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# Union Representation Election Statements: A Call for Implementation of the Statute

Since its creation in 1935, the National Labor Relations Board<sup>1</sup> has recognized the congressional policy of restricting campaign speech in union representation elections. The congressional goal has been to protect employee-voters from the effects of misrepresentations.<sup>2</sup> Originally, only employers' speech was restricted, for Congress wanted to encourage the growth of unions.<sup>3</sup> In 1947, however, Congress amended the National Labor Relations Act so as to forbid certain types of expression by unions as well as employers.<sup>4</sup>

Nevertheless, the NLRB has persisted in granting unions greater latitude in this area than it has given employers. The Board removed campaign speech from the domain of section 8(c) of the National Labor Relations Act, which outlaws speech containing a threat of reprisal or force, or promise of benefit.<sup>5</sup> It also developed a standard which gave the Board wide discretion in determining whether a misrepresentation during a campaign has had an impact on employees significant enough to warrant setting aside the election result. This exercise of discretion has allowed the Board to favor unions over employers in misrepresentation cases.

Recently, the Board has questioned, rejected<sup>6</sup> and readopted<sup>7</sup> this standard. In its opinions, the Board has concentrated on employees' need for protection from campaign misrepresentations. Yet the NLRA has already settled this issue, for it recognizes this need and restricts both employers' and unions' speech. The issue is whether the Board should be allowed to continue to disregard the NLRA and substitute its own discretionary standards which have favored unions.

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<sup>1</sup>The National Labor Relations Board was created by the National Labor Relations (Wagner) Act, ch. 372, §§ 3, 4, 10, 49 Stat. 449 (1935), *as amended by* 61 Stat. 136 (1947), 65 Stat. 601 (1951), 72 Stat. 945 (1958), 73 Stat. 541 (1959), 88 Stat. 395 (1974) (current version at 29 U.S.C. §§ 151 - 169 (1976)). The function of the Board was to administer both the unfair labor practice and the representation provisions of the NLRA.

<sup>2</sup>A. COX, D. BOK & R. GORMAN, LABOR LAW CASES AND MATERIALS 83 (8th ed. 1977) [hereinafter cited as A. COX].

<sup>3</sup>*Id.*

<sup>4</sup>Taft-Hartley Act, ch. 120, §§ 8, 9, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 158, 159 (1976)). Only those amendments found at 61 Stat. 140-46 (1947), 29 U.S.C. §§ 158, 159 (1976) are relevant to this note. These amendments were intended to allow employers as well as unions to comment in union representation elections, and provided parallel limitations on both employers' and unions' campaign speech.

Section 8 of the Wagner Act applied only to employers. With the adoption of the Taft-Hartley Act, the employer-related provisions became § 8(a) and the union-related provisions constituted § 8(b).

<sup>5</sup>See note 26 *infra*.

<sup>6</sup>Shopping Kart Food Mkt., 228 N.L.R.B. 1311 (1977).

<sup>7</sup>General Knit, Inc., 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (Dec. 6, 1978).

This note calls for the NLRB to reconsider its present policy of applying its self-developed standards and to develop guidelines consistent with section 8(c) of the National Labor Relations Act. Although misrepresentations can be made in a variety of ways, this note focuses on speech in representation elections.

#### ELECTIONS UNDER THE WAGNER ACT

The National Labor Relations (Wagner) Act of 1935 establishes the rights of employees to organize and to bargain collectively through representatives of their own choosing.<sup>8</sup> Section 8 of the Act<sup>9</sup> identifies behavior constituting unfair labor practices. In the Senate committee report on the Wagner Act, major emphasis was placed on the need to increase the bargaining power of the workers;<sup>10</sup> to do this, it was said the government would have to protect and assist unions.<sup>11</sup> It was no surprise, then, that the provisions of section 8 focused on employers' actions.

