 36% had attended union meetings.

39. *Id.* at 93.

40. *Id.* at 96.

41. 357 U.S. 357, 362-63 (1958).

42. *Sioux City & New Orleans Barge Lines, Inc.*, 193 N.L.R.B. 382 (1971), *enforcement denied*, 472 F.2d 753 (8th Cir. 1973); *cf. Alaska Barite Co.*, 197 N.L.R.B. 1023 (1972) (island); *S. & H. Grossinger's Inc.*, 156 N.L.R.B. 233 (1965) (hotel).

43. *Montgomery Ward & Co.*, 145 N.L.R.B. 846 (1964).

44. *May Dept Stores Co.*, 136 N.L.R.B. 797 (1962), *enforcement denied*, 316 F.2d 797 (6th Cir. 1963).

45. *GETMAN STUDY*, at 97. Eighty-four percent of the reasons given by union voters and 71% of the reasons given by company voters were issues in the campaign.

46. *Id.*

47. *Id.* at 98.

stereotype of employees who are convinced by the issues in a campaign.⁴⁸

Ordinarily a union establishes its status as a bargaining representative by obtaining the vote of a majority of the employees voting in an NLRB election. Data produced by this study is of significance with regard to the question when a company may be ordered to bargain with a union because the union has obtained cards signed by a majority of the employees. An employer who has not engaged in unlawful pre-election conduct need not bargain with a union on the basis of signed authorization cards, but may instead insist upon an NLRB election.⁴⁹ But an employer who *has* engaged in such conduct may be ordered to bargain with a union which has obtained authorization cards from a majority of the employees if it is concluded that the unfair labor practices make impossible the holding of a fair election.⁵⁰ These holdings have given rise to controversy as to the reliability of union authorization cards as indicators of employee preferences. The data suggested to the authors that union authorization cards are reliable indicators of employee choice at the time the card is signed, and that refusal to sign a card generally represents opposition to the union or uncertainty concerning the benefits of union representation.⁵¹ The data revealed, however, that union authorization cards were inaccurate predictors of actual voting behavior for approximately one-quarter of the voters. Seventy-two percent of the card signers ultimately voted for union representation, whereas seventy-nine percent of the non-signers voted against the union.⁵² The inaccuracy of voting predictions based upon union authorization cards indicates that the NLRB and the courts are correct in considering elections to be the preferred method for determining employee desires concerning union representation. For those committed to the importance of providing an opportunity for the company to present its views before employees accept union representation, the data significantly demonstrated that in most of the elections in which it was possible to make the determination, the company did not know about the card-signing campaign in time to respond to it.⁵³

48. *Id.* at 141.

49. *Linden Lumber Div., Sumner & Co. v. NLRB*, 419 U.S. 301 (1974).

50. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

51. *GETMAN STUDY*, at 132.

52. *Id.* at 133.

53. *Id.* at 135.

These conclusions of the authors were undoubtedly a surprise to many experienced persons in the field of labor relations, particularly because the findings of this study are inconsistent with long held NLRB assumptions. Perhaps it is familiarity with the assumptions underlying the NLRB's election rules that leads such persons to conclude that there are basic but undetected errors underlying the study. A symposium of such experts discussing the book illustrates this view.⁵⁴ Board member Jenkins, dissenting from the *Shopping Kart* majority's acceptance of the study as a basis for overturning a Board election rule, characterized the work as based upon "nonprobative factual data and non sequitur logic."⁵⁵ He was apparently convinced that his intuition provided a surer ground for adhering to the rule.

