Empiricism in NLRB Election Regulation: *Shopping Kart* and *General Knit* in Retrospect

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Board regulation of misrepresentation in union elections, as articulated in *Hollywood Ceramics* and recently reaffirmed in *General Knit*, is grounded in behavioral assumptions increasingly subject to empirical attack. The author traces the development of this policy and explores the array of interests current policy serves. The author suggests that policy reform based exclusively on scientific methodology would ignore these other political and institutional interests, and proposes that the Board make tentative policy changes, observe how these interests are affected, and how labor, management, and the public respond.

I

INTRODUCTION

In a period of wide-ranging calls for regulatory reform the National Labor Relations Board is a curiosity. Though its policymaking processes have long been the subject of criticism, the Board remains outside the general sweep of the current reform movement, aimed primarily at those agencies whose regulatory activities have economic consequences more visible or substantial than those of the Board. Moreover, the movement’s immediate objective appears to be reform of the rulemaking process—a policymaking technique which the Board abjures. Finally, the substantive agency policies which have spawned

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1. The range and ferocity of this criticism is well-illustrated in the record of congressional hearings on Board policymaking held more than a decade ago. *Congressional Oversight of Administrative Agencies (National Labor Relations Board): Hearings before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess.* (1968).

2. While the Board is authorized to engage in rulemaking, 29 U.S.C. § 156 (1976), it has steadfastly refused to do so. See Bernstein, *The NLRB’s Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 *Yale L.J.* 571 (1970); Peck, *The Atrophied Rule-mak-

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much of the present discontent involve technical economic and scientif-

ic issues generally thought to be more complex than those presented
by labor policy.\footnote{Id.}

The Board, however, has not entirely escaped the scrutiny of the
reformers. Increasingly, commentators suggest that the Board fails to
understand in an empirical sense the ways in which participants in la-
bor-management relations respond to each other, particularly the man-
er in which employees respond to the actions of employers and
unions.\footnote{Id.} These critics generally urge that the Board utilize the method-
ology of the behavioral sciences to develop policy which comports
more accurately with the real world of labor relations.\footnote{Id.}

Notwithstanding the considerable rational appeal of this position,
the Board has for the most part studiously disregarded the suggestion
and continues to operate in the fashion to which it has become accus-
tomed. In 1977, in \textit{Shopping Kart Food Mart},\footnote{228 N.L.R.B. 1311, 94 L.R.R.M. 1705 (1977).} however, the Board
flirted briefly with empirical research in a decision that overruled
its longstanding policy of regulating false or misleading election campaign
propaganda.\footnote{Hollywood Ceramics Co., 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962).} The policy reconsideration was inf-
fluenced significantly by a sophisticated empirical study of Board election regulations pub-
lished by professors Julius Getman, Stephen Goldberg and Jeanne

The study provided important evidence of flaws in some of the basic behavioral assumptions upon which the Board regul-
ates representation elections. On the basis of the study, the researchers
recommended broad changes in Board election regulation policy, in-
cluding the change adopted in \textit{Shopping Kart}.\footnote{Id.}

the Board appears to have prevailed as a legal matter in its insistence upon formulating policy

3. Most attention has focused on industry-specific economic regulation (e.g., transportation, communications, energy) or general environmental or product safety regulation involving issues
in the basic sciences. In the labor area little attention has been given to the economic issues in
union-management relations regulation. \textit{But see} proposed Labor Reform Act of 1977, H.R. 8410,
95th Cong., 1st Sess. (1977); House Comm. on Education & Labor, \textit{The Labor Reform Act}
Cong., 2d Sess. (1978); H.R. 5900, 94th Cong., 1st Sess. (1975); House Comm. on Education &
(1975). Labor standards regulation, however, has presented similar issues (most notably in the
area of occupational safety and health). \textit{See}, \textit{e.g.}, Marshall v. American Petroleum Institute, —
U.S. —, 100 S. Ct. 2844 (1980).


5. \textit{Id.}
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The study's immediate influence was short-lived. Less than eighteen months after the Shopping Kart decision, the Board returned to its prior election misrepresentation policy in General Knit, Inc., leaving unsettled the question of what role, if any, behavioral research would play in future Board policy formulation. Perhaps the most puzzling aspect of the controversy generated by the study and earlier commentary was the need apparently felt by the Board to restore promptly the status quo. The hasty retreat from the study's implications not only cut short the opportunity for observing the effect of policy grounded in new behavioral premises, but also raised the question of whether the Board has more at stake in its longstanding assumptions than its behavioralist critics recognize. In the context of the Shopping Kart-General Knit controversy, this article seeks to explore that question by inquiring how and why the Board uses untested behavioral assumptions to formulate policy. The analysis suggests this practice does not necessarily reflect an institutional conviction that these assumptions accurately describe employee responses to election tactics. Instead, the use of untested behavioral assumptions may also serve to further interests not directly related to employee free choice. These include preserving the appearance of fairness and propriety in the election process, providing an administratively convenient basis for policy formulation, achieving results which seem intuitively correct and acceptable to the Board's regulated constituencies and the public, and preserving the concept of Board expertise in labor-management relations.

The article concludes that under these circumstances, there exists a seemingly irreconcilable tension between proposals for greater use of behavioral research and the Board's traditional approach to election policymaking that may impede the further development of election policy. The article proposes that the Board seek to relieve this tension by openly undertaking a trial and error process in policy formulation that directs attention beyond the narrow behavioral issues to the broader range of interests at stake in election policy.

II

THE DEVELOPMENT OF ELECTION POLICY

A. Statutory Underpinnings

Much of the history of the misrepresentation policy at issue in Shopping Kart and General Knit is intertwined with the history of the

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more general Board policy of closely regulating campaign propaganda. Thus, it is necessary to trace briefly the foundation of the broader approach to election regulation. In doing so, it is important to recognize that in this area, the Board derives considerable discretion to regulate from the skeletal expression of policy in the NLRA with respect to representation elections. Section 7 of the Act grants employees the right to bargain collectively with their employer through a chosen representative or to refrain from doing so. Section 9(a) of the Act qualifies this right by making the choice of the majority binding on all employees. Thus, two of the most basic principles of the Act are grounded in concepts of the American political system: free choice and majority rule. But the Act provides the Board with little guidance for implementing these principles. The election process established in section 9(c) of the Act is generally understood to be the "preferred," though not the exclusive, method for choice. Yet the only statutory standard governing the election itself is that it be "by secret ballot." Other provisions of the Act are designed to protect free choice and ensure that majority rule is workable in particular cases.

The Board is required to "certify" the results of elections. While this duty would not necessarily require the Board to regulate all aspects of the election process, the Board, with court approval, has treated it as an invitation to do just that, and thus to embark upon an unmarked course. The only statutory guidance for its actions is the principle of


14. The unfair labor practices provisions of the Wagner Act were aimed primarily at techniques that had been used by employers to thwart union organizational activity. Thus, they may be viewed as reinforcing any rules designed to protect the choice as to representation in the election process itself. In fact, the Board has long made clear that the commission of an unfair labor practice in the pre-election period will normally constitute grounds for setting aside an election. Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1787, 50 L.R.R.M. 1489, 1492 (1962).

The statutory standards, 29 U.S.C. §§ 159(a)-(c) (1976) and the Board rules with respect to the question of "appropriate" units for elections are primarily intended to avoid internal conflicts in the bargaining relationship should a union be certified as a result of the election. See generally J. ABODEELY, THE NLRB AND THE APPROPRIATE BARGAINING UNIT (1971).


democratic "free choice." And ultimately, the only method for enforcing its decisions is to refuse to certify election results and to direct new elections.

The earliest Board regulation of election campaign propaganda, however, was not grounded in its election supervision authority, but rather in the unfair labor practice provisions of the Act, particularly section 8(1), which declared employer interference with, and restraint or coercion of employees in the exercise of section 7 rights unlawful. Such regulation reflected a simple and indisputable view of human behavior: free choice cannot be exercised in the face of threat or coercion. The Board, however, embellished upon this behavioral truism to conclude that because of employee economic dependence in the employment relationship any employer expression of views on the question of representation inherently interfered with free choice. Thus, any employer pre-election speech was not only a ground for setting aside an election but also an unfair labor practice. The Board did not, however, extend this regulatory approach to union campaign propaganda. Because, in the Board's view, such expression lacked the "inherently coercive" feature of employer speech and was presented by an


18. Wheeling Steel Corp., 1 N.L.R.B. 699, 1 L.R.R.M. 44 (1936), enforced per curiam, 94 F.2d 1021 (6th Cir. 1938). The Board observed: "[t]he power of an employer over the economic life of an employee is felt intensely and directly," and that "[t]he employee is sensitive to each subtle expression of hostility upon the part of one whose good will is so vital to him, whose power is so unlimited, whose action is so beyond appeal." Id. at 709. See also 1 NLRB ANN. REP. 73 (1936) and 3 NLRB ANN. REP. 125 (1938).

It is not entirely accurate to place the burden of this behavioral premise solely on the Board. The drafter of the Wagner Act, in explaining the generality of the unfair labor practice provisions, observed: "It is impossible to catalog all the practices that might constitute interference, which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship." S. Rep. No. 573, 74th Cong., 1st Sess. 10 (1935). In fact, it must be recognized that the terms of the Act reflect, at least on a general level, the same behavioral assumptions upon which the Board regulates. This has led one commentator to suggest that arguments as to the validity of these assumptions should be addressed to the Congress rather than the Board. Phalen, The Demise of Hollywood Ceramics: Fact and Fantasy, 46 U. Cin. L. Rev. 450, 459 (1977) [hereinafter cited as Phalen].

19. See, e.g., Nevel Knitting Co., 6 N.L.R.B. 284, 2 L.R.R.M. 151 (1938). The Board, however, made it a practice in such cases to find that the speech "occurred against a background of open manifestations of hostility to self-organization." Killingsworth, Employer Freedom of Speech and the NLRB, 694 Wis. L. Rev. 211, 217 (quoting NLRB, REPORT OF THE NATIONAL LABOR RELATIONS BOARD TO THE SENATE COMMITTEE ON EDUCATION AND LABOR UPON S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, 76th Cong., 1st Sess. 60 (1939)). This avoided the necessity of basing the unfair labor practice on speech alone, thus minimizing possible first amendment objections. Note, Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representative Elections, 127 U. Pa. L. Rev. 755, 758 (1979). The speech nevertheless was treated as an independent unfair labor practice. E.g., In re Muskin Shoe Co., 18 N.L.R.B. 1, 7, 2 L.R.R.M. 434, 434 (1938).
"interested" party, the Board followed a policy consonant with first amendment values in the political electoral process:

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.  

This strict dichotomy in the treatment of employer and union campaigning had, at least, the virtue of simplicity. Loosely put, the Board excluded all employer speech, yet tolerated all union speech. The rationale for the dichotomy, however, contained the seeds of future conflict. Passing for a moment over the question of the validity of the behavioral assumption that employees are inherently coerced by employer speech, it is difficult to sustain the view that the value of open debate should be sacrificed simply on the theory that employers are "disinterested" observers in the contest. If the Board were to rely in part upon the political campaign model, it would have to evaluate the role of the employer more thoughtfully.

