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Labor Law-Representation Elections-NLRB Will No Longer Probe into Truth or Falsity of Parties' Campaign Statements-Shopping Kart Food Market, Inc.

Labor Law—REPRESENTATION ELECTIONS—NLRB WILL NO LONGER PROBE INTO TRUTH OR FALSITY OF PARTIES' CAMPAIGN STATEMENTS—*Shopping Kart Food Market, Inc.*, 94 L.R.R.M. 1705 (NLRB 1977).

Shopping Kart Food Market, Inc. (the employer) objected to the outcome of a labor representation election won by the Retail Clerks, Local 99, AFL-CIO (the union). The employer's objection was based on a significant misrepresentation, made by the union's business representative, of the employer's profits.[1] The Regional Director of the National Labor Relations Board (NLRB or the Board) overruled the employer's objection and certified the union as the employees' bargaining representative. On review, the Board affirmed the Regional Director's certification[2] and overruled its longstanding rule[3] of overturning elections because of campaign misrepresentations.

I. BACKGROUND

A. NLRB Supervision of Representation Elections

Section 7 of the National Labor Relations Act (NLRA)[4] gives employees the right to choose, or refrain from choosing, a collective bargaining representative.[5] A bargaining representative chosen by the majority of employees becomes "the exclusive [representative] of all the employees . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."[6] One method of determining the majority status of a collective bargaining representative is an NLRB-conducted representation election.[7]

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1. The day before the election, the union's representative had told the employees that the employer's profits for the last year had totaled $500,000. In fact, the employer's profits had only totaled about $50,000.

2. Shopping Kart Food Mkt., Inc., 94 L.R.R.M. 1705, 1705 (NLRB 1977).

3. The rule is stated in Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962).

4. 29 U.S.C. §§ 151-168 (1970).

5. *Id.* § 157.

6. *Id.* § 159(a).

7. 1 J. JENKINS, LABOR LAW § 3.1 (1968): "Petitions for such an election may be filed by (1) the employees, (2) any individual or labor organization acting on behalf of the employees, or (3) by an employer confronted with a claim from an individual or labor organization."

Before the Board can order an election, it must find that "a question of representation affecting commerce exists." 29 U.S.C. § 159(c)(1) (1970). Affecting commerce means "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." *Id.* § 152. "A question concerning representation exists when it is necessary to determine the majority status of one or more labor organizations [or neither]

Beyond the requirement that elections be conducted by secret ballot,[8] the NLRA itself does not spell out the procedures for the conduct of representation elections. Moreover, the Act "has been interpreted as granting the NLRB 'a wide degree of discretion' in establishing" election rules and procedures and in determining the validity of election results.[9]

The Board has declared that manifestation of employees' free choice is a purpose of representation elections.[10] By regulating campaign conduct, the NLRB seeks to ensure that the employees are able to make a "reasoned, untrammeled choice" of a bargaining representative.[11] In order to protect the employees' freedom of choice from improper employer or union influences, the Board has sought to provide a "laboratory" in which conditions are as "nearly ideal as possible" for determining the "uninhibited desires of the employees."[12] Laboratory conditions exist when, in the Board's opinion, there has been no interference with the employees' free choice of their bargaining representative.[13] Once the NLRB concludes that there has been interference with free choice, the "automatic sanction" is invalidation of the election.[14]

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in an appropriate unit." 1 J. JENKINS, *supra* § 3.1.

The Board will not conduct a representation election unless it is shown that 30% or more of the employees support the petition, or election. 29 U.S.C. § 159(e)(1) (1970); 29 C.F.R. § 101.18 (1976).

8. 29 U.S.C. § 159(c)(1) (1970). Pursuant to its rulemaking authority granted by § 6 of the NLRA, the Board has promulgated procedural regulations for the conduct of representation elections and the filing of objections to representation elections in 29 C.F.R. §§ 101.17-.21, 102 (1976).

9. R. WILLIAMS, P. JANUS, & K. HUHN, NLRB REGULATION OF ELECTION CONDUCT 4 (Labor Relations and Public Policy Series No. 8, 1974) (quoting NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946)).

The courts have recognized that the Board's view on the regulation of preelection propaganda should be granted deference because of the Board's expertise in that area. Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224, 1228 (2d Cir. 1974).

