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Labor Representation Elections and the Constitutional Right to Campaign Vigorously: The Use of Racial Propaganda

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LABOR REPRESENTATION ELECTIONS AND THE CONSTITUTIONAL RIGHT TO CAMPAIGN VIGOROUSLY: THE USE OF RACIAL PROPAGANDA

I. INTRODUCTION

The purpose of this paper is to examine and analyze the strictures placed upon an employer's constitutional right to express himself on racial matters by the National Labor Relations Board[1] during the period preceding a duly authorized representation election.[2]

Under the National Labor Relations Act (hereinafter NLRA), employees are guaranteed the basic right under section 7[3] to self organize, form, or assist labor organizations, to bargain collectively through chosen representatives and engage in concerted activities for the purpose of collective bargaining (they also have the right under section 7 to refrain from such activities). Section 8(a)(1) provides that: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 [section 7] of this title . . . ."[4] Section 8(c) lists the circumstances whereby an employer's speech may constitute an unfair labor practice by interfering with section 7 rights:

> 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 subchapter, if such expression contains no threat of reprisal or force or promise of benefit.[5]

Therefore, while section 8(c) certainly buttresses the employer's first amendment rights, it does not follow that an employer's right to express himself is absolute.[6] It is, in fact, constricted by the statutorily

1. 29 U.S.C. § 151-68 (1964). The NLRA is actually comprised of three acts: The National Labor Relations Act [Wagner Act] 49 Stat. 449 (1935); Labor Management Relations Act [Taft-Hartley Act] 61 Stat. 136 (1947); Labor Management Reporting and Disclosure Act [Landrum-Driffin Act] 73 Stat. 519 (1959).

2. For a comparison of political elections with representations elections *see* note 163-4 *infra.*

3. 29 U.S.C. § 157 (1964).

4. 29 U.S.C. § 158 (a) (1) (1964). 5. 29 U.S.C. § 158 (c) (1964).

6. *See, e.g.,* J. Cuneo, *NLRB's Totality of Conduct Theory in Representation Elections and Problems Involved in Its Application,* 7 DUQUESNE L. REV. 229 (1969).

and constitutionally bestowed right of workers to self organize. These respective "rights" are often in conflict with one another and constitutional friction results. Therefore, the Board, and often the courts have been faced with the difficult problem of balancing these independent rights. This balancing problem is often precipitated by active electioneering by unions and employers during campaigns which precede representation elections.

It is with the delicate balancing of the employer's freedom of speech against the employee's right to organize in general, and with the more acute problems posed by one party's injection of racial statements into the election that this paper addresses itself.[7]

II. FREEDOM OF EXPRESSION IN REPRESENTATION ELECTIONS—SOME GENERALITIES

It is not the purpose of this paper to explore in depth the broad spectrum of constitutional issues arising out of the freedom of speech, freedom to organize, sans interference, dichotomy. The following will survey the historical development of the NLRB's position as it effects the racial propaganda questions, so that the reader will have some degree of familiarity with the multitudinous constitutional issues spawned by a representation election.

The Wagner Act was silent on the issue of whether an employer could articulate his anti-union position to his employees. The NLRB's early decisions, however, construed section 7 and sections 8(1) and (2)[8] as requiring not only that the employer maintain a neutral posture on the efficacy of unionism but in some cases proscribed employer involvement altogether.[9]

7. Although this paper will deal in the main with an employer's use of racial propaganda in representation elections, the employment of similar tactics by the union will also be discussed. The paper will also briefly touch upon the imposition of vicarious responsibility upon one of the parties who is benefitted by a third party influencing an election by the use of similar propaganda.

8. 49 Stat. 449 (1935).

9. *See, e.g.*, Wickmire Brothers, 16 N.L.R.B. 316 (1939); Rockford Mitten and Hosier Co., 16 N.L.R.B. 501 (1939). The appellate courts were not unanimous in their support of the Board's position, however. In *NLRB v. Ford Motor Co.*, 114 F.2d 905 (6th Cir. 1940) *cert. denied* 312 U.S. 689 (1041) the court held that such restrictions so abridged the communicative abilities of the employer that it virtually vitiated his right to speak in this area.

The Supreme Court addressed itself to the problem in 1941 in *NLRB v. Virginia Electric & Power Co.*[10] in which it held that "conduct, though evidenced in part, by speech, may amount, in connection with other circumstances, to coercion . . . . If the *total activities* of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the act."[11] This decision did not constitute a carte blanche acceptance of the board's "strict neutrality" position, however; the Court clearly recognized and supported the employers right to engage in campaigning activities.

The "totality of conduct" test left to the Board, and to a lesser extent the lower courts, the task of promulgating viable standards for the regulation of campaign propaganda content.[12] By 1945 it was settled that an employer could diligently campaign, without coercion, against the aspiring union with a degree of impunity.[13] The employer's right to electioneer was solidified with the passage of section 8(c) of the Taft-Hartley Act in 1947.[14] For an employer's speech to constitute an unfair labor practice under section 8(c) it must contain a threat of

10. 314 U.S. 469 (1941). On remand the NLRB applying the "Totality of Conduct" test found that the sum of the employer's activities did constitute an unfair labor practice. 44 N.L.R.B. 404 (1942) *enforced*, 132 F.2d 390 (4th Cir. 1942), *aff'd*, 319 U.S. 533 (1943).

11. 314 U.S. at 477 (emphasis added). *Virginia Electric* required that the NLRB both examine the content of the employer's speech to determine whether it was coercive and to determine whether the speech as a whole had a coercive effect. "In any event the NLRB was obligated to find that there was a coercive interference with the employee's right of self-organization before it could hold that an employer's campaign speech constituted an unfair labor practice." Note, *The Right of Free Speech in Representation Elections*, 2 GA. L. REV. 433, 436 (1968).

12. The NLRB's approach from 1941 to 1947 is epitomized by the following:

> Statements containing an actual, implied, or veiled threat of economic reprisal are coercive *per se* and are not privileged. A more difficult problem arises in connection with statements which on their face appear unobjectionable. In such a case the Board does not consider the statement in isolation, but appraises it in light of the employer's entire course of conduct. Thus an otherwise privileged statement may acquire a coercive character when accompanied by other unfair labor practices or when found to be an inseparable and integral part of a course of anti-union conduct, which in its "totality" amounts to coercion within the meaning of the act.

11 NLRB Ann. Rep. 34 (46).

13. *See e.g.*, Thomas v. Collins 323 U.S. 516 (1945).

14. Amendment to National Labor Relations Act, P.L. 101, 80th Cong. 120, 1st Sess. The text of 29 U.S.C. Section 158 (c) is set out in the text accompanying Note 5, *supra*.

reprisal or force or promise of benefit. The meaning of section 8(c) was clear to many writers[15] who maintained that Congress explicitly intended that the ambit of employer speech be extended and that only a finding that the speech was an unfair labor practice would suffice for setting aside an election. The Board, however, managed to circumvent the above interpretation of legislative intent by holding in the *General Shoe Corporation*[16] case that section 8(c) applied only to unfair labor practices and did not effect representation election issues. The Board considered its duty to be one of insuring "laboratory condition," during election periods.

The Board articulated this theory as follows:

> We do not subscribe to the view . . . that the criteria applied by the Board in a representation proceeding to determine whether certain alleged misconduct interfered with an election need necessarily be identical to those employed in testing whether an unfair labor practice was committed although the result will ordinarly be the same.[17]

Therefore, the upshot of *General Shoe* was that a finding of an unfair labor practice was not a prerequisite to a finding that a representation election should be set aside. The Board rationalizes this distinction on the basis of the difference between the remedies available where an unfair labor practice has been committed and the remedy available where the only finding is that the laboratory conditions have been upset. Where an unfair labor practice is found, the Board is directed by Labor Management Relations Act section 10(c) to order the offending party to "cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act."[18]

The Board, therefore, has been given much latitude in fashioning

15. *See, e.g.*, Pokemper, *Employer Free Speech Under the National Labor Relations Act*, 25 MD. L. REV. 111, 115 (1965), and J. Protning, *Employer Free Speech: Two Basic Questions Considered by the NLRB and Courts*, 16 LABOR LAW JOURNAL 131, 138 (1965).

16. 77 N.L.R.B. 124 (1948). The Board, in what critics label a curious construction, stated that "conduct that creates an atmosphere calculated to prevent a free and untrammeled choice by the employees will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *Id.* at 126.

17. *Id.* at 127. See also footnote 39 *infra*.

18. 29 U.S.C. 160 (1964).

remedies. Thus, where an unfair labor practice has been committed the Board cannot only take action to rectify the harm caused by the specific activity which gave rise to the unfair labor practice charge but also such other "activities of a somewhat different nature which might be resorted to in an attempt to circumvent the Board's decision."[19] Where the Board merely finds that one of the parties to a representation election has tampered with the requisite laboratory conditions, the choice of remedies is reduced to one—the setting aside of the tainted election.[20] Whether this rationale is justifiable on functional grounds is debatable; logically it is an artifical distinction.

III. THE INJECTION OF RACIAL PROPAGANDA INTO REPRESENTATION ELECTION CAMPAIGNS.

A. The Problem and the Constitution.

The injection of propaganda with racial overtones is one of the most perplexing and constitutionally difficult aspects of representation election campaigning. Both parties often accuse the other of injecting

19. *Amalgamated Meat Cutters Local 88 v. NLRB*, 237 F.2d 20, 26-27 (D.C. Cir. 1956). The celebrated *J. P. Stevens* cases offer a graphic example of the broad remedial powers of the Board under § 10(c). *J. P. Stevens Co. v. NLRB*, 380 F.2d 292 (2d Cir. 1967) and *Textile Workers Union of America v. NLRB*, 388 F.2d 896 (2d Cir. 1967).

