

12-15-1983

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Recommended Citation

Susan Gardner *N.L.R.B. Campaign Propaganda: A Call for Congressional Reform*, 11 Pepp. L. Rev. Iss. 1 (1983)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol11/iss1/4>

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N.L.R.B. Campaign Propaganda: A Call for Congressional Reform

SUSAN GARDNER*

With its decision in Midland National Life Insurance Company, the National Labor Relations Board no longer probes into the truth or falsity of statements made during the course of preelection campaigns. The decision marks the third policy reversal in regulating campaign propaganda during the last five years. Of concern to employers and unions is the uncertainty of Board resolutions in this area, particularly when each policy reversal was preceded immediately by Presidential appointments to the Board. This article traces the shifting Board policy of regulating campaign misrepresentations and calls for Congressional intervention to stabilize the preelection process.

I. INTRODUCTION

Among the most troublesome issues that haunt the National Labor Relations Board (Board) are incidents of employer and union misrepresentations prior to union representation elections.¹ During the course of these frequently bitter campaigns, less-than-

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1. The National Labor Relations Board [hereinafter cited as NLRB or Board] was created by Congress to administer the National Labor Relations (Wagner) Act, ch. 372, §§ 1-16, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169) (1976 and Supp. V 1981) [hereinafter cited as NLRA, Act, or Wagner Act]. The two main functions of the Board are to conduct and certify representation elections and to investigate unfair labor practices.

accurate statements may be made to voting employees. The Board must determine whether to take action against those who have profited by the inaccurate election propaganda.²

A growing concern of employers, unions, and the courts is the increasing uncertainty of Board resolutions in this critical area.³ In three of the past five years, the Board has reversed its major decisions on the standards it will apply to cases of preelection misrepresentation.⁴ Neither party to these contests is thus able to conduct zealous campaigns without knowing whether the election results will be certified or set aside and a new election ordered.

This article traces the history of the regulation of campaign misrepresentation; examines the two extreme positions which have been the focus of debate and, finding neither satisfactory, calls for Congress to eliminate the shifts in policy by establishing a concrete standard.

II. BACKGROUND

Before analyzing the Board's current policy on regulating pre-election misrepresentation, knowledge of Board election processes as well as a historical perspective of the issue are essential.

A. Representation Elections

Under the National Labor Relations Act (Act), employees have the right to select or refrain from selecting an exclusive representative⁵ for the purpose of collective bargaining.⁶ One method for employees to exercise their "freedom of choice" is by voting for or against a union in a Board-conducted representation election.⁷

The Act itself affords little guidance for the conduct of representation elections, providing only that the method of voting be

2. 29 U.S.C. §§ 158(a)(1), (b)(1), 160(a) (1976). The Board has the authority to set the election aside and order a new election in instances of misrepresentation and improper campaign tactics. R. WILLIAMS, P. JANUS & K. HUHN, *NLRB REGULATION OF ELECTION CONDUCT* 11-12 (University of Pennsylvania, Wharton School, Vance Hall/CS, Labor Relations and Public Policy Series No. 8, 1974) [hereinafter cited as WILLIAMS].

3. See, e.g., *NLRB v. Mosey Mfg. Co.*, 595 F.2d 375, 376 (7th Cir. 1979) (commenting on "great flux" of law involving pre-election misrepresentation).

4. *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311 (1977); *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978); *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. No. 24 (1982).

5. 29 U.S.C. § 157 (1976).

6. 29 U.S.C. § 159(a) (1976). The parties bargain over wages, hours and other terms and conditions of employment.

7. 29 U.S.C. § 159(c)(1) (1976). See also *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

by secret ballot.⁸ However, judicial interpretation of the Act has declared that the Board has "a wide degree of discretion" in promulgating "the procedure and safeguards" for representation elections.⁹ The procedures developed by the Board have been based on the policy that representation elections must "assure the employees full and complete freedom of choice in selecting a bargaining representative."¹⁰ Free choice has been viewed as more than simply noncoerced choice.¹¹ Rather, the Board has sought to provide an atmosphere "free not only from interference, restraint, or coercion . . . but also from *other elements* which prevent or impede a *reasoned* choice."¹² One area of employer and union activity which has been frequently regulated to assure the exercise of reasoned choice is preelection propaganda.¹³ If the Board determines the campaign propaganda substantially interfered with the election by prohibiting employees' free choice, then the election may be set aside and a new election ordered, regardless of whether the conduct was also deemed an unfair labor practice.¹⁴

B. *The Initial Policy--1935 to 1947*

Initially, the Board was reluctant to intervene in the representation election process by probing into the truth or falsity of preelection propaganda.¹⁵ Eventually, however, the Board began to view the issue of representation as involving only the union and

8. 29 U.S.C. § 159(c)(1) (1976).

9. NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946). *See also* Souther S.S. Co. v. NLRB, 316 U.S. 31, 37 (1942); NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940).

10. Hollywood Ceramics Co., 140 N.L.R.B. 221, 223 (1962). *See also* Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953); General Shoe Corp., 77 N.L.R.B. 124 (1948).

11. 29 U.S.C. § 158(a)(1) (1976) (expressly prohibiting coercion of employees in exercise of their section 7 rights of selecting or refraining from selecting exclusive representation).

12. Sewell Mfg. Co., 138 N.L.R.B. 66, 70 (1962) (emphasis added). *See also* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 47 (1964).

13. 138 N.L.R.B. at 70. Preelection propaganda is measured from the time of filing a petition for election to the time a representation election is conducted. Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275, 1278 (1961).

14. *See* WILLIAMS, *supra* note 2, at 19-20. *See also* General Shoe Corp., 77 N.L.R.B. at 126.

15. *E.g.*, Maywood Hosiery Mills, Inc., 64 N.L.R.B. 146 (1945). *See also* MORRIS, *THE DEVELOPING LABOR LAW* 91 (1971).

the employees.¹⁶ Thereafter, employer campaign statements, by their very nature, were seen as being prejudicial to the interests of employees.¹⁷ As a matter of course, these statements were considered unfair labor practices, causing the elections to be set aside.¹⁸ Conversely, the Board rarely intervened in those instances where union propaganda was at issue.¹⁹ Rather, employees were charged with recognizing union propaganda "for what it [was] and discount[ing] it."²⁰ For example, in *Maywood Hosiery Mills, Inc.*,²¹ the Board declared that it "[had] never undertaken to police . . . union campaigns, to weigh the truth or falsehood of . . . union utterances, or to curb the enthusiastic efforts of employee adherents"²²

What had begun as a uniform Board policy of strict neutrality in judging election propaganda had evolved into a dual standard—intervention for employer propaganda and nonintervention for union propaganda. Subsequently, this predilection of the Board towards union propaganda in contrast to its imposition of stringent standards on employer misstatements prompted criticism to mount on two fronts—the courts and the Congress.²³

C. The Courts and Congress React

In 1941, the United States Supreme Court rendered the

16. See 1 NLRB Ann. Rep. 70-76 (1936); WILLIAMS, *supra* note 2, at 17.

17. WILLIAMS, *supra* note 2, at 17. See, e.g., *Curtiss-Wright Corp.*, 43 N.L.R.B. 795 (1942); *Rockford Mitten & Hosiery Co.*, 16 N.L.R.B. 501 (1939).

18. 1 NLRB Ann. Rep. 73 (1936). To avoid first amendment challenges, the Board never found a violation on the basis of speech alone. Rather, "hostility to[ward] self-organization" was used as the prime determinant. Even so, speech was regulated. Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 758 & nn. 17-19 (1979). See also *NLRB v. Federbush Co.*, 121 F.2d 954 (2d Cir. 1941); *Schult Trailers, Inc.*, 28 N.L.R.B. 975 (1941); *Ford Motor Co.*, 23 N.L.R.B. 342 (1940); *Southern Colo. Power Co.*, 13 N.L.R.B. 699 (1939); *Muskin Shoe Co.*, 8 N.L.R.B. 1 (1938).

19. E.g., *Southeastern Clay Co.*, 73 N.L.R.B. 614 (1947); *Maywood Hosiery Mills, Inc.*, 64 N.L.R.B. 146 (1945); *Corn Prods. Refining Co.*, 58 N.L.R.B. 1441 (1944). *Contra* *Continental Oil Co.*, 58 N.L.R.B. 169 (1944) (election was set aside because of union actions which made impartial election impossible); *Sears, Roebuck & Co.*, 47 N.L.R.B. 291 (1943) (election was set aside because union claimed it had received Board endorsement).

20. *Corn Prods. Refining Co.*, 58 N.L.R.B. at 1442.

21. 64 N.L.R.B. 146 (1945). See also *Wilson Athletic Goods Mfg. Co.*, 73 N.L.R.B. 744 (1947); *Kroder-Reubel Co.*, 72 N.L.R.B. 240 (1947); *Aurora Wall Paper Mill, Inc.*, 72 N.L.R.B. 1035 (1947).

22. 64 N.L.R.B. at 150.

23. Killingsworth, *Employer Freedom of Speech and the NLRB*, 1941 WIS. L. REV. 211, 237. See also *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941); H.R. Rep. No. 1902, 76th Cong., 3d Sess. 82-83, 90-91 (1940); Raskin, *Deregulation of Union Campaigns: Restoring the First Amendment Balance*, 28 STAN. L. REV. 1175, 1175-76 (1976).

landmark decision of *NLRB v. Virginia Electric and Power Co.*²⁴ Rejecting the Board's limitation of employer speech, the Supreme Court held that employers had a constitutional right to express noncoercive opinions during organizational campaigns.²⁵ However, employer speech was subject to scrutiny in order to determine whether the "total activities" of the employer interfered with employee organizational rights.²⁶ Subsequent to *Virginia Electric*, Board decisions appeared to provide a degree of latitude towards employer statements made during organizational campaigns.²⁷

Notwithstanding the "less restrictive" approach taken by the Board, Congress enacted sweeping legislation in 1947, known as the Taft-Hartley Act, which had the purpose of bringing more balance to the Wagner Act.²⁸ The Republican Congress found prior Board decisions in the area of speech far too restrictive.²⁹ Thus, section 8(c),³⁰ the "free speech" proviso, was enacted not only to

24. 314 U.S. 469 (1941). *Virginia Electric* contended that the company and its employees had enjoyed a relationship of understanding without the involvement of a union. Thus, the interests of employees were best served by continuing this relationship of "confidence and understanding." The Board found the communications interfered with employee organizational rights. *Virginia Elec. & Power Co.*, 20 N.L.R.B. 911, 919-24 (1940). See also *NLRB v. American Tube Bending Co.*, 134 F.2d 993 (2d Cir.), cert. denied, 320 U.S. 768 (1943).

25. 314 U.S. at 477.

26. *Id.* On remand, the Board determined that the totality of the employer's conduct was coercive in nature. *Virginia Elec. & Power Co.*, 44 N.L.R.B. at 429, *aff'd*, 132 F.2d 390 (4th Cir. 1942), *aff'd*, 319 U.S. 533 (1943).

27. *E.g.*, *Edward G. Budd Mfg. Co. v. NLRB*, 142 F.2d 922 (3d Cir. 1944); *Clark Bros. Co.*, 70 N.L.R.B. 802, *enforced in part*, 163 F.2d 373 (2d Cir. 1947). See also Wollett & Rowen, *Employer Speech and Related Issues*, 16 OHIO ST. L.J. 380 (1955); Note, 14 U. CHI. L. REV. 104 (1946).

28. Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 151-169 (1976)) [hereinafter referred to as Taft-Hartley]. See also *NLRB v. Golub Corp.*, 388 F.2d 921, 926-27 (2d Cir. 1967); Reilly, *The Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285 (1960).

29. *E.g.*, S. REP. NO. 105 on S. 1126; 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, 429-430 (1948); H.R. Rep. No. 345 on H.R. 3020; 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, 299, 324 (1978). See also Koretz, *Employer Interference with Union Organization versus Employer Free Speech*, 29 GEO. WASH. L. REV. 399 (1960).

