Behavioral and Non-Behavioral Approaches to NLRB Representation Cases

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NOTES

BEHAVIORAL AND NON-BEHAVIORAL APPROACHES TO NLRB REPRESENTATION CASES

The National Labor Relations Board justifies its representation election campaign regulations as necessary to protect employee free choice.¹ In ascertaining whether any impediments to employee choice were present during a campaign, the Board scrutinizes employer and union campaign tactics and propaganda to determine their effect on employee voting behavior.² This behavioral inquiry presupposes knowl-


Furthermore, Section 7 of the Act provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .


Section 9(c)(1) states in part: "If the Board finds . . . a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Id. § 9(c)(1), 29 U.S.C. § 159(c)(1).

The Supreme Court has interpreted § 9(c)(1) to mean that the Board alone possesses the authority to determine the steps necessary to conducting a fair election. NLRB v. Waterman Steamship Corp., 309 U.S. 206, 226 (1940).

The Board's conception of its function is "to conduct elections in which employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise." To achieve this atmosphere the Board has established and enforced standards of campaign conduct. Sewell Mfg. Co., 138 NLRB 66, 70 (1962). See also General Shoe Corp., 77 NLRB 124 (1948). Even if an unfair labor practice has not been committed, when the requisite atmosphere is not present, the Board will set aside the election and direct a new one. Automotive Controls Corp., 165 NLRB No. 43 (June 13, 1967); Dal-Tex Optical Co., 137 NLRB 1782 (1962); Great Atlantic & Pacific Tea Co., 120 NLRB 765 (1958); Diamond State Poultry Co., 107 NLRB 3 (1953). The NLRB justifies its rules "solely in terms of need for protecting the voters from improper influence." Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. L. Rev. 38, 45 (1964).

2. The Board stated in The Liberal Market, Inc., 108 NLRB 1481, 1482 (1954) that it must scrutinize events preceding an election, and, when the need arises, must itself step in and overturn the election. . . . In deciding whether the registration of a free choice is shown to have been unlikely, the Board must recognize that Board elections do not occur in a laboratory where controlled or artificial conditions may be established. We seek to establish ideal conditions insofar as possible, but we appraise the actual facts in the light of realistic standards of human conduct. . . . In this connection, we note that a realistic appraisal of the effect of antecedent conduct upon a Board election must, of course, be concerned with particular acts and their effect upon those of the voters who are directly involved; it must also be concerned, however, with the overall picture
edge of employee response to campaign conduct. In its opinions, however, the Board often fails to articulate the behavioral evidence supporting its conclusions and appears merely to speculate on employee responses. These speculations are based upon questionable, if not invalid, assumptions about human behavior. Non-behavioral analyses which the Board occasionally uses avoid such speculation by focusing on ascertainable facts rather than behavioral assumptions as reasons for its rulings. This

of how the totality of the conduct affects not only the voters directly involved, but any others who may or may not be indirectly affected because they are within the voting unit.

3. The Board postulates that, if unimpeded, employees will make a free and reasoned choice for or against union representation. Sewell Mfg. Co., 138 NLRB 66 (1962). An employee's choice is free if it expresses his free will or uninhibited desires. Stem Bros., 87 NLRB 16 (1949); General Shoe Corp., 77 NLRB 124 (1948). A reasoned choice involves a complex means-end analysis to ascertain for whom to vote. Employees ponder the positive and negative consequences of unionization, assign values to them and then vote in accordance with their decision as to which alternative is most likely to accomplish their end. Note, Employee Choice and Some Problems of Race and Remedies in Representation Cases, 72 YALE L.J. 1243 (1963).

What the Board says, however, is not always what it does. As one commentator has said, the Board's election controls assume "that workers are generally like amoebas—unthinking, unfeeling, passive, and reactive—easily swayed, unable to evaluate, and susceptible to propaganda, promises and blandishments." Samoff, NLRB Elections: Uncertainty and Certainty, 117 U. PA. L. REV. 228, 235 (1968).

4. In evaluating the interference resulting from specific conduct, the Board does not attempt to assess its actual effect on employees, but rather concerns itself with whether it is reasonable to conclude that the conduct tended to prevent the free formation and expression of the employees' choice. In making this evaluation, the Board treats each case on its facts, taking an ad hoc rather than per se approach in resolution of the issues.