The Board interpreted section 8 as prohibiting any employer's action that might discourage union membership.<sup>12</sup> Construed in this manner, section 8(a)(1) limited the employer's freedom of speech in his dealings with employees, as the employer was prohibited from making any comment concerning unions, especially as to their desirability and rights.<sup>13</sup> Providing management the opportunity to express its views was considered unimportant, as the choice of a representative was seen as the exclusive concern of the employees and the union.<sup>14</sup> A strict rule was enforced which considered any pre-election anti-union speech as an unfair labor practice and a ground for setting aside the election.<sup>15</sup>

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<sup>8</sup>Section 7 provides: "Employees shall have the right to self-organization, to form, to 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." Wagner Act, ch. 372, § 7, 49 Stat. 452 (1935) (current version at 29 U.S.C. § 157 (1976)).

Despite its adoption in 1935, it was not until 1937 that the Wagner Act took full force and effect of law. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court sustained the constitutionality of the Act. See A. COX, *supra* note 2, at 84-86; H. METZ, *LABOR POLICY OF THE FEDERAL GOVERNMENT* 23-24 (1945); H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 35-40 (1950).

<sup>9</sup>Wagner Act, ch. 372, § 8, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 158 (1976)).

<sup>10</sup>S. REP. NO. 573, 74th Cong., 1st Sess. 3-4 (1935).

<sup>11</sup>*National Labor Relations Board: Hearings on S. 195 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 104 (1935) (statement of William Green).

<sup>12</sup>See H. METZ, *supra* note 8, at 33-34.

<sup>13</sup>H. METZ & H. JACOBSTEIN, *A NATIONAL LABOR POLICY* 72 (1947). The Board has held that an admittedly correct statement of employees' rights under the NLRA was a violation of § 8(1) (presently § 8(a)(1), see note 4 *supra*). H. METZ, *LABOR POLICY OF THE FEDERAL GOVERNMENT* 23, 34 (1945); *Mock-Judson-Voehringer Co.*, 8 N.L.R.B. 133, 136 (1938).

<sup>14</sup>R. WILLIAMS, P. JANUS & K. HUHN, *NLRB REGULATION OF ELECTION CONDUCT* 17 (Univ. of Pa. Wharton School Labor Relations and Public Policy Series No. 8, 1974) [hereinafter cited as R. WILLIAMS].

<sup>15</sup>*Id.* See, e.g., *Rockford Mitten & Hosiery Co.*, 16 N.L.R.B. 501 (1939); *Virginia Ferry Corp.*, 8 N.L.R.B. 730 (1938); *Nebel Knitting Co.*, 6 N.L.R.B. 284 (1938); 1 NLRB ANN. REP. 73 (1936).

In contrast, restrictions on union speech were virtually nonexistent. The Board stated in 1945: "Absent violence, we have never undertaken to police union organization or union campaigns, to weigh the truth or falsehood of official union utterances, or to curb the enthusiastic efforts of employee adherents to the union cause in winning others to their conviction."<sup>16</sup> The only concern was that employees "did not vote under actual coercion or duress."<sup>17</sup> The Board reasoned that "[e]mployees undoubtedly recognize [campaign] propaganda for what it is, and discount it."<sup>18</sup>

#### TAFT-HARTLEY AND THE BOARD'S RESPONSE

Through the end of the decade, unions gained in both number and power. With the onset of World War II, the government, in order to strengthen its war effort, sought the full cooperation of organized labor.<sup>19</sup> Union involvement in government, along with the publicity which accompanied that involvement, gave unions a governmental stamp of approval.<sup>20</sup> Additionally, the policies of the War Labor Board encouraged collective bargaining and strengthened the unions' role in the plants.<sup>21</sup> These factors contributed heavily to union growth and the spread of collective bargaining.<sup>22</sup>

By the end of the war, the coal mining, construction, railroad and trucking unions were powerful.<sup>23</sup> In 1947, over both the vehement objections of organized labor and a presidential veto, Congress passed the Taft-Hartley Act,<sup>24</sup> an attempt "to ensure greater latitude to employers in speaking against unionization in election campaigns."<sup>25</sup> Section 8(c) of the new Act limited the scope of prohibited employer speech to that which contained a threat of reprisal or force or a promise of benefit.<sup>26</sup>

<sup>16</sup>Maywood Hosiery Mills, 64 N.L.R.B. 146, 150 (1945). See also *Curtiss-Wright Corp.*, 43 N.L.R.B. 795, 797 n.2 (1942) (election sustained despite false claim by one of two competing unions that it was not bound by wartime agreement renouncing overtime pay whereas its rival was); *Corn Prod. Ref. Co.*, 58 N.L.R.B. 1441, 1442 (1944) (election sustained despite false claim by one of two competing unions that it had NLRB approval whereas its rival did not).

