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Available at: http://digitalcommons.law.scu.edu/lawreview/vol20/iss1/7
THE HOLLYWOOD CERAMICS-SHOPPING KART MERRY-GO-ROUND: WHERE WILL IT STOP?

If truth is diluted, it is no longer truth. . . .
There cannot be “virtually” the truth any more than there can be “virtually” a virgin.¹

INTRODUCTION

Union election campaigns are often bitter contests in which truth is sometimes stretched beyond the point of recognition. The National Labor Relations Board (hereinafter NLRB or Board) has vacillated over the years in its regulation of this sensitive area. In the early days after the passage of the National Labor Relations Act (hereinafter NLRA),² the NLRB did not strictly scrutinize campaign propaganda in union organizing drives. This general approach of non-involvement gradually gave way to various exceptions in which the NLRB decided that intervention was sometimes necessary to insure employees' free choice. The factors prompting Board intervention were finally summarized in the landmark Hollywood Ceramics Co.³ decision in 1962. In that case, the Board declared that a union election would be set aside when one party’s substantial misrepresentation, that might have a significant impact on the election, was made so close in time to the election that the other party could not effectively reply.⁴

The Hollywood Ceramics approach was increasingly criticized because the required subjective evaluation led to time-consuming analysis of campaign propaganda and inconsistent application of the sanction. Finally, in the 1977 Shopping Kart Food Market, Inc.⁵ decision, the Board reversed its position and declared that it would no longer inquire into the truth or falsity of campaign representations unless they involved the Board and its processes, or forgery, and rendered the voters unable to

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¹ Allis-Chalmers Mfg. Co. v. NLRB, 261 F.2d 613, 616 (7th Cir. 1958)(emphasis in original).
³ 140 N.L.R.B. 221 (1962).
⁴ Id. at 224.
⁵ 228 N.L.R.B. 1311 (1977).
recognize the propaganda for what it was. This decision was premised on the belief that employees are more sophisticated now and no longer need the paternalistic protection of the Board.

In December 1978, the Board, in General Knit of California, Inc., again reversed its position and decided to return to the Hollywood Ceramics standards. The majority believed that such an approach was more consistent with its overall goal of ensuring fair elections.

This comment will trace the evolution of the law in union campaign misrepresentations and examine the two extreme positions taken by the NLRB in the past three years. It is suggested that neither position is entirely satisfactory and that a compromise of the two positions will better satisfy the needs of the competing parties.

BACKGROUND

Policy Framework

The Labor Management Relations Act (hereinafter LMRA) provides employees with the right to select a representative “for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” The bargaining representative will become the exclusive representative of a group of employees if chosen by a majority of those voting. The choice is often made in a representation election conducted by the National Labor Relations Board. Each of the parties to such an election—the employer, the employees and the union—usually hold strong eco-

6. Id. at 1313.
10. Section 159(a) of the LMRA provides in part: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such units. . . .” Id.
11. Id. § 159(c). Although the LMRA provides for a secret ballot election to determine majority status of a collective bargaining organization, the National Labor Relations Board and the courts have recognized that majority status may be accomplished in other manners as well. See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (majority status established by possession of cards signed by majority of employees authorizing union to represent them).
nomic, social and philosophical beliefs regarding the merits of collective bargaining representation. The confluence of these strong, competing forces can create an atmosphere where reasoned debate may be threatened or even eliminated.\(^\text{12}\)

Faced with this prospect, Congress gave the NLRB authority to regulate representation elections.\(^\text{13}\) Pursuant to this authority, the Board has established guidelines to be followed during representation elections, the ultimate purpose of which is to ensure employees' freedom of choice.\(^\text{14}\) The Board attempts to accomplish its goal by seeking to conduct elections under "laboratory conditions as nearly ideal as possible."\(^\text{15}\) When laboratory conditions break down, the NLRB will invalidate the results of the election.\(^\text{16}\)

**Historical Development of Misrepresentation Regulation**

The regulation of campaign misrepresentations during union elections underwent several changes prior to the adoption of the laboratory conditions standards. From the passage of the NLRA in 1935, until the passage of the LMRA in 1947, there was little regulation of campaign propaganda. The NLRA prohibited employers from campaigning,\(^\text{17}\) and union campaign

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13. Section 159(c)(1) of the LMRA provides, in general, that when a petition relating to recognition as the employees' collective bargaining representative has been filed with the NLRB, the Board will investigate the petition, provide for a hearing if necessary, direct a secret ballot election if a question of representation exists, and certify the results. 29 U.S.C. § 159(c)(1) (1970). See also NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940); NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946). Congress has "entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." \textit{Id.}

14. "The basic policy . . . is to assure the employees full and complete freedom of choice in selecting a bargaining representative." 140 N.L.R.B. at 223 (footnote omitted). See also Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

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

16. It is our duty to establish those [laboratory] 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. \textit{Id.} (citation omitted).

17. The early philosophy of the Board was that the question of union representation was an issue to be decided between the employee and the union. Accordingly, if
material was generally not reviewed. The Board would, however, set aside an election if the union misused the Board processes. The perceived imbalance favoring unions prompted Congress to pass the LMRA, which amended many provisions of the NLRA. One amendment, section 8(c), removed the prohibition on employer campaigning. The intended effect of the proviso was to place employers and unions on an equal footing during union organizing drives. The Board, aware of the

an employer made pre-election statements revealing his dislike for unions, it was held to be an unfair labor practice and would justify a new election. See 1 N.L.R.B. ANN. REP. 70-76 (1936); Rockford Mitten & Hosiery Co., 16 N.L.R.B. 501, 507 (1939) (employer statements denouncing labor organizations and criticizing union leaders as insincere and irresponsible under circumstances indicating to employees they should take heed held to be unfair labor practice).

18. The Board in 1944 appeared to retreat slightly from this position in Continental Oil Co., 58 N.L.R.B. 169 (1944). In overturning an election because the incumbent union had prematurely released a notice of a government approved pay increase, the Board noted that factors which, regardless of their source or truth or falsity, make impossible an impartial election will be grounds for invalidating the election. Id. at 172 n.2.

However, the following year, in Maywood Hosiery Mills, Inc., 64 N.L.R.B. 146 (1945), the Board reaffirmed its standing policy of non-interference with union campaign material. In permitting: 1) a union's inaccurate portrayal of its bargaining relations with the employer; and 2) union supporters' alleged job threats to non-union supporters, the Board stated:

Absent violence, we have never undertaken to police union organization or union campaigns, to weigh the truth or falsehood of official union utterances, or to curb the enthusiastic efforts of employee adherents to the union cause in winning others to their conviction. Id. at 150. The Maywood Hosiery Mills approach was cited with approval in subsequent Board decisions. See, e.g., Wilson Athletic Goods Mfg. Co., 73 N.L.R.B. 744 (1947); Southeastern Clay Co., 73 N.L.R.B. 614 (1947); Aurora Wall Paper Mill, Inc., 72 N.L.R.B. 1035 (1947); General Armature & Mfg. Co., 69 N.L.R.B. 768 (1946).

The rationale for this approach was that employees could recognize campaign propaganda for what it was and discount it accordingly. Corn Products Ref. Co., 58 N.L.R.B. 1441, 1442 (1944).

19. In Sears, Roebuck & Co., 47 N.L.R.B. 291 (1943), the Board invalidated an election when one of two competing unions circulated a false endorsement of the union by the NLRB Regional Director.

20. One of the fundamental changes was the modification of section 158 of the NLRA to prohibit certain activities by unions which were already prohibited for employers. For example, the LMRA made it an unfair labor practice for a union to restrain or coerce employees in the exercise of their section 7 rights, or to refuse to bargain collectively with the employer. 29 U.S.C. § 158(b)(1), (3) (1970). These prohibitions had been placed on employers in 1935 under the NLRA. See also Reilly, The Legislative History of the Taft-Hartley Act, 29 GEO. WASH. L. REV. 285 (1960).

