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General Knit Revives Hollywood Ceramics; The NLRB Again Prohibits Campaign Misrepresentations

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General Knit Revives *Hollywood Ceramics*; The NLRB Again Prohibits Campaign Misrepresentations

After a relatively brief departure from its prior policy of insuring against material misrepresentation in connection with pre-representation election campaigning, the NLRB has adopted a standard of review which will again require that a representative election be set aside when the dissemination of misleading campaign propaganda creates an atmosphere nonconducive to the exercise of informed employee free choice. The author traces this circular history, highlighting the change in attitude which has led the Board to return to a more protective approach to the problem of pre-election misrepresentation.

I. INTRODUCTION

In the area of labor elections the question of how truthful the union and the employer must be in their respective pre-representation election campaign propaganda has now revolved a full circle with the decision in *General Knit of California*.[1] The resolution of this case left many observers uncertain as to the future of labor relations.[2]

The National Labor Relations Board has traditionally provided standards concerning conduct during the pre-election campaign period.[3] One such standard is the prohibition of unduly coercive conduct and misrepresentations that tend to disturb the employee's freedom of choice.[4] In balancing the competing interests of the election process (*i.e.*, free speech vs. honest information) the Board has long been faced with the question of whether or

1. General Knit of California, Inc., 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (Dec., 1978).

2. *See e.g.* NLRB v. Mosey Mfg. Co., 100 L.R.R.M. 3134, (April, 1979), where the 7th Circuit Court of Appeals remanded to the Board, refusing retroactive application of a standard to be employed in light of "the great flux" of law on this issue.

3. Congress established the NLRB to administer and to enforce the Act, their two main functions being to conduct representation elections and certify the results, and to prevent employers and unions from engaging in unfair labor practices.

4. Actually, there are two types of conduct which can result in having an election set aside, one being misrepresentation as to the Board's election process itself and the other being improper campaign tactics. The latter is the subject of this article. *See* §§ 7-8 of NLRA as well as § 1 which contemplates freedom of choice in selecting a bargaining representative.

not material misrepresentations of fact, without an adequate opportunity for the other side to respond, provide a sufficient basis to set aside an election.[5]

The rule in *General Knit*, which readopts the earlier position of *Hollywood Ceramics*,[6] would prohibit misrepresentations that would vitiate the employee's free choice. Since this would require the Board to take a closer look at the facts of each case, some commentators assert that the result will be a delay and impairment of bargaining.[7]

An examination of the principles of free choice as well as of the relevant cases before and after *General Knit* is warranted to understand the representation campaign process in labor elections.

II. History of NLRB Elections

In the 1948 case of *General Shoe Corporation*,[8] the Board discussed the policy behind the employee's right to freedom of choice in labor elections when it stated:

> Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election . . . our consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative. Because we 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. The question is one of degree.[9]

Thus, the Board formulated what has become known as the "laboratory conditions" test.[10] Its purpose is to provide a satisfac-

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5. The NLRB does not attempt to determine whether the conduct actually interfered with the employee's expression of free choice, but rather looks to see if the conduct tends to do so. *See* U.S. Govt. A Guide to Basic Law & Procedure Under the NLRB (1976).

6. Hollywood Ceramics Co., Inc., 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962). The test requires (a) misrepresentation of a material fact involving a substantial departure from the truth (b) made by a party with special knowledge of the truth (c) communicated so shortly before the election that the other party has insufficient time to correct it and (d) involving facts which the employees are not in the position to know the truth. *See* Peerless of America, Inc. v. NLRB, 576 F.2d 119, 123, 98 L.R.R.M. 2471 (7th Cir., 1978).

7. *See* Board Members Penello & Murphys' dissent in General Knit, *supra*.

8. 77 N.L.R.B. 124 (1948), *see also* Matter of P.D. Gwaltney, Jr., and Co., Inc., 74 N.L.R.B. 371 (1947).

9. *Id.* at 126. The Board rejects the view of the dissent which would apply the same standard in a representation election (where misrepresentations have allegedly interfered with the employee's free choice) as that used in testing whether an unfair labor practice was committed (although the majority felt the result would be the same here).