In fact, the Board's insistence upon employer neutrality never received full judicial acceptance and the Supreme Court ultimately rejected the notion that "coercion" inhered in all employer speech. In *NLRB v. Virginia Electric & Power Co.*, the Court instructed the Board that to determine whether employer speech, which is not threatening on its face, has a coercive effect it must assess the employer's entire course of conduct, i.e., the "surrounding circumstances." Although the Court rejected the Board's *per se* approach, it reserved for the Board wide discretion in carrying out the more complex task the decision implicitly imposed:  

Perhaps the purport of these utterances may be altered by imponderable subtleties at work, which it is not our function to appraise. Whether there are sufficient findings and evidence of . . . coercion . . . without reference to the speeches, or whether the whole course of conduct, evidenced in part by the utterances, was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence.

Yet it was not so much the judicial response to Board election regulation that brought about a basic shift in policy. Rather, it was the enactment in 1947 of section 8(c) of the NLRA, as part of the Taft-Hartley amendments, which provided in party-neutral terms that:

The expressing of any views, argument, or opinion, or the dissemina-
tion thereof, whether in written, printed, graphic, or visual 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.25

The pre-1947 Board regulation of employer speech had been grounded in the unfair labor practice provisions of the Act which declared unlawful any employer interference, restraint, or coercion of employees in the exercise of section 7 rights. To the extent election speech contained “no threat of reprisal or force or promise of benefit,” section 8(c) by its terms vitiated the Board’s power to regulate campaign propaganda under the unfair labor practice provisions of the Act. More importantly, the neutral tone of section 8(c) bespoke congressional recognition of free-speech values inherent in employer as well as union speech during campaigns. But the Board did not respond to 8(c) by abandoning regulation of election propaganda. Rather, it resorted to its power to certify (or not to certify) election results. In 1948, in General Shoe Corp.,26 the Board announced an approach to election regulation which it follows to this day:

“When we are asked to invalidate elections held under our auspices, our only consideration derives from the Act which calls for freedom of choice by employees as to a collective bargaining representative.” Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice.

... 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.27

Thus, the Board preserved its election regulation function, notwithstanding the enactment of 8(c). In doing so, it conceived an even more intrusive role for itself. Election regulation would not proceed from the political election model, but rather from the idealized model of a “laboratory” experiment.


27. Id. at 126-27, 21 L.R.R.M. at 1340-41 (quoting In re P.D. Gwaltney, Jr. & Co., 74 N.L.R.B. 371, 373, 20 L.R.R.M. 1172, 1173 (1947)).
The Board later deemed the absence of substantial factual misrepresentation in election campaign propaganda one of the necessary laboratory conditions. But before considering the transition from the broad policy announced in *General Shoe* to the particular policy of setting aside elections on the basis of factual misrepresentations, some comment on the policy development to this point may be useful.

It is a mistake to interpret early Board decisions regulating campaign speech as premised on the view that free choice is enhanced by restricting the flow of information in the pre-election period. Early Board policy toward union propaganda is evidence of a contrary judgment. More realistically, the view was based on the premise that employees would more likely choose union representation if employers were silenced. Regardless whether promotion of this choice was an appropriate function for the Board under the Wagner Act, if the Board perceived its responsibility in this fashion, the concept of free choice posed an obstacle to the accomplishment of its objective. If the policy reflected no more than an attempt to adjust economic power between employers and employees, the choice was purely ideological. In this view, the Board would not concern itself with the validity of its assumptions regarding election behavior.

Having used behavioral analysis, albeit untested and simplistic, to accomplish possibly ideological objectives, the Board faced the risk of becoming a prisoner of its own methodology. Once section 8(c) had imposed a party-neutral restriction on the use of the unfair labor practice provisions as a means for regulating campaign propaganda, the Board was forced to retreat to its election certification power to continue its censorial role. For those forms of employer speech falling within the rationale of "inherent coercion" the shift to exclusive use of the certification power had limited practical effect. In contrast, election speech that purported to offer employees "facts" affecting their exercise of free choice, but which was actually false or misleading, created a new dilemma for the Board. If an objective of the Board remained establishing conditions under which employees would be more likely to vote for union representation, then a technique for accomplishing this objective would be to curtail employer speech which might cause employees to make the contrary choice. But if the Board limited such employer speech it would also have to limit similar union speech, because the "inherently coercive" rationale of the earlier behavioral analysis would be unavailable. Non-coercive, false or misleading

28. See notes 42-43 infra and accompanying text.
29. See text accompanying note 20 supra.
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statements of fact by unions would be just as likely to interfere with free choice. Thus, the Board would be forced to either expand the behavioral analysis to exclude the objectionable employer misstatement (while excluding as well the union misstatements) or refuse to extend the behaviorally-based analysis of free choice. In the end the Board chose the former, but the path by which it reached that result again suggests that behavioral considerations may not have been the motivating force.

The move to regulation of the truth or falsity of campaign propaganda might be said to have begun even prior to General Shoe. In the 1940s, while abjuring regulation of the substance of campaign propaganda, the Board set a number of elections aside on the ground that a party sought to create the false impression that it had support from the Board or another government agency by using documents which emanated or appeared to emanate from the agency. The Board’s rationale in these cases was not clear. Such propaganda might be said objectionable in three respects. First, it suggests support or endorsement where none exists. Second, the false impression is conveyed by a form of trickery. Finally, it affects the integrity of the election process by calling into question the neutrality of the Board as the supervisor of the election. Either of the first two objections, if they are to be grounds for setting aside an election, requires some assessment of the effect of the conduct on employee voting behavior. The third does not; rather, it reflects a concern for public (as well as employee) confidence in the integrity of the Board processes. While this objection would represent the most narrow intrusion into the substance of election propaganda, the Board explained its decisions in more cryptic terms: “Elements, regardless of their source or of their truth or falsity, which, in the experienced judgment of the Board, make impossible an impartial test, are grounds for the invalidation of an election.”

By the early 1950s, however, the Board moved beyond restricting its scrutiny to noncoercive speech that reflected adversely upon the integrity of the Board’s processes. In setting aside elections where a party had used “forged” documents for propaganda purposes, the Board

32. Continental Oil Co., 58 N.L.R.B. 169, 15 L.R.R.M. 30 (1944) (election set aside where an incumbent union prematurely posted an erroneously issued notice from the War Labor Board indicating the approval of a previously negotiated wage increase); Sears Roebuck & Co., 47 N.L.R.B. 291, 11 L.R.R.M. 247 (1943) (election set aside where one of two unions seeking certification implied in its campaign that it was favored by the Board and distributed a leaflet purporting to represent an endorsement of the union by the Board’s regional director).
34. United Aircraft Corp., 103 N.L.R.B. 102, 31 L.R.R.M. 1437 (1953) (election set aside where one of two competing unions distributed a fake telegram, purportedly sent by the president.
expressly drew a distinction between the content and the manner of deception:

Absent threats or other elements of intimidation we 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.35

By grounding its policy expressly in terms of effect on voting behavior, the Board almost inevitably committed itself to an expansion of its propaganda regulation role. If the manner of a misrepresentation could be said to impair reasoned choice, then substance of some propaganda could easily be seen as having the same effect.36 Yet, even this change in policy could have been justified as merely establishing a standard of propriety in the campaign process. Forgeries and other forms of campaign trickery could have been regulated without the highly subjective judgments involved in content regulation and without relying upon any behavioral assessment. The question would not have been whether the trickery actually or potentially impaired the ability of voters to make a reasoned choice, but whether the conduct was sufficiently reprehensible as a matter of election ethics to warrant Board intervention.

One can only speculate whether considerations of propriety rather than the effect on free choice actually motivated the Board. The new standard was applied to both union and employer conduct,37 thus indicating that the Board’s approach was not entirely result-oriented. But even the Board’s earlier approach to campaign material which falsely implied Board endorsement had been justified, in part, by its possible effect on employees. Intuitively, neither the use of forged documents nor the use of documents which imply Board support for a party seems more likely to affect employee choice than any other substantial false representation. Yet both can be said to be objectionable for reasons not directly related to free choice. The Board, however, would have faced two obstacles if it had not based its decisions in terms of behavioral considerations. First, the Board would have had to confront the awkward task of justifying an election standard in essentially moral

36. There is some indication that the Board’s move to deeper involvement in the regulation of the truth or falsity of campaign propaganda was influenced by court decisions that extended the Board’s own rationale. See Williams, supra note 9, at 23 n.28 (citing NLRB v. Trinity Steel Co., 214 F.2d 120 (5th Cir. 1954)).
37. See note 34 supra.
terms. Second, it would have had to assert authority under its power to certify elections to regulate the process for purposes other than to promote the free choice guaranteed by section 7. Thus, even if considerations of propriety rather than effect on employee choice were the motivating force, practical concerns may have deterred an express adoption of such a rationale. In *Gummed Products Co.* the Board made clear that the distinction between the form and the substance of a misrepresentation had been abandoned. Because the union had misrepresented the wage rates it had negotiated for the employees of a competing business, the Board set aside the election, explaining that it:

normally will not censor or police preelection propaganda by parties to elections, absent threats or acts of violence. However, . . . the Board has imposed some limits on campaign tactics. 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 where it may be said that the uninhibited desires of the employees cannot be determined in an election.

The line between exaggerations and half-truths on the one hand and serious misstatement of vital facts on the other, however, could not easily be drawn, particularly because the distinction would involve an assessment of the effect on free choice. Not only would the Board distinguish among misrepresentations on the basis of their substantiality, but also it would make a behavioral connection: the more serious the misrepresentation, the more likely free choice would be affected. Again, it appears that the Board chose not to use a rationale which could have avoided need for behavioral analysis. Even with respect to content misrepresentations, the Board could have drawn a distinction based on propriety rather than effect on free choice by distinguishing between the deliberate and the unintentional misstatement of fact. While this line of inquiry might have presented difficult problems of proof in some cases, these difficulties seem no greater than those presented in assessing the nature and degree of the misrepresentation.

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38. Rejecting this approach to election regulation Professor Bok observed:

It seems clear that campaign tactics cannot be condemned merely because they seem immoral or unethical. Little virtue will be gained by compelling the parties to be good, nor is there any reason to suppose that Congress intended the representation election as a drill in proper behavior for its own sake. Hence, intervention should depend upon a showing that the behavior in question will impair the election or interfere with some legitimate interest of the parties involved.

Bok, *supra* note 9, at 56.


40. Id. at 1093-94, 36 L.R.R.M. at 1156-57.

41. See notes 46-47 *infra* and accompanying text. In fact, it appeared from some cases that
B. The Hollywood Ceramics Assumptions

In the period between 1955 and 1962, the Board expanded and refined the Gummed Products doctrine, developing an increasingly detailed set of standards for evaluating false or misleading campaign propaganda. In 1962, in Hollywood Ceramics Co., the Board undertook to explicate the policy as it had developed to that point:

We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. . . . But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have had a de minimis effect. Or, it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so that they could not reasonably have relied on the assertion. Or, the Board may find that the employees possessed independent knowledge with which to evaluate the statements.

