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INTRODUCTION

At the heart of every representation election campaign lie the communications made by either side to the electorate—the stream of handbills, speeches, conversations and letters that seek to influence the final decision of the voters. It is through these partisan messages that employees obtain the bulk of information from which they must make a reasoned choice in accepting or rejecting unionization. On the one hand, limits have been imposed to restrict the content of what may be said by either party, while on the other, rules have been laid down to guarantee both employers and unions a reasonable opportunity to convey their views to the voters.[1]

Section 9 of the NLRA requires the Board to "direct an election by secret ballot and . . . certify the results thereof"[2] if it finds that there is a question of representation.[3] A necessary adjunct to this statutory power is the authority to regulate representation elections to insure that the outcome reflects the free choice of the electorate.[4] In addition to this authority to regulate representation elections, the Board has the power to set aside an election which fails to conform to its standards. This comment is addressed to the standards utilized by the Board in representation elections, particularly the "total context" theory, its origin and its future.

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1. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the NLRA*, 78 HARV. L. REV. 38 (1964).
2. 29 U.S.C. § 159(c)(1)(B) (1964).
3. *Id.* (A), (B) (1964).
4. "Our main concern is with . . . the safeguards required to protect the employees against tactics that tend to interfere with an informed and reasoned assessment of the consequences of selecting a union." Bok, note 1 *supra*, at 47.

The Evolvement of the Total Context Theory

The early decisions of the National Labor Relations Board, at least until 1941, appear to have been grounded upon two major rationales. First, it was felt that every appeal by an employer opposed to unions violated the Wagner Act provision against interference, restraint and coercion[5] because it inevitably created a fear in the minds of his employees that he would use his economic power against those who disregarded his expressed desires. Second, it was believed that the choice of a bargaining representative was the sole concern of the employees and that the employer lacked sufficient interest to warrant his intrusion.[6] These theories limited the employer to a position of strict neutrality in communications regarding union organization of his plant.[7]

The courts, in many instances, agreed with the reasoning that the "position of the employer . . . carries such weight and influence that his words may be coercive when they would not be so if the relation of master and servant did not exist."[8] Other courts reasoned, however, that based on a constitutional standard, employers should be free to express opinions and state facts regarding a union seeking to organize their establishment.[9] As so often is the case when theories conflict in a significant area of the law, the Supreme Court will ultimately be asked to settle the issue. In 1941, in *NLRB* v. *Virginia Electric and Power Co.*,[10] the Court had such an opportunity. The Court stated:

> Neither the Act nor the Board's order . . . enjoins the employer from expressing its views on labor policies or problems . . . . the employer is . . . free . . . to take any side it may choose . . . . But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then these employees are entitled to the protection of the Act.

5. 29 U.S.C. § 158(a) (1964). Section 7 of the NLRA protects the right of employees "to form, join or assist labor organizations." 29 U.S.C. § 157 (1964).

6. Burke, *Employer Free Speech*, 26 Fordham L. Rev. 266 (1967); Koretz, *Employer Interference with Union Organization Versus Employer Free Speech*, 29 Geo. Wash. L. Rev. 399 (1960).

7. Ford Motor Co., 23 NLRB 342 (1940), *enforced as modified*, 122 F.2d 414 (8th Cir. 1941); Union Die Casting Co., 7 NLRB 846 (1938), *enforced mem.*, 102 F.2d 1006 (9th Cir. 1939).

8. NLRB v. Falk Corp., 102 F.2d 383, 389 (7th Cir. 1939).

9. Continental Box Co. v. NLRB, 113 F.2d 93 (5th Cir. 1940); Midland Steel Prod. Co. v. NLRB, 113 F.2d 800, 804 (6th Cir. 1940).

10. 314 U.S. 469, 477 (1941).

The Supreme Court thus rejected the rationale limiting an employer to a position of strict neutrality and spawned the "total context" approach. As a result of this decision the Board now considers speeches, letters, pamphlets, and other election propaganda, not alone, but with regard to the total context of their issuance.[11] And, those materials which contain either an actual or implied threat of some economic reprisal are deemed coercive per se. The more difficult problem to which this comment is addressed, occurs in connection with speeches, letters and pamphlets not per se objectionable.

