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PRE-ELECTION CAMPAIGN PROPAGANDA AND ACTIVITIES BEFORE THE NATIONAL LABOR RELATIONS BOARD

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I. INTRODUCTION

In recent years there have been an increasing number and variety of cases before the National Labor Relations Board dealing with objections to elections conducted in accordance with the National Labor Relations Act. Although not all labor elections are objected to, the scope of the problem becomes apparent when we consider the fact that during the last calendar year, the total number of all types of elections conducted by the Board has been placed at 7,300, which represents an increase of approximately 2,500 over the calendar year 1958.[1]

This observation was made by Frank W. McCulloch, Chairman of the NLRB, speaking at the August 1962 meeting of the American Bar Association in San Francisco. Discussing the limitations to be placed on pre-election speech and propaganda, he addressed himself to the question whether the introduction of new and more sophisticated techniques of communication and a more sophisticated labor force require modification of the NLRB rules, in view of the expansive nature of the problem. The purpose of this article, then, is to present a backdrop for this inquiry, spotlighting the campaign techniques of both labor and management prior to the Regional Director's holding of an election.

II. BACKGROUND

The National Labor Relations Board is empowered by virtue of Section 9(c) and (e) of the National Labor Relations Act,[2] upon the

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[1] Annual Report of the NLRB (1958).

[2] 49 Stat. 449 (1935) as amended by 61 Stat. 136 (1947) and 73 Stat. 519 (1959), 29 U.S.C.A. § 141 et seq. (1962).

filing of a petition by either employer, employee or union, to conduct secret ballot elections. The purpose is to determine the desires of employees as to union representation. Each type of election is specifically designated by the Board,[3] and the period of time during which it will review alleged objectional conduct is governed by the rules and regulations of the NLRB. Until recently, such conduct was reviewable only from the date the Regional Director or the Board issued a "direction of election" up to and including the date of the election.[4] Now, from the time the election petition is filed in both contested[5] and uncontested[6] elections, until the election itself is held, the Board will consider the conduct of the parties to determine whether the voters have exercised their free choice.

Within five days after the tally of the election ballots have been furnished to the parties by the Regional Director, any party may file objections. These are limited to the manner in which the election was conducted by the NLRB and/or to conduct which affected the results of the election,[7] the latter forming the majority of such cases. Once filed, an investigation is begun.[8] In an "agreement for consent elections,"[9] the Regional Director rules on the objections and issues a decision from which there is no right of review.[10] In a stipulated election,[11] the parties agree to waive their rights to any hearing *before*

[3] The designations are as follows:

RC A petition by a labor organization or employees for certification of representatives for purposes of collective bargaining under § 9(c)(1)(a)(1).

RM A petition by employer for certification of a representative for the purposes of collective bargaining under § 9(c)(1)(B).

RD A petition by employees under § 9(c)(1)(A)(ii) asserting that the union previously certified or currently recognized by their employer as the bargaining representative, no longer represents a majority of the employees in the appropriate unit.

UD A petition by employees under § 9(e)(1) asking for a referendum to rescind a bargaining agent's authority to make a union shop contract under § 8(a)(3).

X The national emergency election, to determine whether employees wish to accept the final offer of settlement made by their employer. This election must be conducted between the sixtieth and seventy-fifth days after a federal district court has issued an injunction against acts which imperil or threaten to imperil the national safety.

[4] In a contested election see F. W. Woolworth, 109 N.L.R.B. 1446, 34 L.R.R.M. 1584 (1954) and an uncontested or stipulated election see Great Atl. & Pac. Tea Co., 101 N.L.R.B. 1118, 31 L.R.R.M. 1189 (1952).

[5] Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275, 49 L.R.R.M. 1316 (1961).

[6] Goodyear Tire & Rubber Co., 138 N.L.R.B. No. 59, 51 L.R.R.M. 1070 (1962).

[7] 29 C.F.R. § 102.69(a) (Supp. 1962) (Rules & Regs. of NLRB Series 8).

[8] Id. § 102.69(c).

[9] Id. § 102.62(a).

[10] See Sumner Sand & Gravel Co., 128 N.L.R.B. 1368, 46 L.R.R.M. 1467 (1960), also Elm City Broadcasting Corp. v. NLRB, 228 F.2d 483 (2d Cir. 1955). For a contrary view, see NLRB v. Sidran, 181 F.2d 671 (5th Cir. 1950).

[11] 29 C.F.R. § 102.62(b) (Supp. 1962) (designated as "stipulation for certification upon consent election").

the election (in the consent election agreement, the parties waive any possible hearing). The parties further agree that the Board in Washington, D. C. shall finally determine all questions relating to the election, e.g., validity of challenges and election conduct objections, etc. The Director prepares a report on any objections, with his recommendations which he serves on the parties who may file exceptions thereto within ten days to the Board.[12] On the other hand, where no agreement for an election by consent has been reached,[13] the Director may either prepare a report on the objections, or rule on the objections, issuing a decision under the authority delegated to him by the Board.[14] If a report is filed, any party may file exception within ten days. The Board considers whether substantial and material issues with respect to the conduct or results of the election have been raised and then either decides the matter on the record or directs that a hearing be held.[15] Alternatively, if the Regional Director has made a decision, the right of review by the Board is limited under the regulations to those cases in which a substantial question of law or policy has been raised.[16]

The conduct by unions, employers or others which interferes with the employees' free choice may or may not be of sufficient degree to constitute an unfair labor practice. But because these activities are considered in a different context, the same criteria does not apply. If an unfair labor practice charge is filed against an employer, ordinarily an election will not be conducted pending its disposition,[17] whereas if a charge is filed after the election, the Board will usually consolidate it with the objections to the election and hear both matters at the same time.[18]

Objectionable conduct may be effected by words or deeds or both. However, such conduct as changing fringe benefits, interrogation, intimidation and surveillance of employees, wage increases or decreases by the employer, threats or other coercion on the part of unions, while certainly relevant, shall not be considered since this article is confined to the use of campaign propaganda and activities in NLRB elections. Nevertheless, in order to properly evaluate a particular case, it is necessary to consider all the activities or conduct involved, including speeches, literature, and the like.

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[12] Id. § 102.69(c).
[13] Id. § 102.63 et seq.
[14] Id. § 102.69(c).
[15] Id. § 102.69(c) & (d).
[16] Id. § 102.67.
[17] Franz Food Prods., 137 N.L.R.B. No. 35, 50 L.R.R.M. 1143 (1962).
[18] 29 C.F.R. §§ 102.69(e) & 102.46 (Supp. 1962).

III. Process of Board Determination

A. *Ground Rules*

As the cases have been decided by the NLRB, certain ground rules have been developed which are used by the Board in deciding these cases on an *ad hoc* basis. Consider, for example, the *General Shoe Corp.* case,[19] decided in 1948. It is perhaps the leading case dealing with campaign propaganda and is significant, among other things, in that the Board characterizes its responsibilities by stating:

> [W]e cannot police the details surrounding every election, and because we believe that in the absence of excessive acts employees can be taken to have expressed their true convictions in the secrecy of the polling booth, the Board has exercised this power sparingly. . . . 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. . . .[20]

This, because it has been thought better to leave "to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements."[21]

This rule was later refined in the *Radio Corp. of America* case where the Board stated:

> . . . in the absence of coercion, it will not undertake to censor or police union campaigns or to consider the truth or falsity of electioneering propaganda, unless the ability of the employees to evaluate such material has been so impaired by the campaign material or by campaign trickery that the uncoerced desires of the employees cannot be determined.[22]

A 1961 pronouncement by the Board found in the *United States Gypsum Co.* case[23] summarized its position:

> The general rules which the Board applies to election campaigns are well settled and not in dispute. Exaggerations, inaccuracies, partial truths, name calling, and falsehoods, while not condoned, may be excused as legitimate campaign propaganda provided they are not so misleading as to prevent the exercise of a free choice by employees in the election of their bargaining representative. Absent threats or other ele-

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19 77 N.L.R.B. 124, 21 L.R.R.M. 1337 (1948).
20 Id. at 126-27, 21 L.R.R.M. at 1340-41.
21 Stewart Warner Corp., 102 N.L.R.B. 1153, 1158, 31 L.R.R.M. 1397, 1399 (1953).
22 106 N.L.R.B. 1393, 1394, 33 L.R.R.M. 1035 (1953).
23 130 N.L.R.B. 901, 47 L.R.R.M. 1436 (1961).

> ments of intimidation, the Board will not undertake to police or censor the propaganda material used by the participants in a Board election, and leaves it to the . . . employees themselves to evaluate . . . such utterances. However, when one of the parties deliberately misstates material facts which are within its special knowledge, under such circumstances that the other party or parties cannot learn about them in time to point out the misstatements, and the employees themselves lack the independent knowledge to make possible a proper evaluation of the misstatements, the Board will find that the bounds of legitimate campaign propaganda have been exceeded and will set aside an election.[24]

Notwithstanding the above, the Board has recognized the efforts of a party to rectify any improper campaign technique, evidence of this being clearly seen from the language of one of the earlier cases in the area:

> We believe that the statements . . . made by the Petitioner before the election were not such as would under the circumstances improperly interfere with the employees' exercise of a free choice of a bargaining representative at the polls. Moreover, any coercive element which may have been contained in some of the statements was effectively dissipated by speeches of the Employer's president on July 6 and 20.[25]

Another significant ground rule case is the recent *Hollywood Ceramics Co.* decision.[26] In overruling a line of cases which suggested that the misrepresentation must be deliberate in order to set aside an election, the Board stated:

> 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.[27]

The Board noted, however, that statements which may be reasonably construed to contain a threat of reprisal or force or a promise of

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[24] Id. at 904 and citing Cleveland Trencher Co., 130 N.L.R.B. 600, 47 L.R.R.M. 1371 (1961); Kawneer Co., 119 N.L.R.B. 1460, 41 L.R.R.M. 1333 (1958); Thomas Gouzoule d/b/a/ The Calidyne Co., 117 N.L.R.B. 1026, 1028, 39 L.R.R.M. 1364 (1957).

[25] Bender Playground Equip., Inc., 97 N.L.R.B. 1561, 1562, 29 L.R.R.M. 1284, 1285 (1951).

[26] 140 N.L.R.B. No. 36, 51 L.R.R.M. 1600 (1962).

[27] 51 L.R.R.M. at 1601. Cf. Lane Drug Stores, Inc., 88 N.L.R.B. 584, 25 L.R.R.M. 1360 (1950).

benefit will invalidate an election and it is not a defense that the message was equivocally phrased.[28]

B. *Judicial Review*

Board determinations in a representation proceeding are not reviewable by district courts under their general equity jurisdiction.[29] Review is granted, with several exceptions, only when relevant to an unfair labor practice proceeding in a circuit court of appeals. This is due to the fact that Congress rejected, both in 1935 (Wagner Act) and 1947 (Taft-Hartley Act), proposals for a direct review of representation determinations because it believed that the opportunity for such review would result in the employment of dilatory tactics. This in turn would frustrate the statute's basic policy of promoting collective bargaining.

The provisions of the act, however, expressly provide the employer with an additional statutory procedure for obtaining review of Board representation determinations in an appropriate court of appeals. If an employer is aggrieved by the determination of the Board in a representation case, he may refuse to bargain with the union certified. Upon the filing of a charge and the issuance of a complaint, a finding by the Board that the employer committed a violation of section 8(a)(5), (refusing to bargain with the union) is reviewable directly under section 8(e) and (f) of the act in a United States Court of Appeals. This may be either upon petition by the Board to enforce its order or on the petition of "any person aggrieved." Section 9(d) provides that in such a situation, the record in the representation case shall be filed in the court of appeals, and the representation determination may be reviewed at that time.

Two narrow exceptions to the general rule of nonreviewability of representation determinations have been recognized in actions instituted by unions, as distinguished from employers, in district courts since no similar statutory review procedure is available to them. In such cases, review authority exists only where it can be shown that the Board's action constitutes either a violation of an express statutory command[30] or raises a substantial constitutional question.[31]

At this point, the particular devices and techniques used by employers and unions should be examined to see how the NLRB has

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[28] Citing Dal-Tex Optical Co., 137 N.L.R.B. No. 189, 51 L.R.R.M. 2608 (1962).

[29] AFL v. NLRB, 308 U.S. 401 (1939); McLeod v. Local 476, 288 F.2d 198 (2d Cir. 1961); Carpenters v. Vincent, 286 F.2d 127 (2d Cir. 1960); Leedom v. I.B.E.W., 278 F.2d 237 (D.C. Cir. 1960); National Biscuit Div. v. Leedom, 265 F.2d 101 (D.C. Cir. 1959), cert. denied, 359 U.S. 1011 (1959); Fitzgerald v. Douds, 167 F.2d 714 (2d Cir. 1948).

[30] Leedom v. Kyne, 358 U.S. 184 (1959), affirming, 249 F.2d 490 (D.C. Cir. 1957).

[31] Fay v. Douds, 172 F.2d 720 (2d Cir. 1949).

dealt with them. It is essential to observe that the Board considers each case on its own facts and that the foregoing ground rules do not necessarily apply to every case.