21. The expressing of 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.

competing pressures that an employee would face if the pre-election campaign atmosphere were left unregulated, adopted the laboratory conditions standard in 1948 in General Shoe Corporation.\(^2\)

The significance of the laboratory conditions standard as it related to campaign misrepresentations became more apparent in the early 1950's. In 1951, the Board slightly modified its Maywood Hosiery Mills, Inc.\(^3\) approach in which the Board would not inquire into the truth or falsity of campaign statements unless threats were involved. In West-Gate Sun Harbor Co.,\(^2\) the Board added "gross misconduct" as a circumstance that would require Board intervention.\(^2\) In that case a union official stated that if a rival union were voted in, the employees would be on strike for a substantially longer time. The Board held that this was legitimate campaign propaganda, and thus did not fall under one of the exceptions of violence, coercion, or other gross misconduct warranting Board intervention.\(^2\)

The Board approach was further expanded in 1952 in Timken-Detroit Axle Co.\(^2\) In that case the employer mailed a letter to his employees during the pre-election period that purported to be a spontaneous anti-union appeal from another employee. The Board set the election aside because

the employees were blinded to the fact that it was the employer who revised and prefaced the [employee] letter, and stamped and mailed it to them . . . . The 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.\(^2\)

The Board thus seemed to be focusing on the manner in which the campaign statement was made and the corresponding lack of opportunity of the employees to evaluate it on its face. Since the employees were deceived as to the source of the letter, the Board correctly concluded that this conduct impaired free choice. Timken-Detroit Axle thus added the principle of dependent reliance of employees to the previously established

\(^{22}\) 77 N.L.R.B. 124 (1948); see notes 15 & 16 supra.
\(^{23}\) 64 N.L.R.B. 146 (1945); see note 18 supra.
\(^{24}\) 93 N.L.R.B. 830 (1951).
\(^{25}\) Id. at 833.
\(^{26}\) Id.
\(^{27}\) 98 N.L.R.B. 790 (1952).
\(^{28}\) Id. at 792.
factors of violence, threats, or gross misconduct that would justify a new election. The concept of misrepresentation that impairs employees' abilities to properly evaluate campaign statements was firmly established in subsequent cases.  

In 1955, the Board further retreated from its position of normal non-involvement in judging the accuracy of campaign statements. In *Gummed Products Co.*, the union misrepresented the wages paid to employees at a nearby plant where it was the bargaining representative. The employer pointed out the misrepresentations to his employees. However, on the eve of the election, the union reaffirmed its earlier misrepresentations. The Board set the election aside, stating:

Exaggerations, inaccuracies, partial truths, name-calling, and falsehoods, while not condoned, may be excused as legitimate propaganda, provided they are not so misleading as to prevent the exercise of a free choice by employees in the election of their bargaining representative. The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point

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29. In *United Aircraft Corp.*, *Pratt & Whitney Aircraft Div.*, 103 N.L.R.B. 102 (1953), one union circulated a forged telegram allegedly received from the president of a competing union in which the president supposedly admitted certain campaign misconduct and also praised the other union's president. The Board set the election aside on the theory that the misleading union "by its deliberate deception as to the source of the 'telegram' so blinded the employees to the significance of its contents that they could neither recognize it as a fake nor evaluate it as propaganda." *Id.* at 105 (citation omitted).

In *Merck & Co.*, 104 N.L.R.B. 891 (1953), one union distributed a pamphlet accusing representatives of a competing union of graft. In characterizing the pamphlet as obvious propaganda, the Board reiterated its position that in the absence of threats of intimidation:

we [the NLRB] will not undertake to censor or police union campaigns or consider the truth or falsity of official union utterances, unless the ability of the employees to evaluate such utterances has been so impaired by the use of forged campaign material or other campaign trickery that the uncoerced desires of the employees cannot be determined in an election.

*Id.* at 892 (citations omitted). The Board in *Shopping Kart* returned to a very similar standard.

See also *Radio Corp. of America*, 106 N.L.R.B. 1393 (1953). The Board stated that in the absence of coercion, it

will not undertake to censor or police union campaigns or to consider the truth or falsity of electioneering propaganda, unless the ability of the employees to evaluate such material has been so impaired by the campaign material or by campaign trickery that the uncoerced desires of the employees cannot be determined.

*Id.* at 1394 (citation omitted).

where it may be said that the uninhibited desires of the employees cannot be determined in an election.\textsuperscript{31}

The key element in the Board’s statement was the proviso that, although falsehoods may be condoned as propaganda, they will not be excused if they are so misleading as to impair the employees’ free choice. This would necessarily require Board involvement in assessing the substantiality of the misstatement. The Board thus departed from its \textit{Timken-Detroit Axle} approach which focused more on the manner of the misrepresentation. Both manner and substance were now factors for Board review.

\textit{Gummed Products} also introduced two other important concepts. Since the union represented employees at the plant whose wages were being misrepresented, it was apparently in a better position to know the true wage rates. The NLRB therefore characterized the misrepresentation as deliberate,\textsuperscript{32} a concept that reappeared in subsequent decisions.\textsuperscript{33}

Another important element considered by the \textit{Gummed Products} Board concerned the timing of the misstatement. The union had reaffirmed its misrepresentation on the eve of the election. The court noted that this late reaffirmation following the employer’s contradiction was entitled to greater weight.\textsuperscript{34}

The closeness of the misrepresentation to the election would become a consideration in later cases.\textsuperscript{35}

Another factor in the increasingly complex formula was the \textit{Otis Elevator Co.}\textsuperscript{36} decision in 1955. The facts again involved union misrepresentation regarding wages and fringe benefits. While acknowledging that the union had erroneously stated that the employer’s employees had to pay for their own hospitalization, the Board dismissed its significance because “[the misrepresentation] dealt with information which was within the employees’ own knowledge and which they themselves could properly evaluate.”\textsuperscript{37} The effect was to limit the application of \textit{Gummed Products} and to attempt to return to the Board’s earlier non-involvement posture. In \textit{Timken-
Detroit Axle, the Board had placed emphasis on inherent employee reliance upon the author of the misrepresentations due to the employees' inability to fully evaluate the material for themselves. Otis Elevator, in essence, reaffirmed this position by indicating that Board protection is not necessary if the employees are indeed in a position to perform the necessary evaluation. Also, the deliberateness element mentioned in Gummed Products would be of lesser importance if the employees could perform the evaluation function anyway.38

To summarize, by the end of the 1950's there had been a gradual erosion of the Board's policy of non-involvement in assessing the veracity of campaign statements. In the years following the passage of the 1935 National Labor Relations Act, employers were prohibited from campaigning and union statements were not reviewed unless it appeared they were coercive. However, misrepresentations involving NLRB processes would justify a new election. When the section 8(c) “free speech” proviso of the 1947 Labor Management Relations Act provided employers with the power to present anti-union arguments, the Board adopted the General Shoe laboratory conditions standard. Under the Board's early approach to laboratory conditions, it would still not consider the truth or falsity of campaign statements and would look only to coercion or violence as warranting a new election. Eventually, the Board began to examine gross misconduct to determine if standards had been violated. The laboratory conditions standard expanded to include factors such as manner of misrepresentation, opportunity of employees to independently evaluate the statement, deliberateness, authoritative knowledge or position of the speaker and

38. Although the Board in Gummed Products found the misrepresentation of wages at another plant to be deliberate because it was also the collective bargaining agent at the other plant and thus would have knowledge of the true wage rates, it should not matter that the union in Otis Elevator Co. was only seeking to be the bargaining agent at the time of the misrepresentation. Although the lack of official capacity might rebut a charge of deliberate misrepresentation in areas requiring detailed knowledge of an employer’s operations (e.g., specific wage rates for a number of detailed job labor grades), it should not rebut such a charge in a more general area (e.g., whether employees do or do not have to pay for their hospitalization). Information of this latter type can usually be obtained with relative ease. A union should therefore be charged with accurate information in this area.

