Selected Campaign Tactics Permitted Under the National Labor Relations Act

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INTRODUCTION

Obtaining status as the recognized representative of the workers in a plant or factory is usually achieved through a representation election conducted by the National Labor Relations Board (N.L.R.B.). The first step in the process for the union is to obtain a majority of authorization cards from the workers. Then the union will usually demand recognition and file a petition for election with the N.L.R.B. In order to file a petition, the union must have authorization cards from at least 30% of the bargaining unit. At this point a date is set for the election by the N.L.R.B. and the election campaign commences.

Needless to say, at this point the union is striving to persuade a majority of the employees to vote “Union,” and management is attempting to persuade a majority to vote “No Union.” A multitude of tactics can be employed by both sides to obtain their objectives; some are permissible, some are not. Since it is the Board’s responsibility to conduct and supervise the election, the Board serves as a neutral third party in deciding the propriety of conduct if an objection to the election is filed by either party. The Board’s role in this capacity is vital to the integrity of the election process as the effect of an election is far reaching. Simply put, the union by winning embarks upon a course of collective bargaining with the employer. On the other hand, a management victory results in maintaining the status quo, i.e. no union.

The thrust of this discussion is to concentrate on several tactics utilized mainly by employers (Soliciting and/or Remediing Grievances during an Election Campaign and Interrogation and Polling) and a tactic used solely by the union (Waiver of Initiation Fees). Following these discussions, a chapter will be devoted to Interference with the Board’s Election Process by both parties. Finally, the issue of Misrepresentations in an election is considered with a focus on the Board’s role in hearing objections.

There are two other methods to achieve recognition, but they are not used as frequently as the representation election. One method is the card check and the other is the strike. The employer will rarely acquiesce to card check recognition because a union will usually be able to muster enough signatures and therefore win. As to the strike, there is a considerable amount of risk involved when the union threatens strike. It may well be that there will not be enough support to be successful. For these reasons, the usual course of action is to utilize the N.L.R.B. conducted election.

In reality there should be a small time lapse as the employer may choose to honor the demand (very unlikely).


Tactics other than those discussed herein include solicitation, distribution, use of movies and poster, captive audience speeches, union buttons, violence, racial and sex prejudices, and surveillance.
election campaign will be discussed in depth as this issue is very important today in light of the ever changing approach of the Board over the past several decades.

I. SOLICITING AND/OR REMEDYING GRIEVANCES DURING AN ELECTION CAMPAIGN

The soliciting and remedying of grievances during an organizational campaign is a method that has been used by management to thwart the union's quest for members. Often a union is able to gain the upper hand in the drive for recognition due to the past practices and policies of management that has resulted in employee dissatisfaction. Recognizing the impact of possible recognition, the employer will quickly move to halt the drive of the union by rectifying worker complaints. Conduct of this nature constitutes interference with the organizational activities of the employees. Generally, the manner in which management solicits grievances is through a series of meetings or the use of a suggestion box.

In *H. L. Meyer Co., Inc. v. N.L.R.B.*, the Eighth Circuit sustained the Board's finding that the suggestion box was designed and did interfere with the organizational activities of the employees. The idea for the suggestion box originated with two employees, but the President of the company used the box to offset the gains made by the union concerning management's policies. After questions were submitted to management, answers were posted on the bulletin boards. Typical of the questions and answers are as follows:

Q: I heard that the employees of the other plants have been there 10 yrs. or over are getting 3 weeks paid vacation. Is this correct?
A: Yes. This year they will get 3 weeks pay, but only 2 weeks off. During a Union organization campaign the law prohibits us from changing employee's benefits; such is the case at H. L. Meyer Co.

Q: As I understand that the other plants such as Butler and Versailles get their raise prior to Feb. 1. Is there a possible chance that we the employees of H. L. Meyer Co. would get back pay if by chance the Union would be ruled out, come Mar. 1.
A: Butler and Versailles got raises Jan. 1. Yes, back pay for H. L. Meyer employees is possible, however, we can make no promise or take any action until after the election.

The Board found the employer impliedly conditioned the back pay award on the defeat of the union at the upcoming election as management stated no decision would be made until the election results were certified. In agreeing with the Trial Examiner, the Board stated:

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6 A § 8 (a) (1) violation of the National Labor Relations Act (N.L.R.A.)
That some of these replies constitute separate violations of Section 8 (a) (1) in that they created the impression that but for the pending union campaign certain employee benefits granted at the Respondent’s other plants would have been initiated at the Kansas City Plant. Thus, the Respondent sought to shift the onus of the delay to the Union and, at the same time, it impliedly conditioned these wage and vacation benefits upon defeat of the union at the election.⁸

In 1971, the Board found in *Reliance Electric Co.*⁹ that management’s use of meetings “to hear suggestions from the employees as to their jobs, what we might do to help them, and . . . to voice any complaints so we might adjust (them) where possible” violated Section 8 (a) (1) of the N.L.R.A.¹⁰ At a series of meetings the employees were afforded the opportunity to ask questions concerning any and all aspects of employment policies and practices currently being engaged in by management. Several of management’s supervisory personnel testified that the meetings were designed as a “complaint session,” and the reason for conducting such meetings was to correct the obvious breakdown in communications that had occurred. The Board found that even though the meetings were not publicized as a forum for “airing their complaints,” that was the purpose behind the practice. Finally, the Board stated:

Where, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.¹¹

In *Uarco Inc.*,¹² the Board found the inference raised by the employer’s conduct in soliciting grievances at preelection management meetings to be effectively rebutted. The record revealed ten preelection meetings were conducted by management during the month immediately preceding the election. Present at the meetings were various members of the supervisory staff of the employer. Attendance at the meetings was purely voluntary. The meetings were open to discussion and the principal complaint was the lack of communication between management and employees. Even though it appeared from testimony that the employees’ interpreted the purpose of the

⁸ *Id.*
¹⁰ *See also* Rotek, 194 N.L.R.B. 452b, 78 L.R.R.M. 1685 (1971) (gripe session); Flight Safety, Inc. 197 N.L.R.B. 223 (1972) (to find out what the problems were within the department).
meetings to afford the workers' the opportunity to express their feelings regarding employment conditions, management was careful to avoid any express "solicitation of complaints and grievances."

The Board found that the employer repeatedly conveyed the fact that no promises could be made and no promises were being made. In following this course of conduct, management clearly avoided the situation where employees could imply from statements made by the employer that conditions might change if the union was defeated at the polls. Furthermore, a letter containing the following statements was distributed to employees. This letter exemplified the course of conduct undertaken by management to express and negate any specific promises.

1. That I have learned what your legitimate problems are.
2. That I am concerned about your problems.
3. That we can work at these problems by working together.
I will make one promise that I will do my best.

The recent decision in Carbonneau Industries involved both the use of meetings and suggestion boxes by management and soliciting and remedying grievances during an election campaign. In this case the employer set up a series of meetings for the purpose of providing to the employees information concerning the financial and economic status of the company. These facts were discussed, but the forum was also opened up to questions concerning working conditions. Also, the employer replaced an old suggestion box with a new one and posted employee suggestions on the bulletin board. Many of these suggestions were identical to the ones raised at the previous series of meetings. Also included on the posted suggested cards were the words "checking into," "done," "finished," or "forthcoming" adjacent to the list of suggestion.

The Board in reaching its decision followed the Reliance Electric rule that "an employer who has had a past policy and practice of soliciting employee grievances may continue such a policy and practice during an organizational campaign." Here, Carbonneau had in the past had an "open door" policy on occasion, but the practice was used only sparingly. The instituting of a policy of holding a series of meetings designed to solicit grievances during an organizational campaign was found to violate the right of employees to have a free and fair choice in determining a bargaining representative.

13 See note 7, supra, and accompanying text.
14 216 N.L.R.B. at 2.
16 Id. at 597, 598. Grievances were aired concerning retirement plans, bathroom ventilation, additional relief personnel, holes in the floor, floor fans, the roof, and two supervisors.
17 Id. at 598.
The Union also objected to the employer's corrective measures undertaken in following the suggestions that were submitted by the employees in the new suggestion box. 9 These corrective measures were found by the Board also to be an interference with the election process.

From the line of decisions in this area, it seems that the Board will only set aside an election in two situations. The first situation is when the employer actively pursues the course of action of soliciting grievances in an organizational campaign and has not engaged in the practice in the past. 20 By doing so the Board will find that the only purpose is to thwart the union's campaign for representation. The other situation is when an inference is raised from the evidence that the employer is making a promise, and this inference is not rebutted by testimony that clearly negates the implication of a promise depending on the results of the election. 21

II. INTERROGATION AND POLLING

Once the representation campaign is under way, the employer often tries to discover exactly what the sympathies and feelings are towards both union and management. The most direct method to obtain this goal is by questioning individual workers. Howard W. Kleeble, then the Associate Executive Secretary of the Board, aptly stated in 1964 the employer's thoughts as to the discovery of inside information.