Six years after the Supreme Court's decision in *Virginia Electric,* Congress amended the NLRA[12] and added Section 8 (c) which reads as follows:

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

The experts differ both as to the necessity for and effect of the provision.[13] My own view is that Section 8(c) was nothing more than a broad codification of the rule laid down by the Supreme Court, and followed by the Board during the interval between *Virginia Electric* and the Taft-Hartley Amendments.

Shortly after the enactment of Section 8(c), the Board formulated the so-called *General Shoe* doctrine.[14] This doctrine states that conduct which creates an atmosphere rendering improbable a free choice warrants invalidation of an election, even though that conduct may not constitute an unfair labor practice. In adopting this rule, the Board rejected the contention that the criteria applied by the Board in a representation case to decide whether an election was interfered with need necessarily be identical to those used to determine whether an unfair labor practice has been committed. The Board stated:

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11. As Judge Learned Hand stated earlier: Words are not pebbles in alien juxtaposition; they have only a communal existence . . . all in their aggregate take their purpose from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941).

12. Taft-Hartley Amendments to the NLRA, 61 Stat. 136 (1947), as amended, 29 U.S.C. § 151 *et seq.* (1964).

13. Cox, *Some Aspects of the Labor Management Relations Act,* 1947, 61 HARV. L. REV. 1, 15-20 (1947); Christensen, *Free Speech, Propaganda and the National Labor Relations Act,* 38 N.Y.U.L. REV. 243, 265 (1963); 13 NLRB ANN. REP. 49 (1948).

14. General Shoe Corp., 77 NLRB 124 (1948).

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

At the same time the Board noted that the protection of Section 8(c) applies only to unfair labor practice cases.[15]

Under this approach, the Board may thus regulate pre-election employer speech either under Sections 8(a)(1)[16] and 8(c) or under the "laboratory conditions" standard of *General Shoe*.

In *Dal-Tex Optical Company, Inc.*,[17] the Board reversed intervening decisions holding certain employer statements privileged because of the introduction of Section 8(c) into the statute.[18] "To adhere to those decisions," stated the Board, "would be to sanction implied threats couched in the guise of statements of legal position."[19] The Board, in referring to its former rule, pointed out that:

> Such an approach is too mechanical, fails to consider all the surrounding circumstances, and is inconsistent with the duty of this Board to enforce and advance the statutory policy of encouraging the practice and procedure of collective bargaining by protecting the full freedom of employees to select representatives of their own choosing. Rather, we shall look at the economic realities of the employer-employee relationship and shall set aside an election where we find that the employer's conduct has resulted in substantial interference with the election, regardless of the form in which the statement was made.[20]

The Board further found that conduct which amounts to an unfair

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15. This dichotomy was recently affirmed in Eagle-Picher Indus., Inc., Electronics Division, Precision Products Dep't, 171 NLRB No. 44 (1968). "We do not regard that section as determinative of questions involving election interference." See also NLRB v. Realist Inc., 328 F.2d 840 (7th Cir. 1964), *cert. den.* 377 U.S. 994 (1964).

16. "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the right to self-organization, to form, join or assist labor organizations, or to refrain from such activities." 29 U.S.C. § 158(a)(1).

17. 137 NLRB 1782 (1962).

18. National Furniture Mfg. Co., Inc., 106 NLRB 1300, 1301-02 (1953). Here, the Board found that statements that the employer would not bargain, were merely expressions of the Employer's "legal position."

19. Note 17, *supra*, at 1787.

20. *Id.*

labor practice, i.e., restraint or coercion, is, a fortiori, conduct which will interfere with employees exercising a free choice in an election.[21] This is so because the test of conduct which may interfere with the laboratory conditions for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint or coercion which violates Section 8(a)(1).[22]

Recognizing that employer speech must be afforded first amendment protection, the Board also held that "the strictures of the first amendment must be considered in all cases."[23]

With this background discussion of the evolution of the "total contest" theory by the Board and Courts, I shall now examine the extent of its application as expressed in the Board's decisions of the past several years.