10. General Shoe Corp., 77 N.L.R.B. 124, 126 (1948).

11. Sewell Mfg. Co., 138 N.L.R.B. 66, 69 (1962). The right of the employees to a bargaining representative of their own choosing is guaranteed by § 7 of the NLRA; the Board regulates campaign propaganda to ensure that there has been no interference with that right. *Id.*

12. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). When there has been interference with the employees' free choice, laboratory conditions have been breached and the election must be reconducted so that the free choice of the employees may be determined. *Id.*

13. *See* General Shoe Corp., 77 N.L.R.B. 124 (1948).

"[T]he 'laboratory conditions' doctrine . . . is of such an ambiquous [*sic*] nature that it has been subjected to a multitude of interpretations, none of which have outlasted their author's Board tenure." R. WILLIAMS, P. JANUS, & K. HUHN, *supra* note 9, at 11.

14. R. WILLIAMS, P. JANUS, & K. HUHN, *supra* note 9, at 5.

No definitive statement can be made, however, as to what conduct will be found to interfere with the employees' freedom of choice;[15] the Board's composition at a given time is likely to be determinative.[16] The Board's standards for the regulation of campaign conduct have been developed on a case-by-case basis,[17] and have often been applied inconsistently.[18] In addition, the Board has apparently applied a double standard when evaluating campaign conduct[19]—interference with employee free choice is more readily found when employer interference is alleged than when union interference is claimed.[20] For these reasons, the Board's

15. The Board regulates campaign conduct that is "deemed likely to coerce, mislead, or otherwise improperly influence the voters." R. WILLIAMS, P. JANUS, & K. HUHN, *supra* note 9, at 12. Campaign conduct includes all of the acts of the union and employer during the critical preelection period that are calculated to influence the employees to vote for or against the union. *See generally id.* The critical preelection period is the period between the time the election petition is filed and the time the election is conducted. Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275 (1961).

By protecting the employees' free choice, the Board seeks to prevent interference "with an informed and reasoned assessment of the consequences of selecting a union." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 HARV. L. REV. 38, 47 (1964).

16. R. WILLIAMS, P. JANUS, & K. HUHN, *supra* note 9, at 6.

17. *Id.* "[T]he Board's election case rulings have often tended to be narrow and limited to particular fact situations, and few comprehensive statements of election policy have emerged." *Id.*

18. J. GETMAN, S. GOLDBERG, & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 21 (1976).

19. Raskin, *Deregulation of Union Campaigns: Restoring the First Amendment Balance,* 28 STAN. L. REV. 1175, 1175-76 (1976): "[T]he standards applied by the Labor Board have been so imprecise and usually so one-sided in their definition of what is coercive that they offend both fairness and reason."

On at least two occasions the courts have disapproved of the Board's unfair application of a double standard. *See* Wilkinson Mfg. Co. v. NLRB, 456 F.2d 298 (8th Cir. 1972); NLRB v. Sanitary Laundry, Inc., 441 F.2d 1368 (10th Cir. 1971).

20. Smither, *Does the Goalpost Move When Employers Kick About Union Misconduct During Elections?,* 25 LAB. L.J. 578, 578 (1974):

> [U]nions . . . file objections almost twice as frequently as employers but their success rate since 1969 has been approximately three times that of employers, and in 1970 the probability that the Board would sustain objections filed by a union was four times greater than in the case of employer objections.

Employer statements are more likely to be found coercive because the employer is in a position to carry out his threats while the union is not. *Id.* at 581. *See also* Fairweather, *What Can Employers Do in Election Campaigns?,* 17 N.Y. CONF. LAB. 183 (1964).

The lack of definition, the inconsistency, and the one-sidedness of the NLRB's regulation of campaign conduct, however, have not prevented the NLRB from maintaining its claim of expertise in determining when campaign conduct has interfered with the employees' free choice. J. GETMAN, S. GOLDBERG, & J. HERMAN, *supra* note 18, at 4 n.20. The courts have accepted the Board's claim of expertise as fact. *Id.*

The source of the Board's expertise is found in the "sheer volume of cases handled." Smither, *supra* at 581. One court has said that "[f]rom its supervision and review of thousands of representation elections each year, no area is more within the expertise of

regulation of election conduct has been widely criticized.[21]

The issue in an election interference case is not whether there has been an unfair labor practice; rather, the question centers on whether there has been interference with the employees' free choice.[22] An unfair labor practice need not be shown.[23] In fact, propaganda that interferes with free choice encompasses a broader range of propaganda than does the related class of unfair labor practices. Unfair labor practices are limited to conduct that is in the nature of coercion,[24] while interference with free choice has been found to result from misrepresentations, fraud, or coercion.[25]

But, because the free choice standard is less restrictive than the standard applied to unfair labor practices, the finding of an unfair labor practice is, "*[a] fortiori,* conduct which interferes with the [employees'] exercise of free and untrammeled choice in [a representation] election."[26] Thus, if the Board finds an unfair labor practice has occurred during the critical preelection period, the Board may without further inquiry conclude that there has been interference with the employees' free choice. The finding of an unfair labor practice in the representation election context is therefore important only in that it enables the NLRB to find that the employees' free choice has been interfered with without making a specific determination to that effect.