The Board in 1958 extended the notion of deliberate misrepresentations to include erroneous statements arising from one party's innocent misunderstanding. However, it relied on the rationale that the effect of a misrepresentation on an employee is the same whether the misrepresentation is innocent or deliberate. Kawneer Co., 119 N.L.R.B. 1460, 1461 n.4 (1958).
time proximity of the statement to the election. In short, the Board had moved from a position of basic non-involvement to one of active involvement that required a balancing of many factors. It was against this background that the Board consolidated its standards in the case of Hollywood Ceramics.

**Hollywood Ceramics**

In *Hollywood Ceramics*, the union distributed a handbill on the afternoon before the election that erroneously compared wage rates at the employer's plant with rates at "other union ceramic plants." The Board found the information in the pamphlet to be erroneous because the employer's stated wages did not include an existing incentive pay plan; incentive pay was included in the wage rates stated for the unionized plants. The non-union employer's rates were therefore understated by approximately thirty percent.

In deciding to set the election aside, the Board consolidated and reformulated its approach to election misrepresentations. The new standard would set aside an election only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

The Board specifically overruled cases that required a misrepresentation be deliberate. The decision was based on the Board's belief that employees should be afforded a degree of protection from overzealous campaigners who distort the issues by substantial misstatements of relevant and material facts within the special knowledge of the campaigner, so shortly before the election that there is no effective time for reply.

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40. The Board also found that the plants being compared to the employer's were not truly comparable in terms of types of operations and requisite skill level for the jobs involved. *Id.* at 222-23.
41. *Id.* at 224 (citation omitted).
42. *Id.* at 224 n.8.
43. Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311, 1315 (1977) (emphasis in original) (dissenting opinion).
The Hollywood Ceramics rule became the authoritative standard for campaign misrepresentation issues.\textsuperscript{44}

Eleven years later in \textit{Modine Manufacturing Co.},\textsuperscript{45} the Board hinted it was not entirely satisfied with the \textit{Hollywood Ceramics} approach. Although it applied the standard to the facts of \textit{Modine},\textsuperscript{46} it also acknowledged that employee voters had benefitted, along with other citizens, by improvements in the educational process.\textsuperscript{47} A combination of these educational improvements and the fact that elections have become commonplace in the industrial world, persuaded the Board that the increased level of employee sophistication might justify overturning \textit{Hollywood Ceramics}.\textsuperscript{48} Nevertheless, the Board decided it was not yet time to leave the voters "to sort out, with no protection from us, . . . a barrage of flagrant deceptive misrepresentations."\textsuperscript{49}

The concept of increased employee sophistication was developed by Board Member Penello, dissenting in two subsequent cases. These dissents laid the foundation for the eventual overturning of \textit{Hollywood Ceramics}. In \textit{Medical Ancillary Services, Inc.},\textsuperscript{50} Member Penello asserted that the \textit{Hollywood Ceramics} approach "resulted in extensive analysis of campaign propaganda, restriction of free speech, increasing litigation,

\textsuperscript{45} 203 N.L.R.B. 527 (1973).
\textsuperscript{46} The employer alleged the union misrepresented union requirements regarding a strike vote. The Board concluded even though there may have been a misrepresentation in the strict sense, it was not a significant one. \textit{Id.} at 530.
\textsuperscript{47} \textit{Id.} at 531.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} 212 N.L.R.B. 582 (1974) (supplementing 195 N.L.R.B. 290 (1972)), \textit{revised and remanded}, 478 F.2d 96 (6th Cir. 1973). On the day of the election, a chief stewardess for the union made four remarks to employees which the Board majority found to be objectionable. They included erroneous allegations that a company official had told an absent sick employee that she would be replaced if she didn't come to work to vote; that the employer had deliberately interfered in the processing of a disability claim for the employee; that another employee was not paid, with no explanation, for a day off; and that the employer had not properly paid a group of employees for overtime worked. The Board majority overturned the union's 51-49 victory because the statements constituted material departures from the truth uttered so close to the election that the employer lacked a reasonable opportunity to reply, and the statements were likely to have substantial impact on the results of the election. 212 N.L.R.B. at 589-91. Member Penello disagreed with the Board's application of the \textit{Hollywood Ceramics} standards to the facts and took the occasion to criticize the standards in general.
and unwarranted delays in the finality of election results.”

These results stem, he contended, from the Board’s approach of “treating employees not like mature individuals capable of facing the realities of industrial life and making their own choices but as retarded children who need to be protected at all costs.” Penello suggested limiting Board intervention to cases “which involved intentional trickery which the voters could have no reason to suspect and no reason to check for authenticity.” Similar views were expressed in his dissent in *Ereno Lewis*.

**Shopping Kart**

These criticisms finally achieved their intended result in *Shopping Kart*. On the evening before the election, the union vice-president told employees that the employer had profits of $500,000 the previous year. In truth, profits were only $50,000. The union won the election the next day by a vote of fourteen to eight. The Regional Director dismissed the employer’s objection because he did not consider the misrepresentation to be

51. 212 N.L.R.B. at 584 (citations omitted).
52. *Id.* at 585.
53. *Id.* at 586.
54. 217 N.L.R.B. 239 (1975). On the morning of the election the employer distributed a leaflet which incorrectly stated the union initiation fees to be $104. It also presented a sample check showing what the employee’s pay for the week would be if union dues and the initiation fee were deducted from the employee’s check that week. Members Jenkins and Kennedy of the three person Board panel set the election aside. Kennedy’s rationale was that the employer made a substantial misrepresentation by asserting the initiation fee to be $104 when in fact it was only $60. The employer had included, as part of initiation costs, $81 for three months advance dues and $20 for a death benefit contribution. The discrepancy of $3 in the employer’s calculations was not explained. Member Jenkins set the election aside, not because of the inaccurate portrayal of actual initiation fees, but because the manner in which they were presented to employees constituted a material misrepresentation. Jenkins believed the sample check did not reflect the actual fact that the fees were payable over a three month period.

Member Panello believed the election should not be set aside. To have expected a precise breakdown of the $104 amount arrived at by the employer would demand “absolute precision of statement” which cannot be expected. He also believed there was nothing improper with the sample check not specifying that total fees could be deducted over a period of time. He argued that to adopt such a requirement would indicate that the Board’s opinion of employees’ intelligence and ability to understand the English language is exceedingly low. *Id.* at 242. He continued with a further attack on the *Hollywood Ceramics* standards, concluding by stating “[e]xperience in application of [Hollywood Ceramics] has revealed it is not employees who need rescue from their gullibility; it is the Board which needs rescue from its own misguided paternalism.” *Id.* at 243.

The Board also upheld the election but for a different reason. By a three-two vote, the Board decided that it would no longer overturn elections on the basis of misleading campaign statements. However, deceptive campaign practices such as forged documents or improper involvement of the Board or its processes would still warrant Board intervention. The majority concluded that *Hollywood Ceramics* tended more to "frustrate free choice than to further it," citing as problems the Board's extensive analysis of campaign propaganda, restrictions on free speech, varying applications of the rule by the Board and the courts, increased litigation and reduced election finality. The majority adopted Member Penello's view that employees are "mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." The majority stated that although there were many problems in administering the *Hollywood Ceramics* standard, they would not overturn it if they continued to believe that employees needed the protection of the Board.

