Pre-Election Conduct—Expanding Employer Rights and Some New and Renewed Perspectives*

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This article discusses the evolution of selected National Labor Relations Board rules and procedures governing employer conduct during the period preceding a representation election. Several commentators have suggested that there should be fewer structural controls on employer campaign conduct, and Board decisions indicate such a trend. The author considers the validity of these suggestions and concludes that rather than a drastic reduction in Board control, the Board should clarify the rules concerning permissible conduct and consider other kinds of reform.

I
INTRODUCTION

Prior to 1947, a majority showing in a National Labor Relations Board election was not the only means by which Board certification of a union occurred. In the early Wagner Act* years, "other suitable methods" were extensively relied upon. The most common alternative was, of course, the "card check," whereby union authorization cards were compared with the employer's payroll roster. Even though the alternatives to an election were subsequently less relied on as a means of obtaining certification, it was not until the adoption of the 1947 Taft-Hartley amendments† that Board elections became the exclusive vehicle for obtaining Board certification.

Despite the necessity of a Board-conducted election as a prerequisite to "certification," after 1947, the employer's obligation to bargain collective-

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1. Hereinafter referred to as NLRB or Board.
ly with employee representatives did not solely depend upon Board certification. It was established under the Act that an employer's denial of recognition required more justification than lack of Board certification of the union. For many years, an employer’s refusal to recognize the union without an election was justified only by the employer’s "good faith doubt" as to that union’s majority standing. As this "good faith doubt" concept developed, however, an employer could, as a practical matter, avoid recognition absent an election as long as he also refrained from committing unfair labor practices. Where an employer’s course of conduct involved the commission of unfair labor practices, such was construed as belying the claim of a "good faith doubt." More than two decades after the passage of Taft-Hartley, it became apparent that Board-conducted elections were the preferred means for establishing the obligation to bargain, and this method thereafter became firmly established. The Supreme Court in NLRB v. Gissel Packing Co. in effect rendered irrelevant the "good faith doubt" standard as a consideration and expressly relegated the card check to a status "admittedly inferior" to a Board-conducted election. The Court, however, did reaffirm that under certain circumstances an employer may be required to bargain without an election. The Court removed any doubt as to the legal preference for a vote in Linden Lumber Division, Summer & Co. v. NLRB. The Court held that, absent a showing of independent unfair labor practices, an employer does not violate section 8(a)(5) by refusing to recognize a union based on its claim of an authorization card majority, even though the employer chooses not to petition the Board for an election. The union, the Court held, has the burden of invoking the Board’s election procedures.

Questions remain, and will be discussed infra, as to whether this preference for the Board’s election process is warranted. Inasmuch as the secret ballot election does enjoy an almost sacred status, the Board’s rules and procedures concerning the conduct of these elections have become extremely important. Traditionally, the Board has structured the representation election process so as to promote section 7 rights, thereby restricting employer freedom to campaign. Recent Board decisions demonstrate a trend toward fewer structural controls on employer campaign conduct, especially employer speech activity. Some commentators suggest that more extensive deregulation of the pre-election campaign process is called for.

A thorough review of the Board's standards and rules governing elections is a task too broad for this article. This article will discuss the evolution of selected Board rules and procedures governing pre-election conduct with an eye towards ascertaining how the Board presently views its role as overseer of the election process and what future adjustments of the present procedure the Board might consider.

This article will also consider the validity of some of the arguments made by commentators for further deregulation, particularly the conclusions and the underlying data and analysis provided in a recent empirical study of Board elections.\(^1\) This article will examine both the strengths and weaknesses of that study to determine its relevance with respect to reform via further deregulation. The effect of the study upon proposed procedural rules, such as certification by authorization-card majority and the requirement of equal access to employees on employer premises will be analyzed. As an initial consideration, however, an employer's historical and current right to wage any campaign must be reviewed.

II

THE EMPLOYER'S ABILITY TO CAMPAIGN AND THE "CAPTIVE AUDIENCE"

The Board's supervision of the election process attempts to balance the right of employees to be free from employer interference in their selection or rejection of a bargaining representative and the employer's right of free speech. Interpretation of how that balance should be struck, however, has been varied.\(^1\)\(^2\)

In the early Wagner Act years (1935-1941), the Board usually held that any anti-union statement of an employer made during an organizational campaign was coercive, *per se*.\(^1\)\(^3\) Employers were held to a standard of strict neutrality. The Board reasoned that since an employer speaks from a position of weight and authority, any anti-union statements by the employer preyed upon an employee's fear of the loss of his job, and thus were


See, e.g., Citizen-News Co., 21 N.L.R.B. 1112 (1940), *enforcement denied*, 134 F.2d 962 (9th Cir. 1943); Rockford Mitten & Hosiery Co., 16 N.L.R.B. 501 (1939); Knoxville Stove Co., 5 N.L.R.B. 559 (1938); and Union Pacific Stages, Inc., 2 N.L.R.B. 471 (1936), *enforcement denied*, 99 F.2d 153 (9th Cir. 1938).
impermissible. In 1941 the Supreme Court rejected this per se approach, and thereafter permitted employers a limited right to express anti-union views. The shifting of balance that followed is illustrated by the evolution of the law concerning employers' anti-union "captive-audience" speeches.

Captive-audience speeches were obviously illegal under the early proposition that all anti-union speech of an employer was impermissible. Even after the Court's rejection of that rule in 1941, the Board ruled in 1946 that an employer violated the Act if it required employees to attend an anti-union speech on company time and premises. On appeal, the Second Circuit set forth a modified rule that permitted such captive-audience speeches, as long as a similar opportunity to address the employees was accorded the union.

In 1947 the Taft-Hartley Act was enacted. Section 8(c) of that Act provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The application of section 8(c) to employer free speech in a captive-audience context was first tested in Babcock & Wilcox Co. in 1948. Such speeches were held not to be the basis of unfair labor practices against an employer. However, General Shoe Corp., also decided by the Board in 1948, limited the application of section 8(c). The Board ruled that section 8(c) applied only to unfair labor practice cases since election conduct standards were more rigorous than those applied in unfair labor practice cases. The Board stated that in election proceedings, its role is to assure that "laboratory conditions" prevail so that the "uninhibited desires of the employees" can be ascertained.

In Bonwit Teller, Inc., and its progeny, the Board ruled that an
employer who makes captive-audience speeches, while at the same time refusing to honor union requests for equal opportunity to be heard, is engaging in illegal interference sufficient to set an election aside. In *F. W. Woolworth Co.* the Board, relying on *Bonwit Teller*, held that an employer violated section 8(a)(1) by applying its privileged no-solicitation rule in a discriminatory fashion, refusing the union an opportunity to address the employees after having made two captive-audience speeches.

A change in Board composition subsequently occurred in 1953. The result was a change in Board policy concerning employer free speech in a captive-audience setting. In 1953, the Board held, in *Livingston Shirt Corp.* that in the absence of an unlawful or privileged no-solicitation rule, there would not be an unfair labor practice finding by virtue of a captive-audience speech, even if no opportunity was accorded the union to respond. On the same day, the Board established its twenty-four hour rule in *Peerless Plywood Co.* holding that neither party could give captive-audience speeches within the twenty-four hour period before the election. The *Peerless Plywood* Board affirmed the employer's right to make a non-coercive captive-audience speech prior to the twenty-four hour period and deny the union's request to reply.

Thus, by 1953, the right of employers to engage in captive-audience speeches was firmly "in" and the right of the union to equal access was as firmly "out." The law in this regard has remained relatively unchanged to the present time.

nonworking hours, it would not be required to give the union an opportunity to reply to its anti-union speeches. *See also*, NLRB v. American Tube Bending Co., 205 F.2d 45 (2d Cir. 1953) where the same court again indicated that if an employer permitted union solicitation during nonworking hours it could make anti-union speeches during working hours and refuse the union a similar opportunity without committing an unfair labor practice.

25. 102 N.L.R.B. 581 (1953), enforcement denied, 214 F.2d 78 (6th Cir. 1954).
27. 107 N.L.R.B. 400, 408 (1953).
29. *Id.* at 430.
30. In NLRB v. United Steelworkers of America (Nutone, Inc.), 357 U.S. 357, 364 (1958), the Court seemingly affirmed the Board's *Livingston Shirt* and *Peerless Plywood* rules in holding that "the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation" does not constitute an unfair labor practice absent "some basis, in the actualities of industrial relations," which would justify such a finding. The Court noted that the labor organizations had not shown that their ability to communicate effectively with employees had been "truly diminished" by the no-solicitation rules, however the Court stressed that it was primarily the responsibility of the Board to appraise the interests of labor and management in view of both varying case circumstances and the Board's industrial expertise.

In NLRB v. Excelsior Laundry Co., 459 F.2d 1013 (10th Cir. 1972), the court expressly relied on *Peerless Plywood* in enforcing the Board's bargaining order against an employer who had made a captive audience speech within 24 hours of the election.
In the evolution of the law, the scales had tipped decidedly in favor of the employer in terms of its right to engage in an anti-union campaign, as well as the manner in which it could engage in that campaign. Whereas the union was initially the only party who could be heard in the campaign, now it could be excluded from responding to the employer’s campaign in the most favored setting, i.e., on company time and premises.

III

PRE-ELECTION SPEECH AND CONDUCT—THE EMPLOYER’S EXPANDING RIGHTS

The general standard by which campaign conduct is to be evaluated was enunciated in 1948 by the Board in General Shoe. The Board said that,

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.

