

**Shopping Kart Food Market, Inc. and Retail Clerks Union Local 99, Retail Clerks International Association, AFL-CIO, Petitioner. Case 28-RC-2710**

April 8, 1977

**DECISION ON REVIEW AND CERTIFICATION OF REPRESENTATIVE**

On February 11, 1975, the Regional Director for Region 28 issued a Second Supplemental Decision on Objections to Conduct Affecting Results of Election and Certification of Representative in the above-entitled proceeding, in which he overruled the Employer's Objection 1,<sup>1</sup> and certified the Petitioner as the representative of all of the Employer's employees in the unit found to be appropriate.<sup>2</sup> Thereafter, in accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's Second Supplemental Decision on the grounds, *inter alia*, that, in overruling Employer's Objection 1, he departed from well-established precedent.

By telegraphic order dated June 4, 1975, the Employer's request for review was granted with respect to Objection 1 and the certification of representative was stayed pending decision on review.

The Board has considered the entire record in this case with respect to the issues under review and makes the following findings:

During a meeting on the evening of June 19, 1974, Petitioner's vice president and business representative, Roger W. Deason, told the employees that the Employer had profits of \$500,000 during the past year. The uncontroverted evidence establishes that the Employer's profits during this period amounted to approximately \$50,000. The election was conducted the next day, June 20, 1974, between the hours of 3 and 4 p.m. Deason did not explain to the assembled employees how he arrived at the \$500,000 figure.

Relying on *Cumberland Wood and Chair Corp.*,<sup>3</sup> the Regional Director concluded that the Petitioner's statement did not constitute a material misrepresenta-

tion within the *Hollywood Ceramics* rule<sup>4</sup> because there was no evidence that Deason either had or could reasonably be perceived to have had knowledge concerning the Employer's profits. Accordingly, he overruled the Employer's objection and certified the Petitioner.

We agree with the Regional Director that the alleged misrepresentation does not warrant setting aside the election, but so find for the reasons set forth in Member Penello's dissenting opinions in *Medical Ancillary Services, Inc.*,<sup>5</sup> and *Ereno Lewis*.<sup>6</sup> In sum, we decide today that the Board will no longer probe into the truth or falsity of the parties' campaign statements. Accordingly, we hereby overrule *Hollywood Ceramics*.

As an initial matter, we understand this judgment to be one which the Board is clearly authorized to make. Thus, the Supreme Court has long recognized that the Board possesses a "wide degree of discretion" in performing its function of establishing policies and procedures to safeguard the conduct of representation elections.<sup>7</sup> Most significant, in the recent *Weingarten* decision,<sup>8</sup> the Court held that the exercise of our administrative discretion in the decisionmaking process necessarily includes the authority to revise or modify principles previously adopted. The Court stated its holding in the following emphatic terms:<sup>9</sup>

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

<sup>1</sup> Pursuant to a notice of hearing and order issued by the Regional Director on November 21, 1974, a hearing was held to resolve the issues raised by the Employer's Objection 1 insofar as it alleged that the Petitioner's vice president and business representative misrepresented the Employer's profits. In his Second Supplemental Decision, the Regional Director affirmed the Hearing Officer's findings of fact, to which no exceptions were filed, and adopted his conclusions of law

<sup>2</sup> The appropriate unit is

All full-time and regular part-time selling and non-selling employees employed by Shopping Kart Food Market, Inc., Maricopa County, Arizona, excluding all meat department employees, watchmen, guards and supervisors as defined in the Act

The revised tally of ballots served on the parties on November 15, 1974, indicated that 14 voted for, and 8 voted against, the Petitioner

<sup>3</sup> 211 NLRB 312 (1974).

<sup>4</sup> *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962).

<sup>5</sup> 212 NLRB 582 (1974).

<sup>6</sup> 217 NLRB 239 (1975)

<sup>7</sup> *NLRB v. A. J. Tower Company*, 329 U.S. 324, 330 (1946) Accord, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969)

<sup>8</sup> *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975)

<sup>9</sup> *Id.* at 265-266

The Fifth Circuit reached a similar conclusion in *Foremost Dairies*<sup>10</sup> in which it denied enforcement of a Board Order, stating that it was merely applying the Board's own "laboratory conditions" standard. That standard, the court emphasized, was adopted originally by the Board, not the courts, and, accordingly, is controlling only "until the Board announces a change and its reasons for the change."<sup>11</sup> We announce that change today for the reasons that follow.