In adopting their new assumptions about employee sophistication, the majority relied on a prominent empirical study of election campaigns which concluded that the majority of employees, regardless of employer or union campaigning, vote in accord with their predispositions for or against union representation.

56. Id.
57. Id. at 1313.
58. Id. at 1312.
59. Id.
60. Id. at 1313.
61. Id.
62. Id. (citing Getman & Goldberg, The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentation: An Empirical Evaluation (Part II), 28 STAN. L. REV. 263 (1976)). This article was consolidated with its predecessor, NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates, 27 STAN. L. REV. 1465 (1975), into a subsequent book. See J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976) [hereinafter cited as GETMAN, GOLDBERG & HERMAN].


The majority cited the study's finding that 43% of the union members studied had previous union affiliations elsewhere and that 30% had voted in previous Board elections to support their contention that employees are sophisticated and not easily
Then-Chairperson Murphy concurred with Members Pencello and Walther in holding that elections would still be overturned on the basis of forgeries and misrepresentations involving Board processes. She further stated that she would also overturn an election when one party makes an “egregious mistake of fact.”

In a vigorous dissent, Members Fanning and Jenkins argued that standards should not be lowered to nearly the point of fraud before an election will be overturned. They believed the new rule would result in more campaign charges and countercharges and even less regard for the truth. They also cited various procedural problems with the empirical study.

Swayed by campaign assertions. Of paramount significance to the majority, however, was the study’s conclusion that the votes of 81% of the employees could be correctly predicted from their pre-campaign intent and their attitudes to unions and working conditions. This indicated to the majority that the vote of most employees was determined on the basis of their everyday work experiences, not on the basis of election campaigns. Of the remaining 19% who voted contrary to their original intent or were undecided at the beginning of the election campaign, only 5% of the total sample who either switched to the union or were initially undecided and decided later to vote for the union were influenced by the union campaign. 28 N.L.R.B at 1313.

63. 228 N.L.R.B. at 1314.
64. Id. This apparently would be a very high standard to meet, in Murphy’s view. To illustrate her requirements, she stated that they would not be met and a new election would not be ordered in a case such as Henderson Trumbull Supply Corp., 220 N.L.R.B. 210 (1975). In that case, a union representative told employees that the company had made over one million dollars, construed to mean profits. In truth, the employer’s gross profits were $260,371 and its net income was $11,669.
65. 228 N.L.R.B. at 1315.
66. “As ‘bad money drives out the good,’ so misrepresentation, if allowed to take the field unchallengeable as to its impact, will tend to drive out the responsible statement.” Id. at 1316.
67. Id. at 1315-17. The dissent noted that the majority did not address the study’s further finding that 50% of the employees studied were aware of union claims regarding wages paid elsewhere, although only 22% could recall the precise amount to within 10%. The dissent believed that if half of the voters retain this information, rules should be maintained to prevent one party from making last minute, substantially inaccurate wage claims. Id. at 1315-16. Although the dissent’s point is valid, it does not effectively refute the more direct evidence cited by the majority that the votes of 81% of the employees could be predicted from their pre-campaign intent and their attitudes towards unions and working conditions in general. The 81% statistic is a “bottom-line” number in the sense that it correlates the relationship of employees’ predispositions to vote and their actual vote after all the various factors that come to bear on the employees during a campaign have had their effect. Arguably, wage claims would have been one of these factors.

The dissent also questioned whether the Getman, Goldberg, & Herman study included a statistically significant sample since it only covered 31 elections in the Midwest. Assuming arguendo it was a representative study, the dissent further argued that the study’s validity is limited to campaigns conducted in accordance with Hollywood Ceramics standards. Id. at 1316.
General Knit of California

The Shopping Kart approach was doomed to a short-lived existence, however. Member Walther, who sided with the majority in Shopping Kart, left the Board and was replaced by John Truesdale. In December 1978, less than two years after Shopping Kart, Truesdale joined Members Fanning and Jenkins in General Knit of California and voted to return to the Hollywood Ceramics standard.

In General Knit, the union had distributed leaflets on the morning of the election that contained possible misrepresentations of the employer’s profitability. General Knit had sustained a five million dollar loss in 1976. However, its parent company had profits of 19.3 million dollars. The union leaflet used the phrase “this company” in such a way that it was conceivable the reader might be confused as to which company had earned the 19.3 million dollars. While agreeing with the Regional Director’s conclusion that the election should not be overturned on the basis of the Shopping Kart standard, the majority decided to abandon that approach because “[it] is inconsistent with our responsibility to ensure fair elections.”

The majority took issue with the view that Hollywood Ceramics does not recognize employees as mature individuals, stating:

The dissent’s latter point is especially well-taken. An empirical study must be conducted under controlled conditions. Part of the controlled conditions in the study was the threat of sanction for violation of Hollywood Ceramics standards. With this sanction removed under the Shopping Kart approach, the same conclusions may not necessarily follow. This indicates a need for more empirical data under Shopping Kart standards. See also Flanagan, supra note 62, at 1203-04; King, supra note 62, at 65.

69. The leaflet stated in pertinent part:
   “Who is fooling who???
   “General Knit can cry poor mouth if they want. But let’s look at the facts.
   “In 1976, General Knit had sales of $25 million.
   “General Knit is owned by ITOH who has a net worth in excess of $200 million.
   “This company had an increase of 12.5% in sales for the period ending March 31, 1977.
   “During this period this company had a profit of $19.3 million.
   “Don’t be fooled by General Knit and their high price lawyers.
   “ITOH who owns General Knit is making it big and can afford decent wages for its employees.
   “Vote yes today, and make the company share some of their high profits with you—the worker.”
99 L.R.R.M. at 1688.
70. Id.
[N]o matter what the ultimate sophistication of a particular electorate, there are certain circumstances where a particular misrepresentation . . . may materially affect an election. In such circumstances, that election should be set aside in order to maintain the integrity of Board elections and thereby protect employee free choice.\textsuperscript{71}

In support of its conclusion, the \textit{General Knit} majority discussed several factors. First, it contended that \textit{Hollywood Ceramics} has served as a serious deterrent to campaign trickery. It reasoned that since the parties know the serious consequences that may flow from violations of the \textit{Hollywood Ceramics} standard, they have refrained from engaging in improper conduct.\textsuperscript{72} Second, the majority believed that the \textit{Hollywood Ceramics} standard "legitimizes the integrity of the election process" by offering an avenue of appeal to a party who believes it has been damaged by prejudicial conduct.\textsuperscript{73} Third, the majority contended that enforcement of the \textit{Hollywood Ceramics} standard has not been administratively burdensome, citing the fact that of 13,184 representation cases processed in 1976, only 307 involved \textit{Hollywood Ceramics} allegations.\textsuperscript{74} Fourth, the majority questioned the validity of the conclusions of the empirical study relied upon by the majority in \textit{Shopping Kart}. The \textit{General Knit} majority interpreted the results of the study to indicate that a substantial minority of employees are indeed influenced by employer and union campaigns and that their votes affected the outcomes of twenty-nine percent of the elections.\textsuperscript{75} But more importantly, the majority believed that the results of a single study should not be grounds for discarding a long-standing rule predicated on years of Board experience.\textsuperscript{76}

