Loyola University Chicago Law Journal

Volume 10
Issue 4 *Summer 1979*

Article 6

1979

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Introduction

The National Labor Relations Board (NLRB) possesses wide discretion in establishing policies to safeguard the conduct of union representation elections[1] held pursuant to statutory procedure.[2] The Board's function is "to assure the employees full and complete freedom of choice" in voting for or against union representation.[3] Recognizing that employer or union misconduct during an election can impair this free choice, the NLRB has sought to guarantee that elections be conducted under "laboratory conditions."[4] The elections are thus viewed as experiments to determine the employees' real preference.[5] When the laboratory conditions are impaired by employer or union conduct, the Board will set aside the election and direct that a new one be held.[6]

In a 1962 decision, *Hollywood Ceramics Co.*,[7] the NLRB held that gross misrepresentation about a material election issue is one factor which interferes with the expression of free choice and disturbs laboratory conditions.[8] In 1977, the Board announced in *Shopping Kart Food Market, Inc.*[9] that it would no longer probe into the truth or falsity of campaign statements nor set aside elections on the basis of misrepresentation.[10] Twenty months later, the NLRB reinstated the *Hollywood Ceramics* rule in *General Knit of California*.[11] This comment will examine the Board's reasons for reestablishing the frequently criticized *Hollywood Ceramics* rule.

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1. NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946). *Accord,* NLRB v. Wyman-Garden Co., 394 U.S. 759, 767 (1969).

2. Section 9(c)(1) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 159(c)(1) (1970), provides for the filing of a petition for a representation election by the employees, the employer, or a union. If upon the basis of the petition the Board determines that it has reasonable cause to believe that a question of representation affecting commerce exists, it orders a hearing. "If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." *Id.*

3. Hollywood Ceramics Co., 140 N.L.R.B. 221, 223 (1962).

4. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

5. *Id.*

6. *Id.*

7. 140 N.L.R.B. 221 (1962).

8. *Id.* at 223.

9. 228 N.L.R.B. 1311 (1977).

10. *Id.* at 1311, 1313.

11. 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (Dec. 6, 1978). The *Shopping Kart* decision had been unexpected. *See* Note, *Shopping Kart: The Need for a Broader Approach to the*

LABORATORY CONDITIONS AND MISREPRESENTATION

Section 7 of the National Labor Relations Act[12] (NLRA) broadly outlines employee rights "to self-organiz[e], to form, join, or assist labor organizations, to bargain collectively through representatives of [the employees'] own choosing, and . . . to refrain from any or all of such activities . . . ."[13] The NLRA specifically prohibits as unfair labor practices actions which coerce, interfere with or restrain employees in the exercise of these organizational rights.[14] The laboratory conditions required for union elections are not specifically mandated by the NLRA, but originated in the Board's *General Shoe Corp.*[15] decision.

General Shoe held that speech or conduct during an election campaign which falls short of constituting an unfair labor practice may still violate laboratory conditions, requiring invalidation of the election.[16] Thus the NLRB has overturned an election where a non-coercive campaign speech was made on company time within twenty-four hours of an election.[17] Non-coercive employer interviews have also been held to interfere with free choice because of the circumstances under which they were conducted.[18]

Problems of Campaign Regulation, 56 N.C.L. REV. 389, 390 n.8 (1978) [hereinafter cited as *Problems of Regulation*]. Observers noted the possibility of its being overruled after a change in Board membership. *Id.* at 406 n. 102; Note, *Misrepresentations in Union Organizational Elections: The Death of Hollywood Ceramics*, 9 U. TOL. L. REV. 399, 419 (1978) [hereinafter cited as *Death of Hollywood Ceramics*]. The *Shopping Kart* majority consisted of Member Pennello, then-Member Walter and then-Chairman Murphy; Members Fanning and Jenkins dissented. New Member Truesdale joined Jenkins and Chairman Fanning in the *General Knit* decision, with Members Penello and Murphy dissenting.

12. 29 U.S.C. §§ 151-69 (1970).