10. In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish these conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare case, the

tory environment in which the election "experiment" may take place.

One of the first significant cases in this area following *General Shoe* was the *Gummed Products*[11] case, a 1955 decision in which the union had issued a handbill containing erroneous statements about the employer's wage rates as compared with other companies represented by the union. The union's first handbill was distributed one week before the election, and the employer had made an attempt to respond, but the union countered with a second handbill which characterized the employer as "a liar." It was the Board's view that:

> The Board will not normally censor or police pre-election propaganda by parties to an election, absent threats or acts of violence. However, as indicated in *United Aircraft*[12] the Board has imposed some limits on campaign tactics. Exaggerations, inaccuracies, partial truths, name-calling, and falsehoods, while not condoned, may be excused as legitimate propaganda, provided 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 the point where it can be said that the uninhibited desires of the employees cannot be determined.[13]

Accordingly, the Board found the prohibited impairment of free choice and ordered a new election. The number of cases following the *Gummed Products* precedent are quite numerous.[14]

Another major development which reinforced the principles of *General Shoe* and *Gummed Products* was the 1962 *Hollywood Ce-*

> standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

Id. at 127.

11. 112 N.L.R.B. 1092, 36 L.R.R.M. 1162 (1955), *see also* Thomas Gouzoule, et. al.d/b/a The Calidyne Co., 117 N.L.R.B. 1026, 39 L.R.R.M. 1364 (1957).

12. *See* United Aircraft Corp., Pratt & Whitney Aircraft Div., 103 N.L.R.B. 102, 104, 31 L.R.R.M. 1437 (1953), where campaign materials misidentified the originator. *See also* The Timken-Detroit Axle Co., 98 N.L.R.B. 790, 29 L.R.R.M. 1401 (1952).

13. Gummed Products, 112 N.L.R.B. at 1093-94. *See also* Comfort Slipper Corp., 112 N.L.R.B. 183 (1955); Merck & Co., Inc., 104 N.L.R.B. 891, 892, 32 L.R.R.M. 1175 (1953).

14. NLRB v. Southern Paper Box Co., 473 F.2d 208 (8th Cir. 1973) (falsely asserting that the employer's president used the employees' bonus money to finance his European vacation); Walled Lake Door Co. v. NLRB, 472 F.2d 1010 (5th Cir. 1973) (imposter representing employees at other employer's plants); Tyler Pipe & Foundry Co., 161 N.L.R.B. 784 (1966) (grossly exaggerating profits); The Trane Co., 137 N.L.R.B. 1506 (1962) (overstating the amount of union dues); The Cleveland Trencher Co., 130 N.L.R.B. 600 (1961) (misstatements about significant fringe benefits). For an extensive analysis of these and other problems, *see* Jackson & Lewis, *Winning NLRB Elections*, PRACTICING L. INST. (1972).

ramics case.[15] The facts here were strikingly similar to those in *Gummed Products*: the union had distributed a leaflet purporting to compare wage rates at other union ceramic plants with those of the employer. The leaflet was distributed on the day before the election containing numerous exaggerations and inaccuracies.[16] The Regional Director found that the content of the handbill was such that the employees could evaluate it and discount its propaganda effect. The Board overruled and ordered a new election,[17] reiterating the basic policy of free choice:

> It is obvious that where employees cast their ballots upon the basis of a material misrepresentation, such vote cannot reflect their uninhibited desires, and they have not exercised the kind of choice envisaged by the Act. For this reason the Board has refused to certify election results where a party has misrepresented some material fact, within its special knowledge, so shortly before the election that the other party does not have time to correct it, and the employees is [*sic*]not in the position to know the truth of the facts asserted.[18]

The Board went on to discuss the practical realities of the election process[19] and suggested that a balancing of the employee's right to a free and unfettered choice and the right of both parties to conduct a vigorous campaign must be met to insure equality in the election process:

> However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside. Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon a consideration of all the circumstances that the statement would not likely have a real impact on the election.[20]

Although the *Hollywood Ceramics* "test" had been the subject of much debate and criticism,[21] the Board stated in 1973 that

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15. 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962).

