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Permitting limited admission of polygraph evidence in a hearing upon a motion for new trial is a novel compromise between the strict evidentiary standard of general scientific acceptance and the liberal rules of relevant evidence. *Barbara* preserves the sanctity of the trial from a "questionable device," but permits the court to test the utility of the polygraph under strictly controlled conditions. If the polygraph fails to demonstrate its reliability in gauging witness sincerity within the confines of new trial hearings, the *Barbara* court has limited adequately the effect of its decision through the numerous conditions imposed on the permissible use and purpose of such evidence. Conversely, if the polygraph succeeds in demonstrating its reliability in assessing witness credibility, the *Frye* standard of general scientific acceptance should be satisfied and the door properly opened to the general admission of polygraph evidence for impeachment purposes.

MICHAEL MORRIE JONES

**Labor Law—** *Shopping Kart: The Need for a Broader Approach to the Problems of Campaign Regulation*

In accordance with its authority under the Labor Management Relations Act to regulate union election campaigns, the National Labor Relations Board has developed a complex set of election standards to protect employee "freedom of choice" in voting for or against union representation. The Board conceives of free choice not simply as an uncoerced refusal to submit to a polygraph examination. *Cf.* People v. Towns, 69 Mich. App. 475, 245 N.W.2d 97 (1976) (improper for trial court to induce defendant to take polygraph test prior to sentencing even though court told defendant that refusal to take the test would not affect the sentence); People v. Allen, 49 Mich. App. 148, 211 N.W.2d 533 (1973) (improper to ask defendant if he were willing to take a polygraph test).

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1. Section 9(c)(1) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 159(c)(1) (1970), states in part, "[I]f 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." The Supreme Court interpreted a similar provision under § 9(c) of the National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 453 (1936), to give the Board authority to promulgate regulations necessary to conduct a fair election. Southern S.S. Co. v. NLRB, 316 U.S. 31, 37 (1942); NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940).

choice, but also as one that is "informed" and "reasoned." To promote such rational decisionmaking by employees, the Board seeks in the elections it supervises to "provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible." This "laboratory conditions" ideal has provided a rationale under which the Board has developed extensive rules for determining when conduct or speech by either employer or union will be grounds for setting aside an election. As part of this development, for over two decades the Board has held that a substantial misrepresentation by either side that could be found to have had a probable impact on the election would be a sufficient basis for invalidating an election and ordering another. In an unexpected decision in April, 1977, however, the Board reversed this long-standing policy and declared in Shopping Kart Food Market that it will no longer probe into the truth or falsity of campaign statements, or set aside elections on the basis of alleged misrepresentations. Beyond its effect of deregulating one facet of election practices, Shopping Kart illustrates the limitations of the Board's adjudicative approach to policymaking and the desirability of the Board's effectuating any further changes in its campaign regulations in a comprehensive, rather than piecemeal, manner.

3. Coercion of employees is expressly prohibited under § 8(a)(1) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 158(a)(1) (1970), which makes any action that interferes with, restrains or coerces employees in the exercise of their rights under § 7 of the Act, id. § 157, an unfair labor practice. Section 7 provides that employees have the right of self-organization and the right to form or join labor organizations.

4. The Board has stated:

   Our function . . . is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization 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 from other elements which prevent or impede a reasoned choice.


6. See text accompanying notes 24-33 infra.

7. Notable cases in the Board's development of controls over misrepresentations include United Aircraft Corp., 103 N.L.R.B. 102 (1953) (election invalidated when one union fabricated a letter from the president of a second union admitting election misconduct and praising the first union), and Gummed Products Co., 112 N.L.R.B. 1092 (1955) (election set aside because of union's misrepresentation concerning wages negotiated with another employer). See text accompanying notes 29-33 infra.

8. The Board did not indicate before Shopping Kart Food Market, 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705 (Apr. 8, 1977), that it was considering a reevaluation of its long-standing policy on misrepresentations. Thus, counsel for both sides were not able to submit briefs or orally argue the merits of the policy change. Motion for Reconsideration I (copy on file in office of North Carolina Law Review). Following the Board's decision, counsel for both the employer and the union argued that the record should be reopened for oral and written argument on the change in policy. Id.; Brief in Reply to Employer's Motion for Reconsideration (copy on file in office of North Carolina Law Review).


10. Id. at ---, ---, 94 L.R.R.M. at 1705, 1708.
UNION ELECTIONS

In Shopping Kart, a union official told employees on the day preceding the election that the employer had earned profits of $300,000 in the past year, although actually they had totalled only $50,000. The employer lost the election and challenged the results, alleging that the misrepresentation had caused the union's victory. The Regional Director, applying the Board's policy on misrepresentations as articulated in Hollywood Ceramics Co., according to which only material misrepresentations would invalidate an election, found that the misrepresentation was not material. The Board, although agreeing with the Regional Director that the union should be certified, determined in a three to two decision to overrule Hollywood Ceramics altogether.

In the majority opinion, Board members Penello and Walther argued that the Board's painstaking, subjective determinations of the probable impact on employees of election misrepresentations had resulted in inconsistent rulings, an increased number of objections and a delay in the final outcome of elections. The problem of delay had been exacerbated, they noted, by the frequent refusal of the courts to enforce Board decisions, which had encouraged parties to litigate to the fullest. The majority contended that the negative effects of Board control over misrepresentations could no longer be justified since an influential empirical study had shown that employees are not influenced by election campaigns anyway. Thus, they concluded, "[T]he Hollywood Ceramics rule operates more to frustrate free choice than to further it and . . . the purposes of the Act would be better served by its demise." Although ex-Chairman Murphy joined Penello and Walther in overruling Hollywood Ceramics, she stated in a concurring opinion that she will continue to vote to set aside elections in which a party makes an "egregious mistake of fact." The three members

11. Id. at —, 94 L.R.R.M. at 1705.
12. 140 N.L.R.B. 221 (1962); see text accompanying notes 29-33 infra.
13. 228 N.L.R.B. at —, 94 L.R.R.M. at 1705. The Regional Director found that the union official had neither actual nor imputed knowledge of the employer's profits. Id.; see note 38 and text accompanying notes 32 & 33, 38-41 infra.
15. Id. at —, 94 L.R.R.M. at 1706-07. The majority also criticized the Hollywood Ceramics policy for its effect of restricting free speech. Id. Although this has been a major criticism leveled at the Board in connection with this policy, see note 28 infra, the Shopping Kart majority did not emphasize the issue.
17. Id. The empirical study relied on by the majority is discussed in notes 64, 71-76 and text accompanying notes 64-76 infra.
18. 228 N.L.R.B. at —, 94 L.R.R.M. at 1708.
19. Id. (concurring opinion). Unfortunately, Murphy did not define any standard for an "egregious" misrepresentation except by negative implication. She stated that she would find such election interference "only in the most extreme situations" and would not set aside
were in total agreement, however, in holding that the Board would continue to invalidate elections on the basis of forgeries and misrepresentations involving Board processes. 20