13. 29 U.S.C. § 157 (1970).

14. 29 U.S.C. §§ 158(a)(1), 158(b)(1) (1970).

15. 77 N.L.R.B. 124 (1948).

16. The case was the Board's response to the enactment in 1947 of § 8(c) of the Labor Management Relations (Taft-Hartley) Act, which provides:

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

29 U.S.C. § 158(c) (1970). Congress intended this section to allow employers greater freedom of expression than they had enjoyed under the Board's pre-1947 policies. However, the Board held that the section would apply only to unfair labor practices and announced it would continue to regulate campaign behavior. *See generally Problems of Regulation, supra* note 11, at 392 n.24, 393 n.28.

17. Peerless Plywood Co., 107 N.L.R.B. 427 (1953). The *Peerless Plywood* rule is based on the Board's belief that last minute speeches on company time to massed assemblies of employees "tend to interfere with that sober and thoughtful choice which a free election is designed to reflect." *Id.* at 429.

18. *E.g.*, Peoria Plastic Co., 117 N.L.R.B. 545 (1957) (interviews at employees' homes);

In *Hollywood Ceramics,*[19] the Board applied the laboratory conditions standard to misstatements made during an election campaign, and announced the following rule:

> 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 . . . 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.[20]

Hollywood Ceramics weighed the right of the employees to an "untrammeled choice" against the right of all parties to wage a free and vigorous campaign.[21] On balance, the Board determined that the former consideration prevailed. However, the Board noted that its intervention in the election process should be limited, since directing new elections upsets plant routine and prevents stable labor-management relations.[22]

In addition, the review process used by the Board to determine whether a new election should be held also had unsettling effects. Losing parties could delay certification of election results by filing post-election objections to campaign conduct with the NLRB.[23] Fur-

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General Shoe Corp., 97 N.L.R.B. 499 (1951) (interviews in management offices with employees called in individually and in small groups).

19. 140 N.L.R.B. 221 (1962).

20. *Id.* at 224 (footnote omitted). On the afternoon before the election, the union had distributed a handbill comparing the hourly rates paid by the employer with those prevailing at several unionized plants. The employer's rates did not include payments on an existing incentive system but the other rates did. The handbill did not adequately explain the differential and the Board found the misrepresentation material. *Id.* at 225.

The Board sought in *Hollywood Ceramics* to restate and clarify election conduct rules which had developed over the years in cases such as Celanese Corp. of America, 121 N.L.R.B. 303 (1958); Dartmouth Finishing Corp., 120 N.L.R.B. 262 (1958); Gummed Products Co., 112 N.L.R.B. 1092 (1955). *See* R. WILLIAMS, P. JAMES & K. HUHN, NLRB REGULATION OF ELECTION CONDUCT 17-25 (U. Pa. Wharton School Labor Relations and Public Policy Series No. 8, 1974) [hereinafter cited as WILLIAMS].

Although the *Hollywood Ceramics* test was one of probable rather than actual impact, the Board recognized that employees' actual independent knowledge of matters might negate the effect of a misrepresentation. 140 N.L.R.B. at 224. Similarly, if the misstatement concerned an unimportant matter or was so extreme that it would preclude reasonable reliance by employees, the Board would not set the election aside. *Id.*

21. 140 N.L.R.B. at 224.

22. *Id.*

23. Section 8(a)(5) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 158(a)(5) (1970), makes an employer's refusal to bargain an unfair labor practice which the Board is empowered to prevent under § 10 of the Act, 29 U.S.C. § 160 (1970).