<sup>17</sup>R. WILLIAMS, *supra* note 14, at 18, citing *Curtiss-Wright Corp.*, 43 N.L.R.B. 795, 797 (1942).

<sup>18</sup>*Corn Prod. Ref. Co.*, 58 N.L.R.B. 1441, 1442 (1944).

<sup>19</sup>A. COX, *supra* note 2, at 89-90.

<sup>20</sup>*Id.* at 90.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* at 91.

<sup>24</sup>Taft-Hartley Act, ch. 120, §§ 8, 9, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§158, 159 (1976)).

<sup>25</sup>See Note, *Shopping Kart: The Need for a Broader Approach to the Problem of Campaign Regulation*, 56 N.C.L. REV. 389, 392 (1978).

<sup>26</sup>Section 8(c) states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions

The Board responded the next year in *General Shoe Corp.*<sup>27</sup> by exempting all campaign speech from examination under section 8(c) and claiming jurisdiction over it under the Board's section 9(c) power to prescribe regulations for representation elections.<sup>28</sup> While the language of 9(c) grants the Board power to promulgate regulations in this area, it does not give the Board power to override section 8(c). The NLRB did need the authority to develop some regulations in order to implement the Taft-Hartley amendments, but the purpose of this grant could not have been to allow the Board to circumvent those amendments. Nevertheless, the Board declared that its duty was to provide

a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When . . . the standard drops too low . . . the requisite laboratory conditions are not present and the experiment must be conducted over again.<sup>29</sup>

The adoption of this test signaled a major policy change on the part of the Board, which would now apply a stricter standard to all parties. Rather than allowing employers the same free rein concerning campaign speech that unions had enjoyed, the Board preferred to place restrictions on union speech.<sup>30</sup>

The impact of the "laboratory conditions" standard was first clearly evidenced in *Merck and Co.*,<sup>31</sup> where the Board spelled out its new position concerning the employee-voter's ability to decipher campaign propaganda. While noting that the campaign statements involved were "obvious propaganda, clearly recognizable as such by the employees," the Board held that it would not police union campaigns or consider the veracity of union utterances unless employees' freedom of choice was

of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Taft-Hartley Act, ch. 120, § 8(c), 61 Stat. 136 (1947) (current version at 29 U.S.C. § 158(c) (1976)).

<sup>27</sup>77 N.L.R.B. 124 (1946).

<sup>28</sup>Section 9(c) states in relevant part: "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . ." Taft-Hartley Act, ch. 120, § 9(c), 61 Stat. 136 (1947) (current version at 29 U.S.C. § 159(c) (1976)). The Supreme Court has interpreted this language as giving the Board authority to promulgate regulations to insure a fair election. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 37 (1942); *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

<sup>29</sup>77 N.L.R.B. 124, 127 (1946).

<sup>30</sup>R. WILLIAMS, *supra* note 14, at 20.

<sup>31</sup>104 N.L.R.B. 891 (1953). In *United Aircraft Corp.*, 103 N.L.R.B. 102, 104 (1953), the Board had indicated that misrepresentations that were not so misleading as to prevent the exercise of employees' free choice in the selection of a bargaining representative might be excused as legitimate campaign propaganda. *See also* *Kearney & Trecker Corp.*, 96 N.L.R.B. 1214 (1951); *Chicago Mill & Lumber Co.*, 64 N.L.R.B. 349 (1945).

substantially impaired.<sup>32</sup> Two years later, in *Gummed Products Co.*,<sup>33</sup> the Board clearly indicated that substantial impairment constituted a violation of laboratory conditions.