IV. Objections to Conduct of Employers

A. *Limitations on Speeches and Written Communications*

Unquestionably the largest area of objections to elections concerns speeches and letters or pamphlets distributed prior to the election. The employer who is faced with an election has two limitations on what he can say or write to his employees.

The first is the so-called twenty-four (24) hour rule which precludes an employer from making a pre-election speech to massed assemblies of his employees within twenty-four hours of the holding of the election *if* the speech is to be made on company time and attendance is compulsory. It is also referred to as the *Peerless Plywood* rule as it evolved from the Board's reasoning in the *Peerless* case:

> It is our considered view, based on experience with conducting representation elections, that last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect. We believe that the real vice is in the last-minute character of the speech coupled with the fact that it is made on company time whether delivered by the employer or the union or both. Such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word.[32]

The Board, fearful of an unwarranted extension, clearly stressed that this prohibition does not apply to the distribution of literature, nor does it apply when employee attendance is voluntary and on the employees' own time, nor will it prohibit an employer's speech on company time beyond the twenty-four hour limitation even though the union is not granted an opportunity to reply.[33] A speech to seven

[32] Peerless Plywood Co., 107 N.L.R.B. 427, 429, 33 L.R.R.M. 1151, 1152 (1953). See also Rainfair Inc., 123 N.L.R.B. No. 187, 44 L.R.R.M. 1163 (1959); Sportswood Specialty Co., 107 N.L.R.B. 1094, 33 L.R.R.M. 1319 (1954).

[33] Id. at 430, 33 L.R.R.M. at 1152. It should be noted that this reasoning was applied in the *Livingston Shirt case*, 107 N.L.R.B. 400, 33 L.R.R.M. 1156 (1953), which overruled the *Bonwit Teller* doctrine, 96 N.L.R.B. 608, 28 L.R.R.M. 1547 (1951), as to both representation cases and unfair labor practice cases, in that, in the absence of either a privileged or an unlawful broad no-solicitation rule, an employer does not com-

employees has been held not to violate this rule where there were 220 voting and the talk was informal and non-partisan.[34]

The second limitation facing an employer is not as easily or clearly determined. Generally stated, it is that an employer may not make any statements or speeches which are coercive in that they contain threats of reprisal or force or promises of benefit. This limitation involves an interpretation of Section 8(c) of the National Labor Relations Act, as amended,[35] the historical development of which is necessary in order to fully understand its application.

During the period of 1935 to 1947, the National Labor Relations Act, or Wagner Act as it was commonly called, did not have any "free speech" provisions. The NLRB was guided by the strictures of the first amendment to the Constitution.[36] The Supreme Court in *Thornhill v. Alabama*,[37] *Thomas v. Collins*,[38] and *NLRB v. Virginia Elec. & Power Co.*[39] supported the view that the first amendment protects an employer's expressions of noncoercive opinion to his employees respecting union organization.

In the leading case of *Virginia Elec. & Power Co. v. NLRB*,[40] the Supreme Court found an employer's statement coercive when considered in a background of anti-union activities. This was called the "totality of conduct" doctrine and was followed in the case of *Matter of Bausch & Lomb Optical Co.* where the Board concluded:

> The pamphlet on its face contains no coercive statements, but consists essentially of statements disparaging unions and of expressions of opinion as to the disadvantages of labor organization—statements which, standing alone, are protected by the constitutional guarantee of free speech. Nor are the statements coercive when evaluated in the context in which they were made.[41]

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mit an unfair labor practice or engage in conduct which will overturn an election if he makes a non-coercive speech to his employees and denies the union an opportunity to reply on company premises.

For a more complete discussion concerning property rights in this area, see Hanley, Union Organization on Company Property—A discussion of Property Rights, 47 Geo. L.J. 206 (1958).

[34] National Petro-Chems. Corp., 107 N.L.R.B. 1610, 33 L.R.R.M. 1443 (1954).

[35] 73 Stat. 525 (1959), 29 U.S.C.A. § 158(c) (1962).

[36] U.S. Const. amend. I.

[37] 310 U.S. 88 (1940).

[38] 323 U.S. 516 (1945).

[39] 314 U.S. 469 (1941).

[40] 319 U.S. 533 (1941).

[41] 72 N.L.R.B. 132, 134 (19 L.R.R.M. 1145) (1947). See also Ray Dept. Stores Co. v. NLRB, 326 U.S. 376 (1945); Donnelly & Sons Co. v. NLRB, 156 F.2d 416 (7th Cir. 1946); NLRB v. Fairmount Creamery, 144 F.2d 128 (10th Cir. 1944); Stone & Sons v. NLRB, 125 F.2d 752 (7th Cir. 1942); Reynolds Wire Co. v. NLRB, 121 F.2d 627 (7th Cir. 1941).

These cases set the stage for the 1947 amendments to the Wagner Act, *i.e.*, the Labor Management Relations or Taft-Hartley Act.[42] Questioning the constitutionality of the "totality of conduct" doctrine, the majority House Report stated:

> Although the old Labor Board protests it does not limit free speech, it is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them. The bill provides that the new Board is prohibited from using as evidence against an employer, an employee, or a union, any statement that by its own terms does not threaten force or economic reprisal.[43]

The Minority House Report, in a far more pragmatic opinion, took issue with the majority:

> But these provisions [sec. 8(d)(1), now sec. 8(c), which provide that it shall not constitute an unfair labor practice to express any views, arguments or opinions in written, printed or visual form if the expression by its own terms does not threaten force or economic reprisal] go far beyond mere protection of an admitted constitutional right. By saying that statements are not to be considered as evidence, they insist that the Board and the courts close their eyes to the plain implication of speech and disregard clear and probative evidence. In no field of the law are a man's statements excluded as evidence of an illegal intention. Here, again, a deep seated intention to protect employers in the commission of unfair labor practices is evident. Here, again, the laudable purpose of protecting free speech cloaks an evil design to encourage unfair labor practices by employers.[44]

The majority Senate Report on its version of the free speech provision left unaltered the existing law by stating:

> The committee believes these decisions[45] to be too restrictive, and, in this section, [8(c)], provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. The Board, of course, will not be precluded from considering such statements as evidence.[46]

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[42] 61 Stat. 136 (1947), 29 U.S.C.A. § 141 et seq. (1962).

[43] H. R. Rep. No. 245, 80th Cong., 1st Sess. 8 (1947).

[44] H.R. Minority Rep. No. 245, 80th Cong., 1st Sess. 84-85 (1947).

[45] Referring to Monumental Life Ins. Co., 69 N.L.R.B. 247, 18 L.R.R.M. 1206 (1946), and Clark Bros., 70 N.L.R.B. 60, 18 L.R.R.M. 1360 (1946).

[46] S. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947).

The Minority Senate Report's only comment was as follows:

> We agree with the excellent protection of the right of free speech accorded by section 8(c), and, except for the qualifications that we have noted with respect to the cooling off provision, with the definition of collective bargaining contained in section 8(d) [sic].[47]

In section 8(c), as finally adopted, the part which recites "The expressing of any views, arguments, or opinions, 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 provisions of this Act," is identical with section 8(d)(1) of H.R. 3020 as reported, and the addition of the phrase "if such expression contains no threat of reprisal or force or promise of benefit," is identical with the last clause of section 8(c) of S. 1126 as reported. It should be noted that the clause "if it does not by its own terms threaten force or economic reprisal," which was contained in the House bill,[48] was deleted before final passage.

Thus, it appears that the NLRB, after passage of the Taft-Hartley Act with its free speech provision, was faced with these issues:

1. Is a statement, oral or written, an unfair labor practice if it, by its own terms, contains a threat of force or economic reprisal?
2. May a statement, though innocuous in itself, be used in conjunction with reasonably simultaneous events to determine the possibility of an unfair labor practice?
3. Does section 8(c) apply to representation cases or is it limited to only unfair labor practice cases?

The first issue is easily decided since by definition such a statement is not protected by section 8(c), and would be an unfair labor practice unless it was an isolated or remote threat of force or economic reprisal.[49]

The Court of Appeals for the Seventh Circuit considered the second issue in the 1949 case of *NLRB v. Kropp Forge Co.*,[50] involving enforcement of an order of the Board. After summarizing the prior cases,[51] the court stated:

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[47] S. Minority Rep. No. 105, 80th Cong., 1st Sess. 41 (1947).

[48] Supra note 43, at 26.

[49] Safeway Stores, 122 N.L.R.B. 1369, 43 L.R.R.M. 1302 (1959); Frohman Mfg. Co., 107 N.L.R.B. 1308, 33 L.R.R.M. 1338 (1954); Peerless Woolen Mills, 86 N.L.R.B. 82, 24 L.R.R.M. 1584 (1949); Madix Asphalt Roofing Corp., 85 N.L.R.B. 26, 24 L.R.R.M. 1342 (1949).

[50] 178 F.2d 822 (7th Cir. 1949).

[51] NLRB v. Fulton Bag & Cotton Mills, 175 F.2d 675 (5th Cir. 1949); NLRB v. La Salle Shed Co., 178 F.2d 829 (7th Cir. 1949); NLRB v. Gate City Cotton Mills, 167

> Therefore, in determining whether such statements and expressions constitute, or are evidence of unfair labor practice, they must be considered in connection with the positions of the parties, with the background and circumstances under which they are made, and with the general conduct of the parties. If, when so considered, such statements form a part of a general pattern or course of conduct which constitutes coercion and deprives the employees of their free choice guaranteed by Section 7, such statements must still be considered as a basis for a finding of unfair labor practice. To hold otherwise would nullify the guarantee of employees' freedom of action and choice which Section 7 of the Act expressly provides. Congress, in enacting Section 8(c) could not have intended that result.[52]

The Board's approach to the problem may be found in the representative language of a 1952 case:

> Under some circumstances expression of preference by supervisors may be privileged under Section 8(c) of the Act, as may be simple expressions of preference by an employer. In the context of the whole case, including the Employer's hasty recognition of the AFL on a card showing with rival organizing going on, however, the activities of these supervisors obviously reflect employer intent and action to aid one of two competing labor organizations, which is not protected by Section 8(c).[53]

The applicability of section 8(c) to representation cases, the third issue, has run the full gauntlet.[54] The early Board cases indicated that, section 8(c) notwithstanding, if the employees' free choice was interfered with, the election would be set aside.[55] Later cases held that an employer's speech was protected by section 8(c)[56] although

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F.2d 647 (5th Cir. 1948); NLRB v. Ford, 170 F.2d 735 (6th Cir. 1948); Sax v. NLRB, 171 F.2d 769 (7th Cir. 1948).

[52] Supra note 50, at 828-29.

[53] Corning Glass Works, 100 N.L.R.B. 444, 447, 30 L.R.R.M. 1307, 1308 (1952). See also Cary Lumber Co., 102 N.L.R.B. 406, 31 L.R.R.M. 1324 (1953); Happ Bros. Co., 90 N.L.R.B. 1513, 26 L.R.R.M. 1356 (1950). Note in the *Dal-Tex Optical Co.* case, supra note 28, the Board stated "Under *all* the circumstances" and cited NLRB v. Virginia Elec. & Power Co., supra note 39, which stands for the "totality" approach.

[54] Note, Employer Free Speech in Union Organizing Campaigns, 15 U. Fla. L. Rev. 231 (1962).

[55] General Shoe Corp., supra note 19; Metropolitan Life Ins. Co., 90 N.L.R.B. 935, 26 L.R.R.M. 1294 (1950).

[56] Lux Clock Mfg. Co., 113 N.L.R.B. 1194, 36 L.R.R.M. 1432 (1955); National Furniture Mfg. Co., 106 N.L.R.B. 1300, 33 L.R.R.M. 1004 (1953); A. S. Abell Co., 107 N.L.R.B. 362, 33 L.R.R.M. 1144 (1953); Esquire Inc., 107 N.L.R.B. 1238, 33 L.R.R.M. 1367 (1953).

these were specifically overruled in the recent case of *Dal-Tex Optical Co.*[57] The Board notes, however, that the strictures of the first amendment, to be sure, must be considered in all cases.[58] In view of this fact, some courts have stated that section 8(c) is nothing more than the first amendment restated.[59] Thus employers have urged that free speech, whether protected by 8(c) or the Constitution, still controls what an employer may state during an election campaign.

The problem was summarily treated by NLRB Member, Gerald A. Brown. Speaking before the Labor Law Section of the State Bar Association of Texas, he stated:

> I would classify the principal problem presently before the Board in balancing freedom of communication with freedom of employee choice as those involving: statements which because they are couched in subtle or sophisticated language can be construed as threats or promises of benefit or as mere noncoercive attempts at employee persuasion; and misrepresentations of facts, emotional appeals through the use of movies, and appeals to racial prejudice to which the Board either could apply truth therapy and find interference with the laboratory conditions or relegate to the field of campaign propaganda.[60]

Considering this to be representative of the issues involved, the following discussion will highlight the Board's determinations of these issues.

B. *Speeches and Written Communications in General*

This area represents one of the most constant sources of conflict and as a result, the Board has been called upon to hand down numerous decisions. For present purposes, only the more significant cases will be discussed. This will allow a general canvas of the area as well as an exposition of the basic problems.