The Board since General Shoe has characterized the standard applied to pre-election campaign speech and conduct in these terms, and courts have utilized this standard both in enforcing the Board’s orders and in denying enforcement. No attempt is made here to trace the development of the Board’s standards applicable to all employer pre-election conduct and speech, but a reading of recent Board decisions indicates that what constitutes “laboratory conditions” has changed with time.

A number of recent decisional developments indicate a trend toward fewer restrictions on employer speech and conduct in election campaigns. This trend can be seen in the Board’s recent rejection of various per se rules used to determine employer rights of speech and conduct in various campaign situations. An example with broad application is that concerning the relationship between a finding of section 8(a)(1) interference on the one hand and objectionable conduct warranting the overturning of the election on the other. The Board has apparently rejected the principle stated in Dal-Tex Optical Co. that:

32. Id. at 127 (footnote omitted).
33. See, e.g., NLRB v. National Container Corp., 211 F.2d 525 (2d Cir. 1954), enforcing Board’s cease and desist order against an employer who had granted disparate electioneering privileges to one of two competing unions; and NLRB v. Trinity Steel Co., 214 F.2d 120 (5th Cir. 1954), denying enforcement of the Board’s bargaining order because a union representative repeatedly made misrepresentations during the campaign.
34. 137 N.L.R.B. 1782 (1962).
Conduct violative of Section 8(a)(1) is, . . . a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election. This is so because the test of conduct which may interfere with the "laboratory conditions" for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).35

The principle was reiterated as recently as 1972, in Birdsall Construction Co.36 In that case the Board found the employer's systematic interrogation of employees violative of section 8(a)(1) and set aside the election. In a footnote, the Board panel of Chairman Miller and Members Jenkins and Kennedy, citing Dal-Tex, stated:

The Trial Examiner considered it unnecessary to decide whether the interrogations found to constitute Section 8(a)(1) violations also interfered with the election. We find that Respondent's conduct did result in such interference in view of the Board's rule that conduct violative of Section 8(a)(1) a fortiori interferes with the exercise of free and untrammeled choice in an election.37

However, the principle recently passed unnoticed in Rock Island Franciscan Hospital.38 The panel majority of Members Penello and Walther ruled that no cease-and-desist order would be issued to remedy the employer's admittedly unlawful threat to discontinue the employee's health benefits if the union was voted in. Dismissing the union's complaint, the Board found that this conduct did not interfere with the election, even though the section 8(a)(1) violation was conceded. Member Fanning dissented in part, finding that the conduct did interfere with the election.

Per se approaches have also been rejected in recent decisions involving specific employer conduct and speech. The Board has changed its view of the legality of an employer's tactic of calling individual or small groups of employees away from their normal work places, into a private area, to urge rejection of the union. Under Peoples Drug Stores, Inc.,39 such conduct in itself was considered interference with the conditions necessary to a free choice by the employees in the selection of a bargaining representative and warranted setting aside the election.40

35. Dal-Tex Optical Co., 137 N.L.R.B. at 1786-87. The courts have relied on this standard in enforcing Board orders directed against various acts committed by employers. See, e.g., NLRB v. Marsh Supermarkets, Inc., 327 F.2d 109 (7th Cir. 1963), cert. denied, 377 U.S. 944 (1964) (threatening statements); and American Bridge Div., U.S. Steel Corp. v. NLRB, 457 F.2d 660 (3rd Cir. 1972) (use of unsanctioned election procedures).


37. 198 N.L.R.B. at 163 n.3.


40. The Board majority in Peoples Drug reasoned that "[t]he very fact that employees were summoned by management representatives to a place, removed from their work stations which [had] been selected for that purpose by management representatives, imparts to the place selected its character as 'the locus of final authority in the plant.'" The majority noted that an
However, in *NVF Co., Hartwell Division*, the Board majority of Chairman Miller and Members Kennedy and Penello held that such conduct, in itself, does not warrant setting aside an election. Instead, the Board espoused a case-by-case analysis of all the factual circumstances in determining the legality of such conduct, and overruled *Peoples Drug* to the extent that it required a per se approach to the problem. Such conduct will constitute interference, said the Board:

only where it can be said on reasonable grounds that, because of the small size of the groups interviewed, the locus of the interview, the position of the interviewer in the employer's hierarchy, and the tenor of the speaker's remarks, we are not justified in assuming that the election results represented the employees' true wishes.

The standards to be observed in an employer's systematic pre-petition polling of its employees have recently been held inapplicable to particular factual situations. Those standards were set forth in *Struksnes Construction Co.* and seemingly established per se rules. In *Struksnes* the Board held

employer could, if it desired, call a meeting of employees on the premises or talk with employees individually at their work stations. 119 N.L.R.B. at 636.

It appears that the courts have not had the opportunity to evaluate this per se approach. This situation seems to be due to the Board's practice of grounding its orders on the entirety of employer conduct. Thus, for example, the Board would find that an employer had violated section 8(a)(1) by coercive behavior of which a violation of *Peoples Drug* would be only a part. In those cases where the courts reviewed such findings, narrow focus upon the employer's violation of *Peoples Drug* would not occur. See, e.g., NLRB v. Lenkurt Elec. Co., 438 F.2d 1102 (9th Cir. 1971).


42. 210 N.L.R.B. at 664. Despite the analysis-of-all-the-circumstances approach, the Board declined to order a hearing, as suggested by dissenters Fanning and Jenkins, to test the employer's contentions regarding the circumstances, which were set forth in its exceptions to the Regional Director's recommendation. The Board concluded that the circumstances did not constitute a reasonable basis for a determination that the employees had been unable to express their true wishes. The Board stated that:

The employees were not called singly into the general manager's office but in groups of five or six until approximately 95 percent of the employees were interviewed. In view of the size of the groups and the total number of employees interviewed, there is no reason to believe that the individual employee considered that he was singled out by the Employer for special attention and thus for special pressure. The interviews took place in the general manager's office. But, as found by the Regional Director, the employees were familiar with this office since they had occasion to visit it to obtain loans from, or discuss grievance matters with, the general manager. It thus had no special impact of awe upon the employees. Moreover, the Employer's assertion that there were no places other than the general manager's office to present the Employer's views was not disputed. Finally, the general manager's remarks to the employees were noncoercive and temperate in tone.

*Id.* at 664 (footnote omitted). Cf. *Peoples Drugs*, 119 N.L.R.B. 634, 636 ("the non-availability of other opportunities to present the Employer's views, and the non-coercive tenor of the Employer's actual remarks, are immaterial.").

43. 165 N.L.R.B. 1062 (1967).
that such employer polls of employees regarding their union sentiment, will, absent unusual circumstances, violate the Act unless:

(1) the purpose of the poll is to determine the truth of a union’s claim of majority,

(2) this purpose is communicated to employees,

(3) assurances against reprisals are given,

(4) the employees are polled by secret ballot, and

(5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.44

The Board also ruled in Struksnes that polls “taken while a petition for a Board election is pending [do] not... serve any legitimate interest of the employer that would not be better served by the forthcoming Board election,” and stated that such polls would “continue to be found violative of Section 8(a)(1).”45

44. Id. at 1063. The development of these standards, however, was judicially prompted. The Board had previously held that the employer’s polling of its employees had not violated section 8(a)(1), and had accordingly dismissed the union’s complaint. 148 N.L.R.B. 1368 (1964). On appeal, the Court of Appeals for the District of Columbia Circuit set aside the Board’s Decision and Order (insofar as it pertained to the employer’s polling conduct), and remanded the case to the Board with the direction that the Board “should come to grips with this constantly recurring problem... and outline at least minimal standards to govern the ascertaining of union status....” International Union of Operating Eng’rs Local 49 v. NLRB, 353 F.2d 852, 856 (D.C. Cir. 1965).

The treatment accorded the Struksnes standards by the various courts of appeal has not been uniform despite the United States Supreme Court’s seeming approval of these standards in NLRB v. Gissel Packing Co., 395 U.S. 575, 609 (1969). The Fifth Circuit in NLRB v. J.M. Mach. Corp., 410 F.2d 587 (5th Cir. 1969), and the Ninth Circuit in NLRB v. Super Toys, Inc., 458 F.2d 180 (9th Cir. 1972), have applied the Struksnes standards strictly in upholding Board rulings of unlawful employee interrogation. The Sixth Circuit in NLRB v. Lou De Young’s Market Basket, 430 F.2d 912 (6th Cir. 1970), however, indicated that limited interrogation of employees might constitute only a minor infringement of the Struksnes requirements, and thus not warrant issuance of a bargaining order against the employer. Moreover, the Second Circuit expressly recognized a different set of standards upon which to determine the lawfulness of employer interrogation of employees from those established in Struksnes. Bourne v. NLRB, 332 F.2d 47 (2d Cir. 1964). Accord, Retired Persons Pharmacy v. NLRB, 519 F.2d 486 (2d Cir. 1975).

In addition, inconsistent application of the Struksnes standards has occurred within the same circuit. In NLRB v. Harry F. Berggren, 406 F.2d 239 (8th Cir.), cert. denied, 396 U.S. 823 (1969), the court sustained the Board’s reliance on the Struksnes standards in upholding its ruling that the employer’s failure to give assurances against reprisal rendered unlawful a poll conducted in a non-coercive atmosphere. However, in General Mercantile & Hardware Co. v. NLRB, 461 F.2d 952, 954 (8th Cir. 1972), the court held that the employer’s interrogation of its employees was not unlawful absent a showing that the employer was motivated by an “anti-union animus,” although the court purported to apply the Struksnes standards.

45. 165 N.L.R.B. at 1063. The Board had previously held that employer interrogation of its employees subsequent to the Board’s arrangements for an election, in conjunction with other factual circumstances, was violative of section 8(a)(1). Mallory Plastics Co., 149 N.L.R.B. 1649 (1964), rev’d, 355 F.2d 509 (7th Cir. 1966). See also Phillips Mfg. Co., 148 N.L.R.B. 1420 (1964).