In a strongly worded dissent, members Fanning and Jenkins argued that it was only through its regulations that the Board maintained a high standard of campaign conduct in a majority of elections 21 and that the Board's abandonment of its regulatory role would lead to an increase in propaganda and misrepresentations. 22 The dissent also attacked the behavioral study that the majority relied on to support its decision. 23

The policy established in Shopping Kart of not examining the substance of campaign representations is not new to the Board. Between 1935 and 1947, the Board intervened only rarely in cases of union misrepresentations; employers, on the other hand, were held to a standard of strict neutrality. 24 In 1947, Congress, in an attempt to ensure greater latitude to employers in speaking against unionization in election campaigns, adopted section 8(c) of the Taft-Hartley Act, which removed most speech from the ambit of unfair labor practices. 25 In response, in General Shoe Corp. 26 the Board held that section 8(c) applied only to unfair labor practices, and that campaign speech would continue to be subject to regulation under the Board's section 9(c) 27 power over election practices, regardless of any

20. Id. at —, 94 L.R.R.M. at 1708-09 (majority & concurring opinions).
21. Id. at —, 94 L.R.R.M. at 1709 (dissenting opinion).
22. Id. at —, 94 L.R.R.M. at 1710 (dissenting opinion).
23. Id. at —, 94 L.R.R.M. at 1709-10 (dissenting opinion). For a discussion of this study, see notes 64, 71-76 and text accompanying notes 64-76 infra. Board member Jenkins dissented further on the basis of his disagreement with the conclusions of the study. 288 N.L.R.B. at —, 94 L.R.R.M. at 1712.

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

For an excellent discussion of the legislative history of § 8(c), see Koretz, Employer Interference with Union Organization Versus Employer Free Speech, 29 Geo. Wash. L. Rev. 399 (1960).
immunity under section 8(c). This policy was subsequently applied to both employers and unions.

After 1947, the Board, through case-by-case adjudication, gradually established a set of criteria to be used in judging the impact of a misrepresentation on an election. These criteria were summarized by the Board in 1962 in *Hollywood Ceramics Co.*, which became the definitive statement of the Board’s misrepresentation policy:

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 . . . . But even where a misrepresentation is . . . substantial, the Board may still refuse to set aside the election if it finds . . . 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. . . . Or, it could have been so extreme as to put the employees on notice of its lack of truth. . . . Or, the Board may find that the employees possessed independent knowledge with which to evaluate the statements.

An additional consideration, which had been articulated in previous cases, was added in a footnote to *Hollywood Ceramics*—whether the informant’s knowledge of the subject matter that was misrepresented was so special that it would induce employees to attach unusual significance to the misstatement.

In applying the *Hollywood Ceramics* standards, the Board has had to make a series of subjective determinations in every case; as a result, Board

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28. 77 N.L.R.B. at 126, 127; see Williams, supra note 24, at 19-20; Christensen, supra note 24, at 258-62.

The General Shoe policy has been frequently attacked by Board critics. A Senate report found that the Board’s regulation of campaign speech under § 9 is “in conflict with the spirit of section 8(c)” and noted that “the idea that speech of any kind, much less ‘protected speech’ can invalidate an election is unacceptable outside of labor law, and is dubious within it.” Excerpts from the Report of the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 120 Cong. Rec. 11304 (1974). But see Wirtz, The New National Labor Relations Board; Herein of 'Employer Persuasion, 49 Nw. U.L. Rev. 594, 612-16 (1954) (use of the banner of freedom of speech to characterize employers’ expressions of opinion to their employees about unionization is misleading).


31. Id. at 224 (footnotes omitted).


33. 140 N.L.R.B. at 224 n.10.
decisions in misrepresentation cases have been inconsistent and frequently have been overturned by the courts.\textsuperscript{34} Evaluating the substantiality of a misrepresentation has required the Board to decide what degree of departure from the truth in each case is actually significant.\textsuperscript{35} When a misrepresentation has been judged to be substantial the Board then has had to decide how much time was needed for an effective rebuttal, and, in cases in which the opposition has not responded to the misrepresentation, whether it could have so responded.\textsuperscript{36} Determining the materiality of a misrepresentation has involved the Board in difficult examinations of the relative importance of the issues in each campaign.\textsuperscript{37} Finally, in considering the credibility of the source of the misrepresentation and employees’ knowledge about the subject of the misrepresentation, the Board has had to evaluate the employees’ state of mind and receptivity.\textsuperscript{38} The Board has said numerous times that it does not look for evidence of employees’ \textit{actual} knowledge,\textsuperscript{39} but instead makes

\textsuperscript{34} See \textit{Williams}, supra note 24, at 28-61; Bok, \textit{The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act}, 78 Harv. L. Rev. 38, 82-90 (1964).

\textsuperscript{35} The subjectivity inherent in this type of determination has led to inconsistency in application. See \textit{Williams}, supra note 24, at 28-33; Bok, supra note 34, at 84-86. \textit{Compare}, e.g., Cross Baking Co., 186 N.L.R.B. 199 (1970), \textit{rev’d}, 453 F.2d 1346 (1st Cir. 1971) (wage misrepresentation amounting to 15 cents an hour was not substantial), \textit{with} Kawneer Co., 119 N.L.R.B. 1460 (1958) (union’s representation that hourly wages elsewhere were $1.81 and vacation time was two weeks when actually wages ranged from $1.73 to $1.90 and vacation time was one week was substantial) \textit{and} Trane Co., 137 N.L.R.B. 1506 (1962) (inference fostered by employer that union dues were five dollars a month when they were actually four dollars a month was substantial).

\textsuperscript{36} For examples of Board-court disagreement over the application of the timing standard, see Aircraft Radio Corp. v. NLRB, 519 F.2d 590 (3d Cir. 1975) (Board and court reached different conclusions on effectiveness of employer’s rebuttal to a prior union misrepresentation); NLRB v. Cactus Drilling Corp., 455 F.2d 871 (5th Cir. 1972) (Board and court applied different standards concerning responsibility of employer to investigate and respond to union’s misrepresentation made four days prior to election); \textit{Williams}, supra note 24, at 39-46.