A very exemplary case occurred in 1954 where unfair labor practices and objections to the election were consolidated.[61] The Board found that the foreman had made the following statements: that the "people would lose the plant"; that the stockholders would be "left holding the bag"; that if the union lost, "everybody would come back to work with a raise, and we would have better working

[57] Supra note 28.

[58] See text accompanying note 36 supra.

[59] NLRB v. Corning Glass Works, 204 F.2d 422 (1st Cir. 1953); NLRB v. Bailey Co., 180 F.2d 278 (6th Cir. 1950); NLRB v. La Salle Steel Co., 178 F.2d 829 (7th Cir. 1949).

[60] 50 L.R.R.M. 72, 75 (1962).

[61] Franchester Corp., 110 N.L.R.B. 1391, 35 L.R.R.M. 1240 (1954). See also NLRB v. Frieder & Sons, 155 F.2d 266 (3d Cir. 1946).

conditions" and that "the guys that stuck with the company would be the guys to receive those [desirable] jobs." These, coupled with an assurance of holiday pay to laid-off employees on the eve of the election, were held by the Board to be actively calculated to interfere with the employees' free choice. The election accordingly was set aside.

In a recent case[62] the Board concluded that the discharge of a supervisor for his failure to join in the discriminatory discharge of an employee had the effect of creating a reasonable fear in other employees that the employer would take similar action against them if they continued to support the union. This conduct was thus held to inhibit a free and untrammeled electoral choice by the employees. This same rationale was employed in an earlier case[63] (which involved other conduct as well). The employer stated that he would "meet any union conditions" and granted a pay increase to one of the employees because she was "with them, and deserved it." As a result, the election was set aside.

A further example of employer-interference was brought out in the *Coca-Cola Bottling Co.* case. The company president while addressing the employees stated:

> I won't make you a lot of promises, but I can promise you this. I can promise you a year round job with a year round pay envelope, and you won't have to pay anybody to get it, or to keep your job.
>
> Your vote tomorrow is a vote for your future, but I am also going to feel that every NO vote is not only a vote against the union but is a vote for me. . . .[64]

The Board, holding this to be a promise of benefit which interfered with the employees' free choice, directed a new election.

In other cases the Board held the premature distribution of pay checks,[65] the attempt to establish a grievance procedure controlled by the company,[66] and the granting of an additional holiday or overtime, or a change in the vacation schedule,[67] as sufficient interference to warrant setting aside the elections.

In contrast to the above election-invalidating communications, the Board has determined in other cases that the employer's statements are privileged and not violative of the employees' free choice. In one such case, a letter was sent to the employees a week before the election stating: "Furthermore, in keeping with the company's progressive

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62 General Eng'r, Inc., 131 N.L.R.B. 648, 48 L.R.R.M. 1105 (1961).
63 F. W. Woolworth Co., 101 N.L.R.B. 1457, 31 L.R.R.M. 1238 (1952).
64 118 N.L.R.B. 1422, 1423, 40 L.R.R.M. 1390, 1391 (1957).
65 Craddock-Terry Shoe Corp., 82 N.L.R.B. 161, 23 L.R.R.M. 1529 (1949).
66 Precision Sheet Metal, 115 N.L.R.B. 949, 37 L.R.R.M. 1441 (1956).
67 Exchange Parts Co., 131 N.L.R.B. 806, 48 L.R.R.M. 1147 (1961).

policy, since January, 1953, management has been working on a formula to make possible the payment of average earnings, rather than base rates for vacation and holidays." The Board, in reversing the Regional Director, said that this statement fell short of a promise of benefit contemplated by the Act.[68] In a similar case,[69] the employer, three days before the election, held a foremen's meeting on company time and property to which some employees were invited. They attended without loss of pay and free beverages and dinner were served. At the meeting the employer's president made a speech in which he left no doubt that he opposed unionization. The Board decided that such conduct per se was legitimate campaign media and, without facts establishing that there were promises of benefits, threats or reprisals, the election would stand.

A somewhat unusual situation arose in the *Maine Fisheries Corp.* case.[70] Here the Board set aside the first election because of the employer's speech, but sustained the second election even though the employer sent letters to the employees, a portion of which is as follows:

> The Board said that he [the employer at the first election] interfered with your freedom of choice. We disagree with the National Labor Relations Board and we have told it so. We never intended to bribe you for your vote. We respect your honesty and good sense too much. Unfortunately, the National Labor Relations Board does not understand the practice in this industry of getting additional boats to bring you fish to work on [referring to the employer's promise in the first election]. So, here we are with another election. This time with two unions trying to get your vote.[71]

The Board said that at most this statement was a reminder to the employees of past benefits granted without union representation, and sustained the result of the election wherein no collective bargaining representative was chosen. This reasoning was determinative in a later case similarly involving a letter sent to all employees. The Board held that the letter merely urged the employees to consider their *present* benefits in determining whether to vote for the union.[72]

Other cases involving privileged or allowable campaign propaganda concerned the Board with employer-statements that the employees would get their pay raise anyway[73] or that surveys and personnel studies would be postponed pending the election.[74] It was also

[68] American Laundry Mach. Co., 107 N.L.R.B. 511, 33 L.R.R.M. 1181 (1953).
[69] Zeller Corp., 115 N.L.R.B. 762, 37 L.R.R.M. 1399 (1956).
[70] 102 N.L.R.B. 108, 31 L.R.R.M. 1278 (1953).
[71] Id. at 109-10, 31 L.R.R.M. at 1278.
[72] Tyler Pipe & Foundry Co., 116 N.L.R.B. 1258, 38 L.R.R.M. 1455 (1956).
[73] Montgomery Ward & Co., 50 L.R.R.M. 1553 (1962).
[74] Group Hosp. Servs., 115 N.L.R.B. 1502, 38 L.R.R.M. 1098 (1956).

concerned with such employer-conduct as increasing the value of company outing tickets prior to the election[75] or stressing the employer's economic condition.[76]

C. *Statements Pertaining to Employees' Legal Position*

The value of previously decided employer-statement cases[77] as precedence has been somewhat clouded by the recent decision in *Marsh Supermarkets, Inc.*,[78] at least to the extent that a careful examination of language is required. In this case the company president and personnel director said at various meetings of employees that if the union won the election, the employees would lose some benefits, particularly a vacation plan, and would have to "start from scratch." This was held to be a violation of section 8(a)(1) and the election was set aside. In the decision, the Board refers to the *Dal-Tex* case,[79] wherein an atmosphere of fear of economic loss and hostility to the union was also generated by the employer's statements. Thus, the language in *Marsh* may be contrasted with strikingly similar language held by the Board to be protected in the earlier *La Pointe Mach. Tool Co.*[80] and *Schick, Inc.*[81] cases. In the former the employer's vice-president stated:

> The AFL will tell you that you are a separate unit and you have the right to strike. If they are honest with you—and I think they will be—they will tell you that the other employees of the Company probably will work while you strike and, more than that, if the Company gets permanent replacements to take your jobs while you are on strike, that you have lost your jobs.[82]

The latter involved the employer's foreman telling employees that the Bluebook which contained employees' benefits would be "out" and that the union would start bargaining "from scratch" if the union won.

In addition to *Marsh*, contrast *Seltzer & Rydholm, Inc.*,[83] a more recent case, not yet before the Board, in which the trial examiner concluded in his intermediate report that the respondent-employer had violated section 8(a)(1) of the act by threatening employees with loss of benefits in the event they should favor the union. The case was considered upon a stipulated set of facts derived solely from a series

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75 American Thermos Prods., 119 N.L.R.B. 557, 41 L.R.R.M. 1134 (1957).

76 Meyer & Welch, Inc., 85 N.L.R.B. 706, 24 L.R.R.M. 1459 (1949).

77 Universal Producing Co., 123 N.L.R.B. 548, 43 L.R.R.M. 1480 (1959); Schick, Inc., 118 N.L.R.B. 1160, 40 L.R.R.M. 1330 (1957); LaPointe Mach. Tool Co., 113 N.L.R.B. 171, 36 L.R.R.M. 1273 (1955).

78 140 N.L.R.B. No. 83, 52 L.R.R.M. 1134 (1963).

79 Supra note 28.

80 Supra note 77, at 172, 36 L.R.R.M. at 1274.

81 Supra note 77.

82 Supra note 77, at 172, 36 L.R.R.M. at 1274.

83 1-C.A.-3948, Intermediate Report 102-63 (1963).

of speeches to employees. The employer, while informing her employees that she was not threatening them, stated:

> We would not start from where we now are, we would wipe the slate clean of all these benefits and fringes, and we're going to start from scratch. We're going to start and bargain. You probably would get some of the things back, I don't know, I don't know how the union bargains. But we're not going to start from where we now are, we're going to wipe the slate clean, and start from scratch. They probably didn't tell you that, but that's what we had to hire lawyers for. . . . If the time ever comes, as I said before, we will do it in good faith, but we would go entirely by the book, and strictly from scratch. Everything will be wiped off and we will start from scratch. Everything would be up for discussion.[84]

D. *Threats and/or Prediction*

This is an area where the Board must determine whether, given certain facts, a statement is a threat so as to void an election, or merely a prediction, and hence privileged, so as not to disturb an election. Once again, each case must be decided on its own particular facts.

Voided elections have resulted from an employer stating that he would refuse to bargain because the union was Communist dominated[85] or a store manager's statement to an employee just before an election that the employer would not sign a contract with the union,[86] since these were considered to be threats. In another case, a letter was sent by the employer to his employees wherein he stated: "Your Company would be happy to make these increases [$3 per week given to other areas] available to you also, but we regret that in view of the pending union representation proceeding in the National Labor Relations Board, we are not permitted under the law to do so at this time or until the legal objections are withdrawn."[87] The Board held that this statement was not made in good faith and did interfere with the employees' free choice.

A case where not only the employer's acts, but also those of the local merchants and newspapers were involved, was the *Falmouth Co.* case.[88] Here the entire community participated in the rumor that the plant would close if the union won. The Board, notwithstanding the

[84] Ibid.

[85] Scavullo d/b/a/ Legion Utensils Co., 103 N.L.R.B. 875, 31 L.R.R.M. 1586 (1953).

[86] Great Atl. & Pac. Tea Co., 124 N.L.R.B. 329, 44 L.R.R.M. 1379 (1959).

[87] Great Atl. & Pac. Tea Co., 101 N.L.R.B. 1118, 31 L.R.R.M. 1189, 1190 (1952).

[88] 114 N.L.R.B. 896, 37 L.R.R.M. 1057 (1955); See also Franchester Corp., 110 N.L.R.B. 1391, 35 L.R.R.M. 1240 (1957); Osbrink Mfg. Co., 104 N.L.R.B. 42, 32 L.R.R.M. 1043 (1953).

employer's last minute speech disaffirming such a plan, held that the fear of economic loss which permeated the atmosphere surrounding the election warranted its being set aside. Some other instances of employer threats voiding an election are the threat to replace Negro workers with white,[89] the threat of loss of jobs[90] or bonus,[91] a possible wage decrease,[92] a loss of work and threat to move,[93] an indication that the union jeopardized defense contracts,[94] a reference by an employer to "Just look thirty miles down the road" where another plant of the employer had closed,[95] and a veiled threat to discharge the employees and close the plant down.[96]

Elements of misrepresentation, fear of economic loss and the concept of the futility of unionization were grounds for setting aside elections in three recent Board cases. In *Steel Equip. Co.* the Board found that the employer's statement in a leaflet received by the employees one or two days before the scheduled election, contained a substantial departure from the truth in stating that the quoted wage rates at another plant were the products of collective bargaining by the petitioning union. The Board, in setting aside the election, cited with approval the *Hollywood Ceramics* case[97] and held that the assertions of the employer were designed to implant in the minds of the employees a fear of economic and physical suffering, the probability of loss of benefits and the hazards of collective bargaining.[98]

In the leading *Trane Co.* case[99] the employer communicated to its employees that it had voluntarily established a wage and benefit policy and stated that such would be continued, union or no union, and thus, he pointed out, the union offers nothing more than the opportunity to pay dues for benefits the employees would receive anyway. The employer also remarked that it would at least equalize area rates and asked the employees to judge the future by the past. The Board held that

> [s]uch an attitude is not only inconsistent with good faith

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89 Southern Car & Mfg. Co., 106 N.L.R.B. 144, 32 L.R.R.M. 1418 (1953).

90 R. D. Cole Mfg. Co., 133 N.L.R.B. 1455, 49 L.R.R.M. 1033 (1961); Aeronca Mfg. Corp., 118 N.L.R.B. 461, 40 L.R.R.M. 1196 (1957); National Container Corp., 103 N.L.R.B. 1544, 32 L.R.R.M. 1020 (1953).

91 Columbia LP Record Club, 120 N.L.R.B. 1030, 42 L.R.R.M. 1117 (1958); Humko Co., 117 N.L.R.B. 825, 39 L.R.R.M. 1339 (1957).

92 F. W. Woolworth Co., supra note 63.

93 Aragon Mills, 135 N.L.R.B. 859, 49 L.R.R.M. 1669 (1962).

94 Motec Indus., Inc., 136 N.L.R.B. No. 74, 49 L.R.R.M. 1828 (1962). Note that here the objectionable statement was neutralized by the timely reply of the union.

