An Examination of Two Aspects of the NLRB Representation Election: Employee Attitudes and Board Inferences

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AN EXAMINATION OF TWO ASPECTS OF THE NLRB REPRESENTATION ELECTION: EMPLOYEE ATTITUDES AND BOARD INFERENCES

I. Introduction

In the National Labor Relations Act, Congress has sanctioned the use of elections to determine whether or not employees wish to be represented by a labor organization for purposes of collective bargaining.\(^1\) It has been suggested that it was the economic exigencies of the 1930’s which led to the adoption of this democratic means of resolving the problem of establishing representational rights in the workplace.\(^2\) In any event, the National Labor Relations Board (NLRB) has, during the last 35 years, made the ballot, with its implications of order and stability, available to over 25 million American workers.\(^3\) Some may suppose that the bulk of union organization has already taken place and that today the election function of the NLRB is relatively unimportant. This is not the case. In fiscal 1968 the NLRB received 12,889 representation petitions, conducted 7,857 elections, and brought the ballot to over 506,000 employees.\(^4\) In an age when it is fashionable to make disparaging statements about bureaucratic ineptness, the commendable record of the NLRB in the representation area should serve to protect this agency from any serious criticism.\(^5\)

The purpose of this paper is to examine, through the use of random sampling techniques, employee reactions to unions and employers, and to examine the effectiveness of NLRB policies followed in the regulation of representation elections.

The NLRB has taken the position that it has been endowed by Congress with the general power to oversee the conduct of the representation campaign.\(^6\) In furtherance of this objective the

5 Admittedly, the NLRB has not escaped criticism, but in recent years most criticism of the Board has dealt with its administration of the unfair labor practice provisions of the N.L.R.A. See, for example, Affeldt, Bargaining Orders Without an Election: The National Labor Relations Board’s “final solution,” 57 Ky. L. J. 151 (1969); Brown, NLRB and the Will of Congress: Restoring the Balance of Power in Labor Relations, 73 Dick. L. Rev. 220 (1969); and Petro, Expertise, the NLRB and the Constitution: Things Abused and Things Forgotten, 14 Wayne L. Rev. 1039 (1968).
Board has announced in its decisions over the years a series of rules which should serve as a guide to the parties in ordering their pre-election conduct.

In *General Shoe Corp.* the Board announced its "laboratory atmosphere" requirement for elections in which the "uninhibited desires of the employees" could be registered. In any case in which it appeared that the employees probably could not have made a free choice, the Board would invalidate the election and order a new election to be conducted.

Since 1941 the Board, with Supreme Court approval, has set aside elections in instances where the employer has made "coercive" statements. Situations involving promises (by employers) of benefits have been treated similarly by the Board.

In *Dal-Tex Optical Company Inc.* the NLRB announced that it would examine "the economic realities of the employer-employee relationship and shall set aside an election where we find that the employer's conduct has resulted in substantial interference with the election, regardless of the form in which the statement was made." There has been some criticism of the Board's administration of the "total context" theory. The theory is so general and ambiguous in nature that it is difficult for the parties to anticipate how the Board will apply it. For example, in *Arch Beverage Corporation* an employer's letter to the electorate was attacked by the union because it contained an apparent threat to close the plant if the union was successful in its organizational activities. The Board found the document unobjectionable when viewed in the total context of the letter. Similarly, in *American Greetings Corporation* the Board exonerated an employer campaign which was built around "the inability of strikes, loss of employment, and violence," because of the relevance of the appeal to the issues before the employees. By contrast, in *Storkline Corporation* the election was set aside because the employer's central campaign theme was built around fear. At least one NLRB Regional Director has commented upon

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7 77 NLRB 124 (1948).
9 137 NLRB 1782 (1962).
10 Id. at 1787.
11 140 NLRB 1385 (1963).
12 146 NLRB 1440 (1964).
13 Id. at 1441.
14 142 NLRB 875 (1963).
the difficulty of applying the "total context" theory to a given fact situation. His recommendation is that absent an independent unfair labor practice "less confusion would result if the 'total context' theory were not applied." 15

An NLRB regulatory technique that the authors chose to test empirically was the "material misrepresentation" rule of Hollywood Ceramics. 16 The rule was stated by the Board as follows:

"We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside. 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. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have a de minimis effect. Or, it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so they could not reasonably have relied on the assertion. Or the Board may find that the employees possessed independent knowledge with which to evaluate the statements." 17 (Emphasis ours)

The point has been made by Director Cuneo that more reliance should be placed on the standards utilized in misrepresentation cases and much less placed on the "total context" approach. 18 In conducting the research study that follows, the authors placed before employees the issue of material misrepresentation and tested their reactions to this regulatory standard.