Hollywood Ceramics made clear that concerns with campaign propaganda as a matter of ideological preference or election propriety had now, at least formally, been supplanted by a complex, though entirely unverified, behavioral assessment. At a general level, the policy was based upon some of the behavioral assumptions identified by Getman, Goldberg and Herman: (1) employees are attentive to campaigns; (2) employees are unsophisticated about labor relations; and (3) free choice is fragile. More particularly, the policy was based on assumptions that: (1) employees chose, in part, on the basis of "facts" presented in the campaign; (2) the more egregious the misrepresentation of fact, both as a matter of materiality and substantiality, the more likely reasoned choice is to be distorted (except in the case of the wholly implausible misstatement); (3) employees can distinguish between

the Board itself was drawing this distinction. See, e.g., The Calidyne Co., 117 N.L.R.B. 1026, 1028-29, 39 L.R.R.M. 1364, 1365 (1957); Reiss Assoc., 116 N.L.R.B. 217, 218-19, 38 L.R.R.M. 1218, 1218 (1956). The Board ultimately rejected this approach, noting that the deliberateness of the misrepresentation was irrelevant to the behavioral considerations. Hollywood Ceramics Co., 140 N.L.R.B. at 224 n.8, 51 L.R.R.M. at 1601 n.8. See also Kawneer Co., 119 N.L.R.B. 1460, 1461 n.4, 41 L.R.R.M. 1333, 1334 n.4 (1958). However, one may speculate that, at least at the early stages in the development of Board policy regarding misrepresentations, considerations of propriety rather than voter response underlay the Board's thinking.

42. 140 N.L.R.B. 221, 51 L.R.R.M. 1600.
43. Id. at 224, 51 L.R.R.M. at 1601-02.
44. See VOTING STUDY, supra note 8, at 8, 11, 13. See note 64 infra and accompanying text.
exaggeration and misrepresentation and sometimes possess independent knowledge that would lead them to discount misrepresentation; and (4) the effect of an otherwise objectionable misrepresentation can be overcome by a corrective reply by the other party (or, more accurately, by sufficient time for a reply).

Aside from concern for the degree of intrusion upon free speech represented by the restated policy, the behavioral assumptions of Hollywood Ceramics lay the Board open to criticism, not only because the premises were unverified, but also on the ground that the standards derived from them were complex and required highly subjective evaluation. Indeed, the Board encountered numerous reversals from reviewing courts which decided that the Board had misjudged one of the subjective elements of the test. Frequently the courts, apparently doubting the evenhandedness of the Board's action, demanded even stricter adherence to the rule than the Board. Moreover, it had become apparent that parties frequently filed marginal or even frivolous Hollywood Ceramics objections for the purpose of delaying the representation process. Ultimately it was these and other practical problems with the doctrine rather than its lack of empirical foundation, that prompted reconsideration of Hollywood Ceramics; first, without any significant change, in the 1973 case, Modine Manufacturing Co.

45. The first amendment issues raised by Hollywood Ceramics provide the basis for one line of criticism of the rule. Interestingly, it does not appear that any court has been persuaded to address the matter specifically. One explanation may be that the Supreme Court has not been particularly sympathetic to first amendment challenges to Board election regulation generally. See NLRB v. Gissel Packing Co., 395 U.S. 575, 616-18 (1969). See also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 778-79 (1976) (Stewart, J., concurring). Most Board election regulation, however, depends upon assumptions concerning the probable impact of employer speech given the economic dependence of the employee-listeners. 395 U.S. at 617. This feature is absent from the Hollywood Ceramics policy. Similar regulation of false or misleading propaganda in public elections has been held unconstitutional. Vanasco v. Schwartz, 401 F. Supp. 87 (S.D.N.Y. 1975), aff'd, 423 U.S. 1041 (1976).

46. Williams, supra note 9, at 56-57; Bok, supra note 9, at 92. For example, the Board regularly heard and decided questions such as how large a union misrepresentation of wages it had negotiated at other plants or how large an employer misrepresentation of union dues would be tolerated under the quantitative prong.

47. NLRB v. Millard Metal Service Center, Inc., 472 F.2d 647 (1st Cir. 1973); Walled Lake Door Co. v. NLRB, 472 F.2d 1010 (5th Cir. 1973); Cross Baking Co. v. NLRB, 453 F.2d 1346 (1st Cir. 1971); Tyler Pipe Indus., Inc., 447 F.2d 1136 (5th Cir. 1971); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968); Schneider Mills, Inc. v. NLRB, 390 F.2d 375 (4th Cir. 1968); Graphic Arts Finishing Co. v. NLRB, 380 F.2d 893 (4th Cir. 1967); NLRB v. Houston Chronicle Publishing Co., 300 F.2d 273 (5th Cir. 1962); Celanese Corp. v. NLRB, 279 F.2d 204 (7th Cir. 1960); Allis-Chalmers Mfg. Co. v. NLRB, 261 F.2d 613 (7th Cir. 1958).

48. See Williams, supra note 9, at 57-59.

49. See cases cited note 47 supra.


and then in *Shopping Kart* in 1977. Nevertheless, the issue of empirical verification loomed over the policy debate.

The evolution of the *Hollywood Ceramics* doctrine to this point suggests that the policy may have developed for reasons other than a firm conviction on the part of the Board as to the soundness of the behavioral analysis which appeared to underlay it. First, the rule arguably had its origins in a broader policy of restricting campaign propaganda for the purpose of obtaining particular election results. Secondly, in its earliest form the rule itself aimed more at regulating election conduct as a matter of propriety than as a matter of preserving free choice. Finally, in its mature form the very complexity and subjectivity of the rule gave the Board enormous leeway in deciding whether to certify the results of particular elections.

III.

THE IMPACT OF BEHAVIORALIST CRITICISM

A. Empirical Attack on *Hollywood Ceramics*

Whatever its true basis, by 1973 the policy had become the subject of considerable criticism by both the courts and the commentators. The Board took the opportunity presented in *Modine Manufacturing Co.* to reexamine its regulatory practice. While the case nominally involved the question of the standard for granting an evidentiary hearing when *Hollywood Ceramics* objections were filed, the Board used the occasion to reflect on its administration of the policy generally. In uncharacteristically frank language, the Board described the difficulty of the behavioral assessment the rule required:

Over the years since 1962, when the *Hollywood Ceramics* case issued, we have found that in a seemingly ever-increasing number of cases we are faced with allegations that the principles enunciated in that leading case ought to require the setting aside of elections because one party or another has departed from the truth in the final stages of its campaigning.

It thus becomes our recurring task to make a determination, with the aid of such expertise in the field as we may collectively have developed, as to whether the nature of such last-minute departures is such as to constitute a “substantial” departure from the truth, as to whether the issue involved is itself “substantial,” as to whether it is likely to have “had a real impact on the election,” as well as the collateral, but not unrelated issues of whether there was time for an effective reply,

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52. See cases cited note 47 *supra*.

53. See, e.g., *Williams, supra* note 9, at 25-55. For earlier criticism of the policy, see Bok, *supra* note 9, at 82-92; Samoff, *supra* note 50, at 234-38.

whether employees might reasonably have relied on the misrepresentation, and so on.

Where there is conduct which clearly puts in jeopardy the integrity of our elections, we do not hesitate to [invest our administrative resources]; nor can we then avoid the necessity of delay in making our procedures effective. But neither can we, as prudent administrators, let too remote or too speculative objections lead us to a ready willingness to accede to the desires of self-interested election losers.

We do not wish to have unrealistic standards, or insist upon such improbable purity of word and deed that we will obstruct or delay our administrative task of conducting elections in so high a number of cases that any hard-fought campaign will almost inevitably result in our elections being invalidated.

For our experience has taught us how easy it is for an objecting party in any heated campaign to seize upon some sentence, or some paragraph, in the final propaganda effort by one of the participants and find therein a claimed departure from solid fact or objective truth, and demand that we hold a hearing as to its verity and as to the still more elusive issues of materiality to the voter’s choice and its probable—or possible—impact on that choice.

While the Board rejected the suggestion that the behavioral assumptions underlying the rule failed to give sufficient weight to the increasing sophistication of the employee electorate, some language in the opinion appears to have been intended, in part, to deemphasize the narrow issue of individual free choice and to reintroduce the value of preserving the integrity of the election process generally:

[T]hese procedures are, and were from the beginning, administrative safeguards arrived at and developed out of this Board’s administrative expertise, in an attempt effectively to carry out the primary administrative task of conducting elections and maintaining the integrity of those election processes in such a manner that they achieve and maintain acceptability in the industrial relations community.

Nevertheless, the Board left the rule intact. As a formal matter, it had simply indicated its sensitivity to criticism of the policy.

The Modine opinion also provided the first indication of what was to become a deep division in the Board over the wisdom of the policy. Member Penello, by way of a footnote, revealed his dissatisfaction with continued adherence to Hollywood Ceramics, but deemed that issue not to be raised by the case, presumably because the case directly involved

55. *Id.* at 529-30, 83 L.R.R.M. at 1135-36 (emphasis added).
56. *Id.* at 530, 83 L.R.R.M. at 1136.
57. *Id.* at 529, 83 L.R.R.M. at 1135.
a procedural issue.\textsuperscript{58} Then, in two subsequent cases in which the Board applied \textit{Hollywood Ceramics}, Penello formalized his disagreement with the policy in vigorous dissenting opinions. Relying heavily on commentators' criticism of the rule, he made a special point of his disagreement with the Board's view of employee behavior. In \textit{Medical Ancillary Services, Inc.}\textsuperscript{59} he argued that the Board was treating employees like "retarded children who need to be protected at all costs,"\textsuperscript{60} and, in \textit{Ermeno Lewis},\textsuperscript{61} he labeled the Board's behavioral premises "misguided paternalism."\textsuperscript{62} The real test of the policy and the Board's commitment to its behavioral views came after the publication of the formal results of the Getman, Goldberg and Herman study of voting behavior in Board-conducted representation elections.\textsuperscript{63}

Drawing upon earlier suggestions that much Board regulation of representation elections was based upon assumptions drawn from a questionable model of voting behavior, the researchers hypothesized that the Board excessively regulated the election process.\textsuperscript{64} Their study,\textsuperscript{65} completed in 1973, sought to test the validity of a set of behavioral assumptions similar to those underlying \textit{Hollywood Ceramics}.\textsuperscript{66}

\texttt{\textit{[T]}he employee voter, like the political voter, acts on the basis of an informed and reasoned judgment, voting to further his own best interests. He is attentive to the campaign, from which he receives most of his information about union-management relationships, and by which he is powerfully influenced. Indeed, the employee voter's susceptibility to campaign influence is even greater than that of the political voter, primarily because of his economic dependence on the employer. As a result of this dependence, he is likely to interpret the employer's statements, if ambiguous, as containing implied promises of benefit if he rejects the union or threats of reprisal if he does not. Even if he previously favored union representation, he will react to those promises or threats, or to their effectuation, by voting against the union. In view of the employee voter's susceptibility to the employer's economic power, the Board must intervene to prevent the employer from trading on his}

\textsuperscript{58} \textit{Id.} at 530 n.6, 83 L.R.R.M. at 1136 n.6.
\textsuperscript{60} \textit{Id.} at 585, 86 L.R.R.M. at 1602.
\textsuperscript{62} \textit{Id.} at 243, 88 L.R.R.M. at 1485.
\textsuperscript{63} \textit{Voting Study, supra} note 8.
\textsuperscript{65} The major findings of the study were first published in a two-part article, Getman & Goldberg, \textit{NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates} (pt. 1), 27 STAN. L. REV. 1465 (1975) and Getman & Goldberg, \textit{The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation} (pt. 2), 28 STAN. L. REV. 263 (1976). The complete findings were published in book form. \textit{Voting Study, supra} note 8.
\textsuperscript{66} \textit{Voting Study, supra} note 8, at 13 n.62.
position.\textsuperscript{67} The authors, however, found a very different pattern of behavior:

Employees have strong predispositions for or against union representation that are based on their attitudes toward working conditions and unions. Their ultimate votes are largely a function of these predispositions. The campaign does not cause most employees to switch, because their predispositions insulate them from influence attempts. Company supporters rarely attend union meetings, though when they do they are more likely to switch to the union than those who do not, perhaps because they are convinced by the union's campaign. Union supporters distort the employer's campaign, perceiving his attempts to influence their vote by economic power as evidence that they need a union, not as a reason to switch. There is no evidence that union supporters who do switch are coerced. Rather, their dissatisfaction with working conditions apparently lessens, indicating that a vote for the union is no longer reasonable.\textsuperscript{68}

On the basis of their findings, the authors recommended radical changes in Board election regulation policy.\textsuperscript{69}

The voting study is pivotal in the present analysis for several reasons. First, it was published at a time when a policy typifying the Board's approach to behavioral issues was under attack. Thus, to the extent the study impeached the Board's behavioral assumptions, defenders of the policy within the Board would be forced to respond to sophisticated empirical data or to distance themselves from the traditional behavioral assumptions, perhaps by articulating previously obscured bases for the policy. Secondly, the study opened the delicate question of the Board's capacity to understand employee behavior without relying upon behavioral science methodology. Finally, it provided data which could be used in resolving the developing policy controversy and thus served as a vehicle for experimenting with a new technique in policy formulation. While the opportunity for experimentation presented by a single study would necessarily be limited, the Board's use of the study provided substantial insight into the problems of incorporating behavioral science data into the Board's policymaking process.

\textbf{B. Board Response and Retraction: \textit{Shopping Kart} and \textit{General Knit}}

The opportunity to use the study came in \textit{Shopping Kart}.\textsuperscript{70} The case involved a ten-fold overstatement of the employer's profits by a

\textsuperscript{67} Id. at 26. \\
\textsuperscript{68} Id. at 146. \\
\textsuperscript{69} Id. at 146-63. \\
\textsuperscript{70} 228 N.L.R.B. 1311, 94 L.R.R.M. 1705 (1977).
union representative less than twenty-four hours prior to the election.\textsuperscript{71} All five members of the Board agreed with the Regional Director that the misrepresentation was not objectionable under the \textit{Hollywood Ceramics} standard because the employees could not reasonably have perceived the agent as a credible source of information concerning company profits.\textsuperscript{72} Nevertheless, three members of the Board, including Member Penello, used this unusual vehicle to overrule \textit{Hollywood Ceramics}.

After asserting the wide discretion of the Board to establish and modify election regulation policy, the lead opinion, adhered to by Members Walther and Penello, summarized only briefly the various practical burdens that implementation of the \textit{Hollywood Ceramics} doctrine had presented.\textsuperscript{73} The opinion then turned to the behavioral issues: "[d]espite the many difficulties in administering the \textit{Hollywood Ceramics} rule we, too, would nevertheless choose to continue to adhere to it if we shared the belief that employees need our protection from campaign misrepresentations."\textsuperscript{74} The opinion rejected a view of "employees as naive and unworldly whose decision . . . is easily altered by the self-serving campaign claims of the parties" and instead adopted "a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."\textsuperscript{75} To support this view, the opinion relied upon the conclusions of the Getman, Goldberg and Herman study, particularly the finding that the votes of 81\% of the employees studied could be predicted from their pre-campaign voting intent.\textsuperscript{76} While abandoning the \textit{Hollywood Ceramics} rule, the opinion indicated that elections would continue to be set aside in cases in which a party had used "deceptive" campaign practices such as "improperly involving the Board and its processes" or using "forged documents."\textsuperscript{77} Thus, in the view of Members Penello and Walther, \textit{Shopping Kart} reinstated the policy concerned only with the manner in which campaign representations are made, and not with the substance of the representations.

Then-Chairman Murphy's concurring opinion is also notable in several respects. First, she indicated she accepted the overruling only "reluctantly" because of her agreement with the "basic principles" of

\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} The opinion referred with approval to Member Penello's dissenting opinions in \textit{Medical Ancillary Services} and \textit{Ereno Lewis}. See notes 59, 61 supra.
\textsuperscript{74} 228 N.L.R.B. at 1312-13, 94 L.R.R.M. at 1707.
\textsuperscript{75} Id.
\textsuperscript{76} Id. (citing Getman & Goldberg, \textit{The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation} (pt. 2), 28 \textit{Stan. L. Rev.} 263 (1976)).
\textsuperscript{77} Id. at 1708. See notes 32-34 supra, and accompanying text.
In her view, however, the case had been so "expanded" and "misapplied" in subsequent cases that the current approach was at odds with the original intent of the Board. Second, she agreed with her colleagues' position that employees must be viewed as mature persons, but she made no reference to the voting study to support her position. Third, and most important, she rejected the Penello and Walther position that the substance of a campaign representation should never be the basis for setting aside an election. Instead she adopted the position that elections should continue to be set aside wherever a party makes an egregious misrepresentation of fact. Her opinion, however, gave little indication of how she would apply this standard.

The dissenting opinion of Members Fanning and Jenkins conceded, as the full Board had two years earlier in Modine Manufacturing, that the Hollywood Ceramics policy was not easily administered. Nevertheless, they rejected the position that the burdens of its administration outweighed the benefits it provided in the election process. Because the pivotal question for Penello and Walther appeared to have been the effect of campaign propaganda on voter choice and because they relied heavily on the voting study, the dissenters were forced to respond to the behavioral evidence. In this respect the dissent represented the first formal defense by Board members of election regulation policy in the face of conflicting empirical evidence. While the voting study had been the target of some methodological criticism, the dissenters only obliquely questioned the methodology. They noted the finding that 81% of the employees studied voted in accord with their expressed pre-campaign intent, but chose not to infer from the study

78. Id.
79. Id.
80. Id.
81. Chairman Murphy simply explained that the standard would lead to the setting aside of an election only "in the most extreme circumstances" and referred to two recent Board decisions involving relatively large misrepresentations which she indicated would not meet that standard. Id. (citing Henderson Trumbull Supply Corp., 220 N.L.R.B. 210, 90 L.R.R.M. 1477 (1975) and The Contract Knitter, Inc., 220 N.L.R.B. 579, 90 L.R.R.M. 1484 (1975)).
82. 228 N.L.R.B. at 315, 94 L.R.R.M. at 1709.
84. The dissenters commented:
Indeed, even if one were inclined to accept the view that the 31 elections studied by the authors of "Behavioral Assumptions" constitutes a statistically significant sample—a dubious proposition at best—and the resultant conclusion that precampaign intent can predict the result in 29 out of 31 cases, its validity is surely limited to campaigns conducted in accordance with Hollywood Ceramics standards.
228 N.L.R.B. at 1316, 94 L.R.R.M. at 1710.
85. Id. at 1315, 94 L.R.R.M. at 1710.
that employees are generally unaffected by and inattentive to campaign propaganda. Rather they focused on another finding of the study—that with respect to certain campaign issues which often led to Hollywood Ceramics objections (in this instance "wages elsewhere"), 50% of the voters questioned after the elections could recall the issue from the campaign and 22% could recall the wage claim with "precision." \textsuperscript{86} The dissenters viewed this degree of attentiveness as "highly significant" in evaluating the Hollywood Ceramics policy. \textsuperscript{87} More significant to the dissenters than the behavioral evidence were Board statistics indicating that in recent years Hollywood Ceramics objections were filed in only 3 to 4 1/2 percent of the over 10,000 elections conducted annually by the Board and were sustained in only 7 percent of the cases in which they were filed. \textsuperscript{88} To Members Fanning and Jenkins these figures suggested that the policy served an important prophylactic purpose, and that in all but a handful of the impressive number of elections held annually, campaigns were free of objectionable misrepresentations. The dissenters also noted the unusually high percentage of eligible voters who cast ballots in Board-conducted elections, commenting:

We think it can fairly be said that the high degree of voter participation in our elections is encouraged by the longstanding policy that Hollywood Ceramics represents and, indeed, that voters in political elections may refrain from voting to the extent they do partly because they are reluctant or unable to rely on the representations made where there is no satisfactory method of review of campaign conduct. \textsuperscript{89}

\begin{center}
\begin{tabular}{|l|c|c|}
\hline
Year & Alleged Employer Misrepresentations & Percent Sustained \\
\hline
1971 & 205 & 10.7 \\
1972 & 150 & 11.3 \\
1973 & 210 & 10.0 \\
1974 & 104 & 15.4 \\
1975 & 207 & 7.2 \\
1976 & 84 & 21.4 \\
\hline
\end{tabular}
\end{center}

\begin{center}
\begin{tabular}{|l|c|c|}
\hline
Year & Alleged Union Misrepresentations & Percent Sustained \\
\hline
1971 & 174 & 1.7 \\
1972 & 176 & 9.1 \\
1973 & 240 & 3.8 \\
1974 & 142 & 10.6 \\
1975 & 245 & 4.1 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{86} \textit{Id.}, discussing \textsc{voting study, supra} note 8, at 82.
\textsuperscript{87} 228 N.L.R.B. at 1315-16, 94 L.R.R.M. at 1710.
\textsuperscript{88} The statistics upon which the dissenters relied were, for the years 1971 through 1976:

\textsuperscript{89} \textit{Id.} at 1316, 94 L.R.R.M. at 1711.
Likewise, ignoring the question of impact on voter choice, the dissenters wrote:

It is well for the parties to have a minimum of lingering doubt as to the fairness of the election if bargaining ensues. Stability of the bargaining relationship and, hence, industrial peace are encouraged if that doubt is minimized.  

Thus, the initial response to behavioral data from those Board members who would adhere to the longstanding Hollywood Ceramics policy was both to use the study itself and to broaden the basis for their position beyond individual free choice.

The policy change lasted less than eighteen months. With the departure of Member Walther and the appointment of Member Truesdale, the Board abruptly shifted course in General Knit, a case again involving alleged union misrepresentation of company profits. The new majority (consisting of Members Fanning, Jenkins and Truesdale) overruled Shopping Kart, returned the Board to the policy of Hollywood Ceramics, and remanded the case to the Regional Director for reconsideration under the revived standard. The majority also embellished upon the themes that had emerged in the Shopping Kart dissent.

Like the dissenting opinion in Shopping Kart, the opinion found support for the policy in the voting study. The majority focused on the 19 percent of the voters whose election vote could not be predicted from their pre-campaign intent and whose votes may have been affected by the campaign. While the study’s findings with respect to this group of voters is open to differing interpretations, the majority concluded from the data that “a substantial minority of employees [is] influenced by the campaign” and that the votes of this group “affected
the outcome of over a quarter of the elections” studied. From the relatively high number of elections in which no objection of any kind is filed, the Board drew the conclusion that parties in the vast majority of Board-conducted elections are “satisfied with the integrity of result,” and have been deterred from “engaging in conduct which would tend to interfere improperly with a free election.”