Our more than 20 years' experience with the rule of *Hollywood Ceramics* and its progenitor, *The Gummed Products Company*, 112 NLRB 1092 (1955), has revealed that although its adoption was premised on assuring employee free choice its administration has in fact tended to impede the attainment of that goal. The ill effects of the rule include extensive analysis of campaign propaganda, restriction of free speech, variance in application as between the Board and the courts, increasing litigation, and a resulting decrease in the finality of election results. As has been thoughtfully examined in several scholarly studies of this subject, to a large degree the source of these difficulties lies in the very nature of the standards we have formulated and sought to administer. Thus, Professor Bok, in his classic treatise on Board election procedures,<sup>12</sup> stated: "If a standard of truth and accuracy could actually provide an administrable norm, something might be said for adopting such a view. But this possibility tends to dissolve on more careful analysis. In the welter of words exchanged during a heated campaign, it is plainly impractical to intervene upon every misstatement made by the agents of the union or the employer. Thus, judges and administrators have long recognized that inaccurate or misleading assertions should be proscribed only under certain conditions. These qualifications, however, immediately began to blur the line between the licit and illicit." Professor Bok concluded 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."<sup>13</sup>

A recent study by Robert E. Williams, Peter A. Janus, and Kenneth C. Huhn analyzed the *Hollywood Ceramics* standards in the following terms:<sup>14</sup>

<sup>10</sup> *Home Town Foods, Inc., d/b/a Foremost Dairies of the South v NLRB*, 416 F.2d 392 (C.A. 5, 1969)

<sup>11</sup> *Id.* at 399. Additionally, the Board itself has, in the past, modified its approach and application of analogous rules for the conduct of elections. See, e.g., *NVF Company, Hartwell Division*, 210 NLRB 663 (1974) (Members Fanning and Jenkins dissenting, but not on the basis of lack of authority), modifying the interpretation of *Peoples Drug Stores, Inc. and Peoples Service Drug Stores*, 119 NLRB 634 (1957)

<sup>12</sup> "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act," 78 Harv. L. Rev. 38, 85 (1964)

Determinations regarding the *substantiality* and *materiality* of particular misrepresentations are necessarily highly subjective. It would be difficult for any tribunal [sic] . . . to reach uniform and consistent results in the application of such standards. The *timing* test represents a logical and necessary attempt to limit agency involvement to cases of "last-minute" abuses, but even it may raise vexatious issues of fact regarding what is required for an "effective" opportunity for reply. With respect to the *source* and *independent knowledge* factors, the Board's decisions reflect a fundamental ambivalence as to how much emphasis should be placed upon the voters' own abilities to recognize campaign propaganda for what it is and either disregard it or take independent steps to verify it before voting in reliance thereon. In some cases, the Board appears to have regarded the employees as exceptionally naive and in need of extensive protection from the agency. In others, the Board has seemed willing to impose a high degree of responsibility on the voters themselves to protect themselves from being misled by campaign claims.

These authors conclude with the following *caveat*: "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 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."<sup>15</sup>

Certainly reasonable men can differ in the application of these vague and flexible standards. Therefore, it is not surprising that the years of litigation under the *Hollywood Ceramics* approach have been marked by frequent differences of opinion between the Board and the courts. This variance in application is illustrated by the several recent cases involving the identical issue presented in the instant case, i.e., alleged union misrepresentations of an employer's profits, in which courts have denied enforcement of Board Orders.<sup>16</sup> Regrettably, these differences further encourage "protracted litigation before the

<sup>13</sup> *Id.* at 92

<sup>14</sup> "NLRB Regulation of Election Conduct" at p. 57, Industrial Research Unit of the Wharton School, University of Pennsylvania (1974)

<sup>15</sup> *Id.* at 60.

<sup>16</sup> E.g., *Argus Optics, a Division of Argus, Inc. v NLRB*, 515 F.2d 939 (C.A. 6, 1975); *Lake Odessa Machine Products, Inc. v NLRB*, 512 F.2d 762 (C.A. 6, 1975); *La Crescent Constant Care Center, Inc. v NLRB*, 510 F.2d 1319 (C.A. 8, 1975); *Henderson Trumbull Supply Corporation v NLRB*, 501 F.2d 1224 (C.A. 2, 1974)

Board and in the courts” and thus also serve to detract from the election goal of giving “speedy practical effect to the choice of employees for or against collective representation.”<sup>17</sup>

The existence of many of these problems was frankly acknowledged by the Board majority in *Modine Manufacturing Co.*<sup>18</sup> Thus, it was therein noted that experience under the *Hollywood Ceramics* approach has revealed that questions of materiality and impact on voter choice are indeed “elusive issues,” the Board and the courts of appeals have often disagreed on the application of the misrepresentation standards, the parties are quick to seize on these uncertainties and file objections, and the resulting increase in litigation has an adverse effect on the finality of election results. Notwithstanding these “inherent dangers” which made abandonment of the *Hollywood Ceramics* approach “in some degree tempting,” the Board majority decided that it was “not yet ready” to leave the voters “to sort out, with no protection from us, from among a barrage of flagrant deceptive misrepresentations.”<sup>19</sup>