B. Development of the Hollywood Ceramics *Rule*

The Board's policy regarding the impact of the truth or fal-

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the Board than the proper limits of campaign propaganda and the impact of employer and union statements upon the employees' exercise of free choice." NLRB v. Golden Age Beverage Co., 415 F.2d 26, 30 (5th Cir. 1969). The Board's claim of expertise has not gone unchallenged, however. *See* Getman & Goldberg, *The Myth of Labor Board Expertise,* 39 U. CHI. L. REV. 681 (1972).

21. *See* Raskin, *supra* note 19; Smither, *supra* note 20.

22. Hicks-Hayward Co., 118 N.L.R.B. 695, 695 n.1 (1957).

23. General Shoe Corp., 77 N.L.R.B. 124, 126 (1948).

24. 29 U.S.C. § 158(a), (b) (1970). "The [NLRA] condemns only improper influence which is in the nature of coercion." J.S. Dillion & Sons Stores Co. v. NLRB, 338 F.2d 395, 399 (10th Cir. 1964).

25. *See* Sprague Ponce Co., 181 N.L.R.B. 281 (1970) (coercion interfered with election though no unfair labor practice found); Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962) (misrepresentation interfered with election); Shovel Supply Co., 121 N.L.R.B. 1485 (1958) (threat couched in the form of an opinion interfered with election); United Aircraft Corp., 103 N.L.R.B. 102 (1953) (fraud interfered with election though no unfair labor practice found).

26. Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 (1962).

sity of campaign propaganda on employee free choice was originally one of noninterference.[27] But in *United Aircraft Corp.*,[28] where one union distributed a forged telegram in which the opposing union's president purportedly apologized for his union's improper conduct and praised the other union's president, the Board found that the employees' freedom of choice had been interfered with because it was impossible for the employees to recognize the forged telegram as campaign propaganda and discount it accordingly.[29] In a later case, the Board stated that

> as a general rule, and in the absence of coercion, [the Board] will not undertake to censor or police union campaigns or to consider the truth or falsity of electioneering propaganda, unless the ability of the employees to evaluate such material has been so impaired by the campaign material or by campaign trickery that the uncoerced desires of the employees cannot be determined.[30]

In *Gummed Products Co.*,[31] the Board overturned an election because a union's misstatement of wage rates in a competing unionized plant, made the day before the election, interfered with the employees' free choice of a bargaining representative.[32] The Board recalled that it did not usually "censor or police preelection propaganda by parties to elections, absent threats or acts of violence," but recognized that there were "*some limits* on campaign tactics."[33] The Board observed that "[e]xaggerations, 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 by the employees in the election of their bargaining representative."[34]

Then, in *United States Gypsum Co.*,[35] the Board set aside an election won by the employer where, two days before the election,

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27. Union campaign propaganda was not examined, and employers were not permitted to campaign. R. WILLIAMS, P. JANUS, & K. HUHN, *supra* note 9, at 17-18.

28. 103 N.L.R.B. 102 (1953).

29. *Id.* at 103-04. The Board returns to this level of campaign regulation in the instant case. Shopping Kart Food Mkt., Inc., 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705, 1708 (1977).

30. Radio Corp. of America, 106 N.L.R.B. 1393, 1394 (1953).

31. 112 N.L.R.B. 1092 (1955).

32. *Id.* at 1094.

33. *Id.* at 1093 (emphasis added).

The limits referred to by the Board were the limits imposed in United Aircraft Corp., 103 N.L.R.B. 102 (1953).