30. 29 U.S.C. § 158(c) (1976) [hereinafter referred to as 8(c)]. 29 U.S.C. § 158(c) reads in full:

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

Id.

guarantee both employer and union speech but also to provide Congressional interpretation as to the limitations which may be placed on speech in a labor-management context.³¹ Under section 8(c), “[t]he expressing of any views, argument, or opinion . . . shall not constitute . . . an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”³²

Following enactment of section 8(c), the Board refused once again to probe into the truth or falsity of campaign statements.³³ Rather, emphasis was placed on employee abilities to use their “good sense” in assessing campaign propaganda.³⁴ However, this neutrality in examining election propaganda was short-lived.

D. The Board Responds

In 1948, the Board rendered its first decision in response to section 8(c): *General Shoe Corp.*³⁵ The decision was significant for two reasons: one, it created the “laboratory conditions” standard as a requisite for Board-conducted elections;³⁶ and two, it distinguished instances of Board intervention based on the type of proceeding.³⁷

Read literally, section 8(c) applies only to unfair labor practice proceedings, even though there is support in the legislative record for the position that Congress intended its scope to include election cases.³⁸ Exploiting this facial distinction, the Board held: “We do not subscribe to the view . . . that the criteria applied . . . in a representation proceeding . . . need necessarily be identical to those employed in testing whether an unfair labor practice was

31. See S. REP. NO. 105, 80th Cong., 1st Sess. 23, n.38 (1947); H.R. REP. NO. 510, 80th Cong., 1st Sess. 45 (1947); H.R. REP. NO. 245, 80th Cong., 1st Sess. 8 (1947); 93 CONG. REC. 6859-60 (1947).

32. 29 U.S.C. § 158(c) (1976).

33. *E.g.*, N.P. Nelson Iron Works, Inc., 78 N.L.R.B. 1270 (1948); Carrollton Furniture Mfg. Co., 75 N.L.R.B. 710 (1948); 13 NLRB Ann. Rep. 49-50 (1948).

34. N.P. Nelson Iron Works, Inc., 78 N.L.R.B. at 1271; Carrollton Furniture Mfg. Co., 75 N.L.R.B. at 712.

35. 77 N.L.R.B. 124 (1948).

36. *Id.* at 127. Under the laboratory condition requirement, the Board views the election environment as a laboratory and insists the same conditions used to purify a scientific laboratory must also exist within the election environment.

37. *Id.* at 126-27.

38. See *supra* note 31. See also Note, *Free Speech and Free Choice in Representation Elections: Effect of Taft Hartley Act Section 8(c)*, 58 YALE L.J. 165, 174 (1948); Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 762, n.45 (1979). Further, the dissent in *General Shoe* would have applied the same standard in a representation election as that used in unfair labor practice cases. 77 N.L.R.B. at 131.

committed. . . ."³⁹ Henceforth, the role of the Board in election proceedings would be to assure the simulation of "laboratory conditions" so that employees could exercise their uninhibited choice.⁴⁰ No criteria for these conditions were given.⁴¹

Immediately thereafter, the Eisenhower-appointed Board refused to probe into the truth or falsity of campaign statements, absent violence or coercion.⁴² As noted in *The Liberal Market, Inc.*,⁴³ the Board recognized that elections did "not occur in a laboratory where controlled or artificial conditions may be established."⁴⁴ Thus, the role of the Board was "to establish ideal conditions insofar as possible," to assess "the actual facts in the light of realistic standards of human conduct."⁴⁵ It appeared that the laboratory conditions espoused by *General Shoe* would be interpreted in light of section 8(c), serving to limit Board intervention in election proceedings.⁴⁶

39. *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). See also Bok, *supra* note 12, at 45-47.

40. *General Shoe Corp.*, 77 N.L.R.B. at 127.

41. Nevertheless, the conditions requisite for providing "untrammeled choice" were adjudged as not being present in *General Shoe*. *Id.* at 126. The employer gave an anti-union address to a group of employees and had sent foremen to employees' homes to deliver a similar message. Although the conduct was not deemed coercive and, thus, not an unfair labor practice, it was viewed as impairing employee choice. *Id.* Because the conditions of the laboratory were not ideal, "the experiment [election]. . . [had to be] conducted over again." *Id.* at 127. See also *Bausch & Lomb, Inc. v. NLRB*, 451 F.2d 873 (2d Cir. 1971), in which a first amendment challenge was raised unsuccessfully.

42. *E.g.*, *National Furniture Co., Inc.*, 119 N.L.R.B. 1 (1957); *Lux Clock Mfg. Co., Inc.*, 113 N.L.R.B. 1194 (1955); *L.G. Everist, Inc.*, 112 N.L.R.B. 810, 811-12 (1955); *Southwestern Co.*, 111 N.L.R.B. 805, 806 (1955); *American Laundry Mach. Co.*, 107 N.L.R.B. 511 (1953). See also Wirtz, *The New National Labor Relations Board: Herein of "Employer Persuasion,"* 49 Nw. U.L. REV. 594, 600-01 (1954).

43. 108 N.L.R.B. 1481 (1954).

44. *Id.* at 1482.

45. *Id.*

46. Nevertheless, standards for laboratory conditions emerged, which focused on whether the manner in which a campaign statement was made impaired employee abilities to evaluate it as propaganda. For example, in *West-Gate Sun Harbor Co.*, 93 N.L.R.B. 830, 833 (1951), the Board intimated that incidents of "gross misconduct" during the election campaign would warrant Board intervention. Although the union made statements that the election of a rival would result in lengthy strike activity, the Board held the statement did not fall into the exceptions of "violence, coercion or other gross misconduct," and thus intervention was not warranted.

Shortly thereafter a series of decisions added another exception for Board scrutiny: that of deceptive tactics which precluded effective employee evaluation of the campaign statements. In *Timken-Detroit Axle Co.*, 98 N.L.R.B. 790, 792 (1952), the Board set aside the election because of the manner in which the campaign state-

Not until 1955, in *Gummed Products Co.*,⁴⁷ did the Board begin to scrutinize the substance of preelection statements. The day before the election, the union misrepresented wages it had negotiated at another plant. The Board admitted that it rarely "censor[ed] or police[d] preelection propaganda . . . absent threats or acts of violence."⁴⁸ However, "some limits" had been imposed.⁴⁹ Taking these limitations into account, the Board concluded:

[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 The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election.⁵⁰

The decision introduced three considerations for future Board intervention into election proceedings: one, misleading statements; two, deliberate misrepresentation; and three, timing of the misrepresentation.⁵¹

With the introduction of the Kennedy or "New Frontier" Board, the resurgence of the "laboratory conditions"⁵² concept returned. In *Dal-Tex Optical Co., Inc.*,⁵³ the employer stated the election

ment was made. The employer distributed an anti-union statement, alleging it was a spontaneous appeal from an employee. Finding the employees were "blinded to the fact that . . . the [e]mployer" was the source of the letter, the Board held, "[t]he use of plain envelopes misrepresented to the employees the source of this anti-union propaganda, thereby infringing their right to a fair opportunity to evaluate it." *Id.* In *United Aircraft Corp., Pratt & Whitney Aircraft Div.*, 103 N.L.R.B. 102, 105 (1953), one union forged a telegram, misidentifying it as from a rival union. The president of the rival union allegedly apologized for misconduct and extolled the virtues of the competing union's president. The Board asserted that the telegram could not be evaluated as mere campaign propaganda since its source was mendacious. *See also* *Radio Corp. of Am.*, 106 N.L.R.B. 1393, 1394 (1953).

47. 112 N.L.R.B. 1092 (1955). *See also* *NLRB v. Southern Paper Box Co.*, 473 F.2d 208 (8th Cir. 1973); *The Trane Co.*, 137 N.L.R.B. 1506 (1962); *Hicks-Hayward Co.*, 118 N.L.R.B. 695 (1957); *Thomas Gouzoule*, 117 N.L.R.B. 1026 (1957); *Comfort Slipper Corp.*, 112 N.L.R.B. 183 (1955); *contra* *Otis Elevator Co.*, 114 N.L.R.B. 1490, 1492 (1955). In *Otis* the Board retreated from its position in *Gummed Products*. The case again involved misrepresentation of wages and benefits; however, they were made by the employees whom the union was attempting to organize. The Board refused to invalidate the election, stating: "[The misrepresentations] dealt with information which was within the employees' own knowledge and which they themselves could properly evaluate."

48. 112 N.L.R.B. at 1093.

49. *Id.* (citing *United Aircraft Corp.*, 103 N.L.R.B. 102 (1953)).

50. *Id.* at 1093-94.

51. *Id.* *See also* *Kawneer Co.*, 119 N.L.R.B. 1460, 1461 (1958); *Allis Chalmers Mfg. Co.*, 117 N.L.R.B. 744 (1957); *Thomas Gouzoule*, 117 N.L.R.B. at 1026; *Reiss Assoc. Inc.*, 116 N.L.R.B. 217 (1956); WILLIAMS, *supra* note 2, at 22-23.

52. *See supra* notes 35-36 and accompanying text.

53. 137 N.L.R.B. 1782 (1962). *See also* *United States Gypsum Co.*, 130 N.L.R.B. 901, 902-03 (1961); *Bowman Biscuit Co.*, 123 N.L.R.B. 202 (1959).

process would "not mean a thing if the union wins," because the employer would take a "couple of years" to litigate it.⁵⁴ The Board overturned the election, finding "the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to . . . [an unfair labor practice]."⁵⁵

In summary, Board regulation of propaganda between 1935 and 1947 appeared to be dependent upon the philosophical disposition of the Board.⁵⁶ After announcing its *General Shoe*⁵⁷ decision, wherein "laboratory conditions" were requisite to an uninhibited election process, the Board retreated to its earlier position of non-intervention.⁵⁸ However, based on a case-by-case determination, this approach was relaxed for incidents involving material misstatements, deceptive tactics impairing independent employee evaluation, knowledge exclusive to the speaker, and inadequate time for rebuttal.⁵⁹ The preceding melange of decisions was finally consolidated in 1962,⁶⁰ in an effort to "balance the right of the employees to an untrammelled choice, and the right of the parties to wage a free and vigorous campaign with all the normal legitimate tools of electioneering."⁶¹

III. HOLLYWOOD CERAMICS

From 1962 to 1977, the unanimous decision of *Hollywood Ceramics* provided the definitive standard for Board evaluation of pre-election propaganda.⁶² Because more recent decisions involving campaign misrepresentations have either overruled or returned to the *Hollywood Ceramics* standard,⁶³ the decision, an analysis

54. 137 N.L.R.B. at 1783.

55. *Id.* at 1786-87.

56. See Hickey, *Stare Decisis and the NLRB*, 17 LAB. L.J. 451, 460-63 (1966); WILLIAMS, *supra* note 2, at 6.

57. See *supra* notes 35-36 and accompanying text.

58. See *supra* note 42 and accompanying text.

59. See MORRIS, *supra* note 15, at 91.

60. *Hollywood Ceramics*, 140 N.L.R.B. 221 (1962).

61. *Id.* at 224. Cf. *Linna v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53 (1966) (court held that where party to labor dispute circulates false and defamatory statements during union organizing campaign, court has jurisdiction to apply state remedies if complainant proves that statements were made with malice and that he was injured).

62. 140 N.L.R.B. at 224. See also *York Furniture Corp.*, 170 N.L.R.B. 1487 (1968); WILLIAMS, *supra* note 2, at 26.

63. *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311 (1977) (overruling *Hollywood Ceramics*); *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978)

thereof and an account of the disaffection among the courts follow.

A. *The Decision*

The day before the election, the union distributed a circular allegedly comparing employer wage rates with those of unionized plants. The comparison was inaccurate because an incentive pay plan, while included in the data for the wages of unionized plants, was omitted in the wage rates for the employer's plant. The effect of the omission was an understatement of employer wage rates by thirty percent. Furthermore, the type of operation, jobs and requisite skill levels of the plants were not analogous and thus, any information purporting to compare the two was erroneous.⁶⁴ The union contended the information was not deliberately inaccurate.