20. While the NLRB protects the employer's freedom of speech (although it limits it somewhat) and at the same time protects employees from employer expressions which are intimidatory, coercive, or threatening (such are deemed to be unfair labor practices) its election provisions also guarantee the employees the right to exercise a free choice in an atmosphere devoid of words or conduct which impinge upon that right. Therefore, it is incumbent upon the board to reconcile these sometime incongruous policy considerations of the NLRA. Permutations of the basic balancing problem are myriad. The areas are extremely "factual" oriented and "[O]nly on rare occasions has the Board set aside an election solely on the grounds of the content of an employer's speech which falls within the privilege of 8(c)." 2 GA. L. REV. at 438.

> [T]he Board in each "free speech" case is required to make a careful factual determination to which the standards of the statute must then apply. The Board must analyze the likely impact of an employer's or a union's pronouncements on the employees with due regard for the context of the statements, the characters and economic positions of those who heard it; and the intent of the speaker in uttering the statement.

69 L.R.R. 186 (1968). (Excerpted from a supplementary memorandum from the NLRB to the Subcommittee on Separation of Powers of the Committee On the Judiciary of the United States Senate (Erwin Committee).

The preceeding discussion does not attempt to deal with the multifaceted problems precipitated by the NLRB's regulation of communications in pre-election campaigns. Analysis of the constitutional ramifications of this "free speech" area of labor law is beyond the scope of this paper.

race-hate propaganda into their campaigns.[21] The majority of litigation, however, has been precipitated by union claims, especially in the South,[22] that the employer is playing upon racial attitudes and prejudices in order to defeat the union.[23] While injection of the racial issue is certainly not restricted to the South the

> resentment is most prevalent in the South, and employers there have sought to utilize it for their own purposes. Time and again during organizing campaigns the employer reminds his employees that the union seeking recognition favors racial equality, and that the consequences of union certification are Negro supervisors,

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21. In light of the scarcity of authoritative information on the use of the race issue the YALE LAW JOURNAL attempted to survey unions and civil rights organizations active in the South. The president of the North Carolina State AFL-CIO wrote that 95% of them in the South raise the racial issue in . . . organizing campaigns. The Public Relations Director of the S.C. Labor Council noting that exact figures are not available, wrote that "the equal opportunity policies and practices of organized labor are very often raised by the employer."

Note, *Employee Choice and Some Problems of Race and Remedies in Representation Elections*, 72 YALE L.J. 1243, n.2 (1963).

22. George Meany's letter to the *New York Times* epitomizes the problems facing union organizers in the South:

> [I]n the Southeastern states—where union organization was difficult enough under more favorable circumstances—the labor movement has been subjected to attacks of almost incredible viciousness because it supports the principles of equal opportunity . . . . Racial passions are deliberately inflamed by employers during organizing campaigns as an anti-union weapon. In consequence, union organization has not only failed to spread, but in some key industries, like textiles, has diminished.

Meany, *Letter to the Editor, N.Y. Times*, May 8, 1961, p. 34, col. 7.

23. "Attempts to show that unions will favor Negroes are made before nearly every representation election conducted by the NLRB in the South." *N.Y. Times*, Nov. 10, 1957, p. 57, Col. 2. But the following table "indicates that Northern, Western, as well as Southern employers used blatant racial propaganda in the pre-election campaign especially before the historic *Brown v. Topeka Board of Education*, 347 U.S. 483 (1954), case.

Incidents of use of racial propaganda.

1938-48			1949-53			1954-65		
North	South	West	North	South	West	North	South	West
3	8	4	6	13	1	2	20	3

. . . But from 1954 to the present it occurs more frequently in the South." J. Drotning, *Race Propaganda: The NLRB's Impact on Employer Sublety and the Effect of this Propaganda on Voting*, 18 LABOR LAW JOURNAL 172, 180 n. 41 (1967).

24. For example, in the Southwest and in Southern California, Mexican and other hyphenated Americans of Latin extract are often the subject of, or target for, racial exploitation in pre-election campaigns. *See, e.g.*, Snap Out Binding and Folding, Inc., 166 N.L.R.B. 316 (1967).

> integrated washroom facilities, integrated social events, and ultimately intermarriages.[25]

The NLRB's position with respect to the injection of race-hate propaganda has been ambivalent in that it has been more lenient in the application of its standards where unions have employed the tactic than where employers have done so.[26] The Board has been sensitive to employer injection of race propaganda primarily because of the economic relationship between the employer and the employee.[27] Board involvement, and regulation of pre-election campaigning is made most difficult by the potentially variant national policies of "encouraging the processes of self-organization and collective bargaining [per the NLRA] and the national goal of equal protection set forth in the fourteenth amendment . . . with the equally cherished first amendment guarantee of free expression."[28]

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25. D. Pollitt, *The National Labor Relations Board and Race Hate Propaganda in Union Organization Drives,* 17 STANFORD LAW REV. 373, 376 (1964). The use of facial propaganda is not solely a creature of the civil rights activities of the late 1950's and 1960's, however. In the earlier cases, blatant appeals were made to white superiority and the social distance between whites and Negroes, *See* Planters Manufacturing Co., 10 N.L.R.B. 735 (1938). These incidents of racial propaganda were not peculiar to the South, however. *See e.g.,* California Cotton Oil Corp., 20 N.L.R.B. 540 (1940).

26. *See* note 139 and accompanying text, *infra.*

27. "We try to apply similar tests to pre-election statements by employers and labor spokesmen, but we recognize the difference between the party who has control of the job and the party who does not." 68 L.R.B. 48 (1968) (Reprint of Chairman McCulloch testimony before the Ervin Committee), where the speaker-employer makes known his total, and often virulent, opposition to unionization, the fact that he employs the recipient of his aired views certainly adds some coercive weight to his statements. *See* International Ass'n of Machinists v. NLRB, 311 U.S. 72 (1940).

28. Pollitt, *supra* note 25, at 378, "[T]he preferred place given (in the Constitution) the freedoms secured by the First Amendment . . . gives these liberties a sanctity and a sanction not permitting dubious intrusions." Thomas v. Collins, 323 U.S. 516, 530 (1945). "That the state has power to regulate labor unions with a view to protecting the public interest is . . . hardly to be doubted. They cannot claim special immunity from regulation. Such regulation, however . . . must not trespass upon the domain set apart for free speech and free assembly." *Id.,* at 532. The NLRA lends itself to conflict with constitutional freedoms because of its broad and, at times, vague language.

> It is a very difficult area to administer because of the conflicting interpretations which may be given to the meaning and effect of employer's letters and speeches. The richness and protean quality of the English language may be a boon to the poet and punster, but to an attorney latent ambiguities in language give more pain than pleasure. Because of the time-honored sanctity of freedom of speech, and the many pitfalls and snares for the unwary, the Board is very careful in its approach.

Fanning, *The Broad View: A Question of Balance,* 15 LOYOLA L. REV. 1, 5 (1969).

> [W]hen the employer merely seeks to engender emotions and prejudices

Some absolutists argue that the NLRB has no business interfering at all with pre-election racial statements by employers[29], while others becry the need for more restrictions.[20] First amendment rights are not held to be absolute. As early as 1919 the Supreme Court held that the "[f]irst amendment to the Constitution while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language."[31] More recently, the Court has held that the first amendment "envisions that persons be given the opportunity to inform the community of both sides of an issue in a community problem and such privilege should not

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> that do not depend upon his power over the employees, he does no more than any political candidate might do in exploiting racial issues or predicting the dire consequences which will follow if his opponent is elected. Such tactics may appeal to passion rather than reason, but it would be just as improper for the government to draw this line in representation elections as it would be in the ordinary run of political campaigns.

Bok, *The Regulation of Campaign Tactics in Representation Elections Under the NLRA*, 78 HARV. L. REV. 38, 47 (1964). See NLRB rebuttal of political election analogy at footnote 165, *infra.*

> 30. The greatest impediment to Union organizing is the captive audience . . . only fair rule that would counteract this advantage of employers is a rule of absolute equality . . . The law that the NLRB has developed with respect to what is permissible pre-election propaganda by employers . . . (causes the writer) to advise clients to avoid an NLRB election. Unions have learned the hard way that what the Board considers permissible propaganda can be very effective.

Excerpted from a speech by Joseph A. Finley to the Third Annual Midwest Labor Law Conference at Columbus, Ohio in December, 1966 as reported in 63 L.R.R. 300 (1966). Former Board member McCulloch emphasized the plight of the Board, caught between the divergent and seemingly irreconcilable views of Dean Bok and Joseph Finley:

> Our Board decisions passing upon employer's and union's election conduct seems to draw almost equal fire from both sides . . . [W]e try to draw fair and clear lines as to what conduct oversteps the law's restrictions against threats, coercion, promises and other improper interference, and what does not. Some employer representatives, however, draw up case lists to show we are too strict, and some union lists seek to prove we are too lenient. The court sustains us and reverses us . . . . Yet, I note with a certain pride that in the past fiscal year (1964-65) the Board's position was sustained by the Courts of Appeal, in whole or in part, in 79.7% of the cases there reviewed.

Excerpted from text of speech delivered by NLRB Chairman Frank W. McCulloch at the 43rd Annual Conference of Texas Industry (Oct. 1965) as it appeared in 60 L.R.R. 135, 150-1 (1965). Sen. Burdick (D, N.D.), in defending the NLRB before the Erwin Committee further praised the NLRB's track record when he pointed out that "49 free speech cases were reviewed by courts in 1967 and the Board was sustained in whole in 36, in part in 4 others, and was reversed, in toto, in 9 others." 68 L.R.R. 6 (1968).

31. Frohwerk v. United States, 249 U.S. 204, 206 (1919).

be lightly curtailed."[32] The problem, therefore, is greatly more complicated than the absolute approaches alluded to above imply. From each's arguments can be gleaned two basic premises from which a possible solution can be formulated: (a) the unbridled use of racial propaganda by the employer, when coupled with his dominant economic position, creates a situation in which it can be scarcely contended that the employee is guaranteed an atmosphere conducive to the casting of a reasoned ballot; (b) total elimination of race-hate propaganda without consideration of other factors violates first amendment freedoms.