95 Cleveland Woolens, 140 N.L.R.B. No. 5, 51 L.R.R.M. 1482 (1962).

96 Duplan Corp., 139 N.L.R.B. No. 87, 51 L.R.R.M. 1485 (1962). See also Somismo, Inc., 133 N.L.R.B. 1310, 40 L.R.R.M. 1030 (1961).

97 140 N.L.R.B. No. 122, 52 L.R.R.M. 1192 (1963), citing 140 N.L.R.B. No. 36, 51 L.R.R.M. 1600 (1962).

98 As to this latter point, see Somismo, Inc., supra note 96.

99 137 N.L.R.B. No. 165, 50 L.R.R.M. 1434 (1962).

> bargaining, it is also reasonably calculated to have a coercive effect upon employees who, no more than the generality of mankind, are inclined to engage in futile acts. There is no more effective way to dissuade employees from voting for a collective bargaining representative than to tell them that their votes for such a representative will avail them nothing.[100]

Somismo, Inc.,[101] the third case, represents a far more subtle case in this area. The employer told his assembled employees that there was "no doubt" in his mind that there would be a strike if the union came in because of its "terrific" demands. He added that the company would not be able to cope with the problem but that he was not saying whether or not the company would go out of business—the employees would have to use their own judgment.

Cases are just as numerous where the NLRB has found the employer's statements or actions to be predictions and hence privileged. For example, in the 1957 *Westinghouse Elec. Corp.* case,[102] in addition to the showing of a motion picture, discussed infra, the employer distributed to his employees at the conclusion of the movie, copies of the November 1956 issue of Redbook magazine and the April 1955 issue of the Kohler of Kohler News. Both contained stories of the hardship incident to a strike and pictures of strike violence. This the Regional Director held was protected by section 8(c) and the Board adopted his finding.

The Board reached the same result in the *Zeller Corp.* case[103] although the campaign propaganda was certainly far more subtle. The employer distributed to his employees a copy of a letter sent to him by the Whirlpool Corporation, a customer of the company, which requested information as to the company's union status. However, the employer enclosed, in addition, his own statement which read, "Obviously this buyer [Whirlpool Corporation] endeavors to place his orders with the suppliers in Group 2 (Companies with no union such as ourselves), and since you or I would probably do the same if we were in his position, you can readily see how we can retain customers and secure new business without the presence of a union."[104] In a three to two decision the Board determined that this did not prejudice the election.

Other cases where the Board held conduct to be predictions rather than threats cover a wide range of circumstances including a circular

[100] Id. at 1436.
[101] Supra note 96.
[102] 118 N.L.R.B. 364, 40 L.R.R.M. 1191 (1957).
[103] Supra note 69.
[104] Id. at 767, 37 L.R.R.M. at 1401.

charging union bribery,[105] a statement that unionization might lead to loss of employment,[106] an indication that if the union won, the company might have to move its plant,[107] or that work during slack periods would be discontinued,[108] a reproduction of a part of a ballot,[109] an allegation that the union's strict adherence to job assignments may necessitate plant removal,[110] and a statement that the employees are taking risks with the benefits they now have.[111]

E. *Pay Stubs*

A forerunner to the pay stub technique was the *Gummed Prods. Co.* case.[112] Here the Board held that knowingly false statements made by the union the day before the election exceeded the limits of legitimate campaign conduct. This was followed by the *Bata Shoe Co.* case,[113] holding that an announcement by the company one week before the election of an improved vacation plan was calculated to and did interfere with the election.

These cases set the stage for the *Montrose Hanger Co.* case.[114] Here the election was to be held at noon on pay day. The employer distributed the pay checks before noon. On the pay stub under "Miscellaneous Deductions" was written: "Union Dues, $30.00 A Year (at least) For Dues Alone *PLUS* Deductions for Fines and Assessments! THIS WILL BE ON YOUR PAY CHECK IF THE UNION GETS IN." The Regional Director held that the use of the pay check or stub as a propaganda device is more than argument, information or persuasion; it is a technique which exploits the fear of personal loss by manipulation of the documents used in normal pay procedure. The Board decided, however, that this is not a per se objectional means, and that there was no vital misrepresentation of facts and hence no interference.

The *Mosler Safe Co.* case, decided two years later, presented a similar situation. Here the checks normally distributed on Friday between 3:30 and 4:00 were given out before noon on election day. Each employee found in his pay envelope a smaller envelope containing a $5 bill with this inscription:

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105 F. H. Snow Canning Co., 119 N.L.R.B. 714, 41 L.R.R.M. 1170 (1957). Note that here the Board held that the employees could evaluate such propaganda.

106 Barber Colman Co., 116 N.L.R.B. 24, 38 L.R.R.M. 1184 (1956).

107 Supplee-Biddle-Steltz Co., 116 N.L.R.B. 485, 38 L.R.R.M. 1288 (1956); Chicopee Mfg. Corp., 107 N.L.R.B. 106, 33 L.R.R.M. 1064 (1953).

108 Lockwood-Dutchess Inc., 106 N.L.R.B. 1089, 32 L.R.R.M. 1611 (1953).

109 Stratford Furniture Corp., 116 N.L.R.B. 721, 39 L.R.R.M. 1080 (1956).

110 Sylvania Co., 106 N.L.R.B. 1210, 32 L.R.R.M. 1652 (1953).

111 Guiberson Corp., 121 N.L.R.B. 260, 42 L.R.R.M. 1322 (1958).

112 112 N.L.R.B. 1092, 36 L.R.R.M. 1156 (1955).

113 116 N.L.R.B. 1239, 38 L.R.R.M. 1448 (1956).

114 120 N.L.R.B. 88, 41 L.R.R.M. 1432 (1958).

> This $5.00 is yours—*Now* the CIO wants us to take at least $5.00 out of your pay envelope each month and send it to them. To keep the CIO from getting $60.00 a year out of your money, vote against them in the election today. $60.00 minimum yearly dues is only a starter. There is also initiation fees—and possible assessments, "political contributions," fines and other charges. What a *difference* there is between CIO big talk—and the true facts.[115]

The Board held that neither the use of the pay envelopes for the stated propaganda purpose nor the acceleration of the pay hour constituted such an interference with the employees' freedom of choice which would warrant setting aside the election.

This same device was resorted to in the recently decided *Trane Co.* case although a different result was reached. The employer, before and during voting hours, caused to be passed out by his foreman (it was the regular pay day) pay checks from which $5 was deducted. The $5 was separately enclosed in a special envelope which was stapled to the check. Upon the envelope was printed the following:

> THIS ENVELOPE CONTAINS $5.00 OF YOUR MONEY
>
> This is the estimate amount the union would want you to take out of your pay check every month, and hand over *TO THEM!*
>
> The money in this envelope does not include fines, assessments and other charges that you may be forced to pay to the union . . . .[116]

The Board found that this statement was false in two respects, *i.e.*, the dues would be $4 a month and under the Tennessee "Right to Work Law" no employee could be required to join a union or pay dues in order to retain his employment, even if the petitioner were selected as bargaining representative. It was further determined that the employees were not able to evaluate this propaganda, particularly in view of its timing and manner. The Board stated:

> We hold that, regardless of whether the misstatements were willful or inadvertent, their inclusion in propaganda material distributed to employees by supervisors immediately before the election seriously impeded a determination of the employees' choice of a collective bargaining representative.[117]

The Board cited but did not distinguish the *Montrose Hanger* and *Mosler Safe* cases. The dissents of Board members Rodgers and

[115] 129 N.L.R.B. 747, 749, 47 L.R.R.M. 1058, 1059 (1960).
[116] Supra note 99, at 1435.
[117] Id. at 1436.

Leedom assert that there was no material misrepresentation and that the *Gummed Prods.* rule was not properly applied. They urged that the employees *were* in a position to evaluate in that their employer had no special knowledge as to the amount of union dues and that the Tennessee "Right to Work Law" had been publicly discussed throughout the state for approximately fifteen years.

Thus the *Trane Co.* case illustrates the fact that the Board affords these pay stub devices the same careful scrutiny required of other written campaign statements. Since clear cut distinctions are difficult, the cases dictate that particular concern be placed on the timing of the distribution, truth or falsity of the statements,[118] ability of the employees to evaluate their veracity in view of the authority of the source and their practical importance to the employees.

F. *Motion Pictures*

In a relatively new area of propaganda, the Board had occasion recently in the *Cherry Lane Foods* case[119] to comment on a motion picture shown by an employer. On the eve of the election, the employer had circulars distributed to his employees followed by a motion picture entitled, "Women Must Weep" depicting strike activities involving a union and another employer some five years earlier. The circulars concerned a letter, purportedly written by a minister's wife, describing the strike violence, the shooting of an infant child and the like. The motion picture was based, part in truth and part in fiction, upon this letter and was professionally written, directed and played by competent actors. The employer equated these events with a nation-wide situation. However, the activities portrayed went far beyond the actual strike situation. The union involved in the prior strike was not the same as the union seeking certification here. The Board in condemning this activity stated:

> Here the Employer resorted not only to speeches and pamphlets, but used the creative efforts of a motion picture company to paint a fearful picture of what could happen to its employees if they voted the next day for union representation. It is well established that the motion picture is a much more powerful instrument than the printed or spoken word in arousing emotions and influencing attitudes.[120]

The Board considered the movie a misrepresentation which exceeded all bounds of permissible campaign propaganda and a direct interference with the election of the following day.

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[118] This principle is clearly enunciated in Steel Equip. Co., supra note 97 and accompanying text.

[119] Plochman & Harrison Cherry Lane Foods, 140 N.L.R.B. No. 11, 51 L.R.R.M. 1558 (1962).

[120] Id. at 1559.

This view is in direct contrast with the previously considered *Westinghouse* case.[121] There the Board, in agreement with the Regional Director, held that the showing of a motion picture and the distribution of magazines depicting strike violence, mass picketing, fighting, stone throwing, etc., at the main gate of a branch plant the previous year were privileged activities within the purview of section 8(c). However, it should be noted that in the *Cherry Lane Foods* case, Board members Rodgers and Leedom again joined in dissenting. Consistent with *Westinghouse*, they concluded that the movie was not a misrepresentation itself, nor was its timing an interference with the voters.

Considering the course of the cases and the subtleties involved and in view of the resourcefulness of the participants, it would appear that the "movie" technique has given rise to yet another medium of campaign propaganda for the Board's future consideration.

G. *Racial Prejudice*

Another fairly recent device of election propaganda is the use of racial prejudice.[122] An early case involved an eight page letter by the employer sent to his employees which stated that the petitioning union was pro-integration and among other things, had contributed $75,000 to NAACP. The election took place in Madison, North Carolina. The Board said of the letter, "We note that there is no misrepresentation, fraud, violence, or coercion and that the statements here were temperate and factually correct. They therefore afford no basis for setting aside the results of the election."[123] In another case decided the same year, it was alleged that the employer's vice-president, Jackie Robinson, had appealed to racial prejudice to keep the petitioning union out.[124] Again the Board sustained the election stating: "While we do not condone appeals to racial prejudice, nor the conduct of the Company's vice-presidents in raising the issue, we do not find that the injection of the issue, or the context in which it was discussed herein, sufficient ground for invalidation of the results."[125]

With this as a back drop, the Board was called upon to decide two cases last year and thus had occasion to re-examine this issue. The *Sewell* case[126] presented a situation where the employer, two weeks before the election, showed his employees a picture of an unidentified Negro man dancing with an unidentified white woman. Beneath the

[121] Westinghouse Elec. Corp., supra note 102 and accompanying text.

[122] For a more complete discussion of this area, see Soren, The National Labor Relations Act and Racial Discrimination, 62 Colum. L. Rev. 563 (1962).

[123] Sharnay Hosiery Mills, Inc., 120 N.L.R.B. 750, 751, 42 L.R.R.M. 1036, 1037 (1958).

[124] Chock Full O'Nuts, 120 N.L.R.B. 1296, 42 L.R.R.M. 1152 (1958).

[125] Id. at 1299, 42 L.R.R.M. at 1153.

[126] Sewell Mfg. Co., 138 N.L.R.B. No. 12, 50 L.R.R.M. 1532 (1962).

picture was the caption, "The C. I. O. Strongly Pushes and Endorses the F. E. P. C." The same day the employer sent the employees a reproduction of the front page of the Jackson (Mississippi) Daily News, which contained a picture, four columns wide, of a white man dancing with a Negress. The caption beneath this picture read: "Union Leader James B. Carey Dances With A Lady Friend—He is president of the I.U.E., Which Seeks to Unionize Vickers Plant here."[127] Also beneath this picture was a bold heading: "Race Mixing An Issue As Vickers Workers Ballot." This, coupled with the employer's letters and his distribution of "Militant Truth," a magazine dealing with the race issue, was held to be objectionable conduct. The Board stated: "We are faced in this case with a claim that by a deliberate, sustained appeal to racial prejudice the Employer created conditions which made impossible a reasoned choice of a bargaining representative and therefore that the election should be set aside." This was not, as the Board was careful to point out, a case involving threats or promises with racial overtones.[128] Nor did this resolve the issue for the second election was also set aside on substantially the same grounds.[129] "We find that the documents in question were intended to and did inflame the racial feelings and other prejudices of the voters on matters unrelated to election issues," stated the Board.