5. The hazards of speculation about human behavior were indicated by Lazarsfeld's sample list of typical survey findings. Readers might observe their own reaction to the statements:

I. Better educated men showed more psycho-neurotic symptoms than those with less education. (The mental instability of the intellectual as compared to the more impulsive psychology of the man-in-the-street has often been commented on.)

II. Men from rural backgrounds were usually in better spirits during their Army life than soldiers from city backgrounds. (After all, they are more accustomed to hardships.)

III. Southern soldiers were better able to stand the climate in the hot South Sea Islands than Northern soldiers (of course, Southerners are more accustomed to hot weather).

IV. White privates were more eager to become non-coms than Negroes. (The lack of ambition among Negroes is almost proverbial.)

V. Southern Negroes preferred Southern to Northern white officers. (Isn't it well known that Southern whites have a more fatherly attitude toward their "darkies"?)

VI. As long as the fighting continued, men were more eager to be returned to the states than they were after the German surrender. (You cannot blame people for not wanting to be killed.)

Each of these statements seems correct, but every one of them is the direct opposite of what was actually found. Lazarsfeld, The American Soldier—An Expository Review, 13 PUB. OPIN. Q. 377, 379-80 (1949).
note examines the Board's behavioral and non-behavioral approaches to representation cases. It concludes that the Board either should articulate the evidence supporting its behavioral conclusions or, abandoning this approach, adopt exclusively a non-behavioral approach to representation election campaign regulation.

THE BEHAVIORAL APPROACH

A statement of the standard by which the Board draws distinctions between temperate and intemperate campaign appeals can be found in Storkline Corp., where the Board stated that campaigns "keyed" to instilling in employees' minds fear of strikes, physical violence and loss of jobs as a consequence of selecting a union constituted grounds for setting aside the election. The difficulty with this standard is illustrated by its application in subsequent cases.

In General Industries Electronics Co., an election was set aside because the employer's speeches, letters, and posters, when aggregated, amounted to a clear message that unionization could lead only to strikes, violence, and loss of jobs. During the campaign, the employer stated that the union "can get you less than you have" and that "the only way that the union can try to force the company to agree is to make you go out on strike." Posters portraying union strike violence also were used.

Eight days later, in American Greetings Corp., the Board found the employer's campaign references to strikes, violence, and loss of jobs permissible because they "were factual and temperate in tone, . . . were relevant to the election issues before the employees," and had been refuted by the union. During the campaign, the employer sent out a letter which discussed a strike in which employees lost their jobs to replacements. Accompanying the letter was a newspaper photograph of two female strikers walking the picket line captioned: "9 Months Later—
The Fun is Gone—So Are Their Jobs!"17 The employees also were sent a letter which asked whether they wanted their “home shot up,” “chunks of concrete thrown through the windows of their homes,” or their “automobile[s] shot up.”18 In addition, the employer reported an offer by an insider to “bust up” the union for a price and lampooned the union organizer’s promises by passing out play money.19

It is difficult to understand how the employer’s statements in General Industries Electronics are more fear evoking than the statements in American Greetings. Certainly a letter asking employees if they want their homes and cars “shot up” and a newspaper photograph connecting unions with strikes and strikes with loss of employment is keyed to instilling fear in employees’ minds at least as much as posters depicting strike violence and a statement that it will be necessary to strike in order to obtain company agreement.

To reach opposite results in these cases, the Board had to distinguish the impact on employees of practically equivalent conduct.20 The decisions seem to represent a point at which campaign appeals to fear impede employee choice. This interpretation would be consistent with the Board’s view that the stronger the appeal to fear the more likely it will interfere with employee free choice.21 The validity of this assumption is disputed by empirical studies which show that persons tend to reject strong fear appeals and are persuaded more by temperate ones.22 Aside from the doubtful accuracy of its behavioral assumption, the Board does not cite any evidence upon which it could conclude that in General Industries Electronics the campaign appeal interfered with employee choice while in American Greetings it did not. What the Board seems to do is to characterize propaganda in accordance with its conclusion without explaining how it arrived at the conclusion.23

17. Id.
18. Id. at 1446.
19. Id. at 1442-43.
20. See note 2 supra.
21. The Board expressed this view forcefully in Thomas Products Co., 167 NLRB No. 106 (Feb. 6, 1968):

... the more the employer persists in referring to strikes and what they might entail—replacement, violence, unemployment, walking picket lines, unpaid bills—the more the employee is likely to believe that the employer has already determined to adopt an intransigent bargaining stance which will force employees to strike in order to gain any benefits. ... Power can persuade and substantial power can persuade substantially. ... When comments such as these are delivered by men in positions to affect permanently the lives of the listeners, they are not lightly received.