While recognizing that "absolute precision of statement and complete honesty are not always attainable,"⁶⁵ the Board, nevertheless, believed that a proper balance between honest information and uninhibited speech could be achieved by assuring that elections were conducted under unimpaired laboratory conditions.⁶⁶ The standard for review of whether laboratory conditions existed was restated as follows:

[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 . . . 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.⁶⁷

As the standard was not intended to have unlimited applicability, the Board cautioned that "exaggeration, inaccuracies, half-truths, and name calling, though not condoned, will not be grounds for setting aside elections."⁶⁸

B. *The Analysis*

The *Hollywood Ceramics* standard represented a consolidation of four determinative factors gleaned from earlier cases for evaluating whether an election should be overturned. The thrust of the evaluation concentrated on whether the preelection misstate-

(reinstating *Hollywood Ceramics*); *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. No. 24 (1982) (overruling *Hollywood Ceramics*).

64. *Hollywood Ceramics Co.*, 140 N.L.R.B. at 222-23.

65. *Id.* at 223. See also *Celanese Corp. of Am. v. NLRB*, 291 F.2d 224, 226 (7th Cir.), cert. denied, 368 U.S. 925 (1961).

66. 140 N.L.R.B. at 224.

67. *Id.*

68. *Id.* at 224 n.6.

ments: one, were material and substantial; two, prevented independent employee evaluation; three, precluded opportunity for reply; and four, involved the intimate knowledge of the speaker.⁶⁹

Interpretation provided by the Board as well as the "conjunctive" phrasing of the standard imply that all factors must impede employee choice in order to warrant the setting aside of an election.⁷⁰ Pursuant to this standard, the misstatement must depart substantially from the truth.⁷¹ Recalling that an election would not be invalidated for "exaggerations," the Board must thus discern between "puffery" and substantial departure.⁷² Furthermore, though the misstatement may be substantial, it must also involve a material issue, one that is important as opposed to *de minimis*, to employees in their exercise of free choice.⁷³

Nevertheless, a substantial departure would not justify invalidating an election if the impact of the misstatement was not significant to the process.⁷⁴ Thus, a substantial departure from the truth may be so blatant as to warn employees of its falsity or employees may possess knowledge so as to be able to independently evaluate the misstatement, causing the impact of the misstatement to become insignificant in the preelection process. Assuming the misinformation was substantial and material, with a significant impact on the process, the election would nonetheless be validated if the party had an opportunity to rebut the misstatements.⁷⁵ Whether they exercised their opportunity was not criti-

69. *Id.* at 223. The standard has been analyzed as a four or five factor test. See WILLIAMS, *supra* note 2, at 26-27; NLRB v. Cactus Drilling Corp., 455 F.2d 871, 874 (5th Cir. 1972); NLRB v. O.S. Walker Co., 469 F.2d 813, 817 (1st Cir. 1972); MORRIS, *supra* note 15, at 91; Phalen, *The Demise of Hollywood Ceramics: Fact and Fantasy*, 46 U. CIN. L. REV. 450, 453 (1977).

70. 140 N.L.R.B. at 224. See also MORRIS, *supra* note 15, at 92.

71. 140 N.L.R.B. at 224.

72. *Id.* at 224 n.6. See, e.g., Cross Baking Co., 186 N.L.R.B. 199 (1970); Southern Foods, Inc., 171 N.L.R.B. 999 (1968).

73. 140 N.L.R.B. at 224. See also NLRB v. Houston Chronicle Publishing Co., 300 F.2d 273 (5th Cir. 1962); Bailey Meter Co., 198 N.L.R.B. 1227 (1972); Allis-Chalmers Mfg. Co., 194 N.L.R.B. 1014 (1972); The Trane Co., 137 N.L.R.B. 1506 (1962); WILLIAMS, *supra* note 2, at 33-39. According to a later case, materiality is also determined by whether the speaker has or is presumed to have intimate knowledge of the subject matter of the statement. Cumberland Wood & Chair Corp., 211 N.L.R.B. 312 n.1 (1974).

74. 140 N.L.R.B. at 224. See also Uniroyal, Inc., 169 N.L.R.B. 918 (1968).

75. 140 N.L.R.B. at 224. See also General Elec. Co. Specialty Control Dept., 162 N.L.R.B. 912 (1967). However, an issue raised early in the campaign about which a last minute misstatement is made may not force the election to be set aside despite the lack of opportunity for reply. E.g., Convalescent Hosp. Management

cal to the validation decision.⁷⁶

The standard enunciated in *Hollywood Ceramics* also considered the knowledge possessed by the speaker of the misstatement. If the source was one which caused employees to reasonably "attach added significance to [the] assertion," the election may be voided.⁷⁷ The Board weighed whether the employees *believed* the speaker had intimate knowledge, not whether the speaker actually possessed the special knowledge.⁷⁸

The intent of the Board was to establish the factors articulated in *Hollywood Ceramics* as a clear-cut standard in evaluating misrepresentation issues. However, application of those factors has frequently caused disagreement among individual Board members and courts of appeal.

C. Board Application and Court Disaffection

The standard developed in *Hollywood Ceramics* was both "vague and flexible."⁷⁹ Its application, therefore, required a progression of subjective interpretations according to the facts of each election proceeding brought before the Board. For example, the Board was called upon to determine whether a misrepresentation involved a *material* issue which departed *substantially* from the truth and, if so, whether the resultant impact *significantly* interfered with the election. The consequences of this inherent subjectivity have been inconsistent applications and unpredictable results as different Board members analyzed similar facts.⁸⁰

Corp., 173 N.L.R.B. 38 (1968). *But cf.* United States Gypsum Co., 130 N.L.R.B. 901 (1961) (telegrams containing misrepresentations distributed to employees' supervisors and posted on bulletin boards by employer two days prior to election held to be cause to set aside election because union had insufficient time to discover and correct the misstatements).

76. *E.g.*, NLRB v. Cactus Drilling Corp., 455 F.2d 871, 876 (5th Cir. 1972). *See also* WILLIAMS, *supra* note 2, at 40 (whereby parties would be encouraged to correct misstatements, thus eliminating the tactical advantage that one party may gain by allowing a misrepresentation to go unanswered and then using the misrepresentations as a basis for overturning unsatisfactory election).

77. *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 223-24 & n.10 (1962). *See also* NLRB v. Houston Chronicle Publishing Co., 300 F.2d 273 (5th Cir. 1962); Cumberland Wood & Chair Corp., 211 N.L.R.B. 312 n.1 (1974).

78. *See* MORRIS, *supra* note 15, at 93 (citing NLRB v. A.G. Pollard Co., 393 F.2d 239 (1st Cir. 1968); Cranbar Corp., 173 N.L.R.B. 200 (1968)). *See also* Bailey Meter Co., 198 N.L.R.B. 1227 (1972); Allis-Chalmers Mfg. Co., 194 N.L.R.B. 1014 (1972); The Trane Co., 137 N.L.R.B. 1506 (1962) (later decisions which considered the "special knowledge" evaluation as part of materiality determination).

79. Penello, *Shopping Kart Food Market, Inc.: The Cure for the Hollywood Ceramics Malaise*, 46 U. CIN. L. REV. 464, 465-66 (1977). Penello is a former member of the NLRB and the leading proponent of overruling *Hollywood Ceramics*.

80. *See* WILLIAMS, *supra* note 2, at 28-61; Bok, *supra* note 12, at 82-90; Note, *Labor Law—Shopping Kart: The Need for a Broader Approach to the Problems of*

The uncertainty caused by subjective evaluation was further exacerbated by Board/court disagreement over application of the standard. The perceived tendency of the Board to interpret employer misrepresentations as substantial while finding union misrepresentations to be inconsequential⁸¹ led the courts to independently examine the facts of many cases.⁸² The majority of cases before the courts concerned the Board's overruling of employer claims of union misrepresentation.⁸³ As alleged by Member Penello, "the judiciary could correct this suspected bias only by imposing a more rigorous standard in regard to alleged union abuses, rather than ordering a more lenient standard in regard to alleged employer abuses."⁸⁴ This concern was echoed by the

Campaign Regulation, 56 N.C.L. Rev. 389, 394-96 (1978). Compare *Gooch Packing Co., Inc.*, 200 N.L.R.B. 1096 (1972) (overstatement of wage rates by nine cents was "puffing") with *Follet Corp.*, 160 N.L.R.B. 506 (1966) (overstatement by seven cents was substantial deviation from truth). See also *NLRB v. A.G. Pollard Co.*, 393 F.2d 239 (1st Cir. 1968); *Ereno Lewis*, 217 N.L.R.B. 239 (1975); *Medical Ancillary Servs., Inc.*, 212 N.L.R.B. 582 (1974); *Cumberland Wood & Chair Corp.*, 211 N.L.R.B. 312 (1974).

81. See *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."; *Raskin, supra* note 23, at 1175-76. Compare *Cross Baking Co. v. NLRB*, 453 F.2d 1346 (1st Cir. 1971) (Board considered a 15 cents an hour wage misrepresentation by union as inconsequential) with *The Trane Co.*, 137 N.L.R.B. 1506 (1962) (Board considered a one dollar misrepresentation by employer of union dues as substantial). See also *Penello, supra* note 79, at 465.

82. See *WILLIAMS, supra* note 2, at 28-61; *Bok, supra* note 12, at 82-90. See also *Henderson Trumbull Supply Corp. v. NLRB*, 501 F.2d 1224 (2d Cir. 1974); *Luminator Div. of Gulton Indus., Inc. v. NLRB*, 469 F.2d 1371 (5th Cir. 1972) (reversing Board's evaluation of wage misrepresentation); *NLRB v. G.K. Turner Assocs.*, 457 F.2d 484 (9th Cir. 1972); *Cross Baking Co. v. NLRB*, 453 F.2d 1346 (1st Cir. 1971); *NLRB v. Maine Sugar Indus., Inc.*, 425 F.2d 942 (1st Cir. 1970); *NLRB v. Smith Indus., Inc.*, 403 F.2d 889 (5th Cir. 1968); *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525 (9th Cir. 1968) (reversing Board's evaluation of wage misrepresentations); *Graphic Arts Finishing Co. v. NLRB*, 380 F.2d 893 (4th Cir. 1967) (reversing Board's evaluation of wage representations); *NLRB v. Bata Shoe Co.*, 377 F.2d 821 (4th Cir. 1967); *NLRB v. Bonnie Enters., Inc.*, 341 F.2d 712 (4th Cir. 1965); *NLRB v. Houston Chronicle Publishing Co.*, 300 F.2d 273 (5th Cir. 1962) (reversing Board's evaluation of whether statements were misrepresentations). The Board is an administrative body. Thus, the courts of appeal are given an opportunity to review the record when called upon to enforce a Board order to bargain.

83. See *Penello, supra* note 79, at 465.

84. *Id. Cf. NLRB v. Bonnie Enters., Inc.*, 341 F.2d 712 (4th Cir. 1965) (board certification of election overruled because of union misrepresentation on election day and day preceding).

Eighth Circuit which remarked: "It should hardly need saying that [the *Hollywood Ceramics* standard] no less applies to material misrepresentation by a union than by an employer."⁸⁵ Thus, a number of Board bargaining orders were denied enforcement.⁸⁶

The proclivity of the courts to adopt a more stringent application of the standard was not the only cause of Board/court disagreement. In some instances, the vagueness of the standard made it difficult to evaluate the factors. For example, in determining whether there existed an opportunity to rebut the misrepresentation (the "timing" factor), the Board and courts have had difficulty when examining repeated misrepresentations. As illustrated by *Aircraft Radio Corp.*,⁸⁷ a misrepresentation was repeated frequently, with the final misstatement immediately preceding the election. The Board concluded the opportunity to rebut was available to the employer following the initial misrepresentation. Consequently, the employer was ordered to bargain with the union. The court of appeals, however, denied enforcement of the bargaining order, placing greater emphasis on the effectiveness of a rebuttal to a misstatement rather than the mere opportunity to dispel the falsehood.⁸⁸ Its reasoning may be considered circuitous. After chiding the Board for placing too much weight on the timing factor, the court reversed, concluding that any prior reply by the employer would have been ineffective, thereby expanding the scope of evaluation for the timing factor.⁸⁹

As criticism mounted, the Board sought to reevaluate and clarify the standard developed by *Hollywood Ceramics*. The opportunity to do so arose in 1973.