16 140 NLRB 221 (1962).
17 Id. at 224.
18 Supra note 15 at 238.
Regional Director Bernard Samoff has recently noted a rising trend in inconclusive election results, an increase in the number of objections filed by employers, and an increase in the number of post-election reports on objections and challenges being prepared by the agency's regional office. Samoff believes that Board elections, like their political counterparts, should result in final, definitive, and unchallenged results. As a solution Samoff proposes hearty and unrestricted electioneering by the parties with a right of equal access to the voter-employees. An innovator, Director Samoff favors less direct regulatory control of election campaigns by the NLRB with more emphasis on procedural rules.

Director Samoff supports the position of Professor Bok, who asserts that there is a lack of consensus on the proper role that the law should play in the conduct of these elections. The difficulty in making reasoned judgments in this area stems from a lack of an adequate understanding of employee voting behavior. The issue of how much protection the voter-employees should receive from the Board is a key consideration here.

It is administratively impossible for the Board to elicit testimony from all voters during the investigation of a disputed election in order to gauge the effect of questioned preelection tactics. Therefore the law has created a scheme of inferences of "coercion" and "interference." The administrators who make these inferences are in no way involved in the day-to-day conduct of the campaign. The authors have attempted to test these inferences by sampling employee-voter opinion on the objectionable conduct and on the Board's actions taken thereon. To the best of the authors' knowledge sampling procedures have not been utilized heretofore to verify the Board's inferences.

In 1967 Professor Brotslaw conducted a study of the voting behavior of a group of retail workers involved in an NLRB election and analyzed the relationship between the employees' per-

20 Id. at 251-252.
21 See Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Board, 78 Harv. L. Rev. 38, 40 (1964).
22 Id. at 40-41.
23 Brotslaw, Attitude of Retail Workers Toward Union Organization, 18 Lab. L. J. 149 (1967).
sonal characteristics and their decisions in the election. The authors have noted the research findings of Professor Brotslaw and shall make reference to them at the appropriate times.

Director Samoff has challenged students of labor relations to attempt an exploration and analysis of the factors bearing upon workers' choices in NLRB elections. In this pilot study, the authors have attempted to meet that challenge. There has been very little empirical work done in this area and it would appear that legal commentators could profitably utilize the survey approach to expand the body of knowledge in this field. It seems highly desirable that this be done, since the decisions and policies of the Board in representation matters directly influence thousands of employees in a direct and immediate way. The law of the representation election should not depend on supposition and unsupported inferences. The regulatory decisions of the NLRB should be grounded upon a body of knowledge gained, at least in part, from direct contact with the employee electorate.

II. Methodology

In preparation for this pilot study the authors had discussions with employers, legal practitioners, and representatives of the NLRB and labor organizations. In accordance with our understanding with all of these persons, we shall not in the course of this study identify any individual, labor organization, or employer.

While all parties appeared interested in the results of the authors' undertaking, there was understandable reluctance to cooperate with the authors to the extent of making available actual lists of employee names and addresses. After winning a Board election an employer representative was reluctant to have us "start something up again" in the shop. In another instance an employer attorney remarked that if his client's employees were asked to analyze why they voted "No" in a recent election (which the union had lost) they might not be able to justify their answer and might therefore vote for the union in a subsequent election.

Reluctance to cooperate was by no means confined to the employer side alone. One union demanded a right of censorship over our question selection. In another case a union agent who was currently organizing the plant in question was apprehensive
of the effect of our research on his organizing campaign. In short, neither side wished to jeopardize its present economic position. Normally, both the employer and union have made certain “investments” in the employees. The nature of these investments may be different, but they are looked upon as investments just the same. Both parties are naturally reluctant to have any outside party endanger any gains made by them toward winning the employees’ loyalty and/or esteem.

In order to test both major areas of concern—attitudes of employees toward unions and employers and employee reactions to NLRB regulatory schemes (in the Hollywood Ceramics situation)—the authors sought out units in which an election had been set aside in 1969 because of a material misrepresentation.

The unit for study ultimately chosen was the circulation department employees of a large west-central New York state newspaper publisher. The unit comprises about 500 employees, a majority of whom are part-time workers, who handle the distribution of the published product throughout the geographic area served by the publisher. Out of the 476 votes cast in the NLRB election, the union received 137.

The questions were designed to sample employee attitudes in the areas outlined above. Ample space was provided on the questionnaire for written comments and some of the responses elicited will appear in the data analysis section of this Comment.

Due to the large number and dispersion of the population, the conducting of personal interviews was impossible, and the authors were forced to rely on the mail questionnaire to obtain information. A cover letter, a two-page questionnaire, and a self-addressed, stamped envelope were sent to 250 employees in the unit. The cooperating labor organization made available to the authors its addressograph plates, and from them the authors selected a portion of the plates from each zip code represented.