I suggest that the principal causes of a variance between the hunches of persons familiar with labor relations and the results of the study are to be found in the types of companies studied and the late date at which the first interviews were conducted. As mentioned above, the Wave I interviews took place as soon as possible after the direction of an election and at least ten days before the elections.⁵⁶ One hesitates in reviewing a book such as this to make statements without supporting empirical data. Nevertheless, I suggest that unions ordinarily do not file a petition for an election among employees of an unorganized company until they have engaged in a considerable amount of organizational work. At the minimum, the NLRB requires as a condition of holding an election that the union has signed authorization cards from thirty percent of the employees in the bargaining unit which it wishes to represent.⁵⁷ Moreover, common sense dictates that the union file its petition at a time when it believes its orchestrated organizational efforts will reach a culmination near the date of the election. Most elections take place pursuant to consent agreements of the parties.⁵⁸ The authors state—but without citation—that the period between the signing of the consent election agreement and the election is generally between fifteen and thirty days,⁵⁹ whereas Wave I

54. *Symposium, Four Perspectives on Union Representation Elections: Law and Reality*, 28 STAN. L. REV. 1161 (1976).

55. *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. No. 190, at 25, 94 L.R.R.M. 1705, 1712 (Apr. 8, 1977).

56. GETMAN STUDY, at 33-34.

57. 29 C.F.R. § 101.18(a) (1976) (NLRB Statements of Procedure).

58. 40 NLRB ANN. REP. 16 (1975).

59. GETMAN STUDY, at 2.

interviews began an average of only eleven days before the election.⁶⁰ Thus, there was ample time for campaigning prior to Wave I interviews.

The authors report that little campaigning occurred between “the card signing drive” and the direction of the election.⁶¹ They acknowledge that “some campaigning” did take place between the direction of the election and the Wave I interviews, but, contrary to these suggestions their statistics indicate that unions held only fifty-one percent of their meetings and distributed only sixty-four percent of their written materials after those interviews.⁶² Their text does not state that “the card signing drive” was a part of the union campaign, but this reviewer has been informed that it was.⁶³

This opportunity for pre-Wave I campaigning during “the card signing drive” is particularly important when consideration is given to the labor relations policies of the companies included in the study. The authors state that the primary basis for selecting the thirty-one companies studied was “the likelihood of vigorous, possibly unlawful campaigning.”⁶⁴ (That the elections differed somewhat from the norm is indicated by the fact that the unions won only one quarter of them,⁶⁵ whereas unions ordinarily win about one half of NLRB elections.⁶⁶) The indicators which the authors used to identify companies as likely to engage in vigorous campaigning were probably also known to the employees of those companies,⁶⁷ who were thereby sensitized to problems of unionization. The “card signing drive” necessarily involved a substantial amount of personal contact (which the authors found to be a particularly effective campaign tactic for both sides). This could have shaped and rigidified the pro-union attitudes of

60. *Id.* at 69 n.18.

61. *Id.* at 69.

62. *Id.*

63. Telephone interview with Professor Julius Getman (one of the authors) (July 26, 1977).

64. GETMAN STUDY, at 34.

65. *Id.* at 102.

66. 41 NLRB ANN. REP. 17 (1976).

67. The factors included “the strength of the employer’s opposition to unionization,” “whether the employer had engaged in unlawful practices in prior elections,” “the views of employer and union representatives as to the likely nature of this campaign,” and “whether the law firm representing the employer had a reputation for representing employers who campaigned strongly and sometimes unlawfully.” Getman Study at 34–35. Professor Getman informed the reviewer in a telephone conversation that the latter factor was given the greatest weight by the authors.

the employees with a result that later overt and public campaigning had little effect on the predispositions existing at the time of the Wave I interviews. Those employees who had been intimidated or coerced by the known hostility of the employer might already have succumbed to that pressure, resolving the problem of the cognitive dissonance between their view of themselves as persons of integrity and independence and their fear of employer reprisals by concluding that they were in basic and fundamental agreement with the employer. For these employees, the subsequent pre-election campaign accordingly would be of little importance. Those persons who successfully resisted the employer's pressure remained true to their convictions, and the campaigning would likewise be of little significance.⁶⁸

This analysis suggests that the study might be valid only for employers whose prior conduct suggests the likelihood of vigorous and possibly unlawful campaigning. I do not know (nor does the NLRB) what effect an unexpected demonstration of employer hostility would have on the predispositions of employees. My empirically unvalidated hunch is that the effect would be greater than the reaffirmance of that hostility was for the employees in the companies studied, but that it likewise would not be consistent with the NLRB's assumptions. The discounting factor for the validity of the study is the extent to which employees generally do not anticipate that unionization will meet with employer hostility and use of known economic force. If employees generally anticipate hostility and use of economic force, the study is valid despite its use of elections in which such conduct was predictable.