34. Gummed Prods. Co., 112 N.L.R.B. at 1093-94.

35. 130 N.L.R.B. 901 (1961).

the employer read to the employees a telegram containing deliberate misrepresentations.[36] The Board held that

> when one of the parties deliberately misstates material facts which are within its special knowledge, under such circumstances that the other party or parties cannot learn about them in time to point out the misstatements, and the employees themselves lack independent knowledge to make possible a proper evaluation of the misstatements the Board will find that the bounds of legitimate campaign propaganda have been exceeded and will set aside an election.[37]

Finally, in *Hollywood Ceramics Co.*,[38] the Board held that the union's misrepresentation of wage rates, made the day before the election, interfered with the employees' free choice of a bargaining representative.[39] Because wage rates are a matter of utmost concern to the employees, the Board found that any misrepresentations of wage rates could have had a significant impact on the election.[40] The Board overruled cases previously requiring that misrepresentations must be deliberate[41] and stated its new rule for the regulation of campaign misstatements:

> [A]n 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.[42]

Until the decision in the instant case, the Board considered the

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36. The telegram said that the employees had no voice in accepting the contract the union was negotiating with the employer and that the union was preventing the employer from granting wage increases. *Id.* at 902-03.

37. *Id.* at 904. The Board stated the rule in terms of legitimate campaign propaganda rather than in terms of interference with free choice, but the holding in *United States Gypsum* makes it clear that there had been interference with free choice. Both earlier (*e.g.*, *Gummed Products*) and later (*e.g.*, *Hollywood Ceramics*) cases indicate that the "ultimate consideration [in evaluation of campaign propaganda] is whether the challenged propaganda has lowered the standards of campaigning to the point where the uninhibited desires of the employees cannot be determined in an election." Gummed Prods. Co., 112 N.L.R.B. at 1094. The Board in fact found that free choice had been interfered with when it said that the "bounds of legitimate campaign propaganda have been exceeded." United States Gypsum Co., 130 N.L.R.B. at 904.

38. 140 N.L.R.B. 221 (1962).

39. *Id.* at 225.

40. *Id.*

41. *Id.* at 224 n.8.

42. *Id.* (footnote omitted).

Hollywood Ceramics rule to be "the definitive statement of its policies regarding campaign misrepresentations."[43]

II. INSTANT CASE

Holding that it would no longer look into the truth or falsity of campaign propaganda, the NLRB overruled the *Hollywood Ceramics* rule in the instant case.[44] The Board felt that the rule did not serve to protect the employees' freedom of choice, but rather "tended to impede the attainment of that goal."[45] In addition, the Board found numerous ill effects produced by the *Hollywood Ceramics* rule, "includ[ing] extensive analysis of campaign propaganda, restriction of free speech, variance in application as between the Board and the courts, increasing litigation, and a resulting decrease in the finality of the election results," and attributed these ill effects to the "nature of the standards"[46] employed by the Board.[47] The Board saw the variance

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43. R. WILLIAMS, P. JANUS, & K. HUHN, *supra* note 9, at 26.

44. Shopping Kart Food Mkt., Inc., 94 L.R.R.M. 1705 (NLRB 1977). Two members of the Board, Fanning and Jenkins, dissented. *Id.* at 1709.

The majority made it clear, however, that the holding in the instant case did not affect the Board's policy of regulating "campaign conduct which interferes with employee free choice outside the area of misrepresentation." *Id.* at 1708. The Board noted also that the *United Aircraft* rule was also unaffected by the holding in the instant case and that elections would continue to be overturned where forged documents make it impossible for employees to recognize campaign propaganda because of its misleading form. *Id.* at 1708 n.27.

45. *Id.* at 1706.

The Board emphasized that it had the authority to decline to probe into the truth or falsity of campaign statements. *Id.* at 1705. Relying on NLRB v. A.J. Tower Co., 329 U.S. 324 (1946), the Board stated that "the Supreme Court has long recognized that the Board possesses a 'wide degree of discretion' in performing its function of establishing policies and procedures to safeguard the conduct of representation elections." 94 L.R.R.M. at 1706. The Board also cited NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975), in which "the Court held that [the Board's] administrative discretion in the decisionmaking process necessarily includes the authority to revise or modify principles previously adopted." 94 L.R.R.M. at 1706. The Board found further support in a Fifth Circuit case which acknowledged that the laboratory-conditions standard was "adopted originally by the Board, not the courts, and, accordingly, is controlling only 'until the Board announces a change and its reasons for the change.' " 94 L.R.R.M. at 1706 (quoting Foremost Dairies of the South v. NLRB, 416 F.2d 392 (5th Cir. 1969)).

46. "If a standard of truth and accuracy could actually provide an administrable norm, something might be said for adopting such a view. But this possibility tends to dissolve on more careful analysis. In the welter of words exchanged during a heated campaign, it is plaintly [*sic*] impractical to intervene upon every misstatement made by the agents of the union or the employer. Thus, judges and administrators have long recognized that inaccurate or misleading assertions should be proscribed only under certain conditions. These qualifications, however, immediately begin to blur the line between the licit and illicit." . . .