While these two positions appear to be patently incongruent many writers believe reconciliation is possible. Most criticism of the Board's restrictions of free speech rights are lodged in behalf of the employer, but the Board has also restricted the union's use of race-hate propaganda.[34]

B. The NLRB's Regulation of Race Propaganda in Representation Election Campaigns.

Before the enactment of section 8(c) the NLRB had taken the position that the employer's dominant economic position over the employee's rendered any appeal to racial prejudice an unlawful interference, restraint or coercion and, therefore, an unfair labor practice.[35] The Board, therefore, considered the free exercise of employee choice to be the paramount consideration. The passage of the Taft-Hartley amendments to the Wagner Act in 1947, included section 8(c)[36] which allows the expression of views, etc., that do not contain threats of reprisal or force or promise of benefit. Consequently, employers have been allowed much greater latitude to comment upon

32. Wood v. Georgia, 370 U.S. 375, 391 (1962).

33. *See,* e.g., Samoff, *NLRB Elections: Uncertainty and Certainty,* 117 U. PENN. L. REV. 228 (1968).

34. See generally, notes 121 through 143 and the accompanying text, *infra.*

35. Thus while the Wagner Act Board held employers to strict neutrality in representation campaigns, the employer is now allowed, and encouraged, to present the case against unionism in order that the employee, in making his choice, may have the benefit of the views and information of all the parties to the election.

72 YALE L.J., *supra* note 21, at 1246. *See also,* Planters Mfg. Co., 10 N.L.R.B. 735 (1938); and American Cyanamid Co., 37 N.L.R.B. 578 (1941).

36. For the provisions of section 8(c) see the text accompanying footnote 5 *supra.*

unions. The Board, however, has distinguished between pure speech and speech coupled with a threat which the employer himself is capable of enforcing. Therefore "[t]he employer is permitted to disparage the union's position on racial equality and to predict dire consequences if the union is elected, but he may not link racial argument with threats of economic detriment that he might be capable of injecting.[37] Thus, speech plus such threats constitutes an unfair labor practice per section 8(a) (1).[38]

In a landmark 1948 decision the NLRB held that:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible to determine the uninhibited desires of the employees . . . . When, in the rare extreme cases, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.[39]

Thus, the Board has greater latitude in acting to mitigate, or totally purge, race-hate propaganda in election cases than it does in unfair labor practice cases. The Board has continued to uncategorically

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37. Pollitt, *supra* note 25, at 382.

38. For the text of section 8(a)(1) see text accompanying note 4 *supra*. Pollitt asserts that the Board has been more disposed to find instances of unlawful threats in recent years than it was immediately subsequent to the passage of the Taft-Hartley Amendments. Pollitt, *supra* note 25, at 382. In an address by former NLRB Chairman Guy Farmer delivered to the New York Chamber of Commerce Labor Law Forum in 1969 he conceded such a trend and criticized the Board for it, saying in part:

> In decision after decision the NLRB has gone very far in inhibiting employer statements, finding them to be coercive, or using them to set aside elections that unions have lost, in a context where these statements were merely expressions of opinion or statements of fact . . . the Board has been permitted great latitude.

70 L.R.R. 143 (1969). Judicial criticism of Board encroachment of employer free speech rights is epitomized by the following 1967 decision rendered by the second Circuit: "Congress did not intend the Board to act as a censor of the reasonableness of statements by either party to a labor controversy even if it constitutionally could." NLRB v. Golumb Corp., 38 F.2d 921, 929 (2d Cir. 1967).

39. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948). Criticism of the "laboratory condition" standard has been both voluminous and vociferous. Typifying as to both, is the remarks of Senator Sam Erwin (D., N.C.) before the Congress of American Industry:

> The theory has been strictly applied to censure employer actions and speech which disturb what in the eyes of the Board should be a pristine election campaign. The slightest mis-step by an employer or his agent may destroy the "laboratory conditions" of the election especially it seems, when the union has lost. 69 L.R.R. 353 (1969).

repudiate the argument that section 8(c) is applicable to election cases.[40]

The NLRB, therefore, has delineated between cases where the injunction of race-hate propaganda constitutes an unfair labor practice and those where such propaganda upsets the laboratory conditions which must exist during an election period (thereby justifying setting the election aside). The latter is obviously a stricter test but the remedy is less severe.[41] Further analysis of Board decisions will be delineated as follows: unfair labor practice cases; employer use of race propaganda in election cases and its effect on laboratory conditions: union use of race propaganda and its effect on the requisite election atmosphere.

1. The injection of race propaganda in election campaigns: does it constitute an unfair labor practice?

The Board has found that employer conduct *constituted* an unfair labor practice in the cases that follow.

In *Bibb Mfg. Co.*[42] the trial examiner found that a statement by an agent of the employer implying that an employee would have to work with Negroes if he voted for the union was unlawful. The trial examiner took into account the facts that the plant was segregated and was located in Georgia.

In *Empire Mfg. Co.*[43] the Board held that a North Carolina employer had committed an unfair labor practice by statements to the employees that if the Union was voted in it would mean "hiring niggers" and that there would only be two to three hours of work per day. Indirect threats of economic detriment were also held unlawful in *Petroleum Carrier Corp.*[44] where the Board adopted the trial examiner's finding that the Florida employer's agent had by his

40. "We do not regard that section as determinative of questions involving election interference." Eagle-Picker Industries, Inc., Electronics Division, Precision Products Dept., 171 N.L.R.B. No. 44 (1968).

41. The remedies effected where an unfair labor practice is found varies. See text accompanying footnote 19 *supra*. Where an election is tainted by conduct of the employer which creates an atmosphere not conducive to free exercise of choice, that election is set aside and a new one ordered.

42. 82 N.L.R.B. 338 (1949), *modified on other grounds*, 188 F.2d 825 (5th Cir. 1951).

43. 120 N.L.R.B. 1300 (1958), *aff'd on other grounds*, 260 F.2d 528 (4th Cir. 1958).

44. 126 N.L.R.B. 1031 (1960).

statements impliedly threatened to change working conditions to the detriment of the white employees if the union won.[45]

In *Babcock and Wilcox Co.*[46] the employer threatened the job security of black employees as a campaign tactic. The Mississippi employer's agent threatened to demote the black employees if the union won. The Board found these statements to constitute a direct threat and, hence, an unfair labor practice.

In *Boyce Mach. Corp.*[47] the employer was held in violation of 8(a)(1) because he told some of his Negro employees (the Louisiana plant was integrated) that if the union won the election the *union*[48] would replace the Negroes with whites and they (management) would not be able to prevent it.[49] The Board held that the company had overstepped the legal bounds by intimating that it might abdicate part of its management prerogatives to the union and thereby added fuel to the Negroes fears of discharge.[50]

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45. This Board decision offers a good example of the lengths to which the Board would go to find coercive threats. "It [statement that company would hire anyone if union won] was, rather, a direct threat that the employees would suffer enforced association with persons of supposedly inferior origins if they accepted the Union and the falsity of the premise does not negate the threat." *Id.* at 1038-39. The Trial examiner specifically and pointedly objected to the employer's employment of the epithets "niggers, cajuns, wops, and whatnot" when describing those the company would hire if the union won. Therefore, it would appear, inferentially, that by the use of less offensive language the employer could circumvent the *Petroleum Carriers* rationale while still conveying the same message to his employees. Thus, by evading clear cut definitions, the Board probably made the task of culling the lawful from the unlawful more difficult; *Petroleum Carriers* seems to place a premium on such subtlety.

46. 128 N.L.R.B. 239 (1960).

47. 141 N.L.R.B. 756 (1963).

48. Compare *Boyce* with *Babcock*. In the former the employer stated that the union would replace the Negro employees and in the latter the employer himself threatened to replace the Negro employees if the Union won.

49. The employer was held not in violation of the Act on two other charges. First, the Board held that the employer's agent's allusions to the union organizer as a "goddam Dago" was reprehensible but not unlawful. Secondly, the agent's statement to the Negro employees that the Union discriminated against Negroes was held to be lawful because "no one would suggest that Negro employees were not entitled to know that the Union which seeks to represent them practices racial discrimination; a truthful, relevant campaign statement is [not] to be condemned because it may have racial overtones." 141 N.L.R.B. 761 n.9 (1963).

50. In actuality, the Board probably considered the totality of statements. The employer's constitutionally protected truthful statement about the Union's racial policies when coupled with the predicted capitulation of management duties was enough to transform this conduct from the innocuous to the unlawful. The Board applies the same

In *Durant Sportswear*[91] the Board upheld the trial examiner's finding that the use by the employer of a large racially inflammatory placard in his segregated Mississippi plant prior to an election constituted an unfair labor practice. The Board indicated that the clear inference of this poster was that the pro-integration union would pressure the company to hire Negroes; the upshot being the replacement of whites with Negroes. The poster also indicated that the company would capitulate to such demands.[52] Both *Boyce* and *Durant*, therefore, involved the employer's threatened acquiesence to union encroachment upon normal management decision-making functions pursuant to purported union racial policies.

In *Atkins Law Div., Borg-Warner Corp.*[53] the Board upheld the trial examiners finding that even though the complained of activity itself might be lawful, it was still an unfair labor practice to threaten employees with coercive action. The unlawful conduct occurred in a Mississippi plant in which, although Negroes were employed, separate restroom and drinking fountain facilities were used and in which there were separate seniority lists maintained. The following were among some of the statements by the employer's agent to white employees found to be offensive: "We would have to use the same restroom facilities . . . and that he could not just promote a person according to his ability but he would have to go solely by seniority.[54] If the Union comes in, there is nothing that we can do about it, none of us. In a Union every man is equal."[55]

The Board upheld the Trial Examiners finding that the lawfulness of the conduct did not purge it of possible coerciveness given the

standard whether the employer is playing upon Negro employees' fears of job encroachment by Whites or vice versa. Compare this with the ambivalent standards employed by the Board with respect to racial propaganda which is devoid of coercive or restraining connotation (and thus does not constitute an unfair labor practice) and is legally objectionable only if it upsets the required laboratory conditions of an election. *See* text accompanying footnote 151, *infra.*

51. 147 N.L.R.B. 906 (1964).