\textsuperscript{37} The Board and the courts have frequently disagreed in applying the materiality standard. See NLRB v. Santee River Wool Combing Co., 537 F.2d 1208 (4th Cir. 1976) (Board’s finding that false assertion by union that one employee had been illegally discharged was immaterial since the company had in fact illegally discharged other employees reversed); Luminator Div. of Gulton Indus., Inc. v. NLRB, 469 F.2d 1371 (5th Cir. 1972) (Board’s decision that union misrepresentation of wages and benefits received under a different contract was immaterial reversed); NLRB v. Graphic Arts Finishing Co., 380 F.2d 693 (4th Cir. 1967) (Board’s determination concerning the materiality of claims about union strike benefits set aside); \textit{Williams}, supra note 24, at 33-39.

\textsuperscript{38} One study of Board decisions in this area has found that: 
[T]he 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 . . . to protect themselves from being misled by campaign claims. \textit{Williams}, supra note 24, at 57.

its own judgment, based on its "administrative expertise," as to what employees might reasonably be expected to know. Though this approach has maximized the Board's administrative flexibility, it has done so at the sacrifice of a clearly defined standard.

The subjectivity of the determinations inherent in the application of the Hollywood Ceramics standards has given the courts of appeals the latitude to make independent factual determinations in misrepresentation cases, despite pleas from the Board that such determinations are more properly within the purview of its administrative powers. The courts also have at times refused to apply all the standards, or have applied additional standards, and have sometimes enforced the standards with a rigidity explicitly

41. WILLIAMS, supra note 24, at 48. The fact that earlier Board decisions focused on the actual special knowledge of the source of the misrepresentation whereas later cases looked more to the reliance of employees has also impeded formulation of a clear standard in this area. Id. at 46-51. Different Board members often apply different formulations of the standard and arrive at different results. See, e.g., Cumberland Wood & Chair Corp., 211 N.L.R.B. 312 (1974). In some cases, the Board has applied the earlier test, focusing on the actual knowledge of the speaker, but the courts, setting aside orders, have reached different results based on a standard that focuses more on reliance. See NLRB v. A.G. Pollard Co., 393 F.2d 239 (1st Cir. 1968); WILLIAMS, supra at 46-51.

The Board has further contributed to the confusion at times by failing to look to the source of the misrepresentation when it would be appropriate. See, e.g., Medical Ancillary Servs., Inc., 212 N.L.R.B. 582, 583 (1974) (Penello dissenting) (majority set aside an election because of misleading statements made by a union stewardess who did not occupy a position of authority or have any special knowledge about the matters at issue).

Board member Jenkins has at times apparently ignored the source factor in overturning elections. See, e.g., Ereno Lewis, 217 N.L.R.B. 239 (1975); Medical Ancillary Servs., Inc., 212 N.L.R.B. 582 (1974). However, in Shopping Kart, Jenkins and Fanning stressed the importance of the source factor in concluding that, even under Hollywood Ceramics, the election should not be overturned. 228 N.L.R.B. at →, 94 L.R.R.M. at 1709.

42. See, e.g., Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224 (2d Cir. 1974); Walled Lake Door Co. v. NLRB, 472 F.2d 1010 (5th Cir. 1973); Luminator Div. of Gulton Indus., Inc. v. NLRB, 469 F.2d 1371 (5th Cir. 1972); NLRB v. G.K. Turner Assocs., 457 F.2d 484 (9th Cir. 1972); Cross Baking Co. v. NLRB, 453 F.2d 1346 (1st Cir. 1971).

43. There must be a reasonably flexible and not too constrained or rigidly controlled area left for administrative expertise in determining, in the best judgment we can muster from our knowledge and experience in the field, and in the exercise of sound administrative discretion, what circumstances justify either invalidating an election or holding a hearing on misrepresentation issues.


44. In particular, the courts have resisted considering whether the source had special knowledge, and whether the employees' independent knowledge would largely counter the misrepresentation, on the grounds that these considerations allow the guilty party to escape unpunished. See LaCrescent Constant Care Center, Inc. v. NLRB, 510 F.2d 1319 (8th Cir. 1975); Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224 (2d Cir. 1974); NLRB v. Millard Metal Serv. Center, Inc., 472 F.2d 647 (1st Cir. 1973); WILLIAMS, supra note 24, at 54.

45. See, e.g., NLRB v. Santee River Wool Combing Co., 537 F.2d 1208, 1211 (4th Cir. 1976) (considering the element of deliberateness or intentionality in determining the effect of the misrepresentation on employees); Aircraft Radio Corp. v.NLRB, 519 F.2d 590, 593-94 (3d Cir. 1975) (considering both deliberateness and the closeness of the original election vote);
rejected by the Board in *Hollywood Ceramics*.46 These conflicts between the Board and the courts have resulted in an enforcement rate in misrepresentation cases that is much lower than the enforcement rate for Board decisions in general.47

An examination of the measurable effects of the Board’s past regulation of misrepresentations shows that the negative results have outweighed the benefits. Although *Hollywood Ceramics* objections to elections have not necessarily become routine as implied by the majority in *Shopping Kart*,48 the number of objections based on alleged misrepresentations have constituted a large proportion of post-election objections.49 Very few of these

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46. The Board expressed a realistic view of election campaigning in *Hollywood Ceramics*: 

"We are . . . aware that absolute precision of statement and complete honesty are not always attainable . . . . Election campaigns are often hotly contested and feelings frequently run high. At such times a party may, in its zeal, overstate its own virtues and the vices of the other without essentially impairing "laboratory conditions.""

140 N.L.R.B. at 223-24. This view has not been consistently followed by either the Board or the courts. See Williams, supra note 24, at 28-33; Bok, supra note 34, at 88. The classic statement of an idealistic approach to elections was made in a case that predated *Hollywood Ceramics*:

"If truth is diluted, it is no longer truth. A glass of pure water is no longer pure if a one-ninth part thereof is contaminated, nor is it 'virtually' pure. There cannot be 'virtually' the truth any more than there can be 'virtually' a virgin." Allis-Chalmers Mfg. Co. v. NLRB, 261 F.2d 613, 616 (7th Cir. 1958).

