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"...And Women Must Weep" v. "Anatomy of a Lie": An Empirical Assessment of Two Labor Relations Propaganda Films

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I. INTRODUCTION

In an attempt to bring some "relevance" into the mossy halls of legal academia, extracurricular arrangements were made for a showing of two well-known films[1] which had been discussed in the context of a labor law class.[2] An evening program was set up[3]

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1. ". . . And Women Must Weep" is available for rental from the National Right to Work Committee, 1900 L St., N.W., Washington, D.C. The film is in color and is a 28-minute, 16mm reel, renting for $15.00 generally and $7.00 for educational purposes. "Anatomy of a Lie" is available from the AFL-CIO Film Division, 815 Sixteenth St., N.W., Washington, D.C. It is an 18-minute, black and white, 16mm reel, costing $3.00 per rental.

2. *See, e.g.*, MELTZER, LABOR LAW: CASES, MATERIALS AND PROBLEMS, 101-103 (Little, Brown and Co., 1970).

3. February, 1971.

and two of its major components were billed as a management-inspired film depicting union violence[4] and a union rebuttal of the former.[5]

More as an intellectual exercise than anything, an unannounced twist was planned: the organizers of the program decided to breach some hallowed law school traditions and conduct an *experiment*[6] to determine for themselves the impact of the notorious[7] ". . . And Women Must Weep" on the unsuspecting public—as well as the merits of the rebuttal film. All of the details were arranged,

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4. A flyer advertising the film reads:

> ". . . And Women Must Weep" the motion picture that shows how COMPULSORY UNIONISM breeds *strike violence . . . Bloodshed . . . Destruction.* A documentary of VIOLENCE . . . "And Women Must Weep" is more than a recitation of the facts surrounding the violence that flared during a wildcat strike in the small town of Princeton, Indiana, in 1958. It's documented proof of what happens in a situation made possible by the compulsory union shop; in short, what happens when irresponsible union leadership cannot be called to account . . . .
>
> The strike brought on waves of violence and left scars which the daily local newspaper said might not heal for 25 years. The violence hit its crest when the four month old baby of a non-striker was shot in the head while lying in her crib; until that sickening moment, nobody knew how far union professionals were willing to go to preserve their free ride on the backs of their members.
>
> . . . . .
>
> COURT APPROVED! The Fifth Circuit Court of Appeals has ruled that ". . . And Women Must Weep" may be shown to newly-hired employees—that it does *not* violate the Taft-Hartley Act. In his decision, Circuit Judge Bell said that both sides in a labor dispute have the right to express opinions . . . . He further observed that, while the film is professionally staged, "the record is barren of evidence showing that it is false or even exaggerated."

[The quote from Judge Bell can be read in context in Southwire Co. v. NLRB, 383 F.2d at 240. This case is discussed *infra.*]

5. AFL-CIO, FILMS FOR LABOR, 17 (1971); there the film, "Anatomy of a Lie" is described as follows:

> This film was produced to set the record straight by exposing the outrageous lies in the viciously anti-labor National Right to Work Committee film . . . . Using a series of clips from the right-to-work film to present the background story as presented in that film, the IAM proceeds to expose the lie and document the truth through a series of on-the-scenes interviews with people who had been involved in the strike. It is not necessary to see the right-to-work film in order to use "Anatomy of a Lie" effectively. This is a fascinating study in propaganda techniques.

6. Concerning the status of this type of research in the law, see generally: Cavers, *Non-Traditional Research by Law Teachers: Returns from the Questionnaires of the Council on Law Related Studies*, 24 J. LEGAL ED. 534 (1972). Concerning the special relevance of this type of research here, see *General Shoe*, note 27 *infra.*

7. *See, e.g.*, Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 65 (1964). "Anyone who has endured the film '. . . And Women Must Weep' may justifiably regret that labor relations should call forth propaganda of this kind." *See also, Beaunit*, note 94, *infra*, at 115.

and on the evening of the program, when all were seated, a leaflet was distributed containing the following directions:

> In attempting to evaluate the films you are about to see, we are requesting your aid in a small experiment.
>
> Please try to imagine yourself as an employee in a small plant here in Smalltown, U.S.A., and assume that there have been recent attempts to organize that plant by a national union. Of course, the union has promised all of the sorts of things which unions promise, and the owners have responded with the usual management arguments against the need for a union.
>
> Assuming the election is right *now,* please vote for or against the union in your plant by writing "yes" or "no", respectively, on the ballot we are furnishing.
>
> Thank you for your cooperation.

No one walked out as a result of being confronted with this unexpected exercise, and most, if not all of those present, marked one of the three color-coded ballots which were then distributed to each person.[8] The lights were dimmed, and everyone sat back to be propagandized by the management film. Following that and the same directions as earlier, a second ballot was marked and collected, and the lights were again dimmed for "Anatomy of a Lie." By the time the lights were back on after the second movie, most of the audience had already marked the third ballot. In any event, the directions were again given, and the last of the ballots were collected. The program was then turned over to a speaker while all the ballots were eagerly taken to another room for inspection.

There were two major surprises that evening. One of those was discovering that, contrary to expectations created by reading a description of the first film in an NLRB decision,[9] the films did not directly confront the interesting issue of whether unions are good or bad; rather, they addressed the issue of whether "right to work"

8. There were perhaps 30 people present, from whom we received about 20 complete, usable sets of ballots. No effort was made to survey the sample for sex or like variable. The fact that as many as half of the group were students then taking labor law, and other such factors, made the results subject to considerable criticism. As noted, *supra*, this survey was more in the nature of an attempt to satisfy idle curiosity than anything else. For that reason, no attempt was made to retain and tabulate what data was received and there is little merit here in going into detail as to the procedure used.

9. Note 2, *supra*: Plochman and Harrison—Cherry Lane Foods, Inc., 140 N.L.R.B. 130 (1962) [hereinafter cited as *Cherry Lane*]. Likewise, the National Labor Relations Board will be cited as NLRB or simply the Board.

laws should be enacted in the various states under authority of Section 14(b) of the Taft-Hartley Act.[10] The second unexpected development was that, after all three ballots were cast by all of the participants in the experiment, management lost in the aggregate by two votes, i.e., between the first and third ballots, there were two fewer votes *against* the union.[11]

What made the discovery unexpected was the knowledge that, since 1962, the NLRB had upset approximately half a dozen representation elections where management had shown ". . . And Women Must Weep" to its employees prior thereto (and the union had lost).[12] More than once, this was after the union had also shown the rebuttal film to the same employees. Further, in addition to upsetting elections, the NLRB had decided, in most of the same cases, as well as others, that the employer was guilty of an unfair labor practice and therefore ordered it, under sanction of the Act,[13] to cease and desist from again showing the film to its employees.[14]

While the first showing of the films and the tentative experimental evaluation of their propaganda impact left much to be desired from a scientific viewpoint,[15] more than a germ of doubt was planted as to the wisdom of the Board in pursuing its policy toward the admittedly anti-union film. For this reason, and because the courts had consistently refused to enforce Board orders

10. The official title of the act is Labor Management Relations Act, 1947, 29 U.S.C. § 164(b) (1964). That section allows states, at their option, to enact legislation abolishing situations where an employee is required to belong to a union as a condition of employment. Such state laws, where enacted, give the employee the "right to work" without having to necessarily belong to a union, forbidding union-employer arrangements to the contrary.

11. *E.g.*, on the first ballot it may have been 10 "yes" and 10 "no" ballots, whereas it would have been 12 "yes" and 8 "no" ballots on the third and final ballot—*see* note 8, *supra.*

12. The cases are discussed in the paper. As to the act, insofar as it is remedial and not punitive, there is little point in attempting action against an employer who was technically in the wrong but did not benefit from it. Results in Section III of this paper, *infra*, indicate that this could have happened quite frequently.

13. Labor Management Relations Act, 1947, 29 U.S.C. §§ 141 *et seq.* Section 10(c), 29 U.S.C. § 160(c), provides that the Board shall issue "an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action . . . as will effectuate the policies of this Act: . . . ."