If, after Board review, the union were certified as the representative, an objecting employer could obtain judicial review of the misrepresentation issue by refusing to bargain with the

ther, the United States courts of appeal often disagreed with the Board's application of its own standards for reviewing election objections. The frequent refusal of the courts to enforce Board bargaining orders in misrepresentation cases compounded the uncertainty in these situations.[24]

Stating that it could no longer support a standard of review that "operates more to frustrate free choice than to further it,"[25] the Board in *Shopping Kart Food Market, Inc.* abandoned the *Hollywood Ceramics* test. In overruling *Hollywood Ceramics,* the Board primarily relied on a single empirical study of employee voting behavior known as the Getman study.[26] The study concluded that employees are generally inattentive to election campaigns.[27] The Board also acknowledged the criticism of its election procedures.[28] The *Shopping Kart* decision stressed that employees are capable of ferreting out misleading campaign propaganda.[29] Conse-

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newly certified union. Such refusal would prompt unfair labor practice proceedings, resulting in a Board order to bargain. Enforcement of the order could be sought in the circuit courts, § 10(c), 29 U.S.C. § 160(c) (1970), where the employer could raise campaign conduct objections. This review process can be extremely lengthy. *See* note 48 *infra.*

In Modine Mfg. Co., 203 N.L.R.B. 527 (1973), the Board recognized that the problem of delay was one of the inherent dangers in the *Hollywood Ceramics* rule. The Board expressed concern over such factors as the time and money spent on hearings and re-elections, and the need for caution in applying rigorous election safeguards. Although these dangers made it tempting to overrule *Hollywood Ceramics,* the Board declined to do so at that time. *Id.* at 530.

24. *See* WILLIAMS, *supra* note 20, at 60. The study noted that routine objections by losing parties and a high volume of litigation were likely to continue under *Hollywood Ceramics* and recommended that it be overruled. *But see* General Knit of Cal., 239 N.L.R.B. No. 101, ____, 99 L.R.R.M. 1687, 1691 (1978) which noted that relatively few misrepresentation cases are appealed.

25. Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311, 1313 (1977).

26. The study was published in two parts; Getman and Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation,* 28 STAN. L. REV. 263 (1976) [hereinafter cited as Getman], and Getman, Goldberg and Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates,* 27 STAN. L. REV. 1465 (1975). The study was also expanded in book form: GETMAN, GOLDBERG & HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976) [hereinafter cited as LAW AND REALITY]. *See Problems of Regulation, supra* note 11, at 389, 399-403 for an analysis of the Board's treatment of the study. *See generally* Miller, *The Getman, Goldberg and Herman Questions,* 28 STAN. L. REV. 1163 (1976).

27. Getman, *supra* note 26 at 283. A key finding was that slightly over 80% of the employees in the sample had voted in accordance with their pre-campaign intentions and attitudes. *Id.*

28. 228 N.L.R.B. at 1312-13 n.17, *citing* Samoff, *NLRB Elections: Uncertainty and Certainty,* 117 U. PA. L. REV. 228 (1968); Bok, *The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act,* 78 HARV. L. REV. 38 (1964); WILLIAMS, *supra* note 20.

29. "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." 228 N.L.R.B. at 1313.

quently, elections would no longer be set aside on the basis of misrepresentations.[30] The Board declared that it would continue to intervene in cases involving the misuse of Board processes or the use of forged documents.[31]

Two Board members objected to the policy shift, arguing that the Board should continue to investigate claims of misrepresentation so that the parties to an election would have a "minimum of lingering doubt" as to its fairness.[32] These dissenting opinions laid the groundwork for the reversal which came in General Knit.

General Knit: Return to Board Review

The facts in *General Knit of California*[33] did not present a strong case for overruling *Shopping Kart*. On election day, the union had distributed a leaflet describing the financial condition of both the employer and its parent corporation.[34] The employer claimed that

30. Since *Shopping Kart* involved only a misrepresentation—the union's representative had told employees that company profits for the previous year had been $500,000, though in fact the profits were $50,000—the Board overruled the employer's objection and certified the union. *Id.* at 1314.

31. Then-Chairman Murphy stated in her concurrence that she would also set aside an election where a party makes an egregious mistake of fact, but only in the most extreme situations. *Id.*

As an example of the "Board processes" exception, the Board cited L. Ray McDermott & Co., 215 N.L.R.B. 570 (1974) (flyer containing partisan statements along with a reproduction of a Board document might have led employees to believe that Board had endorsed union; second election directed). *But see Death of Hollywood Ceramics, supra* note 11, at 417 n.121 ("Board processes" exception inconsistent with Board policy of treating employees as mature and sophisticated voters).