D. The Board Defends

The facts of *Modine Manufacturing Co.*⁹⁰ were markedly similar to those of *Hollywood Ceramics*. The company alleged the union overstated the wages achieved at unionized plants while grossly understating those earned at the employer's plant. Furthermore,

85. NLRB v. Lord Baltimore Press, Inc., 370 F.2d 397, 401 (8th Cir. 1966). See also *Wilkinson Mfg. Co. v. NLRB*, 456 F.2d 298, 304 (8th Cir. 1972); *NLRB v. Sanitary Laundry, Inc.*, 441 F.2d 1368 (10th Cir. 1971); *The Bendix Corp. v. NLRB*, 400 F.2d 141, 146 (6th Cir. 1968).

86. Note, *supra* note 80, at 396 n.47 (indicating that 51.1% of the Board's decisions in misrepresentation cases have been denied enforcement by the courts in contrast to a 14.7% denial rate for Board decisions in general).

87. 214 N.L.R.B. 358 (1974).

88. *Aircraft Radio Corp. v. NLRB*, 519 F.2d 590 (3d Cir. 1975). Compare *NLRB v. Cactus Drilling Corp.*, 455 F.2d 871 (5th Cir. 1972), with *Lipman Motors, Inc. v. NLRB*, 451 F.2d 823 (2d Cir. 1971). See WILLIAMS, *supra* note 2, at 39-46.

89. 519 F.2d at 593.

90. 203 N.L.R.B. 527 (1973), enforced 500 F.2d 914 (8th Cir. 1974).

the union allegedly misinformed employees of its own procedures for a strike vote.⁹¹ Applying *Hollywood Ceramics*, the Board found that although the union had technically misrepresented some issues, common sense dictated that the impact on the election process was not significant.⁹²

The Board acknowledged the mounting criticism of commentators as well as dissatisfaction among its own members with the approach taken by *Hollywood Ceramics*.⁹³ It further noted the increases in employee sophistication and improvements in educational background which might eventually lessen the need for protection.⁹⁴ However, it was not yet willing to abandon the protections afforded by the standard. To do so would subject employees to a "barrage of flagrant deceptive misrepresentations."⁹⁵

To support continuation of *Hollywood Ceramics*, the Board reemphasized the original narrow focus of the standard which did not require complete accuracy in campaign electioneering.⁹⁶ Stressing that a common sense yet experienced approach would best facilitate application of the standard, the Board asked the courts to defer to their "administrative expertise" in determining whether campaign propaganda exhibited a "tendency materially to mislead" employees, thereby impairing freedom of choice.⁹⁷

The hope of a greater court deference to the Board's expertise was dashed by the merry-go-round experience illustrated in *Medical Ancillary Services, Inc.*⁹⁸ First heard in 1972, the company charged the union with misrepresenting the employer's position by reporting that it had denied disability insurance and failed to pay for overtime. The Board, applying *Hollywood Ceramics*, over-

91. 203 N.L.R.B. at 530-31. Although a two-thirds vote is required for a strike, there were numerous exceptions which the union failed to mention.

92. *Id.* at 531.

93. *Id.* at 529-30.

94. *Id.* at 530.

95. *Id.*

96. *Id.* Pursuant to *Hollywood Ceramics*, the parties have a right to a "free and vigorous campaign" and thus "exaggeration, inaccuracies, half-truths, and name-calling" would not invalidate an election. 140 N.L.R.B. at 224 & n.6. See also Truesdale, *From General Shoe to General Knit: A Return to Hollywood Ceramics*, 30 LAB. L.J. 67, 69 (1979). Truesdale is a former member of the NLRB and a leading proponent of *Hollywood Ceramics*.

97. 203 N.L.R.B. at 531.

98. 212 N.L.R.B. 582, *supplementing*, 195 N.L.R.B. 290, *rev'd and remanded*, 478 F.2d 96 (6th Cir. 1973). See also *NLRB v. Snokist Growers, Inc.*, 532 F.2d 1239 (9th Cir. 1976); *LaCrescent Constant Care Center, Inc. v. NLRB*, 510 F.2d 1319 (8th Cir. 1975); *Henderson Trumbull Supply Corp. v. NLRB*, 501 F.2d 1224 (2d Cir. 1974).

ruled the employer's objections and issued a bargaining order.⁹⁹ The court of appeals disagreed and remanded the case to the Board for a hearing.¹⁰⁰ Without comment, the Board reversed its initial finding by adopting the ruling of the Hearing Officer and ordered a new election.¹⁰¹

The decision provoked the first of two vigorous dissents by Member Penello who exhorted the Board to overturn *Hollywood Ceramics*. He argued that the application of the standard had caused "extensive analysis of campaign propaganda, restriction of free speech, increasing litigation, and unwarranted delays in the finality of election results."¹⁰² The theme of the dissent centered on the majority's treatment of employees as "retarded children" when in fact the Board had no duty "to protect voters from their own gullibility."¹⁰³ Penello believed that Board intervention should be limited to instances involving "intentional trickery," for in those cases employees "could have no reason to suspect and no reason to check for authenticity."¹⁰⁴

Despite the dissents and continued criticism by commentators, the court continued to demand stringent application of the standard.¹⁰⁵ However, when Chairwoman Murphy and Member Walther indicated they would adopt the approach advocated by Member Penello for future cases,¹⁰⁶ the burial of *Hollywood Ceramics* was inevitable.

IV. THE REVOLVING DOOR

In 1977, 1978 and 1982, the Board embarked on an odyssey to formulate the definitive statement of its policy towards misrepresentation issues. However, the policy which prevailed at any

99. Medical Ancillary Servs., Inc., 195 N.L.R.B. 290 (1972).

100. NLRB v. Medical Ancillary Servs., Inc., 478 F.2d 96 (6th Cir. 1973).

101. Medical Ancillary Servs., Inc., 212 N.L.R.B. 582 (1974).

102. *Id.* at 584. Member Penello stated the "case illustrates graphically the restrictive interpretation that has been put on *Hollywood Ceramics* and its progenitor, *The Gummed Products Company*, 112 N.L.R.B. 1091 (1955), and the need for a complete reevaluation of the Board's approach to misleading campaign propaganda." 212 N.L.R.B. at 584.

103. 212 N.L.R.B. at 585-86. In Ereno Lewis, 217 N.L.R.B. 239, 242-43 (1975), Member Penello again decried the "misguided paternalism" of the majority in finding an employer's statement, which inaccurately portrayed by \$3.00 union dues and fees, as a substantial departure from the truth. Asserting that continued adherence to the standard could be based only on a misguided belief of employee naivete, he urged the Board to provide *Hollywood Ceramics* with a "decent burial." 217 N.L.R.B. at 240.

104. Medical Ancillary Servs., Inc., 212 N.L.R.B. at 586.

105. See Phalen, *supra* note 9, at 456. See also NLRB v. Snokist Growers, Inc., 532 F.2d 1239 (9th Cir. 1976); LaCrescent Constant Care Center, Inc. v. NLRB, 510 F.2d 1319 (8th Cir. 1975).

106. See Phalen, *supra* note 69, at 456.

point in time reflected the views of the most recent appointees to the Board. The lack of Board resolution in this area has caused an era of uncertainty. As each new appointee walked through the door, the definitive statement was reevaluated and, as though a part of a revolving door, the policy came and went as did the appointees. During these years, on divided Board votes of three to two, it either overruled or returned to the *Hollywood Ceramics* standard.

A. 1977—*Shopping Kart Food Market, Inc.*

In April of 1977, *Hollywood Ceramics* was overruled by *Shopping Kart Food Market, Inc.*¹⁰⁷ The evening before the election, a union vice-president inaccurately portrayed company profits at \$500,000, ten times their actual level. Without apprising the parties of an intention to reconsider its policy, the Board agreed to uphold the election by overruling *Hollywood Ceramics*.¹⁰⁸ Absent deceptive tactics such as misrepresenting Board involvement or employing forged documents, the Board announced it would no longer probe into the truth or falsity of campaign statements.¹⁰⁹ Reflecting its earlier decision of *United Aircraft Corp.*¹¹⁰ the manner of campaign propaganda, not its substance, would be the determinative factor.¹¹¹

107. 228 N.L.R.B. 1311 (1977).

108. *Id.* See also Note, *Labor Law—Shopping Kart: The Need for a Broader Approach to the Problems of Campaign Regulation*, 56 N.C.L. REV. 389, 390 n.8 (1978). Before advancing arguments in support of *Shopping Kart*, the Board assiduously described its authority to change major policy. Citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946), the Board noted the Supreme Court's acknowledgment of the "wide degree of discretion" possessed by the Board in formulating policy. *Accord* *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969). Further reliance was placed on a more recent opinion by the Supreme Court where it was held the exercise of administrative discretion, by necessity, included authority to revise or modify principles previously adopted. *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975). Specifically, the Court stated: "To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking. 'Cumulative experience begets understanding and insight by which judgments . . . are validated or qualified or invalidated.'" *Id.* *Accord* *Home Town Foods, Inc. v. NLRB*, 416 F.2d 392 (5th Cir. 1969).

109. 228 N.L.R.B. at 1313.

110. 103 N.L.R.B. 102 (1953). See *supra* note 46.

111. *Shopping Kart Food Mkts., Inc.*, 228 N.L.R.B. at 1314. The Board justified a deceptive tactics exception on the basis that "while employees are able to evaluate mere propaganda claims, there is simply no way any person could recognize a forged document for what it is from its face since, by definition, it has been altered to appear to be that which it is not." *Id.* Member Murphy concurred, while adding

Foremost among the different reasons advanced for the policy change was the majority's desire to effectuate employee choice, promptly.¹¹² Protracted litigation, caused by subjective evaluation and Board/court conflict had impeded the attainment of this goal under *Hollywood Ceramics*.¹¹³ Therefore, by no longer scrutinizing campaign propaganda, litigation would decrease thereby permitting employee choice to be implemented expeditiously.

Notwithstanding antipathy with protracted litigation, the basis of the decision was the majority's fundamental disagreement with the underlying premise of *Hollywood Ceramics*—the need to protect employees from campaign misrepresentation.¹¹⁴ Emphasizing it would not accept "the completely unverified assumption" that campaign propaganda impeded employee choice, the majority viewed employees not as "naive and unworldly," but as sufficiently mature to recognize "campaign propaganda for what it [was] and discount[] it."¹¹⁵ Improvements in education and familiarity with Board-conducted elections were cited as justifications for this belief.¹¹⁶

To further support its contention that employees do not need protection from misleading statements, the majority relied extensively on an empirical study which demonstrated employee choice was rarely affected by campaign propaganda.¹¹⁷ The study

an exception. She would also invalidate an election when one party has made an "egregious mistake of fact." *Id.* No criteria were proposed to evaluate egregious mistakes of fact. Rather, she cited two former cases in which she would not have found egregious mistakes of fact. One case involved a union misstatement of employer profits—stated: \$1 million; actual: \$260,376. *Henderson Trumbull Supply Corp.*, 220 N.L.R.B. 210 (1975). The other case involved a union misstatement of employee earnings at other plants. *The Contract Knitter, Inc.*, 220 N.L.R.B. 579 (1975).

112. 228 N.L.R.B. at 1313.

113. *Id.* at 1312-13. See Bok, *supra* note 12, at 92 (Bok contends that a policy which restricts campaign statements "resist[s] every effort at clear formulation and tend[s] inexorably to give rise to vague and inconsistent rulings which baffle the parties and provoke litigation").

114. See *supra* notes 64-78 and accompanying text.

115. 228 N.L.R.B. at 1313.