52. The Board also applied the *Sewell Mfg. Co.* [138 N.L.R.B. 66 (1962)] test with respect to the burden of proof being on those who employ racial propaganda to show it is not coercive.

53. 148 N.L.R.B. 98 (1964). This case arose shortly after riots had occurred in Mississippi when James Meredith attempted to become the first Black to enroll in the nearby University of Mississippi. This, of course, greatly exacerbated racial tensions in the state and community in which the plant was located.

54. *Id.* at 954.

55. *Id.*

situation where the white employees were led to believe that forced association with Negroes would be the result of a union victory. The Trial Examiner concluded:

> In the context in which they were made, I am persuaded that these statements were designed to and did reasonably tend to coerce these white employees into voting against the union by convincing them of the inevitability of these changes if the union became the bargaining representative.[56]

In *Certain-Feed Products Corp.*[57] the Board held that the Texas employer had committed an unfair labor practice by, among other things, threatening employees for participating in union activities including a threat to replace Negro employees with white employees and white employees with Negro employees if the Union won the election.

In *Lake Butler Apparel Co.*[58] the employer was found to be guilty of an unfair labor practice when he warned some of his white employees in the Florida plant that they would be replaced by Negro employees if the union was victorious. He further intimated that some Negroes would be switching to better jobs if the union came in.

In *Viking Bag Div., Slurfine Central Corp.*[59] the Arkansas employer employed a small number of Negroes (mostly in the warehouse). The employer's agents asserted that if the union came in then the white employees would be forced to work with Negroes in the same department. The following typifies the statements which the Board found to be objectionable:

"Well if the union came in that the plant would have to hire more niggers and that it [the union] wasn't for anybody but niggers and that a lot of people would be fired or lose their jobs over it."[60]

In *NLRB v. Bush Hog Inc.*[61] the Fifth Circuit Court of Appeals

56. *Id.* at 955.
57. 153 N.L.R.B. No. 44 (1965).
58. 158 N.L.R.B. No. 85 (1966).
59. 161 N.L.R.B. 648 (1966).
60. *Id.* at 658.
61. NLRB v. Bush Hog, Inc., 405 F.2d 755 (5th Cir. 1968). In another 1968 case the Board cited and the employer admitted to 58 separate violations of 8(a)(1) one of which was a suggestion to some of its Alabama employees that it would have to hire Blacks if the Union won the election. GFA Transportation Co. 169 N.L.R.B. No. 72 (1968).

enforced an NLRB order[62] based on a finding that the employer had committed 52 specific unfair labor practices.[63] The Selma, Alabama plant management engaged in several activities calculated to incite the racial prejudice of the white employees. In one speech, a plant executive remarked that the Teamsters Union "is not very likely to be turning right around [after its President, James Hoffa, had contributed $25,000 to Martin Luther King's Selma, Alabama march] and [start] fighting integration."[64] The court found that the evidence indicated strong anti Negro sentiment among the all white management and employees. The plant officials on several occasions intimated that if the Union won the plant would have to be integrated but if the company won they would perpetuate a segregated work force. The court stated:

> Considered in isolation, the reminder of the undisputed fact that Hoffa donated teamsters funds . . . might fall within the ambit of privileged speech guaranteed by Section 8(c) . . . . Yet we evaluate such speech, not in a vacuum, but in the "totality of conduct" . . . . We are aware also that permissive propaganda standards are not "fixed and immutable," particularly where a racial prejudice appeal is involved.[65]

The court then held that when the company implied it would maintain a segregated plant it was implicitly making a "promise of what was considered to be a benefit."[66] The statement, therefore, was not protected by 8(c) and clearly violated 8(a) (1).

In the following cases, the Board determined that the complained of employer conduct did *not constitute* an unfair labor practice.

In *Burns Brick Co.*[67] the employer addressed his Negro employees and counseled them against joining forces with the union. He alluded to previous racial troubles in their Georgia city and cautioned them against joining a union on the basis of the alleged proclivity of the

62. 161 N.L.R.B. No. 136 (1966).

63. The non-racial violations included: Interrogation of employees about their union activities and sympathies; the promise of benefits if they voted anti-union; threats to discontinue benefits if the union won; threats that a union victory might result in layoffs; warnings to some employees of the difficulty in securing other employment if their support for the union became known; informing the employees that a sheriff's posse was standing by in the event of a strike. *Id.*

64. NLRB v. Bush Hog, Inc. 405 F.2d at 755 n.2. (5th Cir. 1968).

65. *Id.*

66. *Id.*

67. 80 N.L.R.B. 389 (1948).

townspeople to engage in racial rioting. He also brought in local ministers to speak to the employees about the danger of riots which might be precipitated by a union victory. The Board in overturning the trial examiner held that such statements were not proscribed by the Act since they contained no direct or implied threat of economic reprisal or a promise of benefit.[68]

In American Thread Co.[69] the Union alleged that the employer had committed an unfair labor practice by stating that the union advocated racial integration in all aspects of social and business life. In addition, the employer intimated that a union victory would result in whites working with Negroes in their Georgia plant. He also stated that a union victory would only work to the benefit of union leaders. The Board held that although it deplored such slurs they did not, of themselves, constitute a violation of 8(a) (1).[70]

In *Model Mill Co.*[71] the Tennessee plant's president presented a graphic illustration of what would insure from a union victory. He directed a Negro employee to assume a position behind his desk and asked the white employees if they would like to have someone come in and tell them how to run their home. The Board, however, upheld the trial examiner's finding that such conduct was within the ambit of section 8(c) protection.

In *Snap-Out Binding and Folding Inc.*[72] the Board held the employer could lawfully quote out of a magazine an article to his

68. Perhaps if the employer had hinted at his active participation in such riots the Board would have been constrained to find at least an upset of the requisite laboratory conditions. See discussion of third party involvement in representation election at text accompanying footnotes, *infra.* 144-48.

69. 84 N.L.R.B. 593 (1949), *enforced,* 188 F.2d 161 (5th Cir. 1951) (per curiam).

70. It is difficult, at best, to reconcile this decision with many decisions in which an unfair labor practice was held to have been committed. Especially arduous is reconciliation of this case with *Bush Hog.* In the latter the court held the employers statement that a change in working conditions would occur if the union won but would not if the company won, constituted an implied promise of benefit. Factually, *Bush Hog* can be distinguished on the basis of the multitudinious unfair practices committed by that employer. Logically, however, *Bush Hog* and *American Thread* are strange bed mates. Practically, the variant approaches could be explained away on the basis of the difference in year of decision (and, hence, difference in Board composition) or on the basis of a gradual hardening of attitude about the use of race-hate propaganda by the Board.

71. 103 N.L.R.B. 1527 (1953), *enforced,* 210 F.2d 829 (6th Cir. 1954) (per curiam).

72. 166 N.L.R.B. 316 (1967).

employees, in which the organizing union was said to have discriminated against Negroes and Mexicans.

In *Bonwit Teller, Inc.*[73] the Board found the employer in violation of 8(a) (1) but not because he had made certain racially oriented statements. The Board held that the Chicago, Illinois store's general manager acted within his section 8(c) rights when he told certain Negro non-selling employees that the non-selling unit sought by the union was a segregated unit and that the employees would thereby be excluding themselves from the rest of the employees by promoting this union drive. The Board reasoned that the employer's appeal was posited upon his desire to retain the racially (and functionally) integrated character of the store-wide unit and therefore were not irrelevant inflammatory appeals to racial prejudice.[74]

In *Southwire Co. v. NLRB*[75] the Fifth Circuit considered the question of whether or not the employer's use of the film "and Women Must Weep" constituted a threat of reprisal such that an unfair labor practice would have been committed. The Board had found the film violative of section 8(a)(1) of the Act.[76] "The same film had been considered on three prior occasions. In two cases elections were set aside based on the fact the film was exhibited by the employer to the employees in mass meetings during election campaigns . . . ."[77] Those decisions were posited upon the film's transgression of the laboratory conditions required during an election campaign. In the instant case, however, the showing of the film was not related to an election campaign. (It was being utilized here as part of an orientation program for new employees.) Therefore, the film must contain a threat of reprisal or force or no unfair labor practice can be found.

The court pointed out that no law required "an employer to withhold knowledge of its opposition to unionization" and further that the nature and content of the film, the emotional impact of the film and

73. 170 N.L.R.B. No. 55 (1968).

74. The employer was motivated by a desire not so much to better the lot of the non-selling employees, but to maintain the storewide unit which was conducive to smoother labor relations. By departmentalizing the employees, the Union would have balkanized the employer's collective bargaining efforts among various unit factions. His motivation, therefore, was mostly economic and administrative in nature.

75. 383 F.2d 235 (5th Cir. 1967).

76. Southwire Co., 159 N.L.R.B. 32 (1966).

77. 383 F.2d at 238.

the fact that the employees constituted a captive audience "must be measured against Respondent's right to free speech under the First Amendment and under section 8(c) . . . ."[78]

The court stated that the right of free speech in an industrial society must be balanced against the employees section 7 bestowed right to self organize. The court reasoned that an election campaign is an adversary proceeding and, therefore, not impartial, and that Congress had set a limit on the right of free speech and that limit was set in section 8(c). The court held, therefore, that there was insufficient proof to establish that the film constituted such a threat. The court concluded by stating that "we do not believe that free speech is limited to non-emotional or non-impact speech . . . . We thus do not reach the legal question of whether and to what extent factual misrepresentations may limit free speech."[79]

In *Block-Southland Sportwear Inc.*[80] the Board found that the employer had not committed an unfair labor practice[81] by virtue of the statement of one of their supervisors, who herself was a Negro, to a Negro employee (who was wearing a union pin) that the union was for whites and not Negroes. The statement was said to be an expression of the supervisor's own personal views. This is not to infer that employers can circumvent the intendments of the Act by shifting the onus to its hirelings. In fact, as shall be pointed out later,[82] they are often held liable for the activities of parties with whom they have no employment relationship.