In Jerome J. Jacomet, the Board ruled that Struksnes was inapplicable to polling which occurred on the day the petition was filed. At a meeting called by the employees, the employer, in response to a statement by an employee "spokesman" that the employees had decided not to join the union, said, "Nobody wants to join the union?" When the employees nodded yes, the employer said, "Well, fine. That's excellent. Is this everybody here? Nobody wants to join the union?" The Board majority stated that the Struksnes "formula" was inapplicable to these facts because the employer was merely verifying that which the employees had already told him. The majority opinion does not mention the Struksnes per se rule that polling while a petition is pending violates section 8(a)(1).

While the Board has tended to minimize application of per se rules governing election conduct, it has also liberalized the permissible content of employer speech. An example concerns the propriety of showing, during the election campaign, the anti-union motion picture film And Women Must Weep. In 1962, the Board ruled in Plochman & Harrison—Cherry Lane Foods, Inc., that showing of the film constituted "misrepresentation" exceeding "the bounds of permissible campaign propaganda," and therefore interfered with the election. In two subsequent decisions, the Board set aside elections in part because of the showing of the film, even though in both cases it was shown at least a week prior to the election. In 1966 the

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46. 222 N.L.R.B. 899 n.1 (1976).
47. In Bushnell's Kitchens, Inc., 222 N.L.R.B. 110 (1976), relied on by the Board majority in Jacomet. Struksnes was not applied where an employer's poll was found to have been sought by the employees through their union representative. The poll there occurred prior to the filing of the petition.

Failure of the Jacomet majority to apply the Struksnes per se rule governing post-petition polling is peculiar, in view of the fact that the Board specifically reiterated the principle that "objectionable conduct occurring on or after the day of the filing of the petition would be considered on its merits as the basis for setting aside an election." In their dissent, Members Fanning and Jenkins refer almost apologetically to the per se rule. In a footnote, they quote the per se rule from Struksnes in an "it should also be noted" context. Jerome J. Jacomet, 222 N.L.R.B. 899, 900 (1976) (dissenting opinion). It may be that the post-petition rule of Struksnes has been overlooked in the wake of its more famous brother. For example, in Northeastern Dye Works, 203 N.L.R.B. 1222 (1973), the Board found that a poll begun on the day the petition was filed violated section 8(a)(1) because, "conducted as it was with no assurances given against reprisal and, in part, by nonsecret ballots, . . . it did not conform to the applicable [Struksnes] standards . . . ." No reference was made to the fact that the conduct occurred on the same day the petition was filed.

48. 140 N.L.R.B. 130, 133 (1962). The film was shown on the day before the election. Chairman McCulloch, who joined in the majority ruling, indicated that he did not consider the timing of the showing to be controlling. The majority opinion indicated that the Board considered the union's lack of opportunity to reply to the film's showing a significant factor. The Board characterized the film as "a moving story of callous union leaders, a helpless employer, unfortunate victims, including, as a climax, . . . [an] incident involving the [shooting of an] infant." Id. at 131.

49. In Carl T. Mason Co., 142 N.L.R.B. 480 (1963), the showing occurred twelve days prior to the election. Chairman McCulloch, concurring, said that the showing of the film was, in itself, sufficient grounds for overturning the election. In Storkline Corp., 142 N.L.R.B. 875, 879 (1963), the Board panel found that the film, shown one week before the election, was designed
Board characterized its earlier decisions as holding that "the film contains misrepresentations of such prejudicial nature" as to make the showing of the film prior to an election the basis for setting the election aside.\(^{50}\)

Perhaps overexposure of the film lessened its unlawful impact. In the 1973 Hawesville Rolling Mill\(^{51}\) decision, a Board panel of Chairman Miller and Members Fanning and Kennedy found no interference with the election where the employer showed the film on three successive days after the union filed its petition but before the employer received notice of the petition from the Board. The Board held Plochman inapplicable to these facts, reasoning that there were insufficient grounds upon which to base an order setting aside the election where there was no finding of any other unlawful or objectionable conduct.\(^{52}\) In the subsequent Heckethorn\(^{53}\) case, although the election was overturned for other reasons, a panel of Chairman Miller and Members Jenkins and Penello found, "in the context of [the] case," no violation or interference with the election when, a week before the election, the employer exhibited the film. The "context" of the case, and the basis upon which the election was overturned, was the employer's unlawful interrogation of employees and its threatening employees with loss of jobs.

\(^{50}\) Southwire Co., 159 N.L.R.B. 394 (1966), enforced in part, 383 F.2d 235 (5th Cir. 1967). The court overturned the Board's ruling that showing the film violated section 8(a)(1) because the circumstances of the case did not indicate that the film constituted a threat of reprisal or force by the employer against its employees. Id. at 241-42. The court's decision indicated that absent such proof, showing the film was protected by section 8(c) of the Act.

In Hawthorn Co., Div. of Kellwood Co., 166 N.L.R.B. 251 (1967), the Board again ruled that showing the film constituted an unfair labor practice under section 8(a)(1), but the ruling was again overturned. N.L.R.B. v. Hawthorn Co., 404 F.2d 1205 (8th Cir. 1969).

In Speed Queen, Div. of McGraw-Edison Co., 192 N.L.R.B. 995 (1971), enforced in part, 469 F.2d 189 (8th Cir. 1972), the Board again ruled that the exhibition of the film violated section 8(a)(1). In making its determination, the Board considered the court's holding in Southwire Co., but nevertheless found the exhibition of the film to be "unmistakably coercive," contrary to that case. Id. at 999. However, in light of the court's ruling in Hawthorn Co. and in a subsequent case, Kellwood Co. v. NLRB, 434 F.2d 1069 (8th Cir. 1970), cert. denied, 401 U.S. 1009 (1971), the Board did not seek enforcement of that aspect of its order.

Finally, in Luxuray, Div. of Beaunit Corp. v. NLRB, 447 F.2d 112 (2d Cir. 1971), the Board's finding of an unfair labor practice was once more overturned, the court characterizing the exhibition of the film as a "mere expression of anti-union sentiment." Id. at 116. Thus, all three courts of appeal which considered the lawfulness of an employer's showing of the film to his employees expressly found that no unfair labor practice had occurred.


\(^{52}\) The Board appeared to rely in part on the fact that the film was not shown after notice of the election was received. But that consideration would seem inconsistent with the Board's rule, see note 47 supra, that conduct occurring on and after the filing of the petition is to be considered on its merits as a basis for setting the election aside.

Finally, in Litho Press, Chairman Miller and Members Kennedy and Penello held that showing of the film "is neither violative of the Act nor a sufficient basis for setting aside an election," overruling all prior inconsistent decisions. Members Fanning and Jenkins disagreed with the conclusion that showing the film could never constitute a violation of the Act or interfere with an election. Member Jenkins indicated that, while in his view showing of the film is not in itself unlawful, the matter should be considered on a case-by-case basis with emphasis upon the surrounding circumstances in each case. A violation could be found if the employer had committed other unfair labor practices. However, Member Jenkins did not find the unfair labor practices in Litho Press sufficient to warrant a holding that the film also violated the Act. Member Fanning also espoused a case-by-case approach, and would consider "such factors as demonstrated hostility to unionization, employer assertions of such intransigence in bargaining as will likely provoke a union strike, and circumstances that permit a conclusion that the film . . . misrepresents the union's normal response to those who do not support its strike."

There are other recent examples of expansion by the Board of the employer's ability to engage in campaign conduct previously considered to be impermissible. For instance, in 1965 the Board held in Robert Meyer Hotel Co. that an employer's notice to employees to "Don't sign anything"—"Don't sign union cards" violated section 8(a)(1). That decision was followed until as recently as 1973, when in Trojan Battery Co., a Board panel found that the employer's statement in a letter to his employees, stating "Don't sign anything . . . don't sign cards," was not protected by section 8(c), but violates section 8(a)(1). The Board stated, "Admonitions, as opposed to views, arguments, or opinions, to employees not to sign union