Before development of the *Hollywood Ceramics* doctrine, the Board limited its review to factual situations involving forgery. *See, e.g.*, United Aircraft Corp., 103 N.L.R.B. 102 (1953) (one union distributed copies of a forged telegram from an opposing union's president, purporting to apologize for campaign misconduct; election set aside because employees could not have recognized the forgeries as propaganda).

32. 228 N.L.R.B. at 1315.

33. 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (Dec. 6, 1978).

34. The leaflet stated in part:

'WHO IS FOOLING WHO???

GENERAL KNIT CAN CRY POOR MOUTH IF THEY WANT, BUT LET'S LOOK AT THE FACTS.

IN 1976, GENERAL KNIT HAD SALES OF $25 MILLION.

GENERAL KNIT IS OWNED BY ITOH WHO HAS A NET WORTH IN EXCESS OF $200 MILLION.

THIS COMPANY HAD AN INCREASE OF 12.5% IN SALES FOR [THE] PERIOD ENDING MARCH 31, 1977.

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

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

ITOH WHO OWNS GENERAL KNIT IS MAKING IT BIG AND CAN AF-

the union had misrepresented the parent corporation's profits of $19.3 million as those of the employer, when in fact General Knit had lost $5 million.[35]

The Acting Regional Director correctly overruled General Knit's objections on the basis of *Shopping Kart*. The Board, however, decided to reinstate *Hollywood Ceramics* "to maintain the integrity of Board elections and thereby protect employee free choice."[36] The case was remanded for factual findings on the misrepresentation issue.[37]

The *General Knit* majority emphasized the stability of the bargaining relationship which results from the free election process. The *Hollywood Ceramics* test, it claimed, "has been a significant factor in the Board's electoral success, since the parties, knowing the serious consequences of their acts, have been deterred from engaging in conduct which would tend to interfere improperly with a free election."[38] Further, the Board relied on its past experience in conducting elections and rejected *Shopping Kart's* conclusion that employees ignore campaign propaganda.[39] The majority also responded to charges of unreasonable delay in certifying election results which had been leveled in *Shopping Kart* and reiterated in a strong dissent in *General Knit*.[40] It noted that such delays are inher-

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FORD DECENT WAGES FOR ITS EMPLOYEES.
VOTE YES, TODAY, AND MAKE THE COMPANY SHARE SOME OF THEIR HIGH PROFITS WITH YOU—THE WORKER.'

Id. at ___, 99 L.R.R.M. at 1688.

35. *Id.* at ___, 99 L.R.R.M. at 1687.

36. *Id.* at ___, 99 L.R.R.M. at 1688-89.

37. *Id.* at ___, 99 L.R.R.M. at 1691. Dissenting Member Murphy objected to this further delay, since she predicted that the misrepresentation, if any, would not be found material and the Board would eventually certify the union. *Id.* at ___, 99 L.R.R.M. at 1701.

Whatever the ultimate resolution of *General Knit* after investigation, it is noteworthy that the Board did not wait for a case involving a particularly gross misstatement of fact to reinstate *Hollywood Ceramics*.

38. *Id.* at ___, 99 L.R.R.M. at 1689.

39. "The results of 43 years of conducting elections, investigating objections, and holding hearings at which employees testify concerning their recollection of campaign tactics convince us that employees *are* influenced by certain union and employer campaign statements" (emphasis added). *Id.* at ___, 99 L.R.R.M. at 1690.