In *Arch Beverage Corporation*,[24] a letter which on its face appeared to be a threat to close the plant was found by the Board to be a reply to union propaganda and unobjectionable in view of the total context of the letter.[25]

In two later cases the Board reaffirmed the total context theory but reached an opposite result on similar facts. In *American Greetings Corporation*,[26] the employer sent a series of 14 letters to employees. The Regional Director concluded that the "entire thrust of the Employer's pre-election material was to impress upon the employees the futility and foreboding consequences of choosing the [union], including the inevitability of strikes, loss of employment, and violence. . . ."[27] The Board, however, disagreed with the conclusion of the Regional Director[28] and found that while the employer had waged an aggressive

21. Daniel Constr. Co., Inc., 145 NLRB 1397 (1964); Cohen Bros. Fruit Co., 166 NLRB No. 2 (1967); General Automation Mfg. Inc., 167 NLRB No. 66 (1967).

22. Note 17, *supra*, at 1786-87.

23. *Id.*

24. 140 NLRB 1385 (1963).

25. A similar result was reached in Decorated Prods., Inc., 140 NLRB 1383 (1963), where the Board reversed the Regional Director who had set aside the election based on a letter which he found had a coercive impact on the employees. The Board found that the letter contained neither an implied nor expressed threat of reprisal when considered in its total context.

26. 146 NLRB 1440 (1964).

27. *Id.* at 1441.

28. Although the campaign propaganda which bears on strikes and their consequences does not contain any express or implied threats of retaliatory action by the employer, it does become improper when it produces an atmosphere of unreasoned fear that the employer will take such action if the employees select a union to represent them. The problem is to determine whether campaign propaganda has exceeded the bounds of fair comment, taking into account the entire context in which the material was presented, as well as the union's opportunity to reply.

campaign, its statements concerning strikes were temperate and factual in character and were relevant to the election issues before the employees. Furthermore, the union had full opportunity to, and did in fact, circulate counter-propaganda.

In *Storkline Corporation*,[29] the Board set aside an election where the employer's campaign, in its total context, was keyed to the idea of instilling fear in the minds of employees who might be disposed to vote for the union—fear of physical violence, fear of strikes, and fear of loss of employment.[30]

The above and similar cases[31] illustrate that the line separating temperate from intemperate remarks in the total context of a letter, speech, or pamphlet is extremely difficult to draw. It is true, of course, that sentences or phrases which, plucked out of context, might appear to be unlawful interference, might appear otherwise when appraised in their total context. However, it is equally true and it has long been recognized that statements and words which, standing alone, might be noncoercive, take on the character and quality of the coercive comments accompanying them and no longer can be said to be permissible expressions of views. As Justice Holmes observed concerning words and their use, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[32]

The difficulty in applying the total context theory to an actual fact situation is further complicated by cases in which the Board has said that Section 8(c) does not apply, but has continued to look for coercion and interference. In some cases, coercion has been found and is cited as the reason for setting the election aside. In others, the reason given is merely that the "laboratory conditions" have been upset.[33]

It is submitted that in cases where language is found to be sufficient to set aside an election in the context of an unfair labor practice viola-

29. 142 NLRB 875 (1963).
30. *Id.* at 879.
31. In Oak Manufacturing Company, 141 NLRB 1323 (1963), prior to an election, management had sent two letters to employees informing them that its company provided the highest wages in the area as well as fringe benefits superior to many neighboring plants. Management also stated that the union "cannot and will not obtain any wage increase for you." The Board set aside the election, finding the text of both letters, taken as a whole, interfered with the employees' freedom of choice. The dissenting members of the Board, however, disagreed stating that pre-election propaganda should be judged in the context of the complete documents involved and of the "total election campaign" and not on the basis of isolated statements "considered in the abstract."
32. Towne v. Eisner, 245 U.S. 418, 425 (1918).
33. Brunswick Corporation, 147 NLRB 428 (1964).

tion,[34] that less confusion would result if the "total context" theory were not applied. Rather, the Board should decide these cases on the well-settled rule that conduct amounting to an unfair labor practice is a fortiori conduct which constitutes sufficient grounds for setting the election aside.[35]

Another line of cases concerns employer statements to employees which describe adverse reactions by customers to a unionized plant. In the recent case of *Pinkerton's National Detective Agency*,[36] the employer stated, *inter alia*, that "many of our clients lacked faith in unionized guards." The Board viewed this as a "temperate and factual report of events that had occurred," relevant to the election issues.[37]