The second case, *Allen-Morrison Sign Co.*,[130] involved a five and a half page, single spaced letter from the employer to his workers dealing primarily with matters indisputably germane to the election, particularly the union's stated position on race matters. This was followed two days before the election with a letter which contained a one column reprint from an issue of "Militant Truth," the same magazine referred to in the *Sewell Mfg.* case. The Board restated its test as laid down in the *Sewell* case:

> So long, therefore, as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such

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127 (The lady with whom Mr. Carey was dancing happened to have been the wife of an official of one of the new African nations and the occasion was a diplomatic party about five years ago.)

128 Citing Granwood Furniture Co., 129 N.L.R.B. 1465, 47 L.R.R.M. 1237 (1960); Westinghouse Elec. Corp., 119 N.L.R.B. 117, 47 L.R.R.M. 1237 (1957).

129 Sewell Mfg. Co., 140 N.L.R.B. No. 24, 51 L.R.R.M. 1611 (1962).

130 138 N.L.R.B. No. 11, 50 L.R.R.M. 1535 (1962).

> party is within the described bounds, the doubt will be resolved against him.[131]

Thus, concluding that the employer's letter was temperate in tone and that the excerpt from "Militant Truth" may have been related to the choice before the voters, the Board declined to set the election aside.

V. Objections to Conduct of Unions

The same guidelines are used by the Board in airing the objections to the pre-election conduct of unions as was previously discussed with respect to employers. Here too, it must be stressed that within the Board's general rules each case is approached by the Board on an *ad hoc* basis.

Thus, aware of the fact that parties "in hotly contested representation elections, like those in hotly contested political elections, frequently make allegations during the campaign which would not be made by a disinterested historian,"[132] the Board will not police the truth or falsity of ordinary campaign representations. Instead, they will allow the good sense of the employees to determine which are true and which are false insofar as they may effect the validity of the election.[133] By the same token the Board has conscientiously made every reasonable effort to accommodate this rule of reason to its policy of affording employees a free and untrammeled choice in a representation election. Thus, the Board has stated, "Not only under the mandate of the National Labor Relations Act but pursuant to American democratic tradition, this Board should erect and maintain every practical safeguard to insure that the results of its elections represent the free will of employees."[134]

In considering each case on its own merits, the Board has demonstrated its conviction that a proper appraisal of an election requires that a realistic yardstick be applied. Regard must be given to the specific exigencies of the case, including the type of employees involved, the size of the election, the intensity of the dispute between employer and union, or between competing unions, and the entire environment under which the election took place.[135]

As in the case of objections to employer's conduct, the Board imposes certain limitations upon its refusal to police or censor the truth or falsity of union campaign propaganda. If the ability of the employees has been so impaired by the use of forged campaign material, misrepresentations, or other campaign trickery that the un-

[131] Supra note 126, 50 L.R.R.M. at 1535.

[132] Celanese Corp. of America, 121 N.L.R.B. 303, 306, 42 L.R.R.M. 1354 (1958); 125 N.L.R.B. 352, 356, 45 L.R.R.M. 1126 (1959).

[133] Horders, Inc., 114 N.L.R.B. 751, 37 L.R.R.M. 1049 (1955).

[134] Stern Bros., 87 N.L.R.B. 16, 19, 25 L.R.R.M. 1061, 1062 (1949).

[135] New York Shipping Ass'n, 108 N.L.R.B. 555, 34 L.R.R.M. 1026 (1954).

coerced desires of the employees cannot be determined,[136] the Board will set aside the results of the election.[137]

An examination of the following factual situations of union conduct with which the Board has had to cope is presented in the interest of shedding light upon the Board's application of its standards.

A. *Alleged Misstatements and Misrepresentations*

In the entire area of campaign propaganda, no single topic is of such vital concern to employees as wages, nor has any other single topic exerted as much controversy before the Board and the courts. This is aptly demonstrated by the following cases.

Kawneer Co.[138]—A union distributed leaflets two days before the scheduled election referring to a contract which the union had "won" with another employer and listing "some of the many benefits" the employees had gained over their old contract. Specifically, it stated that employees were to receive one-half, two or three weeks of vacation depending upon service of six months, one year or fifteen years, respectively. Also, janitors, foremen and watchmen were to receive a flat wage of $1.81 per hour. However, contrary to the leaflet, the contract actually provided for a one week vacation for employees working from one to three years, and janitor's wages ranging from $1.73 to $1.90 per hour rather than a flat rate. The Board set the election aside because of these material misrepresentations of fact. Since the misstated contract had been entered into only a few days before the election, the employees had no independent means of evaluating the statements in the leaflet, nor did the employer have sufficient time to inquire into and challenge the misstatements.

Distribution of leaflets to employees on the eve of an election was also resorted to in the *Cleveland Trencher* case.[139] The union advertised the benefits that it had obtained for the employees of four other companies. For one company it purportedly obtained benefits comparable to the other three and, in addition, a cost of living clause together with an automatic wage increase of ten to fifteen cents for a three-year contract period. This, the leaflet announced, provided an additional eight cents per hour for each employee. However, the eight cents figure was admittedly erroneous, and certain of the other fringe benefits described were either inaccurate or misleading. The Board found that the union had deliberately made a misrepresentation of fact under circumstances which did not admit of evaluation. Thus, in voiding the election, the Board reasoned that since the union was in

[136] Merck & Co., 104 N.L.R.B. 891, 32 L.R.R.M. 1160 (1953).
[137] Cleveland Trencher Co., 130 N.L.R.B. 600, 47 L.R.R.M. 1371 (1961).
[138] 119 N.L.R.B. 1460, 41 L.R.R.M. 1333 (1958).
[139] Supra note 137.

an authoritative position to know the true facts, it had interfered with the employees' free choice.

Celanese Corp. of America[140]—The union circulated a letter which was received by employees on the day before the election. This letter followed a series of letters written by the employer informing employees of the benefits under its present policy and urging them to vote against the union. The union letter stated:

> He [the plant manager] says all of the fine fringe benefits show the company's interest in your concern. This could be something less than the truth, for the fact is that Celanese fringes, as well as other plant conditions, were won through collective bargaining, and in many instances over the initial opposition of the Company.[141]

This was in direct opposition to the employer's statement that some of its benefits were never contained in union contracts at any of its plants. Despite this contradiction, the Board refused to set aside the election. It reasoned that the union statement was no worse than a half truth, thus harmless in view of the good sense of the voters and their ability to evaluate the propaganda in the light of their employer's earlier statements. It pointed out that the fact that the employer's denial of the union claim preceded the union's assertion was immaterial since the employer was not entitled to the last word as a matter of right. The Seventh Circuit refused to enforce,[142] holding that the applicable criteria promulgated by the Board for setting aside an election were present in that (1) there had been a material misrepresentation of fact; (2) it came from a party having special knowledge or was in an authoritative position to know the true facts; and (3) the employer did not have sufficient opportunity to correct the misrepresentation before the election.

Cross Co.[143]—Union handbills were circulated on the day of the election. They contained such statements that in 1949 the employer laid off 100 employees and recalled only three; that contrary to the employer's claims, engineers were being laid off out of seniority; and that under the company SUB plan, a typical payment to a foreman was $8.29 as compared to $1,156 collected by one man under the union severance plan after only eleven years at Cross. Because the union's reference to the 1949 incident was untrue, the employer countered by informing the employees before the election that for the past year, during which the union had been incumbent, there had been 250 lay-

[140] Supra note 132.

[141] Id. at 304, 42 L.R.R.M. at 1354.

[142] Celanese Corp. of America v. NLRB, 291 F.2d 224 (7th Cir. 1961), vacating 125 N.L.R.B. 352, 45 L.R.R.M. 1126 (1959).

[143] 123 N.L.R.B. 1503, 44 L.R.R.M. 1153 (1959).

offs, and 100 had been recalled. As to the comparison made between the respective SUB plans, the records revealed that the employer's average payment was $200, and the $1,156 payment referred to by the union was atypical.

The Board in reviewing these facts, concluded that the information regarding the 1949 layoff was not within the union's peculiar knowledge, and because the employees were capable of evaluating its truth or falsity, there was no necessity for the employer to answer. The SUB statement was at worst an exaggeration and not so misleading as to exceed the bounds of election campaigning. Thus, the Board reiterated its rule that mere falsity alone does not constitute campaign trickery which would invalidate an election. It is only when one of the parties deliberately misstates material facts which are within its special knowledge and which the employees are unable to properly evaluate that the Board will set aside an election.[144] However, the Court of Appeals for the Sixth Circuit,[145] in reversing the Board's determination, found that the union's representations were false and under the circumstances, not within the limits of legitimate campaign representations.

Gummed Prods. Co.[146]—One week before a scheduled election, the union distributed a handbill containing incorrect hourly rates allegedly paid by other employers whose employees the union represented. The company answered this with a letter of its own to the employees pointing out the discrepancies and quoting the correct rates. On the day before the election, the union issued a leaflet which explained that the corrected rates quoted by the company were effective under an old contract whereas the rates quoted by the union were those paid under a new contract. There was *no* new contract! The Board, in setting aside the election, pointed out that exaggerations, inaccuracies, name-calling and falsehoods, while not condoned, may be excused as legitimate propaganda if they are not so misleading as to prevent the exercise of a free choice. The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to a point where it may be said that the uninhibited choice of the employees cannot be determined in an election. Applying this criteria to the case at bar, the union's false statements of fact, repeated on the very eve of the election in the face of a direct contradiction by the employer, truly exceeded the limits of legitimate campaign propaganda.

R. L. Polk & Co.[147]—During the pre-election campaign the employer, campaigning for "No Union," published comparisons with

[144] But see Hollywood Ceramics Co., 140 N.L.R.B. No. 36, 51 L.R.R.M. 1600 (1962).

[145] Cross Co. v. NLRB, 260 F.2d 746 (6th Cir. 1958).

[146] 112 N.L.R.B. 1092, 36 L.R.R.M. 1156 (1955).

[147] 125 N.L.R.B. 181, 45 L.R.R.M. 1096 (1959).

its Trenton plant where the employees were represented by the same union stating that the unionized Trenton plant did not get a wage increase in 1958. To this, the union shouted "lie" only to have the employer again deny that a general wage increase had been given posting facsimiles of the contract and a circular addressed to employees captioned, "Here is the truth." Just before the election the union circulated material which was the last of a series of leaflets distributed by both the employer and union in which it again attacked the employer's representations and asked the employees, "Has perjury been committed?"

The Regional Director, relying upon the Board's decision in *Gummed Prods.*, recommended that the election be set aside on the ground that the union's misrepresentations of facts peculiarly within its knowledge tended to confuse those employees who did not have the factual knowledge necessary to evaluate the propaganda. The Board reversed the Director and certified the results of the election, holding that *Gummed Prods.* was not controlling. The Board pointed out that there were two assertions in *Polk*—one by the employer and one by the union, both with knowledge of the facts, and further noted that the employer had refuted the union's allegations, albeit before the last union circular. The Board thus concluded that the employees could weigh one against the other and appraise the misrepresentations contained in the union's leaflet. Again the Board pointed out that the employer does not have a right to the last word.

Reiss Associates[148]—On the day before the Board election, the petitioning union distributed leaflets to employees listing wage rates paid under seven contracts negotiated with other employers in the area. While the maximum rates quoted were essentially correct, the base or minimum rates were inaccurate in six of these contracts. The employer, unfortunately, was unable to check the accuracy of the data before the election. Concluding that wage information is a matter vitally important to employees, that the method of presentation was clearly misleading and that the late timing made any check by the employer or employees difficult, if not impossible, the Board held that the misstatements exceeded the bounds of legitimate campaign propaganda. In so holding, the Board "distinguished" this case from *Horder's, Inc.*[149] where the employer in response to the union's representations characterized the quoted rates as "phony," and in *Otis Elevator Co.*,[150] where not only were the employees themselves in a position to evaluate the literature, but the inaccuracies were apparently inadvertent and the information substantially correct.

[148] 115 N.L.R.B. 217, 38 L.R.R.M. 1218 (1956).
[149] Supra note 133.
[150] 114 N.L.R.B. 1490, 37 L.R.R.M. 1198 (1955).

Walgreen Co.[151]—The most recent of this type of case, the petitioning union similarly distributed on the eve of the election a handbill which, on its face, purported to indicate a composite wage increase and vacation benefits obtained for *all* its members. The union already represented employees in one unit and was seeking certification in still another. The members referred to in the handbill included not only the represented unit, but also employees at plants of an association representing other employers in the industry. Actually, the Board found that the increase only encompassed inside employees of the represented unit, that certain other employees received no wage increase, that none of the union members received increased vacation benefits, and that members of the association only received a smaller increase and a three-week vacation after ten years service. Because of the timing the Board determined that the employer could not check the information and reply, nor could the employees properly evaluate the information before the election. Accordingly, with Board member Brown dissenting, the election was set aside.

General Elec. Co.[152]—On the very day of the election, the petitioning union distributed two circulars among the employees; one stating that employees earned $3.50 to $4 an hour at another of the employer's plants. This was a climax to six months and some fifty circulars of campaign propaganda, one of which had claimed that the average hourly plant earnings were only $3.21 with many piece workers making $4 per hour. The circulars also dealt with wages at the employer's other plants where the employees were represented by the union. During this same period, the employer in his own right distributed fifteen to twenty pamphlets, some of which sought to explain these pay differentials. Yet, even assuming the wage data was false, the Board felt that the information was not within the special knowledge of the union but rather within that of the employer, who had an opportunity to counter the union's statements. Moreover, the employees should be able to evaluate information relating to wages of fellow employees working only sixty miles away.