#### ELECTIONS UNDER THE *HOLLYWOOD CERAMICS* STANDARD

The Board did not intend the "laboratory conditions" language to be taken literally; it stated in various opinions that elections "do not occur in a laboratory" and that "elections . . . should not be judged against theoretically ideal, but nevertheless artificial standards."<sup>34</sup> Instead, it hoped to develop a flexible standard and to determine whether in a given case the facts came sufficiently close to the standard utilized.<sup>35</sup> The courts, however, fearing abuse of discretion by the Board, were intent on applying the standard more rigorously.<sup>36</sup> As a result, there was frequent conflict between the Board and the courts.<sup>37</sup>

In 1962, the Board modified its position on the regulation of campaign behavior. In *Hollywood Ceramics*,<sup>38</sup> the Board determined that employees needed greater protection. In determining whether the laboratory conditions had been violated, the Board declared that its duty would be to balance "the right of the employees to an untrammelled choice . . . [against] the right of the parties to wage a free and vigorous campaign with all the normal legitimate tools of electioneering."<sup>39</sup> The Board recognized that, since union campaigns are often hotly contested, "a party may, in its zeal, overstate its own virtues and the vices of the other," and since complete honesty is not always attainable nor "expected by employees," these misstatements do not necessarily impair laboratory conditions.<sup>40</sup> The formula utilized in striking this balance was as follows:

We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.<sup>41</sup>

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<sup>32</sup>Merck & Co., 104 N.L.R.B. 891, 892 (1953).

<sup>33</sup>112 N.L.R.B. 1092, 1093-94 (1955).

<sup>34</sup>Liberal Mkt. Inc., 108 N.L.R.B. 1481, 1482 (1957). See also *Morganton Full Fashioned Hosiery Co.*, 107 N.L.R.B. 1534, 1538 (1954).

<sup>35</sup>See R. WILLIAMS, *supra* note 14, at 25.

<sup>36</sup>See *id.* at 23-24.

<sup>37</sup>See Phalen, *The Demise of Hollywood Ceramics: Fact and Fantasy*, 46 U. CIN. L. REV. 450, 453-54 (1977).

<sup>38</sup>140 N.L.R.B. 221 (1962).

<sup>39</sup>*Id.* at 224.

<sup>40</sup>*Id.* at 223-24, citing *Celanese Corp. of America*, 121 N.L.R.B. 303 (1958).

<sup>41</sup>*Id.* at 224. For criticisms of the standard, see Bok, *The Regulation of Campaign Tactics In Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 85 (1964); R. WILLIAMS, *supra* note 14, at 60, 61.

At a time when the Board might have acted to alleviate the courts' concern by developing a less subjective test, it developed a standard calling for wider Board discretion. Consequently, the tension continued, resulting in court reversals of Board decisions favoring unions.<sup>42</sup>

The Board adhered to this standard for more than a decade. It was not until a 1973 decision, *Modine Manufacturing Co.*,<sup>43</sup> that the Board's view of employees' ability to deal with campaign propaganda evidenced change. In *Modine*, the Board, while reaffirming the *Hollywood Ceramics* standard, noted that employees' sophistication in matters concerning representation elections had risen substantially.<sup>44</sup>

Board Member John Penello indicated in a footnote<sup>45</sup> that it was time to abandon this standard, although *Modine* was not the case in which to do so. His views were more fully expressed in later cases, in which he argued in dissent that the Board had no obligation "to protect voters from their own gullibility,"<sup>46</sup> and that the Board's continued adherence to *Hollywood Ceramics* was based on an erroneous assumption of employees' sophistication and was "misguided paternalism."<sup>47</sup>

#### SHOPPING KART AND THE GETMAN STUDY

Penello's views became NLRB policy in *Shopping Kart Food Market, Inc.*<sup>48</sup> where it was decided that the Board would no longer probe into the truth or falsity of campaign statements, or set aside elections on the basis of misleading campaign statements.<sup>49</sup> Elections would continue to be invalidated as a result of forgeries and misrepresentations about the Board's processes.<sup>50</sup> This action, overruling *Hollywood Ceramics*, was based on an empirical study by researchers Getman and Goldberg<sup>51</sup> which purportedly demonstrated that campaigns have a minimal effect on voter preference in union elections. This conclusion was contrary to the Board's previous assumptions that campaign propaganda interferes with employees' freedom of choice and that employees are naive.<sup>52</sup> Thus,

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<sup>42</sup>For a commentary on the Board's inconsistent application of this standard, see J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 21-26 (1976) [hereinafter cited as J. GETMAN]. See also Phalen, *supra* note 37, at 453-54.