The majority recognized that the \textit{Hollywood Ceramics} rule

\begin{itemize}
\item \textsuperscript{71} \textit{Id.} at 1689.
\item \textsuperscript{72} \textit{Id.} To support this assertion, the majority noted that there were 8,899 elections conducted in 1976. Neither side filed objections to the election in 7,982 (90\%) of the cases. \textit{Id.}
\item \textsuperscript{73} \textit{Id.} The majority cited the fact that even in the 12 months after \textit{Shopping Kart}, there were still 180 objections filed based on misrepresentation. Although this was a drop from the 307 filed in 1976, the majority believed this indicated a continued need by the parties for Board review. \textit{Id.} at 1689 n.13. An equally plausible explanation, however, may be that the losing party filed objections to continue the delay process or in the hope that \textit{Shopping Kart} might be overruled because of the new composition of the Board.
\item \textsuperscript{74} \textit{Id.} at 1689.
\item \textsuperscript{75} \textit{Id.} at 1690. See also notes 134-136 and accompanying text infra.
\item \textsuperscript{76} \textit{Id.} at 1690.
\end{itemize}
has been criticized for its lack of predictability and its use as a delaying tactic. The majority believed, however, that the inconsistency has come from “judgmental differences as to the reasonable effect of a misrepresentation on the electorate, not from any fundamental difference in standards . . . .” In addressing the argument that Hollywood Ceramics is used as a delaying tactic, the majority suggested that the problem had been exaggerated and that, in any event the Board should not place a greater value on expediency at the expense of maintaining standards. The majority concluded that Hollywood Ceramics enhances employee free choice, ensures fairness of election, and gives stability to bargaining relationships.

Members Pannello and Murphy filed separate dissenting opinions. Member Penello argued that the very nature of the standards had caused inconsistent results. He believed that the Shopping Kart approach was superior because it focused on the manner rather than the substance of the misrepresentation. This, it is argued, leads to more predictable results. Delaying tactics would be reduced under Shopping Kart because a quick determination could be made to see if the objection was based on the substance of misrepresentations and if so, the objection could be summarily dismissed. Penello illustrated the problems of delay under the Hollywood Ceramics approach by noting that it takes an average of fourteen months from the filing of a charge alleging misrepresentation until a decision is rendered by the Board.

77. Id. The majority thus failed to meet the criticism directly. Whether the inconsistency stems from “judgmental differences” or from any “fundamental difference in standards,” the net result is the same and the parties remain hampered in their ability to predict impermissive conduct.

78. Id. at 1691. The majority noted that since 1947 the largest number of cases involving Hollywood Ceramics issues that were appealed to the circuit courts in any one year was 11, in 1968 and 1975. Id. However, the majority does not address the fact that appeals to the Board may also be a delaying tactic and may be so effective that further appeal is unnecessary. See note 82 infra.

79. Id. at 1693. Member Penello believed that if such questions as: when does a departure from truth become substantial?; what issues are material?; and how much time is necessary for an effective reply? are required to be answered, then it is natural that the Board and the courts will be in disagreement to the answers on a number of occasions. To illustrate, he compared the Board’s overall 15% “set aside” rate by the courts to the 50% “set aside” rate in misrepresentation cases. Id.

80. Id. at 1696.

81. Id.

82. Median time from date of election to date of the Regional Director’s decision on objections is two months. An appeal to the Board of the Regional Director’s decision consumes three months. It averages another nine and a half months before a Board
Ex-Chairperson Murphy noted in dissent that the majority's decision placed emphasis on the insurance of fair elections. She considered this duty to be subordinate to the more fundamental obligation of insuring the right to a speedy election. Murphy also disagreed with the majority's basic assumption about the susceptibility of employees to campaign statements.

**Problems and a Proposal**

From the foregoing history, the only easy conclusion to draw is that the Board is not quite sure what approach to campaign misrepresentations would better effectuate the purposes of the act. As the Board retreated from its early policy of general non-involvement in monitoring campaign misrepresentations, it became increasingly caught in its own web of protective rule-making. Its dilemma became more apparent during the 1970's when visible opposition to *Hollywood Ceramics* began to emerge. The Board in *Shopping Kart* tried to extract itself from the predicament by shifting responsibility in this area to the competing parties and to the employees. The less-than-unanimous support for such an approach was illustrated by the subsequent return to *Hollywood Ceramics* standards in *General Knit*. Clearly, the Board is groping to find the correct formula in an area where correctness is only a matter of perspective. A review of the approaches will demonstrate the inherent troubles associated with each.

**The Hollywood Ceramics-General Knit Approach**

A major problem of the *Hollywood Ceramics* approach has been the lack of definite guidelines for the parties. Inconsistent results in similar fact situations can be expected when the Board has to decide the materiality of a fact and at what point in time the objecting party loses its opportunity to reply. Part of the problem also stems from the nature of the activity sought to be regulated. In the emotion-charged environment of a hotly

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83. *Id.* at 1699, 1701. She concluded that the majority "have restored a proven delaying tactic to the arsenal of those who would forestall the certification of election results." *Id.*

84. *Id.* at 1701-02.

85. See notes 45-54 and accompanying text *supra*.

86. See Member Penello's dissent in *General Knit*. 99 L.R.R.M. at 1693-94.
contested union campaign, statements are likely to be made that a reasonable person would consider unfair in any sense of the word. Yet in this same campaign, half-truths and misinterpreted facts will also be disseminated. Should the Board draw a line between this type of misrepresentation and the former type involving gross unfairness? If so, how? Professor Bok's conclusion is that such an attempt "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." 87

The problem is compounded by the increasing number of representation elections the Board monitors. In 1961, the year before Hollywood Ceramics, the Board conducted 6,610 elections. 88 By 1977, this had increased to 9,975, an increase of nearly fifty percent. With an increasing caseload, the Board cannot give each case the individual attention it deserves, resulting in more possibilities for inconsistency. 89

Incongruous applications lead to another problem—inconsistency between the Board and the courts. As noted earlier, the courts are substantially more likely to set aside a Board decision involving campaign misrepresentations than they are other Board decisions taken up on appeal. 90 It has been argued that the origins of this predicament trace back to the Taft-Hartley era. 91 In response to the "free speech" provision 92 in the Taft-Hartley Act (LMRA) that provided employers with more latitude in presenting their arguments to employees, the Board began making distinctions—in favor of the unions—between misrepresentation by employers and misrepresentation by unions. 93 The natural response of the courts was to assume a more active review posture in this type of case. 94 For example, in Aircraft Radio Corp. v. NLRB, 95 the

88. 26 NLRB ANN. REP. 16 (1961). This itself was a 46% increase over 1958. Id.
89. 42 NLRB ANN. REP. 18 (1977).
90. See note 79 supra.
92. See note 22 supra.
94. The court noted in NLRB v. Lord Baltimore Press, Inc., 370 F.2d 397, 401 (8th Cir. 1966), that the potential damaging effect of campaign misrepresentations can stem from unions as well as from employers. See also Automation and Measurement Div., Bendix Corp. v. NLRB, 400 F.2d 141 (6th Cir. 1968).
95. 519 F.2d 590 (3d Cir. 1975).
union, in attempting to organize a small division of Cessna Aircraft Company, attributed Cessna’s entire sales and profits to the smaller division. After the employer responded by disseminating the accurate information, the union reasserted its claims in modified form on the eve of the election. The Board upheld the union’s victory on the rationale that the employer had, and in fact did exercise, the opportunity to rebut the false allegations. The court reversed the Board’s position, noting that while the employer had indeed rebutted the initial allegations, it should also have been provided with the opportunity to deny the union’s last minute charges. In short, the court disagreed with the Board’s application of the timing element in the *Hollywood Ceramics* standard. Disagreement between the Board and courts occurs periodically and only aggravates the existing problem of the Board’s own inconsistencies.