In certain situations, the threatening nature of an employer's speeches,[38] letters and pamphlets is obvious. However, in the cases discussing the "total context" approach, where the dividing line between temperate and intemperate remarks is extremely difficult to draw, a possible solution to the problem, and one which would remove some of the uncertainty in this area, would be to not set aside an election where the opportunity to reply is present. Obviously, employer coercion is neither legitimized nor diluted by a union's opportunity

34. General Automation Mfg. Inc., 167 NLRB No. 66; *Cf.* Formex Co., 160 NLRB 835 (1966); Dixie Cup, Div. of Am. Can Co., 157 NLRB 167 (1966).

35. In General Indus. Electronics Co., 146 NLRB 1139, 1141 (1964), the Board explicitly reaffirmed the "total context" theory. "In our judgment, the sum total of the Employer's separate communications to its employees constituted a clear message that it was futile for them to select the [union] as their bargaining representative for the purpose of improving their conditions of employment, and that selection of Petitioner could only bring strikes, violence, and loss of jobs. It makes no sense to us to find that such a message does not interfere simply because each component part of the message, viewed separately, falls just a little short of interference. We are not here engaged in the addition of a series of ciphers, the sum of which is always zero, but rather in assessing the impact of a series of statements delivered in the course of an anti-union campaign and couched in words which were calculated to impress upon employees that the selection of [the union] . . . could only change their conditions of employment for worse."

36. 169 NLRB No. 81 (1968).

37. Similarly in Freeman Mfg. Co., 148 NLRB 577 (1964), the employer sent employees a series of letters, stressing the competitiveness of the industry and the fact that if its largest buyer thought union activity could possibly affect its dealings, it would be harder, if not impossible, to sell them. The Board viewed the contents of the letters in their entirety and considered their contents, timing, the opportunity for the union to respond and its actual responses and concluded "the issue of loss of business and a resultant reduction in the work force was fully brought to the attention of the employees by the electioneering" of both the Employer and the Union. *Cf.* Haynes Stellite Co., Div. of Union Carbide Corp., 136 NLRB 95 (1962), *enforcement denied sub. nom.*, Union Carbide Corp. v. NLRB, 310 F.2d 844 (6th Cir. 1962).

38. For instance if the employer states that it will take economic reprisals against employees if they vote for unionization, obviously this amounts to coercion. NLRB v. Lester Bros., 301 F.2d 62 (4th Cir. 1962). Similarly, if the Employer states he will not bargain with the union even if the employees vote for unionization, this is not a protected statement.

to respond. But in the area of employer's statements, read in their totality, which in some cases are found to constitute interference with elections and others, where they are found to be permissible campaign propaganda, some ascertainable guidelines must be set forth in fairness to employers and unions alike.

A recent article written in this area compares restrictions placed on employer speech during organizing campaigns with those placed on politicians in political campaigns.[39] The article states that " 'the aim of the few regulations pertaining to political elections is to insure that both sides have an equal opportunity to disseminate their views.' "[40] An example of such an approach is the "equal time" provision of the Federal Communications Act.[41] "The actual content of a candidate's speech is rarely the subject of restriction outside of the self-imposed limitations which the threat of a libel suit might engender."[42]

In certain areas in the regulation of representation elections, the Board has applied several rules that are far more concrete and hence easier to apply than the "total context" theory. For instance, the Board in *Excelsior Underwear, Inc.*,[43] established the rule that within seven days after the Regional Director approves a consent election agreement or after the Regional Director or the Board directs an election, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all eligible voters. The Regional Director in turn must make this information available to all parties to the case. Failure to comply with this requirement is a ground for setting aside the election upon the timely filing of objections.[44]

Similarly, in 1953 the Board established the *Peerless Plywood* rule[45] which is still in effect. The rule states:

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39. Comment, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 N.W.U. L. REV. 40, 56 (1968). The writer of the article concedes however, that only "certain analogies" are appropriate in view of the fact that in representation cases, the employer exerts "economic power" over his employees.

40. *Id.*

41. 47 U.S.C. § 315(a) (1964).

42. *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, note 39, *supra*, at 56.