<sup>43</sup>203 N.L.R.B. 527 (1973).

<sup>44</sup>*Id.* at 530.

<sup>45</sup>*Id.* at 530 n.6.

<sup>46</sup>Medical Ancillary Services, 212 N.L.R.B. 582 (1974), *supplementing* 195 N.L.R.B. 290 (1972), *rev'd and remanded*, 478 F.2d 96 (6th Cir. 1973).

<sup>47</sup>Ereno Lewis, 217 N.L.R.B. 239, 243 (1975). See Phalen, *supra* note 37, at 454-56; Penello, *Shopping Kart Food Market, Inc.: The Cure for the Hollywood Ceramics Malaise*, 46 U. CIN. L. REV. 464 (1977).

<sup>48</sup>228 N.L.R.B. 1311 (1977).

<sup>49</sup>*Id.* at 1313.

<sup>50</sup>*Id.*

<sup>51</sup>Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976), also reported in J. GETMAN, *supra* note 42, at 33. See *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311, 1313 (1977).

<sup>52</sup>*Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. at 1313.

the assumed need for the Board to protect employees was made to appear greatly overrated. Yet the study, while gaining much-deserved recognition for its pioneering attempt to determine the validity of the Board's assumptions, was also the subject of criticism.<sup>53</sup>

The study was performed in two parts. The first examined NLRB decisions related to union elections, and noted several Board assumptions regarding campaign behavior which reveal a general view of the employee as particularly susceptible to campaign statements.<sup>54</sup> The second part of the study, designed to test these assumptions, was a survey of employees involved in thirty-one contested representation elections.<sup>55</sup>

The value of the study was unfortunately weakened by two major shortcomings. First, the researchers failed to include a group of voters who were involved in an uncontested election,<sup>56</sup> making it difficult to determine how much of the change in voters' preference was due to the campaign, and how much was the result of misrepresentations. What renders this so damaging is that the study did not attempt to determine any other cause of the shift.<sup>57</sup>

Second, the study reported that in order to maximize predictability of

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<sup>53</sup>For criticisms, see Eames, *An Analysis of the Union Voting Study from a Trade Unionist's Point of View*, 28 STAN. L. REV. 1181 (1976); Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311, 1315-18 (1977) (Jenkins, Member, dissenting; Fanning, Member, dissenting in part). For favorable responses, see Flanagan, *The Behavioral Foundations of Union Election Regulation*, 28 STAN. L. REV. 1195 (1976); Raskin, *Deregulation of Union Campaigns: Restoring the First Amendment Balance*, 28 STAN. L. REV. 1175 (1976); Goetz & Wike, Book Review, 25 KAN. L. REV. 375 (1977).

The conclusion that campaign violations have minimal influence on voters is not consistent with two previous studies of rerun elections showing the probability of a different outcome in a rerun depends partially on the type of violation reported in the first election. See Dronting, *NLRB Remedies for Election Misconduct: An Analysis of Election Outcomes and Their Determinants*, 40 U. CHI. J. BUS. 137 (1967); Pollitt, *NLRB Re-run Elections: A Study*, 41 N.C.L. REV. 209 (1963).

Yet, there is evidence that the study's general conclusions agree with those of more limited studies of voting behavior. See Brotslaw, *Attitude of Retail Workers Toward Union Organization*, 18 LAB. L.J. 149 (1967) (primary determinants of employee voting are previous union experience, general perception about unions and job satisfaction); Comment, *An Examination of Two Aspects of the NLRB Representation Election: Employee Attitude and Board Inference*, 3 AKRON L. REV. 218 (1970) (positive experiences with management, satisfaction with working conditions and perception of personal job security are most crucial in voting choice).