This in turn leads to another problem. The losing party, cognizant of inconsistency by the Board in applying its standards and of the further inconsistency between the Board and the courts in enforcement, is tempted to file objections to the election to contest the outcome. The result is a delay in the finality of elections. Both the employer and union may have different motivations in seeking delay. The employer may be able to undermine the strength of the union during the processing of the objection. Even if the employer’s objection is overruled and the union is certified, the union will not have the psychological advantage of a recent election victory to carry into negotiations. If the objection is sustained and a new election ordered, the union bears the heavy burden of maintaining peak employee interest until the second election. The union is also forced to divert its resources from organizing employees to defending the legality of the contested election. Furthermore, even if the union should eventually be certified and a contract negotiated, the employer will have saved the increased costs,

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96. ARC, the division, had sales of 11 million dollars in 1972 and a net loss. Cessna had sales of 248 million dollars and a profit of 13.5 million dollars. The union alleged that these latter numbers were ARC’s, and that despite “the greatest profit in the history of the company, they did not share it with the workers.” Id. at 592.
97. Id. at 593.
98. Id. at 594.
99. See Member Penello’s dissent in *General Knit* for a listing of cases in recent years. 99 L.R.R.M. at 1693-1694.
100. See, e.g., H. R. REP. No. 972, 74th Cong., 1st Sess. 5 (1935).
at least for an additional period of time, resulting from the collective bargaining contract.102

The union, on the other hand, may file objections if it feels its campaign may have peaked too early and a second election would result in victory. It may also be tempted to file objections to sustain employee interest while the union waits the required one year before another election may be held.103 It is probable that some unions also file objections merely as a face-saving mechanism in an attempt to shift blame for the defeat to the Board.

An employer's ability to delay election finality is enhanced by a procedural mechanism. Sections 10(e) and (f) of the LMRA provide for court review of final Board orders. This does not, however, include review of Board decisions in certification proceedings.104 Therefore, a Board determination overruling an election objection is usually conclusive. It is reviewable, however, when the dispute concerning the correctness of the certification eventually results in the finding of an unfair labor practice by the Board.105 The employer, then, can appeal an adverse Board determination by refusing to bargain with the newly certified union. The Board will find the employer guilty of an unfair labor practice and will seek enforcement in the courts. The employer has the opportunity, during this enforcement proceeding, to litigate not only the refusal-to-bargain charge but the underlying question of the campaign misrepresentation as well.106 This procedure, as noted earlier, takes an average of twenty-two months, and may take as long as four years.107 The net result, election uncertainty, does more to frustrate employee choice than to enhance it.

Another objection to the Hollywood Ceramics approach is its possible infringement upon free speech. This was noted by the majority in Shopping Kart.108 In establishing the laboratory

102. Id.
103. 29 U.S.C. § 159(c)(3) (1970) provides that a second election may not be held within 12 months of a valid prior election.
107. 29 U.S.C. § 159(d) (1970) provides that when a certification decision by the Board is reviewed by the courts, the official record shall include the record of the Board's investigation of the underlying certification proceeding.
108. See note 62 supra.
110. 228 N.L.R.B. at 1312.
conditions standard of *General Shoe*, the Board implicitly placed restrictions on statements that might normally fall within the protective ambit of free speech. The Senate Judiciary Committee has criticized this restrictive approach as being in conflict with the spirit of 8(c) of the Taft-Hartley Act, stating:

[N]eedless 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.\(^1\)

Although the foregoing are valid reasons for abolishing the *Hollywood Ceramics* standards, there are also obviously strong rationales behind guidelines that survived for fifteen years and were re-adopted in *General Knit*. One of the most cogent of these rationales is the principle of deterrence. As noted by the majority in *General Knit*, in 1976, the Board conducted 8,899 elections; neither party challenged the result in almost ninety percent of those elections.\(^2\) This appears to be persuasive, although not conclusive, evidence of the *Hollywood Ceramics* standards' effectiveness. In an election where both sides feel they have a fair chance of winning, it is reasonable to assume that each side will give deference to the *Hollywood Ceramics* guidelines for fear of nullifying a potential election victory. If one party feels it has nothing to lose by gross misrepresentations because it is lagging far behind anyway, *Hollywood Ceramics* will admittedly be a lesser factor. But its importance still cannot be disregarded. If the lagging party does suffer actual defeat at the polls, the issue is moot; if it wins, the losing party will have a *Hollywood Ceramics* challenge to correct the injustice.\(^3\)

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112. 99 L.R.R.M. at 1689.

Even if the foregoing is true, however, the issue remains: How often is a *Hollywood Ceramics* remedy necessary and does this frequency justify the administrative and financial burden on the Board? Of the nearly 9,000 elections conducted in 1976, objections alleging misrepresentation issues were raised in only 307 cases. The *General Knit* majority interpreted these numbers to indicate that the *Hollywood Ceramics* standards do not impose too great an administrative burden on the Board. But alternatively, the relatively low number of misrepresentation objections also suggests that there is no need of sufficient magnitude to justify retaining a rule that contains the previously described disadvantages.

The Board has, in the past, been reluctant to allow economics to interfere with its primary function of enforcing the law. This is certainly a valid perspective, but it must be tempered with the realization that compromises will be necessary. The *General Knit* majority’s statement, that consideration of the effect on caseload should have no place in the administration of the law, is an idyllic suggestion starkly juxtaposed against contemporary political and economic reality. As professor Bok has aptly commented:

> The inconvenience and administrative costs that result from a complex regulatory system are factors to be considered in deciding whether rules of more doubtful significance should be imposed. Moreover, in view of the problems arising from the heavy workload of the Board, administrative costs should have a bearing on the form in which rules are cast and, more important still, on the creation of effective sanctions for these rules.

As discussed earlier, the *Hollywood Ceramics* regulations require the Board to make a myriad of subjective evaluations, each requiring an investment of resources that might be spent elsewhere. Three hundred seven elections contested because of misrepresentations may not be an impressively significant number when compared to the total number of elections conducted. But a different picture emerges when the additional

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115. *Id.* at 1689.
116. In Bernel Foam Prods. Co., 146 N.L.R.B. 1277 (1964), a case involving both objections and unfair labor practices, the Board stated: “considerations of economy, in our view, must be subordinated to the overriding policies of the Act.” *Id.* at 1281.
considerations of lengthy delay in finality of elections, inconsistent application of the Hollywood Ceramics rule by the Board and courts, and possible restrictions on free speech are added. These weaknesses of the Hollywood Ceramics regulations underscore the desirability of shifting Board resources away from close regulation of campaign misrepresentations.

The Shopping Kart Approach

Although Shopping Kart was viewed by many people as a solution to the problems of Hollywood Ceramics, several problem areas remained that should be addressed if the Board should again decide to formulate similar standards. For example, the Shopping Kart majority held that elections may still be overturned when a party has improperly involved the Board or its processes in the campaign. What level of improper involvement will initiate Board sanction? Historically, the Board has jealously guarded its neutral position in election matters, and apparently this would continue. In Formco, Inc. v. Automobile Workers, a post-Shopping Kart decision, the union had distributed a letter asserting that the Board had found the employer guilty of an unfair labor practice. In actuality, while a complaint had indeed been issued, the charge had been disposed of by a settlement agreement containing a nonadmission clause. The Regional Director applied Shopping Kart and upheld the union's victory. The Board panel (Fanning, Jenkins, and Murphy) reversed, holding that such conduct did indeed fit into the Shopping Kart exception. It thus appears a strict standard of accuracy would be applied when the misrepresentation involves the Board or its processes.