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between the Board's and the courts' application of the *Hollywood Ceramics* rule as producing protracted litigation and further delay in the implementation of the employees' choice of bargaining representative.[48]

The major reason for the Board's rejection of the *Hollywood Ceramics* rule was its belief that the employees did not need the Board's protection from campaign misrepresentations.[49] The majority reasoned that employees are "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."[50] In short, the Board found that misrepresentations do not affect the employees' free and untrammeled choice of bargaining representatives.[51] Support for this conclusion was found in a recent study of voter behavior in representation elections.[52] The study had indicated that voting decisions are based on precampaign predilection, that voters generally pay little attention to the campaigns, and that misrepresentations do not significantly affect voter choice.[53]

III. ANALYSIS

In the instant case, the NLRB reversed a longstanding policy of regulating campaign misrepresentations without making substantial changes in the traditional framework of campaign regulation. While part of the Board's regulatory scheme was rejected, the basic premises of regulation stayed unchanged: impairment of free choice remains the measure of impermissible election interference.[54]

> . . . Professor Bok concluded that restrictions on the content of campaign propaganda requiring truthful and accurate statements "resist every effort at clear formulation and tend inexorably to give rise to vague and inconsistent rulings which baffle the parties and provoke litigation."

94 L.R.R.M. at 1706 (quoting Bok, *supra* note 15, at 85, 92).

47. *Id.*

The dissent in the instant case did not find the ill effects claimed by the majority to be of any significance. *See id.* at 1710-12.

48. *Id.* at 1707. *See, e.g.*, Lake Odessa Mach. Prods., Inc., 512 F.2d 762 (6th Cir. 1975); La Crescent Constant Care Center, Inc., 510 F.2d 1319 (8th Cir. 1974); Henderson Trumbull Supply Corp., 501 F.2d 1224 (2d Cir. 1974).

49. 94 L.R.R.M. at 1707.

50. *Id.*

51. *See id.*

52. *Id.* The study referred to was Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976). The complete findings of the study were subsequently published in J. GETMAN, S. GOLDBERG, & J. HERMAN, *supra* note 18.

53. Getman & Goldberg, *supra* note 52, at 283.

54. 94 L.R.R.M. at 1707.

A. Continued Existence of Free Choice Framework in Campaign Regulation

The Board supported its attack on the *Hollywood Ceramics* rule by, first, finding numerous ill effects attributable to the rule's application[55] and, second, finding that campaign misrepresentations did not, in fact, affect free choice.[56] In support of this latter conclusion, the NLRB referred to an empirical study supporting its view that misrepresentations did not interfere with free choice.[57]

It is the second finding, that misrepresentations do not affect free choice, that spelled the death knell for *Hollywood Ceramics.* The rule's purported ill effects and the empirical study are not essential to the holding in the instant case[58] and can probably be viewed merely as further justification[59] for the demise of the *Hollywood Ceramics* rule. The rule had originally been adopted to protect the employees' freedom of choice;[60] when in the instant case the Board determined that campaign misrepresentations do not actually affect freedom of choice, the rule became surplusage and rejection of the rule followed directly. Thus, the free choice test that had once provided the reason for the birth of the *Hollywood Ceramics* rule, twenty years later has provided the reason for its demise.[61]

The Board was careful to keep the free choice test intact. The free choice test, it should be noted, has been used by the Board to justify regulations of the time,[62] place,[63] and manner[64] of elec-

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55. *See* notes 46-47 and accompanying text *supra.*

56. 94 L.R.R.M. at 1707.

57. *Id.*

58. The NLRB would have continued to administer the *Hollywood Ceramics* rule in spite of its ill effects if the Board had believed that misrepresentations interfered with the employees' free choice. *Id.*

59. The Board was careful to show that it had the authority to overrule *Hollywood Ceramics*—possibly indicating a concern about the acceptance of the holding in the instant case. *See id.* at 1705-06.

60. Hollywood Ceramics Co., 140 N.L.R.B. 221, 223 (1962). The Board has said that the basic purpose of election regulation "is to assure the employees full and complete freedom of choice in selecting a bargaining representative." *Id.*

61. 94 L.R.R.M. at 1708.