Another factor which may have distorted the study results deserves mention. To facilitate the process of interviewing employees promptly after the election, all of the employees interviewed in Wave I were sent a post card reminding them that they would be interviewed again at the day and time agreed upon in the Wave I interview.⁶⁹ Undoubtedly, the reminder facilitated the Wave II interviews. But I suggest, again without supporting empirical data, that such a reminder of a forthcoming interview may have prompted at least some employees to vote in accordance with the views they expressed during the first inter-

68. Indeed, the authors recognized this possibility. *Id.* at 129.

69. *Id.* at 46.

view, thus enhancing the apparent importance of predispositions in determining the ultimate vote.

Despite these reservations, the findings of the study should not and have not been dismissed as inconsequential. It is important to remember that most of the study is directed to the Board's election rules, rather than to the law of unfair labor practices. The Board adheres to the proposition that parties who proceed with a consent or stipulated election waive all objections to conduct which preceded the filing of a petition for an election.⁷⁰ Much may be said for such a doctrine in terms of conserving the resources of the Board and sparing parties the burden of elections held at unpropitious times. The question thus is not whether the Board should approve employer conduct which results in pro-company predispositions, but whether the conduct which occurs after the filing of a petition should be the basis for setting aside the election.

It is something of a triumph that the authors have already succeeded in *Shopping Kart* in getting the NLRB to reconsider an election rule which had considerable importance even though the reconsideration was accomplished by a divided majority of three. The impending resignation of Board member Walther,⁷¹ who voted with one majority, may reduce the decision to a position of relative insignificance, but whether this will occur depends upon the views of his successor. In any event, the change was probably the one which could best be made with confidence on the basis of the study.

In *Shopping Kart*,⁷² the Board examined the rule enunciated in *Hollywood Ceramics Co.*,⁷³ to the effect that an election would be set aside if any party to the election made a substantial misstatement of facts within the special knowledge of the party so shortly before the election that there was no effective time for reply. Application of that rule necessarily involved the Board in making determinations of the truth or falsity of campaign propaganda, and thus limited the freedom of speech of the parties involved in the elections. It also provided op-

70. Goodyear Tire & Rubber Co., 138 N.L.R.B. 453 (1962).

71. Board Member Walther announced his decision to resign from the NLRB for personal reasons on March 31, 1977. 94 LAB. REL. REP. (BNA) 299 (Apr. 11, 1977). Nevertheless, he has continued to serve on the Board. 95 LAB. REL. REP. (BNA) 402 (Aug. 22, 1977).

72. 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705 (Apr. 8, 1977).

73. 140 N.L.R.B. 221 (1962).

opportunities for parties dissatisfied with election results to challenge those results on the basis of what they deemed to be objectionable and false campaign statements of opposing parties. These objections to the *Hollywood Ceramics* rule were pointed out as early as 1964 by then Professor Bok,⁷⁴ and were more recently restated in the extensive study of Williams, Janus, and Huhn.⁷⁵

After noting these more traditional academic criticisms of NLRB doctrine, members Pennello and Walther turned their attention to the authors' study. They noted that the study cast doubt upon the assumption that employees are unsophisticated about labor relations and that the campaign influenced the majority of employees to vote contrary to their predispositions. Finding the assumptions underlying the *Hollywood Ceramics* rule to be "dubious at best," they concluded that the rule did more to frustrate free choice than to serve it. Accordingly, they decided that elections should no longer be set aside on the basis of misleading statements by the employer or the union. The extent of their conversion by the study should not be overestimated because they maintained that elections *would* be set aside where a party engaged in deceptive practices involving Board processes, and they asserted that they would continue the policy of overseeing other campaign conduct which interferes with employee free choice outside the area of misrepresentation.⁷⁶ Then Chairman Murphy, whose vote was necessary to make the majority, emphasized in a concurring opinion her belief that elections should be set aside when a party makes an "egregious mistake [*sic*] of fact"⁷⁷ or when use is made of threats, promises of benefit, or similar improprieties.⁷⁸ There were two dissenters, the present Chairman Fanning and Member Jenkins, the force of whose dissents suggest that they will attempt to correct what they view as aberrational conduct.