22. Strong appeals to fear tend to induce less change in attitude than low fear appeals; they may even boomerang. See studies described in E. Jones & H. Gerard, Foundations of Social Psychology, 459-67, 500-02 (1967).
23. For example the majority in American Greetings, 146 NLRB 1440, 1442, in-
The majority in *American Greetings* regarded as an important factor the union’s rebuttal of the employer’s campaign. But the majority in *Storkline* failed to discuss the union’s campaign in its opinion, although it asserted in a footnote that it had considered both the employer’s and union’s campaign propaganda. Nonetheless one suspects, as did the dissenter, that the majority “considered the Employer’s campaign matter only in terms of selected passages and paragraphs without regard to the total election campaign.” In *General Industries Electronics* neither the majority nor the dissent discussed the union’s utilization of an opportunity to rebut the employer’s statements. Thus, the union’s rebuttal was an added factor in *American Greetings* based upon the assumption that appeals to fear can be dissipated by arguments from the other side. However, the dissent in this case asserted that appeals to fear cannot be so dissipated.

The factors which, when emphasized, support the Board’s conflicting decisions are: separate consideration of the various aspects of the employer’s campaign; viewing the employer’s campaign as a whole; and consideration of the campaigns of both the employer and the union, noting particularly the union’s use of its opportunity to rebut. There are at least two difficulties with the Board’s approach. First, that strong appeals to fear are more persuasive than temperate ones is a doubtful behavioral assumption. In addition, the Board’s inconsistent emphasis on different aspects of the campaign in different cases suggests that the Board does not know what factors are behaviorally significant in employee choice.

On election eve, the union in *Walgreen Co.* distributed a handbill which purported to indicate composite wage and vacation benefits obtained for all union members employed by the company. Only one group of employees had in fact received the wage increase. The Board set aside the election since it believed the misrepresentation interfered with employee choice. The NLRB argued that wages and vacation benefits are important
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considerations in the employees' deliberations. Furthermore, it was noted that the employees themselves had no way of learning the truth; they would not readily question the union's credibility since it appeared to be an authoritative source concerning its members' wages and the employer did not have an opportunity to respond to the union's misstatement.

The majority noted that, because of the proximity of their workplaces, employees were likely to have had contact with union members who had received the wage increase, thus lending credence to the union's claim. The dissenter argued that this fact indicated the employees themselves possessed the information necessary to evaluate correctly the

29. In determining whether a message containing a misrepresentation is likely to have had an impact on the employees' voting decision, the Board considers what was said in light of all the circumstances. Hollywood Ceramics Co., 140 NLRB 221 (1962). The Board suggests that assertions by the employer or the union concerning certain concrete issues tend to have an impact on employee behavior. In Smith Industries, Inc., 178 NLRB No. 46 (August 29, 1969), the union circulated a handbill which contained three misrepresentations. The Board set aside the election because it found material the union's false assertion that it had negotiated a Christmas bonus in a contract with another company since it involved a wage-related subject. But it found insubstantial the statement that a competitor's employees had received a 42-cent hourly wage increase which failed to specify that it took effect incrementally over a three-year period and an erroneous description of a job classification. These conclusions imply an exact knowledge of the impact of particular facts on employees' voting decisions. The results, however, appear merely to be speculative since the Board never explains the basis for its conclusions. The Board also has set aside elections where, for example, the misrepresentation involved wage rates: Steel Equipment Co., 140 NLRB 1158 (1963); Walgreen Co., 140 NLRB 1141 (1963); Hollywood Ceramics Co., 140 NLRB 221 (1962); Gummed Products Co., 112 NLRB 1092 (1955); the source of derogatory literature: United Aircraft Corp., 103 NLRB 102 (1953); Timkin-Detroit Axle Co., 98 NLRB 790 (1952); and the amount of union dues: The Trane Co., 137 NLRB 1506 (1962).