2. Employer Injection of Race-Hate Propaganda into Representation Election Campaigns: Does it Warrant Ordering a New Election?

Section 9 of the NLRA requires the Board "to direct an election by secret ballot and . . . certify results thereof."[83] The Board,

78. *Id.* at 239.

79. *Id.* at 242.

80. 170 N.L.R.B. No. 101 (1968).

81. The employer was held in violation of the act on other grounds, however.

82. *See* text accompanying footnotes 144-148, *infra.*

83. 29 U.S.C. § 159(c) (1964). Mechanically, the statute specifies the following procedures for the conduct of representation elections:

> The National Labor Relations Board is empowered by virtue of section 9(c) and (e) of the National Labor Relations Act, upon the filing of a petition by either employer, employee or union, to conduct secret ballot

therefore, is empowered to regulate elections and has construed this authority as granting it the power to regulate pre-election employer speech either under section 8(a) (1) or under the Board's assumed power to insure the election is held under laboratory conditions.[84] The Board's assumption of the power to guarantee employees laboratory conditions during election campaigns has come under relentless attack from many sources. Many question the constitutionality of their assuming such power[85] and the Board's consequent curtailment of first amendment rights via such regulation.[86]

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elections . . . . Each type of election is specifically designated by the Board, and the period of time during which it will review objectional conduct is governed by the rules and regulations of the NLRB . . . [F]rom the time the election petition is filed in both contested and uncontested elections, until the election itself is held the Board will consider the conduct of the parties to determine whether the voters have exercised their free choice.

Within five days after the tally of the election ballots have been furnished to the parties by the Regional Director, any party may file objections. These are limited to the manner in which the election was conducted by the NLRB and/or to conduct which affected the results of the election, the latter forming the majority of such cases . . . . The conduct by unions, employers or others which interferes with the employees' free choice may or may not be of sufficient degree to constitute an unfair labor practice.

Fuchs, *Pre-Election Campaign Propaganda and Activities Before the NLRB*, 4 B.C. IND. & COM. L. REV. 485-487 (1963).

84. Dal.-Tex. Optical Co., Inc., 137 N.L.R.B. 1782 (1962).

85. Typical of the criticism is the following:

While § 1 of the Act declares the policy of the United States to be that of encouraging the "practice and procedure of collective bargaining" § 7 enumerates the rights of employees and specifically provides for "the right to refrain from any or all of such activities" . . . [b]ut the statute makes no mention of any grant of authority to establish a "laboratory experiment" or to scrupulously supervise its operation according to the reactions of the Board members (five presidential appointees) to various forms of communication . . . . One wonders whether the "substantial evidence form of Court review may not unduly insulate Board policies that restrict first amendment guarantees.

Note, *The NLRB's Restrictions on the Employers Right of Free Speech*, 3 AKRON L. REV. 206, 210 (1970).

86. I now charge the Board with a serious offense and it is this: That without ever having had the courage to say so expressly and frankly, it has proceeded on the premise that the employer does not have a legal right to oppose the unionization of his employees. It finds him guilty when he exercises his right of free speech to express his views on unionization.

Bureau of National Affairs, 1966 Labor Relations Yearbook 155-156.

The laboratory condition standard places wide discretion on the Board to

Perhaps it would be better to begin a discussion of the NLRB's policy with respect to the employer's use of race-hate propaganda by summarizing what their present position is. The NLRB neither prohibits all use of race hate tactics nor does it always condone it as an exercise of constitutional rights. The Board engages in a teleological analysis of the purpose of the employer's tactics: if its sole purpose is to exacerbate racial tensions and thereby derive the fruits of racial prejudice it is unlawful; on the other hand, truthful apprising the employees of the union's racial position (be it informing white's that the union is pro-integration or pointing out to Negroes that the Union discriminates) is always allowable. In the first instance, even if the sole purpose is to inflame racial tensions, single epithets or isolated slurs are usually permissible. In the second situation, the statement of the union's racial position will be permissible even though the statement itself has racial roots or panders to racial prejudice if it is in some way apposite to the choice before the employees. But the burden of proof here will be upon the party availing himself of the use of racial propaganda to establish that the racial statement is both germane and truthful. Having drawn conclusions, the premises must be expounded.

In general, although the NLRB has assumed the power to regulate union campaigns, it is chary of using that power:

> In the ordinary election, the NLRB refrains from utilizing its censoring power. Perhaps out of necessity, the Board relegates the assessment of electioneering propaganda to the good sense of the voters . . . . Thus the NLRB maintains a fairly consistent hands-off policy in policing its representation elections if the union has the opportunity to reply and the employees can evaluate the charges, the Board will not overturn the election results.[87]

While the unions have annually carped about employers use of race-

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begin with, and the standard is rendered even more uncertain by the continuing turnover in Board membership. President Nixon will appoint three board members between 1969 and 1971, and this may mean that the agency attitude toward these first amendment matters will be modified. Query: Should these fundamental freedoms be dependent for their expansion or contraction upon the political philosophy of presidential appointees who serve for a five year term?

3 AKRON L. REV. *supra* note 85, at 213.

87. Pollott, *supra* note 25, at 390-91. The writer notes that the NLRB discards its hands-off policy when the union's opportunity to rebut and the voters ability to discern obvious propaganda are absent. He then categorizes five situations where the employees can't recognize propaganda in its true light:

hate propaganda and have asked for an absolute ban on its use[88] the NLRB has not been swayed. Instead, the NLRB has traditionally treated it in the same manner as any other propaganda.

It is necessary at the outset to delineate between NLRB treatment of the problem before the landmark case of *Sewell Mfg. Co.*[89] and its approach thereafter. Proceeding chronologically, in *Southern Car and Mfg. Co.*[90] the racial issue was tied to a direct threat to job security and the Board, therefore, set the election aside.[91] In *Westinghouse Electric Corp.*[92] the employer apprised his white employees of the union's pro-integration policy and their attendant disregard for race in their seniority lists. The Board held the North Carolina employer's statement was within the ambit of section 8(c)'s protection.

In *Meade-Atlanta Paper Co.*[93] the Board held the Georgia employer's comparison of the Negro to white ratio in his plant with those of unrecognized plants in their area (which he said had higher ratios) was permissible. In *Chock Full O'Nuts*[94] the Board refused to set aside an election where a Negro official of the plant told other Negroes that his position in the company had fostered jealous whites attempts to unionize the plant.

In *Sharnay Hosiery Mills Inc.*[95] the Board was forced to address itself to the issue of whether the inclusion of race propaganda in a pre-election campaign would, per se, justify setting an election aside. The

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a. Deliberate falsehoods about material matters which the opponent can't answer.
b. Use of forged materials and other campaign trickery.
c. Use of bribes or threats.
d. Elections in a general atmosphere of confusion and fear.
e. Use of indefensible and reprehensible tactics.

Id. at 391-394. The injection of race hate propaganda is most readily accommodated within category "e" above.

88. They argue, for example, that "the racial question in the South today is . . . so emotional a problem that it is impossible to provide for reasoned choice if the race issue is injected. . . ." Pollett, *supra* note 38, at 395.

89. 138 N.L.R.B. 66 (1962).

90. 106 N.L.R.B. 144 (1953).

91. An appeal was made to the Alabama plants' Negro majority to support the company. Accompanying this appeal was a thinly concealed prediction of job loss if the Union was voted in.

92. 118 N.L.R.B. 364 (1957).

93. 120 N.L.R.B. 832 (1958).

94. 120 N.L.R.B. 1296 (1958).

95. 120 N.L.R.B. 750 (1958).

company had circulated a letter stating that the union favored racial integration and had, in fact, supplied legal assistance in the school desegregation cases. The company dispassionately and accurately (they had supported their statements with factual evidence) disseminated this information in a North Carolina mill town. Upon losing the election the union protested the injection of race into the campaign. The Board ruled, however, that they had in the past "relied on the good sense of the voters to evaluate the statements of the parties . . . . [T]he statements here were temperate and factually correct. They, therefore, afforded no basis for setting aside the results of the election."[96]

The final pre-*Sewell* case was *Bonnie Francis Lingerie* 15 R.C. 2395 (NLRB 1962) (unreported). Located in Mississippi approximately 10% of the work force of the plant was Negro. A local businessman told the white employees that unionization would result in Negroes replacing white workers. Subsequent to that talk, but shortly before the day of election, a dozen Negroes entered the plant employment office to apply for jobs. The applicants while in the employment office were in sight of all the white workers. The employer denied any complicity in the matter and, in fact, accused the union of sending them. (In actuality the businessman had sent them). The union's objections to the election were overruled; the Board cited *Sharnay Hosiery* as precedent.[97]

The twin decisions of *Sewell Mfg. Co.*[98] and *Allen Morrison Sign Co.*[99] in 1962 have resulted in waves of criticism being visited upon the NLRB.[100] The election in *Sewell* took place in Georgia. Prior to the

96. *Id.* at 751.

97. For a detailed discussion of employer liability for the acts of non-employees which play upon the prejudice of his employees, see the text accompanying notes 144-48, *infra*.

98. 138 N.L.R.B. 66 (1962).

99. 138 N.L.R.B. 73 (1962).