16. The described hourly rates for respondent/employer's plants did not take into account an existing incentive plan, while the rates at the other union ceramic plants did. Also, the Regional Director found that the two "other plants" used to compare were in fact not truly comparable as to operations or the skill-level required. *Id.* at 222-23.

17. The Board stated that if the names of the "other plants" had been disclosed, the employees would have had a basis for evaluating the dissimilarity. *Id.* at 225.

18. *Id.* at 223.

19. We are aware that absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by the employees. Election campaigns are often hotly contested and feelings frequently run high. At such times a party may, in its zeal, overstate its own virtues and the vices of the other without essentially impairing "laboratory conditions." *Id.* at 223-24.

20. *Id.* at 224. *See also* Dartmouth Finishing Co., 120 N.L.R.B. 262, 266, 41 L.R.R.M. 1483 (1958); Celanese Corp. of America, 121 N.L.R.B. 303, 307, 42 L.R.R.M. 1354 (1958).

21. For an excellent discussion *see* Modine Mfg. Co. v. NLRB, 203 N.L.R.B. 527,

notwithstanding the inherent dangers of the *Hollywood Ceramics* uncertainties and the resulting increase in litigation, we are not yet ready to leave the voters to sort out, with no protection from us, from among a barrage of flagrant deceptive misrepresentations.[22]

Just three years later, however, the Board abandoned *Hollywood Ceramics* and adopted an opposite view in the *Shopping Kart* decision.

III. *SHOPPING KART* OVERRULES *HOLLYWOOD CERAMICS*

In performing its function of establishing policies and procedures to safeguard the conduct of representation elections, the Supreme Court has "long recognized the wide degree of discretion that must be afforded the NLRB."[23] In 1977, exercising this discretion, the Board re-evaluated the standards of *Hollywood Ceramics* and decided that "henceforth the Board would cease to inquire into the truth or falsity of campaign statements." In doing so, the court created the foundations of the *Shopping Kart* rule.[24]

The Board in *Shopping Kart* was confronted with a familiar set of facts; the union representative had told employees on the day before the election that their employer had profits ten-fold over the actual amount.[25] The Regional Director concluded that this statement was not a material misrepresentation because there was no evidence that the union representative could have had knowledge concerning the employer's profits. The Board agreed.[26]

In re-evaluating the *Hollywood Ceramics* rule the Board felt that instead of promoting employee free choice, the practical effect of the rule was to impede this goal, stating that the rule restricted free speech, created a variance in application between the Board and the courts due to its subjective nature, increased litiga-

529-30 (1973), *enforced* 500 F.2d 914 (8th Cir. 1974). *See also* Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224, 1229 (1974).

22. Modine Mfg. Co., 203 N.L.R.B. at 530.

23. NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946), *accord*, NLRB v. Wyman Gordon Co., 394 U.S. 759, 767 (1969).

24. Shopping Kart Market, Inc., 228 N.L.R.B. 1311, 94 L.R.R.M. 1705 (1977).

25. An official of the Retail Clerks Union told the employees that their employer (Shopping Kart Food Market, Inc.) had profits of $500,000 during the past year, whereas, actual profits were $50,000. *Id.* at 1311.

26. The Board agreed even though the union representative in question was the union's vice-president and business representative. *Id.*

tion, and provided a delay tactic for the losing party.[27]

IV. *General Knit* Revives *Hollywood Ceramics*

Within twenty months from *Shopping Kart's* controversial reversal of *Hollywood Ceramics*, the Board reversed itself *again* giving new life to the highly protective standards of *Hollywood*.

In *General Knit*, the union made last minute misrepresentations as to the financial condition of the employer.[28] The union subsequently won a close election.