43. 156 NLRB 1236 (1966).

44. The Board stated one of the considerations which impelled this decision was that "an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." In other words, by "providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation." 156 NLRB at 1240.

45. Peerless Plywood Co., 107 NLRB 427 (1953).

> [E]mployers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed.[46]

The above rules provide guidelines for interested parties to follow in representation elections[47] and put employers and unions on notice that if they do not follow these rules, the election may be set aside.[48]

The Board's rule most pertinent, in my opinion, to the solution of the total context problem was set forth in *Hollywood Ceramics Co.*[49] The case dealt with material misrepresentations in campaign propaganda. The Board stated its rule as follows:

> We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside. Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have a *de mimimis* effect. Or, it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so they could not reasonably

46. *Id.* at 429.

47. Unlike speeches, there is no comparable 24-hour election rule with respect to written communications. Such written literature may be distributed up until the election, assuming that this is not done at or about the polls.

48. Examples of additional grounds used by the Board to set aside elections include the following: In National Caterers of Va., 125 NLRB 110 (1959), the Board reaffirmed the rule that otherwise legal, private, and non-coercive interviews by employers are sufficient to set aside an election when they take place within the "locus of managerial authority." In Allied Elec. Prods. Inc., 109 NLRB 1270 (1954), the Board decided that in the future it would not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked sample on its face.

49. 140 NLRB 221 (1962).

have relied on the assertion. Or the Board may find that the employees possessed independent knowledge with which to evaluate the statements.[50]

While in the above case, the union distributed false wage data before the election, the rule applies equally to employer misrepresentations. Professor Bok suggests that representation election campaigns involving misrepresentations should only be set aside where the misrepresentation is "highly material and substantially misrepresented."[51] The emphasis, according to Professor Bok, should be on the effect of the outcome of the election and not on the exactitude of remarks in campaigning.[52] In any event, more certainty would be attained by placing less emphasis on the total context approach and more emphasis on the standards utilized in misrepresentation cases.

In a recent case, the Ninth Circuit held that the employers did not violate the Act by refusing to bargain with the certified union since the election was invalid.[53] On the eve of the election, the union had distributed leaflets which the court concluded contained false and misleading representations regarding wages paid by the employers and those paid at unionized stores and that these misrepresentations could reasonably be expected to have a significant impact on employees.[54]

In the above case had the employer possessed the opportunity to respond to the campaign propaganda, it is possible that the elections would not have been set aside by the court. Greater emphasis by the Board on the criterion of "opportunity to reply" to campaign propaganda would provide for greater stability and predictability in this area than presently exists.

As it stands now, however, the total context theory places both unions and employers in a position of uncertainty as to what may properly be said during the pre-election campaign. A discussion of some recent cases will make this apparent.

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50. *Id.* at 224.
51. Bok, *supra*, note 1, at 90.
52. *In accord*: 63 N.W.U. L. Rev., *supra*, note 39 at 60.
53. Gallenkamp Stores Co. v. NLRB, 69 LRRM 2024 (9th Cir., Nos. 21621, 21632 and 21649, August 8, 1968).
54. In Graphic Arts Finishing Co. v. NLRB, 380 F.2d 893, 896 (4th Cir. 1967), the Court held that issuance by the union 24 hours prior to an election of a circular which misrepresented the hourly wage and fringe benefits being paid in the area under union contracts, constituted a material misrepresentation which rendered the election unfair when there was no opportunity by the employer to reply. *In accord*, Schneider Mills, Inc. v. NLRB, 390 F.2d 375 (En banc, 4th Cir. 1968); Collins & Aikman Corp. v. NLRB, 383 F.2d 722 (4th Cir. 1967); NLRB v. Houston Chronicle Publishing Co., 300 F.2d 273 (5th Cir. 1962).