A more potentially troublesome area is the possible interpretation of Murphy's "egregious mistake of fact" exception. She had indicated in Shopping Kart that the facts would have to be extreme to warrant overturning an election on this

119. 228 N.L.R.B. at 1313.
122. 96 L.R.R.M. at 1395.
123. 228 N.L.R.B. at 1314.
A clear picture of the boundaries of this exception did not emerge during Shopping Kart's short tenure. In Thomas E. Gates & Sons, Inc., the employer understated by approximately two dollars per hour the amount of wages the employees could expect to receive based on the union's current contract with a contractor's association. Murphy concurred with Penello that this misrepresentation did not warrant setting aside the employer's victory. But in a footnote to the opinion, she added that the employer's conduct "did not rise to the level of an egregious mistake of fact amounting to fraud" and referred to her concurring opinion in Shopping Kart. Since Murphy's Shopping Kart opinion contained no reference to fraud, she apparently was trying to provide further insight on her personal approach to the exception, while at the same time trying to avoid any definitive answer. If fraud were Murphy's definition of "egregious mistake," it would be a high standard indeed. It is important that her position be clarified if and when the Board decides to again diverge substantially from its Hollywood Ceramics-General Knit guidelines.

A major area that remained unclear after Shopping Kart was the relationship, or lack thereof, of misrepresentation and coercion during an organizing drive. The Shopping Kart majority stated that, although it would no longer provide close monitoring of misrepresentations, it would continue to oversee coercive campaign misconduct that falls outside the area of misrepresentations. The reasoning behind such an approach is inconsistent with, but preferable to, deregulation of coercive conduct. Although the Shopping Kart majority listed inconsistency of application, decreasing finality of elections and extensive analysis of campaign propaganda as reasons for no longer inquiring into the truth or falsity of campaign statements, it

124. See note 64 supra.
126. Id. n.6.
127. 228 N.L.R.B. at 1314. 29 U.S.C. § 158(a)(b) (1970) makes it an unfair labor practice to "coerce" employees. If the Board finds an unfair labor practice, a fortiori there is an interference with employees' free choice, and a new election is warranted. Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1786-87 (1962). Conversely, a finding of misrepresentation does not establish the existence of either an unfair practice or an interference with free choice. The misrepresentation may have interfered with free choice if the Hollywood Ceramics standards have been violated. If so, a new election is possible. Furthermore, conduct interfering with free choice need not necessarily be an unfair labor practice.
128. 228 N.L.R.B. at 1312.
is precisely these factors that are involved when the Board examines pre-election conduct containing elements of coercion. The Board is inconsistent in attempting to justify an overthrow of Hollywood Ceramics for reasons that are equally applicable to the area of coercive statements, which the majority would continue to monitor.

If coercive conduct will still be monitored, there certainly will be arguments regarding what is coercion and what is only misrepresentation. For example, an employer’s speech that makes a false and very vague reference to potential loss of incoming business in the event of unionization might arguably be either an “innocent” misrepresentation or a coercive statement. Although the Shopping Kart approach focuses on the “manner rather than the substance” of the misrepresentation, the Board will still have to examine the facts to determine if the statement is mere misrepresentation or unlawful coercion. Thus, overruling Hollywood Ceramics may be “more a fantasy than a fact, for standards would have to be developed to evaluate the claim, just as has been done under Hollywood Ceramics.” Member Penello disagrees with this conclusion and asserts that the Shopping Kart standard draws a clear line between intervention and nonintervention. But, he contradicts his position in a subsequent attempt to deny that Shopping Kart would lead to a relaxation of speech standards as they relate to threats to employment. He concludes that denial by stating: “[A]pplication of my approach has always been limited to misleading statements that are merely inaccurate, and I will continue to distinguish speech of that kind from coercive statements such as threats of economic reprisal.” If the Board is indeed going to distinguish misleading statements from coercive statements, then, by definition, an examination of the content must be made. A simple determination of the manner of the statement will obviously be insufficient.

A final problem stemming from Shopping Kart is the majority’s reliance on the Getman, Goldberg and Herman study’s conclusion that misrepresentations do not play a major role in elections because eighty-one percent of the voters vote in ac-

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129. Id. at 1314.
132. Id.
cordance with their pre-campaign attitudes toward unions and their jobs. Of the remaining nineteen percent, six percent were undecided and thirteen percent voted contrary to the intent they held immediately after the filing of the petition for election. The significant factor overlooked by the *Shopping Kart* majority in its analysis of Getman, Goldberg and Herman's conclusion is that the ultimate vote of both groups correlated with their familiarity with the union's campaign. The implication, of course, is that nearly a fifth of the voters may be casting their ballots in accord with opinions shaped during campaign drives where gross exaggerations and misrepresentations would not be controlled by *Hollywood Ceramics* standards. The importance of this implication is underscored by the finding that the votes of these nineteen percent were determinative in twenty-nine percent of the elections. In short, if Getman, Goldberg and Herman's findings are statistically accurate, there is a potential that between one-quarter and one-third of Board-conducted elections will be decided on the basis of campaign propaganda that would be left virtually unregulated under *Shopping Kart*.

**Proposal**

A review of the development of *Hollywood Ceramics* and its subsequent application indicates that the root of its many problems is the necessary application of a myriad of subjective factors. The Board quite correctly attempted to adopt a more objective approach in *Shopping Kart*. Unfortunately, it took a rather extreme position and alienated many who believe that the Board should still play a major role as overseer of election propaganda. There is merit to the contention that some regulation of campaign misrepresentations is still appropriate. Even the *Shopping Kart* majority recognized this by retaining the power to set aside elections involving forgeries and misrepresentations involving Board processes. Some untruths may be so glaring that the Board should not overlook them.

133. 99 L.R.R.M. at 1689-90.
134. Id. at 1690. Penello disagrees with this interpretation of the results of the study and asserts that only five percent of the "undecided" and the "switchers" were influenced by the campaign of the party for which they voted. Id. at 1695 (Penello, dissenting).
135. 99 L.R.R.M. at 1690.
136. 228 N.L.R.B. at 1314.
137. Celanese Corp. of America v. NLRB, 279 F.2d 204 (7th Cir. 1960), vacated
It appears that the underlying factor influencing those who would continue Board monitoring is the notion of fairness. Getman, Goldberg and Herman believe “[i]t is fundamental to the democratic process that each party should have a roughly equal opportunity to communicate with the electorate, regardless of the effectiveness of that communication.” The fairness standard may be met in substantial part if each party is given the opportunity to reply to the other’s charges. Perhaps the Board’s emphasis on laboratory conditions is misplaced. Some commentators suggest that laboratory conditions are impossible to obtain anyway. It may be that the focus of Board attention should be on a party’s adequate opportunity to reply, if indeed there is going to be Board regulation at all.

With these considerations in mind, the following proposal is made. In determining whether to overturn an election because of campaign misrepresentations, a two-step analysis should be made. First, if the margin of victory is twenty percent or more, misrepresentations by the winning party should not be grounds for invalidating the victory. If the margin is less than twenty percent, the Board should examine alleged misrepresentations made during the seventy-two hours prior to the election. If it is discovered the winning party made an actual misrepresentation during this period, the election is per se invalid and a new one ordered.


139. Bok, supra note 87, at 91-92; see also Samoff, supra note 101, at 250-51.

140. See, e.g., Samoff, supra note 101.

But can any elections be conducted under antiseptic conditions? Can they be germ free? ... Isn’t it fatuous to expect employers and unions to rely solely upon sober and reasonable arguments and upon facts accurately stated? Can the Board establish workable standards for electioneering in diverse geographic and industrial settings without risking more and more disputed results? I submit that the Board has set for itself an unattainable goal in assuming the role of overseer.

Id. at 234. See also NLRB v. Sumter Plywood Corp., 535 F.2d 917 (5th Cir. 1976).

141. Jay Siegel, Chairman, Labor Relations Section, American Bar Association, has proposed adoption of a rule automatically invalidating an election when the winning party has made a misrepresentation within 72 hours preceding the election. Siegel, Union Election Campaign—A New Ball Game Under the Board’s Shopping Kart Ruling?, in LABOR LAW DEVELOPMENTS 57 (M. Landwehr ed. 1978).