55. Id. at 1015.
56. Those unfair labor practices included promulgation and enforcement of a discriminatory no-access and no-distribution rule; interrogation of employees; threatened loss of overtime; and encouragement of formation of a grievance committee, rather than the employees' selection of the union to represent them.
57. Member Fanning agreed that in this case there was insufficient basis for a conclusion that showing the film interfered with, restrained or coerced employees in the exercise of their section 7 rights. Id. at 1015.
58. 154 N.L.R.B. 521 (1965), enforced in relevant part, 387 F.2d 603 (5th Cir. 1967). However, the court's decision was based merely on its determination that there was some evidence in support of the Board's finding of a section 8(a)(1) violation. In NLRB v. Borden Co., 392 F.2d 412 (5th Cir. 1968), the court again granted enforcement to part of an order relating to the Board's finding of a similar section 8(a)(1) violation. In a speech to his employees, the employer stated: "The signing of a union card is serious and it could have a far-reaching effect on you, your family, and your job with the . . . Company . . . . Don't get mixed up in trouble which can cause you and your family to suffer for the rest of your lives." The court reasoned that such "veiled threats, as well as direct threats, of economic reprisal against union activity" violated section 8(a)(1). Id. at 414 n.4.
authorization cards, are violative of the Act. A year later, *Trojan Battery* was overruled by the full Board in *Airporter Inn Hotel*, where the employer had distributed a letter to its employees which included statements such as "refuse to sign any union authorization cards and avoid a lot of unnecessary turmoil" and "reject the union." The Board held that the statements were not instructions or directions, and did not contain any unlawful threats or promises. The Board majority, while admitting that the statements could be characterized as admonitions, cited the dictionary definition of "admonition" as a "gentle or friendly reproof, warning or reminder; . . . counsel against a fault, error, or oversight." The statements at issue were considered to be an attempt by the employer to persuade the employees, in a non-coercive manner, that it was counter to their interests to sign authorization cards, and, as such, did not constitute an unlawful order. The statements thus fell "within the ambit of § 8(c)," and the Board concluded that they were in fact protected by section 8(c) because the thrust of the statements was "purely informational in nature" and did not contain "threats of reprisal or force or promise of benefit." The majority rejected the contention of dissenting Members Fanning and Jenkins that the statements in question were coercive when viewed against the background of the entire letter. In the view of the dissent, while the language in question,  60. *Id.* Chairman Miller dissented on the ground that the statements involved were merely advice, protected by section 8(c).  61. 215 N.L.R.B. 824 (1974).  62. *Id.* at 825.  63. *Id.* at 826.  64. *Id.* at 827.  65. In this respect there is an apparent internal contradiction in the majority opinion. On the one hand, in rejecting the dissent's argument that the language in issue should be considered in the context of the entire letter, the majority asserted that: Unlike our dissenting colleagues, we find it unnecessary to speculate whether the "litany of successive events predicted by Respondent" in pars. 3 through 6 of the . . . letter constitutes an unlawful threat. Only the final paragraph of the letter was encompassed by the stipulation to the Board. *Id.* at 826. On the other hand, to support its conclusion that the statements in question did not violate the Act, the majority relied on what it considered to be the context of the entire letter: In our opinion, the phrases "Refuse to sign any union authorization cards . . . ." and "reject the union" when taken in the context of the entire letter do not constitute "instructions or directions" within the meaning of Section 8(c). If they stood alone as separate declarative statements they might well be deemed to be instructions or directions. But they do not stand alone—they constitute clauses in two sentences whose overall impact is argumentative in nature. Unless the language in dispute is to be read entirely out of context, it seems to us that the only reasonable interpretation is the following: What this boils down to is this: Refuse to sign any union authorization cards and [you will thereby] avoid a lot of unnecessary turmoil . . . . If you want job security and a good place to work under the best terms and conditions, [then] reject the union. Such statements in our view constitute permissible campaign propaganda—not instructions or directions to employees to refrain from executing authorization cards. *Id.* The distinction between "admonition" and "instruction" is apparently gaining popularity. In *Producers Rice Mill, Inc.*, 222 N.L.R.B. 875 (1976), the Board panel found no violation of section 8(a)(1) where an employer told employees to avoid attendance at union meetings. The
may, arguably, appear as harmless campaign rhetoric when read in isolation, it is highly coercive when read in the context of the entire letter and, by any objective analysis, takes on the appearance of a threat. Again we are presented with the same familiar litany of successive events predicted by [the employer] if the union is certified: (1) the [employer] will be faced with excessive and unrealistic demands by the union (i.e., a union-security clause) (2) to which it is morally opposed and therefore cannot agree; (3) the union, to enforce its demands, will inevitably strike, (4) which in turn will lead to the strikers losing their jobs to permanent replacements. The Board has time and time again condemned such unwarranted predictions, almost identical to those contained in the . . . letter, as veiled threats which tend to coerce employees in the exercise of the Section 7 rights.

The dissent did not purport to reach any conclusions as to the legality of the letter’s statements preceding the “don’t sign” language, but did consider those statements to be a proper consideration in determining the perspective in which the language in issue was to be evaluated. In that context, the dissent would have found a violation.66

Airporter Inn was followed by a majority of the full Board (Chairman Murphy and Members Kennedy and Penello) in Mt. Ida Footwear Co., Div. of Munro Co.68 Several of the employer’s officials told assembled employees not to sign union cards since such an action could be “fatal.” The majority held that the statements, in the context in which they were made, merely expressed [the employer’s] position that the employees would be better served in terms of benefits by rejecting the Union and that the employees should therefore not sign any cards. The use of the word “fatal” was a reference to the possibility that unionization could lead to difficulties if the Union were to strike to obtain unreasonable demands.69

The majority said that in Airporter Inn, the Board had found “a similar statement to be permissible campaign propaganda of the type which has become commonplace in our elections.”70

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69. Id. at 1013.

70. Id. Members Fanning and Jenkins dissented. They considered the employer’s remarks to be “a management directive to employees not to sign cards for the [u]nion unless they wished to subject themselves to the dire economic consequences which [the employer] implied would follow such action.” Id. at 1014 (dissenting opinion). In their view, “the statement that
The Board has also expanded the right of an employer to tell employees that if the union is voted in, bargaining will start from scratch. In 1966 the Board ruled in Raytheon Co. that an employer violated section 8(a)(1) by telling employees in a speech that if they chose the union "negotiations would start from scratch and employees could end up losing some of their present benefits." In Saunders Leasing System, Inc. decided in 1973, a violation was found where an employer warned employees that if they selected the union as their bargaining representative, the employer would unilaterally withdraw all employee benefits and thereafter bargain with the union from scratch. However, in Computer Peripherals, Inc. the Board ruled that since the following statement contained no implication that benefits would be taken away unilaterally, it was not unlawful.

But if you think I am going to start bargaining from where you are now you’ve got another think coming. I’m going to start from scratch, a minimum proposal. If the Union wants something like checkoff of union dues or preferred security for stewards they may have to exchange vacations, paid sick time or some other superior benefits you now have in order to get these things. Bargaining is just that, give and take.

The panel majority distinguished Saunders Leasing and found the facts before it "analogous" to those in an earlier case where "there was no union organization will be 'fatal,' unsupported by any objective facts, and even though sincerely believed by an employer, 'is not a statement of fact unless . . . the eventuality . . . is capable of proof,' and violates the statute. [NLRB v. Gissel Packing Co., 395 U.S. 575, 618-19 (1969)]. No factual support was adduced for the assertion here, and Gissel requires that it be found to be a coercive threat violative of Section 8(a)(1) of the Act." Mt. Ida Footwear Co., 217 N.L.R.B. at 1014 (dissenting opinion).

72. Raytheon Co., 160 N.L.R.B. 1603, 1607 (1966). On remand, the court enforced the Board’s order, 445 F.2d 272 (9th Cir. 1971). Relying on Gissel, the court reasoned that the employer’s statements "exceeded the bounds of permissible predictions and were such as to convey to its employees a distinct impression that economic reprisal would follow in the wake of a union victory." Id. at 273.
73. 204 N.L.R.B. 448 (1973), enforced in relevant part, 497 F.2d 453 (8th Cir. 1974).
75. Id. at 293-94.
specific implication that [the employer] intended to adopt a bargaining posture offering employees less than they were receiving.” 77 “Similarly,” said the majority, “in the instant case the [e]mployer’s remarks carried no implication that any benefits would be taken away unilaterally” if the union were victorious. 78

On the basis of Computer Peripherals, the panel majority in White Stag Manufacturing Co., 79 found no violation in the employer’s statement that if the union won, bargaining would begin at “bare table,” or federal minimums, instead of starting at existing levels of employees’ benefits and wages. The Board found no expressed or implied threats that the employer “would unilaterally eliminate the benefits of the employees and require the Union to negotiate to reestablish them,” and on that basis concluded that the “statements were permissible expressions of views.” 80

A similar expansion of employer speech rights has resulted from the Board’s recent grappling with the effect of employer notices stating that union victory will bring “serious harm” to employees. 81 The standards utilized by the Board in determining the lawfulness of such notices were set forth by the Board in 1967. A “serious harm” notice was considered unlawful where there was found to be a “direct relationship between the notice and the total context in which it . . . appeared, including unfair labor practices, which serves to give a ‘sinister meaning’” to the words. 82 Such notices were held to “[acquire] an illegal coercive effect when viewed in the total context of a union organizing campaign accompanied by other employ-