The authors suggest a much more comprehensive revision of NLRB election law than that embraced by the Board majority. They conclude that neither threats of reprisal nor promises of benefit should

74. Bok, *supra* note 6. Derek Bok is now president of Harvard University.

75. REGULATION OF ELECTION CONDUCT, *supra* note 2.

76. Member Walther has stated in a speech before the Bar of Texas in Houston on June 17, 1977, that *Shopping Kart* has no bearing upon employer freedom to make threats or engage in intimidating conduct. 95 LAB. REL. REP. (BNA) 205, 207 (July 11, 1977).

77. 228 N.L.R.B. No. 190, at 11, 94 L.R.R.M. 1705, 1708 (Apr. 8, 1977).

78. *Id.*

constitute a basis for setting aside an NLRB election.⁷⁹ In reaching this conclusion they note that union supporters are generally not deterred by threats or promises, and that nearly all employees believe their vote is secret. They also conclude that interrogation of employees concerning union activities should not constitute either an unfair labor practice or grounds for setting aside an election.⁸⁰ In a catch-all conclusion, they recommend that the NLRB abandon all of the rules which it has developed to preserve “laboratory conditions” for an election.⁸¹ (Illustrative is the *Peerless Plywood*⁸² rule making speeches to massed assembled employees during the twenty-four hour period preceding an election a basis for setting aside the results of that election.) They also propose that a grant of benefits should not constitute either an unfair labor practice or basis for setting aside an election,⁸³ nor would they make denial of benefits or unlawful discharge a basis for setting aside an election, although they would provide protection to the victims of such discriminatory conduct.⁸⁴

In lieu of setting aside elections, the authors suggest internal discipline for Board employees whose conduct damages the appearance of fairness, and specific statutory prohibitions against other objectionable conduct on the part of the parties.⁸⁵ They view with considerable skepticism the use of bargaining orders as remedies for unlawful employer campaign tactics, suggesting instead that such conduct could better be deterred, for example, by requiring employers to pay discriminatorily discharged employees three times their lost earnings.⁸⁶ Counterbalancing the recommendations that protections of unions and union-minded employees be removed, is the suggestion that an employer who holds campaign meetings on working time and premises be required to allow the union to hold similar meetings on working time and premises.⁸⁷ As they see it, this requirement is partic-

79. GETMAN STUDY, at 147–48.

80. *Id.* at 149.

81. The authors make a more modest proposal—that the Board decline to consider objections based on speech in those cases in which the margin of victory is greater than 20% of the vote. *Id.* at 150 n.21. They question whether this more modest reform would have any meaningful impact because if the margin is greater than 20% the loser is not likely to file objections.

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

83. GETMAN STUDY, at 151.

84. *Id.* at 151–52.

85. *Id.* at 152–53.

86. *Id.* at 153–56.

87. *Id.* at 157.

ularly appropriate if restrictions on employer speech are removed as they recommend.