But the Board has refused to set aside elections where it decides that the misrepresentation involved an issue unlikely to have an impact on employees. National Waterlift Co., 175 NLRB No. 135 (May 2, 1969) (failure to include seven-cent cost-of-living increase in wage rates of one company in a wage comparison); Holite Mfg. Co., 146 NLRB 385 (1964) (union's misleading and inaccurate statements of wages achieved for its members and of lows which assure that not one benefit will be lost in negotiations).

30. The effect of material misrepresentations can be dissipated by the dissemination of accurate information since the employees then would be able to evaluate the statements. In Convalescent Hospital Mgt. Corp., 173 NLRB No. 7 (Sept. 27, 1968), for example, the Board found that the employer had sufficiently corrected the union's misrepresentation concerning wages negotiated by a rival union by disseminating the true facts. The assumption implicit in these decisions is that employees who probably have only a high school education or less have the ability and inclination to use prior knowledge critically to examine and refute misrepresentations.

31. Employees themselves may possess information which refutes a misrepresentation. In Cross Co., 123 NLRB 1503 (1959), for example, the Board expressed the belief that the employees' familiarity with the employer's seniority and recall policies enabled them to evaluate the union's misrepresentations concerning a layoff which occurred nine years earlier before most of them were employed by the company. In York Furniture Corp., 170 NLRB No. 169 (April 16, 1968), the Board held that, even though the union was unable to respond to the employer's misrepresentations about an increase in union dues, employees themselves could have asked the union about the issue and, regardless, could have evaluated the remark as campaign propaganda.
union's claim. Without any evidence of the actual impact of the mis-
representation on employees, both presumed an effect. The fact that either
effect is possible indicates the inadequacy of this approach. The decision
is not compelled by the facts; indeed, the decision is not based on fact. It
is based upon an assumption as to whether employees possessed particular
information and, if so, whether they used it rationally to evaluate the
statements of others.

In Livingston Shirt Co.,\textsuperscript{32} the Board upheld the employer's right to
deliver to employees on company time and premises a non-coercive anti-
union speech without granting the union an equivalent opportunity. The
majority believed that the media available to the union were fully
adequate.\textsuperscript{33} But in \textit{May Co.},\textsuperscript{34} it held that a retailer who, similarly,
delivered a captive audience speech had to grant the union an equivalent
opportunity. Since the peculiar circumstances of a retail business allowed
the retailer to enforce a broad ban on employee discussion of unionization
on his premises, the majority believed that the normal effectiveness of the
union's media had been diminished.\textsuperscript{35}

The problem with these decisions is that the Board does not possess
the means for determining the effectiveness of the media. Lacking such
means it is not surprising that Board members disagree on the outcome
of these cases. The majority in \textit{Livingston} pointed to the general success
of a union in organizing employees as evidence of the adequacy of that
union's media.\textsuperscript{36} The dissenter cited Board experience, union organization
manuals, and law review references to social science findings as evidence
of the inadequacy of the union's media.\textsuperscript{37} The majority in \textit{May Co.}
proffered as evidence its belief that on-the-job discussion of union re-
presentation is vital to providing employees with information.\textsuperscript{38}

\textsuperscript{32} 107 NLRB 400 (1953).
\textsuperscript{33} Media available to the union include personal contacts, speeches at the union
hall, handbills, leaflets and other printed material, and mechanical equipment such as
sound trucks. \textit{Cf. Id.}
\textsuperscript{34} 136 NLRB 797 (1962).
\textsuperscript{35} Retailers are permitted to enforce broad no-solicitation rules because the dis-
cussion of unionization on working premises, during an employee's working or non-
working hours, would interfere with customer purchases. See Marshall Field & Co.,
98 NLRB 88 (1952). Normally, such discussions are permitted on working premises
\textsuperscript{36} Livingston Shirt Co., 107 NLRB 400, 406 (1953).
\textsuperscript{37} \textit{Id.} at 421-24.
\textsuperscript{38} In \textit{May Co.}, 136 NLRB 797 (1962), the majority said at 802:

The normal effectiveness of [the union's] channels stems not alone from the
ability of a union to make contact with employees, away from their place of
work, but also from the availability of normal opportunities to employees who
have been contacted to discuss the matter with their fellow employees at their
place of work. The place of work is the one place where all employees . . . . can
discuss with each other the advantages and disadvantages of organization, and
dissenter pointed to the union's ability to obtain authorization cards as proof of the effectiveness of its media.  