78. Computer Peripherals, Inc., 215 N.L.R.B. 293, 294 (1974). The legal analysis is less than persuasive. The Board considered Wagner to be determinative because of the absence of any implication that the employer had assumed a bargaining position. But it requires quite an analytical leap to find that the absence of such a position in Wagner is “similar” to the absence in Computer Peripherals of an “implication that any benefits would be taken away unilaterally.” Presumably, the Board considered Saunders distinguishable because of the absence of the latter type of threat. The analysis of the Board is further confused by its recognition that the employer stated that it would make a minimum initial bargaining proposal. Surely that constitutes expression of a “bargaining posture offering employees less than they were receiving.”
80. Id. at 1250. See also, Ludwig Motor Corp., 222 N.L.R.B. 635 (1976).
81. Indeed, these “serious harm” notices frequently include statements such as “bargaining starts from scratch.” See, e.g., NLRB v. Aerovox Corp., 435 F.2d 1208 (4th Cir. 1970) and Chauffeurs, Teamsters & Helpers, Local 633 v. NLRB, 509 F.2d 490 (D.C. Cir. 1974).
82. Greensboro Hosiery Mills, Inc., 163 N.L.R.B. 1275 (1967), enforcement denied in relevant part, 398 F.2d 414 (4th Cir. 1968). The Board felt “constrained” to delineate standards for determining where serious harm notice would be ruled violative of section 8(a)(1) because several courts of appeal had previously denied enforcement of its orders with respect to such notices. See, e.g., Amalgamated Clothing Workers v. NLRB, 365 F.2d 898 (D.C. Cir. 1966); Surprenant Mfg. Co. v. NLRB, 341 F.2d 756 (6th Cir. 1965); and Wellington Mills Div. v. NLRB, 330 F.2d 579 (4th Cir. 1964). However, the standards established by the Board in Greensboro Hosiery Mills had little influence on the Court of Appeals for the Fourth Circuit which preferred an analysis based on the presence vel non of unspecified “accompanying circumstances.” NLRB v. Greensboro Hosiery Mills, Inc., 398 F.2d 414, 417 (4th Cir. 1968).
er unfair labor practices reflecting a determined opposition thereto." 83 These standards were followed by the Board in 1972, in *Holly Farms Poultry Industries, Inc.* 84 The employer's letter to individual employees stated: "It is your Company's sincere belief that if this Union were to get in here, it would not be to your benefit, but to your serious harm." 85 The statement was held to violate the Act since it was made in the context of other unfair labor practices, namely, the discharge of two union adherents. Notwithstanding that the threat may have been stated "in terms relating to the unionization of the plant," the Board concluded that "the serious harm which [would befall] union adherents even before the Union 'got in' surely was not wasted on other employees who might be inclined to join the Union." 86 Shortly thereafter in *Liberty Mutual Insurance Co.*, 87 the Board found no violation where an employer stated its "sincere belief" that selection of a union to represent its employees "would not be to your best interest and, in fact, could deter and hamper your personal relationship with your Company." 88 In that case, however, no other violations of the Act had been found. *Liberty Mutual* was relied on in a 1975 decision, *Ohmite Manufacturing Co.* 89 The employer's serious harm letter was not found to violate the Act even though the employer committed other unfair labor practices, including the subsequent unlawful discharge of an employee. The panel majority considered *Liberty Mutual* controlling because, in the majority's words, there, "[a]s in the present case, the record failed to reveal any relationship between the letter and any concurrent unfair labor practices." 90 The letter, "viewed in the entire context in which it appeared," was thus

Moreover, several other circuits also adopted this vague "circumstances" test. See, e.g., Amalgamated Clothing Workers v. NLRB, 420 F.2d 1296, 1299-1300 (D.C. Cir. 1969); Serv-Air, Inc. v. NLRB, 395 F.2d 557, 561 (10th Cir. 1968); and J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 302-03 (2d Cir. 1967).

83. Greensboro Hosiery Mills, Inc., 162 N.L.R.B. 1275, 1278 (1967). The other unfair labor practices in *Greensboro Hosiery* included threats and interrogation, suggestions that bargaining would be futile, and references to harm to other companies' employees who had lost their jobs when the companies "sold out." The Board felt certain that employees would directly connect the above conduct with the employer's assertion that a union would work to the employees' serious harm, and read into those words a coercive meaning.

84. 194 N.L.R.B. 952, enforcement denied in relevant part, 470 F.2d 983 (4th Cir. 1972).
85. *Id.* at 954.
86. *Id.* at 952 n.2. One discharge occurred in the month preceding the letter and the other discharge occurred 12 days after the letter. Chairman Miller, dissenting, could find no relationship between the discharges and the statement, in that the "discharges occurred at a time when it was still unknown whether the union would 'get in.'" *Id.* at 952-53. In the majority's view, "[t]o ignore this obvious relationship between [the letter] and the fulfillment of the prediction of serious harm, so far as [the discharges] were concerned, is, in our opinion, more in the nature of 'bootstrap logic' than reliance upon all incidents taken separately or together, as indicating [the employer's] antiunion attitude." *Id.* at 952 n.2. The panel majority thus emphasized the context in which the threat was made as opposed to a direct cause and effect relationship between the letter and other violations.

87. 194 N.L.R.B. 1043 (1972).
88. *Id.* at 1044.
89. 217 N.L.R.B. 435 (1975).
90. *Id.*
considered to be protected by section 8(c). The majority made no mention of *Holly Farms* or the fact that what was absent in *Liberty Mutual* was not just a "relationship" between the statement and other unfair labor practices, but any other unfair labor practices at all.93

Expansion of the employer's right to solicit employee grievances during the pre-election campaign period has also occurred. Recent Board decisions have allowed employers more leeway in soliciting employee grievances during the campaign without fear of violating the Act or interfering with the election, as long as the employer does not explicitly offer to remedy the grievances. Previously, the Board held that where there was no past practice of soliciting employee grievances and the solicitations were in response to the union's organizational drive, such solicitations carried with them the implied promise that such grievances would be remedied and were unlawful.94

The inference, however, became "rebuttable" in the Board's 1974 decision in *Uarco Inc.* The employer, after explaining the mechanics of the imminent representation election to his employees, "threw open the discussion" in what the Board found was an offer "to entertain complaints or gripes," and took notes as to the matters raised so that they could be

91. *Id.*
94. See, e.g., *Hadbar, Div. of Pur O Sil, Inc.*, 211 N.L.R.B. 333 (1974); *Reliance Elec. Co.*, 191 N.L.R.B. 44 (1971), enforced, 457 F.2d 503 (6th Cir. 1972) ("even a refusal to commit [the employer] to specific corrective action, does not cancel the employees' anticipation of improved conditions if the employees oppose or vote against the unions."); *Swift Produce, Inc.*, 203 N.L.R.B. 360 (1973) (where no prior practice of soliciting grievances and such action coincides with the union campaign, "solicitation of employee grievances...carries with it the implied promise that such grievances would be remedied. Such conduct is clearly unlawful."). See also *Raytheon Co.*, 188 N.L.R.B. 311 (1971) (Miller, Chairman, concurring in part):

When an employer who has not previously had a practice of regularly soliciting employee complaints suddenly embarks upon such a course during an election campaign, there is a strong inference that he is, in effect, promising to correct any inequities he discovers as a result of his inquiries, and impliedly urging on his employees that the combined program of inquiry and correction will make collective action unnecessary. His refusal to commit himself as to what corrective action he will take and the statement that he cannot in any event do anything until after the election is over do not cure this evil, and indeed may even heighten the employee's anticipation of good things to come if only the election can remove the unwanted union from the picture.

*Id.* at 312.

Some courts of appeal, however, although agreeing that solicitations of grievances which are accompanied by an implied promise of benefits are violative of section 8(a)(1), have focused on the circumstances of the case as a whole, rather than automatically finding such an implied promise, where the employer had not previously solicited employee grievances and the initial solicitation corresponded with a union organizational drive. See, e.g., *H.L. Meyer Co. v. NLRB*, 426 F.2d 1090 (8th Cir. 1970), and *NLRB v. Tom Wood Pontiac, Inc.*, 447 F.2d 383 (7th Cir. 1971).

discussed at later meetings. The major complaint of employees was a lack of communication between management and employees, and especially the ineffectiveness of a shop committee established for employer-employee communication. Discussion of the shop committee was continued at subsequent meetings. The day before the election, the employer distributed a letter to employees, stating that it had learned what their legitimate problems were, that it was concerned about them, and that "we can work out these problems by working together." The employer stated during the meetings that it could make no promises about the grievances raised, and the Board found that the inference of a promise to correct grievances was "effectively rebutted." Member Jenkins, dissenting, asserted that solicitation of grievances, under existing case law, was by itself coercive and violative of section 8(a)(1) regardless of whether the employer expressly or impliedly promised to adjust such grievances. Further, in Member Jenkins' view, the record contained evidence sufficient to demonstrate that the employer did indicate to employees that their grievances would be remedied. Indeed, Member Jenkins would have found that the employer's "solicitation... of grievances amounted, not to a specific or implied promise to remedy grievances, but to an actual remedy of the employee dissatisfaction which created their interest in the union—the failure of management to communicate with the employees."

_Uarco_ was relied on in _Flint Provision Co._, where a panel majority ruled that the employer's questioning of individual employees as to reasons for their interest in the union was "akin to soliciting employees regarding the grievances which led them to seek union representation." The majority stated that this practice was "not unlawful conduct when, as in this case, the solicitation is unaccompanied by any promise of benefit," and cited _Uarco_ as support. The Board made no reference to the "inference" that the grievances would be remedied.

96. Id. at 2.
97. Id. The majority also emphasized the absence of a showing of union animus or a "context of other unfair labor practices." Id.
98. Member Jenkins emphasized that the rule was stated in Reliance Elec. Co., 191 N.L.R.B. 44 (1971), without limitation or qualification. _Uarco_, Inc., 216 N.L.R.B. 1, 4 n.14 (1974) (dissenting opinion).
99. 216 N.L.R.B. at 4 (dissenting opinion).
100. Id. at 4-5.
102. Id.
103. Id. Member Fanning, dissenting, viewed the questioning, which occurred in an office of the employer on a one-on-one basis and without assurances of non-reprisal, to be violative of section 8(a)(1) and a basis for setting the election aside. _Id._ at 524.

Recently, a Board panel in _Ken McKenzie's_, Inc., 221 N.L.R.B. 489, 490 (1975), stated that:

the mere solicitation of grievances, by itself, is coercive and violates the Act without the necessity of evidentiary proof that the Employer had indeed made explicit or implicit promises to adjust grievances. [citing cases] We see no reason now to depart
Finally, the Board has significantly altered its role as overseer of employer (as well as union) campaign speech with respect to the area of misrepresentation in campaign propaganda.

Until recently, the formula the Board adhered to for striking a balance between the "right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign with all the normal legitimate tools of electioneering," where a party to an election alleges that certain facts have been misrepresented, was set forth by the Board in Hollywood Ceramics. The Board stated:

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. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside. The Hollywood Ceramics standards were subject to intense criticism by some commentators. Moreover, Board policy in the area of misrepresentation was scrutinized by the Chairman's Task Force on the National Labor Relations Board. In its 1976 Interim Report and Recommendations, the Task Force stated:

from [the] standard that the Employer's solicitation of grievances, alone, prevented the employees from being able to freely express their wishes in the election. The panel said that Uarco was distinguishable because of the employer's statement there that it could not make any promises about the grievances, whereas, in the McKenzie's case, there was no evidence of a similar disavowal. The panel majority of Members Fanning and Jenkins went on to say that having noted the distinction, they did "not find it necessary to endorse its validity." Id. at 490 n.6.