Because of the confidentiality of the study, it was deemed best not to send follow-up letters to the employees encouraging their cooperation, since this might have given the employee an erroneous feeling that he was a “marked man.” Suspicion on the part of the employees that the authors were really acting as an agent of the employer or the union was surprisingly widespread and difficult to allay.

Response to mail questionnaires is often limited, and returns of around 20% seem to be good. The authors received 52 completed questionnaires, and these form the basis of our reported data.

Questionnaires nearly always pose problems of interpretation for the researcher, especially in the area of nonresponses. Surveys of this type almost never provide a direct basis for characterizing the entire population. However such surveys are nevertheless valuable, since they do increase society's knowledge of the subject matter, and the information which they provide is often obtainable by no other means.

The data presented will not enable the authors to make broad generalizations about employee attitudes. However in an area where many have been content to hypothesize and infer, the authors have consulted the employee-electorate and have recorded their actual responses. It is submitted that in spite of the limitations of the questionnaire device, this approach is a valuable means of gaining insights into areas where heretofore mere theories have prevailed.

III. Analysis of Data Concerning Employee Attitudes Toward Unions and Employers

A. Personal Characteristics and Voting Behavior

The circulation unit sampled herein is composed mainly of part-time employees. Although the cooperating labor organization reported that women constitute a large percentage of the unit, 82% of the respondents were male. Table One indicates how these individuals voted in the election.

<table>
<thead>
<tr>
<th>Sex</th>
<th>Percentage Reporting</th>
<th>Percentage Vote in Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>82%</td>
<td>39% for Company, 61% for Union</td>
</tr>
<tr>
<td>Female</td>
<td>18%</td>
<td>100% for Company</td>
</tr>
</tbody>
</table>


STUDENT COMMENTS

The cooperating union confirmed the finding of the authors that the overwhelming majority of the female employees work at home as counselors who oversee the distribution of the product to the consumer. It can be thus inferred from Table One that this category of employees voted heavily against organization. That inference is strengthened by the comment of one female respondent who observed:

"I was against the election for counselors. We do not work in the plant but at home and I felt we could not benefit from a union. We only make from $8 to $16 a week. Many of the housewives [sic] do not want to bother with union dues out of so little... I believe the 166 counselors voted 'No,' thus stopping a union for full time circulation people. They had more to gain than we did."

This comment by a part-time worker discloses several understandable objections to a union proposed and conceived mainly for full-time employees. Obviously this part-timer distinguished herself from the full-time workers, feeling that she did not have a close community of interest with those employees working in the plant. Furthermore, she objected to having to pay full union dues when she was a part-time employee. She may have a valid point here, especially if the cost to the union of servicing a part-time employee is less than that for servicing a full-timer. To meet this objection, unions should perhaps experiment with a flexible dues structure when faced with a substantial part-time element in a unit, thereby more equitably apportioning their costs and thereby augmenting their appeal to this group of employees. In addition, the respondent's comment suggests that in the future unions would be well-advised to carefully set forth in their preelection campaign the specific programs which will benefit the part-time workers.

One part-time truck driver stated, "I voted against the union because I believe the union would eliminate part-time jobs." It appears that the union failed to communicate its concern for the preservation of the part-time segment of the unit. Since this particular business relied extensively on part-time help, this oversight was probably very costly to the union in terms of part-time worker election support.

The age and educational distribution of the respondents herein are set forth in Tables 2 and 3 respectively.
Table 2 suggests that the union did better among younger employees than was the case in the Brotslaw study. The union's appeal to the middle age groups was lower except among the 46-55 group. The 56-65 group was composed of long-term employees who also believed themselves very secure in their jobs (see Table 10). While it might be thought that unions offer older employees greater security in the form of pensions, etc., a long-term nonunion employee may feel that he already has adequate security and does not need union protection.

Table 3

B. Work Relationship Data and Voting Behavior

The correlation between length of service with the employer and voting behavior is set forth in Table 4.

27 Supra note 23 at 158.
All of the employees with twelve or more years of service with the company were 47 years of age or older. As indicated earlier, an older employee with long tenure may tend to view his employer as a guardian of his security interests. If this is true, then a union interested in organizing the older, long-service employees would be well advised to disregard the security issue and to stress other matters in its campaign.

The voting behavior of full and part-time employees is recorded below.

The average length of service for full-time employees was approximately 20 years, while the comparable figure for part-time employees was about 3 years.