47. The courts have refused to enforce 51.1% of the Board’s decisions in misrepresentation cases; in contrast, the set-aside rate for Board decisions in general is 14.7%. Speech by Peter Walther to State Bar Ass’n of Texas (June 17, 1977) [hereinafter cited as Walther], reported in [1977] LAB. L. REP. (CCH) ¶ 9126A, at 15,474.

48. 228 N.L.R.B. at —, 94 L.R.R.M. at 1706 (citing Williams, supra note 24, at 60). The criticism by the majority does not seem to be well founded. As the dissent noted, 300 to 400 yearly challenges based on misrepresentations out of a total of approximately 9,000 elections indicates that challenges are not routine. Id. at —, 94 L.R.R.M. at 1710 (dissenting opinion).

49. According to ex-Board member Walther, employer objections based on misrepresentations constituted 1 of every 4 employer election objections filed in fiscal year 1976. Walther, supra note 47, reported in [1977] LAB. L. REP. (CCH) ¶ 9126A, at 15,473. However, since employers filed 223 misrepresentation objections, *Shopping Kart*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1710 (dissenting opinion); see note 50 infra, out of a total 493 election objections, 41 NLRB ANN. REP., supra note 39, at 232 app., table 11C, it appears the ratio is closer to 1 out of 2. Of the 678 union election objections in 1976, id., 84 were based on alleged misrepresentations. *Shopping Kart*, 228 N.L.R.B. at —, 94 L.R.R.M. at 1710 (dissenting opinion); see note 50 infra.
objections, however, have been sustained.\textsuperscript{50} Furthermore, the number of changed outcomes resulting from rerun elections has been even smaller.\textsuperscript{51} By far the most significant practical effect of the regulation of misrepresentations has been the delay in obtaining final results in challenged elections; in 1976 final election results were delayed by litigation from 286 days to 4 years.\textsuperscript{52} Any advantage a union gains from such litigation\textsuperscript{53} is relatively slight compared to what an employer gains. As ex-Board member Walther

\begin{table}
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\begin{tabular}{|c|c|}
\hline
Years & Percent of objections sustained \\
\hline
1971 & 1.7 \\
1972 & 9.1 \\
1973 & 3.8 \\
1974 & 10.6 \\
1975 & 4.1 \\
1976 & 3.6 \\
\hline
\end{tabular}
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\begin{table}
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\begin{tabular}{|c|c|}
\hline
Years & Percent of objections sustained \\
\hline
1971 & 10.7 \\
1972 & 11.3 \\
1973 & 10.0 \\
1974 & 15.4 \\
1975 & 7.2 \\
1976 & 21.4 \\
\hline
\end{tabular}
\end{table}

228 N.L.R.B. at —, 94 L.R.R.M. at 1710 (dissenting opinion).

\textsuperscript{51} In 1976, 18 rerun elections were ordered in response to union objections and 8 in response to employer objections. Walther, \textit{supra} note 47, \textit{reported in} [1977] \textit{LAB. L. REP. (CCH)} ¶ 9126A, at 15,473. In fiscal year 1976, approximately 40% of all rerun elections resulted in outcomes different from the original election. 41 NLRB ANN. REP., \textit{supra} note 39, at 232 app., table 11C. Therefore, the 26 reruns probably yielded 10 or 11 changed outcomes.

\textsuperscript{52} Misrepresentation cases that eventually reach the courts of appeals require lengthy litigation since Board determinations involving representation questions cannot be directly appealed. AFL v. NLRB, 308 U.S. 401, 411 (1940). Therefore, if a union brings a misrepresentation charge and loses, the union cannot appeal. When an employer brings a misrepresentation charge and loses, the union is certified. The employer, however, can refuse to bargain with the victorious union and be found guilty of an unfair labor practice. On appeal of the unfair labor practice finding, all questions, including those involving the original representation election, are reviewable by the courts. \textit{Id.} at 409-12.

In 1976, the 9 misrepresentation cases that went to the courts of appeals for enforcement of Board orders were not decided until 1 1/2 to 4 years after the elections were originally held. Although unions won in 5 of the 9 appeals, the time delay was sufficient to dissipate the union's bargaining power. Lengthy delays also occurred in the 37 summary judgment bargaining orders issued by the Board in misrepresentation cases. Walther, \textit{supra} note 47, \textit{reported in} [1977] \textit{LAB. L. REP. (CCH)} ¶ 9126A, at 15,473. Even the fully contested misrepresentation cases that were not appealed were, on the average, decided by the Board 286 days after the original election. Speech by John Fanning before American Bar Ass’n in Chicago (Aug. 9, 1977), \textit{reported in} [1977] 95 \textit{LAB. REL. REP. (BNA)} 381, 384. Thus, even for cases not appealed to the courts, the time consumed in fully contesting a misrepresentation charge and conducting a rerun probably approximated a year, which coincides with the time established by statute after which a defeated union can obtain a new election in any event. 29 U.S.C. § 159(c)(3) (1970).

\textsuperscript{53} A union might be interested in filing an unwarranted objection so as to maintain an employee nucleus at a partially organized plant. Samnff, \textit{NLRB Elections: Uncertainty and Certainty}, 117 U. PA. L. REV. 228, 242 (1968).
has observed, "If effectuation of a certification can be delayed a year or more . . . the union's following is dissipated and its strength at the bargaining table nil." 54

Given the problems in application and enforcement of the Hollywood Ceramics standards and the negative side effects of prolonged litigation, it seems that the maintenance of the regulatory standards would be justifiable only if they in fact have had a deterrent effect. Neither the majority nor the dissent, however, analyzed the probability or strength of such a deterrent effect. The majority side-stepped the issue by contending that employees are not influenced by misrepresentations anyway. 55 The dissent, on the other hand, assumed without question that the standards had successfully deterred misrepresentations in ninety-five percent of the elections conducted in the past year. 56 The validity of this assertion is debatable considering the vagueness of the standards and their subjective and often inconsistent application. 57 The articulation of the standards on a case-by-case basis rather than in clearly enunciated rules of general applicability probably has also minimized their deterrent effect. 58 In addition, the impossibility of deterring unintentional, careless or unauthorized misstatements, and the use of tactics such as rumor-spreading, were not recognized by the dissent. 59 Given these considerations, it is likely that undetected violations have occurred in numerous elections 60 and that more objections have not been filed because

54. Walther, supra note 47, reported in [1977] LAB. L. REP. (CCH) ¶ 9126A, at 15,473. An employer is also encouraged to file an objection by considerations of the possible money savings that might accrue if bargaining is delayed and of the increased possibility of success if the case eventually is appealed to the courts. See Bok, supra note 34, at 87; Samoff, supra note 53, at 237.