While indicating that the assumptions that produced the *Hollywood Ceramics* rule probably never had any validity, the Board said that improvements in education and employee sophistication over the years have made their validity even more doubtful. *Id.* at 1707.

62. *E.g.,* Peerless Plywood Co., 107 N.L.R.B. 427 (1953) (prohibits campaign speeches made on company time within 24 hours of an election).

63. *E.g.,* Peoria Plastic Co., 117 N.L.R.B. 545 (1957) (noncoercive employer interviews at employees' homes interferes with free choice); Spartan Aircraft Co., 111 N.L.R.B. 1373 (1955) (electioneering near polls interferes with free choice).

64. *E.g.,* General Shoe Corp., 97 N.L.R.B. 499, 501 (1951): "[T]he technique of

tioneering without regard to content.[65] The retention of the free choice standard saves the Board the trouble of developing a new standard or analytical framework for the regulation of campaign propaganda that may or may not have been readily accepted by the courts.[66] The decision in the instant case also preserves a standard that the Board has found particularly useful. The free choice standard is both respectable[67] and flexible.[68] Perhaps unfortunately, however, the combination of the free choice standard and the Board's claimed and accepted expertise[69] in determining when the standard has been breached invites the Board to substitute conclusions for analysis.[70]

Because the Board was able to retain the free choice test while rejecting the *Hollywood Ceramics* rule, the holding of the instant case should produce a minimal disruptive effect on the NLRB's regulation of representation elections. NLRB supervision will continue as before except that the *substance* of a misrepresentation will no longer provide a basis for the setting aside of representation election results.[71] But, misrepresentations may still result in the overturning of an election because of the *manner* in which they are made.[72] The Board has indicated that deceptive campaign practices involving the Board or its processes or the use of forged documents will result in the overturning of an election under the holding in the instant case.[73] This result is essentially the level of campaign regulation set out in *United Aircraft Corp.*[74]

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calling the employees into the Employer's offices individually and in small groups and there urging that they reject the Union [is] in itself conduct which [interferes with free choice]."

65. Possible alternative justifications for the regulation of campaign conduct are fairness and propriety. *See* Bok, *supra* note 15, at 53-57.

66. *See* note 59 *supra.*

67. The free choice standard has been around since 1948. General Shoe Corp. 77 N.L.R.B. 124, 126 (1948). The courts have accepted the free choice standard and applied it in their review of Board decisions. *See, e.g.,* Wilkinson Mfg. Co. v. NLRB, 456 F.2d 298, 303 (8th Cir. 1972); NLRB v. Golden Age Beverage Co., 415 F.2d 26, 32 (5th Cir. 1969).

68. The holding in the instant case demonstrates the flexibility of the free choice standard. *See* notes 58, 60-63 and accompanying text *supra.*

69. *See* note 20 *supra.*

70. *See* Asher, *NLRB Representation Elections—Some of the Problems Confronting Unions,* 17 N.Y. CONF. LAB. 213, 221-22 (1964).

Because of the ad hoc nature of the Board's regulation of campaign propaganda, requiring an analysis of the reasons for overturning an election in a particular case may not be especially useful as a guide for the conduct of others; the requirement does, however, ensure that the decision in the particular case is somewhat reasoned.

71. 94 L.R.R.M. at 1708.

72. *Id.*

73. *Id. See* Formoc, Inc., 96 L.R.R.M. 1393 (NLRB 1977).

74. 103 N.L.R.B. 102 (1953).

twenty-four years ago—only where it is impossible for employees to recognize information as campaign propaganda will misrepresentations be found to violate the free choice rule.[75]

B. Implications in the Coercive Propaganda Context

The Board's rationale in the instant case adequately explains why it overruled *Hollywood Ceramics,* and perhaps no more should be expected. However, the rationale used by the Board creates a troublesome conflict. The Board treats coercive propaganda differently than misrepresentations, notwithstanding the fact that the Board's rationale in the instant case is as applicable to coercive propaganda as it is to misrepresentations.[76]

The ill effects the Board found attributable to the *Hollywood Ceramics* rule are also produced by the regulation of campaign propaganda that is threatening or coercive according to the Board's standards. Those ill effects "include extensive analysis of campaign propaganda, restriction of free speech, variance in application [of the rule] as between the Board and the courts, increasing litigation, and a resulting decrease in the finality of election results."[77] Yet, the Board has indicated it intends to continue regulating coercive campaign propaganda despite any possible "ill effects."[78] Therefore, the holding in the instant case may not dispel the "ill effects" specifically cited by the Board as products of the *Hollywood Ceramics* rule. *Any* regulation of campaign propaganda, whether for misrepresentation or coercion, must necessarily involve extensive analysis of campaign propaganda. Also implicit in any scheme of campaign regulation is some restriction of free speech.[79] The Board and the courts have also differed as to when propaganda believed to be coercive has interfered with the employees' freedom of choice, and the variance has produced the same protracted litigation that plagued the *Hollywood Ceramics* rule.[80] Whenever the Board overturns an

75. *See* notes 28-29 and accompanying text *supra.*

76. 94 L.R.R.M. at 1712 (dissenting opinion).