14. *See* discussion and cases in Section II B. of this paper, *infra.*

15. *See* note 8, *supra.* One serious failing in the procedure could possibly have been the showing of the films back-to-back rather than providing a time gap between their showing as is most apt to be the case in practice.

in such cases,[16] it seemed worthwhile to examine the problem further: first, by a detailed analysis of the law, and second, by conducting a second and more closely controlled experiment to get a more precise evaluation of not only the impact of the first movie, but also the *relative* persuasive merits of both films.

In approaching these goals, arrangements were again made to obtain the films[17] and show them. This time, the audience was to consist of about 75 students of both sexes and somewhat scattered ages enrolled in a two-year, state supported technical college.[18] That data was collected in the late spring of 1972.

Thus, it is the purpose here: (1) to sketch, in some detail, the legal environment within which the second experiment must be evaluated; (2) to describe that experiment's design, execution and results; and, finally, (3) to discuss some conclusions that may be drawn concerning the possible impact of this experimental evaluation of the films on the rules that have heretofore regulated their use in labor relations. These ends will be pursued, respectively.

II. THE LEGAL BACKGROUND

Because of the intricacies of National Labor Relations Board procedures in the area of freedom of speech standards, it seems worthwhile to divide this section of the paper into two parts. The first provides a general sketch of the workings of the Board in this area. The second analyzes in detail the problems generated by the propaganda films within the context of the former.

A. Summary Analysis of Basic Problems

Fundamental to an understanding of some of the interesting issues generated by employer use of the movie, ". . . And Women Must Weep", is an appreciation of a basic dichotomy of National Labor Relations Board jurisdiction. That dichotomy centers about the distinction between representation proceedings and unfair la-

16. *See* Section II B. of this paper, *infra*, generally.
17. The authors would like to point out here that they were recipients of very prompt and courteous service from both film sources. In fact, after locating the AFL-CIO as a source for the second film, "Anatomy of a Lie," it was they who generously provided us with the information for the source of the first.
18. Lima Technical College, Lima, Ohio.

bor practice proceedings. Not only do the procedures for their resolution generally differ, but the substantive issues may be different also.

Different provisions of the Taft-Hartley Act are involved as well, i.e., under Section 9,[19] the Board is under an obligation to resolve problems generated by attempted collective representation of employees, whereas, under Section 10,[20] it is the duty of the Board to prevent unfair labor practices as defined by Section 8.[21] These sections can be explained as creating Board obligations, respectively, to regulate conduct which would (1) interfere with free employee choice in the context of an election or (2) interfere with other employee rights,[22] e.g., the right to engage in preliminary organizational activity which may significantly predate the necessity for an election. Also, direct court is not available in representation cases.

At the same time, the Board is subject to the dictates of the First Amendment. It must use caution in its rulings to avoid overprotecting labor or management at the expense of free speech.

Because the problems considered here involved only employer misconduct, this discussion will be limited accordingly, but it is important for the novice to keep in mind that unions are just as likely as management to be the objects of Board scrutiny. A typical case will concern a plant which has no employee organization to champion employee benefits before the employer. Under those circumstances, at some point, an established labor organization is apt either to be approached by a few disgruntled employees or to initiate, on its own, an attempt to capture majority employee sentiment.

More often than not, as soon as the employer becomes aware of such activity among its employees, a campaign will be launched spelling out in detail the disadvantages of injecting the presence of a stranger into an allegedly theretofore cordial relationship. Some employers, precisely because there *have* been good relations, are able without engaging in conduct prohibited by the Act, to thwart

19. 29 U.S.C. § 159 (1964).
20. 29 U.S.C. § 160 (1964).
21. 29 U.S.C. § 158 (1964). The subsection of primary interest here is 8(a)(1) which defines as an unfair labor practice employer interference, restraint, or coercion of employees in the exercise of "rights guaranteed in Section 7. . . ." *See* note 22, *infra.*
22. Section 7, 29 U.S.C. § 157 (1964) provides:
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities . . . .

organizational drives indefinitely. Others, however, resort to a wide range of tactics calculated to prevent the meddling of strangers in their affairs.

Not surprisingly, such tactics run a full spectrum from insipid rhetoric to actual plant closure, with intermediates of vitriolic anti-union propaganda, thinly veiled threats, and discharge of key organizational employees. Depending on the tone and extensiveness of the employer's campaign or, to some extent, its timing, the employer may find itself defending the propriety of its conduct either in a representation proceeding before a Regional Director or in an unfair labor practice proceeding before a Trial Examiner.[23]

What is at stake in the former is the possibility of setting aside an election which the employer has won and the holding of another election (which it obviously may lose). What is involved in the latter is usually a cease and desist order, prohibiting certain conduct, which is enforceable, via contempt proceedings, in the federal appeals courts.[24] Indeed in the latter, if an employer's conduct is sufficiently reprehensible, it may be ordered to bargain with a majority union without benefit of an election or in spite of the union's losing its majority as evidenced by an election already held. It may be noted, however, that such an extraordinary remedy as the last is not likely to follow the mere showing of a motion picture.[25]

While both representation and unfair labor practice proceedings are reviewable by the Board, only the latter is immediately reviewable by the courts. Speaking of a pre-election representation controversy, a court has said:[26]

> A unit controversy must travel a circuitous route before it reaches court.

23. The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

24. Section 10(e), 29 U.S.C. § 160(e) (1964). Once the Board order becomes a court order, it is enforceable as any court order; until that time, no specific sanctions attach to failure to comply with a Board order. Or a respondent before the Board can take the initiative and have the order reviewed in a court of appeals under Section 10(f), 29 U.S.C. § 160(f). *But see* Section 10(g).

25. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

26. Local 1325, Retail Clerks v. NLRB, 414 F.2d 1194, 1196-97 (D.C. Cir. 1969). *See also* AFL v. NLRB, 308 U.S. 401 (1940); Leedom v. Kyne, 358 U.S. 184 (1958).

. . .

> Except in the most extraordinary circumstances, see *Leedom v. Kyne* . . ., neither the original unit determination made prior to the election, nor the final certification, is subject to direct judicial review. Instead, a company wishing judicial review must refuse to bargain with the certified union. This will ordinarily initiate an unfair labor practice proceeding in which the employer can defend on the ground that the certification was invalid, and may have judicial review of the resulting Board order. Thus, in the case at hand, the Company was *required* to invite an unfair labor practice proceeding in order to bring the unit determination under judicial scrutiny. (Emphasis added.)

Having thus roughly sketched the *procedural* differences between representational and unfair labor practice problems, the differences in general *substantive* freedom of speech standards, to the extent they exist, may be likewise summarized. In a landmark Board decision combining both representation and unfair labor practice problems generated by employer-employee communications, it was stated:[27]

> We do not subscribe to the view . . . that the criteria applied by the Board in a representation proceeding to determine whether certain alleged misconduct interfered with an election need necessarily be identical to those employed in testing whether an unfair labor practice was committed, although the result will ordinarily be the same. In election proceedings, it is the Board's function to provide a *laboratory* in which an *experiment* may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite *laboratory conditions* are not present and the *experiment* must be conducted over again. (Emphasis added.)

In addition to the pertinence of *General Shoe*[28] in the context of this paper in speaking of experiments, it is of special interest here because of its timing. The decision came down in 1948 on the heels of the Taft-Hartley amendments[29] to the Wagner Act.[30] Therefore, the Board was in a bit of a quandary in attempting to regulate the content of employer-employee communications in light of the provisions of Section 8(c) which provides:[31]

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual

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27. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).
28. *Id.*
29. *Cf.* note 10, *supra.*
30. The official title of the Wagner Act was the National Labor Relations Act, 1935. The LMRA (Taft-Hartley Act) amended the NLRB and incorporated it in Title I in 1947, and through such amendments NLRA § 8(1) has become LMRA § 8(a)(1), etc. *Cf.* note 10, *supra.*
31. 29 U.S.C. 158(c) (1964).