55. 228 N.L.R.B. at —, 94 L.R.R.M. at 1707. The majority implied that since employees are not influenced by misrepresentations it is unnecessary to deter misrepresentations. This proposition is questionable, however, since the conclusions of the study cited by the majority for the proposition that employees are not influenced by campaign misrepresentations, see note 64 and text accompanying notes 64-67 infra, were based on studies of elections conducted under the Hollywood Ceramics standards. It is arguable that these standards generally helped to deter gross misrepresentations in the elections studied and that, were employees subjected to totally unregulated campaigning, there would be a greater impact on employee voting. See Miller, The Getman, Goldberg and Herman Questions, 28 STAN. L. REV. 1163, 1170 (1976).

56. 228 N.L.R.B. at —, 94 L.R.R.M. at 1709-10 (dissenting opinion). One Board critic has described such faith as an "unwarranted confidence in the capacity of the law." Samoff, supra note 53, at 247.

57. See notes 35-38, 41 and text accompanying notes 34-41 supra.


59. See Bok, supra note 34, at 86, 87 & n.132 (rumor-spreading is an effective, unregulated way of communicating misinformation). See also Samoff, supra note 53, at 240.

60. This conclusion is supported by data showing that employees reported campaign violations in as many elections that the Board later found to be "clean" as in those that the
of the cost and the improbability of success upon Board review. Despite the improbability that the Board's standards have, in fact, acted as an effective deterrent, the majority's remedy of total deregulation of campaign speech would seem less drastic and be more defensible had the Board considered testimony from unions and management concerning the actual deterrent effect of the now-discarded regulations.

Although considerations of inconsistent results, Board-court conflict and prolonged litigation were important factors motivating the *Shopping Kart* decision, these considerations were all articulated in 1973 when in *Modine Manufacturing Co.* the Board expressly declined to overrule *Hollywood Ceramics*. Thus, the key to the *Shopping Kart* decision appears to lie in the reexamination of the behavioral assumption underlying *Hollywood Ceramics*: that employees are actually influenced by campaigns. This reexamination apparently was provoked, at least in part, by an influential empirical study of employee voting behavior (the Getman study) which found, following an examination of thirty-one elections in five midwestern states, that eighty-one percent of the employees surveyed voted according to their precampaign attitudes and intent, and that, in general, employees did not remember most campaign issues. From this and other data, the authors of the study concluded that employees are generally inattentive to campaigns, and that their vote is not determined by information received during campaigns.

Influential observers of the Board have long noted the need for an empirical study of employee behavior that would test the behavioral as-

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61. See note 50 supra.

62. Testimony might have shown, for example, that standards of election behavior with regard to misrepresentations are largely self-imposed. See note 89 and accompanying text infra.

63. 203 N.L.R.B. 527, 529-31 (1973), enforced, 500 F.2d 914 (8th Cir. 1974).


The purpose of the study was to determine the effect of the pre-election campaign on employee voting behavior. The authors' staff interviewed 1,239 employees who voted in 31 elections. Employees were interviewed as soon as possible after the beginning of the campaign to ascertain their attitudes toward the union and the employer and their voting intent. The second interview, conducted after the election, determined actual vote, issues remembered and reasons given for voting choice. GETMAN, supra at 33.

65. GETMAN, supra note 60, at 53-64, 72.

66. Id. at 73-85.

67. Id. at 53-64, 73-85, 140-41.
sumptions underlying the Board’s campaign regulations.68 The Board’s willingness to reexamine its regulations now that such a study has been done must be commended. The treatment afforded the study in Shopping Kart, however, illustrates the need for a more thorough analysis and scrutiny of the data and a more cautious application of the study’s results. The majority accepted uncritically the study’s conclusions,69 despite conflicting data that indicates that campaign speech may affect a significant minority of elections, perhaps a large enough number to warrant its continued regulation in some form. For example, as the dissent noted, half the employees polled were aware of union claims concerning wages elsewhere, and 22% recalled the precise amount within 10%.70 Although the authors of the study concluded that the average employee was not “very” familiar with campaign issues,71 the averaging of employee recognition of significant issues with insignificant ones arguably underemphasizes the consistent salience of certain key issues such as prospective plant closings, loss of benefits and possible discharges (employer issues), and wages and working conditions (union issues) that were recognized by 23 to 71% of all employees.72 In addition, the study’s finding that union campaigns did in fact influence voters who were exposed to them,73 and the extensive shifting of votes in the most successful union and company campaigns74 suggest that at least some campaigns probably have an effect. By ignoring this data and other weak-

68. See Bernstein, supra note 58, at 582; Bok, supra note 34, at 40, 46-53, 88-90; Samoff, supra note 53, at 233 n.15, 245 n.41; Summers, Politics, Policy Making, and the NLRB, 6 SYRACUSE L. REV. 93, 106-08 (1955).
69. 228 N.L.R.B. at —, 94 L.R.R.M. at 1707.
70. Id. at —, 94 L.R.R.M. at 1710 (dissenting opinion); see Getman, supra note 60, at 82.
71. Getman, supra note 60, at 107. The average employee could remember only 10% of the company campaign issues and 7% of the union issues. Id. at 76.
72. Eight employer issues concerning loss of benefits, improvements not being dependent on unionization, union dues and the destructive effects of unionization were recognized by 25 to 40% of the employees. Id. at 78-79. Six union issues generally concerning wages, working conditions, benefits, grievances and union gains obtained elsewhere were recognized by 23 to 71% of the employees. Id. at 80-81. Additionally, certain issues were of critical importance in individual campaigns, being recognized by as many as 89% of the employees. Id. at 82-83.
73. Among voters who were initially undecided and those who switched from one party to the other, those who voted for the union were significantly more familiar with the union campaign than were those who voted for the company, but those who voted for the company were no more familiar with the company campaign than were those who voted for the union. Id. at 103-09. This suggested to the authors a causal relationship between attendance at union meetings, familiarity with the union campaign and vote switching to the union. Id.; see Eames, An Analysis of the Union Voting Study from a Trade-Unionist’s Point of View, 28 STAN. L. REV. 1181, 1187 (1976).
74. In the five most successful company campaigns the average loss in union support from the card-sign to the vote was 35%; in the most successful union campaigns, however, the unions gained an average 10% from the card-sign to the vote. The authors could find no explanation for these strong gains and losses. Getman, supra note 60, at 100-03; see Eames, supra note 73, at 1185-86; Miller, supra note 55, at 1164.
nesses and inconsistencies in the study,75 and selectively accepting the study's conclusion concerning general employee behavior, the majority avoided directly confronting several difficult issues.76 It did not have to make the difficult value judgment concerning how many elections must be shown to be affected by campaign tactics in order to justify Board regulation.77 Additionally, the majority did not have to consider whether the Board's remedy of election invalidation is supported by any proof of the Board's ability to identify those elections that have actually been influenced by unfair campaigning.78