In these decisions, the Board gauges audience access to information by results in other elections, union success in obtaining authorization cards, and theoretical suppositions. These assumptions overlook the possibility that, for example, employees might selectively expose themselves only to information which confirms their predispositions; or might interpret information only in conformity to prior beliefs; or simply might not react to the information received. Without rigorous tools to measure the effectiveness of media in reaching employees, Board decisions employing such behavioral standards will at best be questionable.

**Available Support for Behavioral Conclusions**

In *Pinkerton's National Detective Agency, Inc.*, the employer told employees it was unable to increase wages. The union countered with a letter contending that the employer was financially able to pay higher wages. In objecting to the election, the employer attempted to prove by the testimony of a supervisor that employees had been unable to evaluate the truthfulness of the union's letter. Overruling the employer's contention, the Board found that employees could evaluate the union's letter as mere propaganda. On the offer of proof the Board noted:

Such statements by employees, even if shown to have been in fact made, do not raise material issues. Subjective testimony by individual employees as to their ability to evaluate statements made by either party in an election campaign is not controlling; but rather the test is whether on the basis of all the objective circumstances it appears that the employees could reasonably have evaluated the statements in question.

lend each other support and encouragement. Where such discussion is not allowed, the normal channels of communication become clogged and lose their effectiveness.

39. He stated,  
[T]he union had, . . . eight months before the election, secured authorization cards from at least 30 per cent of approximately 1,000 of the employees, in support of the first petition which is filed. This indicates the practical effectiveness of the media of communication which the union had chosen to utilize.  

40. Predispositions may lead one only to select communications which support his position. P. Lazarsfeld, B. Berelson & H. Gandet, *The People's Choice* 89 (3d ed. 1968).

41. 124 NLRB 1076 (1959).

42. *Id.* at 1077.

43. *Id.*

44. *Id.* n.3.

45. *Id.*

46. *Id.* n.3. [Emphasis added.] See note 4 supra.
In an earlier case the Board rejected a union affidavit from employees stating that the employees were influenced by another union's campaign misstatements and would have voted differently if they had known the true facts. The rejection of this evidence was based on the principle that postelection statements regarding intent or change of mind cannot be used to upset an otherwise fairly conducted election.

Sound reasons exist for the exclusion of testimony concerning the actual effect on employees of campaign tactics and propaganda. Employees may not be able to recognize and articulate the effects on themselves of the particular conduct. Their responses to campaign conduct ascertained after the election may be affected by the election results. Some employees may feel compelled to join the side of the winning or losing party on the basis of the election instead of their actual vote. Employee testimony may be slanted by fear of reprisal or hope for benefit from the employer or by a desire to assist the union. Further difficulties would arise in gathering and utilizing employee testimony. To obtain accurate information about each campaign, it would be essential to interview employees during the course of the campaign. The manpower necessary for such a task would be enormous. Also, it is unlikely that the Board adequately could analyze the material because of its bulk. The weight of these considerations forecloses one avenue by which the Board could find support for its behavioral conclusions.

Empirical studies have been used not in the Board's analytical process as such but to bolster conclusions already formed. On the eve of the election in Plochman and Harrison-Cherry Lane Foods, Inc., the employer showed a motion picture depicting an unnecessary strike involving violence, including the shooting of an infant by union adherents. The majority treated the movie as a misrepresentation and set aside the election on the grounds that employees could not properly evaluate the movie and the union had no opportunity to rebut its implications. After

48. Id. n.2.
49. Id. This principle had been established in Necco Sales Corp., 119 NLRB 155 (1957), where the employer asserted that several employees had marked their ballots contrary to their intent as grounds to set aside the election. The Board rejected this argument because the ballots were unambiguous, the election had been fairly conducted and voters had not been unduly rushed in casting their ballots. Id. at 156.
50. Bok, supra note 1, at 40 n.8.
51. Id.
52. 140 NLRB 130 (1962).
53. Id. at 131.
54. See text accompanying note 29 supra for a discussion of misrepresentations. The dissenters did not believe the movie constituted a misrepresentation. Plochman & Harrison—Cherry Lane Foods, Inc., 140 NLRB 130, 133 (1962).
55. Id.
coming to this conclusion and although it was analytically unnecessary, the majority cited social scientists to support the general proposition that movies have a greater impact than the written or spoken word.\footnote{56}