40. Much of Member Penello's dissent dealt with Blackman-Uhler Chem. Div.—Synalloy Corp., a case decided the same day as *General Knit*. 239 N.L.R.B. No. 102, 99 L.R.R.M. 1702 (Dec. 6, 1978). Prior to *Shopping Kart*, the Board had overruled employer objections to an election which the union had won and ordered the employer to bargain. The objections were based on an alleged misrepresentation of profits similar to that in *General Knit*. The Board's order was initially enforced by a panel decision of the Fourth Circuit, Blackman-Uhler Chem. Div., Synalloy Corp. v. NLRB, 558 F.2d 705 (4th Cir. 1977), but on rehearing *en banc* the court denied enforcement. 561 F.2d 1118 (4th Cir. 1977). The full court stated that it would disagree with the Board and find the misrepresentation material if the *Hollywood Ceramics*

ent in any appeal of a Board order and are not peculiar to misrepresentation cases.[41]

Recurring Problems of the Hollywood Ceramics Approach

The opinion in *General Knit* acknowledged two specific criticisms of the Board's applicaton of the *Hollywood Ceramics* rule. One major objection was the difficulty in predicting whether the Board would find a particular misrepresentation material under all the circumstances. The flexibility of the rule and the need for detailed factual determinations in each case produced inconsistent results over the years before *Shopping Kart.*[42] The *General Knit* Board's only response to this criticism was to set as it goals strict adherence to the reinstated rule and equal application of the rule to employers and unions.[43] The Board emphasized its intention to allow parties to campaign vigorously.[44]

It is unclear how strict adherence to a flexible standard can produce uniform decisions. Reestablishing review of misrepresentation objections once again places the NLRB in an adjudicative role, analyzing facts and applying the rule on a case-by-case basis.[45] Since *General Knit* failed to establish specific guidelines for determining materiality of misrepresentations, consistent and predictable results remain unlikely.

The inherent uncertainty in the decisions also contributes to the use of objections as a vehicle for delay.[46] According to Member Penello's dissent in *General Knit,*[47] the delays involved in Board review

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standard were applied. The court was unsure, however, of the proper standard of review because in the interim before rehearing, the Board had decided *Shopping Kart.* The case was remanded to the Board solely for a determination on the retroactive application of the new standard. Although it recognized that *Shopping Kart* could dictate a different result in the case, the court specifically did not pass on the correctness of that decision. *Id.* at 1119. Member Penello's reliance on the mere fact of remand is therefore misplaced.

41. 239 N.L.R.B. at ____, 99 L.R.R.M. at 1691 n.28.

42. *See generally* Williams, *supra* note 20, at 55-61.

43. 239 N.L.R.B. at ____, 99 L.R.R.M. at 1690-91. Member Penello in his dissent apparently interprets "strict" adherence to *Hollywood Ceramics* to mean broad application of the rule. *Id.* at ____, 99 L.R.R.M. at 1698. However, the majority opinion implies that "strict" adherence will restrict application of the rule. *Id.* at ____, 99 L.R.R.M. at 1691.

44. *Id.* at 1690-91.

45. *See Problems of Regulation, supra* note 11 (Board should effectuate changes in campaign standards through rulemaking proceedings rather than through adjudication).

46. The unpredictability of the outcome in misrepresentation cases may induce employers to maintain objections of questionable validity following a union victory, in the hope that the delays engendered by the review process will dissipate the union's support. *See* text accompanying note 49 *infra.*

47. Member Penello had urged the abandonment of *Hollywood Ceramics* in two dissents prior to *Shopping Kart. See* Ereno Lewis, 217 N.L.R.B. 239, 240 (1975); Medical Ancillary Serv., Inc., 212 N.L.R.B. 582, 586 (1974). *See also* Penello, *Shopping Kart Food Market, Inc.:*

thwart the fundamental goal of encouraging collective bargaining.[48] Employers have an incentive to appeal adverse decisions because the courts refuse to enforce bargaining orders in fifty percent of misrepresentation cases.[49]

The majority countered that few such cases are appealed[50] and concluded that "the problem of delay has been greatly exaggerated."[51] On a practical note, the Board suggested that it would hold fewer hearings on misrepresentation objections.[52]

The *General Knit* majority gave short shrift to the problems of delay and lack of predictability. Cursory treatment of these issues was justified by the Board's finding that such considerations were outweighed by the value of preservation of free choice.[53] This view begs the question whether free choice is best served by painstaking

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The Cure for the Hollywood Ceramics Malaise, 46 U. CIN. L. REV. 464 (1977).