75. A major weakness is that, although the votes of the 6% of the initially undecided voters and the 13% of the voters who switched from one party to the other determined the outcome of 9 of the 31 elections, GETMAN, supra note 60, at 103, the authors were unable to determine what factors influenced the voters' decisions in those elections. Id. at 98; see Miller, supra note 55, at 1168-69.

The study's conclusion that the campaign had no effect is inconsistent with the proposition that the campaign probably strengthened latent voting predispositions, GETMAN, supra at 142, since the strengthening of predispositions may be important in influencing employees' actual votes. Miller, supra at 1187. In addition, the voting predispositions of a majority of employees in some elections may be very weak because of lack of exposure to unions and absence of strong feelings about the employer. In these elections the information received during the campaign may have more impact on the voters' choice. See Flanagan, The Behavioral Foundations of Union Election Regulation, 28 STAN. L. REV. 1195, 1199 (1976). With regard to this possibility, it seems significant that the majority of the voters studied by the Getman group had had significant exposure to unions. GETMAN, supra at 66.

The conclusion that campaign violations do not influence voters is not consistent with two previous studies of rerun elections that show that the probability of a different outcome in a rerun depends, at least partially, on the type of violation reported in the first election. See Drotening, NLRB Remedies for Election Misconduct: An Analysis of Election Outcomes and Their Determinants, 40 U. Chi. J. Bus. 137 (1967); Pollitt, NLRB Re-run Elections: A Study, 41 N.C.L. REV. 209 (1963).

Despite these criticisms, the Getman study's general conclusions seem to be in accord with other more limited studies of employee voting behavior. See Brotslaw, Attitude of Retail Workers Toward Union Organization, 18 LAB. L.J. 149 (1967) (primary determinants of employee voting are previous union experience, general perceptions about unions and job satisfaction); Comment, An Examination of Two Aspects of the NLRB Representation Election: Employee Attitudes and Board Inferences, 3 AKRON L. REV. 218 (1970) (positive experiences with management, satisfaction with working conditions, and perception of personal job security are most critical in voting choice).


76. The dissent, in contrast to the majority, seized on the inconsistencies of the study and seemingly rejected in toto its conclusions, 228 N.L.R.B. at —, 94 L.R.R.M. at 1709-10, 1712 (dissenting opinions), thereby disregarding valuable information that, even if accepted only in part or with reservations, suggests that some modification of the Board's misrepresentation policy is needed.

The approaches of both the majority and the dissent illustrate that critical comment and analysis from informed observers should be solicited before any further use of the study is attempted. See Bernstein, supra note 58, at 582; note 89 and accompanying text infra.

77. See Miller, supra note 55, at 1168-69 (we do not demand a cost-benefit analysis for all worthwhile regulations in society, so we should not necessarily demand one in this area).

78. See note 60 and accompanying text supra.
The majority's use of the Getman study in *Shopping Kart* also illustrates the danger that the study will be selectively applied by the Board in isolated areas of its regulatory policy to overturn some election controls, while others of equally questionable behavioral validity are preserved. This type of selective use was apparent in the majority's decision to continue to invalidate elections on the basis of forgeries and misrepresentations in which one party has implied Board support for its position,\(^79\) despite the fact that the Getman study indicates that such tactics have no greater impact on employee voting than do other campaign misrepresentations.\(^80\) The decision to continue to invalidate elections when Board neutrality has been misrepresented probably reflects the high value placed on Board impartiality and the desire to maintain respect for the Board's operations.\(^81\) The majority should have considered, however, whether some method of enforcement other than election invalidation would be preferable in these cases, for overturning elections in which misrepresentations have probably not affected the outcome actually frustrates employee freedom of choice.\(^82\)

The decision to continue to invalidate elections on the basis of forgeries seems to have been motivated by a misunderstanding of the Getman study, although unarticulated considerations may have influenced the decision. The majority argued that employees are generally sophisticated about campaign misrepresentations but may be misled by misrepresentations made in such a deceptive manner that even sophisticated voters could not recognize their inaccuracy.\(^83\) In using the Getman study as support for the proposition that employees are not influenced by campaign propaganda because they are sophisticated, however, the majority distorted the study's conclusions and disregarded the study's finding of employee inattentiveness to the campaign.\(^84\) It is also possible that the Board retained election regulations in

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\(^79\) 228 N.L.R.B. at —, 94 L.R.R.M. at 1708.

\(^80\) *Getman*, supra note 60, at 150-53; see text accompanying notes 64-67 supra.

\(^81\) The Board readily overturns elections in which official documents have been reproduced by unauthorized parties, even if the actual impact on the election is doubtful. *See*, e.g., Rebmar, Inc., 173 N.L.R.B. 1434 (1968) (election invalidated because union had reproduced Board's official election notice, despite the innocuous nature of the alteration); Allied Electric Prods., Inc., 109 N.L.R.B. 1270 (1954) (upheld policy against reproducing official ballot so as to not imply Board support for any particular party).

\(^82\) See *Getman*, supra note 60, at 113-18, 155 (suggesting Board's inability to make impact determinations, and need for remedies other than election invalidation that would be triggered automatically by election misconduct without regard to whether the misconduct had an impact on the election).

\(^83\) 228 N.L.R.B. at —, 94 L.R.R.M. at 1708.

\(^84\) The majority's emphasis on employee sophistication, *id.* at —, 94 L.R.R.M. at 1707, implies a view of employees weighing and evaluating information in a rational manner. The Getman study found, on the other hand, that employees' votes were largely determined by general attitudes towards unions and attitudes about working conditions. *Getman*, supra note
cases involving forgeries because of the greater justification in punishing such deliberate and intentional behavior\textsuperscript{85} and the relatively greater ease in determining when such violations have occurred. As with the decision concerning violations of Board neutrality, however, the majority should have considered other means of deterring such behavior than election invalidation.