When an employer learns that an organizational campaign is going on among his employees, human nature being what it is, he's just bursting with curiosity to know whether any of his employees have joined, if there have been union meetings, who has attended them, and what was said? How better can he find out than to ask his employees? 22

The original Board view on this subject set forth in 1949 in the decision of Standard-Coosa-Thatcher Co. 23 In the opinion the Board discussed the general proposition that all interrogation is a violation per se of the N.L.R.A. 24 The Board stated,

Interrogation by an employer not only invades the employee's privacy and thus constitutes interference with his enjoyment of the rights guaranteed to him by the Act. Its effect on the question employed, like that of open surveillance of union activity, is to 'restrain' or to 'coerce' the

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9 228 N.L.R.B. at 599, 94 L.R.R.M. at 1504 (1977). The employer corrected grievances such as soda pop machine availability, lunch room facilities, and the number of ventilation fans in use.
21 216 N.L.R.B. at 1, 88 L.R.R.M. at 1103.
24 First Annual Report of the National Labor Relations Board at p. 76 (1936).
employee in the exercise of those rights. The employee who is interro-
gated concerning matters which are his sole concern is reasonably
led to believe this employer not only wants information on the nature
and extent of his union interest and activities but also contemplates
some form of reprisal once the information is obtained.25

The test set forth in Standard-Coosa-Thatcher28 was held to be too
rigid by the courts and was set aside by the Board in 1954.27 In Blue Flash
Express,28 the General Manager summoned the employees, individually, to
his office and told them he needed some answers to questions regarding
whether the employees had signed union cards. The purpose of the questions
was allegedly to obtain the requisite information so the General Manager
could respond to a letter he had received from the union. Under recent
decisions based on Standard-Coosa-Thatcher;29 the Board would have found
the employer's conduct to be violative of the Act. However, due to judicial
disapproval, the Board adopted the test set forth by the Second Circuit in
Syracuse Color Press.

We agree and adopt the test laid down . . . which we construed to
be that the answer to whether particular interrogation interferes with,
restrains and coerces employees must be found in the record as a whole.
And as the court states 'The time, the place, the personnel involved,
the information sought and the employer's conceded preference must
be considered.30

In Blue Flash Express31 the Board held the poll conducted by the Gen-
eral manager to be lawful based on the guidelines set down in Syracuse
Color Press.32 The adoption by the Board of the Syracuse Color Press test33
in Blue Flash Express34 was thought to have clearly set forth a direction of
the law in this area. This was not to be the case. The Board applied the
Blue Flash Express35 standard in cases involving interrogation, but the
Courts of Appeal on several occasions reversed the Board on the question
of what was the proper weight to be given the circumstances surrounding

26 Id.
28 Id.
29 85 N.L.R.B. at 1358, 24 L.R.R.M. at 1575.
32 209 F.2d 596 (2nd Cir. 1954).
33 Id.
34 109 N.L.R.B. at 591, 34 L.R.R.M. at 1384.
35 Id.
the interrogation of employees. The Board revised the *Blue Flash Express* test in *Struksnes*.

In *Struksnes*, the employer requested of the union that the company be informed of the number of employees who were union members as of a certain date in order to prepare for the coming negotiations. The company was so informed by the union. Two days later, the supervisory personnel of the company polled the employees and asked them to sign a paper whether they desired the company to bargain with and sign a contract with the union or not to bargain and sign a contract with the union. The employees were also told that there would not be any reprisal as the company did not care one way or the other whether there was a union or not. The Board held that the poll was lawful because

(a) its sole purpose was to ascertain whether the Union represented a current majority;

(b) the employees were given assurances reprisal;

(c) the evidence failed to establish that the employees answered untruthfully, but, even if they did, their answers did not result from any threats of reprisal; and

(d) the polling occurred in a background free from hostility toward the Union.

The Board rationale for this holding was based on the revised *Blue Flash Express* test. The Board's criteria was stated in the following language:

Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed:

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

(2) This purpose is communicated to the employees,

(3) Assurance 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.

The revised test requires the balloting to be done in secrecy. Furthermore, the Board warned the parties involved in an organizational campaign against using polls if a petition for a Board certification election is pending.

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86 Id.
88 Id.
89 Id. at 1064.
90 109 N.L.R.B. at 591, 34 L.R.R.M. at 1384.
91 165 N.L.R.B. at 1063, 34 L.R.R.M. at 1386.
because it would not "serve any legitimate interest of the employer that would not better be served by the forthcoming Board election."42

In 1974 the Board was faced with a case43 involving an unprecedented opportunity for the employees to participate in the selection of a newly created foreman position in the upholstery department. Management's decision to poll the employees was made after a representation petition had been filed but almost two months prior to the election. The Chairman of the Board testified that even though the employees were polled as to their choice for the position, no promise was made to them that management would abide by the results. A key fact in the Board's decision was that after the election a foreman position opened in the mill department. On this occasion the employees were not polled as to their choice.

The Board held that the polling of the employees violated Section 8 (a) (1) and that the employer's conduct constituted an interference with the election process. The Board stated:

> Even assuming that the participation of the employees in the selection of a supervisor was not intended by the Respondent to induce the employees to withdraw their support of the Union, nevertheless, such action on the part of the Respondent tended to have the effect of so inducing employees.44

The recent case of Clothing Workers v. N.L.R.B.45 involved an interesting ploy in the employer's attempt to avoid a conflict with the Struksnes rule.46 Here, the employer conducted a poll to discover employee preferences as to whether temporary employees should be permitted to vote at the upcoming representation election. The balloting took place in several areas of the plant and was conducted in a rather unorganized manner. In addition to the voting, management did undertake a rather intensive campaign in the days prior to the balloting on the subject of temporary versus permanent employees.

The Board held that the employer violated Section 8 (a) (1) of the N.L.R.A. in that the polling was conducted in an atmosphere of hostility between management and the union. In light of these circumstances, the Board found that the employer's balloting served as a "plebiscite" between

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42 Id. at 1063. See also Leonard Fontana, 169 N.L.R.B. 368, 67 L.R.R.M. 1210 (1968) where the employer interrogated employees while a petition was pending, the purpose of the interrogation was not communicated to the employees, and threats of a coercive nature were made to the employees. The Board found this conduct to be a violation of Section 8 (a) (1).
44 Id. at 915.
46 165 N.L.R.B. 1062, 65 L.R.R.M. 1385 (1967) see note 37 and 38 and accompanying text, supra.
the two factions and the ultimate effect was designed to discover the preference of sympathy of the employees toward the union.

The Struksnes test has not been modified or rejected since its adoption in 1967. The safeguards imposed by this standard are very rigid. Any deviation by an employer constitutes an interference with the election process, and an election will be set aside. If the management desires to conduct a poll, they must follow the standards set forth in Struksnes religiously.

III. Waiver of Initiation Fees

The waiver of initiation fees is an inducement that gives the union considerable leverage in attempting to sway the undecided voter over to the union's side. Always the issue of net pay is raised by the employer. Very simply management's argument to the workers is the certification of a union as the bargaining representative will result in less take home pay due to initiation fees and monthly dues. To combat this argument the union offers to waive the initiation fee. On occasion the union will even offer a reduction of the monthly dues for a period of time.

Originally the Board held that a promise to waive initiation fees constituted an act that was not consistent with the rule that employees should have a free choice in choosing a bargaining representative. In this case the union's proposal was clear as to how a waiver of initiation fees would be accomplished. Since the waiver was contingent on the outcome of the election, the Board adhering to Gruen set aside the election. It is important to note that the waiver in Lobue only applied to those voters who signed the card before the election. Workers who signed after the results were certified would not enjoy the benefits.

In 1967, the issue arose again in DIT-MCO, Inc. Again the issue was whether an election should be set aside when the union offered to waive initiation fees if the union was victorious. Here, as in Lobue Bros., the union offered the worker the opportunity to sign a card which would waive their initiation fee. However, the waiver would become effective only if the union won the election. In overruling the employer's objections of im-
proper conduct by the union during the pre-election campaign, the Board stated.

We shall assume, arguendo, that employees who sign cards when offered a waiver of initiation fees do solely because no cost is thus involved; that they in fact do not at that point really want the union to be their bargaining representative. The error in the \textit{Lobue} premise can be readily seen upon a review of the consequences of such employees casting vote for or against union representation. Initially, it is obvious that employees who have received or been promised free membership will not be required to pay an initiation fee, \textit{whatever the outcome of the vote}. If the union wins the election, there is by postulate no obligation; and if the union loses, \textit{there is still no obligation}, because compulsion to pay an initiation fee arises under the Act only when a union becomes the employees' representative and negotiates a valid union-security agreement. Thus, whatever kindly feeling toward the union may be generated by the cost-reduction offer, when consideration is given only to the question of initiation fees it is completely illogical to characterize as improper inducement or coercion to vote 'Yes' a waiver of something that can be avoided simply by voting 'No'.

The illogic of \textit{Lobue} does not become any more logical when other consequences of a vote for representation are considered. Thus, employees know that if a majority vote for the union, it will be their exclusive representative, and, provided a valid union-security provision is negotiated, they will be obliged to pay dues as a condition of employment. Thus, viewed solely as a financial matter, a 'No' vote will help to avoid any subsequent obligations, a 'Yes' may well help to incur such obligations. In these circumstances an employee who did not want the union to represent him would hardly be likely to vote for the union just because there would be no initial cost involved in obtaining membership. Since an election resulting in the union's defeat would entail not only no initial cost, but also insure that no dues would have to be paid as a condition of employment, the financial inducement, if a factor at all, would be in the direction of a vote against the union, rather than for it.