The opinion, however, concluded with a statement that again suggests a basis for the policy well beyond that of the effect of campaign misrepresentations on voter choice:

In returning to the rule of Hollywood Ceramics, we are convinced that the rule better enhances employee free choice and the fairness of Board elections than did Shopping Kart. The Hollywood Ceramics rule further assures the public that the Board will not tolerate substantial and material misrepresentations made in the final hours of an election campaign and thereby gives stability to any bargaining relationship resulting from the election. The aims of insuring employee free choice, fairness of elections, and bargaining stability are high, but they are achievable under Hollywood Ceramics. It is for the foregoing reasons that we now return to the rule of that case.

The opinion thus elevated the interest in “fairness” and “bargaining stability” resulting from public confidence in the integrity of the process to a level arguably parallel to that of preventing campaign conduct which affects free choice. While neither concept is fully explained, it is clear, too, that neither depends directly upon the behavioral assumptions the voting study challenged.

Neither of the dissenting opinions in General Knit made further use of the voting study. Member Penello’s lengthy dissent was devoted almost exclusively to further explication of the inconsistencies in the Board’s application of Hollywood Ceramics and the opportunities for delay which inhere in the administration of the policy. Member Murphy’s dissent likewise was devoted primarily to the ways in which the policy burdens the election process. Although Member Murphy again made no reference to the voting study, she ventured a distinction between Board regulation of campaign misrepresentations and other behaviorally based Board election regulation. Recognizing that behavioral assumptions underlie all election regulation, she argued essentially that the assumptions which underlie the proscriptions against threats and promises are more “reasonable” than those upon which the

94. 239 N.L.R.B. at 622, 99 L.R.R.M. at 1690.
95. Id. at 621, 99 L.R.R.M. at 1689. The opinion also asserted that by providing an avenue of review for campaign conduct, the Hollywood Ceramics policy “legitimizes the integrity of the electoral process.” Id.
96. Id. at 623, 99 L.R.R.M. at 1690.
97. Id. at 624-32, 99 L.R.R.M. at 1692-99.
98. Id. at 632-36, 99 L.R.R.M. at 1699-1702.
Hollywood Ceramics policy is based.\(^9\) That is, votes are more likely to be affected by threats or promises than by misrepresentation of facts on campaign issues. Nevertheless, Member Murphy also appeared to adhere to her position in Shopping Kart that elections should be set aside in cases of "egregious" misrepresentations.\(^{100}\)

IV

THE DILEMMA OF A SCIENTIFIC APPROACH TO ELECTION REGULATION

While several Board members derived support for their positions in Shopping Kart and General Knit from the voting study, none acknowledged the true breadth of the study's findings or the conclusions and recommendations of the researchers. Getman, Goldberg and Herman not only advised elimination of the Hollywood Ceramics policy but also recommended that the Board cease regulating all election-related speech and virtually all conduct for election purposes,\(^{101}\) even in cases of threats or acts of reprisal or promises or grants of benefit.\(^{102}\) This recommendation was based on the study's finding that even these seemingly more coercive actions do not generally influence employee votes.\(^{103}\) Yet the majority members in Shopping Kart were careful to point out their intention to maintain all other Board policies regarding campaign speech and conduct.\(^{104}\) Neither Member Penello nor Member Walther sought to square their position with the recommendations of the study upon which they had relied. Member Murphy, of course, had not relied upon the study, but similarly she did not seek to reconcile her view that employees are capable of evaluating campaign propa-

\(^9\) Id at 635-36, 99 L.R.R.M. at 1701-02.
\(^{100}\) Id at 636, 99 L.R.R.M. at 1702.
\(^{101}\) VOTING STUDY, supra note 8, at 146-63.
\(^{102}\) Responding to an argument similar to that made by Member Murphy that clear and open threats can more reasonably be expected to affect voter choice than less "egregious" speech, the researchers commented:

Some might argue for continued Board regulation of threats and promises, but with more restrictive standards. Sanctions could be imposed only when threats or promises are clear, explicit, or egregious. The assumption underlying such regulation would be that clear threats and promises have a greater impact on vote than implied or ambiguous threats and promises.

The findings do not justify this assumption. The data show that union supporters perceive threats and promises even though the employer's statements are ambiguous. They are not affected by these attempts to persuade, probably because they disbelieve the promises and anticipate the threats. There is no reason to suppose that more explicit threats or promises would have an impact on union supporters. If an employee interprets a statement to contain an implied threat or promise, that employee has received the message. If that message does not change his vote when implicit, there is no reason to suppose it will when made openly.

\(^{103}\) Id at 118-119.
\(^{104}\) 228 N.L.R.B. at 1314, 94 L.R.R.M. at 1708.
ganda "for what it is" with her insistence upon continued regulation of "egregious" misrepresentations.

This selective use of the study may have been motivated by concerns similar to those expressed by the pro-Hollywood Ceramics members—that a narrow behavioral analysis of the issue misses other values the policy may serve. Of course, it could be argued that the study provided only a convenient means of abandoning a widely criticized and unwieldy policy.

Another explanation, however, seems equally plausible. The conclusions of the study are in essence a broad attack on the expertise of the Board—its capacity to evaluate the effect of employer or union conduct on employee behavior. If the assumed capacity of the Board to make such behavioral assessments is found lacking, it is only slight hyperbole to say that the entire regulatory structure collapses like a house of cards. The regulatory policies based on this assumed capacity are not limited to representation proceedings, but encompass most unfair labor practices. To respond to the study with full candor would be to concede a need to reexamine virtually the entire range of Board policy.

Furthermore, as one moves from the question of regulating truth or falsity in campaign propaganda to that of policing threats, promises, and related conduct, concern for the integrity of the process would seem to take on significance at least as great as that of effects on voting behavior. That is, even assuming threats and economic promises have little or no effect on voting behavior, a government-supervised election in which such conduct is sanctioned may be unacceptable simply in the interest of preserving public confidence in the integrity of the process. If the interest of public confidence in the election machinery is also understood, as suggested by the majority in General Knit, to in-

105. Id.
106. In an article entitled The Myth of Labor Board Expertise, 39 U. CHI. L. REV. 681 (1972) [hereinafter cited as Getman & Goldberg], Getman and Goldberg assert that reviewing courts have accepted the Board’s behavioral explanations for policy on the basis of the assumed capacity of the Board to make this judgment, and have done so without questioning the source of this special capacity.

One of the earliest expressions of this view appears in Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945):

An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.

108. Cf. Miller, The Getman, Goldberg and Herman Questions, 28 STAN. L. REV. 1163, 1173-
clude the stability of bargaining relationships established by the process, then this concern has even more practical significance. Thus, as the range of arguably untoward conduct which might be tolerated increases, concern for the general integrity of the election process also increases, at some point overtaking concern for the effect of such conduct on voting behavior.

This aspect of the opinions also suggests a further disincentive to substituting empirical data for behavioral assumptions in election regulation generally. When Board policy is based on subtle and intricate behavioral assumptions, as in the case of Hollywood Ceramics, the very complexity of the policy creates some incentive to seek a "better" answer in behavioral science research. When, however, the policy is based on more traditional, if not more plausible, behavioral assumptions, e.g., that conduct can be influenced by threats, it carries such a strong natural presumption of validity that one may doubt that a policymaker could ever be persuaded to abandon such premises on the basis of "mere" social science research.

Finally, the difficulties of incorporating behavioral research into the policymaking process, as reflected in the opinions, would further diminish the appeal of such data for the Board's institutional use. It could not have escaped the attention of either wing of the Board in Shopping Kart and General Knit that each side was able to find support for its position in the voting study. Neither is it likely that the Board was unaware of the methodological criticism to which the study had been subjected. Furthermore, while neither wing expressed concern for the procedural issue, one might ask what became of the opportunity of the parties in the cases to respond to the Board's "official notice" of the study. Clearly, the cases raise questions as to the ability of the Board to use the product of social science research in a careful and responsive manner.

A. The Roomkin/Abrams Solution

One response to these questions concerning the Board's use of empirical data is the suggestion by Professors Myron Roomkin and Roger Abrams published shortly after Shopping Kart that the Board establish a behavioral research unit to generate and analyze behavioral studies as an aid to the formulation of policies. Referring to the conclusions of the voting study and some less prominent research, Roomkin and

74 (1976) [hereinafter cited as Miller]; Bok, supra note 9, at 56-57 (comparing NLRA and political elections).


110. Other empirical studies of election regulation include: Field & Field, "... And Women Must Weep": "Anatomy of a Lie": An Empirical Assessment of Two Labor Relations Propaganda Films, 1 Pepperdine L. Rev. 21 (1973); Brotslaw, Attitude of Retail Workers Toward Union Or-
Abrams argued that

[these criticisms not only raise doubts about the validity of a number of specific tenets of union election regulation, but also call into question the larger issue of the Board's characteristic practice of relying almost exclusively on unverified behavioral assumptions and the abstract elaboration of legal principles as the skeleton on which to build the body of labor law.]

The writers proposed the creation of an empirical research unit within the Board to produce and analyze behavioral evidence pertaining to labor-management relations. While suggesting that sound empirical research from any source (and Board receptivity to such data) would contribute to more sensitive policymaking, Roomkin and Abrams appear to have chosen the concept of an internal research unit largely because of the problems presented in utilizing such data in the adjudicative process through which the Board normally formulates policy. Nevertheless, the details of their proposal for incorporating the work product of the unit into the process of adjudicating particular cases seem more to rationalize than to confront the problems.


111. Roomkin & Abrams, supra note 107, at 1442.
112. Id. at 1459-73.
113. Id. at 1458.
114. With the guidance of the Board, the unit would select “recurring regulatory problems” on which to prepare “Behavioral Impact Statements.” Id. at 1459. These behavioral studies would then be utilized in selected adjudicative proceedings:

[The] unit findings would be most appropriately introduced after the administrative law judge bottleneck and closer to the point at which substantive legal standards are formulated by the Board itself.

Procedurally, this can be accomplished either by having the Board take official notice of the unit research, or by analogizing the unit’s behavioral impact statement to the work of a clerk for a judge. Treating the unit as a behavioral science clerk would be appropriate where the unit, in its impact statement, merely sifted the records of particular cases, summarized existing scientific literature, or provided analysis of industry-wide characteristics rather than those of specific adjudicators. In this case, the unit would be fulfilling the role played by staff specialists within the process of institutional decision-making, and the Board therefore probably would not be required to notify and hear an adversely affected party before using the unit statement.

However, particularly where the unit has conducted original research on the topic at issue, the preferable course for the Board—indeed, perhaps the statutorily required course—would be to give formal notice of the unit’s finding to the parties and thus provide them an opportunity to rebut noticed research. Although the unit’s data and findings, if produced in accordance with the predetermined standards for behavioral research, would be entitled to a presumption of validity, the parties could challenge the internal or external validity of the research or present specific reasons that the study, even if generally valid, failed to account for unique aspects of the case before the Board. Once an adversely affected party has had a meaningful opportunity to contradict them, the findings of the research unit should be within the range of officially noticeable materials, given their broad-based “legislative” character.