100. That criticism runs the gamut from Polletts' assertion that the "Board labored mightily . . . only to bring forth a mouse," (Pollitt *supra* note 25, at 400) to the following scathing critique:

> *Sewell and Allen-Morrison* represent the Board's maiden voyage into the emotional nature and effect of campaign propaganda. In *Sewell* the Board believed it had identified and isolated "inflammatory" race propaganda . . . in *Allen-Morrison* the NLRB believed it had discovered the true nature of a factual, germane and temperate presentation of the union's race policy . . . . The failure of this excursion into a wonderland of prediction and surmise which appears to lie beyond the Board's expertise is borne out

election the employer began disseminating by mail virulent anti-union literature depicting the union as being heavily Negro oriented and pro-integration. Included in the literature were: monthly editions of *Militant Truth,* an anti-union racist newspaper; a picture of an unidentified Negro man dancing with an unidentified white woman captioned, "The CIO Strongly Pushes and Endorses the Fair Employment Practices Commission"; a reprint of a similar picture which had appeared in a Mississippi newspaper with the caption, "Union Leader James B. Carey Dances with a Lady Friend;" two days prior to the election a letter was sent to all the employees outlining reasons why the employer would vote against the union if he were permitted to vote (of note was the employer's expression of distaste to paying "assessments so the Union can promote its political objectives such as the National Association for the Advancement of Colored People . . . .")[101] The Board concluded from the evidence in *Sewell* that the employer had effectively prevented a reasoned choice by intentionally seeking to "exacerbate racial feelings by irrelevant, inflammatory appeals . . . ."[102]

The Board, in sustaining the union's argument that the election should be set aside because the employer embarked upon a deliberate calculated course of appeal to racial prejudice which "created conditions which made impossible a reasoned choice . . . ." held that "[A] deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty . . . . [T]he employer's propaganda directed to race exceeded permission [sic] limits and so inflamed and tainted the atmosphere . . . that a reasoned [choice] . . . was an impossibility."[103]

The Board made clear its intention to distinguish between permissible electoral propaganda and appeals whose only purpose is to inflame the racial feelings of the voters. However, it is not just because a statement has racial overtones or caters to racial prejudice that it is

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by a closer examination of these two cases. A comparison of the propaganda in *Sewell* with that in *Allen-Morrison* demonstrates the unworkability of the common sense distinction between rational and irrational appeals as applied to such emotionally laden issues as race.

Note, *Employee Choice and Some Problems of Race and Remedies in Representation Campaigns*, 72 YALE L.J., *supra* note 21, at 1252.

101. 138 N.L.R.B. at 67.

102. *Id.* at 72.

103. *Id.* at 70, 71, 72.

condemned; it must also be truthless and intemperate and devoid of a legitimate purpose.[104] It further articulated its function with respect to the conducting of elections to be one 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 . . . but also from other elements which prevent or impede a reasoned choice.[105]

The *Allen-Morrison* election took place in Virginia. The employer's pre-election activities included the mailing of a lengthy letter, part of which discussed the union's position on the race question in which he quoted from the union's pro-integration Amicus Curae brief submitted in *Brown v. Board of Education* and alluded to a large donation from the union to the NAACP, the letter concluded with the following:

> Whether you believe in segregation or integration . . . is a question for you to decide . . . . The company considers this a matter for each individual to decide. The national unions on the other hand . . . have actively promoted integration . . . . Our purpose in pointing these matters out is . . . not to tell you how you ought to feel on integration . . . but to let you know the unions, including the Textile Union, have tried to force it down the throats of the people living in the South.[106]

Finally, two days prior to the election, a letter accompanied by an excerpt from *Militant Truth* was sent to the employees which purported to prove that the national union allowed no exercise of autonomy by the locals (in this instance the national union allegedly took over the locals affairs because the local had voted to purchase bonds to help finance a segregated school academy). The Board refused to invalidate the election and held: "The employers own letter was temperate in tone and advised the employees as to certain facts . . . . The excerpt from Militant Truth concerned action taken by the Union in this case in a nearby city. We are not able to say . . . the Employer resorted to

104. The Board concluded by stating that:

> [T]he burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is a doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

Id. at 72.

105. *Id.* at 70.

106. 138 N.L.R.B. 73, 74 (1962).

inflammatory propaganda on matters in no way related to the choice before the voters, and we, therefore, decline to set aside the election."[107]

Writers have chosen various facets of the two decisions to attack but the most telling critiques are posited upon a functional analysis of the "reasoned choice" the Board aspires to protect.[108] A particularly cogent analysis of the functioning of a "reasoned choice" dealt with the various values an employee would attribute to certain goals. The writers conclusion was that "[m]ost appeals to race in the South are likely to call forth a response far more intensive and less rational than appeals to wages, hours and conditions of employment."[109]

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107. *Id.* at 75. Whereas the relevance of the racial utterance is a pertinent consideration under the *Sewell* test the United States Supreme Court has implied, in cases where a party to a labor dispute has been defamed, that the relevance of the defamatory statement to the labor dispute giving rise to it is not so important. Linn v. Plant Guard Workers, 383 U.S. 53 (1966). The *Linn* test's failure to emphasize the relevance of the defamatory statement has been criticized by Professor Currier who argues that:

> The duty to make further inquiry should increase in proportion to the seriousness of the imputed offense, just as it decreases in proportion to the immediate relevance of the subject matter of the communication.

T. Currier, *Defamation in Labor Disputes: Preemption and the Now Federal Common Law*, 53 VA. L. REV. 1, 34 (1967). The *Linn* decision does breathe fresh life into the once listless alternative to board impingement of free speech rights (under the guise of protecting laboratory conditions). By allowing a party during a representation election who is defamed by racial slurs (for example the labor boss in the *Sewell* case who was depicted dancing with a white woman) to avail himself of state libel remedies. The burden of proof under *Linn*, however, is very stringent, requiring proof that the defamatious statement was proffered by one who knew it to be false or who did so with reckless disregard for the truth. In addition, Professor Currier admonishes the aspiring plaintiff that "in the context of an election campaign, intention to hurt, to injure reputation, is inseparable from intention to sway votes and thus offers no basis for differentiation." *Id.* at 32. The utility of *Linn*, therefore, as a deterrent to the use of racially oriented defamatious remarks is questionable.

In addition, even assuming that a defamed party can surmount the rigid proof hurdle imposed by *Linn* and further assuming that he can directly link the election defeat to the racial slur, it is extremely doubtful that he could be compensated for damages arising solely from the loss of said election. (i.e., the aggrieved party might seek to recoup losses incurred by increased wage costs for example).

108. "By attempting to regulate speech appealing to racial prejudice the Board appears to be concerned not with the freedom with which the employees make their choice, but rather with the choice that is made." Note, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 NW. U.L. REV. 40, 53 (1968). The Board has called for a reasoned choice; "[a] choice is deemed rational or reasoned, if given the goal of the actor, however acquired, and the information before him, he selects that alternative which is most consistent with his goal." 72 YALE L.J., *supra* note 21, at 1247.

109. *Id.* at 1251. The writer concluded that the "ultimate decision will be a function of the value he assigns to each components included the employees expectations on wages,

The distinction created by *Sewell* and *Allen-Morrison* has been criticized as being an artificial one. "[I]f the offensive factor in such campaigns is an appeal that tends to reduce the likelihood of a reasoned or rational choice, there seems little to distinguish the propaganda in *Allen-Morrison* from that in *Sewell.*" Labelling the propaganda in *Allen-Morrison* as more personal than that in *Sewell*, the writer continued: "[I]t seems difficult rationally to conclude that an atmosphere less conducive to a reasoned choice was created in *Sewell* than in *Allen-Morrison;* if it be judged by its likely effect, the propaganda was as 'temperate' or 'inflammatory' in one as in the other."[110]

Finally, *Sewell's* transposition of the burden of proof to the speaker has also been criticized:

> [D]anger [inhering in part from the vagueness of the Sewell test] is compounded by the requirement that the employer disprove that he has crossed the line from permitted to prohibited speech and that all doubts be resolved against him. This shift of the burden of proof to the speaker is highly dubious, because it results in the possibility that speech may be inhibited even though no other penalty is imposed.[111]

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job security, employer attitude, and racial relationships] and the likelihood he attaches to the occurrence of each." *Id.* at 1247, 48.

110. *Id.* at 1253. The writer asserts, mistakenly I believe, that a minimal discussion of race may be more effective than a concerted all-out effort. The assumption is valid only when the recipient of the propaganda is both well informed and on social and economic parity with the speaker. Such an assumption in these two cases would be factually unjustified.

111. Pollitt, *supra* note 25, at 404. "It follows that should the NLRB apply the *Sewell* rule as to burden of proof, it may well violate the protection given speech which the Constitution makes free. Speech by which employers seek to inform employees of union racial practices should be given plenty of 'breathing space' . . . ." *Id.* at 405. The Supreme Court is very sensitive about encroachment of free speech rights. The following es exemplary of their position:

> [A] funition of free speech under our system of government is to invite debate. It may indeed serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. It may strike at prejudices and preconceptions and have profound unsettling effects . . . . [T]he alternative would lead to standardization of ideas whether by legislatures, courts or dominant . . . community groups.

Terminello v. Chicago, 337 U.S. 1, 4-5 (1948). The Court has more recently pontificated that "[d]ebate should be uninhibited, robust, and wide open, and may well include vehement, caustic and sometimes unpleasantly sharp attacks." Linn v. United Plant Guard Workers of America, 383 U.S. 53, 62 (1966) citing with approval N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

The distinction between a temperate statement which has racial overtones (or caters to racial prejudice) and an inflammatory appeal to racial bias, was, at best, tenuous even when drawn. The following cases, decided after *Sewell* and *Allen-Morrison* should cast some light on the opaque line.