> form, shall not constitute or be evidence of an unfair labor practice under any provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Insofar as employer communications which would interfere with the proper holding of an election, in the absence of Section 8(c), would also ordinarily be the basis of an order to prohibit unfair labor practices defined as interference with employee rights "to self-organization",[32] the Board's attempted distinction between the two was promptly criticized:[33]

> In refusing to extend the amendment's protection to election cases the Board chose a novel and perhaps contradictory avoidance of legislative purpose . . . .
>
> That decision, while salvaging Board discretion in representation cases, is nevertheless a dubious guarantee that elections will be free. Since the Board may not order the cessation of conduct except in the realm of unfair labor practices . . . . . the employer's sole penalty is the inconvenience of submitting to another election.

However, in spite of such criticism, the dichotomy in respect to communications standards seems to thrive, as will be discussed shortly. The Section 8(c) exemption of communications from regulation as unfair labor practices was discussed by the Supreme Court in the *Gissel* case in 1969.[34] There, in response to an employer assertion that its communications to its employees were protected under the First Amendment and Section 8(c), regardless of their impact on union majority status or the ability of the Board to conduct fair elections, the court reviewed the law and observed:[35]

> Within this framework, we must reject the Company's challenge . . . . Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit."

Moreover, the court observed that the employer should avoid "brinksmanship" in its communications "by avoiding conscious overstatements he has reason to believe will mislead his employees,"[36] and, in that case, because the employer had suggested to its

32. Note 22, *supra*.
33. 58 YALE L.J. 165, 174 (1948).
34. Note 25, *supra*, at 616-620.
35. *Id.* at 618.
36. *Id.* at 620.

employees that the union's winning an election might result in plant closure, the court upheld the Board's finding that such conduct was properly the basis both for upsetting the employer-won election and for a cease and desist order based upon a violation of Section 8(a)(1) of the Act.[37] In short, the employer had wandered too close to the "brink", not only in respect to the election, but also in respect to the unfair labor practice.

This is unfortunate, for it requires a search elsewhere for freedom of speech standards applicable *only* to representation proceedings, i.e., those in which the employer has not made statements which even *verge* on being threats or bribes. There seem to be two sorts of these situations: (1) those in which communications raise irrelevant and inflammatory matters, and (2) those in which misstatements of fact may improperly influence *rational* employee choice. Authority for the first seems to be largely limited to racial matters. A typical case is the Board decision in *Sewell*, in 1962.[38]

There the issue of race was raised in a plant "on the Alabama Border, in northwest Georgia,"[39] and an illustrative item used was a photograph of a white union officer dancing with a black woman. In upsetting the employer-won election, it was said:[40]

> The Board has stated its practice as follows: The Board normally will not censor or police pre-election campaign propaganda by parties to elections, absent threats or acts of violence . . . . 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.

Continuing, the Board further noted that:[41]

> . . . the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

The standards for upsetting elections on the basis of misstatements of fact, however, originate in another 1962 decision. In *Hollywood Ceramics*,[42] the Board stated that it would upset an election only: (1) where there is a misrepresentation of a material fact, (2) the facts are within the special knowledge of the party using them,

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37. Note 22, *supra*.
38. Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).
39. *Id.*
40. *Id.* at 70-71.
41. *Id.* at 72. For a general discussion of this specific problem, *see* Note, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J. 1243 (1963).
42. Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962).

(3) the employees are not in a position to know the truth, and (4) there is no opportunity for rebuttal by the opposite party. Even in that situation, however, it was elaborated that elections need not necessarily be upset because it is possible that the misrepresentation:[43]

> . . . could have been so extreme as to put the employees on notice as to its lack of truth under the particular circumstances so that they could not reasonably have relied on the assertion.

In 1971, the Second Circuit, in *Bausch & Lomb*,[44] cited this test with approval pointing out not only that those standards have been approved by all of the circuits, but also that it and the two other circuits which had closely examined the fundamental issue were in agreement that Section 8(c) of the Act does not limit Board discretion in election cases, the conclusion being summarized as follows:[45]

> We recognize that the Board's laboratory standards may have a minimal chilling effect on both the speech of the employer and the union. The parties vying for the votes of the employees may be reluctant to express themselves fully, fearing that an unintentionally false statement will be seized upon later in overturning an election. But the incidental effects of regulation on the rights of employer and union must be weighed against the interest of employees and the public at large in free, fair and informed representation elections.

It it in this context that the employer-employee communication achieved by the film ". . . And Women Must Weep" must be henceforth analyzed.

B. The Cases in Point

Since the first time the Board was confronted, in 1962, with management use of ". . . And Women Must Weep,"[46] it has written eight decisions involving that film. Indeed, such cases have been pending in practically every year over the past decade. Nevertheless, the number is manageable, and it will be worthwhile to consider all of them in some detail.

Except for the one case in which an issue involving the film was skirted for apparently technical reasons,[47] the Board has upset elec-

43. *Id.* at 224.
44. Bausch & Lomb, Inc. v. NLRB, 451 F.2d 873 (2d Cir. 1971).
45. *Id.* at 879.
46. Note 9, *supra.*
47. Bannon Mills, Inc., 146 N.L.R.B. 611 (1964).

tions and/or issued unfair labor practice orders in all of them. This is surprising, because as will be discussed further, of the six cases appealable, four were taken to the courts; and in *all* of those, there was a refusal to enforce the Board orders based upon use of the film. While the first such upset occurred in 1967, it is interesting to note, too, that these decisions were consistently ignored by the Board until the most recent case, early in 1972, when the new chairman posted a footnote dissent citing these court analyses uniformly opposing the Board position.[48] As for the rebuttal film, no evidence of its existence was found in Board decisions through the very last, although the *courts* note that union use of "Anatomy of a Lie" dates back to at least 1966,[49] and commented on it in three of the four appealed cases.

In spite of the fact that ". . . And Women Must Weep" has occupied so much attention, it was the principal issue in only the first in this series of cases. It is therefore useful to keep in mind that in the remainder of them, the result reached was at least arguably obtained in part because of considerations having only the most peripheral interest here.[50] Aside from an occasional noting of such considerations, the rest of this part of the paper will be concerned with a chronological discussion of only the points bearing on the issues under consideration here.

As mentioned above, the first of these cases was *Cherry Lane.*[51] In addition to its being the first involving the use of labor-relations propaganda films and the only one in which such use is the principal issue, it is of further importance because of its being one of only two purely representational proceedings involved herein, therefore not appealable directly.[52] There, the employer sent pamphlets to his employees four days before the election. The pamphlets contained letters allegedly written by a minister's wife to her mother during the course of the Princeton, Indiana, strike dramatized by the film ". . . And Women Must Weep."[53] The pam-

48. Note 109, *infra.*

49. *See, e.g.,* Southwire Co. v. NLRB, 383 F.2d 235, 240 (5th Cir. 1967).

50. *E.g.,* there may have been actual discharges of employees or threats of discharge, neither of which are exempted from unfair labor practice action by Section 8(c), 29 U.S.C. § 158(c) (1964). Further, the apparent inapplicability of 8(c), *supra,* to representation proceedings gives rise to the kinds of issues discussed in *Hollywood Ceramics,* to note 42, *supra.* Even in *Cherry Lane,* the timing of the showings was at least a distracting factor if not a principal basis of the decision; *see* note 56, *infra.*

51. Plochman and Harrison—Cherry Lane Foods, Inc., 140 N.L.R.B. 130 (1962).

52. *See, e.g.,* note 26, and discussion, *supra.*

53. Note 4, *supra.*

phlets were followed, on the eve of the election with the showing of the film to the employees. The record is fairly barren of what also may have been *said* to the employees in the way of introduction, but that, in spite of its importance in later cases,[54] seems to have been of little consequence in the Regional Director's upsetting this particular election after the employer had won.