In one highly questionable use of an empirical study, DIT-MCO,\footnote{57} the Board found no valid basis for the conclusion that employees are influenced to vote for a union by a promised waiver of initiation fees.\footnote{58} Studies were cited which the Board said showed "that the most important factors influencing an employee's choice are a desire for: (1) higher wages, shorter hours and an end to wage inequities; (2) protection from management favoritism; (3) retaining or gaining the fellowship and respect of those who are already union members."\footnote{59} By negative implication, it concluded that the exclusion of union initiation fees from the list demonstrated the unimportance of the issue.\footnote{60} Apparently the Board failed to consider the possibility that dislike of union initiation fees, as well as dues and assessments, might cause employees to vote against a union.

Sound policy dictates that, at a minimum, the Board use empirical data carefully.\footnote{61} The NLRB's occasional use of empirical evidence has failed to validate its behavioral conclusions. Instead, the use of this material may cast even more doubt on the Board's assumptions.

The major problem with the use of such studies is that they are not directly applicable to the situation. Existing studies describe reasons why employees join unions, the general effect of mass media, or the impact of certain types of appeals.\footnote{62} The few studies which deal specifically with representation campaigns suffer from additional problems in methodology and bias.\footnote{63}

\footnote{56} Id. at 132 n.4.
\footnote{57} 163 NLRB 1019 (1967).
\footnote{58} Id. at 1022.
\footnote{59} Id. at 1022 n.9.
\footnote{60} Id.
\footnote{61} Reasoning on cursory empirical evidence in Livingston Shirt Corp., 107 NLRB 400 (1953), the dissenter also was lead to questionable conclusions. Using secondary references to empirical data, a union organizational handbook and NLRB experience, he concluded that the communications media available to the union were no match for an employer's captive audience speech. Id. at 421-24 and accompanying notes.
\footnote{62} E.g., Bakke, To Join or Not to Join and Seidman, London & Karsh, Why Workers Join Unions in E. Bakke, C. Kerr & C. Anrob, Unions, Management and the Public (1960); E. Bettinghaus, Persuasive Communication (1968) and E. Jones & H. Genard, Foundations of Social Psychology (1967).
The Non-Behavioral Approach

The advantages of a non-behavioral approach lie both in the origin and application of resulting rules. The rules are based upon facts or policy determinations rather than upon assumptions regarding the effect on employees of employer or union conduct. Application of the rules flows directly from the ascertainment of a specific set of facts.

A non-behavioral approach was applied in *Excelsior Underwear Co.* where it was established that an employer must provide the union with the names and addresses of its employees. The Board recognized that unions lack the ability to reach all employees, an ability possessed by the employer; that it would be exceedingly difficult, if not impossible, for the union to obtain the names and addresses of every eligible voter; that the only sure means of providing employees with access to the communications of both sides would be to provide the union with their names and addresses; and that access to these communications is a prerequisite to a fully informed and reasonable choice by the employee.

The significance of this rule is the way in which it was established. Instead of speculating on the effects of union inaccessibility to all employees, the Board pointed to the ascertainable fact that the union did not possess the means for communicating with all employees. Thus a rule was fashioned whose application follows from a simple factual determination.

The same kind of rule was established in *Interlake Steamship Co.*, where the Board held that the employer made a fair election impossible because he denied the union organizer reasonable access to employees. It reasoned that the sailors who customarily stayed aboard ship while it was in port would not be exposed to the union's campaign unless an organizer could board the ship. Again, the union's inaccessibility to all employees is an ascertainable fact which, when joined with the objective of providing employees with information from both sides, leads to a reasonable conclusion. The Board has avoided speculation about human behavior in the creation and application of this rule.