In *Thomas Products Co., Division of Thomas Industries, Inc.*[55] the Regional Director had concluded that Petitioner's objections to the election, which concerned primarily a series of letters, notices, and speeches, amounted to nothing more than legitimate campaign utterances and he accordingly overruled them. The Board stated that in outlining the advantages and disadvantages of unionization, an employer is not prohibited from pointing out that the strike is the union's chief economic lever, and that strike action might entail certain consequences.[56] But the more the employer persists in referring to strikes and what they might entail—replacement, violence, unemployment, walking picket lines, unpaid bills—the more the employee is likely to believe that the employer has already determined to adopt an intransigent bargaining stance,[57] which will force unions to strike in order to gain any benefits. The Board concluded that while there may have been no direct, unqualified threats to close the plant, the "expressions of a willingness to do so, if necessary, and prophecies that the necessity might well arise, constitute coercion sufficient to pollute the atmosphere of an election and to render the employees incapable of making a free choice."[58]

In another recent Board decision,[59] a union lost the election and filed objections alleging that company literature was so completely saturated with references to strikes, union violence and corruption that employees were unable to vote in a free and fair election.[60]

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55. 167 NLRB No. 106 (1968).

56. The week prior to the election, the employer mailed to each of its employees five letters, posted several notices, and addressed the employees on two occasions. The five letters stressed three themes: the likelihood of strikes and loss of jobs if the employees selected the union; the impotence of the union to do anything but to call a strike; and the employer's resolve to deal no more generously with a union than with its employees individually. Two of the posted notices again dealt with strikes and loss of jobs. The two speeches, one of which was delivered four days before the election by the employer's president, embellished and expanded upon these subjects.

57. The Board has also made clear that it will not police or censor propaganda used in elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters. Stewart-Warner Corp., 102 NLRB 1153, 1158 (1953).

58. 167 NLRB No. 106 (1968).

59. Dyersburg Cotton Prods., Inc., 168 NLRB No. 151 (1968).

60. The objectionable material consisted of a pamphlet mailed to employees and a series of nine meetings at which the employer met with groups of employees. At two meetings, the employer showed some thirty-three slides, showing newspaper clippings dealing with union violence; a newspaper clipping concerning a former officer of the union who had been in the plant in a 1953 organizing campaign and who had subsequently been found guilty of conspiring to blow up a boiler at another plant; slides dealing with strikes, and an excerpt from the Board Rules and Regulations dealing with an employer's right to replace economic strikers, and a slide dealing with labor problems at a mill which had gone out of business; other slides dealing with present benefits enjoyed by employees, and wage comparisons with union plants. The pamphlet

The Regional Director concluded that the main thrust of the employer's campaign was the dire consequences of selection of the union as bargaining representative, and further concluded that the pamphlet and a slide show created an atmosphere of fear in which the exercise of free choice was not possible. Accordingly, he recommended that the election be set aside, and a new election directed. Thereafter, the employer filed exceptions to the Regional Director's Report with the Board.

The Board, having found merit in the employer's exceptions, stated:

> Clearly, the Employer undertook an aggressive campaign against the Petitioner. However, the conduct complained of here did not involve unlawful threats against the employees if they selected the Union as their representative. In fact, most of the slides (22 out of 33) were concerned not with stressing the problems of unionism but rather with highlighting the company benefits already enjoyed by the employees.[61]

It is difficult to perceive a distinction between the above cases. Neither contained direct or unqualified threats to employees and in both the employer stressed the likelihood of strikes, loss of jobs and possible plant closings. Yet in one case the Board set aside the election based on the totality of the employer's conduct and in the other found that the totality of the employer's conduct did not warrant the setting aside of the election.[62] The difficulty in application of the total context approach may be further illustrated by discussing another recent case.

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consisted of a series of clippings concerning strike cost, the effects of union activity on industry, strike violence, plant closures and union scandal.

61. 168 NLRB No. 151 (1968).