48. 239 N.L.R.B. at ____, 99 L.R.R.M. at 1692. The *Blackman-Uhler* facts bear out Penello's contention regarding delay; three years passed between the date of election and the date the Court of Appeals denied enforcement of the Board bargaining order. *See* Blackman-Uhler Chem. Div.—Synalloy Corp., 239 N.L.R.B. No. 102, 99 L.R.R.M. 1702 (1978).

However, Penello's statement that "the election loser frequently chooses to litigate rather than negotiate", 239 N.L.R.B. at ____, 99 L.R.R.M. at 1693 (dissenting opinion), is questionable since the highest number of *Hollywood Ceramics*-type cases appealed to the circuit courts in any year since 1947 was 11. *Id.* at ____, 99 L.R.R.M. at 1691.

49. *Id.* at ____, 99 L.R.R.M. at 1693 (dissenting opinion).

50. *See* note 48 *supra*. Members Fanning and Jenkins had previously noted that the NLRB handled some 300 to 400 cases of objections based on misrepresentations out of some 10,000 elections held per year. Out of these, second elections were ordered in only seven percent, or 25 to 27 cases per year. Shopping Kart Food Mkt., Inc., 228 N.L.R.B. at 1316 (dissenting opinion). Based on these statistics, the *General Knit* majority found the administrative burden of regulating campaign misrepresentations slight when compared with the substantial benefit of insuring free choice. 239 N.L.R.B. at ____, 99 L.R.R.M. at 1689. *See id.* at ____ n.13, ____ n.62; 99 L.R.R.M. at 1689 n.13, 1701 n.62. Presumably it is unimportant whether *Shopping Kart* actually had the effect of deterring the filing of misrepresentation objections in the year after its decision, since it would certainly have had that effect if applied consistently for a long enough period. Mere reduction in caseload is not probative of the rule's value. By the same reasoning, neither is the continued filing of objections.

51. *Id.* at ____, 99 L.R.R.M. at 1691.

52. *Id. citing* Modine Mfg., 203 N.L.R.B. 527 (1973), *enforced*, 500 F.2d 914 (8th Cir. 1974). "The median time from the date of election to the date of issuance of a decision by the Regional Director on objections is approximately two months." 239 N.L.R.B. at ____, 99 L.R.R.M. at 1694 (dissenting opinion by Member Penello). However, "[t]his figure represents an average of cases in which hearings have and have not been held." *Id.* at n.32, 99 L.R.R.M. at 1694 n.32. Member Penello estimated further delays as follows: review by the Board of exceptions to the Regional Director's findings (three months); subsequent refusal to bargain resulting in unfair labor practice proceedings (nine and a half months to Board order); appeal of the order to the courts (seven and a half months to decision). *But see* note 48 *supra* (few cases are appealed).

53. "In any event, we would not . . . place a greater value on expediency of case processing than on maintaining standards to preserve the integrity of the electoral process." 239 N.L.R.B. at ____, 99 L.R.R.M. at 1691.

review of campaign propaganda when the resulting delay effectively prevents prompt implementation of bargaining.

Examining campaign statements for truth or falsity to determine their effect on an election is logical so long as the NLRB continues to regulate both unfair labor practices and other violations of laboratory conditions. The *Shopping Kart* decision preserved free choice as the standard for regulating campaign conduct in areas other than misrepresentation,[54] and the dissent there pointed out the inconsistency of ignoring misrepresentations while continuing to regulate other behavior. The dissenters noted that the Getman study, relied on by the majority, had concluded that other forms of misconduct currently recognized as grounds for setting aside an election did not influence employees' votes either.[55]

The Board's laboratory conditions standard is not mandated by the NLRA.[56] Although the *General Knit* decision may aim for the effect of treating misrepresentation consistently with other campaign misconduct, the problems of unpredictability and delay which have plagued the review process in the area of misrepresentation are not alleviated by use of the laboratory conditions standard. Surprisingly, the decision to return to *Hollywood Ceramics* was not accompanied by a reexamination of the propriety of this standard.