<sup>54</sup>The six assumptions discerned by the study were: that employees are attentive to the campaign; that employees will interpret ambiguous statements by the employer as threats of reprisals or promises of benefit; that employees are unsophisticated about labor relations; that free choice is fragile; that limited union campaigning on company premises is adequate; and, that authorization card signing is an indication of employee choice. J. GETMAN, *supra* note 42, at 7-14. Part I is also reported in Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465, 1470-82 (1975).

<sup>55</sup>J. GETMAN, *supra* note 42, at 33; also reported in Getman & Goldberg, *supra* note 51.

<sup>56</sup>Eames, *supra* note 53, at 1182. This group is called a control group. In this study, the shift noted in the groups studied would be compared to that in the control group. The difference would be the amount of shift attributable to the misrepresentations.

<sup>57</sup>*Id.* at 1182-87. Eames writes, "I believe this missing link is crucially important, that it in itself rebuts the conclusion that the campaign does not make a significant difference as to the election results." *Id.* at 1186-87.

the findings, a variety of businesses, unions, unit sizes and communities were included.<sup>58</sup> With a sample size of only thirty-one, obtaining adequate coverage of even two of these four categories would be difficult. This was borne out by the final report of the study, where there was often only one representative per subdivision of each of the above categories.<sup>59</sup> Hence, it is questionable whether the results accurately reflect the general population.<sup>60</sup>

By allowing a single piece of research to be the basis of a major policy change, the Board in *Shopping Kart* made a decision which was unjustified.

#### THE RETURN TO HOLLYWOOD CERAMICS: GENERAL KNIT

The Board had followed *Shopping Kart* for only eighteen months when it overruled itself in *General Knit*.<sup>61</sup> In that case, the union seeking representation had distributed a leaflet on election morning. The message it contained was ambiguously worded, indicating that either the employer or its parent company had made a profit of \$19.3 million the preceeding year. The employer filed objections with the NLRB Regional Director, who determined, under the *Shopping Kart* standard, that even if the alleged misrepresentation did refer to the employer, it did not warrant setting aside the election. The Board reversed, however, holding that "the principle . . . [set forth] in *Shopping Kart* is inconsistent with our responsibility to insure fair elections," and reinstated the standard set forth in *Hollywood Ceramics*.<sup>62</sup>

The majority noted that the *Hollywood Ceramics* standard recognizes employees' ability to evaluate most campaign information, but that there are circumstances in which a misrepresentation may materially affect an election.<sup>63</sup> Specifically, the majority pointed out that "employees should be afforded a degree of protection from overzealous campaigners who distort the issues by substantial misstatements of relevant and material facts within the special knowledge of the campaigner."<sup>64</sup>

The Board indicated that there were some problems with the *Hollywood Ceramics* test. The first was the lack of predictability due to the standard's subjective nature. While acknowledging this problem, the Board failed to answer it satisfactorily.<sup>65</sup> The second problem was that

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<sup>58</sup>J. GETMAN, *supra* note 42, at 34.

<sup>59</sup>*Id.* at 34-36.

<sup>60</sup>As it is not reported that the clusters utilized are heterogeneous, it is not possible to determine the effect of sampling error on the results. For a discussion of cluster sampling, the technique utilized in the study, see H. BLALOCK, *SOCIAL STATISTICS* 523-27 (1972). See also *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311, 1316 (1977).

<sup>61</sup>239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (Dec. 6, 1978).

<sup>62</sup>239 N.L.R.B. No. 101, slip op. at 4, 99 L.R.R.M. 1687, 1688-89 (Dec. 6, 1978).

<sup>63</sup>*Id.* at 6, 99 L.R.R.M. at 1688-89.

<sup>64</sup>*Id.* (quoting *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311, 1315 (1977)(emphasis deleted)).