62. In another recent case, Ripley Shoe Prods. Co., 171 NLRB No. 153 (1968), the Regional Director sustained the union's objections to the election and found that a 10-page book-letter mailed to employees in conjunction with other material was designed to instill fear in the employees by repeatedly alleging that the union was making "phony promises" which eventually would require it to go on strike, by graphically depicting the "dire consequences" of the union's strike at a sister plant and by timing the distribution of the leaflet in question so as to prevent the union from having an opportunity to disavow responsibility. The Board disagreed with the Regional Director and concluded that the union had ample opportunity to defend itself against the charges that it was a "strike happy" union. Further, the employer's leaflet, whether viewed alone or in conjunction with its other campaign propaganda, could not reasonably be construed as intended to impress upon employees the futility of selecting the union as their bargaining representative. The Board further pointed out that the employer had the right to present to employees factual comments concerning the union's strike record, the legal requirements of collective bargaining, its intention to resist "unreasonable demands" should it become obligated to bargain with the union, and the possible consequences of an economic strike in support of the union's demands. *See* Pinkerton's Nat'l Detective Agency, 169 NLRB No. 81 (1968); Allied Egry Business Syss., Inc., 169 NLRB 60 (1968); Formex Company, 160 NLRB 835 (1966); Coors Porcelain Co., 158 NLRB 1108 (1966); American Greetings Corp., 146 NLRB 1440 (1964).

In *Howmet Corporation, Austenal Division*,[63] the United Steelworkers of America, AFL-CIO lost an election and filed objections thereto. Investigation disclosed the following facts, which were set forth in the Report on Objections to the Board:

> The Employer's campaign consisting of speeches, letters, pamphlets and collage of newspaper clippings viewed *in toto* could reasonably lead employees to fear that the Employer, in the event the employees selected the Union as their bargaining representative, would suffer economic consequences and further that the Employer's campaign propaganda demonstrated an intransigent position on the part of the Employer,[64] that bargaining would start from scratch, and that selection of the Union would lead to strikes. On the basis of the above, the Region recommended that the election be set aside.[65]

The Board, however, reversed the Regional decision finding that the "overall impact of the Employer's campaign propaganda did not interfere with the employees' free choice."

The Board stated:

> It is undoubtedly true that the Employer waged an aggressive campaign against selection by its employees of the union as their bargaining representative. Thus, the Employer referred to strikes in which the "Union" was involved and their accompanying effects, and also pointed to the fact that selection of a union would not automatically guarantee employees increased benefits. But a close examination of the Employer's literature discloses no express or implied promise of benefit or threat of reprisal by the Employer.

The Board concluded:

> [E]ssentially the Employer's propaganda was a reminder that there can be disadvantages to union representation and that it would be

63. 171 NLRB No. 18 (1968).

64. In evaluating the Employer's campaign propaganda, consideration was also given to Board decisions finding that statements calculated to move employees may be and are framed in the language of opinion and that the precise words chosen are not alone dispositive but the words used must be judged by their impact upon employees. TRW-Semiconductors, Inc., 159 NLRB 415 (1966), *enforcement denied*, U.S. Court of Appeals, 9th Circuit, No. 21549 (1967).

65. The Report pointed out, however, that in outlining the advantages and disadvantages of a union, an employer is not prohibited from pointing out that the strike is the union's chief weapon and that a strike may entail economic consequences. However, an employer who campaigns on the theory of strikes and what they may entail, including violence and unemployment, leaves himself open to the construction that he does not intend to bargain in a meaningful sense. When the Employer additionally conveys that he would not grant benefits other than those he would grant without a union, and stands ready to demand a reduction in employee benefits in exchange for security measures, employees can well believe that the Employer has decided in advance to refuse to bargain in the good faith which the law requires.

> wise for the employees to give heed to the disadvantages as well as the advantages in making their choice. And while the Employer did advert to strikes in this connection, we do not think that the content of the campaign material and the manner of its presentation was such as to indicate to employees that the Employer would not honor its statutory obligation to meet and bargain with the Union in good faith should the Union win the election.

And yet in the *Thomas Products Co.* case previously discussed, the Board had stated:

> [T]he more the employer persists in referring to strikes and what they might entail—replacement, violence, unemployment, walking picket lines, unpaid bills—the more the employee is likely to believe that the employer has already determined to adopt an intransigent bargaining stance which will force employees to strike in order to gain any benefits. . . . Power can persuade, and substantial power can persuade substantially. . . . When comments such as these [demonstrating the employer's ability to close down one or another of the company's several plants] are delivered by men in positions to affect permanently the lives of the listeners, they are not lightly received. There may have been no direct, unqualified threats to close the plant. We believe that expressions of a willingness to do so, if necessary, and prophecies that the necessity might well arise, constitute coercion sufficient to pollute the atmosphere of an election and to render the employees incapable of making a free choice.[66]

It is difficult to reconcile the *Thomas* and *Howmet* results. In both, the consistent theme throughout the employer's campaign was the inevitability of strikes and accompanying violence, loss of wages and resultant plant closings, the futility of selecting a union, and the need to reject the union in order for the employer to continue granting benefits. The Board, however, condemned the employer's conduct in *Thomas* and upheld the employer's conduct in *Howmet*, based on the total context of the campaign propaganda.