On an appeal to the full Board,[55] three decisions were written. The majority opinion, in which Chairman McCulloch concurred, affirmed the Regional Director's decision. It apparently placed emphasis on the impact of the medium of motion pictures in influencing attitudes and discussed at length the inadequate time for union rebuttal to the film. McCulloch, however, in a footnote, observed that he would have upset the election regardless of the timing of the showing of the film and the opportunity for rebuttal.[56] Members Leedom and Rogers dissented, expressing serious reservations as to the likely impact of the film, regardless of its timing, on employee choice.[57]

In *Mason*,[58] another purely representational proceeding coming the next year, the same three-way split was maintained with McCulloch writing a lengthy concurrence which has even been quoted by the courts[59] as being a fairly accurate appraisal of the film. He observed, in part:[60]

> . . . . It pictures a labor dispute as one in which Americanism, religion, family, motherhood, and innocent childhood are arrayed on one side, and goons, brutes, and murderers on the other or pro-union side.
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> . . .
>
> . . . . The clear tendency if not the purpose in showing the film was quite plainly, in my view, to create such an atmosphere of emotional prejudice that employees would not be able to make a reasoned choice . . . I do not think it material that the film was shown 12 days before the election, rather than 1 day as in *Plochman and Harrison* (*Cherry Lane*). . . .

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54. *E.g.*, Kellwood Co., 178 N.L.R.B. 20, 49 (1969).
55. In all cases, save the first two, the Board decisions were made by a three-member panel, not a full, five-man Board; *see* Section 3(b), 29 U.S.C. § 153(b) (1964).
56. 140 N.L.R.B. 130, n.5 (1962).
57. 140 N.L.R.B. 130 (1962).
58. Carl T. Mason Co., 142 N.L.R.B. 480 (1963).
59. *See, e.g.*, NLRB v. Hawthorn Co., 404 F.2d 1205 (8th Cir. 1969).
60. 142 N.L.R.B. at 486.

One interesting difference between this and the former case is that the Regional Director, in assessing the impact of the film and other anti-union propaganda on the election results (the union lost 50 to 12), determined that the employer had not gone beyond the limits of permissible campaign propaganda. Rogers and Leedom arrived at the same conclusion as in *Cherry Lane,* commenting:[61]

> . . . . We disagree (with our colleagues), and find, in accord with the recommendations of the Regional Director that the documents and film in question were noncoercive in nature and fall into the category of permissible campaign propaganda.

The most noteworthy aspect of this case is that the Board seems to have avoided the freedom of speech standards set down in *Hollywood Ceramics*[62] the previous year, and to some extent apparently relied on in *Cherry Lane,*[63] in two respects. Obviously, in 12 days, as observed by McCulloch,[64] there were plenty of opportunities for union rebuttal of the points made in the film, although it is not known whether the film "Anatomy of a Lie" was available for that purpose.[65] Also, the Board did not see fit to characterize the film as being "so extreme as to put the employees on notice as to its lack of truth . . . ."[66] On the contrary, *Sewell,*[67] seems to have been seized upon as providing the appropriate kind of test for use in relation to the films. In fact, *Sewell* was specifically cited by McCulloch in his concurring analysis of the film.[68]

Bannon Mills,[69] coming in 1964, is the case in which the Board skirted the issue of the film and was the first proceeding in which the possibility of an unfair labor practice based on use of the film was considered. In that case, the union did not proceed to an election, but, following extensive alleged unfair labor practices of the employer during its campaign, elected to file charges based on such violations. Indeed, a bargaining order was sought insofar as the union claimed to have signed a majority of employees as members and that the employer's conduct had negated the possibility of a fair election.[70]

In spite of the fact that the film was shown to employees on seven separate occasions coupled with at least one misstatement of

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61. *Id.* at 487.
62. *See* note 42 and discussion, *supra.*
63. *See* discussion preceding note 56, *supra.*
64. *See* note 60 and quotation, *supra.*
65. *See* note 49 and discussion, *supra.*
66. Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962).
67. Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).
68. Carl T. Mason Co., 142 N.L.R.B. 480 (1963).
69. Bannon Mills, Inc., 146 N.L.R.B. 611 (1964).
70. Note 25 and discussion, *supra.*

fact,[71] the complaint failed to include a count based specifically on the film. When the employer, at the end of the hearing, moved to strike the evidence on this ground, the Trial Examiner refused on the basis that not all evidence need be pled. In his report, the showings of the film were held to violate Section 8(a)(1), although the recommended order did not specifically forbid showing it.

A three member panel consisting of the majority bloc[72] in the preceding cases reviewed the decision. Their decision,[73] with one exception, was essentially a *pro forma* adoption of that of the Trial Examiner. In a footnote,[74] it was observed that the finding of the violation of the Act based on the showing of the films was unnecessary to the result reached and was therefore dropped. This is not surprising, for, in spite of their previously evidenced attitude toward the film, the finding was clearly unnecessary and was potentially objectionable on two grounds: (1) the procedural ground raised before the Examiner, and (2) the substantive ground provided by Section 8(c) of the Act.[75]

Regardless of their motivation in skirting the issue in *Bannon Mills*, Fanning and Brown seem to have gone out of their way to disprove temerity in the face of Section 8(c) in *Southwire* two years later.[76] There, the employer had been using the film as part of its orientation program for new employees for three years and, by this and other devices, had managed to keep unions out of its plant in spite of repeated attempts by more than one union to organize the employees. The Trial Examiner stated that the nub of the issue was whether the film contained a threat of reprisal and held that its use did constitute a violation of Section 8(a)(1). He recommended a cease and desist order specifically prohibiting the showing of the film (in orientations or otherwise, apparently).

While the Board modified the Examiner's decision in several respects and drafted a new order not specific to the film, it noted

71. 146 N.L.R.B. at 615. The Trial Examiner found that the employer told the employees that the actors in the film were the *actual participants* in the fray, although it was not filmed at that time. *Cf.* note 4, *supra* and note 129, *infra*, and discussion.
72. Members McCulloch, Fanning and Brown, 146 N.L.R.B. at 615.
73. Note 69, *supra*.
74. Note 69, *supra*, at 612 (footnote 1).
75. 29 U.S.C. 158(c) (1964).
76. Southwire Co., 159 N.L.R.B. 394 (1966).

that the majority agreed with the Trial Examiner's findings in respect to the film.[77] Member Zagoria, however, finding the determination on the issue unnecessary to the result, created a two-one split.[78]

On appeal in the Fifth Circuit, the latter decision was affirmed on all points save the one under consideration here.[79] After noting that the film: (1) was of potentially substantial adverse impact in the union movement, (2) had been previously used by the Board to upset elections, and (3) was shown to captive audiences, the court nevertheless determined that its use was protected from unfair labor practice sanctions by the Section 8(c) exemption. In short, the court held that, in spite of the Examiner's discussion of 8(c) as noted above, neither he nor the Board had sustained the necessary burden of showing the film contained an employer threat of reprisal or force.

While the court, in *Southwire*, did note the availability of the rebuttal film, "Anatomy of a Lie," and its use by the union in that case, it apparently regarded that factor, in a non-representation context, to be irrelevant, thus providing further evidence of the diversity of freedom of speech standards between representation and unfair labor practice proceedings. Section 8(c), of course, makes no reference to opportunity for rebuttal, and it would seem reasonable that such opportunity would have little meaning outside of situations involving misstatements of fact as discussed in *Hollywood Ceramics*.[80] While a threat is, in most instances, a misstatement of fact (i.e. intention), it is not the kind of misstatement that another party is likely to be able to rebut.

Hawthorn,[81] in 1967, was in most relevant respects quite similar to *Southwire*.[82] It, too, was decided by a three member panel of the Board. Interestingly, Zagoria, who also sat in this case, did not

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77. *Id.*
78. *Id.* at 395.
79. Southwire Co. v. NLRB, 383 F.2d 235 (5th Cir. 1967).
80. Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962).
81. Hawthorn Co., 166 N.L.R.B. 251 (1967).
82. There is, arguably in Southwire Co. v. NLRB, 383 F.2d 235, 240 (5th Cir. 1967) a potential distinction. The court in *Southwire* noted that the availability of the rebuttal film was not to be considered insofar as the case was not concerned with an election, 383 F.2d at 240. The Board decision, however, indicated (note 76, *supra*, at 395) that an election *was* pending at the time of the complained of acts. In any event, neither the Court nor the Board in *Hawthorn* nor *Kellwood* discussed any distinction so premised in spite of the fact that the use of the film in both of *these* was in an election context.

object as he had in *Southwire*,[83] and the unanimous Board opinion contained an order which specifically forbade the employer's showing ". . . And Women Must Weep."