Despite the many difficulties in administering the *Hollywood Ceramics* rule, we, too, would nevertheless choose to continue to adhere to it if we shared the belief that employees needed our “protection” from campaign misrepresentations. However, we do not find this to be the case. For our fundamental disagreement with past Board regulation in this area lies in our unwillingness to embrace the completely unverified assumption that misleading campaign propaganda will interfere with employees’ freedom of choice. Implicit in such an assumption is a view of employees as naive and unworldly whose decision on as critical an issue as union representation is easily altered by the self-serving campaign claims of the parties. If these postulates had any validity 20 years ago at the time of *Gummed Products*, they are surely anachronisms today. We decline to join those who would continue to regulate on the basis of such assumptions notwithstanding “improvements in our educational processes, and despite the fact that our elections have now become almost commonplace in the industrial world so that the degree of employee sophistication in these matters has doubtless risen substantially during the years of this Act’s existence . . . .”<sup>20</sup> Rather, we believe that Board rules in this area must be based on a view of employees as mature

individuals who are capable of recognizing campaign propaganda for what it is and discounting it.

The recently published results of an empirical study of NLRB elections suggest that ours is the more accurate model of employee behavior.<sup>21</sup> In this study, Professors Getman and Goldberg interviewed over 1,000 employees in 31 elections conducted in five States. The data cast doubt on the assumption that employees are unsophisticated about labor relations and are therefore easily swayed by campaign assertions, as 43 percent of the study’s respondents had been union members elsewhere and 30 percent had voted in previous Board elections. Perhaps the study’s most significant finding was that the votes of 81 percent of the employees could be correctly predicted from their *precampaign* intent and their attitudes toward working conditions and unions in general. Thus, the campaign did not influence the majority of employees to vote contrary to their predispositions for or against union representation. Rather, the choices of these employees appear to be a product of attitudes formed on the basis of their everyday experiences in the industrial world. This conclusion is supported by other data indicating that employees are generally inattentive to the campaign.<sup>22</sup> Concerning the remaining employees who voted contrary to their original intent or were undecided at the outset of the campaign, only the 5 percent of the total sample who either switched to the union or were originally undecided and ultimately voted for the union could be said to have been influenced by the campaign of the party for which they voted.<sup>23</sup>

Based on 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. Accordingly, we decide today that we will no longer set elections aside on the basis of misleading campaign statements. However, Board intervention will continue to occur 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 render the voters unable to recognize the propaganda for what it is.<sup>24</sup> While the

<sup>17</sup> Judge Feinberg dissenting in *Henderson Trumbull Supply Corporation*, *supra* at 1233. See Samoff, “NLRB Elections: Uncertainty and Certainty,” 117 U. Pa. L. Rev. 228 (1968).

<sup>18</sup> 203 NLRB 527 (1973), *enfd.* 500 F.2d 914 (C.A. 8, 1974).

<sup>19</sup> 203 NLRB at 530.

<sup>20</sup> *Id.*

<sup>21</sup> Getman and Goldberg, “The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation,” 28 Stanford L. Rev. 263 (1976).

<sup>22</sup> *Id.* at 276-279. This conclusion is also in accord with that of an earlier study of NLRB elections. See Brotslaw, “Attitude of Retail Workers Toward Union Organization,” 18 Lab. L. J. 149 (1967).

<sup>23</sup> In contrast, the company campaign was found not to have an analogous effect on “switchers” and originally undecided employees who voted against the union.

<sup>24</sup> We are pleased that Chairman Murphy has decided to join us in overruling *Hollywood Ceramics*, declining to examine oral or written statements for mere truth or falsity, and adopting the above-described

former standard represents no change in Board law,<sup>25</sup> by our adoption of the latter we choose to revert to our earlier policy<sup>26</sup> of setting an election aside not on the basis of the *substance* of the representation, but the deceptive *manner* in which it was made. The essential difference lies in the fact that, while employees are able to evaluate mere propaganda claims, there is simply no way any person could recognize a forged document "for what it is" from its face since, by definition, it has been altered to appear to be that which it is not. Retention of this standard is fully consonant both with our view of employees as intelligent voters and with our duty to insure the integrity of our election process. We shall, of course, continue our policy of overseeing other campaign conduct which interferes with employee free choice outside the area of misrepresentations which had been objectionable only under the *Hollywood Ceramics* rule.