The NLRB's Regional Director found no egregious mistake of fact even assuming the ambiguous phrase "This Company" referred to *General Knit* rather than its parent corporation.[29] However, the Board was apparently disturbed by the manner in which the union had conducted itself, stating that "after much thought we have decided that the principle expressed in the majority opinion in *Shopping Kart* is inconsistent with our responsibility to insure fair elections."[30]

Instead of allowing the employees to sort out the truth or falsity of campaign propaganda the Board has again decided to lend its protection in an effort to insure free choice based upon honest campaign statements.[31]

V. Analysis

The Board in the *Shopping Kart* decision put much emphasis on Professor Bok's treatise on campaign tactics[32] as well as on studies by various behavioral scientists,[33] both of which attempt to characterize the review of representation elections as a "quagmire of inconsistencies being too subjective to reach any kind of certainty" under the "vague and flexible standards" of *Hollywood Ceramics*.[34]

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27. *Id.* at 1312.

28. In relevant part said: "WHO IS FOOLING WHO??? GENERAL KNIT CAN CRY POOR MOUTH IF THEY WANT, BUT LET'S LOOK AT THE FACTS. IN 1976 GENERAL KNIT HAD SALES OF $25 MILLION. GENERAL KNIT IS OWNED BY ITOH WHO HAS A NET WORTH IN EXCESS OF $200 MILLION. THIS COMPANY HAD AN INCREASE OF 12.5% IN SALES FOR PERIOD ENDING MARCH 31, 1977. DURING THIS PERIOD THIS COMPANY HAD A PROFIT OF $19.3 MILLION." General Knit of California, Inc., 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (Dec., 1978).

29. General Knit is a subsidiary of I.T.O.H. *Id.* at 1688.

30. *Id.*

31. However, the Board has constantly restated that not every misrepresentation will cause an election to be set aside, *see* note 19, *supra*.

32. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the NLRA*, 78 Harv. L. Rev. 38, 85 (1964).

33. *NLRB Elections: Uncertainty and Certainty*, 117 U. Pa. L. Rev. 228 (1968).

34. *Id.*

While it is certainly possible that the Board's application of the principles in *Hollywood Ceramics* could cause delay, it is noted that *only 7%* of referred cases are sent back for re-election. This would seem to indicate that no real delay results from a "routine objection."[35]

The majority in *Shopping Kart* gave much credence to a study of NLRB elections by Professors Getman and Goldbert,[36] which concluded that an employee's *pre-campaign intent* was the determinative factor in representation elections, not the campaign strategies that precede the election.[37] However, the dissent questioned the validity of the behaviorial studies,[38] stating that the failure to review campaign misrepresentations will surely bring out the worst in campaign strategies, "tending to drive out the responsible statement."[39]

Apparently, the crucial factor in adopting *Shopping Kart* was a new perception by the Board that employees need protection:

> Despite the many difficulties in administering the *Hollywood Ceramics* rule, we, too, would nevertheless choose to continue to adhere to it if we shared the belief that employees needed our "protection" from campaign misrepresentations. However, we do not find this to be the case. . . . Implicit in such an assumption (that misleading propaganda will interfere with free choice) is a view of employees as naive and unworldly whose decision on as critical an issue as union representation is easily altered by the self-serving campaign claims of the parties. . . . Rather, we believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.[40]

Apparently, the distinctions made under both *Hollywood Ceramics* and *Shopping Kart* are, indeed, matters of degree. The majority in *General Knit* stated that even though *most* employees will be able to discern *most* of the propaganda, "no matter what

35. 228 N.L.R.B. at 1316.

36. Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STANFORD L. REV. 263 (1976); UNION REPRESENTATION ELECTIONS: LAW AND REALITY, (1976).

37. *See* Brotslaw, *Attitude of Retail Workers Toward Union Organization*, 18 LAB. L.J. 149 (1967).

38. Only 31 elections were studied by Getman and Goldberg. Also, Board Member Jenkins points out several inconsistencies in the study which he believes the majority relied on "quite extensively, perhaps solely." 228 N.L.R.B. at 1318.

39. *Id.* at 1316. It should be noted that upon the reversal of *Shopping Kart* in *General Knit*, Member Penello lashed out a vigorous dissent, accusing the majority of "a four-fold misrepresentation" in their treatment of the previously mentioned behaviorial studies. The majority, however, viewed the disparagement as being one of interpretation of the data, not the data itself. *See* 99 L.R.R.M. at 1690.