In short, there is no valid basis for concluding that an employee who votes for the union in a secret-ballot election must be doing so in any substantial measure because of the previously extended or promised waiver of initiation fees. We conclude, accordingly, that waivers, or provisional waivers of union initiation fees, whether contingent upon the results of an election or not, have no improper effect on the freedom of choice of the electorate, and do not constitute a basis for setting aside an election\textsuperscript{53}.

The Board's analysis of the issue of waiver of initiation fees in \textit{DIT-}

\textsuperscript{53} \textbf{163} N.L.R.B. at 1021, \textbf{64} L.R.R.M. at 1477. The effect of the decision was to overrule \textit{Lobue Bros.} and any cases relying thereon.
MCO was found to be erroneous by the Supreme Court in 1973. In this case, the union circulated “recognition slips” among the employees. By signing the slip prior to the election, the worker would become a member of the union and would not have to pay an initiation fee. The Supreme Court found that by attaching his signature to a slip was tantamount to showing outward support for the union, and this support could be and probably is used by the union as a campaign tool in attempting to persuade the workers who had not signed the cards at that point. The Court went on to state that if the union is permitted to continue engaging in this campaign activity, the Board, in effect, would be allowing “the union to buy endorsements and paint a false portrait of employee support during this election campaign.”

One of the major concerns of the Court was that even though the worker who signed the “recognition slip” was not obligated to vote “Yes” at the polls, he might feel obligated to do so in light of his previous actions. With this distinct possibility in mind, the Court held that this might violate the statutory policy of fair elections as set forth in N.L.R.B. v. Tower Co.

Since the Savair decision in 1973, the Board and the courts have handed down several decisions that have interpreted the Savair rule. In 1974, the Board was faced with a situation where the employer alleged that the union unlawfully promised the workers a waiver of initiation fees in order to persuade them to vote “Yes” for the union at the upcoming election. The offer by the union to the workers was made primarily in a one-page leaflet. The union contended that a meeting was held to explain the contents of the leaflet, and the constitution and by-laws provided for such a promise of waiver. The Board did not accept the union’s contentions as there was not any proof that all workers attended the meeting nor that a copy of the constitution and by laws was given to the employees. This

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54 163 N.L.R.B. at 1019, 64 L.R.R.M. at 1476.
56 414 U.S. at 273 (1973). The initiation fee was sometimes referred to as a fine. Also, those workers who did not sign the “recognition slip” would have to pay the initiation fee if the union was voted in as the bargaining representative.
57 Id. at 277.
58 Id. at 277 citing N.L.R.B. v. Tower Co., 329 U.S. 324, 330 (1946). The Board has the duty to establish “the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.”
61 211 N.L.R.B. at 724, 86 L.R.R.M. at 1498.
62 Id. at 724 (1974). The leaflet stated in pertinent part; “There are no initiation fees for charter members of a new local (and that is what you would be). Monthly dues will start when a contract has been made with the Company.” In addition three organizers put their signatures to the leaflet, and these workers communicated to other workers during the weeks prior to the election that “charter members” would not have to pay initiation fees.
being the case, the Board held that the leaflet was subject to various interpretations and therefore the conduct engaged in by the union was prohibited by the *Savair* decision.68

The Board also decided *Coleman Co., Inc.*64 in 1974. Here, the union through a letter to all employees informed the workers that no dues would have to be paid until a contract was signed with management. However, with respect to initiation fees the letter stated,65 “You will not pay any initiation fee. The initiation fee will be waived for all present employees who make application for charter membership in your new local union.” The Board pointed out that this case falls in line with *Inland Shoe Manufacturing Co., Inc.*66 Nowhere in the letter is an explanation offered as to when “application must be made” or what is entailed in a “charter membership.” The Board found that this resulted in an ambiguity and could have been interpreted by the workers that it was to their benefit to join immediately and “come in at the ground floor.” Failure to clarify the possible interpretations that could be derived from the letter violated the rules set forth in *Savair*, mainly, an interference with the employee’s Section 7 rights.67

In 1977, the Seventh Circuit68 enforced the Board’s order that a pamphlet’s language that waived initiation fees was within the guidelines of *Savair*.69 The Court of Appeals held that the employer’s contention that the intent of the language was to inform the workers that the initiation fee would only be waived if a card was signed prior to the election was without merit. The Court agreed with the Board and the union that the word “usually” was used in the context in describing the customary policy followed in the past by the union. Furthermore, the Court held that unlike workers in *Savair*70 who were faced with several possible interpretations of the meaning of the “recognition slips,” the workers here were not confused by the language set forth in the pamphlet.

A year later the Board was faced with a situation where the union offered the workers a reduced initiation fee and a waiver of the first month’s dues for a majority of prospective union employees.71 During the course of the campaign, the union informed the employees that upon receipt of

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64 212 N.L.R.B. at 927, 87 L.R.R.M. at 1004.
65 Id.
66 211 N.L.R.B. at 724, 86 L.R.R.M. at 1498.
68 562 F.2d 500 (7th Cir. 1977).
69 Id. at 503. The pamphlet’s language stated, “In new plants being organized, the International Union usually does not charge an Initiation Fee until after giving employees a certain period of time to join the Union after a Labor Board election. Those who join during that period will not be required to pay any initiation fee.”
70 Id.
71 522 N.L.R.B. at 499, 95 L.R.R.M. at 1150.
advance payments from a majority of prospective employees, the union would file a representation petition. If due to lack of support a petition did not get filed, then any and all funds collected would be returned to the workers. However, if a petition was filed and the union lost the election, then the monies collected would be retained by the union to cover the cost of the campaign. On the other hand, if the union filed a petition and won the election, then the advance funds would be applied to the first month's dues after a collective bargaining agreement was signed. A reduced fee proposal would remain in effect until the contract was signed.

The Board held the forfeiture policy did not constitute improper conduct in the election campaign. Rather the Board found the policy of the union to be one that offered no special inducement that would hinder the employees' right to a "free and fair choice." Furthermore, the majority of the Board decided the facts in the instant case did not fall in line with those of Savair. In Savair the union discriminated against the workers on the basis of whether they favored and supported the union prior to the election. Here, the situation was found to be the opposite in that the union treated all the workers alike, and the policy followed by the union resulted in an unbiased attitude toward both pro-union and anti-union employees.

In light of these decisions after Savair the key factor is whether the union's proposal is discriminatory as applied to all of the workers. As long as the union's policy is one that treats all of the employees equally, it does not violate the principles enunciated in Savair. Moreover, by adhering to Savair, the employees will be guaranteed a free and fair choice at the polls.

IV. INTERFERENCE WITH THE BOARD'S ELECTION PROCESS

Generally, the Board's view to the normal everyday campaign propaganda is to maintain a "hands off" policy unless the tactics employed by either party is such a flagrant interference with the election process. The use of the reproduction of ballots and other documents fall into the category of interference and is viewed with disfavor by the Board.

A. Reproduction of Ballots and Other Board Documents

The rule regarding the use of reproduction of ballots was set forth in Allied Electric Products, Inc. in 1954. This standard is still adhered to today by the Board in cases involving tactics of this nature. In this case, the employer, prior to the election circulated among the employees a docu-

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72 329 U.S. at 330 (1946).
74 Id.
75 See note 58, supra.
ment that appeared to be a sample copy of the Board's "Official Secret Ballot." The Board disagreed with the Regional Director's finding that the voters were not misled because the ballot was clearly marked "Sample." The Board concluded

Although the Board has traditionally declared its intention not to censor or police pre-election campaign propaganda by parties to elections, it must, in order to preserve an atmosphere of impartiality, impose certain limitations on methods used in campaigning. The reproduction of a document to purport to be a copy of the Board's official secret ballot, but which in fact alters for campaign purposes, necessarily, at the very least, must tend to suggest that the material appearing thereon bears this Agency's approval.

It is clear from the language of the decision that the Board will not allow any interference with the administrative functions of the Board. Engaging in conduct of this nature is an abuse of the election process set up by the Board, and any tactic employed to thwart the objective of a fair and free choice for the employees will warrant a setting aside of an election.

Four years later, the question arose whether an election should be set aside if the ballot is not purported by the employer to be a copy of the Board's ballot. In this case the ballot was on the bottom half of a handbill and the words "SAMPLE OF THE BALLOT" were printed on the top. The words, "UNITED STATES OF AMERICA, NATIONAL LABOR RELATIONS BOARD, OFFICIAL SECRET BALLOT," which are usually printed on the ballot were missing. However, the "NO" box was marked with an "X." The Board, adhering to Allied Electric, found this to be a violation and set aside the election.

Another case arose in 1958 in which the Board held that the marked ballot used by the employer did not violate the Allied Products rule and that the ballot did not communicate to the workers the impression of governmental endorsement. Here, the employer used the word "Sample" in place of the official words that generally served as the head note and deleted the official language in the middle of the ballot relating to the purpose of the ballot. Also, the words directing the voter to sign were deleted. In place of the signature instructions were the words, "Vote Right - Be Right."

77 Id. at 1271. Actually the employer had made several alterations. (1) The word "Yes" was printed in very large type and the left of the "Yes" box; (2) There was an "X" in the "Yes" box; and (3) An additional printed line had been added at the bottom of the ballot, reading: "Do not mark it any other way — Mark "YES" box only."