Wheeler Mfg. Co.[153]—The Board held that in a pre-election circular directed to employees inaccurate wage rate assertions regarding other companies did not warrant setting aside an election, even assuming that the comparison of wages was deliberately inaccurate in part. It was emphasized that the employees, given an opportunity to examine the contracts of the other employers, had gained independent knowledge which would enable them to properly evaluate the data set forth in the circular. The principles laid down by the Board in *Merck*

[151] 140 N.L.R.B. No. 121, 52 L.R.R.M. 1193 (1963).

[152] 119 N.L.R.B. 944, 41 L.R.R.M. 1206 (1957).

[153] Wheelerweld Div., C. H. Wheeler Mfg. Co., 118 N.L.R.B. 698, 40 L.R.R.M. 1241 (1957).

& Co.[154] were held to be controlling. In that case there were three unions on the ballot, including the EOM (Employees Organization Inc. of Merck & Company) which filed objections to another union's pamphlet which stated, *inter alia,* that the EOM "top dogs" liked their petty graft, that the dues receipts kept the EOM boys on the job selling out the workers, that of the $1,800 or so taken in monthly the EOM grafters take it all, that over $100,000 has been paid out to the willing stooges and that another form of graft which the EOM boys look forward to is the supervisory appointments which are obtained by EOM "misleaders" with regularity.

EOM excepted to the Regional Director's conclusion that the objections were without merit regardless of the truth or falsehood of the statements. The Board commented that EOM apparently took the position that if the statements were false, they were necessarily coercive, and, therefore, the Board must determine their truth or falsity. The Board did not agree, stating that absent threats or other elements of intimidation, it will not undertake to censor or police union campaigns or consider the truth or falsity of official union utterances unless the ability of the employees to evaluate such utterances has been so impaired by the use of forged campaign material or other campaign trickery that the uncoerced desires of the employees cannot be determined in an election. Acordingly, the Board held in *Wheeler* that the statements complained of were obviously propaganda, clearly recognizable as such by the employees who, in the opinion of the Board, were entirely competent to evaluate such material.

Calidyne Co.[155]—On the day before the election, the petitioning union distributed a flyer to employees in which it purported to compare wage rates of the employer with those of a company already organized by the union. The flyer misrepresented the rates for sheet metal work paid by the organized company in two respects. It gave a single rate for each job which rate was the maximum, whereas, the contract actually provided for a minimum rate as well, and that the maximum rate reported was not then in effect. The Board pointed out that the union had deliberately misstated material facts which were *peculiarly within its knowledge* and that the employer could not learn the true facts in time to refute them nor would the employees have time to verify them. In view of the importance to employees of wage rates as an argument for or against unionization, the election was not held under circumstances calculated to reflect the free choice of employees. Thus the Board set it aside.

Vellumoid Co.[156]—Six to eight hours before the election, the

[154] Merck & Co., supra note 136.

[155] Thomas Gouzoule d/b/a/ The Calidyne Co., 117 N.L.R.B. 1026, 39 L.R.R.M. 1364 (1957).

[156] 118 N.L.R.B. 1431, 40 L.R.R.M. 1397 (1957).

petitioning union circulated a leaflet which concerned the wage rates which the employer had stated were as good as or better than those paid for comparable work in shops in the area, and in which it asserted that another company paid 30 and 40 cents an hour more than the employer for work on the same type of presses. In fact the presses were quite different. The employer, who manufactured gaskets, used the presses for cutting or punching, while the other company, which manufactured envelopes, used the presses for printing. However, the Board did not set aside the election for it found that the employees were aware of the type of work being performed at both plants because of their proximity to each other, that unlike the rates used by the union in *Reiss, Calidyne* and *Gummed Prods.*, the quotations here did not refer to particular job descriptions, and that the petitioning union did not have the "peculiar" knowledge of the rates at the other plant since it was not the bargaining agent for those plants. In holding that the employees were in a position to evaluate the propaganda, the Board pointed out that the employees were in fact invited to check the data because of the statement in the same circular, "Don't believe us; ask your friends who work there" (the plant used for comparison).

Pinkerton's Nat'l Detective Agency[157]—The Regional Director forwarded ballots to employees pursuant to a mail ballot election,[158] on the same day that the union made false and exaggerated statements relating to the employer's profits and their distribution in the form of bonuses to its supervisory personnel. The Board held that the misrepresentations were apparent on their face, and, as such, the employees would reasonably regard them as mere propaganda. Further, the union's assertion that if it won the election the bonus system would be eliminated and the profits distributed to employees in the form of higher wages, was also found to be the type of propaganda which would not interfere with an election.[159]

Hook Drugs, Inc.[160]—The union compared the rates of the employer with those in plants organized by the union. In its leaflets the union ascribed the rate of $1.68 an hour to a clerk with twenty-four months service, rather than the correct rate of $1.69 for thirty

[157] 124 N.L.R.B. 1076, 44 L.R.R.M. 1596 (1959).

[158] In a situation such as this where the employee detectives are in a wide area at varied locations, it is within the broad discretionary powers of the Regional Director to conduct a mail ballot election. This is accomplished by means of a special envelope on which there is a detachable name tab. The employee receives the ballot and envelope in the mail, votes at home, placing his ballot in the sealed envelope and his name on the tab. When the Regional Office receives the sealed envelope in the mail, the name is checked on the eligibility list in the presence of observers for all parties. Then the name tab is ripped off and destroyed, and the envelope is mixed with others to be later opened at one time by the Board agent with full secrecy.

[159] Orleans Mfg. Co., 120 N.L.R.B. 630, 42 L.R.R.M. 1016 (1958); Kennametal, Inc., 119 N.L.R.B. 1236, 41 L.R.R.M. 1267 (1958); Kendall Co., 115 N.L.R.B. 1401, 38 L.R.R.M. 1078 (1956).

[160] 119 NL.R.B. 1502, 41 L.R.R.M. 1351 (1958).

months service. The Board refused to set the election aside, pointing out that the misstatements were not deliberate and that the employees had access to the wage rate information. Before the Board would void the election, it required that knowledge of the true facts must not be readily available to the employees and the misrepresentation must be deliberate.[161]

Hollywood Ceramics Co.[162]—The union distributed handbills which contained substantial misrepresentations as to comparative wages paid by the employer. The particular plants used in the comparison were not disclosed in the handbill and as it turned out were not truly comparable as to the type of operations and degree of skill required for all the jobs involved. In addition, the employer's rates were grossly understated by the failure of the union to include the incentive increment in the table of wages and the handbills were released at a time which prevented the employer from replying.

The Board did not agree with the Regional Director's finding that the propaganda could be evaluated by the employees and thus set aside the election. In this area the Board felt that it must balance the right of the employees to an untrammeled choice and the right of the parties to wage a free and vigorous campaign with all the normal legitimate tools of electioneering. In striking such a balance the Board utilized its rule or formula, as previously set forth in this article.[163] However, it also stated that even where misrepresentations were substantial, it may still refuse to set aside an election if it finds, upon consideration of all the circumstances, that the statement would not be likely to have had a real impact upon the election. For example, the misrepresentation may have related to an unimportant matter or it may be so extreme as to put the employees on notice of its lack of truth so that they could not have reasonably relied upon the assertion. Moreover, the Board may find that the employees possessed independent knowledge with which to evaluate the statements.

B. *Other Forms of Inaccuracies or Misstatements*

Baltimore Luggage Co.[164]—Objections to the election, as well as unfair labor practice charges under section 8(a)(1), were filed and consolidated for hearing. A settlement agreement was executed wherein the employer, while not admitting that it had violated the act, agreed to post a remedial notice in the unfair labor practice case and to have the election set aside. The union, through circulars, notified the employees that the employer had agreed to a settlement under which it

[161] Cf. Hollywood Ceramics Co., supra note 144 and text acompanying note 26 supra.

[162] Ibid.

[163] Supra note 26.

[164] 123 N.L.R.B. 1289, 44 L.R.R.M. 1119 (1959).

would not interfere with employee rights. In later circulars the union pointed out that the National Labor Relations Board had set aside the election, ordered a re-run and ordered the employer to cease and desist from bombarding the employees with threats. The employer replied refuting these statements; this being followed by charges and counter charges. In reviewing the re-run election, the Board concluded that the employees were in a position to evaluate the pros and cons of the matter, and thus stated:

> [A]ssuming that the Petitioner's propaganda did contain some misstatements and exaggerations, we nevertheless agree that it does not warrant setting aside the election. The assertions did not involve matters peculiarly within the knowledge of the Petitioner. . . . [T]he employees themselves could evaluate the validity of the propaganda in its entirety . . . [and] the Employer . . . had an opportunity to, and did, answer the major portion of the Petitioner's propaganda.[165]

Dura Fitting Co.[166]—Prior to an election requested by a group of employees seeking to decertify the incumbent union, the union distributed two leaflets reciting what purported to be a letter from an employee claiming that her "arm was twisted" by a forelady who tried to force her to sign a decertification petition. While the employer did not have time for rebuttal, the Board again held that the truth or falsity of the assertion was not peculiarly within the knowledge of the union and could be reasonably understood by employees to be campaign propaganda rather than an assertion of fact. This type of propaganda will not be policed by the Board. Similarly, in *Comfort Slipper Corp.*[167] the Board did not consider the union's alleged misrepresentation of the number of pledge cards it had received and of the size of the employer's profits as constituting grounds for setting aside an election.

Kennametal, Inc.[168]—The petitioning union stated in its publication, "Spotlight," that the contract between the employer and the intervening union had been held illegal by the Board. However, the Board had only determined that the contract did not constitute a bar

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[165] Id. at 1289-90, 44 L.R.R.M. 1119, 1120. See R. H. Osbrink Mfg. Co., 114 N.L.R.B. 940, 37 L.R.R.M. 1070 (1955), in which the union misquoted the decision of the court for propaganda purposes; Machinery Overhaul Co., 115 N.L.R.B. 1787, 38 L.R.R.M. 1168 (1956), where the union asserted the program it would obtain if successful in the election; Wheelerweld Div., C. H. Wheeler Mfg. Co., supra note 153, where the union issued misleading statements as to why the employees were discharged; Vellumoid Co., supra note 156, where the union issued ambiguous statements regarding wage rates paid by the employer and Kennametal, Inc., supra note 159, where the union issued ambiguous statements regarding the Board's order and wage rate comparisons.

[166] 123 N.L.R.B. 1665, 44 L.R.R.M. 1192 (1959).

[167] 122 N.L.R.B. 183, 35 L.R.R.M. 1734 (1955).

[168] Supra note 159.

to a present election and to the contrary had specifically disclaimed any finding with respect to the general validity of the contract. In addition, the petitioning union misquoted a management clause in the current contract between the intervenor and the employer. Applying the principles enunciated in *Merck & Co.*, the Board held that, in addition to being false, the statement must involve a deliberate misstatement of facts within the knowledge of the utterer and not readily available to the employees or other parties. It then commented that certainly the statements with respect to the Board decision, which is a public document served upon the parties, including the intervenor, and subject to comment in the local newspaper, cannot be considered as unavailable material. The misquoting of the management clause also stood in the same light. The Board noted that in a subsequent issue of the "Spotlight" this misquote was corrected and thus refused to set the election aside.[169]

Fry Roofing Co.[170]—The Board held that the union did not interfere with the election by promising liberal strike benefits if it won. Even though the union did misrepresent the amount of the benefits, the Board concluded that the promise of such benefits does not impair the free choice of employees as would misrepresentation of wage rates.

Olson Rug Co.[171]—The distribution of literature stating that the employer would change wages and working conditions if the union lost the election also does not warrant setting it aside since the employees could evaluate this propaganda. Nor is the distribution of a circular objectionable in which the union stated that the employer had lost an important contract because it was not unionized and implying that the contract could be obtained if the union won the election. The Board emphasized that this statement constituted mere opinion or prediction and concerned a benefit beyond the union's power to confer.

Anchor Mfg. Co.[172]—The union claimed that higher wages were authorized by the employer but the manager of the plant had robbed the employees and would not raise the rates beyond $1.15 per hour. When the employer refused to bargain with the certified union alleging that this and other pre-election materials were false, the Board entered its order, refusing to set the election aside. The employer petitioned the Court of Appeals for the Fifth Circuit for review and it upheld the Board stating:[173]

> Anchor argues that 'where false statements about the Employer's conduct are made by a Union prior to a representa-

[169] See Milham Prods. Co., 114 N.L.R.B. 1441, 37 L.R.R.M. 1186 (1955).

[170] Lloyd A. Fry Roofing Co., 119 N.L.R.B. 661, 41 L.R.R.M. 1158 (1957).

[171] 118 N.L.R.B. 1274, 40 L.R.R.M. 1353 (1957).

[172] Anchor Mfg. Co. v. NLRB, 131 N.L.R.B. 140, 48 L.R.R.M. 1001 (1961), enforced, 300 F.2d 301 (5th Cir. 1962).