<sup>65</sup>*Id.* at 12-13, 99 L.R.R.M. at 1690. The majority states:

the *Hollywood Ceramics* process of appeals led to a delay of the election result. In the case of employers' appeals, this prevents or postpones collective bargaining between the parties, undermining the function of the employees' chosen bargaining representatives.<sup>66</sup> The Board labeled this latter concern as "greatly exaggerated."<sup>67</sup> It noted that only nine of the 307 cases<sup>68</sup> processed in 1976 were appealed to the circuit courts.<sup>69</sup> Additionally, "such delay occurs whenever an appeal is taken or enforcement is sought of a Board Order, and is not peculiar to *Hollywood Ceramics* cases."<sup>70</sup>

Yet, the majority asserted that this standard had been "well accepted by the courts and by the parties who have used our election procedure,"<sup>71</sup> noting that only forty-seven cases stemming from over one hundred thousand elections had been reversed.<sup>72</sup> However, dissenting Member Penello noted that the forty-seven reversals constituted approximately fifty percent of the campaign misrepresentation cases which had been appealed to the circuit courts.<sup>73</sup> This high reversal rate leads to two observations. First, the courts and the Board diverged in their application of the *Hollywood Ceramics* standard. Second, the courts reverse only sixteen percent of all Board orders,<sup>74</sup> while they have denied Board bargaining orders fifty percent of the time.<sup>75</sup> This may indicate that the courts view the Board's application of the standard as favoring unions,<sup>76</sup> and that the courts desire to implement the NLRA in the manner prescribed by Congress.

#### CONCLUSION

The Board, by developing its own standards through a debatable exercise of statutory authority, has yet to implement fully the Taft-Hartley

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[A]ny inconsistencies in the results . . . have stemmed from judgmental differences as to the reasonable effect of a misrepresentation on the electorate, not from any fundamental difference in the standards or from any desire to regulate the conduct of one party more closely than that of another. In any event, our primary focus is on the future application of this standard and not on the past.

<sup>66</sup>In the case of union appeals, there is no postponement or delay of bargaining with the representative since such an appeal would generally follow a union loss.

<sup>67</sup>*General Knit, Inc.*, 239 N.L.R.B. No. 101, slip op. at 13, 99 L.R.R.M. 1687, 1691 (Dec. 6, 1978).

<sup>68</sup>*Id.* at 7 n.13, 99 L.R.R.M. at 1689 n.13.

<sup>69</sup>*Id.* at 7-8, 99 L.R.R.M. at 1691.

<sup>70</sup>*Id.* at 4 n.28, 99 L.R.R.M. at 1691 n.28.

<sup>71</sup>*Id.* at 7-8, 99 L.R.R.M. at 1689.

<sup>72</sup>*Id.* at 8 n.14, 99 L.R.R.M. at 1689 n.14.

<sup>73</sup>*Id.* at 22-23, 99 L.R.R.M. at 1693-94.

<sup>74</sup>42 NLRB ANN. REP. 261 (1977).

<sup>75</sup>239 N.L.R.B. No. 101, slip op. at 22-23, 99 L.R.R.M. at 1693.

<sup>76</sup>See J. GETMAN, *supra* note 42, at 21-26; Christenson, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U.L. REV. 243, 255-63 (1963). For a compilation of cases that enforced the policy of strict employer noninterference, see Note, *Limitations Upon an Employer's Right of Noncoercive Free Speech*, 38 VA. L. REV. 1037 (1952).

amendments. The Board must cease vacillating among standards it has created, and follow the standard established by Congress which calls for equal restrictions on both employers' and unions' campaign speech. The changes in standards which have occurred over the past three years serve only to cause bargaining instability. The Board should return campaign speech to the domain of section 8(c). It could then use the standard set forth in that section, specifically, that campaign speech containing a threat of reprisal or force or promise of benefit shall constitute or be evidence of an unfair labor practice.

By reversing a high percentage of Board decisions in this area, the courts continue to sound a warning that the former congressional policy of restricting employers' speech for the purpose of encouraging union formation has given way to one of protecting employees from both employers' and unions' campaign speech. The time is ripe for development of a standard to be applied in this area based on section 8(c) of the NLRA. The Board must then recognize its duty to apply that standard to both employers and organized labor equally, consistent with the intent of the Taft-Hartley amendments.

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