78 Id. at 1272 citing United Aircraft Corp., 103 N.L.R.B. 102, 31 L.R.R.M. 1437 (1953).


82 109 N.L.R.B. at 1270, 31 L.R.R.M. at 1538.

83 121 N.L.R.B. at 752, 42 L.R.R.M. at 1428.
It is difficult to distinguish Custom Molders\textsuperscript{84} and Glidden\textsuperscript{85} as the reproductions of the ballot seem to be almost identical. However, a close examination of the facts of the two cases indicates the Board scrutinized the effect of the "NO" marked on the Custom Molders ballot and found the effect to be such that employees might tend to believe this was an official endorsement.

In analyzing the facts and arriving at a conclusion in cases concerning reproduction of ballots, the Board still looks to the Allied Electric\textsuperscript{86} as the standard to be applied. Thus, in Associated Lerner Shops\textsuperscript{87} the Board held the sample ballot used by the employer to be nothing more than a campaign document. Its use was found not to be such that employees would be led to believe that the ballot was representative of governmental endorsement. But when the intent of the reproduction is to create the impression of governmental endorsement,\textsuperscript{88} the Allied Electric rule\textsuperscript{89} will be applied rigidly to set aside an election. In Silco,\textsuperscript{90} the Board held that the ballot used was not altered enough so as to tend to make one believe this was not an official endorsement. The deciding factor appears to be whether or not there is an indication that the altered ballot was prepared by management.

As a result of the decisions that have been rendered by the Board since the adoption of the Allied Electric rule\textsuperscript{91} in 1954, management must sufficiently alter a "Sample" ballot so as not to leave any impression that the document purports to be a government endorsement. One way to accomplish this goal is to draw caricatures on the ballot as management did in Associated Lerner Shops.\textsuperscript{92}

B. Use of Other Documents

The Board also looks with disfavor at documents other than reproductions of sample ballots. In Mallory Capacitor Co.,\textsuperscript{93} the union circulated a document that contained an altered reproduction of a complaint issued by the Regional Director. The altered reproduction was put together in such a manner that the employees only knew about the alleged violations. Also the complaint appeared to be a final judgment, when, in fact, it was not.

\textsuperscript{84} 121 N.L.R.B. at 1007, 42 L.R.R.M. at 1505.
\textsuperscript{85} 121 N.L.R.B. at 752, 42 L.R.R.M. at 1428.
\textsuperscript{86} 109 N.L.R.B. at 1270, 31 L.R.R.M. at 1538.
\textsuperscript{87} 207 N.L.R.B. 348, 84 L.R.R.M. 1463 (1973). The ballot was handwritten. Across the official headnote language were the words "SAMPLE." Below the "NO" box a hand with the index finger pointing to the "NO" box was drawn with the words "Your X in this square will mean you do \textit{not} want this union."
\textsuperscript{89} 109 N.L.R.B. at 1270, 31 L.R.R.M. at 1538.
\textsuperscript{90} 231 N.L.R.B. at 110, 95 L.R.R.M. at 1516.
\textsuperscript{91} 109 N.L.R.B. at 1270, 31 L.R.R.M. at 1538.
\textsuperscript{92} 207 N.L.R.B. at 348, 84 L.R.R.M. at 1463.
\textsuperscript{93} 161 N.L.R.B. 1510, 63 L.R.R.M. 1473 (1966).
Furthermore, the union added a picture of Uncle Sam pointing a finger with the words "Uncle Sam says Mallory Bosses Guilty." Citing Allied Electric, the Board stated, "It particularly looks with disfavor upon any attempt to misuse its processes to secure partisan advantage." The election was set aside as the purpose of the document was to create an impression the employer had been found guilty of federal law. For that reason the election was set aside.

In 1974, the Board decided the Dubie-Clark Co. case. Here, the employer and the union arrived at an informal settlement regarding unfair labor charges brought by the union. This agreement was dated six weeks prior to the election. The "Notice to Employees" concerning the informal settlement was posted 15 days before the election. Three days before the election the union distributed a leaflet which stated in relevant part:

I am sure you have seen the OFFICIAL NOTICE POSTED under the requirement of the Law where the National Labor Relations Board, An Agency of the United States Government, has found that Dubie-Clark has violated your rights under the Law. There are five (5) WE WILL END STATEMENTS . . . Read them carefully because they are very serious violations of your rights in a free and secret ballot election without fear or intimidation.

Yes . . . EMPLOYEE DAY at your plant was postponed by these violations . . . 'DO YOU THINK THE CHARGES THE UNION FILED WERE ERRONEOUS AND WITHOUT MERIT' . . . We feel that you know the merit of the violation.

This statement, even though not a reproduction of an official document, did concern a related official document. The Board set aside the election based on the fact the above quoted passage was inaccurate and misleading. Furthermore, the leaflet was used to secure a partisan advantage by creating an impression that the employer had been adjudged guilty of unfair labor practices.

In this case, Dubie-Clark was followed in Applegate Lane, Inc. the Board agent sent a letter to an allegedly discharged employee regarding the present status of this case. One week before the election the employer sent a leaflet to all of the employees. This leaflet contained a letter from the employer to Wilcox, the allegedly discharged employee. The pertinent portion of that letter reads as follows:

94 109 N.L.R.B. at 1270, 31 L.R.R.M. at 1540.
94a 161 N.L.R.B. at 1511, 63 L.R.R.M. at 1474.
96 Id. at 217.
98 209 N.L.R.B. at 217.
Willie Mae Wilcox was never fired. She claims she had hurt her foot at home and was going to the doctor. She was told to bring a doctor’s certificate when she was ready to return to work. The union *unjustly* brought charges against me. The investigator of these charges sent Willie a letter (copy posted in dining room). Enphasis in original).

The Board distinguished *Dubie-Clark*\textsuperscript{101} from the instant case in that the union’s distribution regarding an informal settlement agreement was for partisan purposes. Here, the Board found the record revealed the leaflet contained an official reproduction of a Board document. Furthermore, the employer did not characterize the letter as being an official government action. The intent of the leaflet was only to express the opinion of management. Thus, in this case, the Board did find the conduct of the employer constituted an interference with election process.

C. *Conduct at the Site of the Election*

Another area that the Board scrutinizes very closely is actual conduct of either of the parties at the election polls as some conduct may be an interference with the Board’s election process.

The Board, in 1968, recognized that past decisions\textsuperscript{102} regarding this conduct had not set forth a clear and concise standard to be applied to future cases. Thus, the Board enunciated in *Michem, Inc.*\textsuperscript{103} a strict rule to be applied to conduct at the polls. In this case, the Secretary-Treasurer of the union stood around the polls conversing with employees who were waiting to vote. The union contended that the only remarks made by their representative concerned general topics such as the weather. The Board held that the content of the conversation was immaterial. All that was necessary to constitute an interference was the fact that the union official was standing there in the first place. The Board set forth the following rationale for the adoption of the “blanket prohibition” of such conduct.

Careful consideration of the problem has now convinced us that the potential for distraction, last minute electioneering or pressure, an unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiring into the nature of the conversations. The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.\textsuperscript{104}

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\textsuperscript{100} *Id.* at 74.

\textsuperscript{101} 209 N.L.R.B. at 217, 85 L.R.R.M. at 1322.


\textsuperscript{103} *Id.*

\textsuperscript{104} *Id.* at 362.
This rule also applies to parties that do not engage in conversation in the polling area. In this case, several representatives of the union were positioned near the polling area with the list of the eligible employees who could vote. As each employee entered and departed the area, the union representatives made notations on the list. The Board held that the notations made could be inferred to be a recording of their names for future reference. Relying on several past decisions, the Board stated, "It has... been the policy of the Board to prohibit anyone from keeping any list of persons who had voted, aside from the official eligibility list used to check off the voters as they received their ballots."

The *Michem* rule is clear to the rationale behind it and the manner in which it will be applied. No one is allowed to be in the voting area. If either side violates this rule, the election will be set aside.

V. MISREPRESENTATIONS

The issue of misrepresentation by either of the parties in a campaign election is of particular interest today. For many years the Board kept a watchful eye on every move made by a party during a campaign. Then in April of 1977, the Board reversed its philosophy and rejected *Hollywood Ceramics*. In December, 1977, the Board suddenly reverted back to *Hollywood Ceramics*. At this point the immediate future of misrepresentation issues is clear, but as to the long term viability of the *Hollywood Ceramics* test, the future is uncertain as the Board may choose once again to adopt a different standard to deal with misrepresentation issues.

The National Labor Relations Act (N.L.R.A.) specifically provides in Section 7 that the employees shall have the right to choose or not to choose a collective bargaining representative. If a bargaining representative is chosen by the employees, that bargaining representative is the exclusive representative of the workers for the purpose of negotiating with management the terms of wages, hours, and other conditions of employment.

As stated in the introduction, the most common method of choosing

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105 168 N.L.R.B. at 793, 66 L.R.R.M. at 1360.
107 Hollywood Ceramics Co., 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962). The Hollywood Ceramics standard is used by the Board to investigate all aspects of alleged misrepresentations including whether the statement is true or false.
111 Id. § 159 (a).
an exclusive bargaining representative is by a N.L.R.B. conducted representation election. The only requirement spelled out in the N.L.R.A. is that the election must be carried out by secret ballot. Other than this requirement, the Board has a great deal of discretion in setting forth the rules and procedures to be used in a representation election.