[173] Id. at 303.

> tion election, such statements constitute an interference with the free choice guaranteed to Employees by the Act and the election should be set aside.', relying on National Labor Relations Board v. Trinity Steel Co. Inc., 214 F.2d 120 (5th Cir. 1954), in support of this proposition. In so doing, petitioner reveals a basic misconception of the true principle involved, and of the principle of Trinity Steel . . . . That principle is not that when false statements are made they constitute an interference with free choice, but that *when* false statements are made *which* constitute an interference with free choice, for or against a bargaining representative, an election should be set aside.

The burden of establishing the requisite unfairness of the election is upon the objecting party. The court went on to state that "the basic issue is whether such false statements as may have been made *in fact* constituted an interference with a free choice of bargaining representatives; it is obvious that every false statement does not."[174] It is interesting to contrast this rationale of the Fifth Circuit with that of the Seventh in *Allis-Chalmers* and the First in *Trancoa*.[175]

In *Allis-Chalmers Co.*,[176] on the day before the election, the employer called to the attention of its employees the substantial ben-

[174] Ibid. Despite the Board's broad discretion and expertise in this area (see NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940), in which the Supreme Court pointed out that "control of the election proceeding and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone") some courts of appeals have disagreed with the Board's findings, particularly with respect to the issue of truth or falsity. See, e.g., NLRB v. Trancoa Chem. Corp., 303 F.2d 456 (1st Cir. 1962), setting aside, 133 N.L.R.B. 791, 48 L.R.R.M. 1754 (1961); Houston Chronical Publishing Co., 300 F.2d 273 (5th Cir. 1962), enforcing 130 N.L.R.B. 1237, 47 L.R.R.M. 1487 (1961), and setting aside 130 N.L.R.B. 1234, 47 L.R.R.M. 1477 (1961); NLRB v. Tampa Crown Distrib., Inc., 272 F.2d 470 (5th Cir. 1959), setting aside, 133 N.L.R.B. 1622, 43 L.R.R.M. 1035 (1958); Allis-Chalmers Co. v. NLRB, 261 F.2d 613 (7th Cir. 1958), setting aside, 120 N.L.R.B. 644, 42 L.R.R.M. 1037 (1958). See also Celanese Corp. of America, supra note 132. In *Celanese* the Supreme Court granted certiorari and remanded the case to the circuit court for consideration in light of Mattison Mach. Works, infra note 182. The court of appeals considered the matter on remand, distinguished *Mattison* on the ground that the latter case involved only a minor irregularity, and again refused to enforce the Board's order. 291 F.2d 224 (7th Cir. 1961). It took the position that its action was within the scope of its authority under the doctrine of the *Universal Camera Corp.* decision. 340 U.S. 474 (1951). There, the Supreme Court stated, *inter alia*:

> The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both. . . . Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals.

Id. at 490-91.

[175] Supra note 174.

[176] Ibid.

efits which it had effectuated for its salaried employees. The following morning, a few hours before the polls opened, the union distributed a communication to employees stating that the benefits listed in the employer's letter were negotiated by the union for the production and maintenance employee unit and "passed along in restricted form." The union asserted that had it not been for its negotiations, it was certain that many of the benefits would not have been granted.

The Board held that mere falsity was not enough to void the election. The employees worked in the same building as the production and maintenance employees, and a number of the salaried employees had been transferred into this unit from production and maintenance. During the pre-election campaign the union had raised this same matter, thus placing it in issue sometime before the election. The Board pointed out that examination of the cases relied upon by the employer[177] revealed that each instance in which the Board had made an exception to its general rule, not only was the statement false but the circumstances were such that the knowledge of the true facts was not readily available to the employees. While not condoning misrepresentation, the Board decided that the employees here had at least sufficient knowledge to evaluate the propaganda.[178]

The Court of Appeals for the Seventh Circut[179] did not agree with the Board, pointing out that one of the nine items of employer benefits, specifically educational opportunities through a college refund plan, was not negotiated by the union for production and maintenance employees and thus was inaccurate. The court stated, "If a truth is diluted, it is no longer truth. A glass of pure water is no longer pure if a one-ninth part thereof is contaminated, nor is it 'virtually' pure."[180] The court considered the deviation from the truth to be substantial and significant, particularly when the election was decided by a two-vote margin.[181]

It is of interest to note that in *Mattison Mach. Works*[182] the Board's notice of election and ballots inadvertently referred to the employer as "Mattison Machine Manufacturing Company" rather than "Mattison Machine Works." The circuit court denied enforcement of the Board's order because it merely assumed that no prejudice resulted. The Supreme Court reversed and held that the refusal of

177 Reiss Associates, Inc., 116 N.L.R.B. 217, 38 L.R.R.M. 1218 (1956); Gummed Prods., supra note 146.

178 See Comfort Slipper Corp., supra note 167; Gong Bell Mfg. Co., 114 N.L.R.B. 342, 36 L.R.R.M. 1581 (1955).

179 Allis-Chalmers Mfg. Co. v. NLRB, supra note 174.

180 Id. at 616. The court here refers to the fact that the Board, in its brief, stated that the union's various contracts with the company on behalf of other employees apparently do embrace virtually all nine items listed as benefits in the company's letter.

181 See Trancoa Chem. Corp., supra note 174.

182 365 U.S. 297 (1961), reversing 279 F.2d 204 (7th Cir. 1960).

the court of appeals to enforce the Board's order was clearly erroneous. It was well within the province of the Board to find upon the record that the occurrence had not affected the fairness of the representation election, particularly in the absence of any contrary showing by the employer, upon whom the burden of such proof rested.[183]

C. *Campaign Trickery*

Sylvania Elec. Prods., Inc.[184]—Three unions were competing in an election. With union A opposed by unions B and C,[185] none received a majority of the vote but B and C were the top choices. Union A filed objections on the ground that on the eve of the election, union B circulated a forged letter allegedly written by union A's international representative. Despite A's protestation that the letter was a forgery, union B continued to circulate the letter, the contents of which stated, *inter alia*, "I've never run into as dumb a bunch of people as work in this plant . . . [A]s per your idea on who should be sent in here after the election, I feel you should send in an altogether new staff man, because we had to go overboard in making promises to these people and could explain things better." The Board held that the deception was such that the employees could not recognize it as a forgery or evaluate it as propaganda, and hence, this conduct lowered the standards of campaigning to a point where the free choice of a bargaining representative could not take place.

United Aircraft Corp.[186]—Here again, union A, competing against union B, conceived and distributed among the employees a fake telegram, purportedly sent by B to A, apologizing for the conduct of its representatives for "smearing" union A and praising its rival union. The Board found that this was a deliberate deception perpetrated by union A and pointed out that the union's purported self-immolation and praise of its rival was a more effective vote getting device than that employed in an anti-union letter as in the *Timken* case.[187] There the Board set an election aside because the employer, during the pre-election campaign, had mailed to the employees what deceptively pur-

[183] Concerning the burden of proof resting with objecting party, see, e.g., NLRB v. Vulcan Furniture Mfg. Corp., 214 F.2d 369, 372 (5th Cir.), cert. denied, 348 U.S. 873 (1954); Orleans Mfg. Co., 120 N.L.R.B. 630, 42 L.R.R.M. 1016 (1958).

[184] 119 N.L.R.B. 824, 41 L.R.R.M. 1188 (1957).

[185] A runoff election is automatically conducted where the ballot in the original election contained three or more choices and no single choice received a majority of the votes cast. Only one runoff election can be conducted in a single representation proceeding. However, a runoff, if it is set aside because of objections, may be re-run. The ballot in this election will provide for a selection between the two choices receiving the largest and second largest number of valid votes cast in the original election. 29 C.F.R. § 102.70 (Supp. 1962).

[186] 103 N.L.R.B. 102, 31 L.R.R.M. 1437 (1953). See also International Smelting & Ref. Co., 107 N.L.R.B. 27, 33 L.R.R.M. 1048 (1953); Calcor Corp., 106 N.L.R.B. 539, 32 L.R.R.M. 1498 (1953).

[187] Timken-Detroit Axle Co., 98 N.L.R.B. 790, 29 L.R.R.M. 1401 (1952).

ported to be a spontaneous anti-union appeal from a fellow employee. In *United Aircraft* the Board held that union A, by its deliberate deception as to the source of the "telegram," so blinded the employees to the significance of its contents that they could neither recognize it as a fake nor evaluate it as propaganda.[188]

Heintz Div., Kelsey-Hayes Co.[189]—On the day before the election the intervening union, an independent, selected eight non-employee male spectators at a ball game, five of whom were Negroes, to distribute handbills to employees at the plant gate. The legend read "VOTE UAW-CIO-JULY 14." There was no identification on the handbill, nor did the distributors wear identification or in any way indicate that they were employed by the intervening union. The intervenor won the election, and objections were filed by the UAW. The Board set aside the election, stating that while it will not ordinarily police the method of campaigning, it will not hesitate to do so in cases of fraud or trickery. The Board asserted its belief that the anonymous intrusion of the intervenor in the petitioner's campaign interfered with the ability of the employees to properly evaluate the propaganda appeal. In order to insure that its elections are conducted under proper laboratory conditions, the Board held that the failure of parties in Board elections to identify themselves as sponsors of campaign propaganda initiated by them constitutes grounds for setting aside the election. This view comports with the standards laid down by Congress in national elections[190] which prohibit the distribution and publication of campaign propaganda without indicating the names of the individuals or groups responsible for its issuance.[191]

D. *Reproduction of Sample Ballots*

In the *Allied Elec. Prods.* case the Board stated that

> . . . it will not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than the one completely unaltered in form and content and clearly marked sample on its face, and . . . will set aside the results of any election in which the successful party has violated this rule.[192]

Thus, in *Hughes Tool Co.*,[193] the intervening union distributed a handbill which contained a facsimile of an official Board ballot, identified as a "sample" but marked with an "X" in the intervenor's

188 See Electric Auto-Lite Co., 116 N.L.R.B. 788, 33 L.R.R.M. 1366 (1956).

189 126 N.L.R.B. 151, 45 L.R.R.M. 1290 (1960).

190 64 Stat. 475 (1948), 18 U.S.C. § 612 (1958).

191 See also Chillicothe Paper Co., 119 N.L.R.B. 1263, 41 L.R.R.M. 1273 (1958); Great Atl. & Pac. Tea Co., 50 L.R.R.M. 1355 (1962).

192 109 N.L.R.B. 1270, 1272, 34 L.R.R.M. 1538, 1539 (1954).

193 119 N.L.R.B. 739, 41 L.R.R.M. 1169 (1957).

box. The Board set the election aside under the *Allied* rule and pointed out that the fact that the handbill also contained written and pictorial propaganda favoring the intervenor did not excuse the use and alteration of the ballot.

On the other hand, in the *Bordo Prods. Co.*,[194] *Kennametal, Inc.*,[195] *Cupples-Hesse Corp.*[196] and *McDonough Co.*[197] cases, the Board did not find conduct in this related area to be objectionable. In *Bordo* a union leaflet included a purported reproduction of the official ballot clearly marked "sample" but altered in certain immaterial respects. (The name of the employer was given as "Inc." instead of "Company" and the employer's address was omitted.) The election was upheld since the ballot did not tend to mislead voters or suggest that the Board endorsed a particular choice.

In *Kennametal* it was held that the union did not interfere with an election by reproducing a copy of the Board's official ballot in a union publication which contained propaganda on the same page. The ballot was unaltered and clearly marked "sample" as required by the *Allied* rule. Nor did the Board feel that because the campaign propaganda appeared on the same page as the sample ballot it created the impression of governmental support for the petitioning union.

In *Cupples-Hesse Corp.* the petitioning union's leaflet, aside from pro-union propaganda, merely contained three squares similar to that on the ballot with an "X" in the petitioner's box. The Board held that this was neither a reproduction nor an attempt to reproduce the official ballot. The same type of ballot was utilized in *McDonough Co.* However, it was not designated as a Board ballot but was captioned, "This is the way to vote." It contained the same three choices with the "X" marked below the petitioning union's name. The board held that this facsimile was not sufficiently similar to the Board's ballot to convey the impression to the voters that the Board had endorsed the petitioner.[198]

E. *Inducements—Waiver of Initiation Fees*

Lobue Bros.[199]—The petitioning union offered employees free membership in the union specifically conditioned upon its success in

194 119 N.L.R.B. 79, 41 L.R.R.M. 1045 (1957).

195 Supra note 159.

196 119 N.L.R.B. 1288, 41 L.R.R.M. 1272 (1958).

197 118 N.L.R.B. 1511, 40 L.R.R.M. 1409 (1957).

198 For other cases involving "sample ballots" see, Glidden Co., 121 N.L.R.B. 752, 42 L.R.R.M. 1428 (1958); Custom Moulders of Puerto-Rico & Shaw Harrison Corp., 121 N.L.R.B. 1007, 42 L.R.R.M. 1505 (1958); Paula Shoe Co., 121 N.L.R.B. 673, 42 L.R.R.M. 1419 (1958); Pyramid Mouldings, Inc., 121 N.L.R.B. 788, 42 L.R.R.M. 1437 (1958); Anderson Air Activities, 106 N.L.R.B. 543, 32 L.R.R.M. 1486 (1953); AM-O-Khrome Co., 92 N.L.R.B. 893, 27 L.R.R.M. 1182 (1950).