40. 228 N.L.R.B. at 1313.

the ultimate sophistication of a particular electorate, there are certain circumstances where a particular misrepresentation may materially affect an election."[41] The re-adoption of *Hollywood Ceramics* will not only lend protection to those employees who may not be able to discern the truth or falsity of campaign statements, but will also provide both parties with a viable means of redress in those few cases[42] where one of the parties feels that the "laboratory" was unclean. The *Hollywood Ceramics* standard will insure an effective deterrent as well as further legitimizing the electoral process.[43] The Board in *Hollywood Ceramics* stated: "Our dissenting colleagues argue that the decline in the number of objectives based on alleged misrepresentations demonstrates *Shopping Kart's* success. In our view, a rule which merely eliminates a certain classification of cases, at the expense of an important principle, is not a success."[44]

Board Member Murphy, in her dissent in *General Knit*, apparently weighed the speediness aspect of elections more heavily than the right to a free choice based upon a "clean laboratory" when she stated: "Naturally, I agree with the new majority that the Board has a responsibility to insure fair elections * * * but I believe that the practical effect by returning to *Hollywood Ceramics* will be a simultaneous abrogation of the more fundamental duty—speedy elections."[45] The majority disagreed, however, declaring that: "We would not, as our dissenting colleagues seem to do, place a greater value on expediency of case processing than on maintaining standards to preserve the integrity of the electoral process."[46]

VI. Conclusion

In light of the seemingly whimsical changes in policy, it appears that the *General Knit/Hollywood Ceramics* rule is the better route to insure fair elections and to preserve the ideal "laboratory conditions" first espoused in the *General Shoe* case, even at the possible expense of some minimal delays.[47]

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41. 99 L.R.R.M. at 1689.

42. In 1976 there were 8,899 elections, approximately 90% of which (7,982 cases) went unchallenged, 41 N.L.R.B. Ann. Rep. 231, (1976).

43. After *Shopping Kart* the Board received over 180 cases raising the same objections based upon campaign misrepresentations. "This fact indicates that both parties still perceive a need for Board review in this area." 99 L.R.R.M. at 1689.

44. *Id.*; *see also* note 13, *supra*.

45. *Id.* at 1699-1700.

46. *Id.* at 1691.

47. As previously noted, under *Hollywood Ceramics* standard only approximately 10% of all elections were contested, thus the weakness of the "delay tactic" argument is apparent. Neither side will waste time and money going through the

Clearly, balancing of all the various factors is warranted, and necessary to clarify the practicalities of the representation election. Perhaps the ill-fated rule in *Shopping Kart* can best be viewed as a learning experience for the NLRB.

In preserving the principles of the NLRB it is crucial to sift through the camouflage[48] and observe the labor/management relationship as it really exists.[49] During the fervor of campaigning there is the potential on both sides to make misrepresentations as to the character and/or factual record of the other. The refusal of the Board to inquire into the "truth or falsity of campaign propaganda" would serve only to put a premium on bad faith, at a time when the NLRB is striving to achieve an "ideal environment" for an informed (not misinformed) election.[50] The re-adoption of *Hollywood Ceramics* is surely a move to protect the employee as well as to maintain the principles of the NLRA.

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objection procedure (without a valid point to contest) knowing that only 7% of those contested will be sent back. *See* 228 N.L.R.B. at 1619.

48. Assuming, *arguendo*, the validity of the behavioral studies, a question evolves regarding the amount of weight to be given in balancing § 7 rights. *But see, How To Lie With Statistics*, (1954).

49. 228 N.L.R.B. 1619.

50. Supporting this position by analogy is the reform of current laws which encourage honesty in campaign tactics. Examples are: "truth in lending, truth in advertising, freedom of information, and financial disclosures in political campaigns." Examples in labor law are: the requirements of disclosure of eligibility lists for the purpose of an informed electorate (the Excelsior Rule) and the prohibition of speeches by either side on company time within 24 hours before election. Peerless Plywood Co., 107 N.L.R.B. 427, 33 L.R.R.M. 1074 (1954). *See* L. GREENBERG, HOW TO TAKE A CASE BEFORE THE NLRB, 136-38 (3d ed., 1967).