In adopting these rules and procedures for the conduct of elections, the primary concern has been the guarantee to the employees of a free choice at the polls. The Board, as an independent guarantor of the exercise of free will, in effect, becomes a guardian over the pre-election activities of both the union and the employer. The purpose behind this policy has been to protect both parties as the outcome of an election affects employer and employee in terms of wages, hours, and working conditions. Thus, the Board began in 1948 to follow a policy of guaranteeing "laboratory conditions" situation during the campaign.

A. Background of Hollywood Ceramics

The policy of "laboratory conditions" was set forth in General Shoe Corp. In this case the employer engaged in certain activities during the last two months of the campaign which were alleged by the union to be coercive in nature. First, the employer sent a series of letters to the employees to correct certain prior misleading statements dealing with the loss of jobs and pay increases if the workers should become unionized. Subsequently, the President of the company sent personal messages to the employees concerning paternalistic benefits now enjoyed by all employees without a union. Finally, during the final week of the campaign, management paid for a full page advertisement in the town's newspaper, addressed small groups of workers in the President's office, and distributed a series of leaflets to the employees. The leaflets were clearly indicative of management's position in that they included slogans such as "Let's Have the Truth," and disparaging cartoons of the American Federation of Labor. In addition, the leaflets contained questions such as "Why there had been no unionization drive at other plants?" and "Why the United States Government did not allow unionization at Oak Ridge during the production stages of the atomic bomb?". As to the latter question, management offered several possible answers. One such answer was that it was just possible that the government did not trust union leaders. Another was that unionization means trouble. Also religious overtones were added to the campaign in form of accusations aimed at the union's representative.

The result of the company's intensive campaigning was a one sided

114 Id. §§ 152, 159 (c) (1).
115 Id. § 159 (c).
victory. The union brought unfair labor charges against the company for the type of tactics employed. The Board held there was no violation of Section 8 (1) as management's viewpoints were expressed in the form of opinions, not threats or reprisals. However, the Board did set the election aside on the basis that management's conduct created an atmosphere which rendered a free choice improbable, and therefore, the results should be invalidated even though the conduct did not constitute an unfair labor practice. The Board found that “an election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative.”

The policy adopted by the Board was analogized to that of a scientific experiment. The idea behind this policy was to put the worker in a vacuum so as not to affect his choice at the polls. But, however ideally the Board may desire a “laboratory” type situation, that is not practicable as the effect would be no campaigning at all. No campaigning would then be a restriction of free choice as the employee would not have the facts of the management’s viewpoint. This being the case, the Board has followed a policy of allowing certain campaign practices so as to permit a choice between the parties, but the Board consistently maintained on paper that the “laboratory conditions” concept must prevail.

After the General Shoe opinion was set forth, three major decisions were handed down by the Board during the next thirteen years. The rationale of these opinions culminated in the Hollywood Ceramics test which was followed for the next fifteen years.

In United Aircraft Corp., the Board set aside an election due to

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118 Id. at 126.
119 Id. at 127. The Board stated “in election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly as 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.”

120 For a criticism of the “laboratory condition” ideal see Siegel, Union Election Campaigns — A New Ball Game Under the Board’s Shopping Kart Ruling? 1978 LABOR LAW DEVELOPMENTS 35 (1977) hereinafter cited as Union Election Campaigns. Siegel quotes Judge Goldberg’s language in N.L.R.B. v. Sumpter Plywood Corp., 535 F.2d 917 (5th Cir. 1976). Judge Goldberg’s opinion as to “laboratory conditions” was “Although the Board aspires to laboratory conditions in elections, we recognize that clinical asepsis is an unattainable goal in the real world of union organizational efforts. Some degree of puffery and propagandizing must be permitted else the laboratory would be found infected in every case. But in the end, we must rest our faith in the ability of the workers, apprised of the position of both sides on all issues, to see through puffery and hyperbole and to vote their own interests.”

121 77 N.L.R.B. 124, 21 L.R.R.M. 1337 (1948).
123 140 N.L.R.B. at 221, 41 L.R.R.M. at 1600.
124 103 N.L.R.B. at 102, 31 L.R.R.M. at 1437.
management's distribution to the employees of a forged telegram that allegedly contained false information. The Board reasoned that it was virtually impossible for the employee voters to realize the nature of the telegram, and therefore its distribution interfered with their freedom of choice.

Two years later, *Gummed Products Co.* was decided. Here, the Union distributed handbills one week before the election which contained the wage rates allegedly paid by other companies represented by the union. One of the companies referred to in the handbill was Setton Fiber Company which was located about eight miles from Gummed Products. Setton was engaged in the same type of manufacturing as Gummed Products. Management of Gummed Products checked the rates in the handbill with Setton and found them to be erroneous. Immediately management challenged the union to reply. The union chose not to do so. The Board in setting aside the results of the election stated, "The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election." In the instant case, the Board found the union representative who incorrectly stated the wages of the Setton plant was in a position to know the wage rates as he was also the bargaining representative for the workers at Setton. This being the case, the employees at Gummed Products were intentionally mislead, and their freedom of choice was interfered with.

In *U.S. Gypsum Co.*, the employer received telegrams from the manager of another U.S. Gypsum plant. The telegrams stated that the "International Boss" of the union had all the control over negotiations, and the members at his plant now regret ever being associated with the union. These telegrams were posted in the plant and copies were distributed to supervisors who then discussed the text of the telegram with the employees. The Board held that the manager of the other plant was in a position to know the circumstances surrounding negotiations at his plant, and he knew that local members were permitted and had participated in the negotiation process in the past. Based on these facts, the Board determined that the election should be set aside and in the future other elections should also be set aside

where (1) the employees would tend to give particular weight to the misrepresentation because it came from a party that . . . was in an authoritative position to know the true facts, and (2) no other party had sufficient opportunity to correct the misrepresentation before the election.

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125 112 N.L.R.B. at 1092, 36 L.R.R.M. at 1156.
126 Id. at 1094, 36 L.R.R.M. at 1157.
127 130 N.L.R.B. at 901, 47 L.R.R.M. at 1436.
128 Id. at 902 (citing Celanese Corp. of America, 121 N.L.R.B. 303, 42 L.R.R.M. 1354 (1958)).
B. Hollywood Ceramics

In 1962, the Board set forth the test\footnote{129} that was used without interruption in election cases involving misrepresentation allegations for the next fifteen years. In Hollywood Ceramics the union distributed a handbill to the employees in English and Spanish. This handbill contained comparative wage rates for similar job classifications at other ceramic plants that were represented by the union. However, the wage rates stated in the handbill did not reveal the effect of the existing payment plan, and the only reference made to this incentive plan was at the end of the wage rate tables. This reference was printed only in English. Also, the rates stated by the union were not truly comparative as the type of operations and degree of skill required at the other plants varied from the Hollywood plant.

The Board's holding in Hollywood Ceramics was based on the policy that the employees must be guaranteed a full and complete freedom of choice in the selection of a bargaining representative. However, this policy must be balanced with the rights of the participants in an election to conduct a vigorous campaign. The Board noted this balance that must exist has been stated several ways.\footnote{130} For the guidance of the parties involved in the instant case, the Board restated the formula in the following manner.

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 this 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. Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election.\footnote{131}

In applying this standard to the facts, the Board found the handbill to have violated the employees' freedom of choice in that the misrepresentations stated therein grossly understated the employer's rates, and the rates for the compared plant were very much exaggerated. Furthermore, the passing reference to the Hollywood incentive plan was ambiguous and, in effect, gave the employee several possible interpretations as to the meaning of the statement. Also, the Board noted that even if the sentence is the
handbill referring to the incentive plan was acceptable, the fact that the sentence was printed only in English was misleading to the approximate one-third Spanish speaking.

The basic factors of the *Hollywood Ceramic* test are (1) the misrepresentation must be substantial, (2) the misrepresentation must be reasonably tend to have a significant impact on the election, and (3) the misrepresentation must be made at such a time that an insufficient opportunity exists for the opposition to reply. In addition, the Board noted in footnote 10 of the opinion that the statement may be more likely to be deceiving if made by a person in a position of authority that has access to the truth or falsity of the statement.

The adoption of the standard left the Board a great deal of discretion in applying the test to each case. The Board was able to look at each particular set of facts and determine whether the misrepresentation was substantial and whether it could have a significant impact on the election. In analyzing the facts on the basis of these two criteria, the Board’s decisions did not follow a consistent pattern due to the nature of the test and the philosophies of the different individuals serving on the Board over the years.

With regard to the time of the misrepresentation, the Board and the courts often were able to dispose of this factor rather easily. The key is whether the employees have a sufficient opportunity to gain access to the information which is the source of the misrepresentation. If the em-

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132 Id.

133 The “knowledge” factor is not always required. See 9 TOL. L. REv. 399 at 405 (1977). The First Circuit stated the formula for “special knowledge” in terms of the employee’s perception. In N.L.R.B. v. A.G. Pillard Co., 39 F.2d 239 at 242 (1st Cir. 1968), the court stated, “In judging the effect of a misrepresentation the test cannot be whether the speaker had special knowledge, but must be whether the listeners would believe that he had a misrepresentation by one having prime access to pertinent facts would be of no consequence if, for some reason, his listeners did not think him believable. On the other hand, a misrepresentation by one in fact having no knowledge at all would be effective if he thought to be credible.”