116. *Id.*

117. J. GETMAN, S. FOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) [hereinafter cited as GETMAN]. The basis of the book is a two-part empirical study: Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976) [hereinafter cited as *Behavioral Assumptions*] and Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975). See also Brotslaw, *Attitude of Retail Workers Toward Union Organization*, 18 LAB. L.J. 149 (1967), discussing the general inattentiveness of employees to campaign electioneering. For critiques of the study see King, *Preelection Conduct: Expanding Employer Rights and Some New and Renewed Perspectives*, DEVELOPING LABOR LAW 41, 60-66 (F. Penn & L. Black ed. 1977) [hereinafter cited as King];

examined thirty-one election campaigns in five states, finding that eighty-one percent of employee votes could accurately be predicted from their precampaign predilections.¹¹⁸ Furthermore, only five percent of the total sample of voters either switched their vote because of or decided to vote on the basis of campaign propaganda.¹¹⁹

In a sharply-worded dissent, Members Fanning and Jenkins took issue with the majority's almost exclusive reliance on an empirical study to overturn a major policy decision.¹²⁰ The dissent challenged the methodology employed (post-election polling), the statistical significance of the sample studied (thirty-one elections) and both the logic of and conclusion reached by the authors.¹²¹ Assuming, *arguendo*, the technique and sample were sound, the dissent claimed the validity of the study would "surely [be] limited to campaigns conducted in accordance with *Hollywood Ceramics* standards."¹²² In other words, voters in those elections were most likely not subjected to the barrage of irresponsible and false campaign propaganda that would exist if the standards were relaxed. In addressing the balance of the majority's justifications for overruling *Hollywood Ceramics*, the dissent viewed the alleged administrative burden as minimal when compared to the "investment in maintaining . . . election standards."¹²³ Further, Board/court conflict in applying *Hollywood Ceramics*, albeit unfortunate, was not caused by the nature of the standard. Rather, it stemmed from those judgmental differences which characteristically emerge when facts are analyzed by different people.¹²⁴ According to the dissent, abandoning the regulation of preelection propaganda could lead only to an escalation of campaign charges

Flanagan, *The Behavioral Foundations of Union Election Regulation*, 28 STAN. L. REV. 1195 (1976).

118. GETMAN, *supra* note 117, at 73. The five states included in the study were located in the midwest and upper south. *Id.* at xvi.

119. *Behavioral Assumptions*, *supra* note 117, at 282.

120. 228 N.L.R.B. at 1315.

121. *Id.* at 1311, 1315-16 & 1318.

122. *Id.* at 1316 & n.34 (dissent claims "[t]he 2 of 31 cases in which precampaign intent cannot serve as a 'predicator' of result is almost 7 percent of the total, about the same percentage as the percentage of 'rerun' elections under *Hollywood Ceramics*.")

123. *Id.* at 1316. The dissent noted that in the past six years, misrepresentation issues were raised in only three to four and one-half percent of all the cases heard. Furthermore, new elections were ordered in only seven percent of those cases (25 to 27 second elections per year).

124. *Id.*

and counter-charges.¹²⁵ Thus, “[a]s ‘bad money drives out good,’ so misrepresentation, if allowed to take the field unchallengeable as to its impact, will tend to drive out the responsible statement.”¹²⁶

Whether the portent of the dissent would have occurred is difficult to determine since there were few post-*Shopping Kart* decisions. In examining a subsequent charge of employer misrepresentation, the Board held an understatement of \$1.90 of wages and fringe benefits which employees could expect to receive from the union amounted to no more than a misleading campaign statement and, therefore, did not warrant a new election.¹²⁷ In evaluating charges of union misrepresentation, the Board found an accusation that employer machinations prevented employee profit-sharing did not interfere with the election process.¹²⁸ However, in *Formco, Inc. v. United Automobile Workers*,¹²⁹ a union’s false assertion that the employer had been found guilty by the Board of committing unfair labor practices was held to be a “substantial mischaracterization or misuse of a Board document,” thereby necessitating a new election.¹³⁰

With the appointment of Member Truesdale by President Carter, the Board again reconsidered its policy on misrepresentation issues. Thus, in December of 1978, less than two years following *Shopping Kart*, the Board reinstated the standard of *Hollywood Ceramics*.

B. 1978—*General Knit of California, Inc.*

Immediately preceding the election, the union in *General Knit of California*¹³¹ distributed circulars attesting to the profitability of the company. The circular referred to the sales of General Knit before examining the net worth of ITOH, the parent company. The questionable sentence stated, in part, “[t]his company had a profit of \$19.3 million.” The issue concerned the likelihood of confusion among employees as they tried to determine which company was profitable—General Knit or ITOH. While ITOH commanded \$19.3 million in profits, General Knit sustained a \$5

125. *Id.* at 1316-17.

126. *Id.* at 1316.

127. *Thomas E. Gates & Sons, Inc.*, 229 N.L.R.B. 705 (1977).

128. *Cormier Hosiery Mills, Inc.*, 230 N.L.R.B. 1052 (1977). *See also* National Council of Young Israel, 230 N.L.R.B. 980 (1977).

129. 233 N.L.R.B. 61 (1977).

130. *Id.* The employer had in fact signed a settlement agreement containing a non-admissions clause. *See also* *Blackman-Uhler Chemical Div., Synalloy Corp. v. NLRB*, 561 F.2d 1118 (4th Cir. 1977).

131. 239 N.L.R.B. 619 (1978).

million loss.¹³²

The Board proclaimed the principles espoused by *Shopping Kart* were inconsistent with its responsibility to insure employee free choice.¹³³ Despite the dissent's contention that *Hollywood Ceramics* did not recognize employee maturity, the majority maintained that:

no matter what the ultimate sophistication of a particular electorate, there are certain circumstances where a particular misrepresentation . . . may materially affect an election. [Such an] election should be set aside in order to maintain the integrity of Board elections and thereby protect employee free choice.¹³⁴

The Board provided detailed reasons to support its reinstatement of *Hollywood Ceramics*. First, of approximately 9,000 Board-conducted elections held in 1976, nearly 90 percent went unchallenged.¹³⁵ Thus, by threatening serious consequences for campaign trickery, the standard of *Hollywood Ceramics* served as a deterrent to conduct which interfered with employee choice.¹³⁶ Second, *Hollywood Ceramics* provided a means of redress to those aggrieved by prejudicial campaign tactics. This accessibility to the Board "further legitimize[d] the integrity of the electoral process."¹³⁷ Third, since only 307 of 13,184 representation election cases in 1976 involved allegations of misrepresentation, the standard was not administratively burdensome.¹³⁸ Fourth, the empirical study, so heavily relied upon by the *Shopping Kart* majority, demonstrated that those voters influenced by campaign propaganda had affected the outcome of twenty-nine percent of the elections studied.¹³⁹

In response to its critics, the majority reiterated that the alleged lack of predictability resulting from the application of *Hollywood Ceramics* was not caused by an inherent failure of the standard but rather by a result of "judgmental differences as to the reasonable effect of a misrepresentation."¹⁴⁰ Furthermore, since only

132. *Id.* at 619-20.

133. *Id.* at 620.

134. *Id.*

135. *Id.* at 621 (citing 41 NLRB Ann. Rep. 231 (1976)).

136. *Id.*

137. *Id.*

138. *Id.* The majority noted that the 13,184 representation cases were in contrast to 32,406 unfair labor practice cases.

139. *Id.* at 622 (undecided voters and voters who switched sides were determinative factors in 9 of 31 elections).

140. *Id.*

nine cases in 1976 were appealed to the courts, the allegation that *Hollywood Ceramics* was employed by the parties as a delaying tactic was "greatly exaggerated."¹⁴¹ Regardless of any dilatory effect, the majority would not pursue election expediency at the expense of maintaining election standards.¹⁴² To blunt future criticism, the majority promised to "adhere strictly" to the original intent of *Hollywood Ceramics*, a rule which, in their opinion, enhanced employee choice and ensured fairness in the election process.¹⁴³

In a lengthy dissent, Member Penello restated his views¹⁴⁴ as described in the majority opinion of *Shopping Kart*.¹⁴⁵ Particular emphasis was placed on the inconsistency in application of the standard and the dilatory consequences of such Board/court conflict.¹⁴⁶ To illustrate the magnitude of the problem, the dissent noted that the average time between filing a charge of misrepresentation to its resolution by the Board was over fourteen months.¹⁴⁷ This delay was further exacerbated by the failure of the courts of appeal to enforce Board-ordered bargaining in forty-seven cases during the years from 1966 to 1978.¹⁴⁸ These two examples served to demonstrate the dissent's belief that *Hollywood Ceramics* tended only to frustrate collective bargaining and defeat the desires of employees. Since the standard established by *Shopping Kart* would only consider the form of the alleged misrepresentation, not its substance, the evaluative inconsistency and dilatory effect would be reduced.¹⁴⁹

An opportunity to further proclaim the qualities of *Shopping Kart* arose in August of 1982. With the appointment of three Reagan members to the Board, a new majority was formed which beat a quick retreat from the standard articulated under *Hollywood Ceramics* and *General Knit*.

C. 1982—Midland National Life Insurance Company

In *Midland National Life Insurance Co.*, the Board resurrected

141. *Id.* at 623. Further, since 1947, the highest number of cases appealed in any one year was eleven.

142. *Id.*

143. *Id.*

144. *Id.* at 624. Member Murphy also filed a dissent. *Id.* at 632.

145. See *supra* note 112 and accompanying text.

146. *General Knit of California, Inc.*, 239 N.L.R.B. 619, 626 (1978).

147. *Id.* at 627.

148. *Id.* at 626. It takes an average of seven and one-half months between issuance of the Board's bargaining order and a decision by a court of appeals. Thus, the entire process takes approximately twenty-two months. *Id.* at 627.

149. *Id.* at 629.

the noninterventionist approach espoused by *Shopping Kart*.¹⁵⁰ The dispute between Midland and the Union, Local 304A, began in 1978 when the union challenged the results of a Board-conducted election. The Board and court of appeals sustained the charge, finding the employer had engaged in objectionable conduct which undermined the election process. A second election was held in October of 1980, resulting in the defeat of the union by a vote of 107 in favor of representation and 107 against representation. Alleging employer campaign propaganda, the union filed objections to those election results.¹⁵¹

The day before the election, the employer distributed campaign literature which contained information describing the allegedly unfortunate impact of Local 304A on three area employers and displaying a portion of the union's 1979 Labor-Management Reporting and Disclosure Act [LMRDA] Report.¹⁵² Photographs and accompanying text depicted one of the companies as a deserted facility, implying that a violent strike had caused closure of the plant.¹⁵³ Text describing the union's activities at the other two companies indicated that employees at one did not yet have a contract, despite a year of negotiation, and those of the other, who were still employed following the election, would not receive any wage increase for another year.¹⁵⁴ Regarding the portion of the union's 1979 LMRDA Financial Report, the employer's accompanying text stated, "NOTHING—according to the report they filed with the U.S. Government was spent 'on behalf of the individual members.' [sic]."¹⁵⁵

150. 263 N.L.R.B. No. 24 (August 1982).

151. *Id.* at 3.

152. The LMRDA Financial Report is a financial statement submitted to the Department of Labor pursuant to the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1976 & Supp. V 1981).

153. 263 N.L.R.B. No. 24, at 5. The text stated: "They too employed between 200 and 300 employees. This Local 304A struck this plant—violence ensued. *Now all of the workers are gone!* What did the Local 304A do for them? Where is the 304A union job security?" (emphasis in original).

154. *Id.* at 6. The text for one company stated, in part: "Almost a year ago this same union . . . told the employees of LUTHER MANOR . . . [it] would get them a contract with job security and more money. Unfortunately, Local 304A did not [say in] . . . what year or century Today the employees have no contract." *Id.* The text for the other company stated, in part: "Since the election a good percentage of its former employees are no longer working there. Ask them! The employees have been offered a wage increase—*next year* of 5%" *Id.* (emphasis in original).

155. *Id.* at 7.