### C. Past Experience With Labor Organizations

The table below shows the voting behavior of employees based on their prior union membership:

<table>
<thead>
<tr>
<th>Prior Union Membership</th>
<th>Vote in Election</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>For Company</td>
<td>For Union</td>
</tr>
<tr>
<td>Yes</td>
<td>8</td>
<td>16</td>
</tr>
<tr>
<td>No</td>
<td>18</td>
<td>10</td>
</tr>
</tbody>
</table>

TABLE 6
The authors asked those respondents who indicated that they had previously belonged to a labor organization whether they had been generally satisfied with the quality of representation provided by that organization. Of those persons responding, 16 indicated that they were satisfied and 8 identified this fact as an important determinative of how they voted in the election under study. Eight persons expressed dissatisfaction with their previous union experience and 4 of them took this fact into account in voting against the union in the election. The authors' data supports that of Brotslaw in suggesting a connection between previous experience with unions and later voting behavior.28

D. Family Influence on Voting Behavior

At least one writer has taken the position that an important determinant of voting behavior is an individual's family attitudes and experiences.29 The author's results are inconclusive on this point. Our data reveals that eighteen respondents did state that they discussed the election with members of their family; however, 8 of this number disclosed that these conversations had only "very slight" impact on their ultimate voting decision. The data would seem to indicate that the respondents did not rely in large measure on family persuasion in their voting. This finding is somewhat contrary to Brotslaw's conclusion that there is a degree of correlation between family union attitudes and the election decisions of family members.30

E. Influence of Fellow Employees on Voting Choice

Nearly all of the respondents surveyed stated that they spoke with fellow employees on the question of union organization of the unit. Six termed the discussions "highly persuasive," 18 characterized them as "helpful," and 18 described them as having "very slight" effect on their vote.

The data suggests that since a majority of the respondents considered these conversations with their colleagues influential on their voting decisions, a union or company campaign should take into account this group spirit factor. It seems probable that

28 Id. at 160.
30 Supra note 23 at 159.
this "group dynamics" influence has, to some extent, a bandwagon effect on employees' decision making.

F. Relations with Employer Personnel and Voting Behavior

Employees reported that on 22 occasions in the recent past they have brought a personal problem to their supervisor or other member of management. Twelve employees found their conversation with the management representative to be helpful, and ten did not. The majority of these 22 employees voted for the union, which discloses that employees who feel comfortable enough with management to bring a personal problem to them for assistance do not necessarily vote for the employer in a representation election.

Social contacts between supervisors and respondent employees were virtually nonexistent in our sample, which indicates that social mingling is apparently not a significant factor in producing election preferences for the employer.

Thirty employees revealed that during the preceding 12 month period they have discussed an objectionable management policy or decision with their supervisor. The reception that was accorded them can be related to the way they voted by means of Table 7.

<table>
<thead>
<tr>
<th>Point of View</th>
<th>Vote in Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Given Fair Consideration</td>
<td>Frequency</td>
</tr>
<tr>
<td>Yes</td>
<td>10</td>
</tr>
<tr>
<td>No</td>
<td>20</td>
</tr>
</tbody>
</table>

Table 7 suggests that the degree of "fairness" attributed to the employer by the employee was an important factor in the way that the employee voted in the election. It must however be noted that the employer may actually have acted reasonably or equitably with respect to the employee complaint, although the employee did not think so. The important consideration is not whether the employer acted justly, but rather, whether the employee believed the employer acted justly. Another possible interpretation of Table 7 is the following: Employees dissatisfied with the employer and receptive to the union's message are prone
to be somewhat critical of employer policies. When their complaint is not met by management, it serves only to reinforce their feelings of overall dissatisfaction with the employer.

When asked whether they believed that they could deal more effectively with the employer if represented by a union, the employees answered as follows:

<table>
<thead>
<tr>
<th>Can Disagree with Employer More Safely with Union</th>
<th>Frequency</th>
<th>Vote in Election For Company</th>
<th>For Union</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>28</td>
<td>4</td>
<td>24</td>
</tr>
<tr>
<td>No</td>
<td>24</td>
<td>20</td>
<td>4</td>
</tr>
</tbody>
</table>

It appears from Tables 7 and 8 that, in general, employees who believe that they can “safely” communicate dissatisfaction with employer decisions and policies and whose opinions are accorded (in the employees’ judgment) fair consideration by management are likely to vote in favor of the employer in the election. This should indicate to employers the practical importance of transmitting a genuine attitude of receptiveness to those employees who see fit to question some management determination.

One respondent clearly expressed the importance he attaches to employer treatment of employees:

"Ever since the union was voted down . . . we have been treated much worse . . . we dare not complain about any situation or refuse what we feel is unfair work for fear of an oral threat of losing our jobs. Fringe benefits are very good, but do not make up for unfair treatment. . . ." (Emphasis original.)