Id. at 1461-62. The proposal apparently assumes that the impact statements would only be used in unfair labor practice proceedings, since it refers to introduction of the studies after the “administrative law judge bottleneck.” A good deal of Board policy which relies heavily on “behavioral
Roomkin and Abrams recognize that any effort to incorporate behavioral research into the decision-making process would require the development of techniques for assessing the validity of the research, both as to methodology and as to "generalizability of the results to other settings or populations." The authors' basic solution to this problem is to subject any research received as evidence to the adversary process. While recognizing the substantial risk of creating "protracted, second-order" disputes on these issues, the authors simply dismiss the problem with the suggestion that the Board could draw upon "elementary principles of scientific inquiry" and establish through rulemaking the "preferred methodological approach" for studying particular issues. Even assuming that such "protocols" would serve to eliminate some issues of validity with respect to particular studies, certainly each different study would likely pose some unique questions and the process of establishing and revising research "protocols" would itself invite similar dispute and delay.

Roomkin and Abrams also acknowledge the question of how to weigh even "demonstrably valid" research in the decision-making process. While scientific evidence has the allure of precision and certainty, the authors concede that it "might be desirable to treat behavioral evidence with more suspicion than other evidence," and suggest conditions which could determine the relative importance of behavioral evidence:

Behavioral evidence might properly receive relatively greater weight where it relates to legal standards of conduct which are defined with sufficient precision to enable researchers to focus upon the relevant variables in constructing their studies, rather than to vague statutory or administrative language which leaves researchers to cast about for appropriate measures. Behavioral research might also have greater influence where it is used to measure an objective or quantifiable attribute.

assumptions" is formulated in representation proceedings where the initial decision is made by a regional director rather than by an administrative law judge. It is not clear why the authors would exclude the use of the statements in representation cases.

115. Id. at 1450.
116. Id. at 1450-51.
117. Id. at 1451. The authors refer to the difficulties that have been encountered in using econometric analysis in administrative proceedings. See Finkelstein, Regression Models in Administrative Proceedings, 86 Harv. L. Rev. 1442 (1973):

Parties adversely affected by econometric results have seized the opportunity afforded by cross-examination and rebuttal testimony to level barrages of criticism and to introduce alternative models yielding significantly different conclusions. Confronted with the welter of objections and conflicting technical points, decisionmakers have often retreated to safe ground and either rejected econometrics outright or emphasized that their decisions did not depend on the mathematical results even when consistent with them.

Id. at 1444.
118. Roomkin & Abrams, supra note 107, at 1451.
119. Id.
120. Id. at 1452.
rather than qualitative or subjective attributes. While this hardly seems to describe the kinds of standards and conduct to which the Board normally addresses itself, the authors' later explanation of how such evidence might be used in developing policy clarifies this observation. It does not, however, adequately address the real issue.

The authors refer first to the two primary approaches to regulation utilized by the Board—judging conduct through \textit{per se} (or "template") rules and through use of multifactor tests which purport to take account of the "totality of the circumstances." They suggest that if a \textit{per se} rule is shown to be in conflict with behavioral evidence, the rule should be reevaluated. With respect to multifactor rules, if behavioral evidence indicates a lack of substantial correlation between one factor and the regulatory objective, the rule should not necessarily be abandoned. The Board might simply adjust the weight accorded the particular factor. The authors then seek to combine the simplicity of \textit{per se} rules with the flexibility of multifactor rules by suggesting the use of behavioral evidence for the development of a third type of standard—the conditional standard. Essentially, this would involve the use of behavioral research to determine the extent to which, or the circumstances under which, a particular practice affects a protected interest. Standards of conduct developed on the basis of such evidence would be \textit{conditional} on the magnitude or severity of the particular practice or the special circumstances in which it occurred.

To illustrate, the authors use the voting study and its recommendation that the \textit{Hollywood Ceramics} rule be eliminated. Emphasizing that the outcomes of two elections, as well as the votes of 19 percent of employees voting, could not be predicted on the basis of pre-campaign intent, they suggest that the appropriate response to the study was not necessarily to abandon the rule. Instead, the authors argue that in the interest of protecting the "sensitive minority" it would have been "prudent" to determine through further empirical study: the types and circumstances of misrepresentations producing the largest degree of vote switching and to formulate standards at that point of maximum need for protection. In addition, further analysis could identify the qualities the minority of affected voters had in common, adjust-

121. \textit{Id.}
122. \textit{See note 102 supra.}
123. Roomkin & Abrams, \textit{supra} note 107, at 1453-54.
124. \textit{Id.} at 1453.
125. \textit{Id.} at 1454.
126. \textit{Id.}
127. \textit{Id.} at 1454-55.
128. \textit{Id.} at 1455.
129. \textit{Id.} at 1455-56.
ing for such variables as the past history of labor relations in the company and the sophistication of the workers. In either case, the Board would be developing conditional standards which more finely tune the protections for the minority of voters who are likely to change their minds during campaigns.  

A conditional standard would, in essence then, be a highly refined calculus based upon detailed empirical study. It would try to ensure "finely tuned" protection for employee interests. Herein lies the problem.

Social science research moves inexorably to explain the as yet unexplained. It seeks to build upon and refine existing knowledge—to answer the questions left open by prior study. The goal, though never assumed to be truly attainable, is a precise, causal explanation for human conduct. As Roomkin and Abrams concede, the scientific method offers the greatest promise in labor regulation when the research relates to reasonably precise standards of conduct rather than "vague statutory or administrative language," or when it is used to measure "objective or quantifiable attributes" rather than "qualitative or subjective attributes."  

The statutory structure underlying Board election policy, however, simply does not offer such a sheltered and confined environment for the social scientist or the policymaker.  

Again, the Hollywood Ceramics rule provides an illustration of the

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130. Id. at 1457.
131. Roomkin & Abrams, supra note 107, at 1452.
132. A number of commentators exploring the similarities between representation elections and political elections have been struck by the seemingly intractable problem researchers have encountered in seeking to explain voting behavior. In his classic article on NLRB election regulation, then-Professor Derek Bok noted:

The lack of consensus concerning the role of law in regulating elections appears to result not so much from political considerations as from a deeper uncertainty regarding the nature of the election process itself. To quote one of the most careful studies in the field:

"Despite the universal interest in what has influenced our elections, interpretation has scarcely risen above the simplest impressionism. The explanations offered for an electoral result are astonishingly varied; they depend typically on the slenderest evidence, and disagreements are commonplace even among knowledgeable observers."

Bok, supra note 9, at 40, quoting A. Campbell, P. Converse, W. Miller & D. Stokes, The American Voter 523 (1960). Of course, it must be recognized that the study of political voting behavior has grown more sophisticated since the period referred to by Bok. A recent article by a noted political scientist identifies 25 important propositions, drawn from the most prominent study from which Bok quotes, that have been disputed by more recent research. See, e.g., Pomper, The Impact of The American Voter on Political Science, 93 Pol. Sci. Q. 617, 622-24 (1978). The original study was The American Voter. Yet even these presumably more advanced studies continue to draw basic methodological criticism. See, e.g., Margolis, From Confusion to Confusion: Issues and the American Voter (1956-1972), 71 Am. Pol. Sci. Rev. 31 (1977). As a recent president of the American Political Science Association observed in urging new approaches to political research, "political behavior research to date has worked with deficient and inappropriate concepts, so that it has not yet performed as a 'behavioral science' properly speaking. Indeed, judging by its fruits so far, political behavior research might well be called a 'pre-behavioral science.'" Wahlke, Pre-Behavioralism in Political Science, 73 Am. Pol. Sci. Rev. 9, 10 (1979).
problem. Under the rule, the Board determines whether to set aside an election on the basis of a misrepresentation primarily by evaluating the objected-to statement as to its substantiality, materiality, and timing. The Board also considers, among other factors, the credibility of the source of the statement and the likelihood of independent knowledge on the part of the employees. In a sense, the rule is, in Roomkin and Abrams' terminology, a conditional standard, though unverified empirically: the more substantial the misrepresentation or the greater its materiality, as the Board views these concepts, the more likely it is that the election will be set aside. Similarly, the closer to the election the statement is made, the greater the likelihood an objection will be found meritorious. While these factors do not represent a refined calculus for deciding cases, nevertheless the rule seeks, in a concededly unscientific manner, to identify the types and circumstances of misrepresentation which are most likely to affect votes. If, however, one is to utilize social science methodology and yet remain sensitive to the interests of the minority of employees whose reactions might fall outside the general pattern of behavior (for example, that found in the voting study), a virtually unlimited set of variables and sub-variables must be studied. These variables and subvariables must in turn be tested for correlation with other variables and sub-variables. One result of this enterprise might be a finding that while a small, but not insignificant, number of employees are affected by campaign propaganda, there is no meaningful correlation between the cases in which an effect is identified and any of the tested variables. At the other extreme, significant effect might be found where a highly refined set of variables coincide. For example, a misrepresentation concerning a particular campaign issue might be shown to influence voter choice in a voting unit with particular demographic characteristics, in industries with particular labor relations histories, and under particular economic conditions. How is the Board, as policymaker, to interpret and use this data?

In the case of the "unexplained" effect, the Board would be in essentially the same position it was after the Getman, Goldberg and Herman study. Should it continue to apply a blanket rule in order to protect an unidentifiable, but nevertheless sensitive, minority? Other things being equal, a utilitarian approach would dictate abandonment of the rule. Greater concern for protecting individual statutory interests would militate in favor of retaining the rule. In short, the research effort would inform the policymaker that the existing rule is overbroad, but would provide no guidance for a better-tailored rule. In the case of the sophisticated, detailed result, the research's value to the poli-

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133. See notes 42-43 supra and accompanying text.
134. See note 93 supra and accompanying text.
cymaker would be no greater as a practical matter. If a new rule were
tailed to prohibit misrepresentations of the type and under the cir-
cumstances for which significant correlations had been found, its im-
plementation would present an awesome set of new administrative
burdens. Most significantly, the more refined the rule, the more com-
plex and protracted would be the litigation to determine the applicabil-
ity of the rule to a particular case. The fact-finding and standard-
application problems that inhere in the current Hollywood Ceramics
rule would be dwarfed by comparison. Moreover, the computeresque
standards that would develop may bear little relation to common
human experience. Thus, while the subjectivity and uncertainty of the
policy would arguably be diminished, the legitimacy of the policy
would depend upon acceptance of sterile scientific methods.