An important NLRB policy is to protect the integrity of the election

64. 156 NLRB 1236 (1966).
65. *Id.* at 1239-40. The Board obtains the list from the employer and disseminates it to employees.
66. *Id.* at 1240-41.
67. *Id.* at 1241.
68. *Id.*
69. *Id.* at 1242. In addition, the Board expressed hope that the rule would reduce its caseload by reducing the number of voter challenges precipitated by inadequate voter eligibility lists. *Id.* at 1243.
70. 178 NLRB No. 20 (Aug. 15, 1969).
process. In *Milchem, Inc.*, the Board banned conversations with prospective voters at or near the polling place on the grounds that last minute conversations were unfair to the other participants in the election and potentially distracting to voters; objections to them were administratively difficult to adjudicate; and a blanket prohibition against them was easily understood. This decision was based on policy considerations, not speculations about human behavior.

Protecting the integrity of the election also was the basis for the rule formulated in *Allied Electric Products, Inc.*, where the union circulated among employees a document that was supposed to be a sample of the Board's "Official Secret Ballot" but in fact altered the ballot to achieve partisan ends. The rule prohibits reproductions of official ballots which alter them in any way in order to remove any suggestion that the Board endorsed a particular choice. The advantage of this rule is that it provides guidelines to election participants and is easily administered. Proof that Board documents were used in a partisan fashion constitutes a violation.

Captive audience speeches within twenty-four hours of an election also are prohibited to protect the integrity of the election process. In *The Great Atlantic & Pacific Tea Co.*, the Board rejected the employer's contention that in applying the prohibition it should measure the effect of the violation to determine the degree of influence upon the eligible employees in the unit as a whole and not set aside elections because of violations which had a *de minimis* effect. It said the purpose of the rule was to provide a preliminary condition to and safeguard for the election. Proof of violation would be sufficient ground to set aside an election. This application of the rule illustrates a non-behavioral approach.

The reasons underlying the rule, however, represent utilization of behavioral assumptions. In *Peerless Plywood Co.*, a captive audience speech within twenty-four hours of the election was prohibited because the majority believed that last-minute speeches by either the employer or the union tend to create a mass psychology which overrides arguments made through other media. Such speeches were deemed permissible.

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72. 109 NLRB 1270 (1954).
73. *Id.* at 1271.
74. *Id.* at 1271-72.
75. 111 NLRB 623 (1955).
76. *Id.* at 624-25.
77. *Id.* at 625.
78. *Id.*
79. 107 NLRB 427.
80. *Id.* at 429.
prior to the twenty-four-hour period because the passage of time would neutralize their effect.\(^8\) Even speeches within twenty-four hours of the election were said to be permissible regardless of whether delivered on company premises as long as employees attended voluntarily on non-working hours.\(^8\) Distribution of literature and other campaign tactics\(^8\) during the twenty-four hours preceding an election were also permissible.\(^8\)

This ruling assumes that a captive audience speech possesses persuasive attributes not shared by other media, such as non-captive audience speeches, radio broadcasts and personal contacts. But the majority does not provide reasons for distinguishing captive audience speeches from other campaign activities; it merely asserts that in its opinion captive audience speeches have such an effect.

It is possible that captive audience speeches have no greater effect than any other propaganda medium. In fact, empirical studies indicate personal contacts are the most influential medium of all.\(^8\) But the point is that no one knows the effect of captive audience speeches on employees.

In a separate opinion, one member argued that the problem was not the captive audience speech but the union's lack of an equal opportunity.\(^8\) He would have ruled that whenever an employer delivers a captive audience speech he must provide the union equal time.\(^8\) Although this rule is based upon a behavioral assumption, its application follows from a simple factual determination.

**Implications of the Non-Behavioral Approach**

The behavioral approach involves costs which the use of a non-behavioral approach could reduce. The Board's constituency would benefit from clear campaign guidelines which in turn would reduce its caseload, because presumably clear guidelines would result in fewer violations. Those cases reaching the Board could be more consistently decided. In all likelihood, this result would reduce the cynicism expressed toward Board decisions and enhance its ability to obtain compliance. More decisive elections would free union and managerial energies for other tasks, and reduce lost productivity due to uncertainty in plants,\(^8\) and might provide

81. Id. at 430.
82. Id.
83. Id.
87. Id. 435.
employees with their true choice sooner in the process. Furthermore, the exposition of clear general rules to be applied to specific facts will aid the courts in review of the Board's decisions. Examples of this non-behavioral approach in the areas of temperate and intemperate appeals, misrepresentations, and access to employees demonstrate the application of the method.