The authors' data generally supports the conclusion of Professor Brotslaw: “Employee dissatisfaction is an excellent foundation upon which to develop sentiment favorable to union organization and collective bargaining.”

Unions might exploit such dissatisfaction by emphasizing in their campaign the futility of “bucking the boss.” However, the issue probably should be treated with some caution, for if the union paints the employees as a herd of docile sheep, it may

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81 Id. at 169.
anger and alienate the very persons whose allegiance it is seeking to gain.

Approximately half of the participants stated that they could deal effectively with their employer without the assistance of a union. The employees’ conception of employer economic power is revealed in Table 9.

<table>
<thead>
<tr>
<th>Does Employer have Economic Power over Employees?</th>
<th>Frequency</th>
<th>Vote in Election</th>
<th>For Company</th>
<th>For Union</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>36</td>
<td>14</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>16</td>
<td>14</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>

All of the “No” votes registered in Table 9 were cast by part-time employees who supported the company in the election. It is interesting to note that while superior employer economic power has been one of the classic justifications for the NLRB’s regulation of elections, this factor did not inexorably inspire the employees to vote for the union. Table 9 shows that nearly half of the “Yes” respondents voted for the company. When asked whether they feared the employer’s economic power, the employees responded in a manner that closely paralleled the figures contained in Table 9. Again, however, the large “Yes” response did not produce a corresponding majority of union votes in the election.

G. Job Security and Voting Behavior

Although 36 employees indicated that a union was necessary to protect individual employment rights, less than half of this group voted for the company. The authors noted the same pattern when analyzing Table 9, dealing with employer economic power. It is generally thought that redress of the power balance and protection of job rights are weighty reasons for supporting a union. However while the respondents were aware of these classic justifications for organization, nearly half of them ultimately supported the company. It appears that other more per-

[32] Supra note 19 at 235-236.
suasive factors often overshadowed the traditional notions when it came time to make the final voting decision.

The employees were asked how they believed unions should treat job rights in the plant. Four respondents felt that management should clear all changes with the union, 30 felt that the company should consult with the union before implementing any changes, and 4 believed that management need only notify the union of changes taking place.

When asked how secure the employee felt his job to be, the respondents answered as follows:

<table>
<thead>
<tr>
<th>Security of Job</th>
<th>Frequency</th>
<th>Vote in Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very Secure</td>
<td>30</td>
<td>22</td>
</tr>
<tr>
<td>Not Very Secure</td>
<td>14</td>
<td>6</td>
</tr>
<tr>
<td>In Jeopardy</td>
<td>8</td>
<td>0</td>
</tr>
</tbody>
</table>

An employee's support for a union seems to follow his evaluation of his own individual job security. The more secure he perceives his job to be, the less likely he is to support a union.

H. Wages and Voting Behavior

<table>
<thead>
<tr>
<th>1. Do unionized employees get higher wages?</th>
<th>Frequency</th>
<th>Vote in Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>32</td>
<td>10</td>
</tr>
<tr>
<td>No</td>
<td>20</td>
<td>18</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2. Do employees need a union to get a fair wage?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
</tr>
<tr>
<td>No</td>
</tr>
</tbody>
</table>

The figures contained in sections 1 and 2 of Table 11 seem to reflect some inconsistent thinking, and the authors are unable to advance a rational explanation for the figures. It is possible that
the participants felt that a "fair" wage was obtainable without a union but that a union could procure a "higher" wage than unorganized employees could secure.

When asked for their views on the appropriate wage policy to be followed by the union in dealing with the company, 26 respondents stated that unions should protect the highest number of jobs regardless of the effect on the resulting wage rate. Only 10 employees thought that unions should bargain for the highest wage possible and ignore the effect on employment levels.

One participant commented that while unions were a necessary institution at one time in our history, currently they "are too powerful—their demands for higher wages and fringe benefits is [sic] causing in great part the inflation we are now experiencing." This same individual stated that union dues in his opinion were too high for the services that are provided members.

I. Fringe Benefits and Voting Behavior

Of those responding to a question concerning the relative importance of fringe benefits (insurance, pensions, paid vacations) to hourly wages, 14 responded that the fringes were "very important," 26 believed them "equally important" with hourly wages, and 12 expressed a preference for the "highest possible" wages. When asked if unions overemphasize fringe benefits at the expense of higher hourly wages, 16 of the respondents answered in the affirmative and 26 replied in the negative. Of the 16 voting in the affirmative, 12 cast their ballot in the election for the company. The respondents split equally on the question of whether in their experience employers in non-union firms pay substantial attention to fringe benefits for their employees.