105. Id. While it was "restating" the rule, the Board indicated that it would continue to consider the materiality of the misstatement, the special knowledge of the speaker, and the lack of independent knowledge on the part of the employees, in evaluating the alleged misrepresentation. Id.

The various courts of appeal have unanimously approved the Hollywood Ceramics standards. See, e.g., Bausch & Lomb, Inc. v. NLRB, 451 F.2d 873, 876 (2d Cir. 1971); NLRB v. Gold Spot Dairy, Inc., 432 F.2d 125, 129 (10th Cir. 1970); S.H. Kress & Co. v. NLRB, 430 F.2d 1234, 1239 (5th Cir. 1970); IBEW v. NLRB, 417 F.2d 1144, 1146-47 (D.C. Cir. 1969), cert. denied, 396 U.S. 1004 (1970); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525, 533-35 (9th Cir. 1968); Carlisle Paper Box Co. v. NLRB, 398 F.2d 1, 6 (3d Cir. 1968); Follett Corp. v. NLRB, 397 F.2d 91, 95 (7th Cir. 1968); NLRB v. A.G. Pollard Co., 393 F.2d 239, 241-42 (1st Cir. 1968); NLRB v. Louisville Chair Co., 385 F.2d 922, 927 (6th Cir. 1967); NLRB v. Bata Shoe Co., 377 F.2d 821, 828-29 (4th Cir.), cert. denied, 389 U.S. 917 (1967); Lord Baltimore Press, Inc., 370 F.2d 397, 401-02 (8th Cir. 1966).


Under the doctrine of General Shoe Corp., NLRB 124, 21 LRRM 1337, as applied in such cases as Sewell Mfg. Co., 138 NLRB 66, and Hollywood Ceramics, 140 NLRB 221, 51 LRRM 1600, the exercise of speech by a party may be the basis of a valid objection to an election, if it violates "laboratory conditions" even though the speech does not constitute an unfair labor practice. Many objections would be precluded if this Section 9 rule were abandoned. The Task Force considered, but does not recommend, a proposal to eliminate as a basis for objections the exercise by any party of its Section 8(c) rights to engage in speech which is not coercive and therefore does not constitute an unfair labor practice.

In Shopping Kart Food Market, a divided Board overruled Hollywood Ceramics, and thus abandoned its controversial standards on campaign misrepresentations. In lieu of those standards, the Board stated that it would "no longer probe into the truth or falsity of . . . campaign statements," and therefore, would "no longer set elections aside on the basis of misleading campaign statements."

All five members of the Board indicated that a statement made by a union official to employees which alleged that the employer "had profits of $500,000 during the past year," whereas in fact, the employer's profits totaled approximately $150,000, did not warrant setting aside the election won by the union. Speaking for the majority, however, Members Penello and Walther stated that not only had the Hollywood Ceramics rule failed to assure "employee free choice," but it had even "impede[d] the attainment of that goal." This failure was attributed both to inconsistent application of the rule by the Board and the courts and to the rule's purported encouragement of routine objections to campaign statements. More significantly, Members Penello and Walther stated that they fundamentally disagreed with the underlying assumption of the Hollywood Ceramics rule—that the exercise of free choice by employees requires the Board's protection from campaign misrepresentations. The majority stated that the rising degree of "employee sophistication" requires a regulatory model "based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." In support of

109. Id.
110. Id. at 1708.
111. Id. at 1705, 1709.
112. Id. at 1706.
113. Id.
114. Id. at 1707.
115. Id. This notion of "sophisticated employees" impervious to campaign misrepresentations (and perhaps by implication impervious to other illegal campaign conduct) has been previously suggested. See, e.g., Modine Mfg. Co., 203 N.L.R.B. 527, 530 (1973), enforced 500 F.2d 914 (8th Cir. 1974); Medical Ancillary Servs., Inc., 212 N.L.R.B. 582, 585 (1974) (dissenting opinion); Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224, 1233 (2d Cir. 1974) (Feinberg, Circuit Judge, dissenting); GETMAN STUDY, supra note 11, at 140, 150; Address by
their "model of employee behavior," the majority relied heavily upon a recent empirical study of NLRB elections by Professors Getman and Goldberg.

Reluctantly concurring, Chairman Murphy noted that she agreed with "the basic principles" of Hollywood Ceramics, but felt obligated to overrule that case because the administration of those principles had blocked "employee free choice" and had "restricted free speech." In a lengthy partial dissent, Members Fanning and Jenkins strongly opposed the abandonment of the Hollywood Ceramics rule. They suggested that the standards embodied by that rule promoted the "[st]ability of the bargaining relationship" by minimizing doubt about the fairness of the election process. They stated that the sheer quantity of uncontested elections demonstrated that the Hollywood Ceramics standards had encouraged "informed free will exercise of voter franchise," and that those cases where objections based on misrepresentations are considered by the Board represent "an excellent investment in maintaining our election standards." Finally, Members Fanning and Jenkins criticized the majority's reliance on the Getman study, and they delineated the methodological as well as the analytical problems which they perceived in that study.

**COMMENTARY AND PROPOSED CHANGES**

The controversy concerning the role the Board should play in supervising the election procedure and the merit of its rules governing pre-election conduct is reflected in scholarly criticism of the Board's approach to the entire area of campaign speech and conduct. These commentators have questioned both the efficacy and the substance of the Board's rules in this area. The fashionable conclusion seems to be that the Board should signifi-
cantly narrow its role in passing judgment on campaign conduct as well as on campaign speech.

If one theme in particular is expressed in the commentary, it may be the perceived lack of empirical evidence to support the assumptions inherent in current Board law. The recent publication of Professors Getman, Goldberg and Herman\textsuperscript{124} purports to respond to the felt need for empirical research in this area.

A. The Getman Study—Effect of the Campaign on Voting

The Getman study reports on the results of an investigation into "the effect of the pre-election campaign, particularly unlawful campaigning, on employee predisposition to vote for or against union representation."\textsuperscript{125} The authors analyzed thirty-one Board elections held during the period February 1972 through September 1973. The elections studied were selected primarily on the basis of the authors' determination of a likelihood of vigorous and possibly unlawful campaigning. An attempt was also made to include a variety of businesses, unions, bargaining unit sizes and communities.\textsuperscript{126} The study technique utilized by the authors was the extensive interviewing of individual employees in two "Waves." In "Wave I," employees were interviewed, as soon as practicable after an election had been ordered to determine their "pre-campaign sentiments about union representation."\textsuperscript{127} Included in the "Wave I" interview were questions as to how the employee felt about working conditions and unions in general. Employees were also asked whether or not they had signed a union authorization card and how they would vote if the election occurred the following day. The "Wave II" interviews were conducted immediately after the election. Employees were asked to recall the issues and claims put forth by both sides during the campaign. They were also asked to state how they voted and their reasons in so voting.

The findings and conclusions of the Getman study are indeed dramatic and controversial, as are its recommendations for change in the Board's supervision of campaign speech and conduct and the election process itself. Such controversy will undoubtedly increase in light of the Board's reliance on the study in \textit{Shopping Kart Food Market}.

The Getman study concludes that most employees vote in accordance with their initial predispositions, notwithstanding intensive campaigning by either or both parties.\textsuperscript{128} The authors attribute this situation to the intensity of employee opinions and attitudes regarding union representation prior to

\textsuperscript{124.} \textit{Getman Study}, \textit{supra} note 11.
\textsuperscript{125.} \textit{Id.} at 33.
\textsuperscript{126.} \textit{Id.} at 34.
\textsuperscript{127.} \textit{Id.} at 33.
\textsuperscript{128.} \textit{Id.} at 146.
the campaign. Those attitudes, in turn, are purportedly based on the employees’ degree of satisfaction with existing job security and wages. The authors conclude, however, that employee desire for unionization is not created by their dissatisfaction with their work as such, since most of the employees indicated that they were satisfied with the nature of their job. Rather the study suggested that unionization especially appealed to employees who liked their type of work but found their working conditions unsatisfactory.

The Getman study asserts that, in addition to working conditions, another factor which significantly influences how employees vote is their attitude towards unions in general. The study showed that forty-three percent of the employees interviewed had, in prior employment, been members of a union. Seventy-five percent of the employees interviewed stated that members of their immediate families had belonged to a union. Thirty percent of employees interviewed had voted in a previous NLRB election.

The study concludes that the employees, basing their voting decisions upon pre-existing attitudes, pay little attention to the campaign and to the issues which it raises. Relying on the study’s finding that eighty-one percent of those employees who stated a voting intent at “Wave I” voted consistently with that intent, the authors conclude that most employees are not influenced by the campaign.

The Getman study asserts that employees who decide to support the union are thereafter unaffected by apparent reprisals or offers of benefits, because they have discounted such employer behavior in their initial decisions to support the union. Threats or acts of reprisal, contend the authors, strengthen the employees’ desire for union protection, whereas employer promises or grants of benefits have little effect because they are considered inadequate or untrustworthy.

The study asserts that even the discharge of union supporters during the campaign, though viewed by other union supporters as discriminatorily motivated, does not deter the latter from voting for the union. Moreover,

129. Id. at 57. Those employees who were dissatisfied with the nature of their work were more likely to vote for unionization than satisfied employees; however, those dissatisfied comprised only a small minority.