Kellwood, the parent company of Hawthorn, also found itself before the Board in yet another proceeding in 1969,[84] which, again, was quite similar to the *Southwire* situation. This time, the Board order required the employer to cease and desist from: "*Introducing as true* and showing to employees the film '. . . And Women Must Weep.' "[85] (Emphasis added.)

Both *Hawthorn* and *Kellwood* were taken before the Eighth Circuit for review,[86] and both were upset on the issue concerning the film. The fact that the employers had told the employees watching the films that the events shown there were *accurately* portrayed by professional actors had no effect on the courts' analyses. In *Hawthorn*,[87] the court quoted Chairman McCulloch's concurrence in *Mason*[88] and agreed that the film was in rather poor taste, but it also cited union use of the rebuttal film which suggested that the campaign was in the nature of a debate which was "uninhibited, robust, and wide-open" and included "vehement, caustic, and sometimes unpleasantly sharp attacks,"[89] not an unfamiliar phenomenon in labor-management controversies.

The court went on to quote extensively from the analysis of the films in *Southwire*[90] and concluded, as had the Fifth Circuit, that neither the Trial Examiner nor the Board had sustained the bur-

83. Note 78 *supra, but see* note 82, *supra*. While no explanation is given for the position taken either time, considerations discussed in note 82, *supra*, would tend to explain an apparent difference in attitude.
84. Kellwood Co., 178 N.L.R.B. 20 (1969).
85. *Id.* at 50. It seems that this order, however, was little more than a hollow exercise *in spite of* the employer's showing the film, the union won the election (666 to 564) and was certified in 1966. The present case was provoked when the employer then engaged in other activities which predicated a strike, replaced striking employees, and proceeded to argue that the union no longer had a majority. He lost the argument and was ordered to bargain with the certified representative, making it rather unexpected that he would again have cause to show the film.
86. NLRB v. Hawthorn Co., 404 F.2d 1205 (8th Cir. 1969), and Kellwood Co. v. NLRB, 434 F.2d 1069 (8th Cir. 1970).
87. 404 F.2d at 1213.
88. 142 N.L.R.B. at 486.
89. 404 F.2d at 1215.
90. 383 F.2d 235 (5th Cir. 1967).

den of showing the film to represent the management threat, required by Section 8(c), necessary to sustain an order based on a Section 8(a)(1) unfair labor practice violation.[91] Relying on this analysis in *Hawthorn*, the court came to substantially the same conclusion in *Kellwood*[92] a year later, even though there is no mention of union use of "Anatomy of a Lie" in the latter case.

The last case thus far to come before the courts involving this kind of issue is *Beaunit Corporation*, decided by both the Board[93] and the Second Circuit[94] in 1970. In that case, the employer showed the film to its employees twice: first to non-union-activists and, later, to the pro-union employees. At the first showing, the employees were told that the film was a *factual* dramatization of events which had transpired in a town about the size of the one in which the current controversy was taking place. On the second showing, the pro-union employees were told that the employer was sorry they had not been invited to the first showing, but that they might change their minds about the union by seeing the film at that time.

Folowing these showings of the film (which the Second Circuit later indicated had been rebutted by the union film) an election was held which the union lost. Interestingly, that election was upset on other grounds and use of the films does not seem to have come into issue until the union filed charges seeking to have the employer enjoined from this and other practices pending the holding of a second election. The case came before a three member panel of the Board, and the Trial Examiner's finding that employer use of ". . . And Women Must Weep" constituted a violation of Section 8(a)(1) was affirmed by only a two-one split.[95] Interestingly, the dissent was written by the same individual who had so thoroughly lambasted the film in *Mason*[96]—Chairman McCulloch. The report says, simply: "Member McCulloch dissents from so much of the Decision as finds that the showing of the film '. . . And Women Must Weep' is a violation of Section 8(a)(1) of the Act."[97]

The Second Circuit also split, two-one, on the issue in overruling the Board.[98] The majority found itself in agreement with the Fifth and Eighth Circuits and quoted extensively from *South-*

91. *See* notes 21, 22, and 31, *supra*.
92. Cases cited note 86, *supra*.
93. 185 N.L.R.B. No. 15, 75 L.R.R.M. 1001 (B.N.A. 1970).
94. Luxuray of N.Y., Div'n of Beaunit Corp. v. NLRB, 447 F.2d 112 (2d Cir. 1971).
95. 185 N.L.R.B. No. 15, 75 L.R.R.M. 1001 (B.N.A. 1970).
96. Note 60 and quotation, *supra*.
97. 185 N.L.R.B. No. 15, 75 L.R.R.M., at 1002.
98. 447 F.2d 112 (2d Cir. 1971).

wire.[99] After discussing the Supreme Court analysis in *Gissel*[100] and quoting[101] from its own observation in *Golub*[102] that "Congress did not intend the Board to act as a censor of the reasonableness of statements by either party to a labor controversy," it went on to note that the film represented neither a protected prediction nor an unprotected threat, but was, rather, mere propaganda answerable by the union in normal debate.

The dissent, by Hays,[103] also quoted *Gissel* and placed considerable emphasis on the failure of the film to convey objective fact. Indeed, it notes that not only is the film, itself, a gross distortion of the portrayed event, but also such distortion is further amplified by management averments that the portrayal is an accurate one, although dramatized. Hays noted that he would have placed greater reliance on Board expertise than the majority allegedly did. Unfortunately, while these objections and observations are sound in principle, they do not seem to address themselves to the problems generated by Section 8(c) which exempts communications from being the basis of unfair labor practice orders except when they consist of an employer threat of reprisal or force.[104]

In the last case to come before the Board,[105] it is interesting that the Trial Examiner decided that the film did *not* convey a threat and therefore did not furnish a basis for finding a Section 8(a)(1) violation. Again splitting, two-one, the same majority as in *Beaunit*[106] upset the Trial Examiner. Citing the Fifth Circuit test in *Southwire*,[107] they held:[108]

> In these circumstances, we find that the showing of the film constituted a clear threat of reprisal or force against the employees if they chose the Union as their bargaining representative. Accordingly, we find . . . exhibition of the film violated Section 8(a)(1) of the Act. (Footnote omitted.)

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99. 383 F.2d 235 (5th Cir. 1967).
100. 395 U.S. 575, 616-620.
101. 447 F.2d at 117.
102. NLRB v. Golub Corp., 388 F.2d 921, 928-29 (2d Cir. 1967).
103. 447 F.2d at 121.
104. *See* note 27 *et seq.* and discussion, *supra.*
105. Spartus Corp., 195 N.L.R.B. No. 17, 79 L.R.R.M. 1351 (B.N.A. 1972).
106. 185 N.L.R.B. No. 15, 75 L.R.R.M. 1001 (B.N.A. 1970), Members Fanning & Jenkins.
107. 383 F.2d 235 (5th Cir. 1967).
108. 195 N.L.R.B. No. 17, 79 L.R.R.M. 1351 at 1353.

The dissent was filed by new Chairman Miller, who observed that he would uphold the findings of the Trial Examiner on this issue and concluded (in the third person):[109]

> His views are in conformity with those of the various courts of appeals, including . . . . He is of the view that free speech is not rendered unprotected by other improper conduct. The other conduct may properly be restrained, but the free speech may not.

Although it might have been,[110] this decision has not been appealed. In making a specific finding that the film constitutes a threat, the Board does, indeed, seem to be overcoming the articulated basis for the Fifth Circuit, *Southwire*, decision which has been heavily relied on by the other circuits. Upsetting a decision, so based, will apparently require overruling the Board on the *facts*: an area where there should be most reliance on Board expertise if any such area exists.[111]

However, the Second Circuit, in *Beaunit*,[112] seems to have anticipated the Board coming very close to, if not arriving at, the point of holding that, *as a matter of law*, ". . . And Women Must Weep" is mere propaganda and not a threat. On the one hand, as the court observed there, the danger of threats in labor-management controversies is that they are not answerable by the opposing party (how can one counter what another *says* his *intentions* are?). On the other hand, as the court also observed in *Beaunit*, the fact that unions can and *do* rebut the showing of the first film with the second, almost by definition, takes the former out of the realm of threats. In any event, further discussion of this issue can await the discussion of the *controlled* evaluation of the films which immediately follows.