Accordingly, as the Employer's objection has been overruled, and as the revised tally of ballots shows that the Petitioner has received a majority of the valid ballots cast in the election, we shall certify it as the exclusive bargaining representative of the employees in the appropriate unit.

#### CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Retail Clerks Union Local 99, Retail Clerks International Association, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

#### CHAIRMAN MURPHY, concurring:

Like Members Penello and Walther, I believe that the time has come for the Board to recognize the ineffectiveness of its present treatment of allegations

criteria as the basis for setting aside Board elections. We note that the Chairman "would also set aside an election where a party makes an egregious mistake of fact." However, it is clear from her opinion that this category is a very narrow one and would require setting an election aside only "in the most extreme situations." Thus, she states that she did not and would not direct a new election on the basis of such facts as those presented in *Henderson Trumbull Supply Corporation*, 220 NLRB 210 (1975), where it was alleged that the union made a hundredfold misrepresentation of the employer's profits

<sup>25</sup> See, e.g., *J. Ray McDermott & Co., Inc.*, 215 NLRB 570 (1974).

<sup>26</sup> This policy was set forth in *United Aircraft Corporation, Pratt & Whitney Aircraft Division*, 103 NLRB 102 (1953), where one union distributed a forged telegram in which its rival purported to apologize for its conduct during the campaign. Since the employees were deceived as to the source of the "telegram," they could not possibly evaluate its contents and the Board set the election aside. The *United Aircraft* decision was followed in such subsequent cases as *Sylvania Electric Products, Inc.*, 119 NLRB 824,

of misrepresentations of fact in preelection campaign literature and statements and to overrule *Hollywood Ceramics, supra*. Accordingly, I join with them in so holding. I reach this conclusion reluctantly because I agree with the basic principles as set forth in that case;<sup>27</sup> but the ruling has been so expanded and misapplied as to have extended far from the original intent of the Board.<sup>28</sup> Further, I agree with my colleagues that the Board's rules concerning preelection statements must recognize employees as mature adults capable of recognizing and evaluating campaign rhetoric for what it is.

In view of our decision herein, elections will no longer be set aside solely on the basis of misleading oral or written statements unless, for example, a party has engaged in deceptive campaign practices such as involve the Board and its processes or the use of forged documents which render the voters unable to recognize the propaganda for what it is. Needless to say, however, I shall continue to set an election aside in the event of misconduct involving threats, promises of benefit, or similar improprieties.

My sole departure from the position of my colleagues on the majority is that, unlike them, I would also set aside an election where a party makes an egregious mistake of fact. This is not to say that I shall set aside elections even on gross errors or will examine statements, oral or written, for mere truth or falsity; nor shall I look to reliance or possible reliance upon any such statements. I would only find an egregious mistake of fact to constitute interference with an election in the most extreme situations. For example, I did not and would not direct a new election on the facts in *Henderson Trumbull Supply Corporation*, 220 NLRB 210 (1975),<sup>29</sup> in which the union's representative allegedly told employees that the company made over \$1 million, which was construed to represent profits, whereas in fact its gross profits were \$260,371 and its net income was \$11,669 for the year. Nor did I or would I find interference with an election on the facts in *The Contract Knitter, Inc.*, 220 NLRB 579 (1975),<sup>30</sup> in which the alleged misrepresentation consisted of the

827-830 (1957), and *Cascade Corporation*, 205 NLRB 638, fn 2 (1973) (Member Penello relying solely on the forgery as grounds for setting the election aside)

<sup>27</sup> As set forth by my colleagues, the basic rule was adopted for the purpose of assuring employee free choice, but its administration has in fact had the opposite effect and has restricted free speech.

<sup>28</sup> See, e.g., *Medical Ancillary Services, Inc.*, 212 NLRB 582 (1974), *GTE Lenkurt, Incorporated*, 209 NLRB 473 (1974), *Aldon, Inc.*, 201 NLRB 579, 587-588 (1973), *Bausch & Lomb, Incorporated*, 185 NLRB 262 (1970), enf'd 451 F.2d 873 (C.A. 2, 1971)

<sup>29</sup> Member Jenkins joined Member Penello and me in concluding that the misrepresentation did not warrant setting the election aside

<sup>30</sup> Member Jenkins also joined in this decision. Cf. *Snokist Growers, Inc.*, 213 NLRB 368 (1974), facts set forth in 532 F.2d 1239 (C.A. 9, 1976), denying enforcement of the Board decision in which Members Fanning and Jenkins joined with the then Chairman Miller in finding no basis for setting

misstatement of the amount of earnings by employees at plants of another company which was Contract Knitter's largest customer.<sup>31</sup>

The alleged misrepresentation here consisted only of the Petitioner's representative telling the employees that the Employer had profits of \$500,000 during the preceding year, whereas the profits were actually about \$50,000. Under these facts, I find no basis for setting this election aside, and as the Union won the election I join in the certification of representative.