The union maintained there was no strike activity at the time the first company was closed. Further, they were not involved initially in the negotiations at the remaining two facilities, having subsequently merged with another union which had conducted those negotiations. As to the financial report, the employer overstated by \$25,000 the amount disbursed by the union to its officers and employees, thereby attributing nineteen percent more in income to those individuals. While the report did not indicate any money had been spent on behalf of individual members, the union contended the instructions for completion of the report required that these disbursements be reflected in another section.¹⁵⁶

The new Board majority decided to return to the "sound rule" articulated in *Shopping Kart*.¹⁵⁷ By overruling *General Knit* and *Hollywood Ceramics*, the majority contended that election results would become final by minimizing dilatory objections to those results.¹⁵⁸ These objectives were deemed consistent with the Board's proper role of assuring "fair and free choice" in selecting bargaining representatives.¹⁵⁹

In support of those contentions, the Board reasserted arguments raised in the majority opinion of *Shopping Kart* and the dissent in *General Knit*.¹⁶⁰ Assailing the inherent subjectivity of the *Hollywood Ceramics* standard, the Board challenged those who disagreed to define "substantial departure," "effective reply," "reasonably be expected," and "significant impact."¹⁶¹ Finding the standard incapable of clear formulation, the majority concluded that continued adherence would result only in discrepant rulings, thereby provoking protracted litigation.¹⁶² In contrast, the majority found that the principles announced in *Shopping Kart* assured objectivity since only the deceptive manner of the alleged misrepresentation, not its substance, was examined. Thus, Board intervention was warranted only in those instances, such as the

156. *Id.* at 8.

157. *Id.* at 9. Thus the Board rejected the recommendation of the Hearing Officer. The Hearing Officer had concluded the employer falsely portrayed the union as an ineffectual, inefficient, violence-prone organization, staffed by highly-paid officials who would cause employees to suffer both in job security and compensation. Since the union was not aware of the misrepresentations until three and one-half hours before the polls were to open, the Hearing Officer, applying the standard of *Hollywood Ceramics* and *General Knit*, directed a third election be held. *Id.* at 8.

158. *Id.* at 15.

159. *Id.* at 14.

160. See *supra* notes 112 and 146 and accompanying text.

161. Midland Nat'l Life Ins. Co., 263 N.L.R.B. No. 24, at 16 (1982) (emphasis added).

162. *Id.* (citing Bok, *supra* note 12, at 88).

use of forged documents, where misrepresentations could not be recognized as propaganda.¹⁶³

As to employee abilities to evaluate the substance of misrepresentations, the majority refused to adopt the paternalistic attitude advocated by *Hollywood Ceramics*. Rather, employees were found to be knowledgeable of the self-serving interests of parties to an election.¹⁶⁴ Since campaign propaganda tended to favor the interest of the speaker, the Board believed employees would evaluate those remarks with "natural skepticism."¹⁶⁵ Noting that under *Hollywood Ceramics*, elections were not set aside if there were opportunities for rebuttal, the majority found its dissenters shared, to a degree, their observation of employee abilities.¹⁶⁶

In a ringing dissent, Members Fanning and Jenkins postulated that by returning to *Shopping Kart*, the majority adopted an "ultra-permissive standard" which invited "the well-timed use of deception, trickery, and fraud."¹⁶⁷ Claiming the majority had opted for administrative expediency at the expense of fair and free elections, the dissent doubted whether such speedy results would be achieved under *Shopping Kart*.¹⁶⁸ To support their suspicion, the dissent cited an audit which demonstrated a decrease in the total number of elections conducted in 1978 (the first full year following *Shopping Kart*), from those conducted in 1976 (the year before *Shopping Kart*), while Board decisions concerning allegations of misrepresentation increased.¹⁶⁹ Furthermore, despite improved employee education, the dissent saw no need to "abandon them utterly to the mercies of unscrupulous campaigners."¹⁷⁰ With the reestablishment of *Shopping Kart*, employers and unions would have "little incentive to refrain from any last-minute deceptions."¹⁷¹ Such last-minute deception was illustrated in *Midland National* where employer misrepresentations were not only substantial but evidenced an "elaborately conceived fraud" by its

163. *Id.* at 17.

164. *Id.* at 18.

165. *Id.* at 18.

166. *Id.* at 19 & n.21.

167. *Id.* at 24.

168. *Id.*

169. *Id.* at 26. In 1976, 8,899 elections were conducted with rulings on misrepresentation charges in 327 cases. In 1978, 8,464 elections were conducted with rulings on misrepresentation charges in 357 cases.

170. *Id.* at 28.

171. *Id.* at 28-29.

description of the union's financial report.¹⁷² According to the dissent, such material misrepresentations affected the election, particularly in view of the 107 to 107 tally.¹⁷³

V. THE PROBLEM

Over the past twenty years, the Board's policy towards propaganda has reflected two extreme positions on how best to ensure employee free choice during the election process. The approaches propounded by *Hollywood Ceramics/General Knit* and *Shopping Kart/Midland National* emanate from a fundamental disagreement concerning the level of protection to be afforded employees who may ultimately become pawns of competing interests in an emotionally charged election contest. This fundamental disagreement has evolved into either an attack on or a defense of the standard developed in *Hollywood Ceramics*. Three issues have been the focus of debate: one, the subjectivity of evaluation causing inconsistent applications and unpredictable results; two, the delay in reaching final determination of employee choice; and, three, the degree to which campaign propaganda influences employees. Uncertainty as to which policy will be adopted by an incoming Board requires the development of an approach which will provide stability to the election process.

A. The Subjectivity

Charges of subjectivity and vagueness, leading to unpredictable results, have plagued the standard of *Hollywood Ceramics* since its inception.¹⁷⁴ Interpretation of each factor—substantiality, materiality, significant impact, timing and source—is not supported by clearly formulated and objective criteria.¹⁷⁵ Rather, interpretation is dependent upon the judgmental assessments of individual Board members as they analyze a myriad of incidents involving allegations of misrepresentation.¹⁷⁶ Thus, the nature of the standard is incapable of precise definition, leading to incongruous applications and discrepant results as interpretations are made by different individuals. Two decisions illustrate the difficulty in weighing the factors. In one instance, the Board found that the overstatement of competitive wage rates by nine cents was not a substantial departure from the truth.¹⁷⁷ This determination was

172. *Id.* at 29.

173. *Id.* at 31.

174. See *supra* note 80 and accompanying text.

175. See Bok, *supra* note 12, at 92.

176. See WILLIAMS, *supra* note 2, at 57.

177. *Gooch Packing Co.*, 200 N.L.R.B. 1096 (1972).

in contrast to an earlier decision which held an overstatement by seven cents substantially departed from the truth.¹⁷⁸ Although some proponents of *Hollywood Ceramics* have submitted that the nature of the standard is not the cause of disparate results,¹⁷⁹ Truesdale, a pro-*Hollywood Ceramics* Board member, admitted it compels the Board "to draw lines more nice than obvious."¹⁸⁰

In contrast, advocates of *Shopping Kart* promise that its standard of limiting examination of misrepresentation to those instances involving a deception "can be clearly formulated and consistently applied."¹⁸¹ Whether that prediction will come true remains to be seen since so few cases have been decided under *Shopping Kart*.¹⁸² Arguably, the Board will have to develop criteria to assist in determining the parameters of "deceptive manner." Will it be limited to forged documents so that mere propaganda, regardless of its egregious character, will not be evaluated? Or, will deceptive manner include documents which, though legitimate on their faces, contain doctoring of key words, as argued by the dissent in *Midland National*?¹⁸³ Member Penello, the leading proponent of *Shopping Kart*, acknowledged he could not predict the limits of campaign trickery, implying that forged documents may be only one manner of deception requiring Board analysis.¹⁸⁴ Thus, parties could necessitate Board examination of misrepresentation issues not on the basis of their substance but rather in challenging the breadth of deceptive manner.

There are other indicia that Board intervention will not be so limited as entertained by the majority in *Shopping Kart* and *Midland National*. Proponents of neutrality in representation elections, while urging the Board to no longer probe into the truth or falsity of campaign statements, encourage intervention in those instances where there is "intentional deception rising to the level of actual fraud."¹⁸⁵ The ability to determine the existence of actual fraud appears to require a probing into the character of the

178. *Follet Corp.*, 160 N.L.R.B. 506 (1966).

179. See *supra* note 124 and accompanying text.

180. Truesdale, *supra* note 96, at 71.

181. See Penello, *supra* note 79, at 466.

182. See *supra* notes 127-30 and accompanying text.

183. See *supra* note 171 and accompanying text.

184. Penello, *supra* note 79, at 467. The majority in *Midland Nat'l* apparently did not accept the further limitation of "egregious mistake of fact" as proposed by Member Murphy in *Shopping Kart*. 228 N.L.R.B. at 1314.

185. See WILLIAMS, *supra* note 2, at 61.

misrepresentation and thus, may necessitate the development of criteria to evaluate such claims on a case-by-case basis.¹⁸⁶ Further, Member Penello insists that despite the limitations envisioned by *Shopping Kart*, the Board will continue to distinguish between those statements which are merely misleading and those which are coercive.¹⁸⁷ The ability to draw this distinction, without examining the content of the alleged statements and thus, introducing subjective interpretation into the process, is not apparent. As noted by Thomas Phalen, former attorney for the National Labor Relations Board, should standards have to be developed to evaluate such challenges, the "overruling of *Hollywood Ceramics* would be truly more a fantasy than a fact."¹⁸⁸

The charge of subjectivity has also been leveled against *Hollywood Ceramics* as the cause of Board/court conflict. The absence of objective criteria has enabled the courts to interpret the standard more rigidly than the Board.¹⁸⁹ This restrictive application has resulted in the denial of Board-ordered bargaining. While the denial rate of all Board bargaining orders is approximately fifteen percent, the set aside rate for those cases involving misrepresentation issues is approximately fifty-two percent.¹⁹⁰ This discrepancy in enforcement rates is a legitimate complaint against the subjectivity of the *Hollywood Ceramics* standard.

Those favoring the *Shopping Kart* approach maintain that Board/court conflict would be greatly minimized in the future.¹⁹¹ Again, few decisions are available to judge the accuracy of that prediction.¹⁹² However, in a 1977 decision, *Blackman-Uhler Chemical Division, Synalloy Corp.*,¹⁹³ the Fourth Circuit Court of Appeals held *en banc* that while the bargaining order was not enforceable under *Hollywood Ceramics*, the decision may differ with application of *Shopping Kart*. The employer charged the union with materially misrepresenting the company's profits. The

186. See Phalen, *supra* note 69, at 457.

187. Penello, *supra* note 79, at 467. Board member Penello made that distinction in *Honeywell, Inc.*, 225 N.L.R.B. 617 (1976), finding the employer's campaign statement ("But all of this effort could be wasted if we can't continue to work effectively as a team. I therefore feel the interference of a labor union would only hinder our chances of further recovery.") to be coercive and thus in violation of section 8(a)(1). The dissent considered the statement to be mere propaganda. *Id.* at 618.

188. Phalen, *supra* note 69, at 457.

189. See *supra* notes 81-89 and accompanying text.

190. *General Knit of California, Inc.*, 239 N.L.R.B. 619, 626 (1978) (Penello, dissenting) (citing 42 NLRB Ann. Rep. 261 (1977)). To further emphasize the set-aside rate, Member Penello listed forty-seven cases which were denied enforcement between the years 1966 and 1978.

191. *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. at 17.

192. See *supra* note 181 and accompanying text.

193. 561 F.2d 1118 (4th Cir. 1977).

Board, applying *Hollywood Ceramics*, rejected the employer's arguments and ordered bargaining. Although the court of appeals denied enforcement of the bargaining order, the court noted that *Shopping Kart* "may well have an impact on the obligation of the employer to engage in collective bargaining negotiations. . . ." ¹⁹⁴ Whether *Shopping Kart* will lead to less Board/court conflict could well depend on whether the Board determination of "deceptive manner" ultimately reaches the courts for their interpretation.