J. Working Conditions and Voting Behavior

The 24 employees who indicated that employers provide for adequately safe and pleasant working conditions voted overwhelmingly for the company in the election. Those (20) who thought employers remiss in this area heavily supported the union. Thirty-two respondents did not feel that unions should devote their resources to collective bargaining on improving working conditions at the expense of higher wages and greater fringe benefits.

In general employees supporting the employer felt that they
could bring enough pressure to bear on the employer to improve
unsanitary or unsafe working conditions. Union adherents usually believed that they needed the intervention of a union to accomplish this objective.

K. Miscellaneous Factors Bearing on Voting Behavior

An overwhelming majority (36 to 14) of the participants took the position that unions ought not to concern themselves with such issues as plant expansion and the introduction of new product lines. These employees apparently do not support union intervention into these areas of traditional managerial responsibility.

On the issue of union militancy in the plant, approximately half of those answering preferred a strong vibrant organization which would nevertheless allow the efficient operation of the plant. The participants believed by a ratio of 3 to 1 that a union should act as a stabilizing influence in the plant.

The data revealed that employees do not generally look upon unions as a source of status or prestige. By a ratio of over 10 to 1 the participants stated that belonging to a union would not serve to enhance their social status.

IV. Data Concerning the “Hollywood Ceramics” Type of Material Misrepresentation

As previously noted, the NLRB has taken the position that it will set aside an election and order a new one only when a campaign communication was a substantial departure from the truth, came at a time that precluded effective rebuttal, and would reasonably be expected to have a significant impact on the electorate.\(^{33}\) The Board reasons that because of the substantial misrepresentation perpetrated by party “X,” which untruth party Y had insufficient time to answer, there was probably a shift of voter allegiance or support from Y to X. When such a situation arises, X’s election victory is nullified and the election is rerun by the NLRB.

In fiscal year 1968 the NLRB conducted 202 rerun representation elections,\(^{34}\) and in only 30% of them was the outcome

\(^{33}\) Hollywood Ceramics Co., 140 NLRB 221 (1962).

\(^{34}\) In fairness it must be pointed out that these elections were originally set aside not only because of material misrepresentations but also because of additional reasons that the Board considers relevant in determining whether to set aside an election.
of the original election reversed.\textsuperscript{35} Based on these statistics, which to our knowledge have not varied much over the years, one would conclude that it is difficult to second-guess an employee's vote by gauging the impact of a particular communication on his electoral decision.

In the case studied the company was found to have violated the \textit{Hollywood Ceramics} misrepresentation standard, and so the NLRB set the election aside. The authors examined the survey participants who indicated that they voted for the company, and attempted to determine the impact of the employer's communication on their vote. The fundamental question to be answered was: does the sample reveal any significant reliance by the respondents on the improper assertions of the employer? An affirmative answer would support the conclusion of the NLRB that the communication had a substantial impact on the election.

The background facts comprising the context of the misrepresentation can be briefly stated. An employer pamphlet entitled "Now Ask Yourself" was prepared and distributed by mail to all employees within a week before the election. The Union did not learn of the pamphlet's existence until about 36 hours before the start of the election.

In a section entitled "What is the [Union] record?" the booklet discusses a situation in Yonkers, New York involving the same employer and union. The pamphlet contains the following statement: "In Yonkers the [Union] won an election in Circulation a year ago, still has no contract, has not bargained in six months, and because of this these employees have not had a pay increase in 18 months." In post-election objections to the NLRB the union argued that the quoted statement was a misrepresentation of the facts, since the Board had within a week of the election found the Yonkers employer guilty of an illegal refusal to bargain.

The Regional Director of the NLRB agreed with this union contention. He commented:

"The Board, of course, seeks to give employees the opportunity to cast their ballots for or against labor organizations in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also free from other elements which prevent or impede a reasoned choice. Where the proper laboratory conditions have been jeopard-

\textsuperscript{35} Supra note 4 at 221.
ized by material misrepresentations, the Board has not hesi-
tated to set elections aside. . . . I am satisfied that the Em-
ployer's remarks regarding the bargaining situation in Yon-
kers, New York . . . violated those standards.”

The Regional Director described the union's ability to func-
tion in the collective bargaining relationship as being of "vital
importance to employees during an organizational campaign.”
He added: “A misrepresentation with respect to these material
matters tends to impede such a reasoned choice and destroy the
requisite laboratory conditions.” (Emphasis ours.) The Re-
gional Director stated further that the employer's remarks were
"calculated to lead employees to believe that the failure of the
Yonkers' employees to receive a pay increase for 18 months was
due to the Union's ineptness and ineffectiveness. However . . .
the actual reason for failure to reach agreement at Yonkers was
the Employer's unlawful refusal to bargain.”