MEMBERS FANNING and *Jenkins*, dissenting in part:

Our colleagues are today departing from long-established Board precedent concerning the treatment of substantial misrepresentations in campaign rhetoric incident to employee opportunity to elect a bargaining representative. This Board will "no longer probe into the truth or falsity of the parties' campaign statements." It will no longer assess, as in *Modine*,<sup>32</sup> the "tendency materially to mislead," hence to destroy laboratory conditions.

In this particular case, the difference in approach within the Board will not affect the result. All agree to certify the Petitioner. On our part we have carefully reviewed the record and are not convinced that the employees considered Deason a credible source in stating that the Employer made \$500,000 in profits when in fact the profit of the year in question was \$50,000, or that the employees of this relatively small single store operation—in an industry having a 5-percent profit margin—were incapable of evaluating Deason's remarks. We note that at the hearing four of the five witnesses presented by the Employer testified that they believed Deason's statement to be incorrect.

We are, however, deeply concerned at this significant change in policy now undertaken by a majority of the Board. The 1962 *Hollywood Ceramics* decision was a clarification of this Board's firm belief that employees should be afforded a degree of protection from overzealous campaigners who distort the issues by substantial misstatements of relevant and material facts *within the special knowledge of the campaigner*, so shortly before the election that there is no effective time for reply. The standards embodied in *Hollywood Ceramics* were written after years of careful and periodic reevaluation.<sup>33</sup> Less than 4 years ago, the Board undertook another reevaluation in *Modine*, *supra*, stating at 530:

aside an election where the union misinformed employees concerning the extent of pension coverage that seasonal workers could expect under union conditions.

<sup>31</sup> Although I appreciate the majority's kind words, I do not deem myself bound by their interpretation of my position, particularly as to what constitutes egregious mistake of fact. My concurrence herein speaks for itself and is neither narrowed nor broadened by my colleagues' opinion as expressed by them in fn 24, *supra*.

<sup>32</sup> *Modine Manufacturing Company*, 203 NLRB 527, 531 (1973) (Member

[W]e are not yet ready to say that we will leave all our voters in all of our elections and in all circumstances to sort out, with no protection from us, from among a barrage of flagrant deceptive misrepresentations.

We consider that statement just as valid today.

Now, however, a majority of this Board has come to the conclusion that there is no need to protect employee voters; that, if there ever was a need, the passage of time has made employees so sophisticated as to negate such need. Our colleagues suggest that we have considered employees "naive," "unworldly," and easily swayed by a self-serving campaign. In some cases, we have had such concerns. Overall we would characterize our concern as stemming from the desirability of maintaining election standards that call a halt to misrepresentation considerably short of fraud. It is well for the parties to have a minimum of lingering doubt as to the fairness of the election if bargaining ensues. Stability of the bargaining relationship and, hence, industrial peace are encouraged if that doubt is minimized.

In rationalizing their policy shift, our colleagues rely upon studies whose authors essentially conclude that employees do not attend closely to preelection campaigns, and that employee voting predilections are not easily changed by campaign information. Therefore, say our colleagues, the *Hollywood Ceramics* rule has done no more than protect free choice in a few. That, we sincerely question. We are aware of these studies and of the fact, as well, that our Nation is given to opinion polling, a technique much used in political campaigns, partly as a guide to tailoring campaign content. In the recent study on "Behavioral Assumptions," the poll consisted of postelection interviews in a five-state area of the Midwest and Upper South, made within a few days after the elections. To our colleagues it is significant that it appears that 81 percent of the employee vote could have been accurately predicted from individual precampaign intent, as recalled postelection. Not commented upon from the same study is the apparent fact that 50 percent of the employees were aware of union claims concerning wages elsewhere, though the precise amount (within 10 percent of the actual claim) was recalled by only 22 percent. We are not prepared to view 22-percent "precise" recall as insignificant. Even the 5 percent of voters who

Kennedy concurring without adopting the discussion on *Hollywood Ceramics*, Member Penello questioned the rule but deferred discussion for a future case), enfd. 500 F 2d 914 (C.A. 8, 1974)