In returning to the *Hollywood Ceramics* rule, the Board summarily discarded empirical evidence in favor of reliance on its own expertise.[57] The only basis offered by the *General Knit* opinion for its assertion that the rule deters campaign misconduct was the Board's experience in conducting elections, ninety percent of which go unchallenged.[58] *Shopping Kart* may have accepted empirical data without sufficient scrutiny,[59] but *General Knit* reaches the op-

54. 228 N.L.R.B. at 1314.

55. *Id.* at 1318 (dissenting opinion), *citing* LAW AND REALITY, supra note 26, at 147-52 (discriminatory discharges and interrogation were among other forms of misconduct studied). One dissenting opining in *Shopping Kart* expressed the fear that the rationale applied by the majority to misrepresentations would be extended to threats, reprisals, and other conduct currently regulated. *Id. See also* Note, 1978 B.Y.L. REV. 208, 220.

56. *Cf. Death of Hollywood Ceramics, supra* note 11, at 405 n.38 (quoting a Senate Committee Report which concluded that the laboratory conditions standard violates the spirit of § 8(c) of the NLRA). *See* notes 15 and 16 *supra* and accompanying text.

57. *See* text accompanying note 39 *supra*. It has been suggested that the Getman study goes to basic policy assumptions underlying the NLRA and is properly addressed to Congress, not the NLRB. Phalen, *The Demise of Hollywood Ceramics: Fact and Fantasy*, 46 U. CIN. L. REV. 450. 459 (1977).

58. 239 N.L.R.B. at ____, 99 L.R.R.M. at 1689.

59. *See Problems of Regulation, supra* note 11, at 400.

posite extreme, finding support for a major policy shift in the nebulous concept of Board expertise.

CONCLUSION

General Knit leaves no doubt that policy prevailed over practicality in the NLRB's decision to once again exercise control over campaign propaganda. Regardless of the benefits of a *Shopping Kart* approach in terms of predictability of result and speedy implementation of collective bargaining, "a rule which merely eliminates a certain classification of cases, at the expense of an important principle [freedom of choice], is not a success."[60] As one Board member noted, the *Shopping Kart* position runs against the current trend toward public protection, as exemplified by recent laws requiring truth in advertising, freedom of information, and financial disclosure in political campaigns.[61]

General Knit brings the briefly errant standard for election regulation—that relating to misrepresentations—firmly back into line with the NLRB's laboratory conditions requirement. The *Hollywood Ceramics* rule's longevity and quick recovery suggest continuing vitality in the future, even at the expense of practical considerations. An untrammelled free choice is meaningless if the results of that choice cannot be implemented quickly and effectively. *General Knit* gives no real clue as to how future decisions can avoid the problems which persisted under the *Hollywood Ceramics* approach.

KAREN DORFF

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60. 239 N.L.R.B. at ___ n.13, 99 L.R.R.M. at 1689 n.13.

Member Murphy argued that even on pure policy grounds *Shopping Kart* should be the proper rule. She maintained that the Board's responsibility to insure fair elections is derivative of its more fundamental duty under the NLRA to protect employees' rights to decide to organize and engage in collective bargaining. *Id.* at ___, 99 L.R.R.M. at 1699 (dissenting opinion).

Murphy distinguished regulation of threats from that of misstatements and justified regulation of coercion on a "reasonable" assumption that employees are likely to act or consider acting to avoid consequences of a threat. This assumption might support ignoring misrepresentation while continuing to regulate other conduct, but it is inconsistent with the findings of the Getman study relied on in *Shopping Kart*. *See* text accompanying note 55 *supra*.

61. Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311, 1317 (1977) (dissenting opinion of Member Fanning).