Considering now the results of the authors' survey, all re-
spondents—both company and union voters—referred receiving
and reading a copy of "Now Ask Yourself." They were then
asked: (1) whether at the time of the election they knew that
collective bargaining had been suspended in Yonkers pending the
outcome of the unfair labor practice case; and (2) whether they
really believed that the union's failure to bargain a contract was
due to its inability to properly represent its membership. The
results appear in Table 12.

| TABLE 12 |
|-----------------|-----------------|-----------------|-----------------|
|                | Company Voter   | Union Voter     |                 |
|                | Yes  | No   | Yes  | No   |                 |
| 1. Coll. barg. suspension pending ULP decision | 6     | 10   | 4     | 18   |                 |
| 2. Union bargaining failure in Yonkers ascribable to ineptness | 2     | 14   | 6     | 16   |                 |

36 3 RC 4515.
37 Id.
38 Id.
39 The variation in the total number of responses in the following Tables dealing with the misrepresentation issue is due to omissions by the respondents.
STUDENT COMMENTS

When asked if they cared in any way about the situation in Yonkers, the respondents replied as follows:

<table>
<thead>
<tr>
<th></th>
<th>Company Voter</th>
<th>Union Voter</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Care about</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yonkers situation</td>
<td>2</td>
<td>20</td>
</tr>
</tbody>
</table>

The participants were then asked whether the employer's misrepresentation had any effect on the way they voted in the election. The results appear in Table 14:

<table>
<thead>
<tr>
<th></th>
<th>Company Voter</th>
<th>Union Voter</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Effect on Vote</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>14</td>
</tr>
</tbody>
</table>

After considering Tables 12, 13, and 14 the authors venture the following observations:

It seems true that few employees—either company or union supporters—had any knowledge of the pending unfair labor practice proceeding between the parties at the Yonkers' unit. However, while the Regional Director may have been correct in assuming employee ignorance of the unfair labor practice proceeding, he was apparently in error when he further assumed that the employees would infer that the union was inept and ineffective. Neither company nor union voters (Table 12) tended to believe from the employer communication that the union was unable to effectively represent its members in Yonkers. This contradicts the Regional Director's findings.

Furthermore, Table 13 reveals that the overwhelming majority of company voters (who were supposedly hoodwinked by the employer's misrepresentation) did not attach any real importance to the Yonkers situation. The coup de grace to the Regional Director's inference process in this proceeding seems to be found in Table 14, which discloses that the employer's misstatement did not have any effect on the way the great majority of company
voters voted in the election. In the words of Hollywood Ceramics, it appears that the employer communication had little if any of the “significant impact” necessary to set aside the election. Thus the limited empirical data obtained in this study suggest that in this case the union objections should have been overruled.40

An additional instance of misrepresentation was also relied upon by the Regional Director in setting aside the election. This was another statement appearing in the booklet “Now Ask Yourself.” The section in question is entitled “What About Job Security?” In this section the employer comments upon the discharge of two employees in the newsroom of the plant; these employees were represented by the union. The booklet states:

“Consider what the [Union] could do when it was the agent when two newsroom employees were fired. Answer: Nothing. . . . Your performance is what guarantees your job. No union can guarantee it. . . .”

The NLRB investigation revealed that the union had objected to one of the discharges and settled the matter by entering into an agreement with the company, whereby the employee was allowed to keep his severance pay and the discharge was listed on the records as a resignation. The second discharge was due to alcoholism and was not protested by the union.

The Regional Director concluded that the employer had, by making this misstatement, violated the Hollywood Ceramics standards. The Director said that the union’s ability to function as an effective grievance representative was of “vital importance to employees.” He added that the union did effectively represent one of the employees and declared, “The assertion that the Union did nothing amounts to a material misrepresentation.” 41

Our data concerning this issue appears in Tables 15 and 16:

40 The authors wish to emphasize that this analysis is not intended as a criticism of the Regional Director’s handling of the case. The Director involved is held in high professional repute by practitioners in his region and has the respect of the authors, one of whom has been privileged to work under his direction. The discussion is intended merely to raise questions about the reliability of the inference theory approach.

41 3 RC 4515.
TABLE 15

<table>
<thead>
<tr>
<th>Company Voter</th>
<th>Yes</th>
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</tr>
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<tbody>
<tr>
<td></td>
<td>6</td>
<td>12</td>
</tr>
</tbody>
</table>

<table>
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<td></td>
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<td>20</td>
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</table>

1. Did you feel that the Union would do nothing regarding the discharges?

2. Did you know that the Union did actually file a grievance in this matter?

<table>
<thead>
<tr>
<th>Company Voter</th>
<th>Yes</th>
<th>No</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>8</td>
<td>8</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
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<th>No</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>16</td>
<td>4</td>
</tr>
</tbody>
</table>