B. The Delay

The unpredictability of results under *Hollywood Ceramics* has also led to charges that application of the standard causes not only delay in implementing employee choice but also that it is susceptible to being used as a delaying tactic.¹⁹⁵ Those finding fault with the standard claim that allegations of misrepresentation have become commonplace.¹⁹⁶ Because one out of every two employer objections in 1976 was based on misrepresentation, there is merit to the charge that the objections raised by employers frequently, or routinely, involve allegations of misrepresentation.¹⁹⁷ Although few of these objections are sustained by the Board,¹⁹⁸ the delay in issuing a bargaining order approaches fourteen months.¹⁹⁹ Member Penello further contended that since other objections to election results were sustained at a rate of seventeen percent, the only reason so many frivolous claims were filed was to delay the certification process.²⁰⁰ On the other hand,

194. *Id.* at 1119.

195. See *supra* notes 112-13 and accompanying text.

196. *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. at 1312-13.

197. In 1976, there were 467 election objections raised by employers, 223 involving charges of union misrepresentation. 41 NLRB Ann. Rep. 66, 232 app., table 11C (1976); *Shopping Kart Food Mkt., Inc.* 228 N.L.R.B. at 1316 (223 figure).

198. See Member Fanning's dissenting opinion in *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311, 1316 (1977), for percentage of employer objections sustained between 1971 and 1976 which varied from a high of 10.6% to a low of 1.7%.

199. See *General Knit of California, Inc.*, 239 N.L.R.B. at 627. However, the process from Board election to circuit court opinion takes approximately twenty-two months. *Id.* Under 29 U.S.C. § 159(c)(3) (1976), a union which loses an election cannot seek a second election for twelve months. The delay caused by objections to the election frequently surpass that limitation.

200. *General Knit of California, Inc.*, 239 N.L.R.B. at 626, 627 (Penello dissenting). Board member Penello commented that "an employer is guaranteed [approximately two years] by simply filing a *Hollywood Ceramics* objection, regardless of its merits." *Id.* (emphasis added).

the "routineness" and dilatory effect of such objections can be tempered by statistics indicating that of the elections conducted, an average of only three to four and one-half percent resulted in allegations of misrepresentation.²⁰¹ Furthermore, despite the lengthy delays resulting from raising misrepresentation objections, only nine cases were appealed to the courts in 1976. Thus, only one-tenth of one percent of the elections were delayed by application of the standard.²⁰² Whether *Hollywood Ceramics* has an overwhelming dilatory effect on employee choice should also be viewed in light of the fact that ninety percent of the election results were not challenged by either party,²⁰³ arguably supporting the belief that the standard prevents delays in achieving finality of the election process.

When the Board refuses to sustain an employer objection to an election, the union is certified and a bargaining order is issued. The certification decision is not appealable to the courts.²⁰⁴ However, further delay in implementing employee choice occurs when an employer refuses to bargain with the duly-certified union. By simply refusing to bargain with the union, the employer is found guilty of an unfair labor practice. Continued failure to bargain forces the Board to seek court enforcement of its order. At that time, not only is the unfair labor practice reviewed by the court but also the original election determination, including allegations of misrepresentation during the election process.²⁰⁵

Although advocates of *Shopping Kart* maintain that it will not serve as a similar tool for delay, the avenue of appeal will still be available to those parties who refuse to comply with an order to bargain. The determination of whether a deceptive manner was in fact involved in the election process would then be reviewed, as the Board and courts seek to establish the scope of the limitation.

C. The Degree of Influence of Propaganda on Employees

Although the above factors influence Board members, the primary cause of divergent approaches toward regulation of campaign propaganda is a fundamental disagreement over the degree to which employees require protection during the election process. The levels of protection recommended by *Hollywood Ceramics* and *Shopping Kart* are founded on dissimilar

201. 228 N.L.R.B. at 1316.

202. See Truesdale, *supra* note 96 at 72.

203. *Id.*

204. 29 U.S.C. § 160(e), (f) (1976). See *American Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940).

205. 29 U.S.C. § 159(d) (1976).

assumptions regarding employee behavior, the cornerstone of which is whether employees are influenced by preelection misrepresentations. Critics of *Hollywood Ceramics* maintain its paternalistic approach views employees as unworldly, naive children who are greatly influenced by campaign propaganda.²⁰⁶ *Shopping Kart*, however, recognizes their increased levels of maturity and education which moderate the influence of campaign propaganda, thereby obviating a need for protection.²⁰⁷ Proponents of *Hollywood Ceramics* counter that increased levels of education neither neutralize the influence of misrepresentation nor warrant abandonment of employees to unscrupulous campaigners.²⁰⁸

The median educational level of employees has increased over the past twenty years. In 1962, the year *Hollywood Ceramics* was announced, the median years of school completed by blue-collar workers was 10.4.²⁰⁹ The level increased to 12.2 in 1977, the year of *Shopping Kart*.²¹⁰ The proponents of *Hollywood Ceramics* contend that employees are influenced by election propaganda.²¹¹ However, there was no empirical study performed to substantiate their conclusion.²¹² In fact, whether the increased educational level affects the influence of campaign propaganda at all is difficult to discern, since only limited analysis of those behavioral assumptions has been conducted.²¹³ Nevertheless, the continuing increase in employee educational levels, coupled with their growing experience with the Board-election process, imply a degree of sophistication or healthy skepticism beyond that recognized in *Hollywood Ceramics*.

Conversely, *Shopping Kart* relied extensively on an empirical

206. See *supra* note 103 and accompanying text.

207. See *supra* notes 112-19 and accompanying text.

208. See *supra* note 16 and accompanying text.

209. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, Table 70, p.141-42 (Dec. 1980).

210. *Id.*

211. See *supra* note 60 and accompanying text.

212. See Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681, 682 (1972).

213. See Bok, *supra* note 12, at 40, 46-53, 88-90. There have been a few limited studies on voting behavior: Brotslaw, *Attitude of Retail Workers Toward Union Organization*, 18 LAB. L.J. 149 (1967); Fitzgerald & Froelke, *An Examination of Two Aspects of the NLRB Representation Election: Employee Attitudes and Board Inferences*, 3 AKRON L. REV. 218 (1970).

analysis known as the Getman, Goldberg and Herman Study.²¹⁴ According to the majority, the study cast doubt on the assumption that employees were swayed by campaign propaganda.²¹⁵ The authors of the study interviewed over one thousand employees who participated in thirty-one elections conducted in five midwestern states.²¹⁶ Eighty-one percent of the employees voted in accordance with their predilection towards jobs and unions.²¹⁷ The authors concluded that employee choice is, therefore, not affected by campaign propaganda.²¹⁸ Furthermore, other supporting data indicated that employees are generally inattentive during campaigns and, thus, would not be influenced by either employer or union propaganda.²¹⁹

Both the study and the Board's reliance thereon generated immediate criticism.²²⁰ The majority appeared to adopt the study's findings without critical analysis.²²¹ Yet serious questions have been raised. Despite the conclusion that eighty-one percent of the employees were not affected by campaign propaganda, nineteen percent arguably were influenced.²²² Data also suggested that, although employees were not familiar with many issues, those issues of importance were recalled.²²³ However, evidence demonstrated that those employees who were initially undecided or who switched their allegiances influenced the out-

214. GETMAN, *supra* note 117. For an indepth analysis of the study, see Comment, *supra* note 80, at 399-404.

215. Shopping Kart Food Mkt., Inc., 228 N.L.R.B. at 1313.

216. *Behavioral Assumptions*, *supra* note 117, at 265-66.

217. GETMAN, *supra* note 117 at 53-64, 72-85. Of the 1,200 employees, 43% had been union members elsewhere and 30% had voted in previous elections. *Id.* at 66.

218. *Id.* at 72.

219. *Id.* at 53-64, 73-85, 140-41. Employees could recall only seven percent of the union's issues and ten percent of the employer's issues. *Id.* at 109.

220. See King, *supra* note 117, at 62-66; Miller, *The Getman, Goldberg and Herman Questions*, 28 STAN. L. REV. 1163 (1976); Phalen, *supra* note 69, at 457-59; Truesdale, *supra* note 96, at 72-74.

221. Shopping Kart Food Mkt., Inc., 228 N.L.R.B. at 1313. The authors of the study focused on six assumptions upon which they *perceived* Board decisions were based. Getman, Goldberg & Herman, *supra* note 117, at 1472-82. The assumptions were: one, that employees are attentive to the campaign; two, that employees will interpret ambiguous statements by the employers as threats or promises; three, that employees are unsophisticated about labor relations; and four, that authorization card signing is an indication of employee choice.

222. General Knit of California, Inc., 239 N.L.R.B. at 621. Member Penello disagreed, contending only five percent of the voters were influenced by campaign propaganda. The remaining employees switched their votes for "unknown" reasons. *Id.* at 628 n.36. However, as noted by Member Truesdale, the authors imply an employer campaign does have a significant impact. The 31 elections surveyed were "vigorously contested" by employers. The union won only 35% in contrast to their nationwide average of 50%. Truesdale, *supra* note 96, at 73.

223. GETMAN, *supra* note 117, at 78-83. For example, wage issues were recalled by 23% to 71% of the employees. *Id.* at 80-81.

come of twenty-nine percent of the elections surveyed.²²⁴ The projection of sophisticated employees weighing relevant campaign issues, as found by *Shopping Kart*, is somewhat muted by the authors' conclusion that employees are generally inattentive during the election process. Furthermore, the ability of these sophisticated employees to evaluate the substance of campaign propaganda should enable them to recognize statements which abuse Board processes or imply a threat to the employee. Perhaps the most serious indictment of the study is that the elections surveyed were conducted under the protection of *Hollywood Ceramics*.²²⁵ The propaganda of the parties could have been tempered so as not to violate the standards which assure elections assimilate laboratory conditions.

In summary, neither approach is supported by uncontrovertible evidence documenting the degree to which employees are influenced by preelection propaganda. If the authors' assumption is accurate, that Board regulation is predicated upon the influence of propaganda on employee choice, then more indepth behavioral studies must be conducted.

VI. A CALL FOR CONGRESSIONAL REFORM

The representation election is the primary tool of the Board for determining employee choice under the NLRA.²²⁶ Conceptually, the election is to produce a winner from among those parties to the contest. By introducing finality to the campaign, the election encourages a return to stability in the workplace, one of the enunciated goals of labor policy.²²⁷ It is difficult to imagine, however, stability occurring when parties to the contest, cognizant of the continuing "flip flop" in Board policy in regulating propaganda, are not tempted to challenge election results. Rather, this uncertainty in policy or certainty that policy will be changed, may well foster objections to election results as a matter of course.

No one has suggested that revisions to the Board's policies are

224. *Id.* at 103. The authors concluded, however, that the Board should not "set aside election results in many cases in the hope of protecting free choice in a few." *Behavioral Assumptions*, *supra* note 117, at 283.

225. See *supra* notes 120-22 and accompanying text.

226. See *supra* notes 5-14 and accompanying text.

227. Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PA. L. REV. 228, 228 (1968).

unwarranted or an abuse of discretion.²²⁸ However, change should be motivated not only by furtherance of the Act's principles but by sober inquiry into the issue under consideration. It is highly questionable that the Board's use of ad hoc adjudication provides a forum for sober inquiry. Since the policy for regulating campaign propaganda has been reversed in three of the past five years, skepticism as to the underlying rationale for initiating change has emerged. This skepticism becomes more plausible when the ever-changing response to campaign propaganda can be traced directly to the political composition of the Board.²²⁹ This politicizing of Board policy has been recognized in commentaries and Congressional debate.²³⁰ Although "policy-making is politics,"²³¹ recent decisions reflect a built-in polarization and single-minded obtuseness which "eliminate any hope that discussion and persuasion with other members [of the Board] will have any effect."²³² Because regulation of campaign propaganda tends to be so highly sensitive to political forces and thus subject to change as each administration takes control, employee interests may not be served by sincere motivations or sober inquiries. Consequently, Congressional reform is advocated to establish a national response towards the regulation of preelection misrepresentation so that those most affected, employees, do not become political pawns of the Board.

The pivotal issues to be weighed by Congress are the need of employees to be protected from propaganda versus the restriction of the participants' speech during an election.²³³ Since few behavioral studies of the influence of propaganda on the exercise of employee choice have been conducted, Congress may not have

228. See, e.g., *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (holding that Board possesses administrative discretion in decision-making and, thus, can revise or modify principles previously adopted). See also *Home Town Foods, Inc. v. NLRB*, 416 F.2d 392 (1969).