130. Id.

131. Id. at 66.

132. Id.

133. Id. at 109.

134. Id. at 72. But cf. Shopping Kart Food Market, 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705 (1977), where dissenting Members Fanning and Jenkins suggest that the fact that 50% of the employees interviewed were at least generally aware of the union’s claims concerning wages elsewhere demonstrates significant awareness of that issue and, consequently, the potential manipulation of voters through misrepresentation. Id. at 1710.

135. GETMAN STUDY, supra note 11 at 129.

136. Id. at 130.

137. Id. at 130.
according to the authors, employees generally were not shown to be sensitive to interrogations.138

In studying "successful employer campaigns" (in which the greatest number of workers abandoned their original intention to vote for the union), the Getman study authors found no substantial difference in the proportion of written material to oral campaign efforts, nor in campaign style, between those campaigns and the "less successful" employer campaigns.139

Based on these findings, the authors recommend that the Board stop regulating almost all conduct as well as speech during election campaigns.140

B. Comments

Derek Bok commented in the Foreword to the Getman study: "I leave to others, more expert than myself, the task of evaluating the research methodology and the ultimate validity of the conclusions reached."141 Therein lies the question central to the study's value. Mere labor lawyers, labor relations practitioners, and others equally unschooled in the mysteries of empirical research and the intricacies of the social sciences, will find it difficult to evaluate the study's methodology. Skepticism of the study and of the validity of its conclusions is therefore predictable. In many instances the reported findings contradict assumptions long held and policies long established, and negate the perceived experience of individual labor law practitioners. Such skepticism, however, should not foreclose an objective consideration of the study inasmuch as it appears to be the good faith product of a substantial effort. At the same time, one should not accept its conclusions merely because of the complexity of its numerous tables and statistics, nor should the Board's reliance on the study in Shopping Kart Food Market be viewed as determinative of the validity of its conclusions.142 In the final analysis, if some of the conclusions, in addition to the

138. Id. Member Jenkins, however, points out in his further dissent in Shopping Kart Food Market that employees were not directly questioned about employers' interrogations. He also notes that the Getman study's data on interrogation is based on only 33% of those who voted. Shopping Kart Food Market, 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705, 1712 (1977) (dissenting opinion).
139. GETMAN STUDY, supra note 11, at 101.
140. Id. at 159.
141. Id. at xi-xii.
142. Although the Board majority relies on the study in overruling Hollywood Ceramics, Members Penello and Walther are careful to point out that their decision is limited to the narrow and specific area of misrepresentation, and that the Board will continue its "policy of overseeing other campaign conduct which interferes with employee free choice." Shopping Kart Food Market, 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705, 1708 (1977).

Moreover, the Board arguably lacks the institutional competence required to analyze the study properly. As stated by Derek Bok, a principal advocate of the study's conclusions, "the Board is singularly ill-equipped to evaluate the study" and its ultimate judgment as to accepting or rejecting the study's conclusions and recommendations "will be political." GETMAN STUDY, supra note 11, at xii.
one concerning campaign misrepresentations, are sustained by the Board, a valuable contribution will have been made.

Some questions and reservations become immediately apparent. The numerical narrowness of the sample leaves much to be desired. Only thirty-one elections were studied; a total of only 1,300 employees were contacted with 1,239 responding.

Geographically, the sampling is unrepresentative. The only elections included were those falling within the jurisdiction of NLRB regional offices of Chicago, Peoria, Cincinnati, Indianapolis and St. Louis. No elections conducted in the South were included. As previously noted, the study found that forty-three percent of the employees had been union members on other jobs; seventy-five percent had members of their immediate families who had been union members, and thirty percent had voted in a previous NLRB election. There is no data on whether these percentages would be representative of all sections of the country.

The extent to which the interviewing process itself may have affected the voting patterns cannot be determined. Employee interviewing of the type conducted in the study adds an ingredient to the campaign that is difficult to evaluate. Did the "Wave I" questioning itself influence the voters? Might employees, by virtue of their "Wave I" answers, have felt committed to a position they were thereafter more reluctant to change?

A serious question is raised by the timing of the "Wave I" interviews. Those interviews, on the average, did not begin until eleven days after the direction of election. The potential for substantial delay between the start of an organizing campaign, the filing of the petition, the direction of election, and the holding of the election itself is well established. In fact, the Getman study authors suggest, but discount, the possibility that employee voting intent could have been substantially affected by campaigning prior

143. Some of the questions which follow have already been recognized, and in some cases addressed by the study’s authors.
144. Getman Study, supra note 11, at 33. The dissent in Shopping Kart Food Market considered the sample “dubious” for purposes of statistical significance. The dissent noted that the failure of pre-campaign intent to predict the outcome of 2 of 31 elections, or about 7% of the elections studied, is approximately equal to the percentage of elections where the Board had ordered rerun elections under Hollywood Ceramics. Shopping Kart Food Market, 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705, 1710 (1977) (dissenting opinion).
145. Getman Study, supra note 11, at 34.
146. Control groups were used in only 2 of the 31 elections. Id. at 48-49.
147. Such a result would appear to be likely according to the “consistency theory” the authors utilize to explain voting contrary to pre-election intent. Id. at 146.
148. Id. at 69 n.18.
149. The Chairman’s Task Force Report, supra note 101, at 5, stated the following national median figures: 9 days from the filing of the petition to the notice of hearing; 14 days from the notice to completion of the hearing; 22 days from the close of the hearing to issuance of direction of election; and 30 days until the election. Thus, in the case of a hearing, and absent review at the Board level, the median is 75 days from the filing of the petition. Obviously, delays greater than the median figure occur; and the organizing campaign often begins substantially prior to the filing of the petition.
This conclusion does not seem to be fully justified. The authors assert that “most employees susceptible to coercion have been weeded out before the pre-election campaign takes place.” They reason that this group of employees is aware of employer hostility toward unions and of their own employer’s economic power over them. The authors conclude that such employees, rather than risk the employer’s exercise of that power, decide to have nothing to do with the union upon learning of the organizing campaign. All of these assumptions fail to take into account the possibility that the early anti-union campaign itself had a chilling effect well before the “Wave I” interviews.

Although it is well known that delay is sometimes an employer tactic, the impact of delay itself is not directly analyzed in the Getman study. The study attributes vote switching to changes in attitude concerning both job satisfaction and unions generally. It is possible that the delay tactic itself sowed the seeds of these attitude changes.

The study makes the following perplexing statement: “Union supporters who switch to the company do not appear to be influenced by the particular issues raised in the company campaign. That campaign, however, may encourage employees to reconsider their initial decision to support the union.” This would suggest that the campaigning has some sort of subliminal effect undetectable by the type of interviewing conducted.

In analyzing the basis of their conclusion that unlawful employer campaign tactics have no greater effect upon employee attitude than lawful employer campaigning, the authors make a telling observation. There is a
very fine line, indeed, between what the Board finds permissible free speech and what it finds coercive. The authors refer to the fine line, for instance, between employer references to plant closures based on union demands and outright employer threats of plant closures; and between the employer’s description of the detrimental economic consequences that unionization has brought about elsewhere, and a threat of reprisal for joining the union. According to the study, however, employees do not draw these neat distinctions. A conclusion to be drawn from these findings is that current Board distinctions are unrealistic. Thus, if employees regard a statement as a threat, the Board’s characterization of it as a “prophecy” makes it no less threatening.

The Getman study’s assessment of the effects of illegal employer campaigning contains an obvious weakness. All the elections studied were in fact conducted under Board standards requiring maintenance of “laboratory conditions.” The study purports to appraise the effects of transgressions from the Board’s rules. The findings of the study provide the basis for the authors’ recommendation that rules governing this conduct be eliminated. What has not been measured, however, is the impact of the no-holds-barred campaigns that could result.

The study is less than thorough in its treatment of the uncommitted employee. It would appear that approximately ten percent of the voters were initially undecided or refused to be interviewed. This is a sizable voting block in any election. Further, the report indicates that predisposition failed to predict votes accurately for nineteen percent of the employees interviewed. Even without the benefit of an empirical study, it is apparent that the vote of nineteen percent of the employees will determine the outcome of many elections.

In light of the Shopping Kart Food Market decision, however, it seems conceivable that the Board may reconsider and possibly further

\[\text{The number of Gissel bargaining orders [footnote omitted] issued on the basis of card majorities after unions have lost elections tainted by unlawful conduct shows that something is causing voters to switch. It is this inescapable fact which my majority colleagues, in reliance on these writers, ignore. Shopping Kart Food Market, 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705, 1712 (1977).}\]
\[\text{156. GETMAN STUDY, supra note 11, at 120.}\]
\[\text{157. Id.}\]
\[\text{158. Members Fanning and Jenkins suggested that in the area of campaign speech such a relaxed “almost anything goes” standard will lead to the demise of the “responsible [campaign] statement.” Shopping Kart Food Market, 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705, 1710 (1977) (dissenting opinion).}\]
\[\text{159. Id. at 73.}\]
\[\text{160. Id. at 73.}\]
\[\text{161. The significance of this unpredictable 19% was clearly demonstrated in the Getman study. In nine elections, some or all of these votes determined the winner. Id. at 103. Moreover, a random sampling of NLRB monthly election reports shows that about 29% of the elections held in October 1976, and about 37% of the elections held in February 1977, were decided by 20% or less of the eligible voters.}\]
modify current regulations governing pre-election campaign conduct. Thus it is reasonable to assume that the Getman study will be cited and relied upon by advocates of such reduced Board supervision of elections.