134 See 38 TEMPLE L. QTRLY 288 (1965) with specific reference to footnote 2 at p. 288 and accompanying text.


136 See Lipman Motors, Inc. v. N.L.R.B., 451 F.2d 923 (2d Cir. 1971). In this case the misrepresentation took place one week before the election. The Board held one week to be sufficient for the opposition to reply and the Second Circuit affirmed; Gummed Products Co., 112 N.L.R.B. 1092, 36 L.R.R.M. 1156 (1955), where two days was not sufficient time to reply. And Lundy Packing Co., 124 N.L.R.B. 905, 44 L.R.R.M. 1530 (1959), where two days was sufficient time in that these misstatements had been made two months before, and this was ample time for the employees to investigate their accuracy. See N.L.R.B. v. Cactus Drilling Corp., 455 F.2d 871 (5th Cir. 1972) for criticism of Board’s policy regarding the time element.

137 For example, see N.L.R.B. v. Bata Shoe Co., 377 F.2d 821 (4th Cir. 1967). In this case the union disturbed a leaflet two days before the election comparing the “Beta” and the “Union contract” ways for measuring piece work. The company contended this was a misrepresentation. However, the company did not respond to the union’s allegations in the company publishes and union leaflet published two days after the distribution of the
ployees are able in a timely manner to discover the truthfulness or falsity of the information, then the Board is not likely to set aside an election.

The Board is also found after the adoption of the Hollywood Ceramics standard that the courts often disagreed with the Board’s decision. Problems with court enforcement and the general attitude of the labor community regarding inconsistencies in decisions led the Board to reexamine the Hollywood Ceramics test in Modine Manufacturing Co.

C. Modine Manufacturing Co.

In Modine, the union won the election by a vote of 93 to 86 over the Intervenor Sheet Metal Workers’ International Association Local Union No. 2, AFL-CIO. The Intervenor challenged the result with allegations that the Union had made material misstatements as to wages, benefits, strike assistance, and dues. The Respondent company desired a hearing after the Intervenor filed objections to the election. In its brief the Intervenor stated that in several recent cases the Board had erred in failing to direct hearings when alleged misrepresentations were based on the Hollywood Ceramics standard.

The Board stated in the test of the decision that the task of the Board is very difficult in terms of funds and personnel to deal with the numerous cases that arise each year. The Board went on to say that the task assigned to the Board is an administrative one, and a decision must always be made one way or another when an objection is filed over an election. Clearly, if the integrity of the election is shown by one of the parties to be in doubt, then the Board must examine the background of the election notwithstanding the factors of funds and personnel that may have to be expended to settle the question. However, in cases where the allegations are too speculative, the Board must in administrative capacity refuse to hear the case. The purpose of refusing to hear a case is based on the need to effect the election result when the allegations are too speculative to warrant review. In order to inform participants in future elections, the Board, adhering to Hollywood Ceramics, stated the following policy.

leaflet. Also, the Regional Director found that “because most of the employer's production employees are piece workers, the employees themselves would be in an excellent position to evaluate the truth or falsity of “Bata’s Way.” The Court of Appeals affirmed the Regional Director's conclusions.


140 Id.

141 Id. at 529. The Board noted that 27,000 unfair labor charges and 9,000 elections must be processed and handled each year.
there must be a reasonably flexible and not too constrained or rigidly controlled area left for administrative expertise in determining, in the best judgment we can muster from our knowledge and experience in the field, and in the exercise of sound administrative discretion, what circumstances justify either invalidating an election or holding a hearing on misrepresentation issues.  

As to the Hollywood Ceramics standard, the Board explicitly reaffirmed the test and indicated how the Board would evaluate cases in the future.

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

From the language of the Modine opinion, the Board seemed to believe that from that point on the Hollywood Ceramics standard would be better understood as to how the test would be applied and the policy underlying the application. However, as much as the Board had hoped for a better understanding of its policy in the labor community, this was not to be the case.

D. Member Penello’s Dissenting Opinions

A year after Modine was decided, the Board heard the case of Medical Ancillary Services, Inc. The case involved alleged misstatements by the chief stewardess to an employee concerning information made to the stewardess by the Vice President of the company. The Board affirmed the administrative law judge’s decision that these statements were too close to the time of the election and a strong likelihood existed that they had a substantial impact on the election.

Member Penello, in a vigorous dissenting opinion, began a crusade against the majority’s strict interpretation of the Hollywood Ceramics’ “laboratory conditions” concept. The dissent’s criticism was twofold in that (1) the decision was a miscarriage of justice, and more importantly (2), the Board’s entire policy concerning misrepresentation issues in elections was erroneous and should be laid to rest. The language used by Member

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142 Id. at 530.
143 Id. at 529.
145 Id. at 586. Specially, Member Penello argued vigorously that the Board has continued to review whether the misstatements are true or false when in the past the Board has said they would not engage in such a determination. Also, the Board suggested in Modine that in
Penello is extremely strong and very much to the point. The following statements clearly indicate his strong desire to rid the labor community of the "laboratory conditions" doctrine imposed by Hollywood Ceramics and adopt the more modern point of view of intervening only when the deception is intentional.

I submit that under the guise of maintaining laboratory conditions we are treating employees not like mature individuals capable of facing the realities of industrial life and making their own choices but as retarded children who need to be protected at all costs. . . . In sum, the Gummed Products role, as "clarified" by Hollywood Ceramics, has served only to impose increasingly greater restrictions on activities of parties in conjunction with Board elections and heavier caseloads on the Board and has led to substantial delays in the final disposition of representation cases. I see no reason why the Board should continue to intervene "to protect voters from their own gullibility," and would limit Board intervention to cases involving . . . intentional trickery which the voters could have no reason to suspect and no reason to check for authenticity.146

In 1975, Member Penello again filed a strong dissent against the continued use of the Hollywood Ceramics rule in Ereno Lewis.147 Here, a leaflet was distributed by management with a "sample check" attached revealing the net amount an employee could expect to receive if the union won the election. A majority of the Board found that the company had misstated the initiation fee and the period in which all monies due the union had to be paid. Therefore, on the basis of these facts, the majority found that the employer had engaged in a material misrepresentation and due to the timing of distribution of the leaflet, the union was left without an adequate amount of time to reply.

Member Penello, as he did in Medical Ancillary Services, Inc.,148 traced the development of misrepresentation cases and strongly attacked the majority's continued adherence to Hollywood Ceramics. In this case, Member Penello did agree with his fellow colleague, Member Jenkins, as to the computation of the monies as the amount required to be contributed was actually understated by several dollars.149 As to the time period required for payment, Member Penello argued that at no time did the company state

the future there would be a tightening of the number of hearings granted by the Board, and that has not been the case as evidenced by the present decision. Finally, he cites Professor Bok's treatise on campaign regulation, Regulation of Campaign Tactics and the Williams study, NLRB Regulation of Election Conduct regarding the vagueness and subjectivity of the Hollywood Ceramics test.

146 Id. at 585, 586.
148 212 N.L.R.B. at 582, 86 L.R.R.M. at 1598.
149 217 N.L.R.B. at 240. Due to the numerous funds that members would be required to contribute to, the amount used by the employer on the "sample check" was fairly accurate. The Union could only contend that the amounts stated were placed in the wrong fund.
or imply that the total amount had to be paid at once. All the company was trying to accomplish was to show the employees what the financial impact of union deductions would mean to their take-home pay. In conclusion, Member Penello contended that all employees had to do to comprehend the meaning of the figures used on the "sample check" was to use some basic everyday common sense and their ability to understand the English language. Perhaps Member Penello's view with regard to the majority opinion is best summarized in the opening paragraph of his dissenting opinion.

In the hope that my words will not fall on deaf ears, I take this opportunity to urge once more that this Board give Hollywood Ceramics a decent burial and return to its earlier, intrinsically sound policy of not inquiring into the truth or falsity of the parties' campaign statements.150

E. Shopping Kart Market, Inc.

With great pleasure, Member Penello along with Member Walther drafted the majority opinion in Shopping Kart Market, Inc.151 in April, 1977. This decision in this case resulted in the "decent burial" of Hollywood Ceramics. For many in the labor community, the decision did not come as any great surprise.152

In Shopping Kart, the union's Vice President and business representative stated on the day before the election that the company's profits for the previous year was $500,000 when in fact it was only $50,000. The Regional Director found there was no misrepresentation under Hollywood Ceramics since the union representative was not in a position to have access to the profits of the company. The Board agreed with the Regional Director, but the majority based its decision on Member Penello's dissenting opinions in Medical Ancillary153 and Ereno Lewis.154 The majority accepted Member Penello's contentions that the Hollywood Ceramics standard was unworkable and burdensome. Continued reliance on Hollywood Ceramics would result in extensive analysis of campaign propaganda, restriction of free speech, variance in application as between the Board and the courts, increase in litigation, and a resulting decrease in the finality of election results.