77. *Id.* at 1706 (majority opinion).

78. *Id.* at 1708.

79. The Board cannot regulate the content of campaign statements without placing limits on what may be said. For example, the dissent in the instant case maintained that misrepresentations do not fall under the protection of the first amendment. *Id.* at 1712. The laboratory-conditions (free choice) standard was developed by the Board to circumvent the free speech clause of the NLRA. R. WILLIAMS, P. JANUS, & K. HUHN, *supra* note 9, at 9.

80. *See, e.g.,* Wilkinson Mfg. Co. v. NLRB, 456 F.2d 298 (8th Cir. 1972); National Can Corp. v. NLRB, 374 F.2d 796 (7th Cir. 1967).

election, whether because the campaign propaganda is misleading or because it is coercive, the finality of the election is postponed and litigation is increased accordingly.

Ironically, the empirical study relied upon by the Board makes no distinction between the effects of misleading campaign propaganda and the effects of coercive propaganda on employee voting behavior.[81] The study found that "[v]oting behavior in elections involving campaign tactics believed [by the Board] to be coercive is not significantly different from voting behavior in campaigns that conform to the Board's standard of 'laboratory conditions.' "[82] The study found that union supporters are likely to perceive threats in ambiguous statements made by their employers, but the data indicated that the perceived threats did *not* affect the employees' voting behavior.[83] Specifically, the study showed that "[e]mployees who want union representation vote for the union despite threats or promises designed to cause them to do otherwise."[84] The study recommended that "[t]he Board should no longer set aside elections or find unfair labor practices based on written or oral campaign communications by employers or unions."[85]

Thus, both the ill effects produced by the regulation of coercive campaign propaganda and the results of the empirical study could support a Board conclusion, similar to that in the instant case, that coercive propaganda does not affect employee free choice. The Board, as noted, however, has expressly indicated

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81. The article cited by the Board was only a partial summary of the empirical study, and was limited to the misrepresentation aspect of the Board's regulation of campaign propaganda. The complete findings were later published in J. GETMAN, S. GOLDBERG, & J. HERMAN, *supra* note 18. The Book made no distinction between coercive propaganda and misleading propaganda. *See id.* at 150. Thus, empirical evidence of the quality used to support the Board's finding as to misrepresentations exists to support the contention that propaganda found coercive by the Board also does not affect employee free choice.

The Board's reliance on the law review article rather than the book, if consciously made, would imply that it did not agree with the conclusions in the book as to coercive propaganda. Although there is nothing in the majority opinion to indicate knowledge of the book, the dissent was familiar with it, and it can be fairly inferred that the majority was also knowledgeable. Shopping Kart Food Mkt., Inc., 94 L.R.R.M. at 1712 (dissenting opinion).

For a comment on the complete empirical study, see *Symposium—Four Perspectives on Union Representation Elections: Law & Reality,* 28 STAN. L. REV. 1161 (1976).

82. J. GETMAN, S. GOLDBERG, & J. HERMAN, *supra* note 18, at 146.

83. *Id.* at 141.

84. *Id.* at 147.

85. *Id.* at 150. The study suggests that NLRB regulation of election campaigns comes too late in the employees' decisionmaking process to provide any protection. Those employees susceptible to coercion are coerced long before the regulated preelection period begins. *See id.* at 129.

that it will continue to regulate coercive campaign propaganda, but in so doing gave no reasons for its apparent inconsistency.[86] The instant case implies that the distinguishing feature of misrepresentations as compared to coercive propaganda is that misrepresentations do not, in the Board's view, affect free choice.[87] Deregulation of propaganda presently regarded as coercive awaits only a Board composed of three members willing to conclude that such propaganda does not affect free choice. Available empirical data could easily support such a conclusion.