Although it was a decision rendered by a state Employment Relations Board the case of *Gibes Distributing Co.*[112] is illuminating in that it follows the broad policy pronouncements of *Sewell* and *Allen-Morrison.* In *Gibes* the employer intimated to a white employee that:

> the employee would be placing the employer in jeopardy if he "voted for the union" in that the employer would have no control in the hiring of new employees, that the union could compel the employer to hire Negro employees, and that thereby the employer's business would be jeopardized inasmuch as accounts in a white neighborhood possibly might not accept deliveries made by Negroes.[113]

In holding the employer in violation of the Wisconsin Act, the Wisconsin Board reasoned:

> It is the public policy of the State of Wisconsin, and also this nation, to encourage and foster the employment of all properly qualified persons regardless of . . . race . . . . "The remarks . . . with respect to the possible forced employment of Negroes by the employer was an appeal to racial prejudice in an attempt to influence the outcome of the balloting.[114]

The Wisconsin Board held such appeals for such purposes were grounds for setting aside an election.[115]

In the case of *Universal Mfg. Corp.*[116] the NLRB had occasion to apply the *Sewell* standard to circumstances where not only the employer, but the entire community, contributed to the transgression

112. 60 L.R.R.M. 1355 (1965).

113. *Id.*

114. *Id.*

115. The NLRB if confronted with the same facts might have also found that the employer's conduct constituted an unfair labor practice. The prediction of dire economic consequences incorporated a veiled suggestion that the employer would relinquish some of his management functions to the union. In addition, the plausibility of his fears are suspect. The Wisconsin Board did go farther than the NLRB has gone in articulating the anti-discrimination public policy rationale and incorporating it in their holding.

116. 156 N.L.R.B. No. 132 (1966), 51 L.R.R.M. 1258. This case is also analyzed under the section on vicarious liability of employers for the acts on non-employees, *supra* notes 156-60.

of the required laboratory conditions. When the union began its organizing drive it was vociferously opposed by the employer, most of the leaders in the Mississippi county in which the plant was located, and the local news media. The handbills and newspaper items and other distributed literature made blatent racial appeals, linked the civil rights movement with Communism, and threatened closure of the plant. Prior to the election a group of citizens ran an advertisement in the local paper in which they exhorted the employees to vote against the union and made predictions of economic disaster for the community should the union win. The union lost the election 287 to 272.

The Board reversed the finding by the trial examiner that the propaganda involving racial matters was truthful and could be reasonably evaluated by the employees and held:

> By appealing to the employees' sentiments as civic minded individuals, injecting the fear of personal economic loss, and playing on racial prejudice . . . were calculated to convince the employees that a vote for the Union meant a betrayal of the community's best interests. Faced with pressures of this sort, the employees in our opinion were inhibited from freely exercising their choice in the election.[117]

The Board also held that even though a statement might satisfy the standard of truthfulness, it can still be unlawful if it is irrelevant. The Board found that the employer and the townspeople were motivated "not to educate or inform the employees about an issue germane to the election, but to prompt them to vote against the Union on 'racial grounds'."[118] One significant aspect of this decision is its emphasis on the relevance of the racially oriented statement. The President of the Teamsters Union's gift to Martin Luther King was held to be irrelevant to any aspect of the campaign.

In their most recent application of *Sewell's* standards, the Board in *Pittsburgh Plate Glass Co.*,[119] found that the employer's dissemination to all the black employees (180 of them) of a reprint of an article entitled "A National Disgrace: What Unions Do to Blacks" §Nov. 12, 1968, *Look]* did not exceed the permissible bounds of electioneering. Although the sender of the article was not identified, the

117. 61 L.R.R.M. at 1260.
118. *Id.*
119. 70 L.R.R.M. 1359, (1969).

trial examiner found that the article itself, and the employer's reprinting and distribution of the article, did not constitute a breach of the *Sewell* standards.[120]

3. The injection of racial appeals into a representation election by a union: When does it justify setting aside an election?

Further delineation between pre-*Sewell* and post-*Sewell* decisions is necessitated by the change in Board policies and standards *that* case represents. Proceeding chronologically, in the case of *Pacific Maritime Assoc.*[121] the Board refused to set aside an election won by the union. The employer contended that the victorious union had continued to discriminate against Negroes and that that justified setting the election aside. While rejecting the employer's contention, the Board left open for further proceedings of a different nature the question whether the Board would consider revoking the certification of the discriminating union.

In *Paula Shoe Co., Inc.*[122] the Board refused to set aside an election which the union won rejecting the employer's argument that the union's dissemination of a handbill urging the employees to vote for the union if they wanted to avoid being mistreated by "that Jew" (the owner) upset the requisite laboratory conditions. The Board ruled that since the above was the only reference made to that issue in the course of the campaign it was too innocuous to warrant Board action.

Also in 1958, the Board held in *Kay Mfg. Corp.*[123] that an agent of the union's statement to an employee that he [the agent] had been told by the plant manager that "Negroes in the South were too afraid of their jobs and that the white trash was too stupid to vote for the union"[124] did not warrant setting the election aside.

In *Heintz Div., Kelsey Hayes Co.*[125] an independent union hired Negroes to pass out handbills entitled "Vote UAW-CIO," the day before the election. The election pitted the independent union against

120. *Id.* The views set forth in the article were deemed to be neither irrelevant nor intemperate.
121. 112 N.L.R.B. 1280 (1955).
122. 121 N.L.R.B. 673 (1958).
123. 121 N.L.R.B. 1077 (1958).
124. *Id.*, at 1079.
125. 126 N.L.R.B. 151 (1960).

the United Auto Workers, with the former being victorious. Although the handbills in question were not printed by the UAW, the employees were led to believe so. The Board felt this inventive tactic deceived the workers and impaired their ability to make a reasoned choice. The Board held that an election would be set aside where one party engages in trickery and deceit so as to deny the voters knowledge of the source of the propaganda and stated "that the failure of parties in Board elections to identify themselves as sponsors of campaign propaganda initiated by them constitutes grounds for setting aside the election."[126]

In general, prior to 1962, the NLRB, while deploring appeals to racial prejudice, would not set a representation election aside absent a showing that the statements were misrepresentative or involved coercion or fraud or violence.[127] The Board was afforded its first opportunity to apply the *Sewell* standards to a case in which the union had allegedly destroyed the laboratory conditions by injecting race into the campaign in two cases involving union attempts to organize two separate Baltimore laundries.

In *Archer Laundry Co.*[128] and *Aristocrat Linen Supply Co.*[129] the employees of both laundries were predominantly Negroes; the regional director found that although the theme of the union's campaign was undeniably posited on race,[130] it was a theme purposed on economic betterment and not the inflaming of racial prejudice. The Board then drew a distinction between the emphasis on the union's pro-integration posture as it appeared in *Sewell* and as it appears in *Archer*.

> The campaign literature distributed by the employer in the *Sewell Manufacturing* campaign was designed solely to inflame racial hatred and to engender a conflict between Negro and white workers in a southern plant. The theme of the *Archer Laundry* campaign on the part of . . . its agents was undeniably based upon a racial issue but with different implications . . . The

126. *Id.* at 153.

127. *See, e.g.*, Chock Full O'Nuts, 120 N.L.R.B. 1296 (1958).

128. 150 N.L.R.B. 1427 (1965).

129. 150 N.L.R.B. 1448 (1965).

130. A prime example of the tenor of the unions campaign was the distribution of a leaflet to the employees entitled "Freedom is Everyone's Fight" in which Negroes were reminded that they had to overcome vicious attacks by white policemen in procuring their civil rights. Then via caricature, the Negroes were rhetorically asked if they were going to let their boss stop them. *Id.*, at 1429.

> literature in the instant case was not designed to engender hatred, but instead, racial self-consciousness.[131]

The principle distinguishing factor (other than the racial prejudice-racial pride dichotomy alluded to above) is hinged on the purpose of the appeal. In *Archer* the Negroes were urged to join a union to better themselves economically and not to act against the white race. The central theme of the campaign was that "[i]t is a simple fact that colored workers who belong to unions are far better off than those who don't."[132]

The Fourth Circuit in 1966 refused to enforce an order to bargain issue by the NLRB because it held that literature distributed to the employees (a majority were Negroes) shortly prior to a consent election urging the Negroes to consider an act upon race as a factor in the election, was so irrelevant and inflammatory that the election had to be invalidated.[133] The court factually distinguished *Archer* from the instant case by pointing out that "[e]quality of race in privilege or economic opportunity was not presently an issue."[134] The court specifically disapproved of the reference in a leaflet to a Negro member of the Maryland House of Delegates who was ballyhooed as the champion of Negro employment rights. Bootstrapped to this patent trumpting of racial pride was a vote solicitation. The court found most reprehensible the union's reference to the "Cambridge" incidents (referring to a racially oriented disturbance). The court concluded by holding that the union's invocation of racial pride had "no purpose except to inflame the racial feelings of voters in the election,"[135] and therefore denied enforcement of the order.

In *Baltimore Luggage Co.*[136] the Board held that the unions emphasizing of the Negroes economic plight in a campaign was not

131. *Id.* at 1432.

132. *Id.*

133. NLRB v. Schapiro Warehouse Inc., 356 F.2d 675 (4th Cir. 1966).

134. *Id.* at 679.

135. *Id.* at 679. It is difficult to reconcile the *Archer* and *Schapiro* cases. The court eliminated the racial pride-racial prejudice distinction from consideration by the simple expedient of stating that "equality" was not an issue in *Schapiro*. But such off-hand dismissals of key questions only muddy the logical waters. One basis, a factual one, for distinguishing *Archer* from *Schapiro* is that in the latter the alluded to "Cambridge" incidents were more likely to exacerbate racial tensions since the incidents had occurred in the recent past. In *Archer*, the references were made to incidents far removed from Baltimore both in time and distance.