<sup>33</sup> See *Curtiss-Wright Corporation*, 43 NLRB 795 (1942), *Sears Roebuck and Company*, 47 NLRB 291 (1943); *Maywood Hosiery Mills, Inc.*, 64 NLRB 146, 150 (1945); *General Shoe Corporation*, 77 NLRB 124 (1948), *The Gummed Products Company*, 112 NLRB 1092 (1955); *Kawneer Company*, 119 NLRB 1460 (1958).

appear to have admitted changing their minds due to the campaign are not insignificant in our view. Highly significant is awareness by *half* the voters of the wages-elsewhere issue. In such circumstances, if substantially inaccurate wage claims were made at the last minute and the employees themselves had no basis for evaluation, we consider it desirable for this Board to rivet attention on a correction by holding a second election. If the result, as here, is not to hold a second election, the parties are nevertheless made aware of the principle—that misleading matter has been considered. An appropriate standard is thereby maintained.

In 1974, the year the authors of "Behavioral Assumptions" made their study, objections of all kinds were filed in only 11 percent of the 9,000 or more elections conducted by the Board. Board elections held per year now top 10,000. The General Counsel's statistics for the last 6 years show that objections based on misrepresentation averaged between 3 and 4-1/2 percent:

Alleged union misrepresentations	Percent sustained
1971 — 174	1.7
1972 — 176	9.1
1973 — 240	3.8
1974 — 142	10.6
1975 — 245	4.1
1976 — 223	3.6
Alleged employer misrepresentations	
1971 — 205	10.7
1972 — 150	11.3
1973 — 210	10.0
1974 — 104	15.4
1975 — 207	7.2
1976 — 84	21.4

Thus the Board considers some 300 to 400 cases per year on the issue. Considering its importance, this seems to us an excellent investment in maintaining our election standards. The number of second elections run as a result can hardly be viewed as burdensome. For the above figures show that second elections are directed in 7 percent (25 to 27 second elections per year) of the cases in which misrepresentation objections are filed under *Hollywood Ceramics*.

These figures demonstrate two facts of considerable importance to our decision in this case. First,

<sup>34</sup> The 2 of 31 cases in which precampaign intent cannot serve as a "predicator" of result is almost 7 percent of the total, about the same percentage as the percentage of "rerun" elections under *Hollywood Ceramics*

<sup>35</sup> See, for example, *LaCrescent Constant Care Center, Inc v N L R B*,

they refute the argument of critics of the *Hollywood Ceramics* policy, adopted by our colleagues, that the losing parties "will object routinely" to their opponent's campaign statements. Objections there may be; routinely filed, no. Secondly, these figures also refute our colleagues' view that the rule guaranteeing investigation and resolution of misrepresentation objections "operates more to frustrate free choice than to further it and that the purposes of the Act would be better served by its demise." For the significance of these numbers lies not in the fact that so few elections are set aside under *Hollywood Ceramics*, but that in over 95 percent of the more than 10,000 elections conducted each year the employees can cast their ballots after responsibly conducted campaigns. Indeed, even if one were inclined to accept the view that the 31 elections studied by the authors of "Behavioral Assumptions" constitute a statistically significant sample—a dubious proposition at best—and the resultant conclusion that precampaign intent can predict the result in 29 out of 31 cases, its validity is surely limited to campaigns conducted in accordance with *Hollywood Ceramics* standards.<sup>34</sup> Were those standards to be relaxed—to the "almost anything goes" standard proposed by our colleagues—one result can be fairly predicted. Campaign charges and countercharges would surely escalate. For the parties will campaign, and they will campaign on the assumption that what they say may make the difference. As "bad money drives out the good," so misrepresentation, if allowed to take the field unchallengeable as to its impact, will tend to drive out the responsible statement.

Our colleagues seek to eliminate the delay in resolving objections under the present system and we agree with them—and with those who thoughtfully follow Board decisions and discuss them, often in published writings—that this delay is a haunting problem to us. This case in particular is egregious in its postponement of election results. However, in view of the consensus not to set aside, it is most unfortunate that this case was not allowed to issue and a more timely one chosen as the vehicle. Perhaps that is inevitable in reevaluations.

We are unable to share our colleagues' concern at the variance in application of the rule as between the Board and the courts. We do not read these decisions to mean judicial disenchantment with the rule, but only disagreement with how strictly the rules should be applied.<sup>35</sup> It may seem desirable to have the courts uniformly enforce our decisions, just as it

510 F 2d 1319, 1321, 1324 (C.A. 8, 1975), where, while differing with the Board's decision to overrule an employer's objection based on union misstatements of company profits, the court quoted approvingly from *Hollywood Ceramics*, and concluded that a particular statement "was a complete falsehood which cannot be characterized as less than a 'substantial

would be desirable to have “uniform and consistent results” in the application of the rule. But judges and Board Members are human beings and unvarying uniformity in end result is not only unlikely but, should it occur, subject to deep distrust under our system of government. As to the added time factor of litigation, it seems to us an unavoidable characteristic of maintaining campaign standards that we consider highly beneficial to elections “across the board.”