C. *Alternative Rationales*

Since the empirical study relied upon by the Board supports the proposition that neither campaign misrepresentation *nor* coercive propaganda affects the outcome of union elections, the Board's decision to deregulate the one activity but not the other seems contradictory. The Board could have reconciled that contradiction in a number of ways.

The contradiction could have been avoided by a Board finding that the study was spurious with respect to coercive propaganda. While this approach eliminates the contradiction, it is not analytically sound. There seems to be no reason to weigh the empirical evidence more heavily in one case than in another.

Alternatively, the Board could have reconciled its decision with the empirical data by relying upon the presumption that certain types of activity affect free choice. The Board could have concluded that the empirical data was strong enough to overcome a weaker presumption that *misrepresentations* influence voting behavior, but not strong enough to overcome a much stronger presumption that *coercive propaganda* influences voting behavior. Common sense would allow such a weighing of the two presumptions in relationship to the data. This conclusion would also seem to flow naturally from the premise that coercion may amount to an unfair labor practice, which would certainly be a violation of the free choice test.[88]

In the past the Board has not required that coercion (in the case of unfair labor practices) or coercive propaganda (in the case of interference with free choice) *actually* influence the employees or that it *actually* affect the outcome of the election.[89] Rather, the

86. Shopping Kart Food Mkt., Inc., 94 L.R.R.M. at 1708.

87. The dissent in the instant case expressed fear that the majority's ultimate purpose may be the deregulation of campaign propaganda. *Id.* at 1712 (dissenting opinion).

88. *See* notes 22-26 and accompanying text *supra*.

89. *E.g.*, NLRB v. Triangle Publications, Inc., 500 F.2d 597 (3d Cir. 1974) (unfair

Board has looked to the character and circumstances of the objectionable conduct in determining if the coercive propaganda has affected free choice.[90] Thus, as an alternative to the inherently contradictory rationale in the instant case, empirical evidence concerning the *actual* effects of coercive propaganda could have explicitly been found to have no bearing on the Board's present policy toward the regulation of campaign propaganda.

Lastly, an alternative rationale may be discerned from the purpose of the NLRA itself. Congress has expressed an intent to protect employees from being coerced or restrained in their free choice of bargaining representatives.[91] Implicit in this expression of congressional intent is the conclusion that threats and coercion do affect the employees' freedom of choice. Congress has not manifested any similar intent to protect employees from the effects of misrepresentations. Given the employer's economic power over the employees, and the employees' certain awareness of that power, the conclusion appears entirely rational. Thus, the Board could have expressly concluded that any change in policy regarding the regulation of coercive propaganda should be left to Congress, but that it was free to change its policy regarding misrepresentations.

Any of the above methods could have been used by the Board to avoid the contradiction that resulted from the Board's reliance on the empirical study. The Board failed, however, to make any attempt in the instant case to define the role such studies should play in Board decisions. The Board's uncritical acceptance of the study places a stamp of approval on techniques and conclusions that are far from infallible. Rather than treating the evidence in an authoritative manner, a better reasoned course would have been to emphasize the fallibility of empirical evidence and to relegate it to a minor role. The correctness of law or policy should not be determined by statistical surveys.

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labor practice); Westside Hosp., 218 N.L.R.B. 96 (1975) (interference with free choice); Steak House Meat Co., 206 N.L.R.B. 28 (1973) (interference with free choice); Central Photocolor Co., 195 N.L.R.B. 839 (1972) (interference with free choice).

But, before the Board will find that a misrepresentation has interfered with free choice, the misrepresentation must be found to have had a significant impact on voter choice. Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962).

90. Steak House Meat Co., 206 N.L.R.B. 28 (1973); Central Photocolor Co., 195 N.L.R.B. 839 (1972).

91. 29 U.S.C. § 158(a)(1) (1970) (employer coercion); *id.* § 158(b)(1) (union coercion).

IV. Conclusion

The Board in the instant case accomplished its purpose—the deregulation of misrepresentations—but in doing so left two questions unanswered: (1) What part should empirical data play in Board decisions?, and (2) What, given the rationale in the instant case, distinguishes the regulation of coercive propaganda from the regulation of misrepresentations? The latter question could have been answered in any one of the ways previously discussed. Considering the Board's plainly expressed desire to continue regulation of coercive propaganda, the Board, if pushed to it, will likely distinguish the regulation of coercive propaganda in some way. However, an answer to the latter question may, but will not necessarily, resolve the first. In the decisionmaking process, the Board should take empirical data into consideration only after careful evaluation. Empirical data is not so accurate as to warrant the Board placing unflinching confidence on it.

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