III. The Experiment

It is the purpose of this discussion to detail the mechanics of the second evaluation of the films under study as hereinbefore noted. To that end, this section of the paper is divided into the following descriptions of elements of that evaluation: (1) the subjects used therein, (2) its design and the procedure for its execution, (3) the method of statistical analysis of data collected, and (4) a discussion of the results and their significance. These will be taken in their respective order and illustrated with tables as appropriate.

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109. *Id.* at footnote 4.
110. *See, e.g.*, note 26 and discussion, *supra.*
111. The test usually applied is whether "substantial evidence on the record considered as a whole" supports the Board's order and the findings it rests on; *see, e.g.*, Universal Camera Corporation v. NLRB, 340 U.S. 474, 493 (1951).
112. 447 F.2d 112 (2d Cir. 1971).

A. The Subjects

The persons who participated in the instant evaluation of the films were all enrolled in a technical college. This group was chosen because its members are preparing for the kinds of occupations where union membership is common.[113] Their ability to empathize with employees who must vote on union representation was therefore posited. The films were shown to students in speech, history, and psychology classes for primarily logistical reasons, and, because all students of the college are required to take those courses, it was expected that most of the training specialties would be represented.[114]

While a total of 73 students completed usable evaluations of the first film, five of those subjects were not present for later testings. Table A describes the ages and sexes of the subjects by group tested, and Table B summarizes their then *current* occupations[115] in the aggregate.

TABLE A

AGES AND SEXES OF SUBJECTS BY GROUPS

	SEX					
	MALE			FEMALE		
GROUP	F_2[a]	F_1[b]	C[c]	F_2	F_1	C
Age						
18				1	3	1
19	5	6	3	3	3	
20		6	2	5	2	
21		5		2		1
22	1	1	1			
23	1	1	1			
24	1		2		1	

113. *Cf.*, note 18, *supra*. The programs are: nursing, law enforcement, electrical or mechanical engineering technician, business, and computer programming.

114. *Id.*

115. A substantial portion of the student population pursues a part-time program, in fact, all of those not indicated in the Table as being "student."

25	1					
26						
27	1					
28	1		2	1		
29					1	
30 and up			4	3	1	
TOTAL	11	19	15	15	11	2

[a]F_2—saw both films.
[b]F_1—saw only ". . . And Women Must Weep".
[c]C—saw no films.

TABLE B

OCCUPATIONS OF SUBJECTS BY SEX

SEX			
MALE		FEMALE	
Occupation	*Number*	*Occupation*	*Number*
student	15	student	18
police officer	7	clerk	3
sales clerk	4	LPN	2
computer operator	2	nurses aide	1
farmer	2	police officer	1
lab technician	2	secretary	1
construction	3	waitress	1
mechanic	3	model	1
tavern manager	1		
hospital orderly	1		
bank teller	1		
truck driver	1		
power serviceman	1		
general labor	5		
waiter	1		

B. Design and Procedure

Obviously, in order to test the effect of a phenomenon expected to produce some kind of change, it is necessary to secure measurements of the parameter expected to change both before and after the subjects have been exposed to that phenomenon. Further, if one wants to evaluate the effects of a phenomenon independent of possible effects of still other factors, it is imperative that precautions be taken to either: (1) measure those other factors, too, or (2) otherwise compensate for their possible presence.

In the specific context of this experiment, that translates into: (1) the need to evaluate the attitudes of subjects toward union representation by testing them both before and after the showing of a film, and (2) the need to insure that any measured changes supposedly generated by the film in question have not been, in fact, induced by some extraneous influence. For example, if subjects' attitudes are measured at point X in time, and it is anticipated that a further attempt will be made to influence them at later point Y, it is important to guard against the effects of interim influences, such as the mere passage of time.[116]

The design here used to account for those matters is reflected in Figure 1 where information concerning three groups of subjects is presented: F_1, F_2, and C. A study of that figure will show that group F_2 was the most manipulated and was shown both films in question. Those subjects, in light of the above discussion, were, therefore, tested before each showing to control for their attitudes at *that* time, whatever they might be. Further, the testing of that

FIGURE 1

EXPERIMENTAL DESIGN

GROUP	FILM			
	I[e]		II[f]	
	Before	After	Before	After
F_1[a]	31[d]	31	28	—
F_2[b]	25	25	23	23
C[c]	17	—	17	—
TOTAL	73	56	68	23

[a]F_1—group saw only the first film.
[b]F_2—group saw both films.
[c]C —group saw neither film.
[d] —numbers in the cells represent the number of subjects completing questionnaires.
[e] —Film I—" . . . And Women Must Weep".
[f] —Film II—"Anatomy of a Lie".

116. *See, e.g.*, note 118 and discussion, *infra*. Another matter to consider is the possibility of sufficient ambiguity in the attitudes of the population to cause vote changes without any particular intervening stimulus.

group before the second film gave some indication of the amount of dissipation of influence the first film suffered from the time of its showing.[117]

To this point, both F_1 and F_2 were treated the same. F_2, however, was then shown the second film and, later, again tested to evaluate its additional impact on their attitudes toward union representation. F_1, which merely buttresses the data of F_2 up to the time of the showing of the second movie, thus reflects no "after" data for the second film. The situation with the C group is similar. Because that group saw neither the first nor the second film, no "after" data was taken either time. The presence of the C group in the design reflects an effort to control for extraneous environmental influences between the time of the first and second showings, e.g. an intervening newspaper story that might be inordinately pro-or anti-union.[118]

All showings of films and collection of data were accomplished in the respective class sessions for the groups on the same day.[119] The second film was shown to F_2 two weeks later, and, again, all data for the groups was collected in class at that time.

The data concerning attitudes toward union representation was collected by means of a questionnaire which is reproduced in Appendix A of this paper. Verbal communications were kept to a minimum, and requests for directions and information were referred to the document. There, the subjects were asked to cooperate, to supply a minimum of personal information (name, age, sex, and occupation) and to put themselves in the position of an employee who must decide whether he wants to join a union after both it and the employer have conducted a campaign to capture employee sentiment. The raw data thus collected is summarized in Table C.

C. Statistical Analysis

Fortunately, an exceptionally appropriate statistical procedure was available for use in evaluating the significance of the data collected: "The McNemar Test for the Significance of Changes."[120]

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117. If the behavior of group C is compared. Insofar as the entire subject population is geographically cohesive, it is assumed that any significant intervening simulus will be reflected in the voting patterns of group C. There was no such significant change registered for that group; therefore, it can be reasonably assumed that the other groups were likewise unaffected by extraneous circumstances.

118. *Id.*

119. Monday, May 22nd, 1972.

120. *E.g.*, SIEGEL, NONPARAMETRIC STATISTICS FOR THE BEHAVIOR SCIENCES, 63 (McGraw-Hill: N.Y., 1956).

TABLE C

RAW DATA

	I[a]						II[b]						
Group	Before[c]		After[d]		Ch1[e]	N[f]	Before		After[d]		Ch2[g]	Ch3[h]	N
	Yes	*No*	*Yes*	*No*			*Yes*	*No*	*Yes*	*No*			
F_1[i]	20	8	20	8	4	28	19	9	—	—	1	—	28
	2	1	2	1	0	3	0	0	—	—	—	—	—
F_2[j]	10	10	10	10	0	20	10	10	10	10	0	0	20
	3	0	3	0	0	3	0	1	0	1	0	0	1
	1	0	1	0	0	1	0	1	1	0	1	1	1
	1	0	0	1	1	1	0	1	0	1	0	0	1
C[k]	11	6	—	—	—	17	11	6	—	—	0	—	17
TO'L.	47	26	35	21	5	73	40	28	11	12	2	1	68

a—Represents the time at which ". . . And Women Must Weep" was shown. (film one)

b—Represents the time at which "Anatomy of a Lie" was shown.

c—Numbers in the colums indicate the subjects responding in the indicated manner.

d—Blank spaces indicate the subjects in the indicated group did not see the film in question.

e—Change period 1: shows absolute number of subjects changing their vote before and after the first film.

f—Shows the number of subjects involved.

g—Change period 2: absolute vote change during time span from after film one to before film two.

h—Change period 3: change from before to after film two.

i—Saw only film one. 3 subjects indicated below did not participate in the second part of the experiment.

j—Saw both films. Subjects in second line did not participate in both parts of the experiment.

k—Saw neither film.