In following Member Penello's dissenting opinions in Medical Ancil-

150 Id.
151 228 N.L.R.B. 1311, 94 L.R.R.M. 1705 (1977). In footnote 24 the majority notes for all practical purposes Member Murphy (concurring opinion) is in complete agreement with the majority.
152 See Phalen, Jr., The Demise of Hollywood Ceramics: Fact and Fantasy, 46 U. Cin. L. Rev. 450 (1977) with specific reference to the biographical information note on the author. The note points out two months prior to the Shopping Kart decision the American Bar Association's Labor Law Section was forewarned of the death of Hollywood Ceramics by Mr. Phalen and Member Penello.
153 212 N.L.R.B. at 582, 86 L.R.R.M. at 1598.
154 217 N.L.R.B. at 239, 88 L.R.R.M. at 1481.
lary and Ereno Lewis, the majority relied to a great extent on several research studies on labor election processes and employee voter behavior as a basis for their decision. First, the majority accepted the conclusion of Professor Bok to substantiate the ill effect of increased litigation under Hollywood Ceramics. The next source relied upon by the majority was the study done by Messrs. Williams, Janus, and Huhn. This research deals with an analysis of the elements required by the Hollywood Ceramics test and the inconsistencies that result therefrom. Specifically cited by the majority are problems associated with applying the substantiality and materiality of an alleged misrepresentation to a particular set of facts. Also discussed are the factors of the source of the misrepresentation and the independent knowledge of the persons involved. The majority concludes their discussion of NLRB Regulation of Campaign Elections by citing the caveat set forth by authors.

As long as the Board continues to probe into the truth or falsity of campaign statements and measure their effect on election results by these uncertain standards, parties unsuccessful in the balloting will be object routinely to their opponents' campaign statements and the Board will be forced to engage in a painstaking analysis of everything that was said in the campaign with the certification of the election results delayed in the interim.

It appears from the opinion the strongest weight given to outside research is accorded to the two-part study by Professors Getman, Goldberg and Herman. Part I of the project deals with the Board's assumptions concerning employee behavior in a certification election while Behavioral

155 212 N.L.R.B. at 582, 86 L.R.R.M. at 1598.
156 217 N.L.R.B. at 239, 88 L.R.R.M. at 1481.
158 See N.L.R.B. Regulation of Election Conduct. Professor Bok contends that restrictions on the content of campaign propaganda requiring truthful and accurate statements "resist every effort at clear formulation and tend inexorably to give rise to vague and inconsistent rulings which baffle the parties and provoke litigation."
159 See N.L.R.B. Regulation of Elections Conduct.
160 228 N.L.R.B. at 1312; citing NLRB Regulation of Election Conduct.
161 See Behavioral Assumptions, Part I and Part II.
162 Behavioral Assumptions, Part I. The assumptions found in their research were divided into the following categories: (1) the assumption that employees are attentive to the campaign, (2) the assumption that employees will interpret ambiguous statements by the employer as threats or promises, (3) the assumption that employees are unsophisticated about labor relations, (4) the assumption that free choice is fragile, (5) the assumption that limited union campaigning on company premises is adequate, and (6) the assumption about authorization card signing as an indication of free choice.
Assumptions, Part II, is devoted to the methods used by the researchers in the selection of specific elections and the approach used to evaluate the results of these elections. Based on these assumptions found by Professors Getman and Goldberg, the majority appears to have accepted their conclusions and without reservation and stated

Based on the assumptions of employee behavior which we find dubious at best and productive of a host of ill effects, we believe that on balance the Hollywood Ceramics rule operates more to frustrate free choice than to further it and that the purposes of the Act would be better served by its demise.

The majority concluded the decision by adhering to the principle that the Board would intervene in the future only where a party had engaged in deceptive practices during the campaign.

A concurring opinion was filed by Chairman Murphy. The only departure from the majority opinion by Chairman Murphy was that an election should also be set aside cases in which a party makes an "egregious mistake of fact." The concurrence then cited two cases as examples in which the election should not be set aside. Other than these two examples, Chairman Murphy did not explain what would constitute an "egregious mistake of fact."

A partial dissent was filed by Members Fenning and Jenkins. Their chief concern was what the future held with regard to the death of Hollywood Ceramics. In no way were these two members convinced of the proposition by the majority that today's employee voter had such sophistication to decipher the statements made during a heated campaign without the guiding protection of the Board. Also, the dissent attached to the Getman and Goldberg study as in conclusive and criticized the majority for not coming forward in their opinion with all the results allegedly discovered by the project. Finally, these two members suggest that the "almost anything

163 Behavioral Assumptions, Part II. Factors used by the authors in selecting the thirty-one representative elections were the intensity of the campaign elections that involved unlawful campaigning, type of business operations, and the size of the city in which the election was conducted.

164 Id., See note 162, supra.

165 228 N.L.R.B. at 1313.

166 Id. at 1314.


168 Id. at 1315. The criticism was aimed at the small number of elections studied out of the numerous elections conducted by the N.L.R.B. Members Fanning and Jenkins also stated that out of ten thousand elections per year only three to four percent are brought to the Board for review. And out of that small percentage only seven percent of the elections are set aside (i.e. twenty-five to twenty-seven elections per year). In light of these
goes" policy of the majority will only result in increased campaign charges and countercharges, and this is directly in conflict with the supposed intention of the majority to restrict litigation in representation cases.

Member Jenkins also filed a further dissent which was highly critical of the majority. He contended that the majority's opinion was not based on any logical reasoning but rather on the basis of a law review article. Further challenges were then levelled at Getman and Goldberg's methodology and logic. From the conclusions reached by these researchers and subsequently adopted in toto by the majority, Member Jenkins reasoned the future would only bring uncertainty and unfairness in misrepresentation cases.

F. Decisions Under Shopping Kart

In Shopping Kart's short lifetime only a few cases were decided and by the time it was overruled no clear line of thought had yet emerged. Regardless, due to shifts in Board policy in the past three years, it is not beyond reason to say that the present policy will not be changed in the future. Therefore, an analysis of several cases decided under Shopping Kart may be helpful if in the future the Board decides to readopt the Shopping Kart doctrine.

In Thomas E. Gates & Sons, Inc., the employer in a letter to the employees understated wages payable under the contract by nearly $2.00 per hour. This alleged misrepresentation took place four days prior to the election. The Regional Director decided the election should be set aside on the basis of Hollywood Ceramics. The Board concluded this was a misleading campaign statement and under the Shopping Kart doctrine did not warrant setting aside the election. Member Fanning, dissenting, stated that a misstatement of wages by approximately $2.00 per hour with an adequate time to reply was a misrepresentation, and he would set aside the election as the misrepresentation would have a substantial impact on the election. Footnotes to the opinion indicate again that elections will only be set aside in cases of deceptive practices and when the conduct of one of the parties commits fraud that is an "egregious mistake of fact" (Member Murphy).

In National Council of Young Israel, dba, Shalom Nursing Home, the statistics which were not revealed in the majority opinion, the partial dissent argues that the time and funds required to maintain this investment is well worth it.

169 Behavioral Assumptions, Part I. and Part II.
170 See also 46 U. Cin. L. Rev. 50, 57 (1977).
172 Shopping Kart's existence as Board policy lasted only 20 months until the Board readopted Hollywood Ceramics.
union, immediately preceding the election, distributed a letter to the employees concerning its contract negotiating results. This letter contained information that amounted to a misrepresentation. The majority (Members Penello and Walther) found that this was a misleading campaign statement that did not fall within the narrow exceptions to the *Shopping Kart* rule. Again Member Fanning dissented. This time Member Fanning dissented on the basis that the employer did not have sufficient time to reply to the statements made by the union.

The next misrepresentation case to be decided was *Cormier Hosiery Mills, Inc.* Here, the Regional Director set aside an election in which the union misrepresented that the employer used an accounting procedure to hide $200,000 so that the amount would not be calculated into the profit-sharing plan. Members Penello and Walther sustained the results of the election on the basis of *Shopping Kart*. Member Murphy found no "egregious mistake of fact," and, therefore the case falls outside of her concurring opinion in *Shopping Kart*.

In *Precision Fabricators, Inc.*, the majority consisting of Members Penello and Murphy found that even if the alleged misrepresentations in the preelection campaign were true, the election should not be set aside on the basis of *Shopping Kart*. Member Jenkins dissented by stating that the wages and benefits described in the leaflet which was distributed by the union did leave an adequate amount of time for the employer to reply. Furthermore, the effect of these misrepresentations could reasonably be expected to have a substantial impact on the election.

The Board in *Shopping Kart Market, Inc.* did hold that an election would be set aside "in instances where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which renders the voters unable to recognize the propaganda for what it is." In *Formico, Inc.*, the Board had the opportunity to apply the *Shopping Kart* exception. In this case, the employer had been charged with unfair labor practices. The charges were disposed of due to a settlement agreement which contained a non-admission clause. The union distributed a letter during the campaign claiming the Board had found the employer guilty of unfair labor charges. The Regional Director certified the union’s victory on the basis of *Shopping Kart*. This decision was reversed unanimously by the Board (Members Fanning and Murphy and Jenkins). The Board held that the tactic used by the union was deceptive in nature and was an improper use of the Board’s election.

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177 228 N.L.R.B. at 1311, 94 L.R.R.M. at 1705.
178 Id. at 1313.
process. It was irrelevant how much time had passed between the date the letter was distributed and the date of the election.

Also to be considered is whether Shopping Kart should have been applied retroactively. The Appeals Court on several occasions have had the opportunity to consider the question. Even though Shopping Kart has been overruled,\textsuperscript{180} the question is still of great importance.