Our elections are well known for the degree of participation by eligible voters, which far exceeds that in political elections where many voters appear to be sufficiently disinterested to allow their fellow citizens to decide the outcome for them. Early this year the Board announced that the 30 millionth voter in a Board election had now voted—at Millers Falls Paper Co. in Massachusetts. The January 16 press release stated:

Conducting such elections, with safeguards to bar improper pressures on the voters by labor or management, has been a major responsibility of the NLRB for nearly 42 years. In some 300,000 elections employee participation has averaged close to 90 percent. At Millers Falls, all but one of the 114 eligible voters in the bargaining unit cast ballots.

It seems to us that this degree of participation is related to the nature of what is at stake: wages, job security, pensions, health benefits, vacation privileges, job conditions. All can be directly affected by the ballot cast by an employee. And that ballot can be directly and significantly affected by the campaign propaganda of the employer and the union. Unlike our colleagues, we are unwilling to permit the parties to campaign, without challenge, on the basis of misrepresentation and distortion of issues so directly related to this economic security of workers.

We think it can fairly be said that the high degree of voter participation in our elections is encouraged by the longstanding policy that *Hollywood Ceramics* represents and, indeed, that voters in political elections may refrain from voting to the extent they do partly because they are reluctant or unable to rely

on the representations made where there is no satisfactory method of review of campaign conduct. The very fact of high voter participation in Board elections counsels the continuance of Board effort in the area of informed free will voting.

Do our colleagues forget that these are the days of a serious search for ways to reform campaign practices in political elections? Every force in our society is moving away from the position taken by our colleagues—truth in lending, truth in advertising, Sunshine laws, freedom of information (not misinformation), financial disclosure in political campaigns, and the like. Is it not most unwise to decide that this is the time for the Board to cast aside a major part of its election protection procedure and retreat to a rule formulated over a generation ago and discarded for good reasons? Pursuant to that procedure there is, for example, the *Excelsior* rule,<sup>36</sup> requiring an employer to furnish eligibility lists, showing the names and addresses of its employees. The Board approved that addition to its election procedures in 1966, 4 years after the *Hollywood Ceramics* restatement on misrepresentations. The purpose was to see that all parties to the election, whatever their viewpoint, have an opportunity to communicate with the electorate to the end that the voters could cast an informed ballot. Disclosure of the names and addresses of the full unit complement in advance of the election was deemed a key factor in insuring fair and free elections by an informed electorate. Are our colleagues now prepared to have these eligibility lists used to grossly misinform the electorate? Or should we interpret the step here taken with respect to *Hollywood Ceramics* as just the first in dispensing with time-honored election safeguards?

It is with astonishment that we note the contention that one of the “host of ill effects” of *Hollywood Ceramics* is the “restriction of free speech.” Are our colleagues equating the Board’s assessment of the impact of campaign misrepresentations on the fairness of its elections with imposition of a prior restraint upon the parties’ expression of their views, arguments, and opinions, in any manner deemed desirable by them? The right of free speech guaranteed by the first amendment has never been construed to our knowledge to leave the speaker

departure from the truth’ under the *Hollywood Ceramics* test” See also *N L R B. v. Carlton McLendon Furniture Co., Inc.*, 488 F.2d 58, 62 (C.A. 5, 1974), where the court described its own parallel test and concluded that the Regional Director erred in finding a last-minute handbill immaterial (to wit the union had won a nearby election though the result was a one-vote plurality with two unresolved challenges, later the subject of charges) In *N L R B. v. Cactus Drilling Corporation*, 455 F.2d 871 (C.A. 5, 1972), the court was not satisfied with the Board’s “strict” application of its opportunity-to-reply criterion, the Board having taken account of the objecting party’s failure to rebut, despite a clear opportunity to do so, and balanced this against the fact that Board rules foster the rights of majorities. The court viewed rebuttal as futile in the context but also observed that

“there is certainly a proper place for the Board’s *Hollywood Ceramics* rule . . .” See also *Argus Optics, a Division of Argus, Inc v N L R B*, 515 F.2d 939 (C.A. 6, 1975), where the court remanded for hearing, noting that the Regional Director had failed to apply the *Hollywood Ceramics* test to one of the letters sent by the union and to an election eve misrepresentation concerning profits, *Thiem Industries, Inc v. N L R B*, 489 F.2d 788 (C.A. 9, 1973), where the court, applying *Hollywood Ceramics*, found, *inter alia*, that “employees are liable to accept . . . uncritically” a union’s statements about its own contracts, thus differing from the Board’s assessment that accepting credit for certain large wage increases in several industries was merely an overexaggeration.