That test has been categorized as follows:[121]

> The McNemar test for the significance of changes is particularly applicable to those 'before' and 'after' designs in which each person is used as his own control and in which measurement is in

121. *Id.* Incidentally, measurement here was on a nominal scale, *i.e.* a simple vote count. An ordinal scale is one in which measurements are ranked, rather than being a simple "yes" or "no."

> the strength of either a nominal or ordinal scale. Thus it might be used to test the *effectiveness of a particular treatment . . . on voters' preferences* . . . (Emphasis added.)

Accordingly, it was used for each group, separately, and for the aggregate of subjects for each of four possible change periods: (1) before to after the first film, (2) after the first to before the second, (3) before to after the second film, and (4) before the first film to just before the second film. The results of that analysis for each group and change period, as defined above, is given in Table D in terms of probability values, p. By convention, if p is equal to or less than 0.05, the results are said to be statistically significant. Conversely, values *larger than* 0.05 are *insignificant* indicating that whatever changes registered were likely registered as a product of chance.[122]

TABLE D

RESULTS OF McNEMAR TEST

	Change Period			
Group	1	2	3	4
F_1	0.99	0.99	—	0.99
F_2	0.99	0.99	0.99	0.40
C	—	—	—	—
Whole[123]	0.99	0.30	—	0.40

D. Results and Discussion

As noted before, the raw data for this experiment is summarized in Table C. An examination of it and Table D will reveal that, while there were a few changes in voting behavior between the various testing times, not only will the unskilled observer find them quite small,[124] but also the more expert will find them to be, within the context of the procedure used, the product of chance *not* of systematic impact of either of the films or both.

122. *E.g.*, SIEGEL, note 120, *supra*, generally.

123. There are no results in period 3 because there was no data from more than one group to combine.

124. While there were five changed votes over the course of the experiment in group F_1, the net overall change was only one vote lost for the union—in spite of the second film's not being shown. For F_2, there was a total of only three votes changed. Prior to the showing of the second film, the union had lost 2 votes, one of which was recaptured by showing the second film. One individual shown there changed his vote twice as indicated, and his and another individual's votes are separated from the group so that it may be determined which way the votes were shifting from point to point.

While it cannot be analyzed systematically, much less statistically, there is some subjective data bearing on the legitimacy of these results. Subjects were allowed to comment freely on their reaction to the films, and those comments are worthy of mention. Four students, for example, who should have been members of the control group (which saw neither film) refused to participate, maintaining that they had inadequate information upon which to base a voting decision.[125]

Other subjects made written comments on the questionnaires. These seem to present a failure to be impressed with the first film.[126] While few commented on the fact that the films dealt with an ostensibly nonrelevant issue, i.e., right-to-work legislation,[127] many indicated a feeling that the first film, in particular, was dated.[128] Many, too, felt that the first film was so melodramatic that it was discounted, and laughter was reported at several points during its showing.

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125. In a role-playing experimental procedure, it is required that a subject be given only general directions and be forced to rely on his own experiences and attitudes to supply the specifics. Hence the questionnaires (Appendix A, *infra*) were deliberately non-committal and uninformative. There is no way to determine whether non-responsiveness by these individuals is a product of ambiguity toward unions or an unwillingness to commit their biases to paper. In any event, this is a widely recognized method of industrial psychologists and others; *see, e.g.*, MAIER, PSYCHOLOGY IN INDUSTRIAL ORGANIZATIONS, 322-23 (Houghton Mifflin: Boston, 1973).

126. One subject, for example, wrote: "All unions do not have this effect or let this happen. It resulted from non-organized union." Another said, "I didn't change my vote because every union does not operate like that." *See also* note 128, *infra*.

127. Note 10, and discussion, *supra*.

128. One student wrote, "Times have changed; they aren't like this anymore. Actually, unions keep management in there (*sic*) places so they won't take advantage of you." Quite a few expressed the opinion that the cars, fashions, etc., shown in the first film were of vintage quality. It is difficult to assess the impact this had on an admittedly fairly young group of subjects (see Table A) nor the likely impact on an older group of individuals. In any event, this problem seems to have been anticipated by the National Right To Work Committee, note 17, *supra*. They have a new work available called "The Springfield Gun," a 16mm color, 25 minute film, renting for $25.00. While this film has not yet shown up in labor cases, it can be expected from the following flyer description:

> "A Motion Picture Sequel to the Emotionally Overpowering" *AND WOMEN MUST WEEP* . . . A saga of COMPULSION . . . "The Springfield Gun" is more than a recording of the facts surrounding those grim days in early 1969 when a bullet was fired into the brain of a 10-year-old child as part of a violence ridden strike called to enforce demands for a compulsory union shop. . . ."

Therefore, there was ample subjective as well as objective evidence to suggest that the propaganda value of the first film was so low, there was little for the second film to rebut. Hence, those who saw the second film were not surprised at being told therein, e.g., that the local union leader and alleged instigator of much of the trouble depicted in the first film was a partially blind, elderly woman—not a burly, young man.[129]

It remains to discuss the significance of these findings in the remainder of the paper.

IV. Summary and Conclusions

As has been hereinabove discussed, the rules for application of freedom of speech standards to matters before the NLRB requires, first, a determination of the kind of proceeding involved. In unfair labor practice actions, in which a cease and desist order may be entered, one must contend with the provisions of Section 8(c), exempting non-coercive communications from being the basis of enforceable orders.

In such proceedings, as was discussed in *Southwire*[130] and later elaborated in, e.g., *Beaunit*,[131] it becomes necessary to categorize a communication as a threat, a promise, or mere propaganda. Of the three, only the first is subject to enforceable Board orders. A "prediction" is distinguished from a "threat" in a certain class of situations within which the one under current discussion probably does not fall. For example, an employer may engage in permissible, though admittedly coercive, predictions concerning the likely adverse economic impact of unionization on its plant.[132] Likewise, in very limited circumstances, an employer can tell employees that a decision has been reached, where indeed it has, to close the plant in the event of unionization.[133]

As was discussed in *Beaunit*,[134] however, a film depicting a possibility of union violence falls neither within the realm of threats nor within that of predictions. It is not the former because that term, in the context of its use in labor relations, has come to mean

129. That is not to say that women are incapable of hotheaded and rash acts, it only shows short-sightedness on the part of the makers to use such easily disproven distortion.
130. *See* note 76 and discussion, *supra*.
131. *See* note 94 and discussion, *supra*.
132. *See, e.g.*, note 25, *supra*, at 616-20, and the discussion corresponding to note 34, *supra*.
133. *See* Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965).
134. *See* note 94 and discussion, *supra*.

a misrepresentation of the employer's intention to do something, itself, in the event of unionization.[135] Insofar as the showing of the film, ". . . And Women Must Weep," cannot be reasonably construed as an employer promise of doing anything itself, the application of the term, "threat", to the showing of the film is improper.[136]

For approximately the same reasons, the use of the term, "prediction", as it has come to be defined in the context of this particular dichotomy, is likewise improper. While the showing of the film may be loosely labeled a "prediction", in the context of standard usage, it is, *again*, not such within the context of *labor* usage because there is no implication of *employer* action. Quite the contrary, it is a suggestion of *union* action which may be adverse to the best interests of the employees.[137]

This leaves the term, "propaganda", for discussion. Clearly the film is propaganda, and, as such, it may be classified as: (1) rational and relevant or irrational, irrelevant and inflammatory; (2) rebuttable or irrebuttable; and/or (3) true or false. However, regardless of its classification in those categories, it is still not a *threat* as that term has been heretofore defined and is, therefore, employer-employee communication exempted from action under Section 10 by Section 8(c) of the Act.[138]

In Section 9 proceedings, nevertheless, as has also been discussed beginning with *General Shoe*,[139] the situation is quite different. There, not only are threats the basis for upsetting an employer-won election, but material misstatements of fact, even *innocent* misstatements of fact,[140] may provide such a basis under the proper circumstances. Further, in apparently limited circumstances, especially inflammatory and emotional propaganda may provide a basis for upsetting an election.