The inadequacy of the Board's analysis of the Getman study in \textit{Shopping Kart} and the apparent unwillingness of both the majority and the dissent to consider other approaches to campaign speech regulation, aside from the general retention or abandonment of the \textit{Hollywood Ceramics} rules, illustrates the limitations of the Board's traditional adjudicatory approach to problems more amenable to rulemaking.\textsuperscript{86} That policy analysis of the type attempted in \textit{Shopping Kart} is better conducted in accordance with established rulemaking procedures\textsuperscript{87} rather than through adjudication has been suggested by numerous Board critics.\textsuperscript{88} The primary advantage of a rulemaking approach is that it generally opens up the decisionmaking process, thereby providing an opportunity for wide participation to all interested parties and helping to assure a variety of inputs.\textsuperscript{89} It also offers

\textsuperscript{80} at 54-64, 72. These findings, and the additional finding of employee inattentiveness to the campaign, suggest that employee voting behavior, although not irrational, does not involve the rational intake of new information in the sophisticated manner implied in the majority interpretation of the study. \textit{Id.} at 143.

\textsuperscript{85} The courts have often considered the element of intentionality. \textit{NLRB v. Santee River Wool Combing Co.}, 537 F.2d 1208 (4th Cir. 1976); \textit{Tyler Pipe Indus., Inc. v. NLRB}, 447 F.2d 1136 (5th Cir. 1971).

\textsuperscript{86} Rulemaking, as defined by the Administrative Procedure Act, is a process for "formulating, amending, or repealing" an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." \textit{5 U.S.C. § 551(4), (5) (1970 & Supp. V 1975).} The NLRB has preferred to develop substantive rules through adjudication, even when general rules of widespread applicability have been articulated. See Peck, \textit{supra} note 58, at 736-40.

\textsuperscript{87} Section 6 of the Labor Management Relations Act authorizes the Board to "make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter." \textit{29 U.S.C. § 156 (1970); see note 89 infra.}


\textsuperscript{89} Rulemaking procedures include publication in the Federal Register of general notice of the proposed rulemaking and hearing, a statement of the proposed substance of the suggested rule, an opportunity for interested parties to submit written data and arguments with or without oral presentation, and publication in the Federal Register of the rule as adopted. \textit{5 U.S.C. § 553(a)-(e) (1970 & Supp. V 1975).}
greater flexibility in considering alternatives other than merely upholding or overruling precedent. For example, with regard to the difficulties of regulating campaign misrepresentations noted in *Shopping Kart*, the critical problem of prolonged litigation could have been considered in light of possible administrative and procedural changes such as increasing the power of Regional Directors and commensurately decreasing the scope of Board review. As an alternative to general deregulation, the Board could have

Although, as one critic has noted, following a rulemaking procedure will not in itself guarantee that the Board actually will consider the opinions and testimony elicited, Bernstein, *supra* note 58, at 593, such a procedure would at least ensure that a variety of opinions is presented. NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974); Bernstein, *supra* at 591, 616-18; Peck, *supra* note 58, at 756-57; Peck, *A Critique, supra* note 88, at 263; Shapiro, *supra* note 88, at 932. Such participation was notably lacking in *Shopping Kart* since the impending reconsideration of Board policy was unannounced. See note 8 *supra*. Analysis of the type described above may be critical with regard to the Getman study considering its unique nature, its scope and its potential impact on other areas of Board election regulation. See text accompanying notes 64-78 *supra*. Participation of affected parties increases the probability that defects in proposed rules will be noted before the rules are adopted. Peck, *A Critique, supra* at 272, and that interrelationships with other rules will be studied, Bernstein, *supra* at 591. Additionally, "[I]n rulemaking, all potentially affected have the opportunity to shape the initial decision before the agency attitude hardens, whereas adjudication often burdens nonparties with persuading the agency to overrule or modify a precedent." *Id.*


91. Limiting the scope of Board review and reducing court review of Board decisions would tend to accelerate ultimate resolution of cases. Both possibilities, of course, would be strongly opposed by some parties on grounds of due process. As Chairman Fanning has noted, "One man's unconscionable delay is another's due process. Where one shades into the other is a perception much influenced by where you sit." Speech by John Fanning, *supra* note 52, reported in [1977] 95 LAB. REL. REP. (BNA), at 383.

The proposed Labor Reform Act, discussed at note 89 *supra*, includes various provisions that would ameliorate the difficulty in achieving final results in disputed elections within a reasonable time. The provisions include setting time limits for parties to appeal adverse Board decisions, cutting back, though not eliminating, court review of Board decisions involving certification and increasing the number of Board members from five to seven. H.R. 8410 §§ 2, 6, 9, 95th Cong., 1st Sess. (1977).

The special task force appointed to investigate and recommend changes in NLRB procedure considered various procedural changes that would accelerate the filing procedure on objections, increase the burden on the objecting party to show substantiating evidence at an early stage in the objection process, allow for parties to waive the right of review, eliminate as a basis for review the ground that a substantial factual issue was clearly decided erroneously and increase the power of Regional Directors to issue decisions in all cases subject to limited review. INTERIM REPORT AND RECOMMENDATIONS OF THE CHAIRMAN'S TASK FORCE ON THE NLRB FOR 1976, at 18-30 (1976).

The Board also could reduce the possibility of parties using its regulations in order to delay bargaining by providing for expedited review of objections brought by parties with a history of filing objections.
established threshold requirements for Board intervention in misrepresentation cases, thereby eliminating Board intervention in numerous cases, setting clearer guidelines for election conduct and preserving Board control in cases in which misrepresentations are most likely to have an impact.92

A rulemaking approach would also have enabled the Board to consider each facet of its election controls within the context of a comprehensive and complementary regulatory scheme. Comprehensive policy examination of this nature is impelled by the Getman study93 and by the fact that the Board's regulation of other campaign practices has produced many of the same problems as its now-discarded controls over misrepresentations.94 Moreover, the Board's policies in various areas of campaign regulation are intimately connected and therefore should be considered together. For example, the policy of providing unions limited access to employer premises serves a goal similar to that of the Board's regulation of campaign misconduct: both policies have as their overriding purpose the effectuation of a free and informed voter choice.95 Abandonment of controls over misrepresentations might have been more justifiable had the Board concurrently taken positive action to provide unions with equal access to employer premises96—a step

92. One threshold suggested by the results of the Getman study is for the Board to consider only cases in which the margin of victory is smaller than 20%. GETMAN, supra note 60, at 150 n.21; see Bok, supra note 34, at 91. Such a policy is supported by studies indicating that the original margin of victory is the most important factor in determining whether there is a different outcome in a rerun election. See Drotning, supra note 75, at 142; Pollitt, supra note 75, at 220.