229. *Hollywood Ceramics*, 140 N.L.R.B. 221 (1962) (Kennedy Board); *Shopping Kart Food Mkt., Inc.*, 228 N.L.R.B. 1311 (1977) (Nixon Board); *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978) (Carter Board); *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. No. 24 (1982) (Reagan Board).

230. See generally Hickey, *supra* note 56, at 460-63; Wirtz, *supra* note 42, at 611-12; WILLIAMS, *supra* note 2, at 6-13; 120 CONG. REC. 11303 (1974), where Senator Tower stated "Board doctrine is susceptible to changes in the political climate and, most particularly, to changes in the Presidency." See also Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 267, n.87 (1968).

231. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 22 (abr. student ed. 1965).

232. 120 CONG. REC. 11306 (1974).

233. Congress has encouraged honest behavior in some areas: e.g., truth in advertising, (15 U.S.C. §§ 52-55 (1976)); truth in lending, (15 U.S.C. §§ 1601-1693 (1976 & Supp. IV 1980)); and financial disclosure in political campaigns (2 U.S.C. §§ 431-456 (1976 & Supp. V 1981)).

sufficient empirical data available to guide their determinations.²³⁴ Further, the Board's propensity to formulate its propaganda policies by adjudication rather than formalized rulemaking has precluded valuable testimony from affected individuals as to their views of the impact of propaganda on the process.²³⁵ Thus, Congress must arrive at its own determination, through Congressional hearings and debate, as to the need to shield employees from propaganda at the expense of regulating honesty in campaign speech.

Prior Congressional regulation of speech during campaigns has evolved from stringently protecting employees to a gradual recognition of their abilities to interpret campaign rhetoric appropriately. Their initial view was that employees were highly influenced by employer propaganda. Because of the disparity in economic power, employer expressions were inherently suggestive of reprisals.²³⁶ Thus, employers were precluded from comment during organizational campaigns.²³⁷ By 1947, with the addition of section 8(c), employees were viewed as sufficiently sophisticated to permit employers the exercise of their free speech rights, absent threats of reprisal or promises of benefit.²³⁸ When the Board limited applicability of section 8(c),²³⁹ Congressional debate reflected growing sentiment that employees were able to interpret appropriately campaign propaganda during the election process. In 1954, the first attempt to extend section 8(c) to election proceedings failed.²⁴⁰ However, in 1974, discontent with the

234. See *supra* note 213 and accompanying text.

235. The Board is authorized to "make, amend, and rescind . . . such rules and regulations as may be necessary . . ." 29 U.S.C. § 156 (1970). Rulemaking procedures permit written arguments to the proposed rule and, at times, oral presentations by interested parties. 5 U.S.C. § 553(a)-(e) (1976 & Supp. V. 1981). See also Peck, *supra* note 230.

236. In 1935, Congress rejected an amendment to the Wagner Act which would have guaranteed employer free speech. Koretz, *supra* note 29 (citing H.R. Rep. No. 1371, 74th Cong., 1st Sess. 6 (1935)). This view was supported by the Board in 1936, which commented: "The power of an employer over the economic life of an employee is felt intensely and directly." As a result, "[t]he employee is sensitive to each subtle expression of hostility upon the part of one whose good will is so vital to him, whose power is so unlimited, whose action is so beyond appeal." *Wheeling Steel Corp.*, 1 N.L.R.B. 699, 709 (1936), *per curiam*, 94 F.2d 1021 (6th Cir. 1938).

237. See *supra* notes 15-18 and accompanying text.

238. See *supra* notes 29-34 and accompanying text.

239. See *supra* notes 35-41 and accompanying text.

240. See Koretz, *supra* note 29, at 409 (citing Sen. Rep. No. 1211, 83rd Cong., 2d Sess. (1954)).

continued limitations on speech during the election process reemerged. The attack was led by Senator John Tower who emphasized that the intent of section 8(c) was not limited to unfair labor practices and, further, that the concept of laboratory conditions as a requisite to election proceedings was unprecedented in an election process:

That reading of the statute, unsupported as it is by statutory language and surely in conflict with the spirit of Section 8(c), is itself hardly mandatory. Needless to say, the concept of "laboratory conditions" for elections has no counterpart in American political practice. Indeed, the idea that speech of any kind, much less "protected speech" can invalidate an election is unacceptable outside of labor law, and is dubious within it.²⁴¹

Despite Senator Tower's statement, the legislative history concerning the scope of section 8(c) has been characterized as "confusing."²⁴² However, in view of the disposition of Congress at the time of passing section 8(c), it is unlikely that its coverage was intended to be limited to unfair labor practice cases.²⁴³ To avoid future uncertainty in regulating campaign propaganda, Congress should exercise its preeminent jurisdiction in the field of labor relations and amend section 8(c)²⁴⁴ to include representation cases.²⁴⁵ Thus, section 8(c) would read:

The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not (i) constitute or be evidence of an unfair labor practice under any provisions of this Act, or (ii) constitute grounds for, or evidence justifying, setting aside the results of any election conducted under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

241. REPORT OF THE SUBCOMM. ON SEPARATION OF POWERS OF THE SENATE JUDICIARY COMM., 120 CONG. REC. 11304 (1974).

242. Wollett & Rowen, *supra* note 27, at 384. The provision's author, Senator Taft, in response to a question concerning section 8(c) replied: "That provision in effect carries out *approximately* the present rule laid down by the Supreme Court of the United States. It freezes that rule into law itself . . ." 93 CONG. REC. 3837 (April 23, 1947) (emphasis added). The rule referred to was rendered in *N.L.R.B. v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941), whereby employer speech was accorded constitutional protection provided it was noncoercive. However, speech, as a part of a coercive "course of conduct" could be unlawful. *Id.* at 477. However, the decision which section 8(c) codified has been judged as containing "considerable ambiguity." Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 1, 17 (1948). In essence, section 8(c) approximates an ambiguous rule.

243. See generally *NLRB v. Shirlington Supermarket, Inc.*, 224 F.2d 649, 658-59 & n.5 (4th Cir.), *cert. denied*, 350 U.S. 914 (1955); H.R. REP. NO. 245, 80th Cong., 1st Sess., 8, 33 (1947); 93 CONG. REC. 6859-60, A3043 (1947); *supra* notes 29-30 and accompanying text.

244. For current 8(c), see *supra* text accompanying note 32.

245. Senator Tower proposed legislation to amend section 8(c) in 1977. The bill was entitled the "Employee Bill of Rights Act." Section 6, "Protection of Free Speech," would have effectively deregulated campaign speech. S. 1885, 95th Cong., 1st Sess. § 6 (1977). In July, 1978, the bill was resubmitted to the Committee on Human Resources, ending any hope of labor reform in the 95th Congress. 124 CONG. REC. S18393-18400 (June 22, 1978).

Further, Congress should make it quite clear that misrepresentation of fact and similar statements are considered as views, argument and opinion.

Failure of Congress to take a stand on the regulation of campaign propaganda will subject the parties to a continuing era of policy uncertainty. More importantly, however, the stand to be taken by Congress must recognize the forum being regulated—an election. A decision to amend section 8(c) as opposed to codifying *Shopping Kart* or *Hollywood Ceramics* provides Congress with some justification to interfere with an election process since it has indicated previously an intolerance of coercive speech in the context of labor relations.²⁴⁶

Admittedly, any regulation of campaign speech implies that the audience (employees) is not sufficiently intelligent or sophisticated to recognize the speech as propaganda. Thus, the outcome of an election will be viewed as a distortion of employee choice unless the process is purified. However, in political elections, the general electorate is bombarded with distortions, half-truths and innuendos concerning competing candidates. That electorate is viewed, nonetheless, as sufficiently intelligent and sophisticated to sift through the rhetoric and arrive at a choice of individuals to serve in positions of responsibility. Senator Tower was correct in his assertion that the concept of "laboratory conditions for elections has no counterpart in American political practice."²⁴⁷ One can only imagine the chaos which would result "if twenty percent of the losing candidates challenged the results of their [political] elections, as do twenty percent of the losers in NLRB elections."²⁴⁸ Should an overly-restrictive regulation of campaign speech be adopted, Congress could be suggesting that it views employee-voters as "a special kind of electorate" who acquire greater insight during political elections.²⁴⁹

This is not to suggest that representation elections and political elections are identical, although they are functionally analogous. One distinction involves the accessibility of voters in a political

246. See *supra* notes 29-34 and accompanying text.

247. See *supra* note 240 and accompanying text. There have been laws regulating political activity. However, they have regulated campaign financing and lobbying, not campaign speech. See, e.g., The Federal Election Campaign Act, 2 U.S.C. §§ 431-456 (1976 & Supp. V. 1981); The Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-70 (1976 & Supp. V 1981).

248. Samoff, *supra* note 227, at 230.

249. *Id.* at 234.

election to analyses of campaign statements. These analyses are provided by a third party, the press. The worker-voter is rarely afforded press analyses of campaign speech during representation elections. With the amendment to section 8(c), however, the worker-voter will be afforded protection against speech which could be most harmful to an employee's choice, that of coercive speech. Further, should accessibility by the employee to opposing views be considered a necessary procedural safeguard, Congress could direct the Board to establish such procedures through its rulemaking authority.²⁵⁰

Although extending section 8(c) to representation cases will not address all criticisms of prior Board regulation of campaign propaganda, it will be a positive first step towards stabilizing the process. First, it would provide a Congressional standard against which the Board must measure campaign speech. Decisions with respect to representation challenges involving speech will become, to a greater extent, de-politicized. Second, it might provide a more realistic recognition of employee abilities to evaluate campaign speech. These abilities have been recognized by behavioral studies of employee-voters conducted to date²⁵¹ and have always been considered attributable to voters in political elections. Third, the delays encountered by prior Board consideration of misrepresentation challenges would be reduced. By adopting a standard of evaluation which will not be reversed by incoming Board appointees, the parties might be encouraged not to challenge election results in hopes of effecting a policy reversal. Further, the courts will no longer have to second-guess Board application of the misrepresentation standards espoused by decisions such as *Hollywood Ceramics*. Fourth, the subjective evaluation of campaign speech would be reduced to a determination of coercive versus noncoercive speech. To prevent future Boards from ever expanding their definitions of those incidents constituting coercive speech, Congress should direct the Board to determine specifically, through its rulemaking authority, the types of incidents which qualify as coercive behavior. Although some commentators may argue that Congressional involvement in setting propaganda policy trammels upon the discretionary judgment of the Board, it can be argued that the Board has failed to demonstrate an ability to establish policy which reflects the interests of employees as opposed to political philosophies of individual Board members. Thus, Congressional reform is warranted.

250. For a description of possible procedural safeguards see Comment, *supra* note 18, at 779-90.

251. See *supra* notes 117-19 and accompanying text.

VII. CONCLUSION

The representation process is fundamental to the exercise of employee choice in selecting or rejecting a bargaining agent. The decision reached impacts directly upon an employee's livelihood. Since it also affects the balance of power between management and organized labor, participants to the process engage in serious and occasionally bitter exchanges of ideas during the campaign. It is therefore imperative that policies governing the process appropriately address employee interests, by providing sufficient protection for employee decision-making, permitting a free and robust exchange of ideas which is so natural to American elections and encouraging finality and stability to the process.

This article has traced attempts by the National Labor Relations Board to regulate campaign speech during the representation process. What began as a policy of noninterference evolved into a competition between two policies, neither of which fully addressed employee interests. More importantly, the continual shifting of policies, reflecting the political composition of the Board, overshadows the ability of either policy to serve employee interests. Consequently, Congress is urged to enact legislation establishing a policy governing preelection speech. Further, it is recommended that the policy to be enacted extend section 8(c) to representation proceedings, thus limiting board evaluation of campaign speech to whether it is coercive in nature. Should it be necessary to afford greater protection to employee decision-making, Congress is encouraged to direct the Board to use its rulemaking authority to develop appropriate procedural safeguards.