Even if this prospect is not viewed as particularly troubling, one
must still consider whether the endeavor will promote the apparent
goal of preventing interference with rational and free choice. The as-
sumption that misinformation impedes rational choice rests on the be-
lief that an employee faced with the decision of whether to vote for a
union will make that choice by rationally weighing the information
available to him. If this is an accurate perception of the employee-
voter, then the elimination of effective misinformation will promote ra-
tional choice. If, however, this perception is only an idealization of
voting behavior, the value of attempting to control the reliability of
information on which even an identifiable minority of employees ap-
pear to rely is questionable.135

The effort then to refine through careful behavioral study the pre-
cise conditions under which campaign propaganda is “effective” may
serve to provide strategic guidance to the sophisticated campaigner
while doing little or nothing to promote the stated regulatory objective.
In fact, it has been argued that the purposes of Board-conducted elec-
tions are best served when parties are uncertain of the impact of cam-
paign propaganda.136

Of course, even the most avid proponents of greater use of behav-
ioral research in labor regulation do not contend that Board policy
should be tailored to conform slavishly to empirical evidence. Room-
kin and Abrams, relying in part on observations made by Getman,
Goldberg and Herman, concede that other policy considerations may

135. As Bok observed:
When employees are unable to form a reasoned judgment on the effects of a union, given
the complexity of the issues and the limited information at their disposal, no legal rule
can lead them to a rational conclusion. If certain influences are suppressed by law, the
voters will often respond by simply relying on other factors that are no more rational.
Bok, supra note 9, at 52.
136. Samoff, supra note 50, at 230.
warrant the continuation of rules based on "impeached" behavioral assumptions.137 Given this necessary concession, those who have followed the behavioralists' arguments to this point may feel that the rug has been pulled from under them. Yes, the Board has articulated elaborate policy in term of behavioral assumptions. Yes, these assumptions may be substantially impeached by behavioral research. Nevertheless, if the Board should, or more importantly if the Board does, temper its use of behavioral theory with other policy considerations, is it realistic to expect better-tuned policy when the underlying behavioral concepts are empirically tested principles rather than plausible assumptions? Could it be that plausible behavioral speculation permits the Board to formulate policy which is sensitive to all the interests and considerations which should guide its decision?

It is difficult, if not foolish, to argue that behavioral speculation as opposed to behavioral empiricism is a superior basis for policy formulation. Even a consciously speculative approach must eventually give way to cumulative contrary evidence which, over time, gains popular acceptance. Until that cross-over occurs, however, the Board, as policy maker, may find as much uncertainty in the accumulating behavioral evidence as others find in its assumptions.

Concerns of this nature alone may justify the Board's apparent reluctance to embrace behavioral research. Yet to argue simply that the uncertainties of behavioral empiricism may be as great as those of behavioral impressionism is not to say that the product of "state-of-the-art" research is meaningless for the policymaker. If, however, the Board's behavioral assumptions are viewed as having value beyond their questionable accuracy in explaining employee behavior, then these values also must become part of the equation for weighing the two approaches.

An example of a value that may exceed that of accuracy is the division of power between labor and management. If existing relationships are widely accepted by the labor-management community and the public at large, the behavioral assumptions from which they have developed would appear to have a social value irrespective of their accuracy. However one may view the balance of labor-management power that has developed from rules resting on this foundation, it is clear that any adjustment in these regulatory premises will shift the allocation of power in subtle and probably unpredictable ways.

Such a shift may result simply from the procedural consequences of a substantive change in policy. For example, in the election area,

137. Roomkin & Abrams, supra note 107, at 1457 n.74 and accompanying text. See Getman, Goldberg & Herman, NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates (pt. 1), 27 STAN. L. REV. 1465, 1491 (1975).
complete deregulation of campaign propaganda and conduct on the basis of findings of the voting study would foreclose the use of election objections as a tactical device. Presently, even though a union may obtain a new election only 12 months after an election loss, unions often choose to pursue the objections process, which can sometimes take much longer. The reason in many cases appears to be that of maintaining the momentum of the initial campaign or of stigmatizing the employer with charges (and possibly findings) of improper conduct. Employer objections in cases of union victories can be used to forestall substantially the legal obligation to bargain, allowing time for union strength to dissipate. In either case, the tactic works relatively well regardless of the merit of the objection.

Of course, if one assumed that the legitimacy of labor regulation depends primarily upon its accuracy in describing employee behavior, then valid behavioral data would be a better basis for Board policy even if the new rules had unpredictable or unintended secondary effects upon relative union-management power. Scientific accuracy in explaining behavior is not, however, the source of the legitimacy of Board regulation. Nominally, the legitimacy derives from the Board's presumed expertise in the field of labor-management relations. As a source of legitimacy, expertise must reflect an understanding that comports substantially with the experience of those subject to the Board's powers, if not with ordinary human experience. Through the use of sophisticated research techniques, however, it is possible to derive theories of behavior which are plausible only for the scientist; to the experienced Board member, the average employee, the seasoned business manager or union representative, they simply seem "wrong." Again, the Getman, Goldberg & Herman voting study provides an illustration: the study concludes that threats of or actual reprisals for supporting the union do not affect employee choice. Experienced union and management representatives seem to agree that retaliatory discharges in the course of a campaign can often backfire and rally support for the union. While this suggests that such conduct may have an intended effect, or at least an unpredictable one, it would be quite foreign to this collective experience to conclude that threats and reprisals have no effect at all. Most likely, it would also be at odds with the ordinary experience of employees. While conventional wisdom and administrative

140. Even those questioning the soundness of the Board's behavioral premises would have to concede they are entirely within the range of ordinary human experience. Of course, often two diametrically opposed views of behavior can be said to fall within this generous range.
141. Bok, supra note 9, at 41.
expertise are not equivalent concepts, the idea that the Board’s expertise serves to legitimate its policymaking would seem to depend in part upon the consistency of its “expert” judgment with common experience. If that experience is traded for the subtleties of social science data, then acceptance of Board policymaking among the agency’s regulated constituencies may be undermined.

To place primary emphasis on maintaining relative union-management power and public acceptance of Board policymaking could, however, lead to an entirely static labor policy. Better understanding of behavior in the industrial setting would no longer be an administrative goal because it would risk disturbing the status quo. Long-standing behavioral assumptions would simply be the glue holding the regulatory structure together. Policy changes based on new and different behavioral views would be a matter for legislative rather than administrative action. Yet one need not go so far with the argument. The structural value of the Board’s behavioral assumptions could simply be weighed against the benefits of behavioral science research. Seen in this light, the choice is not merely between speculation and empiricism. Rather, the Board can be viewed as consciously and legitimately selecting bases of policymaking with an eye to the effect such choice may have on the overall regulatory scheme.

At the same time one must consider whether other values which appear to underlie election regulation policy can be accommodated in policy re-evaluations based on behavioral research. Two concerns alluded to by several Board members during the reconsideration of the Hollywood Ceramics rule seem particularly important. First, existing election policy, though possibly overstating the impact of certain campaign conduct, may serve a worthwhile deterrent function. This consideration is, in effect, an admission of the difficulty of precisely gauging the type of propaganda or other campaign conduct that affects voter choice. By setting a standard, such as that of Hollywood Ceramics, which may well overestimate the “effectiveness” of campaign propaganda, the Board encourages parties to steer clear of extreme speech or conduct. In the process some harmless (perhaps even useful) propaganda is excluded, but the Board is spared of undertaking a more risky form of line-drawing. If behavioral research techniques could be used to perform the sorting process better, then such overkill would seem inexcusable. Yet, ironically, the effectiveness of Board regulation in restricting campaign propaganda eliminates one of the necessary controls for such research. Because most employers and unions try to conform their campaigns to Board standards, it is not presently possible to

study, in an empirical sense, the effect of more extreme propaganda.\(^{143}\) The practical limitations of the empirical method thus leave hanging this seemingly legitimate "fear of the unknown."

The second concern centers around the Board's interest in ensuring public confidence in the integrity of the election process. The unknown in this instance is whether substantial deregulation of campaign speech and conduct might undermine the respect which Board election results are believed to command. One must admit at the outset that it is not clear how election policy, as formulated in *Hollywood Ceramics*, serves this end. If the connection lies in the extent to which certain speech or conduct is thought to affect voter choice and in the belief that to affect choice in that manner would be unfair, the entire concern rests on the same imponderable behavioral issues that have already been discussed at length. And the question of how fairness in this context should be measured further complicates the matter. On the other hand, this concern may express the simplistic, but not unimportant, belief that "clean" elections conducted in accordance with standards which are intended to promote fair play and decency will command a high degree of confidence from the participants.\(^ {144}\) In the intense and often emotional setting of a representation election this concern is well justified. Moreover, respect for the result certified by the Board may have continuing significance for workplace harmony whether or not a bargaining relationship is established thereby. Clearly, these intangible values are not measurable through empirical study. Nor can it be assumed that the Board possesses any unique capacity for assessing them. In short, any analysis of the regulatory function performed by the Board in this area would be incomplete if it did not seek to account for these matters.

V

A Proposal

To this point this article has painted what may seem a dismal, even cynical, picture of Board regulation of representation elections and the prospects for improving it. It would be easy to read what has been said as no more than a muddled apologia for another instance of regulatory failure. But to recognize that the choice between consciously speculative regulation and empirically based regulation in the election area is complex is not to suggest that possibly misguided or unnecessary regulation must be tolerated. It is, however, a necessary step in understanding the Board's regulatory dilemma.


\(^{144}\) Cf. Miller, *n. supra* note 108, at 1173-74 (comparing NLRA and political elections).
As long as the Board's expert judgment is in competition with the product of social science research, the apparent stalemate in policy development is likely to continue. But for the Board to forebear until the evidence contrary to its longstanding assumptions becomes overwhelming, if indeed it does, demeans its preeminent policymaking role.

A. Experimentation and Evaluation

The solution for the Board is to openly undertake a trial-and-error method of policy formulation. Only by giving a policy change a meaningful field trial will the Board and its regulated constituencies be in the position to assess how regulation affects the myriad interests the Board seeks to protect. When conditions indicate a policy change may be in order, the Board should not resist the change by insisting its behavioral views are correct or by blithely postulating other intangible values of the policy. Instead, without affirming or rejecting the behavioral premises underlying the rule, the Board should give the new policy a substantial trial.

The experimental procedure proposed here contrasts sharply with the policy reevaluations that frequently accompany changes in Board membership. These, too, may be characterized as a form of trial-and-error experimentation, but they are invariably couched in terms of the Board's expertise.

The *Shopping Kart* and *General Knit* flip-flop provides an illustration both of what is and is not intended by this proposal. The *Hollywood Ceramics* policy had been widely criticized on a variety of grounds not directly related to the behavioral assumptions upon which it was based. These practical considerations alone might have justified reversal of the policy. Moreover, while there was some indication of doubt as to the value of the rule from either a union or management perspective, there was no evidence of a consensus on either side that the policy should be changed. If the Board had abandoned the rule without addressing the behavioral rationale which at least nominally underlay it, its decision would probably have been criticized as an act of expediency in sacrifice of employee statutory interests. While the


146. In 1976, a task force composed of representatives of the labor-management community appointed by then-Chairman Murphy to study NLRB practice and procedure considered but rejected a recommendation to eliminate rules such as *Hollywood Ceramics* which are grounded in the "laboratory conditions" principle of *General Shoe Corp*. *CHAIRMAN'S TASK FORCE ON THE NLRB*, INTERIM REPORT AND RECOMMENDATIONS 28 (1976).
findings of the voting study tended to impeach the behavioral basis of the rule, the results of the study were far from conclusive. At best, there was simply "evidence" in conflict with the Board's behavioral assumptions. The next question should have been: even assuming some fallacy in the underlying behavioral rationale, might other interests be served by the rule? This question was answered, however, by the bald assertion that such interests were furthered, or at least that in the Board's expert judgment, were so likely to be furthered that a policy change was not worth the risk. Thus, counterbalancing the practical problems in the administration of the rule and empirical data in conflict with its primary rationale were simply new, or at least newly emphasized, assumptions. It is one thing for the Board to resist the notion of wholly substituting empirical data for its expert judgment. It is quite another to seek refuge from such data in new, but entirely unverified assumptions. Under the conditions which existed only a willingness to experiment through a policy change would have provided an opportunity to gauge meaningfully the value of the rule.