The Board also could refuse to hear claims concerning misrepresentation made within three working days of the election, thereby putting greater responsibility on the parties themselves to police the campaign. Additionally, the Board could refuse to examine ambiguous statements, see Bok, supra at 91, and any misrepresentation made to less than a Board-determined percentage of the employees in a unit. It could also limit review to misrepresentations about certain key issues, absent substantial proof by the complaining party that a unique or usually minor issue was important in a given campaign. See GETMAN, supra at 78-79, and note 72 and accompanying text supra, for a summary of which issues are generally important in campaigns. These thresholds could be determined in light of the Board's 25 years of experience with misrepresentation charges.

93. The study recommends deregulation of speech, including threats and promises, misrepresentations, interrogation, emotional appeals and speeches made to massed groups of employees within 24 hours of the election. GETMAN, supra note 60, at 146-50.

94. The Board's regulation of inflammatory, emotional appeals, illegal threats and promises and illegal discharges, among others, requires that the Board make very subjective determinations concerning either motive or impact. For the problems of making impact judgments, see notes 37-38, 41, 44-47 and text accompanying notes 34-47 supra.

95. The Board's policy of requiring employers to disclose names and addresses of their employees is predicated on the policy of enhancing the probability of a free and reasoned choice. Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966).

96. The need for greater access is shown by the Getman study's finding that, although unions were furnished with employees' names and addresses and could conduct meetings off the employer's premises, employee exposure to the union campaign was significantly less than employee exposure to the company campaign. GETMAN, supra note 60, at 96, 143-44, 156-59. Many commentators have advocated greater union access to employer premises as an alterna-
supported both by considerations of fairness and by the desirability of maximizing the opportunity to rebut misinformation.97 Significantly, in Shopping Kart the Board ignored the fact that the Getman study’s recommendations with regard to deregulation were made in the context of other proposals advocating equal access to company premises and stronger remedies for other types of campaign misconduct.99

The outlines of the Board’s new policy of not examining alleged campaign misrepresentations are still somewhat unclear given ex-Chairman Murphy’s failure to more precisely define standards for the “egregious” misrepresentations that will continue to be grounds for setting aside an election.100 Indications are, however, that Board intervention will occur only when the misrepresentation approaches actual fraud.101 If Shopping Kart is not overruled, the primary effect of the decision will be to eliminate a basis for objection to election results that has been used to unduly prolong litigation and delay bargaining in hundreds of cases every year. The decision also eliminates the need for the Board to make difficult impact determinations in one category of election cases. There is, however, the possibility that the general deregulation of election speech will result in an escalation of propaganda in some elections, though probably only a minority. In cases in which such an escalation occurs, unions will probably be at a decided disadvantage because their access to employees is generally more restricted than is management’s, and thus their opportunity to rebut is more limited.

Despite these potential problems, Shopping Kart illustrates a healthy willingness on the part of the Board to reexamine, on the basis of new behavioral data, long-held assumptions and the policies they have previous-

97. See Getman, supra note 60, at 157; Bok, supra note 34, at 52-56, 91-92.
98. Getman, supra note 60, at 157; see Speech by Stephen Goldberg to Labor Relations Law Section of ABA (Aug. 6, 1977), reported in [1977] 95 Lab. Rel. Rep. (BNA) 390 (Goldberg, co-author of the Getman study, emphasized the fact that the suggested changes were not to be considered in isolation).
99. See Getman, supra note 60, at 113-18, 151-55; Speech by Stephen Goldberg, supra note 98.
100. See note 19 supra.
101. In a case arising after Shopping Kart, Murphy indicated that an “egregious” mistake of fact might have to amount to fraud in order to invalidate an election. Thomas E. Gates & Sons, Inc., 229 N.L.R.B. No. 100, at — n.6, 95 L.R.R.M. 1198, 1199 n.6 (May 17, 1977).
102. Since Shopping Kart was decided, Peter Walther resigned from the Board and was replaced by John Truesdale, who, along with Fanning and Jenkins, could constitute the majority needed to overrule Shopping Kart.
ly supported. It is also encouraging that the established misrepresentation policy was overturned on the basis of the Board’s experience with the practical consequences of the Hollywood Ceramics rules rather than as a result of political changes in the Board’s composition. The decision, in conjunction with the challenge to the foundation of existing campaign regulations presented by the Getman study, raises the possibility that the Board will reexamine other election regulations that exhibit many of the characteristics of the Hollywood Ceramics standards. Shopping Kart demonstrates, however, that such a reexamination should be made only after a more thoughtful analysis of the Getman study. Shopping Kart also illustrates the desirability of effectuating any further changes in existing campaign standards through rulemaking proceedings, rather than through adjudication. Such an approach would provide a wider forum for discussion and analysis of the Getman study and of controversial changes. A rulemaking approach would also allow for the establishment of regulatory priorities, the consideration of remedies other than election invalidation, the alteration of administrative and procedural practices where necessary and the concurrent examination of the issue of access and other means of promoting the goal of enhancing informed voter choice.

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103. Most policy changes effected by the Board have resulted from changes in the Board’s composition. See Bernstein, supra note 58, at 597; Wirtz, supra note 28, at 611-12. This has been especially true in the politically sensitive area of “free speech.” Hickey, Stare Decisis and the NLRB, 17 Lab. L.J. 451, 462 (1966).

104. See note 93 supra.

105. See note 94 supra. Although the Board may not be willing to eliminate its election regulations to the extent suggested by the Getman study, the rationale of Shopping Kart, that employees are generally sophisticated enough to protect themselves from campaign propaganda and that employees are largely uninfluenced by such propaganda anyway, would at least support the abandonment of other regulations justified only by the General Shoe doctrine, see note 28 and text accompanying notes 26-28 supra, rather than by specific statutory prohibition. For example, despite the majority’s express indication that it will continue to oversee campaign conduct other than misrepresentations, 228 N.L.R.B. at —, 94 L.R.R.M. at 1708, it is difficult to see how the Board can continue to overturn elections on the basis of appeals to racial or religious prejudices, see, e.g., Sewell Mfg. Co., 138 N.L.R.B. 66 (1962).