Assuming *arguendo* that ". . . And Women Must Weep" is irrelevant, irrational, and potentially inflammatory, and, further, assum-

135. Note 132, *supra*.
136. *See* note 94 and discussion, *supra*.
137. *Id.*
138. *Id.*
139. 77 N.L.R.B. 124 (1948).
140. *E.g., Bausch & Lomb*, note 44, *supra*. In that case, it was held that the Board could properly upset an election even where the misrepresentation was in good faith.

ing it contains material misrepresentations, matters remaining for discussion here include: (1) the propriety of Board action with respect to the film in light of its own rules, and (2) the impact of the present study on the application of those rules to films such as the one primarily in question.

If ". . . And Women Must Weep" is regarded as primarily a misrepresentation of fact, i.e., *material* misrepresentations,[141] the latter being particularly arguable,[142] an employer should not be subject to an election upset if there is adequate time for union rebuttal.[143] Clearly, if sufficient time is allowed for rebuttal with "Anatomy of a Lie," the standards of, e.g., *Hollywood Ceramics*,[144] are met. However, if such time is *not* allowed, it might be very well justified not only to upset an election but also to issue a cease and desist order pending a second one—based not on the communications, *per se*, but rather on the *act* of showing it *within a proscribed period* of time of the election.[145]

Unfortunately, contrary to what was apparently a false start in *Cherry Lane*,[146] the Board seems to have veered away from such an approach to the problem beginning with *Mason*.[147] Even this much is not certain, for, if "Anatomy of a Lie" had been available for use in *Mason*,[148] it is possible, on the one hand, that a different result might have been reached. On the other hand, however, in subsequent cases—ones in which the rebuttal film *was* available[149] —time was not discussed as a relevant issue.

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141. Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962).

142. *See, e.g.*, note 129 and discussion, *supra*. Is such a misrepresentation *material*?

143. *Cf.*, NLRB v. Cactus Drilling Corp., 455 F.2d 871 (5th Cir. 1972). This is an interesting case, further illustrating points made by note 26 and discussion, *supra*. There, after *union* misrepresentations of fact, the union won an election. The employer objected in a representation proceeding, but his objections were not found sound and the union was certified. The employer refused to bargain with the union and an unfair labor practice action was brought in which the employer tried to raise the issue again. The Trial Examiner granted summary judgment on the issue and issued a bargaining order and was "affirmed" by the Board. The court refused to enforce the order, indicating that more than an *opportunity* to rebut is needed where such rebuttal would be ineffective if made.

144. 140 N.L.R.B. 221 (1962).

145. *See, e.g.*, note 33 and discussion, *supra*. This approach would seem to be technically not forbidden by Section 8(c), but no cases are known attempting it. Such an approach might save some time and avoid some of the problems discussed *in re* note 26, *supra*.

146. 140 N.L.R.B. 130 (1962).

147. 142 N.L.R.B. 480 (1963).

148. Note 49 and discussion, *supra*.

149. *Id.*

In spite of rather cogent criticism of such rules,[150] an approach along the lines of *Sewell*[151] seems to have been retained, condemning the film for its injection of arguably irrational and emotional issues into the representation campaign. Because of its insistence on regarding the film as a "threat" which it clearly isn't, it is quite impossible, however, to determine what the Board *really* thinks.[152]

Regardless of feelings toward the film, *per se*, it is the conclusion here that the continued use of film showings to upset elections, much less as a basis for cease and desist orders, is in most cases, a squandering of precious manpower and, in others, may actually be punitive.

In the first place, while the experiment herein described may be the subject of some criticism,[153] its results would seem to reasonably meet the burden of showing the impact of the film, with or without the rebuttal film, to be, at best, minimal.[154] In any event, there is at least one case on record where a union won by a substantial majority in spite of employer use of the first film.[155]

In the second place, in situations where cease and desist orders are otherwise appropriate to insure a clean second election (legal arguments aside), it may be observed that an order *in re* the film is a waste of time once the employer has already shown the film.[156] What could be gained from a *second* showing?

Finally, even in a pure representation context, the upsetting of elections following the use of the film is, moreover, unwarranted. Again, with or without rebuttal and regardless of its irrational and arguably deceptive appeals, the film has been demonstrated ineffective toward its intended end.[157] Given this, and given that the employer's campaign has been *otherwise* proper, what can be gained from upsetting an election which must have (in spite of the film) been won on the merits? At best, such an upset is an exercise in futility and, at worst, as has been previously intimated, it

150. Bok, note 7, *supra* at 73-74.
151. 138 N.L.R.B. 66 (1962).
152. Spartus Corp., 195 N.L.R.B. No. 17, 79 L.R.R.M. 1351 (B.N.A. 1972).
153. *E.g.*, note 128, *supra*.
154. Note 124 and discussion, *supra*.
155. Note 85, *supra*.
156. *Id.*
157. Note 124 and discussion, *supra*.

may unfairly and improperly penalize the employer: this follows from the observation that employee knowledge that the NLRB has seen fit to upset an employer-won election quite possibly will fix, and improperly so, in their minds that the employer is a scoundrel.[158]

In addition, if a general remark can be tolerated at this point, it may be observed in ultimate conclusion that, had the NLRB done more than pay lip service to "laboratory conditions" and "experiments"[159] over the past decade, untold thousands of dollars and man-hours could have been more fruitfully spent.[160] Agencies, e.g., the NLRB, whose function it is to acquire expertise[161] to the end of guiding policy and shaping the law, would do well to make better and more extensive use of well-known and documented techniques in the acquisition of that expertise.[162] Further, a study such as the present will carry far more weight when done under the auspices of a given agency than will be the case if such data is presented by a party in controversy with the agency in an adversary proceeding, and the costs incurred will be more equitably distributed among the beneficiaries of such studies, e.g., the public.[163]

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158. In spite of the observation in the quotation corresponding to note 27, *supra*, the Board posts notices informing employees of the reasons for an election upset. Interesting research could be done on the impact that *this* information would have on employee attitudes.

159. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

160. Bok, note 7, *supra*, at 42, indicates that rules for upsetting elections have often been founded on "little more than naked assertions that various tactics tended to interfere with the election process. As one might expect, decisions of this kind have generally proved unconvincing and unstable." *Op. cit.*, pp. 73-74.

161. *See, e.g.*, note 103 and discussion, *supra*.

162. Discussing the NLRB in the area, generally, Bok, note 7, *supra*, at 45, states:

> So long as rules are justified solely in terms of the need for protecting the voters from improper influence, opinions are bound to be rather thinly explained, for a careful analysis of the facts will too often expose the uncertainties on which so many of these conclusions ultimately rest. To avoid these unruly facts, various assumptions of doubtful validity must be introduced if the opinion is to be brought to a satisfactory conclusion. It will be necessary to posit the goal of maintaining "laboratory conditions" in election campaigns, an objective that no seasoned observer considers realistic. . . .

163. *See, e.g.*, the quotation corresponding to note 45, *supra*.

APPENDIX A

QUESTIONNAIRE

NOTE:

Your help in supplying the information asked for here will be very much appreciated. It is important that you put your name in the space provided—so that the information can be properly handled. In any event, all information which you furnish here will be kept in strictest confidence and will not be associated with your name except for tabulating purposes. These sheets will be destroyed in about a month's time.

QUESTIONS:

Name: _____

Sex (M or F): _____ Age: _____

Occupation (if part-time, please indicate): _____

PROBLEM:

Assume that you are an hourly worker in a plant in Smalltown, U.S.A. You are not a member of any labor organization, but there is a membership drive being conducted by a union at your plant. The union has promised all sorts of advantages of membership in their organization. Your employer has tried to combat the membership drive by telling you and the employees why you don't need a union. After you have had a chance to consider all the pros and cons of joining a union, using all of the information that you have, how will you act? Please mark one of the following:

_____ I will join the union.

_____ I will *not* join the union.

THANK YOU FOR YOUR HELP!