Conclusion

Benefits flowing from application of the total context approach to the determination of whether an employer's representation election campaign communications are sufficient to warrant the setting aside

66. 167 NLRB No. 106 (1968).

of the election appear to be outweighed by the uncertainty which surrounds its application. A more realistic approach seems in order. After protection by the NLRA for more than 30 years, employees are generally able to evaluate the statements made by unions and companies and, absent threats or promises of benefit in the area of election propaganda, the parties might well be left alone to determine their campaign tactics as they see fit, as in the political arena. However, to take that laissez-faire attitude would discount the hard fact that employees undoubtedly are subject to their employer's influence because of the employment relationship and would also ignore the fact that there are cases where the totality of conduct theory has validity. But having stated the obvious does not reduce the uncertainty which arises from application of the theory. Objections to elections are time consuming. A rule which would dispel uncertainty would have the salutary effect of reducing the number of objections filed as well as result in expeditious resolution of objections by the Board.

Parties have little trouble following definite guidelines, as evidenced by the acceptance of the doctrines established in *Peerless Plywood, Excelsior, Allied Electric Products* and more recently in *Milchem.*[67] In every case there will still be certain situations which do not lend themselves to routine application of an established principle.

Since most of the totality of conduct cases involve letters, speeches, graphic portrayals, leaflets, handbills, posters, etc., absent threats or promises of benefits, if the other party has had an adequate opportunity to reply, it is submitted that such leaflets, etc. should not warrant setting aside the election. This proposed rule finds support in the Board's *Hollywood Ceramics*[68] case, where the Board noted that even if there had been a material and substantial misrepresentation by one of the parties, the fact that an opportunity to reply was present, was one of the crucial considerations in not setting aside the election. Possibly the Board is moving in that direction,[69] but if so, it has not specifically stated that future cases will be decided on this basis and seems to reserve the *Hollywood Ceramics* theory to misrepresentation cases.

67. Milchem, Inc., 170 NLRB No. 46, which established the rule that "conversations between a party and voters while the latter are in a polling area waiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks."

68. *Cited with approval* by the Supreme Court in Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966).

69. *See* Dyersburg Cotton Prods., Inc., 168 NLRB No. 151 (1968).

There is support for this approach since the Board has long held that lies and exaggerations, while not condoned, will not form the basis for setting aside an otherwise valid election.[70] Our concern here is not with lies or misrepresentations, but with the totality of conduct which is so gross that despite the absence of clear threats and promises, a free election cannot be conducted. As the Board is charged with the statutory responsibility of maintaining the requisite conditions for the conduct of free elections and is zealous in the exercise of this power, it should, to the extent possible, establish a meaningful standard of pre-election conduct (in the total context area) which can guide the parties accordingly.

The approach recommended here would virtually render the total context theory nugatory because if the objecting party had sufficient opportunity to answer the various statements of the other side, the disputed material would not be deemed sufficient to set aside the election. Last minute appeals containing material of the same kind would be viewed in the light of *Hollywood Ceramics*, i.e. whether a substantial and material misrepresentation was made at a time which prevented the other party from making an effective reply and whether the misrepresentation could reasonably be expected to have a significant impact on the election. All other material of the same stripe which had issued before would be given no weight in evaluating the merit of the objections. Thus, the objections would stand or fall on limited issues. Possibly, this is an oversimplification of what is often a complex problem, but I believe the good sense of the American voter is such that he invariably chooses what he wants despite the urgings of either unions or companies.

Whether or not the reader agrees with the approach I have submitted, he can nonetheless agree that some definitive guidelines must be put into the total context approach in order to permit the parties to campaign without uncertainty as to whether or not they have violated the law.

70. The Gummed Prods. Co., 112 NLRB 1092 (1955); Celanese Corp. of Am., 121 NLRB 303 (1958).