Siegel’s proposal would be more restrictive than the present proposal in that it disregards any possible relationship of the misrepresentation to the results of the election. Thus, under his plan, a victory margin of 90% could theoretically be overturned because of a relatively minor misrepresentation made during the last three days.
Adoption of the above standard rests on the fundamental premise of the validity of the Getman, Goldberg and Herman conclusion that eighty-one percent of the voters vote in accord with their pre-campaign intent. If the conclusion is correct, only nineteen percent of the voters are susceptible to misrepresentations made during the campaign. Therefore, if the victory margin is twenty percent or more, it can safely be assumed that the winning party would have won even in the absence of the misrepresentations. If the margin is less, it is arguable that the misrepresentations might have affected sufficient voters to skew the outcome. Fairness would then require Board intervention.

Board monitoring of misrepresentations prior to seventy-two hours before the election would not be necessary because there would still be sufficient time for the other party to make an effective reply. Rather than have the Board evaluate the various circumstances that may or may not constitute sufficient time for a reply, an arbitrary but reasonable seventy-two hour period is presumed sufficient.

Several factors need to be noted regarding the proposal. First, and most important, the conceptual scheme and specific percentages suggested depend for their foundation on Getman, Goldberg and Herman's study. The study has been criticized both for its startling results and its methodology. Many labor practitioners have trouble accepting the study's conclusion that campaigning during union organizing drives may be materially ineffectual. Such a conclusion flies in the face of their many years of practical experience. Criticism has also been directed at the fact that the study covered only a small number of elections in a limited geographical area; no evidence was presented to indicate that the characteristics of the voters in the study were representative of voters in all areas of the country.  

142. See note 62 supra.
143. It is assumed that should a party deem it necessary or desirable to refute the other side's misrepresentation by mailing the repudiation to the homes of the voters, three days would be sufficient for mail delivery.
144. Derek Bok stated in the Foreword to the Getman, Goldberg and Herman study, that he would leave the task of evaluating the study's methodology and its conclusions to people more expert than himself. GETMAN, GOLDBERG, AND HERMAN, supra note 62, at xi-xii. He thus recognized that many labor practitioners, including himself, are ill-equipped to evaluate and understand research methodology. This could naturally lead to skepticism toward the results of the study.
145. For a listing of articles further discussing the study's methodology, see note 62 supra.
The conclusion is simply that the proposal in this comment is subject to further research verifying the results of Getman, Goldberg and Herman's study. One empirical study—albeit an important and impressive one—should not be grounds for discarding a rule that served to guide parties' conduct for fifteen years; further research should be conducted. If the additional research confirms Getman, Goldberg and Herman's findings, then the proposed plan should be adopted. Modifications can be made in the plan if the consensus of research alters Getman, Goldberg and Herman's findings. For example, if only seventy-five percent instead of eighty-one percent of the voters vote in accord with their pre campaña intent, the proposal would be modified to require the winning party in an election to win by a margin of more than twenty-five percent in order for that party's campaign misrepresentations to be overlooked.

Moreover, the plan is admittedly a simplistic, arbitrary standard that may not please those who prefer more extensive analysis of misrepresentation effect on a case-by-case basis. A standard will need to be developed governing misrepresentations that do occur in the final seventy-two hours. Will all misrepresentations during this period be ground for invalidation? Will there be an exception for de minimis misrepresentations? If so, how will they be defined without again falling into the Hollywood Ceramics materiality factor? Finally, the proposed standard will be deficient in a certain number of campaigns. Getman, Goldberg and Herman found that in the five most successful employer campaigns, there was a thirty-five percent change of voter intent. However, they could not identify the reasons for this. So in a limited number of elections, the proposed twenty percent standard will not account adequately for all the voters who may be influenced by the misrepresentations.

On balance, however, the proposed approach is a good first step in freeing the Board from extensive analysis of campaign

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147. It would be desirable to have certain NLRB decision-making based on scientific research and data rather than on common, but unverified, assumptions. It has been suggested that the NLRB establish an independent research division for this purpose. Roomkin and Abrams, Using Behavioral Evidence in NLRB Regulation: A Proposal, 90 HARV. L. REV. 1441 (1977).
148. Getman, Goldberg & Herman, supra note 62, at 101-03.
propaganda while continuing to satisfy the fairness element. It is a compromise of the competing philosophies. The proposal is an objective test not requiring determinations of timing and materiality. Both parties will know in advance the effect of any transgressions. Election finality will be enhanced by the fewer grounds for objections left open to the parties.\textsuperscript{149}

**CONCLUSION**

The development of the *Hollywood Ceramics* standards and their subsequent application has created a great deal of confusion in the area of union campaign misrepresentation. Both employers and unions remain hampered in their ability to accurately predict the legality of campaign statements under the Board’s current *Hollywood Ceramics-General Knit* approach. In this confusion, the ultimate losers are the employees whose vote on collective bargaining representation remains undecided while lengthy appeals are made by the losing party. The *Shopping Kart* approach tried to correct the problems that had developed under *Hollywood Ceramics*. Unfortunately, it did so in a way that offended many people’s sense of fairness by allowing a situation in which one party might benefit by deliberate deception.

The plan proposed in this comment is an accommodation of the interests of those who emphasize election fairness and those who stress election finality. By focusing on misrepresentations made only during the final seventy-two hours and that arguably influenced a determinative number of voters, the Board will be reducing the number of misrepresentations which may serve as a basis for objections. Fewer grounds for objections will promote election finality. By invalidating election victories narrowly won by a party who made a misrepresentation in the final hours of the campaign, the Board will encourage responsible campaigning by the parties and will maintain election fairness.

The suggested plan is by no means the only alternative. Others have proposed that the problem may be addressed by providing greater access for union organizers to employees on company property in order to equalize the union’s opportunity to respond to the employer’s statements.\textsuperscript{150} It has also been

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\textsuperscript{149} Siegel, supra note 141, at 57.

\textsuperscript{150} Eames, supra note 62, at 1193; Getman, Goldberg, & Herman, supra note 62, at 156-59. For a discussion of the advantages and disadvantages of such an ap-
suggested that the ban on election petitions for one year following a valid election be removed. The effect, it is argued, would be a decrease in the number of union objections requiring lengthy investigation, since the union could immediately file for a new election if it felt it had been damaged by campaign misrepresentations. Additionally, various procedural changes within the Board itself have been suggested to ameliorate the problem.

The above proposals are by no means exhaustive of the possibilities open to the Board. Each has merit and deserves to be fully explored. Hopefully this will be done via the Board's rule-making approach rather than by the adjudicatory approach so that extensive public participation can occur. Whatever regulatory scheme is finally agreed upon, it ideally should recognize the limitations that any rulemaking has in practical effect. As Professor Bok has aptly commented: "legal rules will never succeed in making voters more rational than they are willing and able to become."

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proach, see American Enterprise Institute, Proposed Amendments to the National Labor Relations Act 27-28 (1978).

151. Samoff, supra note 101, at 241-42.
152. Id. at 242.
153. Proposed changes have included limiting court review of Board certification decisions, limiting the time period for a party to appeal adverse Board decisions, and increasing the number of Board members from five to seven. H.R. 8410, 95th Cong., 1st Sess. §§ 2, 6, 9 (1977).
154. 29 U.S.C. § 156 (1970) authorizes the Board to make or amend rules necessary to carry out the provisions of the LMRA. This entails publication of the proposed rules and the opportunity for all interested parties to submit opinions. 5 U.S.C. § 553 (1970).
155. Bok, supra note 87, at 48.