The Board derives its authority to distinguish temperate from intemperate appeals from section 8(c) of the LMRA which prohibits "threats of reprisal or force." Using a non-behavioral approach, the Board could define illegal threats rather than try to evaluate the impact of a particular threat on employee choice. It is suggested that prohibited "threats" should include those which refer to bodily harm or harm to property. Under this non-behavioral approach, the linking of unionization with violence in General Industries probably would not have constituted a "threat."

The Board's discretionary powers under LMRA section 9(c) (1) prohibit misrepresentations which are material and which are not rebutted by the other side or concerning which employees possess no accurate information. Considering the materiality of misrepresentations requires a determination of why employees vote for unions in order to ascertain whether a particular misrepresentation affects employee choice. The problem with an investigation into materiality is that the Board must establish which issues are crucial to an employee's voting decision, but it does not possess the means of doing so. Determining whether employees possess information with which to rebut a misrepresentation also presents problems. First, the Board's finding that employees possess information is often stated in terms that employees must have known certain facts rather than proof that they did know these facts. Second, upon the basis of what employees must have known, the Board assumes how they evaluate their knowledge and the misrepresentation. The only aspect of the misrepresentation rule which would not necessarily involve the use of behavioral assumptions is the existence of rebuttal by the other side. A rule stating that a misrepresentation constitutes grounds for setting aside an election unless the opposing party had the opportunity to rebut is based upon the sound policies of promoting fairness between competitors and ensuring employee access to pertinent information. It also can be applied with ease upon a determination of specific facts. Accordingly, in Walgreen Co.,
the election would have been set aside only if the employer did not have an opportunity to reply to the union's misrepresentation but not merely because of the uncertain availability of information through informal contacts.

From sections 8(a)(1) and 9(c) the Board derives its authority to promote equal access of the employer and union to employees. Analysis in some of these cases includes assumptions, such as an assertion that captive audience speeches are more persuasive than personal contacts, which involve comparisons of the effectiveness of the media used. A non-behavioral approach would permit access to employees through all media with the exception of union and employer solicitation and distribution of materials on the employer's premises during working hours and opportunity to reply to captive audience speeches. Under a non-behavioral approach, captive audience speeches within 24 hours of the election, as in Peerless Plywood, might not be prohibited, because despite the rule's clarity, it is founded on an untenable behavioral conclusion.

Conclusion

Examination of the Board's representation election decisions reveals the inadequacy of evidence supporting its behavioral conclusions. In the absence of such evidence and particularly where there is no statutory guideline, the Board should not engage in such detailed regulation of election campaigns. It should not attempt to make refined distinctions concerning the effects of campaigns on employees. It should reach only those decisions it can sustain factually. The costs of its present regulatory policy outweigh the value of doubtful decisions.

95. Id. at § 9(c), 29 U.S.C. § 159(c).
96. See discussions at notes 32-40 and 79-87 supra.
97. Employers property interest might outweigh any union rights. For rules concerning employees right to solicit and distribute on company property, see Stoddard-Quirk Mfg. Co., 138 NLRB 615 (1962).
98. The employer should not have to finance the union's campaign by paying employees while they listen to a union speech. The union has means of attracting employees to their meetings. See, e.g., Bordo Products Co., 119 NLRB 79 (1957).
99. See discussion at note 79 supra.
100. The Supreme Court has remanded because of insufficient evidence to support an agency's finding. See Atlantic Refining Co. v. Public Serv. Comm'n, 360 U.S. 378 (1959). The difficulty with the NLRB's opinions goes to the heart of the problems in the labor field. See supra note 1, at 45.
101. Section 8 of the LMRA proscribes certain unfair labor practices. Labor Management Relations Act § 8, 29 U.S.C. § 158 (1964). Hence the Board must determine what conduct constitutes a violation. But it need not create other campaign rules under its 9(c) discretionary powers. See note 1 supra.
102. See, e.g., discussion at note 7 supra.
103. See, e.g., discussion at note 64 supra.
104. See discussion at note 88 supra.
Exclusive adoption of a non-behavioral approach would enable the Board to establish and more easily administer justifiable representation election campaign rules.

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