In \textit{Blackmun-Uhler Chemical Division v. N.L.R.B.}\textsuperscript{181} the appeals court remanded the case to the Board for reconsideration\textsuperscript{182} to determine whether the \textit{Shopping Kart} test applied to the instant case.

G. \textit{General Knit of California, Inc.}

\textit{Shopping Kart}'s life was shortlived. In December, 1978, the Board by a margin of three to two reversed itself and discarded \textit{Shopping Kart}\textsuperscript{183} in favor of the \textit{Hollywood Ceramics}.\textsuperscript{184}

In \textit{General Knit},\textsuperscript{185} the employer filed two objections to the conduct of the union during the time period immediately preceding the election. The employer alleged that the union destroyed the laboratory conditions necessary for the employees to make a free and fair choice at the polls. Misconduct alleged regard the distribution of a leaflet which contain material misrepresentations concerning the financial condition of the company.\textsuperscript{186}

The leaflet contained statements regarding the profits and language exemplified by the following:

\begin{quote}
WHO IS FOOLING WHO???
GENERAL KNIT CAN CRY POOR MOUTH IF THEY WANT, BUT LET'S LOOK AT THE FACTS.
IN 1976, GENERAL KNIT HAD SALES OF $25 MILLION.
GENERAL KNIT IS OWNED BY ITOH WHO HAS A NET WORTH IN EXCESS OF $200 MILLION.
\end{quote}

\textsuperscript{180} 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (December 8, 1978). The Board in \textit{General Knit} did not indicate whether the decision to readopt \textit{Hollywood Ceramics} applies retroactively. Now the Board and the Courts will have to decide whether \textit{Hollywood Ceramics} should be applied to cases arising during the time \textit{Shopping Kart} was viable.

\textsuperscript{181} 561 F.2d 1118 (4th Cir. 1977).

\textsuperscript{182} \textit{Id.} at 1119. Note that the court did indicate that under Hollywood Ceramics the election should be vacated while under Shopping Kart the election results would be sustained. See \textit{N.L.R.B. v. Spring Road Corp.}, 577 F.2d 586 (9th Cir. 1978) where the court in footnote 1 stated that evidence that fails to meet \textit{Hollywood Ceramics} cannot satisfy the narrower \textit{Shopping Kart} rule, and, therefore, there is not need to consider \textit{Shopping Kart} in deciding this type of case.

\textsuperscript{183} 228 N.L.R.B. at 1311, 94 L.R.R.M. at 1705.

\textsuperscript{184} 140 N.L.R.B. at 221, 51 L.R.R.M. at 1600.


\textsuperscript{186} \textit{Id.} The union claimed profits for 1976 were $19.3 million. Actually the company incurred a loss of approximately five million.
THIS COMPANY HAD AN INCREASE OF 12.5% IN SALES FOR PERIOD ENDING MARCH 31, 1977.

DURING THIS PERIOD THIS COMPANY HAD A PROFIT OF $19.3 MILLION.

DON'T BE FooLED BY GENERAL KNIT AND THEIR HIGH PRICE LAWYERS.

ITOH WHO OWNS GENERAL KNIT IS MAKING IT BIG AND CAN AFFORD DECENT WAGES FOR ITS EMPLOYEES.

VOTE YES, TODAY, AND MAKE THE COMPANY SHARE SOME OF THEIR HIGH PROFITS WITH YOU—THE WORKER.¹¹⁸⁷

The language objected to by the employer was what company had the $19.3 million profit. The union contended the language clearly referred to ITOH, while the company claimed the union used language so as to infer General Knit earned a $19.3 million profit.

The Acting Regional Director found no violation of the Act under Shopping Kart. The Board agreed with this conclusion if the Shopping Kart doctrine would continue to be adhered to. However, the Board reversed itself and discarded Shopping Kart.

In reverting back to Hollywood Ceramics, the Board reasoned that the old standard was able to preserve the integrity of the election process because this standard acted as a deterrent for many years in the past. Specifically, the Board noted Hollywood Ceramics provided a means of redress for a doubting party as to the validity of election results. Moreover, the Courts have consistently accepted the standard more favorably than they had accepted the Shopping Kart doctrine. Even though the Board only some 20 months earlier had accepted the idea of voter sophistication, from this decision it appears that the Board erred in arriving at that conclusion, or voter sophistication does not justify continued adherenee to Shopping Kart. At any rate the present policy of the Board is to apply Hollywood Ceramics to misrepresentation cases.

Members Penello and Murphy filed separate dissenting opinions. As could be expected,¹¹⁸⁸ Member Penello vigorously attacked the rationale and the effect of the use of the Hollywood Ceramics rule. Specifically he contended that by readopting the Hollywood Ceramics test the election process would be delayed several years in cases which should not even be brought before the Board. Furthermore, the majority's decision will result in increased litigation¹¹⁸⁹ once the appeals courts get involved as the Board's

¹¹⁸⁷ Id. at 3.
¹¹⁸⁹ Id. The majority notes that 180 misrepresentation cases have been filed since the adaption of Shopping Kart, and this figure is an indication that the Shopping Kart doctrine
rate of success in the appellate process is only about 50%. Member Murphy contended that the readoption of Hollywood Ceramics will result in unnecessary delays and will thwart the ideas of speedy elections.

This issue is of paramount importance in the N.L.R.B. conducted elections. Misrepresentations can arise in any and all of the other tactics discussed in previous chapters. By misrepresenting the truth in some form, either side avails itself of an excellent opportunity to be victorious at the polls. As discussed previously, the results of an election can indeed be far-reaching.

The future of misrepresentation issues is uncertain in light of the Board’s shift within 20 months from Hollywood Ceramics to Shopping Kart and back to Hollywood Ceramics. The question prior to General Knit was whether the Board would revert to its old policy of Hollywood Ceramics. Now the question becomes whether the Board will in the future revert back to Shopping Kart.

The labor community has been put in an uncomfortable situation, participants in elections cannot really be sure what course the Board will follow now. Several commentators stated that the membership on the Board may have a great deal to do with Board policy in this area. This view supported by the change in membership in June, 1977, two months after Shopping Kart was decided, and six months later Shopping Kart was laid to rest. Another view is expressed by Jay S. Siegel, the Chairman of the Labor Relations Law Section of the American Bar Association. Mr. Siegel’s proposal combines the features of both Hollywood Ceramics and Shopping Kart. His idea is to prohibit investigation by the Board of misrepresentations occurring prior to 72 hours before the election period. As to the period within 72 hours, Mr. Siegel feels that the election should be set aside automatically if immense misrepresentation takes place. At any rate, the policy of the Board is now once again the Hollywood Ceramics doctrine, and it is too soon to tell exactly what the effect of General Knit will be as to long range Board policies in the area of misrepresentations during an election campaign.

is ineffective in reducing litigation. Note that this figure of 180 works out to approximately 120 cases per year. See also the partial dissent of Members Fanning and Jenkins, 239 N.L.R.B. at ....... (1978). These members argued that 300 to 400 cases are considered each year under Hollywood Ceramics and that is an excellent investment.

190 See Union Election Campaigns at 53; See 46 U. Cin. L. Rev. at 461.
192 See Union Election Campaigns at 55-58. Mr. Siegel cites five advantages to his proposal. First, the Board will not have to judge the substantially and materiality factors. Second, the 72 hour rule would give the other party adequate time to reply. Third, the employees will be able to hear both sides. Fourth, the 72 hour rule will result in fewer elections being set aside as the participants know of the danger of stating a misrepresentation within 72 hours of the elections. Fifth, less litigation will result and the finality of elections will increase.

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CONCLUSION

In the past 30 to 40 years, the Board has attempted to lay down guidelines for both management and unions to adhere to in conducting themselves during a representation election. The Board has recognized the far-reaching impact of a representation election in that it can effect the relations between workers and management for many years to come. In furthering a policy of giving the voters a fair and free choice at the polls, the Board in supervising these elections will allow only a certain type of conduct. The Board's task is to set forth guidelines to be followed. Furthermore, by lawing down these guidelines, the Board offers the parties to an election a system under which they can operate legitimately without risking objections being filed that would lengthen the process of choosing a representative. It is not to either side's advantage to conduct themselves in such a way so as to come under the Board's scrutiny and thereby create an atmosphere of dissension while waiting for the Board's decision as to alleged objections. The more advantageous course to follow is to conduct the election under the Board's guidelines and to have the election results certified immediately after the election.

JOHN D. FRISBY, JR.

THE BUYING AND SELLING OF HUMAN ORGANS FROM THE LIVING: WHY NOT?

I. INTRODUCTION

This article will examine the propriety of establishing a system for the sale of human organs, especially the kidney. Initially, the debilitating malady of end stage renal disease will be discussed as will the marginal "cure" of the disease via hemodialysis. Next, the superior alternative to dialysis, i.e., kidney transplantation will be discussed in two ways. First, the current procedure of using living, related donors will be examined as well as harvesting kidneys from cadaver "donors". Second, the practice of transplantation will be explored for its ramifications to society and the participants in the following areas: medicine, psychology, and the law. As will be shown, the recipient, donor and the physician are affected by the legal aspects of transplantation in many ways.

Then, the scarcity of the availability of life-saving organs under the current procedures will be discussed. Next, a new alternative to current practice, i.e., the sale of kidneys, will be considered as a solution to the scarcity problem. As was done earlier with the current methods, this pro-