The program proposed by the authors first evokes, for those imbued with the traditions of NLRB law, something of the surprise of Alice to the curious logic of the world beyond the looking glass. One recognizes the logic, but it seems unreal. Can one embrace their propositions if as many as nineteen percent of the voters' choice for representation could not be predicted before the pre-election campaigning? Those votes, as noted above, did decide almost one-third of the elections. Departure from the current standards on the basis of the controlling effect of predispositions seems particularly troublesome when consideration is given to the high percentage of continued company loyalty on the part of employees of companies selected for the study because of the likelihood that the employers would engage in vigorous, possibly unlawful campaigning. The employers performed as predicted, and in doing so won approximately seventy-five percent of the elections as compared to the norm of fifty percent. Is it really insignificant that only ten percent of those employees intending to vote for the company thought there was a job-loss theme in the company's campaign, that only nineteen percent of those intending to vote for the company thought there had been promises of benefit for rejecting unionization, or that a lesser percentage of company supporters than union supporters said they viewed discharges as motivated by hostility to unions?

Those who believe that the authors have the burden of proving the current assumptions to be wrong will probably answer these questions in the negative. But have not the authors raised enough doubt about the validity of the current assumptions to require reconsideration of the current rules of NLRB law? If the study casts doubts upon whether certain types of employer conduct affect employee freedom of choice or interfere with the establishment of collective bargaining, the costs of current Board actions to the parties involved as well as to the public must be weighed. If the costs are significant, the Board should no longer pursue a course which only doubtfully protects employee freedom of choice and the institution of collective bargaining.

In any event, it is now clear that the NLRB should undertake its own empirical studies to validate the assumptions upon which it proceeds. It is not enough to find fault with the study conducted by the

authors. Even if they have erred in certain respects, their study has so shaken the underpinnings of current Board law that uncritical continuation of past practices is unacceptable. The current prohibition against research activities of Board employees reaches only to "economic analysis,"⁸⁸ and would not prohibit a study of the sort conducted by the authors. The results of such studies could be publicized and provide the basis for proposed rulemaking hearings, in which parties to be affected by the rules would have an opportunity to comment upon the validity of the study data as well as the wisdom of the rule proposed.⁸⁹

Neither the opinions in *Shopping Kart*, nor the Board's record of use of empirical studies and rulemaking proceedings creates much confidence that the Board will undertake the needed studies. Perhaps the study will have greater effect by inducing courts to require the NLRB to do more than rely upon a mythical expertise now demonstrated to be at best questionable hunches.

If further empirical studies are made to provide a solid foundation for Board rules, those in the labor-management field will be much indebted to the authors for their efforts. It is to be hoped, however, that the effects of the study will not be limited to the specialized field of labor relations. Indeed, the authors have given a persuasive demonstration of the need for empirical research in many areas of law in which rules have been fashioned and followed on the basis of the unvalidated hunches of deciding authorities, both administrative and judicial. Does the Federal Trade Commission have an empirical basis for its determinations of what kind of advertising misleads customers? How much does the public understand of the information required to be published by regulations promulgated under truth-in-lending legislation? How does the Federal Communications Commission decide what sort of programming proposal makes an applicant for a television license the one to be preferred in the public interest if it has not attempted by empirical studies to determine the effects of programming on society or what the public desires or would desire if offered alternatives to what the industry currently produces? What use is made of drugs which are available in over-the-counter sales? How

88. 29 U.S.C. § 154(a) (1970).

89. For a careful consideration of how the Board might make use of empirical studies, see Roomkin & Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1441 (1977).

have welfare agencies responded to the requirement of due process hearings in revocation of welfare benefits? Do recipients of lump-sum settlements under workmen's compensation statutes have a better record of rehabilitation than those who are awarded pensions for permanent partial disabilities? Obviously, many more such questions could be asked and profitably researched.

The years invested by the authors in their study warn that empirical research is not easily undertaken or accomplished. Nor will completion of empirical studies eliminate arguments about what the law should be,⁹⁰ or who should change it.⁹¹ But the authors deserve our appreciation for having so effectively demonstrated the need for empirical research in lieu of unvalidated hunches.

90. See, e.g., A. CONRAD, R. BOMBAUGH, J. MORGAN, R. PRATT, & C. VOLTZ, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* (1964); Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964); Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355 (1974); Peck, *An Exercise Based Upon Empirical Data: Liability for Harm Caused by Stolen Automobiles*, 1969 WIS. L. REV. 909; Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959); *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743 (1968).

91. See Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).