TABLE 16

<table>
<thead>
<tr>
<th>Company Voter</th>
<th>Yes</th>
<th>No</th>
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<tbody>
<tr>
<td></td>
<td>4</td>
<td>16</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Union Voter</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>6</td>
<td>16</td>
</tr>
</tbody>
</table>

The data indicates that a large majority of the supposedly deceived company voters did not believe that the union would sit idly by and fail to protest the newsroom discharges. Half of the company voters responded that they knew the union had filed a grievance over the discharge. Table 15 suggests that the company voters were able to properly evaluate this statement and that in fact very few were misled by the statement. Table 16 reveals the very significant point that only one fifth of the company voters were influenced in their voting decision by the employer's statement. Accordingly, it appears that this ground for setting aside the election was also unsound, since this communication evidently did not have "significant impact" on the electorate. The inference that there was substantial interference with the voters' free choice seems unwarranted by the data compiled in the authors' study.

Conceding that the weight to be attached to one study is not very substantial, nevertheless it is at least possible, if not probable, that the NLRB's reliance on its inference theory in misrepresentation cases is not justified by the facts.
V. Employee Attitudes Toward the Regulation of Elections by the NLRB

Regional Director Samoff has stated that the NLRB ought to recognize the similarity between the citizen-voter in political elections and the employee-voter in representation elections and appropriately revamp its regulatory framework to allow for more certainty of results in NLRB elections. In essence he recommends more unrestricted campaigning by the parties and a narrowing of the grounds upon which the NLRB will set aside an election.

The authors believed that it would be enlightening to sample employee viewpoints concerning the role of the NLRB in overseeing the election process. By a 6 to 1 ratio, employees favored existing NLRB regulation of campaign tactics. Many of the participants implied that they favored even more supervision by the NLRB over the parties than is now undertaken. One employee said that the NLRB keeps the parties "on their toes" and discourages them "from pulling sneaky tricks." Another employee asserted that both sides made "false statements of fact" and that the NLRB should carefully regulate the campaign "so people can know the truth." One respondent declared that the NLRB should investigate campaign booklets and leaflets "for their validity." This same employee added that there were so many charges and counter-charges between the parties that the whole process tended "to confuse the worker."

A third employee saw a distinction between the virtually unregulated political elections and representation elections. He observed, "Public opinion polices political election; union-management elections are not so policed." Two other respondents felt that the NLRB's role was to insure a "fairer election."

Professor Bok, Director Samoff, and others have suggested face-to-face debates between the parties as an alternative to more extensive campaign regulation. One respondent seemed to be recommending just such a procedure when he requested that the NLRB provide "a truthful and lucid picture of both pros and cons in order to alleviate pressure on the voter." This sentiment was echoed by another participant, who wrote: "No employee (ever) knew the truth." The latter further indicated that the

42 Supra note 19 at 228-231.
43 Supra note 21 at 91-92.
44 Supra note 19 at 249.
NLRB regulatory scheme should make available to the voter "a more honest appraisal" of the parties' positions. Thus it appears that the employees desire that the NLRB hold a fairly tight rein on the parties during campaign time.

VI. Conclusions

Bearing in mind the caveat that only tentative generalizations and limited inferences can be drawn from sample surveys of the type employed herein, the authors have reached the following conclusions:

1. Part-time employees working short hours may not perceive a community of interests between themselves and the regular full-time workers. Part-time employees also may question the equity of a flat-rate union dues structure. A union must clearly manifest its concern for part-time employees if it is to overcome their skepticism and win their allegiance.

2. Union "security" arguments may not be persuasive to older, long-term, nonunion employees, for many in this group apparently feel that they can prudently rely on their employer for job protection.

3. Past favorable experience with labor unions tends to persuade an employee to support a union in an NLRB election.

4. Reliance on family experience with unions does not seem to be a significant determinative factor in the election decisions of employees.

5. Personal and social association between employer personnel and employee voters does not appear to be an important consideration in the latter's election decision-making process.

6. The extent of effective complaint communication between employee and supervisor seems to be a significant factor in the employees' election decision.

7. The fact that an employer has great economic power does not by itself substantially increase the likelihood that the employees will embrace a union.

8. The individual employee's conception of his own job security with the employer tends to influence his vote for or against a union.

9. Satisfaction with present working conditions tends to induce the employees to support the employer in a representation election.
The authors attempted in this pilot study to sample as wide a substantive area as feasible. This was done partly to dramatize the scope of the subject matter which needs legal-empirical investigation. It is hoped that legally-trained individuals will undertake further empirical research in this area.

WILLIAM H. FITZGERALD

and

D. RICHARD FROELKE*

* Although Mr. Froelke is an employee of the NLRB, the views expressed in this Comment do not represent the official position of the NLRB.