<sup>36</sup> *Excelsior Underwear Inc*, 156 NLRB 1236 (1966).

unaccountable for the impact or effects of his speech. Similarly, a party to a Board election is free to say what he will, but there is nothing in Section 8(c) to preclude setting an election aside if it can be shown that serious misrepresentations or distortions of election issues have seriously impaired the fairness of the electoral process. The Act contains no license for unrestricted distortions and, though the Board may have the requisite authority to pare sharply the "laboratory conditions" standard it has developed, the step our colleagues now take cannot be justified on the assumption that our standard has restricted free speech.

The right-of-free-speech argument of our colleagues raises doubt of their ultimate purpose. Though they protest that they will continue to oversee "employee free choice outside the area of misrepresentations" their assurance is hardly persuasive. Setting aside elections on the basis of threats, promises, and coercive interrogation can also be labeled as requiring undue analysis of campaign propaganda, litigation that results in variance, postponed finality of elections, and restrictions on the right of free speech. In fact, only fraud or forgery—which have rarely intruded upon our elections—appears suitable for resolution as effortlessly and expeditiously as our colleagues would wish.

Thus, we are unimpressed by the mirage of ill effects our colleagues see in the *Hollywood Ceramics* policy. In our view, proof is entirely lacking that administration of the rule has tended to impede informed free will exercise of voter franchise. Rather, in untold numbers of uncontested elections, it has encouraged that objective.

MEMBER JENKINS, dissenting further:

The majority, in deciding that misrepresentations in an election campaign are of no importance, relies extensively, indeed perhaps solely, on a law review article which the writers have since expanded into a book.<sup>37</sup> In evaluating this conclusion and where it might lead, it is appropriate to examine the latest and most complete expression of the writers' methods, rationale, logic, and conclusions. Such examination leads me to substantial reservations on all points.

These writers conclude (pp. 120–121) that potential union supporters are unaffected by what they perceive as an employer's unlawful campaigning. They base this on their finding that, among the initial union supporters, those who ultimately voted against the union did not report unlawful campaigning in a greater percentage of cases than those who voted for the union. Yet, the most that can be drawn from this

"fact" appears to me to be that the depth of conviction regarding union support varies with individuals, and some of them can be turned around while others cannot.

Using the same sort of "fact" and logic, the writers conclude that discharges perceived as discriminatory similarly have no effect in influencing employees' votes (p. 126).

They also conclude that interrogation does not affect employee attitudes, because "it was rarely reported by employers as a campaign tactic" (p. 149). Yet, the writers did not ask directly whether interrogation had taken place and, nevertheless, 29 employees volunteered that it had occurred in (seemingly) 16 of the 31 elections examined. This appears to me to indicate that interrogation made a substantial impression on the employees. The writers further support their conclusion by the facts that 43 percent of the union voters believed the employer knew their views, and 76 percent of these had voluntarily disclosed their views to the employer. Obviously, interrogation of these hardy souls, 33 percent of the voters, would be unimportant and indeed needless—it is the other two-thirds that concern us, and about whom the writers tell us nothing.

They find that union authorization cards are sufficiently reliable indicators of union support that elections are really not needed (pp. 135, 153), but then conclude that elections are preferable to recognition on the basis of cards in order to allow the employer to present his campaign (pp. 136, 153), and they concede, contrary to what one would expect from their willingness to ignore all election campaign misconduct, that such campaigns are effective in switching the position of the voters (p. 145).

With this sort of nonprobative factual data and *non sequitur* logic, these writers find it easy to conclude that discharges, other reprisals, grants of benefits, threats, promises, interrogation, and misrepresentations should be eliminated as grounds for setting aside elections (pp. 147–152). It is these uncertain guides the majority is here following with regard to misrepresentations. There is no reason to think the same course will not lead them to disregarding threats, promises, discharges, other reprisals, grants of benefits, and interrogation. The number of *Gissel* bargaining orders<sup>38</sup> issued on the basis of card majorities after unions have lost elections tainted by unlawful conduct shows that something is causing voters to switch. It is this inescapable fact which my majority colleagues, in reliance on these writers, ignore.

<sup>37</sup> "Union Representation Elections Law and Reality," Getman, Goldberg and Herman (Russell Sage Foundation, New York, 1976)

<sup>38</sup> *N L R B v Gissel Packing Co., Inc.*, 395 U.S. 575 (1969)