It is submitted, however, that there are still many unanswered questions concerning the validity of the Getman study, only a few of which have been referred to above. A rush to accept the study’s conclusions as gospel and as a basis for further major change in the law should be tempered by the need for more intense examination of both the methodology utilized and the conclusions reached in the study.

C. Reliability of Authorization Cards

Those who would embrace the Getman study simply because it supports greater employer license to engage in anti-union campaigning should read on. The study makes some interesting findings which affirm the reliability of authorization cards. The authors conclude, “The data demonstrate that card-signing is an accurate indicator of employee choice at the time the card is signed.” And, “Card-signing is a reasonably accurate predictor of vote...” With respect to the now well-established legal preference for a secret ballot election as the means of determining employee desire for union representation, the Getman study concludes that:

The preference for elections rests initially on doubts as to whether an employee who signs an authorization card wants union representation at the time he signs. Those doubts are unwarranted. Regardless of what other pressures may contribute to the decision to sign a card, nearly all card-signers reported that they wanted the union at the time they signed the card.

The authors also discuss the often-expressed reservation that the reliability of cards is questionable because the employees have not heard the employer’s side of the campaign. The study states that:

the voting decision, made after hearing the employer’s arguments, is not substantially more informed than the card-signing decision. Nor, for most employees, are the two choices different. For those few employees for whom the card-sign choice and the election choice are different, that difference is not associated with greater familiarity with the company campaign. Accordingly, the fact that most employees sign cards before having heard the employer’s arguments ought not prevent the issuance of a bargaining order based on cards.

162. On the other hand, it is quite possible that the Shopping Kart Food Market decision, itself, will be overruled by a new Board.
163. Id. at 132.
164. Id. at 133.
165. See notes 7-8 supra, and accompanying text.
166. GETMAN STUDY, supra note 11, at 135.
167. Id.
If the Getman study is credited, then the critics of *Gissel*-type bargaining orders lose ground in their argument that such orders are ill-founded because authorization cards neither truly represent employee choice when they were signed nor accurately indicate how the card signers would have voted in a secret ballot election.168

Carried to its logical conclusion, the study seriously questions the Supreme Court’s characterization in *Gissel*169 of cards as “admittedly inferior” to the election process. The Court’s holding in *Linden Lumber*170 that an employer may ignore the union’s claim of an authorization card majority likewise seems to rest on a weaker premise if this new-found empirical evidence is held to be probative.

It should be noted, in this regard, that legislation has been introduced in Congress which would amend the Act to require Board certification of a union, without an election, upon the filing of a petition and a showing that the union is authorized by fifty-five percent of the employees in an appropriate unit.171 If this proposed legislation becomes law, we will have proceeded full circle to the earlier law which provided for Board certification without the necessity of an election. The Getman study, if accepted, can be expected to provide some empirical evidence to support such a rebirth.

V

EQUAL ACCESS REVISITED

Other findings of the Getman study, if accepted, could compel a major change in Board rules by granting unions the right to respond to an employer campaign on company time and premises. The report confirms the long-standing contention of some commentators172 that to permit employers to engage in anti-union campaigning in a captive-audience situation, while denying the union an opportunity to respond in the same setting, creates a substantial imbalance and unfairness.

The study found that employees who attended employer meetings were significantly more familiar with employer campaign issues than those who

168. Many of the reservations regarding the study’s methodology in determining the effect of the campaign on employee vote seem to be inapplicable to the authorization card findings. The authorization card is tangible evidence which can be identified with the particular voter. Tracing the voting pattern of the card signer is a more narrow pursuit than that involved in determining the effect of the campaign on voters in general.

169. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). Note also Board Member Walth-er’s concurring opinion in U. & I., Inc., 227 N.L.R.B. No. 21, 94 L.R.R.M. 1064, 1068 (1976), where he states, “As we all know by now, the Court held that, subject to certain restrictions designed to protect the validity of authorization cards, cards are fully as adequate as a means to determination of majority representation as a Board-conducted election.”


merely received written material. The same correlation with respect to union issues was found for employees who attended union meetings. The unions, however, had substantially less success in getting employees to attend their meetings than did employers. The interviews revealed the reasons for non-attendance at union meetings: "held at an inconvenient time or place (forty percent), not interested in the union (twenty-nine percent), [and] did not know about the meeting (nine percent)." Thus, the study asserts that "[n]early all employees know about union meetings, but many are reluctant to attend such meetings off company premises after working hours."

The study also found that most employees attending union meetings already intend to vote union. While eighty-five percent of those employees intending to vote union attended one or more company meetings, only fourteen percent of those intending to vote company attended union meetings.

In summary, the authors state that:

The company, then, has a great advantage in communicating with the undecided and those not already committed to it. This advantage is particularly important since attendance at union meetings is significantly related to switching to the union. If the union could communicate with more of those not already committed to it, it might do significantly better in the election.

To correct this perceived inequity, the authors recommend that if an employer holds campaign meetings on working time and premises, the union should be accorded the same privilege. This same equal-access privilege, argue the authors, should be extended to instances where supervisors campaign on company premises, whether in individual or small-group meetings.

If the validity of the study is credited in this regard, we should once again see the law turn full circle. While the study would not justify a reversion to the early Wagner Act prohibitions against all employer anti-union statements, or to the Board’s Clark Brothers rule that employer captive-audience speeches are illegal per se, a return to the Board’s Bonwit

173. GETMAN STUDY, supra note 11, at 91.
174. Id.
175. Id. at 92.
176. Id.
177. Id.
178. Id. at 156.
179. Id. at 92.
180. Id. at 156-57.
181. Id. at 157.
182. Id.
183. See text accompanying note 15, supra.
184. See text accompanying note 16, supra.
*Teller* approach\(^{185}\) would seem appropriate. If the employer engages in captive-audience speeches, it should be required to honor the union's request for equal access.

The Getman study findings contradict the present Board assumption that unions generally have adequate opportunity to present their views to employees, without the need for on-premises meeting time.\(^{186}\) If change in this regard is indicated, the decision of the Supreme Court in *NLRB v. United Steelworkers of America (Nutone, Inc.)*\(^{187}\) suggests sufficient latitude for Board modification of its present rules, based on the apparent imbalance between employer and union opportunity to communicate with employees.\(^{188}\)

The Chairman's Task Force Report discusses a proposal made by its union members on the equal access subject.\(^{189}\) The proposal would have the Board adopt, through its rule-making procedures, one of three "equal entry" or "open door" options, which would become part of the required "laboratory conditions" for the conduct of elections.\(^{190}\) The Task Force Report stated that the matter was reserved for further study. Further study is indeed warranted.

Other recommendations of the Getman study provide that: bargaining orders, if used, "should be triggered automatically" by the conduct intended to be deterred rather than by being based on the alleged effect of the illegal campaign tactics on the election outcome;\(^{191}\) injunctive relief (section 10(j))\(^{192}\) be sought to obtain reinstatement of discharged employees prior to the election;\(^{193}\) and that treble damages for lost earnings, as well as loss of government contracts, be utilized to remedy illegal acts.\(^{194}\)

**VI**

**CONCLUSION**

There have been many changes in the law governing the respective rights of the parties in the areas of union organizing and employee representa-

\(^{185}\) See text accompanying notes 23-24, *supra*.


\(^{187}\) 357 U.S. 357 (1958).

\(^{188}\) See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 96-103 (1964).


\(^{190}\) The employer members of the Task Force strenuously disagreed with this proposal. It was reserved for further study. Two members of the Task Force dissented from including materials in the report regarding the proposal. Task Force Report, *supra* note 107 at 30.

\(^{191}\) *GETMAN STUDY, supra* note 11, at 155.


\(^{193}\) *Id.* H.R. 77, 95th Cong., 1st Sess. (1977) also proposes amendments to section 10(j) of the Act which would liberalize the use of temporary injunctions and restraining orders to remedy unfair labor practices committed during the course of an organizing campaign. Support for the liberalized use of such injunctive relief is found in Bok, *supra* note 100, at 131.

\(^{194}\) *GETMAN STUDY, supra* note 11, at 156.
PRE-ELECTION CONDUCT

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PRE-ELECTION CONDUCT

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It appears that the scales have tipped substantially in favor of the employer. In the period since the early Wagner Act years, the employer has acquired the right to depart from a position of neutrality and to engage in an anti-union campaign; the right to carry on that campaign in a captive-audience setting; the right to deny the union a response on company time and premises; absent the commission of significant unfair labor practices, the right to deny the union both certification and recognition without its having petitioned for, and succeeded in, a Board-conducted election; and in light of the Shopping Kart Food Market decision, the right to make misrepresentations. Moreover, the employer continues to gain greater freedom as to the content of its anti-union campaign, as the Board steadily relaxes its standards governing lawful employer campaign speech and conduct.

Some critics of present Board policy urge even less regulation of pre-election conduct. Empirical studies notwithstanding, it seems unwise to open the floodgates to the full potential of what is now impermissible and illegal employer campaign conduct. Such a drastic change runs cross current to established precepts and substantial experience. Evidence suggesting such change is at best inconclusive. A better approach seems to be a clearer statement by the Board as to what is permissible pre-election conduct and what is not, utilizing where possible the Board's rule-making authority. And, if further changes do occur, they should be accompanied by other long overdue reforms. Such reforms would include the prevention of tactical delay by provision for a speedier election process, the reestablishment of the union's right to equal access so that it can at least effectively respond to the employer campaign on an equal footing, the expanded use of the section 10(j) injunction in the pre-election period, and the adoption of more effective penalties for employer unfair labor practices occurring in the election setting. The use of the bargaining order should be retained and confirmed as a likely consequence of illegal campaign conduct. And, in the final analysis, we should reassess the current reverence for the Board election as the only means of gaining Board certification.