136. 162 N.L.R.B. 1230 (1967).

irrelevant nor inflammatory. The Board, in gist, distinguished between appeals designed to incite or inflame racial hatred and those calculated to engender racial self-consciousness and to promote concerted action for economic betterment. In citing *Archer* as controlling the Board stated that "the key to the problem lies in a recognition of the relationship between economic security and social goals."[137] The Board condoned use of campaign material which is directed at rectifying the historically entrenched economic disadvantage of Negroes. "The choice of racial basis for concerted action has been made, not by the victims who organize to seek redress, but by those who use race as a basis to impose the disadvantage."[138] The theme of the campaign was racial solidarity via unionism, and this was held to be a lawful form of concerted action. In a nutshell "a vote for the union was represented as a vote for better working conditions not as a vote against the white race."[139]

The most recent case in this area to be decided by the Board was *Hobco Mfg. Co.*[140] Hobson City, Alabama is inhabited almost entirely by Negroes; the plants entire work force was Negro and the organizing campaign was conducted almost entirely by Negroes with some assistance provided by the Southern Christian Leadership Conference and other civil rights groups. The Board upheld the election despite the company's contentions that: rumors were spread that the employer would replace the Negro employees with white employees if the Union lost; and, that the union in general sought to "fan the flames of division between the Negro employees and their white employer" and to "create hostility toward their white employer by injection of false,

137. *Id.* at 1233.

138. *Id.* The clothing of the white man's burden in the frock of a judicial decision is indeed a peculiar rationale for an administrative body.

139. *Id.* at 1234. The Board hints at its ambivalent attitude in these cases when it intimates that "the employees to whom the appeals are addressed are the best judge of it." This is precisely the policy urged upon the Board by those critics who think the Board's regulation of employer race-hate progaganda is unconstitutional. *See*, in general, Bok, *supra* note 42. The Board seemingly is quite lax in applying *Sewell's* standards to union injection of race into the campaign (all the cases analyzed have involved a union's playing up to Negroes in order to entice their support). One wonders what posture the Board would assume if a union played up to a white majority in a small southern mill town (where arguably, the poor whites are not economically better off than poor blacks). If the Board attitude is, in fact, premised on the desirability of disadvantaged workers banding together then the result should be the same regardless of the economic disadvantaged group's race.

140. 164 N.L.R.B. 862 (1967).

misleading and irrelevant issues in the campaign."[141] The union countered by contending "that the reference to race was germane to the campaign, were not designed to generate hatred of whites as a race, and were [therefore] permissible . . . ."[142]

As to the circulation of rumors concerning the potential discharging of Negroes if the union won, the Board found that the rumors weren't sufficiently widespread to upset the laboratory conditions. The Board concluded by finding that none of the union organizer statements "were in isolation; all were in the context of appeals to the employees to vote for the union in order to achieve improved wages, benefits . . . in harmony with the goals of the civil rights organizations to improve the overall condition of Negroes."[143]

IV. A PARTY'S RESPONSIBILITY FOR THE ACTS OF NON-AGENTS.

The typical situation arises when community groups actively oppose a union which is attempting to organize a plant in their community. The Board distinguishes between cases where the union alleges the community groups have created what is tantamount to an unfair labor practice, and cases where their activities have simply upset the laboratory conditions. In the former, a finding of agency is needed to hold the employer vicariously responsible; in the latter, no agency finding is needed and an election may be set aside if it is found that the community antiunion activity has made it impossible for the employees to cast an uncoerced ballot.[144]

In *Lifetime Door Co.*[145] the Board found that the statements of several members of the community predicting dire economic consequences if the union won created a fear of economic reprisal sufficient to interfere with the employee's exercise of a free choice. The Board held that it was of no import whether the townspeople were motivated by personal or community interest nor did it matter whether

141. *Id.* at 869.

142. *Id.*

143. *Id.* at 870. Aside from the Board's obvious empathy with the goals of civil rights groups, one wonders why there was no mention of the totality of the union proponents conduct here.

144. *See, e.g.*, Universal Mfg. Corp. 156 N.L.R.B. No. 132 (1966); P.D. Gwaltnay and Co., 74 N.L.R.B. 371 (1947).

145. 158 N.L.R.B. 13 (1966).

the conduct could be traced or attributed to the employer. It is likewise of no consequence that they (townsmen and employer) did or did not act in concert.

In *NLRB v. Staub Cleaners*[146] the Second Circuit enforced an NLRB order requiring the appellant-employer to collectively bargain with the union which had won an earlier election. The company argued that it was justified in refusing to bargain because the circulation of rumors that it would discharge all Negro employees if the union lost the election impinged upon the employees freedom of choice. The union countered that it had twice before the election disavowed the rumors in meetings with the employees. The Board overturned the trial examiner and found that subsequent events had neutralized the harmfulness of the rumors. The court noted that the "Board has been reluctant in the past to give the same weight to anonymous or third party attempts to influence the outcome of . . . elections that it gives to improper efforts by the parties themselves."[147] The court also upheld the Board practice of "requiring at the very least that there be a 'substantial likelihood' that the outcome was affected by the rumor."[148]

V. POLITICAL ELECTIONEERING AS AN ANALOGUE TO LABOR ELECTIONEERING

Many critics of the Board's laboratory condition standard point to the lack of tempering with political elections as a model for future board policy vis a vis campaign regulations.

> The need for regulation of employer speech seems questionable if one considers the dearth of regulations on speech in political campaigns. There the proper remedy for speeches which are emotional and argumentative is found in the strength of the arguments and rebuttals of the opposition.[149]

146. 418 F.2d 1086 (2nd Cir. 1969).

147. *Id.* at 1088. This distinction is justified on two grounds: a. employees are less likely to take seriously remarks coming from non authoritative sources; b. the most effective deterrent to future misconduct by a party who is directly at fault is denying him the fruits of his insidious labors. Hence where third parties are involved, there is no deterrent.

148. *Id.*

149. Note, *Restrictions on the Employer's Right of Free Speech During Organizing Campaigns and Collective Bargaining*, 63 NW. L. REV. 40, 53 (1968), Dean Bok points out that in instances of excessively misleading or defamatious statements in political campaigns the defamed party is fairly well restricted to state libel and slander laws. Bok, *supra* note 42 at 40.

Several legal commentators feel that the Board should act only to accord the party damaged by campaign tactics an equal opportunity to be heard.[150] The Board has rejeced the political campaign analogy because:

> [P]ublic officials conducting the election have no responsibility beyond the mechanics of the election . . . . By way of contrast . . . our function . . . is to conduct elections in which the employees have the opportunity to cast their ballots . . . in an atmosphere conducive to the sober . . . franchise . . . .[151]

VI. CONCLUSION

The NLRB is among the most criticized[152] of our administrative agencies:

> "Briefly stated the policy, purpose and philosophy of the Board are concentrated in carry ng out the responsibilities and policy laid down by Congress. We try to follow the admonition given by Mark Twain to a friend:
>
> 'always do right', he said, 'it will gratify some people and astonish the rest.' "[153]

While the criticism of the laboratory condition standard is constitutional in nature, Professor Pollitt has analyzed the NLRB's decisions in this area and has discovered that "[a]pproximately one per cent of all Board elections are nullified because so 'tainted'; the complaining party defeated in the first election has about a one-in-three chance of winning in the second election."[154]

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150. One ex-Board member has written that absent threats or promises of benefits, the employee of today is "generally able to evaluate the statements made by unions and companies and . . . the parties might well be left alone to determine their campaign tactics as they see fit, as in the political arena." Cuneo, *NLRB's Totality of Conduct Theory in Representation Elections and Problems Involved in its Application*, 7 DUQUESNE L. REV. 229, 243 (1969). Another ex-Board member opines that interested employees "are more likely to know the issues and less likely to be susceptible to propaganda than apathetic voters." Samoff, *NLRB Elections: Uncertainty and Certainty*, 117 U. PENN. L. REV. 228, 246 (1968). Samoff suggests allowing broad election tactics with some procedural standards posited primarily on according the other party an adequate opportunity to reply.

151. Sewell Mfg. Co., 138 N.L.R.B. 66, 69-70 (1962).

152. Senator Sam Ervin (D., N.C.) has gone so far as to suggest that a "watchdog committee" be established to conform the actions of the NLRB to the intent of Congress. Senator Ervin feels that the Board's "curious interpretations of free speech" are "exemplary of the Board's deviation . . . from the intent of Congress as expressed in the Taft-Hartley Act." 69 L.R.R. 139.

153. 60 L.R.R. 146-7 (F. McCulloch).

154. Pollitt, *NLRB Re-Run Elections*, 41 N.C. L. REV. 209, 211-12 (1963).

While the injection of race-hate propaganda by either side is a deplorable ploy, it is one which has been constitutionally sanctioned at least to a degree. The best course for the NLRB is to steer clear of the absolutist approaches suggested by critics from both camps and instead formulate procedural safeguards to insure the victims of such vituperative tactics at least a reasonable opportunity to reply.

To this writer the *Archer* and *Sewell* cases purport to employ the same standards but result in anomalous decisions. The dominant economic position enjoyed by the employer over the employee has often been cited as the leading rationale for impinging upon the employers free speech rights.[155] Therefore, using that rationale, the desire to promote relative parity in economic dealings can be cited as justifying what otherwise appears to be irreconcilable approaches to the same problem—contamination of election conditions by the injection of racial propaganda. However, such an argument assumes that unionization will in all cases, and at all times, enhance the economic position of Blacks. It inferentially assumes that in all cases non-union workers are in worse economic position than union workers. Such determinations are best left to those who cast ballots in labor elections.

In addition, the argument breaks down where two unions, one integrated, one comprised only of Blacks, are attempting to organize a predominately Black plant. To allow unfettered appeals to racial pride by the Black union places the integrated union (and a concerned employer who honestly believes the integrated union to be preferable from the standpoint not of his racial prejudices but of potential economic dealings) at a distinct disadvantage. Allowing appeals to racial pride in such a case would relegate more germane economic considerations such as relative strengths of the unions, past bargaining records, etc., to an unwarranted ancillary position.[156]

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155. "Raw words themselves do not generally constitute an unfair labor practice. As Justice Learned Hand so aptly opined:

> Words are not pebbles in alien juxtaposition; they have only a communal existence and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, in which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which is not safe to thwart.

NLRB v. Federbush Co., 121 F.2d 954, 957 (2nd Cir. 1941).

156. For an analysis of the "values" which an employee considers in casting his ballot *see* 72 YALE L.J. *supra* note 349, at 1247, 48.