199 109 N.L.R.B. 1182, 34 L.R.R.M. 1528 (1954).

the election and certification. The Board set aside the election in accordance with the principle enunciated in the *Gruen Watch Co.* case,[200] that a pre-election offer of reduced initiation fees is objectionable when the promised benefit is "contingent" upon how the employees vote in the election or upon the results of the election.

On the other hand, in the *General Elec.* case,[201] the Board held similar conduct unobjectionable. During a question and answer program on the day before the election, in response to a rumor that the initiation fee would be $30, a union representative stated that if the union won the election "not a single person who votes for the IUE in this election will be required to pay an initiation fee for membership in the IUE." He also made it clear that the fee would not be set by the national IUE, but rather locally, and that it would not be $30! The Board felt that the statement was made in rebuttal to the rumored $30 fee and was merely a publication of the union's policy of waiving initiation fees for all potential members *during* the election campaign and thus refused to set aside the results of the election. Equally important, the Board noted that the union had informed the employees that no one, according to the laws of Virginia, is required to join a labor organization, and, therefore, initiation fees are not required of all employees.[202]

In the *A.R.F. Prods.* case[203] employees were told that initiation fees were $5 before the election but would be $35 after the election or a contract had been signed. The objecting employer contended that this was a promise of economic benefit or a threat of reprisal depending upon how the employees voted. The Board disagreed and held that the offer, as reported, meant that when the employees failed to join the union prior to the election, they would suffer an economic loss *if* the union won and obtained a union shop. Since the remarks of the union were not contingent upon whether the employees voted for the union or not, the gist of the remarks was merely a prediction of what would happen if the union was voted in. In any event, the Board indicated that it could not perceive how this would affect the employees' free choice in the election.

Finally, the recent case of *Gilmore Indus.*[204] the Regional Director recommended that an election be set aside under the *Lobue* doctrine because the union had informed the employees that initiation fees

200 108 N.L.R.B. 610, 34 L.R.R.M. 1067 (1954).

201 General Elec. Co., 120 N.L.R.B. 1035, 42 L.R.R.M. 1116 (1958).

202 See also Plant City Welding & Tank Co., 119 N.L.R.B. 131, 41 L.R.R.M. 1014 (1957); Reiss Associates, supra note 148; Calidyne Co., supra note 155; Orleans Mfg. Co., supra note 159 and Otis Elevator Co., supra note 150.

203 118 N.L.R.B. 1456, 40 L.R.R.M. 1398 (1957). See also Superior Sleep-Rite Corp., 117 N.L.R.B. 430, 39 L.R.R.M. 1264 (1957), where the union served free coffee on election day.

204 140 N.L.R.B. No. 8, 51 L.R.R.M. 1562 (1962).

would be waived if it won the election. Here also the statement was made in an atmosphere of a rumored high initiation fee. The Board, however, reversed the Regional Director, distinguishing *Lobue*. In a three to two decision, with members Leedom and Rodgers dissenting, it held that the union's statement did not constitute a promise of benefit since it applied whether or not the employees voted for union.

F. *Other Alleged Inducements or Benefits*

Ra-Rich Mfg. Co.[205]—The Board considered the serving of free refreshments by the union at a pre-election meeting a legitimate pre-election campaign activity consistent with its prior holding in *Bordo Prods. Co.*[206] There an offer to employees of a chance to win prizes by attending union meetings was held not to constitute improper inducement or electioneering. In both cases, the noncontingency was strongly emphasized by the Board. However, this factor was considered irrelevant in *Teletype Corp.*,[207] where an election was set aside because of the auction or competitive bidding for attendance at the pre-election meetings of two rival unions. The Board asserted that the progressive increase in the rates paid for attendance, which at one point reached eight hours' regular pay for a three-hour meeting of two rival unions, so lowered the election standards that expression of free choice by the employees was impossible. This, regardless of whether or not the payments were contingent upon the employees voting for any particular union. Contingency was also relegated to minor significance in *Fry Roofing Co.*[208] The Board held that the union did not interfere with an election by promising liberal strike benefits if the union won despite the fact that the union did misrepresent the amount of the benefits. It stated that a promise of liberal strike benefits does not impair the free choice of employees as would misrepresentation of wage rates.

Charles T. Brandt Co.[209]—The Board determined that a union representative's conduct in transporting employees to the polls and being present near the polling place during the election does not warrant setting aside the election. There was no evidence of coercive statements, and transportation of employees to the polls was not improper conduct. But in *Alliance Ware Co.*[210] the union's operation of a sound truck and its broadcast of electioneering material during the period when the polls were open was found objectionable and the election was set aside.

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205 120 N.L.R.B. 1444, 42 L.R.R.M. 1182 (1958).

206 Supra note 194.

207 122 N.L.R.B. 1594, 43 L.R.R.M. 1341 (1959).

208 Lloyd A. Fry Roofing Co., supra note 170.

209 118 N.L.R.B. 956, 40 L.R.R.M. 1248 (1957).

210 92 N.L.R.B. 55, 27 L.R.R.M. 1040 (1950).

G. *Alleged Threats, Warnings and an Atmosphere of Fear*

Tampa Crown Distrib.[211]—In an election involving eight eligible voters, four voted for the union, three against and one ballot was unmarked. However, prior to the election two of the employees had received anonymous telephone calls threatening their children if they did not vote for the union. The Board held that it would not set aside an election in the absence of evidence showing threatening or coercive conduct attributable to one of the participating parties.[212] Yet it did state that it would do so if the character of the conduct is so aggravated as to create a general atmosphere of fear and reprisal rendering a free expression of choice impossible.[213]

The Court of Appeals for the Fifth Circuit did not agreé with the Board and held that there was an inference from the union's failure to make a denial that it was responsible for making the calls. In addition, a more conclusive result, according to the court, was attained by applying the "atmosphere of fear" test since the fear generated in the minds of two out of eight employees made it improbable, if not impossible, that the result of the election represented the employees' free choice. This was therefore sufficient to set the election aside.[214]

General Shoe Corp.[215]—Before the election, an employee received a letter erroneously informing her that she was ineligible to vote. The source of the letter could not be established, thus no interference was determined by the Board. Also the employer contended that the employees had been warned, during visits by a union representative to their homes, not to vote if they intended to vote against the union. The evidence actually revealed that the union representative told an employee he would drive her to the polls, but that if she intended to vote against the union, she need not bother to come. Another employee was told that if she didn't vote for the union, she should not vote at all; and a third employee was also asked not to vote under similar circumstances. The Board held that these statements contained no threat or warning and would not warrant setting aside the election.

Orleans Mfg. Co.[216]—Statements made by rank and file em-

211 118 N.L.R.B. 1420, 40 L.R.R.M. 1389 (1957).

212 See J. Spevak & Co., 110 N.L.R.B. 954, 35 L.R.R.M. 1170 (1954); White's Uvalde Mines, 110 N.L.R.B. 278, 34 L.R.R.M. 1640 (1954); Gruen Watch Co., supra note 200; Marman Bag Co., 103 N.L.R.B. 456, 31 L.R.R.M. 1562 (1953); J. J. Newbury Co., 100 N.L.R.B. 84, 30 L.R.R.M. 1234 (1952).

213 See Pointsett Lumber & Mfg. Co., 116 N.L.R.B. 1732, 39 L.R.R.M. 1083 (1955); The Falmouth Co., 114 N.L.R.B. 896, 37 L.R.R.M. 1057 (1955); Diamond State Poultry Co., 107 N.L.R.B. 3, 33 L.R.R.M. 1043 (1953).

214 Enforcement denied, 272 F.2d 470 (5th Cir. 1959).

215 123 N.L.R.B. 1492, 44 L.R.R.M. 1161 (1959).

216 120 N.L.R.B. 630, 42 L.R.R.M. 1016 (1958). See also Bronze Alloys Co., 120 N.L.R.B. 682, 42 L.R.R.M. 1047 (1958); W. A. Ransom Lumber Co., 114 N.L.R.B. 1418, 37 L.R.R.M. 1171 (1955).

ployees that the workers would be beaten or whipped if they did not join the union did not warrant invalidation of an election. Such a result might occur, the Board noted, if it could be shown that the speakers were so closely associated with the union that they had apparent authority in the eyes of the employees threatened. In addition an employee, who spearheaded the drive for the union, engaged in a heated argument with an anti-union employee who tried to persuade the former to change his position, ending finally in a threat to sue him. The union adherent told the other to "watch his step" and "not get in the way." In context, this was not held by the Board to constitute a threat and the results of the election were certified.

Kennametal, Inc.[217]—The petitioning union made reference to newspaper accounts of violence in a prior strike by the intervenor. The Board did not consider this interference inasmuch as it referred to a past strike and not to the present situation, which was completely devoid of violence. However, *Gabriel Co.*[218] produced a different result where the conduct objected to involved anonymous and persistent telephone calls of a threatening nature to five officials of union A. The scope of these calls, all of which were linked to union B adherents, revealed a systematic plan to inhibit union A's officials from asserting their leadership in the election campaign. In addition, there were threats of reprisal directed by union B adherents to union A committeemen and the tampering with machinery, as well as the reckless operation of a towmotor in such a manner as to endanger the lives of union A's officials, and the harrassment of them in the performance of their duties. There was no evidence, however, that the acts were committed by agents of union B rather than by its adherents. Nevertheless, this fact was not considered dispositive of the case since the setting aside of the election was warranted by the creation of an atmosphere of confusion and fear among the employees.

H. *Other Activities*

Harsh words or name calling are ordinarily insufficient grounds for setting an election aside. Accordingly, in *Felix Bonura*[219] the union-made statements, "If the boss is so nice, tell him to take the knife out of your back," or "the foreman will drop the words: 'If you keep playing with the union you will lose your jobs,' 'Do you think more of the union than you do of your jobs?' and 'Remember, the boss will try to short cut the law every time unless you know your rights,' " were found to be permissible campaign propaganda.

And in *Plant City Welding & Tank Co.*[220] the Board reiterated

217 Supra note 159.
218 137 N.L.R.B. No. 130, 50 L.R.R.M. 1369 (1962).
219 119 N.L.R.B. 1620, 41 L.R.R.M. 1359 (1958).
220 Supra note 202. See also E. I. Du Pont de Nemours & Co., 105 N.L.R.B. 710,

that interviews at the homes of employees by union representatives do not constitute objectionable interference with an election. Although individual interviews conducted by employers at the homes of employees immediately before the election have been held to constitute interference, the Board reasons that there is a substantial difference between the use of such tactics by employers on one hand and unions on the other. Unions, unlike the employers, not only have more need to seek out individual employees to present their views, but, more significantly, unions lack the relationship with employees which can interfere with their choice of representatives. Finally, it should be noted that the union, in conducting its home interviews, did not engage in coercive or threatening conduct, and thus the objections were overruled.

VI. Conclusion

The above sampling of Board cases has been presented in order to acquaint the reader with some of the issues confronting the Board in this area. Unfortunately, in highlighting the above factual situations, all of the details could not be set forth.

The United States Supreme Court has pointed out that the "control of the election proceeding and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone."[221] In discharging this function the Board evaluates the particular conduct under consideration against the entire pattern of circumstances attending the election. It is in this total context that the Board exercises its broad discretion.

In the field, the professional staff under the direction of their General Counsel, Stuart Rothman, whose office last year handled over 25,000 cases of all types, are acutely aware of the realities under which these issues arise and extremely sensitive to the impact which the subtleties and techniques of campaign propaganda have upon the employees concerned. In Washington the five man Board under the capable guidance of its Chairman, Frank W. McCulloch, laboriously examine every facet of each individual situation before rendering decision, in a conscientious effort to carry out these responsibilities entrusted to it by Congress. Engrossed as it is in its decisional functions, both as to matters relating to unfair labor practices and representation cases, on a day to day, case by case basis, the Board is properly accorded respect and recognition for its expertise by the courts which review its findings.

It has been stressed throughout this article that because of

33 L.R.R.M. 1249 (1954); Canton, Carp's., Inc., 127 N.L.R.B. 513, 46 L.R.R.M. 1049 (1960).

[221] See NLRB v. A. J. Tower Co., 329 U.S. 324 (1946); NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940). For the scope of authority of the Court of Appeals, see Universal Camera Corp. v. NLRB, supra note 174.

factual differences and ever-changing developments, any given case is of uncertain precedent value. As Board Member Brown pointed out,[222] while it is possible to classify Board cases in accordance with predetermined classifications, the cases "must be decided on their own facts and not according to some formula," and in discussing the subtleties which abound in the area of pre-election activities, he stated:

> It would seem elementary that the institutions of collective bargaining can be most effectively promoted by bringing the full force of the law to bear at a time when employees are most in need of protection—that is prior to the establishment of a bargaining relationship. Indeed, no relationship may ensue unless employees are guaranteed the opportunity to exercise their statutory right freely to select or reject an exclusive bargaining representative.

It is in this context that the totality of conduct in each individual case must be viewed.

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222 Address, Recent Trends in N.L.R.B. Decisions, by Board member Gerald A. Brown, Feb. 1, 1963.