Of course, one might assume that the Shopping Kart majority intended just such an experiment. But by proceeding first to reject the behavioral rationale for the rule, it shifted the issue from the value of the change as an experiment to the controversial and far-reaching matter of choice between empirical research and Board expertise.

B. The Process of Experimentation

At the outset it must be conceded that the concept of open policy experimentation does not fit neatly within the traditional procedural structure for agency policymaking. If an agency such as the Board uses a process of trial-and-error—a form of experimentation—in the development of policy, it generally will be free to establish and alter policy through the process of adjudication even though that approach ordinarily precludes broad public participation. In fact, that form of exper-

147. See note 93 supra and accompanying text.

The courts' uncritical acceptance of the myth of the Board's expertise may also be due in part to its usefulness in allocating institutional responsibility. The myth helps to justify a fairly limited scope of review. Since the courts possess no greater knowledge of the impact of employer and union conduct on employees than does the Board, it is sensible of the courts to permit the Board to make and apply the basic rules with little interference. The Board is in a better position to establish a coherent pattern of regulation, serving the significant interest of treating like cases alike. From this point of view, the Board's practice of finding unfair labor practices on the basis of specific rules deduced from assumptions about impact on employees has much to commend it. It has helped to direct the attention of the Board and the reviewing courts to the question whether the decision in a particular case is consistent with the general holding of similar cases—and away from the question whether employee free choice was interfered with, a question that neither the Board nor the courts are capable of answering.
imental policy development by the Board has been specifically approved by the Supreme Court. But in such cases each phase of the policy development is announced as if the change is permanent rather than tentative. The trial-and-error nature of the process is apparent only after the policy has undergone a number of changes or refinements. While this approach is an accepted form of administrative jurisprudence, it is not designed to focus public attention on the process of experimentation. In fact, it often enables the policy predispositions of newly appointed Board members to control without any opportunity for public airing of issues raised by the prior policy. Even if the prior experience receives thoughtful appraisal within the Board, the benefit of the views of regulated parties is lost.

Of course, the limited opportunity for public participation in adjudicative proceedings has long been argued to be a major flaw in the Board’s practice of formulating policy exclusively through adjudication. If the major procedural difference between the two forms of policy experimentation is understood to be the degree of public awareness and involvement, and if the “publicness” of the process is assumed to be important, then the procedural solution would seem to lie in the Board’s use of its rulemaking powers for formulating and evaluating particular policy experiments. But, the Board’s reluctance to use rulemaking appears impenetrable. Unless the concept of open policy experimentation can be made to fit, however awkwardly, within the adjudicative model, there is as little likelihood that the Board will follow that course as there is that the Board will openly embrace behavioral research as a policymaking tool.

Fortunately, the Board’s approach to policy formulation in adjudication has not been so rigid as to make that procedural setting unworkable for open experimentation. Frequently, in anticipation of a major policy change, the Board has invited interested representatives of labor and management to participate in adjudication as amici curiae through

149. In _NLRB v. J. Weingarten, Inc._, the Court observed:

_The use by an administrative agency of the evolutorial approach is particularly fitting. To hold that the Board’s earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking. “Cumulative experience” begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.”_

150. See _Peck_, supra note 2, at 756-57.


152. See note 2 supra.
briefs and oral argument. In effect, this converts the "adjudication" into a limited form of rulemaking since the issue as framed by the Board rarely depends upon any unique facts in the case before it. While this approach can be viewed as a blatant circumvention of traditional rulemaking procedures, it provides an adequate procedural framework for open experimentation. To accept it for this purpose is not to pass generally upon its desirability or propriety; rather, it is to make do with what is available.

The first task to face the Board would be the selection of particular policies for experimental treatment. While in an ideal world it might seem desirable to open the selection process to public participation, this would be cumbersome and would likely generate premature maneuvering by interested parties. Instead it would be both reasonable and practicable to leave the selection of policies for experimentation to the Board as an internal matter. Scholarly commentary, published results of external research, court decisions on review, congressional hearings and informal contacts with its regulated constituencies, which currently inform the Board of the "soft spots" in existing policy, can reasonably be expected to aid in the selection of policies for experimentation.

The most promising subjects for policy trials of the type suggested here would be those for which: (1) the behavioral analysis employed by the Board is especially subtle or complex; (2) there is reputable empirical data that tends to impeach the Board's behavioral premises; (3) values not directly related to the behavioral issues either explicitly or implicitly underlie the policy; and (4) the administrative and practical burdens in implementing the policy are substantial. These criteria would have been satisfied, for example, by the Board's policy with respect to campaign misrepresentations prior to the Shopping Kart decision.

After selecting the subject for experimentation, the Board would simply announce its decision in adjudicating a particular case to which existing policy would otherwise have been applied. The decision would explain the purpose of the experiment and call upon interested parties to use the opportunity to evaluate consequences of the policy change in the field. Little purpose would be served by setting a specific

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154. The Board often proceeds in precisely this manner. In fact, the Shopping Kart decision itself was announced in this fashion. Not even the parties to the proceeding were aware that the case would be used as a vehicle for announcing a policy change. The issue was not briefed or argued, and the policy change was entirely unnecessary for the disposition of the case because, as noted earlier, all five Board members agreed that the election should not be set aside under existing policy. Again, the point is not to endorse this unusual practice but is rather to explain that an entirely internal selection process would conform to existing Board practice—practice that is generally tolerated.
term for the experiment. The experiment should, however, be allowed to run for a period that gives interested parties a meaningful opportunity for observation. In many cases this may require several years. Most importantly, the Board should announce in its decision that it will give notice to representatives of interested constituencies when it determines that the experiment should be formally evaluated. The Board would then evaluate the results in the context of a case in which the policy issue could be raised. The Board would also make clear that until that point any claim raising the policy issue would be dismissed. Thus, the Board would remain in complete control of the timing of the experiment and parties would be discouraged from altering their conduct during the course of the experiment in the hope that the experimental policy would be abandoned to their advantage.

Because the purpose of the experiment would not be to test directly the policy's behavioral premises, there would be no need for the Board to structure the experiment particularly to provide for measurement of this matter. Instead the focus would be on possible values of the prior policy not easily measured by behavioral science techniques and the reactions of the Board's regulated constituencies to field observation of the altered policy. In the case of campaign misrepresentations, attention would be directed towards the possible deterrent value of the prior policy or its possible value in promoting confidence in the integrity of the election process.

To identify these values as ones not readily measurable through scientific methodology is not to suggest, however, that the Board would be without means for evaluating the experiment. It is tempting to suggest a system of selective monitoring of election campaigns and formal surveys of the reactions of participants in the election process as techniques for assessing the experiment. Use of such techniques, however, would inevitably generate the same sort of problems and conflicts inherent in using behavioral science methodology in policy formulation.

The real promise of the undertaking lies in the opportunity it provides for the Board and its regulated constituencies to observe the policy in the field. In the election area, deregulation is often resisted largely out of fear of the unknown. In a process of step-by-step policy experimentation, the Board and the labor-management community could adjust gradually.

Since the technique is admittedly unscientific, the underlying behavioral issues would not receive the type of formal testing urged by some of the Board's critics. Yet it is entirely possible that "accurate" assessment of these issues will seem less important given an opportunity to observe at a practical level the effect of the altered policy. The ultimate policy decision, of course, would have to be explained in tradi-
tional fashion. The behavioral issues must be addressed; the Act would seem to require as much. Plausible behavioral assumptions would continue to play a role, but their use would be tempered by what has been observed. Most importantly "data" that does not now exist and that can be obtained in no other way will be available to add content to the concept of Board expertise.

C. Expertise and Experimentation

Implementation of the proposal also raises an important institutional issue: can an agency, presumed to be expert in labor-management relations, expect judicial tolerance for policy decisions that admit less than complete understanding?

The Board's policy choices in the election area have been sheltered by a narrow scope of judicial review which has been justified on the ground of agency expertise. Yet there has been evidence of judicial misgivings over the concept. Such doubts have been fostered both by questions concerning the source of the Board's presumed knowledge and by the rapid policy changes that have often accompanied changes in the composition of the Board. Policy changes which apparently can be explained only as a function of changes in Board membership would seem to represent the very antithesis of policy grounded in accumulated experience.

Nevertheless, the courts have for the most part accepted these policy changes, justifying their deference to the Board with incantations of agency expertise. Yet as a practical matter it seems only a small step to move from the considerable tolerance shown by the courts when policy changes are confidently justified in terms of expertise to a policy change made in part to provide the opportunity to gain a fuller understanding of the effect of regulation. The concept of expertise is not abandoned in such a move; it is only used in a realistic fashion. It serves as the basis for explaining the need for experimentation and assuring that the undertaking is a competent one and is sensitive to the purposes of the Act. Expertise simply need not be understood to mean

155. The guiding principle for review has been a statement of the Supreme Court in NLRB v. A.J. Tower Co., 329 U.S. 324 (1946), that the Board is "entrusted . . . 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." Id. at 330. See also NLRB v. Gissel Packing Co., 395 U.S. 575, 612 (1969).

156. See, e.g., Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224, 1233 (2d Cir. 1974); Harlan #4 Coal Co. v. NLRB, 490 F.2d 117 (6th Cir. 1974); Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1118 n.16 (7th Cir. 1973); NLRB v. Kaiser Agricultural Chemicals, 473 F.2d 374, 383 (5th Cir. 1973). See also Getman v. NLRB, 450 F.2d 670, 675-76 (D.C. Cir. 1971).

157. See generally Getman & Goldberg, supra note 106.

158. See note 145 supra.

159. See note 61 infra.
omniscience. If the Board carefully selects the subjects for a field trial and openly expresses its intentions, it should satisfy the paramount review standard of a "reasoned and explained" decision. Finally, the theoretical sacrifice of statutory rights that may occur during the course of the field trial can and should be understood as an unavoidable cost of ascertaining the value of various policy alternatives.

The reaction of the courts to the Shopping Kart and General Knit decisions suggests the judiciary is capable of accepting Board policy that concedes incomplete knowledge. The Board's reversal of Shopping Kart following a change in the Board's membership can be more easily justified as an experiment (though one not allowed to run its course) than as a policy judgment based on expertise. While the judicial response to the flip-flop has generally been tolerant, it cannot be assumed that deference to a policy judgment nominally grounded in expertise would be accorded to policy changes made on an openly experimental basis. Still, considering the significant extent to which the Board in these cases risked the shelter of expertise that normally surrounds its policymaking, it does not seem unrealistic to expect similar tolerance.

VI

Conclusion

In the current period of antiregulatory sentiment, the Board can expect to come under increasingly frequent attack for excessive or misguided regulation stemming from its failure to understand in an empir-
tical sense the real world of labor-management relations. But the Board cannot expect easy answers or risk-free solutions from the product of behavioral research. Nor should the Board allow the myopic perceptions of its regulated constituencies regarding the value of longstanding policy to serve as an unspoken justification for maintaining the status quo. Only a meaningful field trial will provide the Board, and equally importantly, its regulated constituencies, adequate information to evaluate its policies and suggested changes in those policies. Only then will the Board be in a position to assess the important issues it faces.